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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ESSENTIAL ACCESS HEALTH, INC.; MELISSA MARSHALL, M.D.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case No. 3:19-cv-01195-EMC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION

Date: April 18, 2019
Time: 12:30 p.m.
Dept: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

Date Filed: March 4, 2019

Trial Date: None Set

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 18, 2019 at 12:30 p.m., or as soon as this matter may be heard by the above-captioned Court, at 450 Golden Gate Avenue, Courtroom 5, 17th floor, San Francisco, California, before the Honorable Edward M. Chen, Plaintiffs Essential Access Health, Inc. and Melissa Marshall, M.D. will and hereby do move the Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction against all Defendants: Alex M. Azar II, Secretary of Health and Human Services; the United States Department of Health and Human Services; Does 1-25; and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with them (collectively, "Defendants").

Specifically, Plaintiffs move that the Court enter a nationwide preliminary injunction, or in the alternative, a stay pursuant to 5 U.S.C. § 705, against implementation and enforcement of the new rule promulgated by Defendants on March 4, 2019, titled "Compliance with Statutory Program Integrity Requirement" and published at 84 Fed. Reg. 7714 on the grounds that it is contrary to law, arbitrary, capricious, and an abuse of discretion, and procedurally unsound, all in violation of the Administrative Procedure Act; violates the Free Speech Clause of the First Amendment to the U.S. Constitution; and is void for vagueness under the Fifth Amendment to the U.S. Constitution.

This Motion is based on this Notice of Motion and Motion; the Complaint in this action; the Memorandum of Points and Authorities filed concurrently herewith; and the accompanying Declarations of:

- Julie Rabinovitz, M.P.H., President and CEO of Essential Access Health, Inc;
- Melissa Marshall, M.D., CEO of CommuniCare Health Centers;
- Kathryn Kost, Ph.D., Acting Vice President of Domestic Research at the Guttmacher Institute;
- Claire Brindis, Ph.D., Professor in the Departments of Pediatrics and Obstetrics and Gynecology and Reproductive Sciences at the University of California, San

Francisco;

- Barbara Ferrer, Ph.D., Director, Los Angeles County Department of Public Health;
- Louise McCarthy, M.P.P., President and CEO of Community Clinic Association of Los Angeles County;
- Marie McKinney, CEO of Westside Family Health Center;
- Shivaun M. Nestor, M.P.H., Director of the Family Planning and Preconception Health Program, San Francisco Department of Public Health;
- Tatiana W. Spirtos, M.D., Vice-Speaker of the House of Delegates for the California Medical Association ("CMA") & CMA Board Trustee;
- Jane Thomas, Director of the Community Health Center Clinic at Fresno Economic Opportunities Commission;
- Henry N. Tuttle, President and CEO of Health Center Partners of Southern California;
- Carmela Castellano-Garcia, President and CEO of the California Primary Care Association;
- Elizabeth B. Forer, M.S.W./M.P.H., CEO and Executive Director of Venice Family Clinic;
- Kayla Wilburn, Clinic Director at the Community Action Partnership of San Luis Obispo County; and
- Jenna Tosh, Ph.D., President & CEO of Planned Parenthood California Central Coast and Chair of the Board of California Planned Parenthood Education Fund

(collectively, the "Declarants").[1] The Declarants include distinguished leaders in public health, heads of healthcare organizations and clinics, practicing physicians, community leaders, and experts in the field of reproductive care.

The Motion is further based on the Declaration of Michelle S. Ybarra and supporting exhibits; the Proposed Order submitted herewith; further papers and argument as may be

[1] Where declarations are offered in support of both this Motion and the State of California's motion for a preliminary injunction in related Case No. 3:19-cv-01184-EMC, those declarations are identical.

submitted to the Court in connection with the Motion; and such evidence and argument as may be presented at the hearing before this Court.

Dated: March 21, 2019

KEKER, VAN NEST & PETERS LLP

By: */s/ Michelle Ybarra*
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JUSTINA SESSIONS
SOPHIE HOOD
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ESSENTIAL ACCESS HEALTH, INC.
and MELISSA MARSHALL, M.D.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

For nearly fifty years, the federal government's Title X[2] program has been a critical part of the nation's public health safety net, subsidizing high-quality family planning services for low-income individuals. Today, Title X is under assault. On March 4, 2019, Defendants[3] promulgated new regulations under the guise of enforcing compliance with the statutory bar on the use of Title X funds for abortions. But Title X funds have never been available for abortion services, and Defendants fail to identify any evidence suggesting misuse of funds in that manner. Notwithstanding those facts, the new regulations impose unprecedented restrictions on medical providers' speech—preventing Title X providers from counseling patients on abortion or providing referrals for abortion, and requiring that they give patients seeking abortions misleading information. The new regulations also impose sweeping separation requirements mandating that Title X projects be physically and financially separate from entities that engage in "prohibited activities" of breathtaking scope, including the mere discussion of abortion as an option for a woman deciding whether and when to bear a child. These new requirements violate the Administrative Procedures Act and the First and Fifth Amendments of the U.S. Constitution, all in service of an ideological preference for rolling back women's reproductive rights.

Though the new regulations take aim at abortion, they will inhibit access to *non*-abortion services funded by Title X, dramatically reducing the availability of contraceptives, sexually transmitted infection ("STI") screenings, breast exams, and Pap tests, and curtailing public education efforts, community outreach, and other services. In California alone, Title X-funded health centers will be forced to lay off staff, reduce clinic hours, discontinue outreach and education programs, and see fewer patients. Underserved and vulnerable communities—including low-income individuals, teens, and women of color—will suffer disproportionately.

As California's sole Title X grantee and the administrator of the state's Title X program, Plaintiff Essential Access Health ("Essential Access") oversees the nation's largest and most

[2] The Family Planning Services and Population Act of 1970, 42 U.S.C. § 300 *et seq.*

[3] Collectively, the U.S. Department of Health and Human Services ("HHS" or "the Department"), and its Secretary, Alex M. Azar II ("the Secretary").

diverse Title X provider network, which serves one million patients annually. If implemented, the Final Rule will unravel Essential Access's work and harm patients who depend on Title X-funded clinics for core family planning services. Faced with a Hobson's choice of either complying with the regulations' unlawful conditions or foregoing Title X funds altogether, providers will be forced out of the program, decimating Essential Access's network. Providers that remain will face exorbitant costs to comply with the onerous and arbitrary new requirements, siphoning money from patient care. Essential Access itself will be forced to cease critical *non*-Title X-funded education, training, and advocacy that discusses abortion, or else duplicate its facilities, staff, and electronic systems in a costly "mirror" organization.

Plaintiff Melissa Marshall, M.D., the Chief Executive Officer of CommuniCare Health Centers ("CommuniCare"), will also be forced to make an untenable choice. If her organization continues to receive Title X funds, Dr. Marshall will have to comply with the regulations' "gag" rule, requiring her to give a patient seeking abortion incomplete or misleading information in violation of her medical and ethical obligations. This will hurt Dr. Marshall's patients and harm her provider-patient relationships. But if Dr. Marshall's organization leaves Title X, the departure will diminish her patients' access to family planning services, harming them in a different way.

Those "choices" are no choices at all. Accordingly, Plaintiffs' Complaint challenges the new regulations under the Administrative Procedure Act as contrary to law, arbitrary and capricious, and procedurally unsound. The regulations violate the Affordable Care Act's explicit prohibition on interference with doctor-patient communications and Congress's mandate that all Title X pregnancy counseling be non-directive. The regulations also compel misleading speech from medical providers in violation of the First Amendment, and vest HHS with unfettered enforcement discretion in violation of the Fifth Amendment.

Plaintiffs are likely to succeed on each of their claims. But, unless Defendants are enjoined from implementing the regulations on May 3, 2019 as scheduled, Plaintiffs will suffer irreparable harm in the interim, along with the millions of individuals who rely on Title X-funded clinics for quality sexual and reproductive care. Because Plaintiffs satisfy the well-established standard for injunctive relief, they respectfully ask the Court to enter the requested preliminary

injunction and stop the new regulations from taking effect.

FACTUAL AND LEGAL BACKGROUND

I. TITLE X ENSURES ACCESS TO REPRODUCTIVE CARE FOR MILLIONS OF AMERICANS

Title X was enacted in 1970 to subsidize "the establishment and operation of voluntary family planning projects," 42 U.S.C. § 300(a), and remains the nation's only federal program devoted to funding family planning services. Kost Decl.[4] at ¶ 13. From the outset, Congress made clear that the goal of Title X was to make a broad array of family planning services available to all, and particularly to low-income individuals.[5] To further this goal, Title X provides grants to a network of public and private sector providers, including nonprofits and healthcare agencies, who offer reproductive health services.

The Centers for Disease Control and Prevention ("CDC") has hailed Title X as one of the greatest public health achievements of the twentieth century.[6] Over the last five decades, Title X-funded health centers have provided critical reproductive health care to millions of individuals. Kost Decl. ¶ 7. In addition to offering the most advanced contraceptive methods available, Title X-funded centers also offer infertility services; pregnancy testing and counseling; STI testing and treatment; cervical and breast cancer screening; and screening for high blood pressure, diabetes, depression, and other pre-conception issues. *Id.* ¶ 15; Brindis Decl. ¶¶ 74-75. The ability of women to control family size and desired birth spacing has been revolutionary for women's health. Ferrer Decl. ¶ 2. Family planning services allow women to prevent pregnancy-related health risks, reduces infant mortality, and enhances education, economic stability, and equality.

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[4] Citations in the form of "___ Decl." refer to the accompanying declarations in support.

[5] *See e.g.*, 116 Cong. Rec. 37375 (1970) ("Our Committee . . . has . . . given priority in the family planning services to low-income families which may not otherwise be able to secure them.") (statement of Rep. Nelsen); 116 Cong. Rec. 37386 (1970) ("I am also concerned over the discrepancy that exists in the availability of family planning services for low-income citizens. Low-income families without access to private medical care are often denied the opportunity to determine the number and spacing of their children.") (statement of Rep. Cohelan); 116 Cong. Rec. 37370 ("The necessity of this legislation arises from the lack of attention and funding in the past given to fertility control in providing health care to the poor.") (statement of Rep. Bush).

[6] *See* CDC, *Achievements in Public Health, 1990-1999: Family Planning*, 48 Morbidity & Mortality Wkly. Rep. 1073, 1073 (1999), *available at* https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm.

Id. Contraception helps women avoid unintended pregnancy, which is associated with adverse prenatal and perinatal consequences, including delayed prenatal care, use of medications that are harmful during pregnancy, prematurity, and lack of breastfeeding. *Id.*

The Title X program currently services over four million low-income, uninsured, and underserved individuals at 3,858 sites across the country. Kost Decl. ¶¶ 67-68.[7] In 2017, 90 percent of Title X patients nationally—approximately 3.6 million people—had family incomes that qualified them for either subsidized or no-charge services. *Id.* ¶ 30. Sixty-seven percent of Title X patients nationally, or 2.7 million individuals, had family incomes at or below the federal poverty level, and 42 percent were uninsured. *Id.*

For nearly fifty years, Essential Access has served as California's primary Title X grantee. Rabinovitz Decl. ¶ 5. As grantee, Essential Access assumes the administrative burden of applying for Title X funding, and then administers the grant to a diverse network of sub-recipient health care organizations. Essential Access's sub-recipients include federally qualified health centers ("FQHCs"), community health centers, city and county health departments, and hospitals, among others. *Id.* ¶¶ 7-9. This arrangement allows sub-recipients to focus their resources on delivering family planning services instead of fundraising. *Id.* ¶ 10. Essential Access's network serves one million patients annually—more than 25 percent of the patients served by the Title X program nationwide. *Id.* ¶¶ 7, 12, 38.

Plaintiff Melissa Marshall, M.D., is CEO of CommuniCare, an Essential Access sub-recipient located in Yolo County, California. Marshall Decl. ¶ 1. In 2017, CommuniCare served over 26,000 patients, nearly 80 percent of whom had income below the federal poverty level. *Id.* ¶ 4. CommuniCare served 4,081 Title X patients in 2017, primarily through a drop-in healthcare clinic for teens. *Id.* ¶¶ 8, 10. Dr. Marshall has seen thousands of patients in her over seventeen years of practice, and continues to see patients at CommuniCare while acting as CEO. *Id.* ¶ 2.

II. THE CURRENT TITLE X REGULATIONS ADVANCE TITLE X'S GOALS

Plaintiffs, like any recipient of Title X funding, are subject to the requirements of Title X

[7] *See also* Office of Population Affairs, Family Planning Annual Report: 2017 National Summary A-33 (Aug. 2018) (hereafter, "2017 FPAR"), *available at* https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2017-national-summary.pdf.

and its implementing regulations. According to the statute, Title X projects "shall offer a broad range of acceptable and effective family planning methods" on a "voluntary" basis, giving "priority" for services to "low-income" individuals. 42 U.S.C. §§ 300, 300a-4, 300a-5. In addition, under the Health and Human Services Appropriations Act, any "pregnancy counseling" offered by a Title X clinic must be "nondirective." Pub. L. No. 115–245, Div. B, Tit. II, 132 Stat. 2981, 3070–71 (2018). Consistent with these requirements, the current Title X regulations—which were promulgated in 2000 and largely restated regulations implemented in 1981—require projects to offer pregnant patients "neutral, factual information and nondirective counseling" and a referral upon request for "(A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination." 42 CFR § 59.5(5)(i) (2014).[8] They also require that a Title X project use "medically approved" family planning methods. *Id.* § 59.5(a)(1).

Under Section 1008 of Title X, "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. Section 1008 is limited by its plain language to Title X ***programs***. Section 1008 does not restrict Title X recipients from providing abortion care using *non*-Title X funds. Entities that provide both abortion and Title X care must ensure that the finances for both are completely separate and that federal funding pays only Title X expenses. Such Title X providers use "counseling and services protocols, intake and referral procedures, material review procedures," and other administrative means to keep their Title X programs distinct from abortion care. *See* Provision of Abortion-Related Services in Family Planning Service Projects, 65 Fed. Reg. 41281, 41282 (July 3, 2000). For decades, HHS has allowed those providers to use the same facilities for both their Title X programs and abortion services, including shared waiting rooms, records systems, and staff. Title X allows recipients to provide abortions with non-Title-X funds so long as they can demonstrate through financial records, protocols, and procedures that Title X funds are not used to provide

[8] For ease of reference, the provisions of the Final Rule are cited by their section number (e.g., "§ 59.5" or "§ 59.14"). The provisions of the 2000 Regulations are cited according to their section in the 2007 version of the Code of Federal Regulations (e.g., "42 C.F.R. § 59.5 (2007)").

abortions. 65 Fed. Reg. 41281, 41282.[9]

III. THE FINAL RULE DICTATES PATIENT-PROVIDER COMMUNICATIONS AND STIFLES CONSTITUTIONALLY-PROTECTED CONDUCT

On March 4, 2019, Defendants abandoned regulations that have been effectively implemented Title X since 1981 and promulgated new regulations that threaten to reverse decades of public health advancement. *See* 84 Fed. Reg. 7714 (March 4, 2019) (the "Final Rule"). As President Trump has made clear, the Final Rule aims (among other things) to ensure entities that provide abortions using non-Title X funds are forced out of the program.[10] To that end, the Final Rule imposes the following requirements.

A. Restriction on Abortion Counseling

The Final Rule eliminates the requirement that Title X projects give pregnant patients neutral, nondirective options counseling and referral for abortion upon request. Instead, the Final Rule prohibits Title X projects from "promot[ing], refer[ring] for, or support[ing] abortion." § 59.5(a)(5).[11] At the same time, it requires that pregnant Title X clients "***shall*** be referred to a health care provider for medically necessary prenatal health care," regardless of whether the patient wishes to continue the pregnancy. § 59.14(b)(i) (emphasis added). In addition to the mandatory referral, the Title X provider "may" provide "[n]ondirective pregnancy counseling," but only if the provider is a "physician[] or advanced practice provider" ("APP"), defined as someone who "receive[d] at least a graduate level degree in the relevant medical field and maintains a license to diagnose, treat, and counsel patients." §§ 59.2, 59.14(b)(i). The Final Rule does not explain how an APP can provide "nondirective pregnancy counseling" that discusses

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[9] In 1988, HHS promulgated new regulations that prohibited Title X-funded projects from providing counseling or referrals for "the use of abortion as a method of family planning." 42 CFR § 59.8 (1988). The 1988 Regulations also required Title X-funded health centers to organize themselves so their Title X-funded activities were "physically and financially separate" from prohibited abortion activities. *Id.* § 59.9. Those regulations were never fully implemented because in 1993, President William J. Clinton directed the Secretary to suspend them. 58 Fed. Reg. 7455.

[10] Remarks by President Trump at Susan B Anthony List 11th Annual Campaign for Life Gala, whitehouse.gov (May 22, 2018) ("My administration has proposed a rule to prohibit Title X funding from going to any clinic that performs abortions"), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-susan-b-anthony-list-11th-annual-campaign-life-gala/.

[11] Unless otherwise noted, citations in the form of "§ __" are to the Final Rule published at 84 Fed. Reg. 7717, 7786–91.

abortion without running afoul of § 59.14(a), which unequivocally states that "[a] Title X project may not promote, refer for, or support abortion as a method of family planning." § 59.14(a); *see also* § 59.5(a)(5) (similar restriction); § 59.16 (similar restriction). The only discussion of abortion the Rule explicitly allows is telling a pregnant woman who has requested information on abortion that "the project does not consider abortion a method of family planning." § 59.14(e)(5).

B. Ban on Abortion Referral

Under the current regulations, a Title X provider can refer a patient to a clinic where she can receive information about abortion or receive that service. Under the Final Rule, a provider may only provide "a list of . . . primary health care providers (including providers of prenatal care)," even in response to a patient's direct request for a referral to an abortion provider. § 59.14(b)(1)(ii), (c)(2). That list must not include ***only*** abortion providers, and need not include ***any*** abortion providers. § 59.14(c)(2). If abortion providers are included, they must also be "comprehensive primary health care providers," and cannot make up more than half the list. *Id.* "Neither the list nor project staff may identify which providers on the list perform abortion." *Id.*[12]

Nor does the ban on abortion referral make an explicit exception where an abortion is medically necessary. Instead, the Rule states 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." § 59.14(b)(2). The Rule provides only one example of an emergency warranting an abortion referral: an ectopic pregnancy. § 59.14(e)(2).

C. Physical and Financial Separation

The Final Rule also imposes a new separation requirement that reflects a radical departure from the Department's established policy of mandating financial, but not physical, separation between a Title X project's abortion and non-abortion activities. *See* 65 Fed. Reg. 41276. Under the new separation requirement, "[a] Title X project [must] be organized so that it is physically

[12] The Final Rule also imposes new reporting requirements by which a funding recipient must provide assurance "satisfactory to the Secretary . . . that the project does not provide abortion and does not include abortion as a method of family planning." § 59.13. The Rule does not explain what the Secretary considers a "satisfactory" representation.

and financially separate . . . from activities which are prohibited under section 1008 of the Act and §§ 59.13, 59.14, and 59.16." § 59.15. "Prohibited activities" are broadly defined to include the provision of abortion, referrals for abortion, and any activity that "encourage[s], promote[s] or advocate[s] abortion as a method of family planning." §§ 59.14, 59.16(a)(1). Even allowing brochures that discuss abortion to "sit[] on a table . . . within the same space where Title X services are provided" falls within the scope. *Id.* § 59.16(b)(1).

To be physically and financial separate, "a Title X project must have an objective integrity and independence from prohibited activities." § 59.15. The Final Rule confers boundless discretion on the Secretary to determine whether such "objective integrity and independence" exist "based on a review of the facts and circumstances." Factors relevant to this determination include:

> (a) The existence of separate, accurate accounting records; (b) The degree of separation from facilities (e.g., treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities; (c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent."

§ 59.15(a)-(d). The Final Rule does not specify what weight each factor carries, nor does it limit the Secretary from considering other, unidentified factors.

D. Dilution of Quality of Care

The Final Rule eliminates the requirement that family planning methods provided through Title X projects be "medically approved." *Compare id.* § 59.5(a)(1) with 42 C.F.R. § 59.5(a)(1) (2007). This will allow Title X grants to fund the provision of methods of family planning that do not meet the FDA's or the Department's own standards for medical care.

E. Restrictions on Care for Adolescents

The Final Rule's restrictions on services are even more onerous for adolescents, who cannot be found financially eligible for subsidized Title X services unless the provider has documented "specific actions taken by the provider to encourage the minor to involve her/his family (including her/his parents or guardian) in her/his decision to seek family planning services." § 59.2. The Final Rule requires assurance "satisfactory to the Secretary" that the

provider will "conduct a preliminary screening of any minor who presents with a sexually transmitted disease (STD)" or "pregnancy" in order to "rule out victimization of a minor," regardless of whether there is any indication of abuse. § 59.17(b)(1)(iv).

F. Transition Provisions

The Final Rule's physical separation requirement takes effect one year after publication (March 4, 2020), and the financial separation requirement, prohibition on abortion counseling and referral, and reporting requirements take effect 120 days after publication (July 2, 2019). *Id.* § 59.19. All other requirements—including § 59.16's prohibition on activities that "encourage, promote, or advocate abortion as a method of family planning"—take effect 60 days after publication (May 3, 2019). 84 Fed. Reg. 7714.[13]

LEGAL STANDARD

To secure a preliminary injunction, a plaintiff must establish that (1) it "is likely to succeed on the merits," (2) it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When the government is a party to the action, "the last two factors [of the preliminary injunction test] merge." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Courts evaluate these factors on a "sliding scale," such that "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). All of the factors are met here.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. The Final Rule is invalid under the APA because it violates the ACA and the HHS Appropriations Act

The Court must hold unlawful and set aside agency action that is "not in accordance with

[13] Confusingly, § 59.14's ban on abortion referrals goes into effect on July 2, 2019, sixty days after Title X recipients must cease all activities that "provide, promote, refer for, or support abortion as a method of family planning" under § 59.5(a)(5).

law." Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). An agency action is "not in accordance with the law" when "it is in conflict with the language of [a] statute." *See Nw. Envtl. Advocates v. U.S. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008); 5 U.S.C. § 706(2)(A). Here, the Final Rule conflicts with the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18114(1)-(5) ("Section 1554"), and the Health and Human Services Appropriations Act.

1. The Final Rule violates the ACA

Section 1554 provides that 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.[14] The Final Rule violates every one of these requirements.

Prohibition on Abortion Counseling and Referral

By forbidding medical providers from promoting or supporting abortion as an option to patients, or referring patients to abortion providers, the Final Rule "interferes with communications regarding a full range of treatment options" and further "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. As Dr. Marshall explains, when pregnant patients are making decisions about their health care, it is essential that they receive neutral, unbiased information about ***all*** of their options. Marshall Decl. ¶¶ 12-15; *see also* CMA Decl. ¶¶ 13-20;

[14] A federal district court judge in Texas recently held that the Affordable Care Act is unconstitutional. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018). However, because that decision has been stayed pending appeal, *Texas v. United States*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), the ACA remains in effect and the Secretary must follow the requirements of Section 1554 in promulgating regulations under Title X.

Kost Decl. ¶¶ 84-85, 92. In some circumstances, an abortion may be medically advisable, such as where pregnancy presents risks to the patient's health. Marshall Decl. ¶ 13; *see also* Kost Decl. ¶¶ 51, 92-94. Yet the Final Rule's prohibition against "promoting" or "supporting" abortion explicitly "interferes with communications" between Dr. Marshall and her patients, prohibiting Dr. Marshall from presenting abortion as an option. Likewise, the ban on abortion referrals prevents Dr. Marshall from giving pregnant patients all the information they need to make decisions about their health care. Marshall Decl. ¶¶ 17-19.

For similar reasons, the Final Rule's restrictions on pregnancy counseling and ban on abortion referrals "violate[] the principles of informed consent and the ethical standards of health care professionals." 42 U.S.C. § 18114. Medical providers, including Dr. Marshall, have professional, ethical, and legal obligations to give patients all information relevant to their treatment options. Marshall Decl. ¶¶ 12-15; CMA Decl. ¶¶ 13-19; Kost Decl. ¶¶ 84-85 (and citations therein); Tuttle Decl. ¶ 10; McCarthy Decl. ¶ 8. This includes information regarding referrals. Marshall Decl. ¶ 14-15, 17; CMA Decl. ¶¶ 16-19.

The ban on abortion counseling and referrals also "creates . . . unreasonable barriers to the ability of individuals to obtain appropriate medical care," "impedes timely access to health care services," and "limits the availability of health care treatment." 42 U.S.C. § 18114. The Final Rule forbids Dr. Marshall from giving patients referrals to abortion providers, even upon request; instead, she may only give patients "a list of . . . primary health care providers (including providers of prenatal care)," some, but not a majority of which, also provide abortion. § 59.14(b)(1)(ii). By forcing Dr. Marshall and other medical providers to obfuscate the identity of available abortion providers, the Rule will require patients to investigate and identify such providers themselves, impeding "timely access to healthcare services" that the ACA seeks to protect. *See* Rabinovitz Decl. ¶ 50-51; Marshall Decl. ¶¶ 17, 20, 22; CMA Decl. ¶ 19; Kost Decl. ¶¶ 73, 87-90; 93-95, 123; Brindis Decl. ¶ 80. Due to the requirement that any abortion providers on the list also offer primary care, women in certain areas will be left without any local referrals, further delaying their receipt of care. Rabinovitz Decl. ¶ 51.

Finally, the Final Rule's requirement that "nondirective pregnancy counseling" only be

provided by a "physician[] or advanced practice provider," § 59.14(b)(1)(i), creates additional "unreasonable barriers" to Title X patients' ability to obtain healthcare, 42 U.S.C. § 18114. At most Title X-funded health centers, the majority of counseling is not provided by physicians and those holding advanced graduate degrees, but by staff who include registered nurses, health educators, licensed clinical social workers, and licensed vocational nurses. *See* McKinney Decl. ¶ 11; *see also* Kost Decl. ¶ 86; Ferrer Decl. ¶ 12. Physicians and advanced practice providers, who only make up a portion of Title X staff at Title X health centers, cannot meet the demand for counseling on their own. *See* McKinney Decl. ¶ 11; Wilburn Decl. ¶ 20. By cutting other counselors out of the process, the Final Rule makes necessary counseling less accessible.

Physical and Financial Separation

The Final Rule's separation requirements also violate Section 1554's prohibition on unreasonable barriers to medical care. Although the Final Rule is vague as to what degree of separation will satisfy the separation requirement, the exemplary factors suggest that, at a minimum, Title X projects must be operated in separate facilities, with separate staff, and separate records. *See* § 59.15(a)-(d). The costs of establishing physically separate facilities with separate personnel, records, websites, and phone numbers will be too great for many Title-X funded health centers to bear, and will divert funds away from family planning services. *See* Kost Decl. ¶¶ 76, 102-109; Nestor Decl. ¶ 13; McKinney Decl. ¶ 10; Tuttle Decl. ¶ 11; Marshall Decl. ¶ 26; Rabinovitz Decl. ¶59-60; Wilburn Decl. ¶ 15; McCarthy Decl. ¶ 9; Castellano-Garcia Decl. ¶ 10. To the extent Title X-funded health centers can afford to comply, Title X patients will have to leave Title X clinics and go to separate facilities in order to receive complete information about their treatment options or to receive a requested referral for an abortion. Marshall Decl. ¶¶ 17, 20. The Final Rule will impact the ability of any Title X-funded entity to partner with agencies or programs that provide, promote, refer for, or support abortion, creating greater fragmentation of health and public health service delivery. Ferrer Decl. ¶ 13.

Provisions Concerning Minors

Minors will face additional barriers to care under the Final Rule. Minors who seek services at a Title X clinic "must be considered on the basis of their own resources," but only if

"the Title X provider has documented . . . the specific actions taken by the provider to encourage the minor to involve her/his family." § 59.2(1)(i). The documentation requirement is waived only if the provider "suspects the minor to be the victim of child abuse or incest," has documented that suspicion, and has reported the situation to the relevant authorities. § 59.2(1)(ii). Providers and health centers who specialize in the treatment of adolescents overwhelmingly believe that these new requirements will create barriers to access to care for adolescents in need of reproductive health services. Thomas Decl. ¶¶ 7–9, 14; Nestor Decl. ¶¶ 9-11. These entities provide services to teens based on trusting and confidential relationships. Thomas Decl. ¶ 14. The Final Rule's reporting requirements will dissuade teen patients from seeking services. *Id.*

2. The Final Rule violates the Health and Human Services Appropriations Act

The Final Rule also violates the HHS Appropriations Act, which provides that "all pregnancy counseling" in Title X projects "shall be nondirective." Pub. L. N. 115–245, Div. B, Tit. II, 132 Stat. 2981, 3070–71.[15] The meaning of "nondirective" is clear: the counseling must provide a patient neutral, factual information about all of her treatment options without steering the patient towards one option over the others. Marshall Decl. ¶¶ 12, 17; Kost Decl. ¶ 85 (and citations therein); *see also* 84 Fed. Reg. 7744 n.72 (quoting Congress's 2000 description of "nondirective counseling to pregnant women" as offering "adoption information and referrals to pregnant women on an equal basis with all other courses of action"). The Final Rule violates Congress's non-directive counseling mandate in at least the following ways.

First, the Final Rule mandates that a Title X provider refer a pregnant patient for prenatal care in all circumstances. The Rule provides that "once a client served by a Title X project is medically verified as pregnant, she ***shall*** be referred . . . for medically necessary prenatal health

[15] It is well established that Congress can legislate through appropriations language. *See generally Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). This includes, as here, adding conditions to congressional programs in subsequent appropriations riders that provide funds. *See Skoko v. Andrus*, 638 F.2d 1154 (9th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979).

care." § 59.14(b)(1) (emphasis added).[16] These referrals are required regardless of the wishes of the pregnant woman or the medical judgment of her doctor.

Second, though the Final Rule pays lip-service to Congress's intent by acknowledging that a medical provider ***may*** provide "non-directive pregnancy counseling," § 59.14(b)(1)(i), the Final Rule's ban on abortion referrals renders this option illusory. The Rule is unequivocal that a Title X provider may not "perform, promote, refer for, or support abortion as a method of family planning," nor take any other action to assist a patient in securing one. § 59.14(a); *see also* §§ 59.5(a)(5), 59.16(a). Forbidding abortion referral is inherently directive, contravening Congressional intent.

Finally, even if a patient explicitly requests a referral for an abortion, the Title X provider may only offer the patient a list of "comprehensive primary health care providers (including providers of prenatal care)." § 59.14(b)(1)(ii). None of the providers on the list ***must*** offer abortion services, and if the list includes any that do, they must comprise less than half of the entities listed. § 59.14(b)(2). The Title X provider may not identify which entities on the list, if any, actually provide abortion services. § 59.14(c)(2). The Rule thus forces providers to direct pregnant patients towards prenatal services (even if unwanted), while steering pregnant patients away from abortion services (even if wanted). The Final Rule directly contravenes the Congress's mandate that pregnancy counseling in Title X projects be nondirective.

* * *

The Final Rule flagrantly violates the ACA and the HHS Appropriations Act, and mandates conduct that those laws were designed to thwart. Plaintiffs are therefore likely to succeed on the merits of their APA "contrary to law" claim.

B. Plaintiffs are likely to prevail on their claim that the Final Rule is arbitrary and capricious

To determine whether an agency decision is "arbitrary and capricious" under the APA, a

[16] Contrary to what the Department claims in the preamble to the Final Rule, the Final Rule's reference to prenatal health care as "medically necessary" does not make it so. 84 Fed. Reg. 7714, 7761-62. Prenatal services are not medically necessary if a patient is terminating her pregnancy. Marshall Decl. ¶ 18. In fact, requiring a patient who wishes to terminate her pregnancy to seek prenatal care only delays the treatment she seeks. *Id.*

court must assess the reasons the agency has given for its change in policy—"or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also* 5 U.S.C. § 706(2)(A). Where, as here, the agency purports to justify the agency action by pointing to a risk of abuse and a purported record of abuse, the Court must examine the evidence cited to determine if it is in fact "evidence of a real problem." *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006) (Kavanaugh, J.); *see also id.* at 837. If the evidence fails to show a "real problem," then the action must be set aside. *Id.* at 839-40.

Critically, the Court may uphold the Final Rule based ***only*** upon the justification articulated by the Department itself (*see State Farm*, 463 U.S. at 50)—"not counsel's *post hoc* rationalizations for agency action." *EchoStar Satellite, LLC v. FCC,* 457 F.3d 31, 36 (D.C. Cir. 2006).[17] In addition, an agency whose "new policy rests upon factual findings that contradict those which underlay its prior policy . . . or [whose] prior policy has engendered serious reliance interests," must offer a "more detailed" justification for its action. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).[18] Against this legal framework, Defendants justifications for the Final Rule fail for multiple reasons.

Physical and Financial Separation Requirements

First, Defendants seek to justify § 59.15's physical and financial separation requirements

[17] For this reason, the Court may determine whether Plaintiffs are likely to succeed on their "arbitrary and capricious" claim without examining the full administrative record. An agency action may only be upheld if "the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Thus, the Court need only examine the purported justifications Defendants gave for the rule at the time they exercised their power to promulgate it.

[18] In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld 1988 regulations, that included provisions similar to the ones challenged here against an "arbitrary and capricious" challenge. *Id*. at 187. However, *Rust* was decided almost twenty years before the Supreme Court clarified in *Fox* that a "more detailed" justification is required when an agency substantially breaks with prior policy without considering the reliance interests implicated. *Fox*, 556 U.S. at 515; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[B]ecause of decades of industry reliance on the Department's prior policy . . . the explanation fell short of the agency's duty to explain" the new policy). The insufficiency of Defendants' justifications is magnified here against the backdrop of a new statutory and regulatory framework, and nearly forty additional years of successful implementation of the Title X program under the previous requirements. *Rust* does not control here.

by arguing that,

> shared facilities create a risk of the intentional or unintentional use of Title X funds for impermissible purposes, the co-mingling of Title X funds, the appearance and perception that Title X funds . . . may also be supporting that program's abortion activities, and the use of Title X funds to develop infrastructure that is used for the abortion activities.

84 Fed. Reg. 7764. But Defendants offer no "evidence of a real problem" of the type they describe. *Nat'l Fuel*, 468 F.3d at 841. Instead, Defendants state that these concerns are "particularly acute in light of" a 2014 study finding that "abortions are increasingly performed at sites that focus primarily on contraceptive and family planning services—sites that ***could*** be recipients of Title X funds." 84 Fed. Reg. 7764 (emphasis added). But Defendants do not contend that the sites considered by the 2014 study actually ***are*** recipients of Title X funds, much less that any of them misused Title X funds. The study therefore is not "evidence of a real problem" regarding misuse of Title X funds. *Nat'l Fuel*, 468 F.3d at 841.

Second, the Secretary identifies isolated instances where Title X-funded health centers overbilled Medicaid. 83 Fed. Reg. 25502, 25508. But Medicaid overbilling is not evidence of misuse of ***Title X*** funds. "Professing that an order ameliorates a . . . problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." *Nat'l Fuel*, 468 F.3d at 844.

Third, Defendants fail to offer the "detailed explanation" necessary to explain the difference in their underlying factual findings and "those which underlay its prior policy." *Fox*, 556 U.S. at 515. "New presidential administrations are entitled to change policy positions," but in so doing, "they must . . . address the prior factual findings underpinning a prior regulatory regime." *See State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d. 1106, 1123 (N.D. Cal. 2017). Defendants have not done so here. The Department's regulations have long made clear that Title X funds may not be used to "provide abortions." 42 C.F.R. § 59.5(a)(5) (2014). To that end, the Office of Population Affairs ("OPA") ensures grantees' compliance with Title X's requirements, including Section 1008, through careful application reviews, independent financial audits, periodic site visits, and yearly budget reviews. Rabinovitz Decl. ¶ 16. Acknowledging these rigorous procedures, the Department rejected a near-identical physical separation requirement in

2000, explaining that the requirement "[wa]s not likely ever to result in an enforceable compliance policy that is consistent with the efficient and cost-effective delivery of family planning services." 65 Fed. Reg. 41276.

Defendants fail to even mention this finding or the strict OPA polices that already ensure Title X compliance with Section 1008—much less "explain why [those] existing safeguards do not suffice." *Nat'l Fuel*, 468 F.3d at 844. Because the Final Rule is based on nothing more than a "theoretical threat of abuse," it must be set aside as arbitrary and capricious. *Id.*

Restriction on Abortion Counseling and Ban on Referral

Defendants contend that the Rule's restrictions on abortion counseling and referral are justified because the previous requirement that Title X-funded clinics provide abortion counseling and referral upon request "may deter qualified providers from applying for Title X grants or participating in Title X projects." 84 Fed. Reg. 7717. The Department also claims that the Final Rule's restrictions ensure compliance with the Church, Coats-Snowe, and Weldon Amendments (the "refusal" Amendments). *Id.* Again, Defendants' own allegations regarding the "refusal" Amendments belie that logic. According to Defendants, the refusal Amendments allow "institutional entities who object" to providing abortions or referrals for abortions to refuse to do so. 84 Fed. Reg. 7716. If entities with a moral or religious objection to abortion are already excused from providing abortion counseling or referral, then no change in the regulations is necessary to protect those entities' rights. Nor have Defendants offered any evidence that the prior requirement deterred providers from applying for Title X grants or participating in the program. The Final Rule's new requirement is nothing more than "a solution in search of a problem"—not reasoned decisionmaking. *Nat'l Fuel*, 468 F.3d at 837.

The Department also "failed to consider an important aspect of the problem": the restrictions contravene Title X providers' medical, legal, and ethical obligations, and will thereby lead to an exodus of providers from the program. *State Farm*, 463 U.S. at 43. The ban on abortion referral is ethically unacceptable. It contravenes established medical guidelines from ACOG and the AMA, and conflicts with the CDC's 2016 Practice Recommendations for Contraceptive Use—both of which endorse the principle of informed consent, accomplished by giving a woman

all relevant information required to make an informed choice about her reproductive options. Marshall Decl. ¶¶ 12-15.[19]

In fact, Essential Access sub-recipients representing 233 clinic sites that serve over 774,000 patients said they would leave or consider leaving the program if their medical providers were prohibited from providing abortion referrals. Rabinovitz Decl. ¶42; Wilburn Decl. ¶ 15. The exodus would not be limited to California, either. Title X providers nationally would feel compelled to leave the Title X program rather than provide substandard or unethical care for their patients. Kost Decl. ¶¶ 77-83. Providers that remained could not absorb the patient demand, meaning that millions of patients who rely on Title X-funded clinics would be without the comprehensive, high quality care the statute envisions. *Id.* ¶¶ 77-83, 113-118.

Finally, Defendants fail to offer any justification for two new requirements that would diminish access to care: (1) that "nondirective pregnancy counseling" may only be offered by physicians and APPs; and (2) that any abortion providers on the list Title X clinics may provide to patients must also be "comprehensive primary health care providers." § 59.14(b)(i), (ii). As to the first, the complete absence of justification alone renders the provision arbitrary and capricious. *See Encino Motorcars*, 136 S. Ct. at 2120 (setting aside a new regulation for "lack of reasoned explication"). An agency's failure to consider the disruption its decision would cause also renders it arbitrary and capricious. *See Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045 (N.D. Cal. 2018). Here, Defendants failed to consider that preventing non-APPs from delivering care will vastly constrict the availability of counseling and lead to worse health outcomes. *See, e.g.*, McKinney Decl. ¶ 11; Kost Decl. ¶ 86.[20]

As to the requirement that abortion providers on the list also be "comprehensive primary health care providers," Defendants claim this "prevents distribution of that list from violating

[19] Absent informed consent, a patient is deprived of autonomous decisionmaking and inappropriately burdened with investigating and discovering providers that offer the care she needs. Rabinovitz Decl. ¶ 50; Marshall Decl. ¶¶ 12-15, 18, 20, 22; Kost Decl. ¶¶ 84-95.

[20] Registered nurses with bachelor's degrees, and other trained personnel, can safely and do effectively participate in the provision of advice and counseling regarding women's reproductive healthcare choices. Kost Decl. ¶ 86; *see also* McKinney Decl. ¶ 11; Forer Decl. ¶¶ 29-30. Non-APPs "were involved with 1.7 million Title X family planning encounters in 2016"—more than a quarter of all family-planning encounters in that year. 84 Fed. Reg. 7778.

section 1008." 84 Fed. Reg. 7761. Defendants' perfunctory justification confirms it failed to consider that this requirement would eliminate local referral options for many patients seeking to terminate a pregnancy and delay access to time-sensitive care. Rabinovitz Decl. ¶ 51; *see also* Kost Decl. ¶¶ 92-95, 123; Marshall Decl. ¶ 22. For example, California women in rural Northern California will have to travel more than five hours in order to visit a "comprehensive primary health care providers" that also offers abortion services. Rabinovitz Decl. ¶ 51. Women in the Central Valley, central coast, and southeastern regions of California will have to drive 2–4 hours to do the same. *Id*. Defendants "entirely failed to consider an important aspect of the problem," and so the rule should be set aside as arbitrary and capricious. *State Farm*, 463 U.S. at 43.[21]

C. Plaintiffs are likely to prevail on their claim that Defendants promulgated the Final Rule without proper notice and comment

The Final Rule should also be enjoined because Plaintiffs are likely to succeed on their claim that Defendants failed to comply with the APA's notice and comment requirements. *See* 5 U.S.C. §§ 553, 706(2)(D). The APA generally requires an agency to give notice of a proposed rulemaking and solicit comments on the same. The notice shall include "the terms or substance of the proposed rule or a description of the subjects and issues involved" (5 U.S.C. §553(b)(3)), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). For notice to be sufficient, the final rule must be "a logical outgrowth" of the proposed rule such that "the complaining party should have anticipated that a particular requirement might be imposed." *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*,

[21] Defendants attempt to justify eliminating the requirement that Title X family planning methods be "medically approved" on the grounds that the term "creat[ed] confusion about what kind of approval is required." 84 Fed. Reg. 7741. But the Rule cites no evidence of such confusion by Title X providers. In any event, OPA, which administers the Title X program, has ***already*** released recommendations for providing Quality Family Planning ("QFP"). Gavin L, Pazol K, Ahrens K., *Update: Providing Quality Family Planning Services — Recommendations from CDC and the U.S. Office of Population Affairs*, 2017. MMWR Morb. Mortal Wkly. Rep. 2017, 66:1383-1385, *available at* https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6650a4-H.pdf. The QFP recommendations set forth broadly accepted, evidence-based standards for high-quality clinical practice regarding the provision of family planning services. Rabinovitz ¶ 29. They are based on a rigorous, systematic, and transparent review of existing clinical guidelines published by federal agencies, such as the CDC and U.S. Preventive Services Task Force. *Id.* ¶ 29. The Rule does not explain why the OPA's own guidance is insufficient to minimize any alleged "confusion" around "medically approved" treatment options.

344 F.3d 832, 851 (9th Cir. 2003). Here, Defendants failed to adhere to those foundational rulemaking requirements.

First, the requirement that an abortion provider also be a "licensed, qualified, comprehensive primary care providers" is not a logical outgrowth of the Proposed Rule. The Proposed Rule permitted a medical doctor to provide a patient "a list of licensed, qualified, comprehensive health service providers" with "some, but not all" providing "abortion, in addition to comprehensive prenatal care." 83 Fed. Reg. 25531. The Final Rule substantially shrinks the universe of providers to whom a pregnant woman may be referred. In some areas, the only qualified abortion provider is a specialized facility that does not provide primary care services. *See, e.g.*, Kost Decl. ¶¶ 89-90. "[O]ne of the salient questions" in determining whether a provision is a logical outgrowth is "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments." *Nat. Res. Def. Council v. U.S. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). Because that is the case here, the provision must be set aside.

The requirement that only physicians and "advanced practice providers" deliver "non-directive pregnancy counseling" fails the logical outgrowth test, as well. The term "advanced practice provider" appears nowhere in the Proposed Rule, while the Final Rule introduces an elaborate definition from whole cloth. § 59.2 ("APP" means "a medical professional who receives at least a graduate level degree in the relevant medical field and maintains a license to diagnose, treat, and counsel patients"). Defendants' failure to provide proper notice deprived the public of an opportunity to meaningfully comment and foreclosed the agency from the chance to "alter its action in light of [public] comments." *Alameda Health Sys. v. Centers for Medicare & Medicaid Servs*., 287 F. Supp. 3d 896, 919 (N.D. Cal. 2017). Had HHS provided proper notice, the public may have expressed concerns consistent with the one shared here: the definition of APP is much too narrow, and excludes professionals who currently provide the bulk of pregnancy options counseling at Title X centers, including registered nurses, health educators, licensed clinical social workers, and licensed vocational nurses. Prohibiting these professionals from continuing to provide care will harm patients. McKinney Decl. ¶ 11; *see also* Kost Decl. ¶ 86.

The APA's procedural protections are intended to ensure agency regulations are tested through public comment. Because they were not here, the Final Rule must be set aside.

D. Dr. Marshall is likely to prevail on her First Amendment claim

The Final Rule suppresses information regarding abortion while forcing providers to espouse support for the continuation of pregnancy in violation of the First Amendment. While the Rule purports to allow "discussion" of abortion, the only clearly compliant "discussion" is the admonition that Title X clinics do not view the procedure as a "method of family planning." *See* § 59.14(e)(5). In contrast, the Rule demands that providers in all cases give referrals to "health care provider[s] for medically necessary prenatal health care," § 59.14(b)(1). In addition, a Title X provider may offer "[r]eferral to social services or adoption agencies; and/or . . . [i]nformation about maintaining the health of the mother and unborn child during pregnancy," § 59.14(b)(iii)(iv), but cannot "refer for" abortion. §§ 59.5(a)(5), 59.14(a).

The Final 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. The government cannot, consistent with the First Amendment, "forc[e] free and independent individuals to endorse ideas they find objectionable." *Janus v. Amer. Fed. of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). A requirement that medical providers "alter the content of their speech" by reciting "a government drafted script" is an unconstitutional content-based speech regulation. *Nat'l Inst. of Family and Life Advocates v. Becerra* (*NIFLA*), 138 S.Ct. 2361, 2371 (2018). The Supreme Court recently reaffirmed that the dangers of government interference in the provider-patient relationship are particularly acute, striking down a California law that required clinics serving pregnant women to post notices about state-sponsored services. *Id.* The Court noted that "[t]hroughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities." *Id.* at 2374. That is precisely what the Final Rule does, by restricting Dr. Marshall's ability to refer her patients to appropriate and responsive providers. The law at issue in *NIFLA* violated the First Amendment because it

required clinics "to inform women how they can obtain state-subsidized abortions," despite petitioners' desire to "dissuade women from choosing that option," thereby "alter[ing] the content" of the providers' speech. *Id.* at 2371(internal quotation marks omitted). The same is true of the Final Rule—it "alters" the speech of healthcare providers by forcing them to make a referral for prenatal care even when it is inappropriate, unnecessary, or unwise.

Defendants will doubtless point to the fact that *Rust* upheld similar restrictions, explaining that the government can "fund one activity to the exclusion of the other" without violating the First Amendment.[22] 500 U.S. at 193. However, *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." *Id.* at 200. The *Rust* Court 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." *Id.* But that is exactly what the Final Rule requires providers like Dr. Marshall to do. The Final Rule compels Title X providers to represent that prenatal care is always necessary, even where the provider disagrees because the patient has already decided to have an abortion. The Final Rule therefore goes beyond a mere government decision to limit the scope of the Title X program, and instead demands that providers make referrals to prenatal care that they do not believe are appropriate. *NIFLA* confirms that such interference in the provider-patient relationship violates the First Amendment. For this reason, Dr. Marshall is likely to succeed on her First Amendment claim.

E. Plaintiffs are likely to prevail on their claim that the Final Rule is void for vagueness

Where "vagueness permeates the text" of a law, it violates the Fifth Amendment. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The Due Process Clause requires that agency actions "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so

[22] Although the reasoning appears nowhere in the opinion, later cases have attempted to justify *Rust*'s holding by characterizing the communications between a provider and patient as "government speech" when care is provided through the Title X program. That logic cannot be squared with the Supreme Court's later decisions in *Rosenberger v. Rector & Visitors of Univ.*, 515 U.S. 819 (1995), and *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

that he may act accordingly," and further requires that rules "provide explicit standards for those who apply them." *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). An agency action that fails to do so is "so indefinite as to allow arbitrary and discriminatory enforcement." *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010) (quotation and citation omitted). Several provisions of the Final Rule violate this standard.

First, the Final Rule's ban on "encourag[ing], promot[ing] or advocat[ing] for abortion," § 59.16, does not give providers fair notice of prohibited conduct. *Grayned*, 408 U.S. at 108. This prohibition is aimed at any action that "assist[s] women to obtain abortions for family planning purposes or increase[s] the availability or accessibility of abortion for family planning purposes." *Id.* Although a provider may "discuss abortion" in providing non-directive pregnancy counseling, the Final Rule offers no guidance whatsoever regarding how to do so without potentially "promoting" abortion or making it more "accessible" to patients. If, for example, Dr. Marshall gave a patient information about the recovery time for a medical abortion, she could not be sure that the Secretary would not find her in violation of the Final Rule. *See, e.g.*, Marshall Decl. ¶ 19. Without additional guidance, providers do not have "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned*, 408 U.S. at 108. This is especially true because, as described in Section I.D *infra*, "First Amendment freedoms are at stake," which requires the statute to "provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

Moreover, a Title X clinic must provide assurance "satisfactory to the Secretary" that it does not encourage, promote, or advocate abortion. § 59.13. The Rule does not provide any further information on what the Secretary considers a "satisfactory" or adequate representation. In this way, the reporting requirement attached to § 59.13 is so standardless as to invite "arbitrary and discriminatory enforcement." *Human Life of Washington*, 624 F.3d at 1019; *see also* Marshall Decl. ¶ 27.

Second, the Final Rule's exception for "emergency care" does not give providers adequate guidance with respect to when they can refer to an abortion provider. Section 59.14 sets the

standard that a Title X provider "may not . . . refer for, or support abortion as a method of family planning." Instead of providing an express exception to that requirement when a woman's health is at risk, the Final Rule states only 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." § 59.14(b)(2).

The exception is impossibly vague on two fronts. To begin, the only example of an "emergency" the Final Rule provides warranting referral is an ectopic pregnancy. § 59.14(e)(2). But termination of a pregnancy may be advisable in many other circumstances—for example, if the pregnant woman unexpectedly experiences a life-threatening illness during pregnancy. *See, e.g.*, Marshall Decl. ¶ 13; Kost Decl. ¶ 94. The Rule is unclear if a referral to an abortion provider for "emergency care" would be appropriate. Nor does the Final Rule make clear that the Secretary would ever deem a specialized abortion provider the "appropriate provider of medical services" in an emergency, as such providers cannot be included on the list of "licensed, qualified, comprehensive primary health care providers" Title X clinics may give patients. § 59.14(c)(2). As a result, Title X providers may decline to give patients potentially life-saving referrals out of uncertainty over the scope of prohibited conduct. *See, e.g.*, Marshall Decl. ¶ 21.

Third, the Rule's financial and physical separation requirements do not give adequate notice of prohibited conduct and invite arbitrary enforcement by the Secretary. Under the Final Rule, "[a] Title X project must be organized so that it is physically and financially separate" from prohibited activities. § 59.15. But "prohibited activities" is defined broadly to cover virtually *anything* abortion-related, from providing abortion or abortion referrals with *non*-Title X funds, to merely allowing brochures that advertise a clinic where abortions are performed to be visible in the same space where Title X services are provided. §§ 59.15, 59.16. And yet, the Final Rule provides no guidance as to what degree of separation of accounting records, examination and waiting rooms, office entrances, phone numbers, website, personnel, and health records is sufficient. If a Title X provider shares a primary phone line with an entity that refers for abortion, but maintains separate extensions, has it violated the Rule? If a Title X provider shares an office entrance with a lobbyist who advocates for increased access to abortion, but they maintain

separate offices, has the Rule been violated? A person of "ordinary intelligence" has no way of knowing. *Grayned*, 408 U.S. at 108; *see also, e.g.*, Marshall Decl. ¶ 25.

Instead, the Final Rule vests boundless discretion with the Secretary to make that determination "based on a review of facts and circumstances" and additional factors "relevant" to the inquiry. § 59.15. The Rule provides a non-exhaustive, exemplary list of factors, but does not indicate what weight each receives or what others the Secretary might rely on. In light of that uncertainty, Essential Access—which engages in substantial *non*-Title X-funded advocacy and public policy efforts around comprehensive reproductive health care, including abortion—will have to conduct those activities with a separate staff, under a separate roof, using separate workstations, email addresses, and phone numbers. Rabinovitz Decl. ¶ 65; *see also, e.g.*, Marshall Decl. ¶ 25; McKinney Decl. ¶ 10. Even this time-consuming and expensive undertaking may not be enough, given the Rule's failure to cabin the Secretary's enforcement discretion with "explicit standards." *Grayned*, 408 U.S. at 108.

For all of these reasons, Plaintiffs are likely to succeed on the merits of their Fifth Amendment claim.

II. ABSENT AN INJUNCTION, PLAINTIFFS WILL SUFFER IRREPARABLE HARM

"The deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th Cir. 2013) (same). As explained above, the Final Rule violates Dr. Marshall's First Amendment rights by compelling her to mislead patients seeking an abortion referral, and Plaintiffs' Fifth Amendment rights by failing to put them on notice regarding the Final Rule's prohibited conduct and standards for enforcing the same. *See supra* Sections I.D, I.E. Thus, Plaintiffs have established they will suffer irreparable harm as a matter of law, and the Court's inquiry may end there.

However, if implemented, the Final Rule will cause Plaintiffs to suffer immediate and irreparable harm in at least three other ways. The Final Rule will (1) decimate Essential Access's Title X network, thwarting its mission and decreasing access to care for patients who rely on Title X for life-changing services; (2) force Dr. Marshall and other providers to violate medical and

ethical standards and provide substandard care, or abandon Title X altogether; and (3) require Essential Access and its sub-recipients to cease *non*-Title-X-funded activities, or else divert extraordinary resources from patient care to the construction of "mirror" facilities.

Each of these harms is immediate, cognizable, and independently sufficient to support Plaintiffs' requested injunction.

A. The Final Rule will devastate Essential Access's Title X network, decreasing patients' access to care

The Final Rule will decimate Essential Access's Title X network, through which it delivers core family planning and related preventative health services, upending its public health programs and thwarting its mission to promote and champion quality sexual and reproductive health care for all. Rabinovitz Decl. ¶¶ 36–38. "Ongoing harms to a [plaintiff's] organizational missions" establish a likelihood of irreparable harm. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018) ("[T]he Organizations 'have established a likelihood of irreparable harm' based on their showing of serious 'ongoing harms to their organizational missions,' including diversion of resources and the non-speculative loss of substantial funding from other sources.") (quoting *Whiting*, 732 F.3d at 1029). Here, the injury is neither speculative nor hypothetical.

Faced with the choice of either complying with the Final Rule or foregoing Title X funds altogether, many sub-recipients will be forced out of the Title X program. Rabinovitz Decl. ¶ 40; McKinney Decl. ¶ 8–13; Thomas Decl. ¶¶ 9–10 ; Nestor Decl. ¶¶ 11–14; Marshall Decl. ¶ 27; Forer Decl. ¶¶ 17, 25; Wilburn Decl. ¶ 14. Sub-recipients that are unable to comply with the Final Rule will become ineligible for Title X funds, mid-grant, on May 3, 2019.

The decrease in Title X-funded entities will be substantial, as will the resulting public health impact. *See* Rabinovitz Decl. ¶¶ 8, 42. Essential Access sub-recipients representing 233 clinic sites that serve over 774,000 patients report they will leave or consider leaving the program if the "gag" rule is implemented. *Id.* ¶¶ 41–42; *see also* Nestor Decl. ¶¶ 11-12; Thomas Decl. ¶ 9; McKinney Decl. ¶ 9; Wilburn Decl. ¶ 15. Sub-recipients representing 194 clinic sites that serve over 682,000 patients report they will leave or consider leaving the program if the provision requiring medical providers to promote family involvement where an adolescent seeks

confidential services is implemented. Rabinovitz Decl. ¶ 42; *see* Thomas Decl. ¶¶ 9, 14; Forer Decl. ¶¶ 26-28. Many sub-recipients confirm that implementing the Final Rule's reporting and separation requirements will be cost-prohibitive, forcing them out of the network. Rabinovitz Decl. ¶ 43; McKinney Decl. ¶ 10; Nestor Decl. ¶¶ 11, 13; Marshall Decl. ¶ 26; Forer Decl. ¶ 31; Wilburn Decl. ¶ 14. In addition, numerous Title X-funded health centers—including Westside Family Health Center ("WFHC") in Los Angeles County, for example—simply do not have enough staff who are doctors or advanced practice providers to perform options counseling services for the patients that they currently serve. Rabinovitz Decl. ¶ 52; McKinney Decl. ¶ 11. Because centers like WFHC cannot comply with the Final Rule as a result, they will be forced to decline Title X funds. McKinney Decl. ¶ 11; Tosh Decl. ¶¶ 39-40. WFHC patients and others like them will thus be denied access to care, or to the extent they can find other providers, will have to travel farther to receive counseling. Rabinovitz Decl. ¶ 52; McKinney Decl. ¶ 12–13.

The dismantling of Essential Access's network will devastate its mission to provide quality sexual and reproductive healthcare for all, and instead drastically decrease access to care for those who need it most. Without Title X funds, health centers vital to their communities will reduce services, decrease clinic hours, eliminate staff positions, cut staff training and continuing education, and close satellite sites. Rabinovitz Decl. ¶¶ 43–44; McKinney Decl. ¶¶ 9–13; Nestor Decl. ¶¶ 11–14; Thomas Decl. ¶¶ 10–16; Marshall Decl. ¶¶ 28-29; Wilburn Decl. ¶¶ 15-21. Because family planning services are often the first interaction a patient has with the health care system, (Tuttle Decl. ¶ 8; McCarthy Decl. ¶ 7), the loss of Title X funds will impact public health well beyond the family planning sphere, affecting patients' access to general health services, targeted outreach programs for teens and low-income communities, and particularized programs to prevent the spread of STIs. *Id.*; Wilburn Decl. ¶¶ 17-19.

Essential Access sub-recipients operating 279 clinic sites that serve over 835,000 Title X patients overwhelmingly confirm that the Final Rule's restrictions would worsen the quality of their patient care. Rabinovitz Decl. ¶ 42; McKinney Decl. ¶¶ 2-7; Thomas Decl. ¶¶ 2-8; Nestor Decl. ¶¶ 2–10; Wilburn Decl. ¶ 15-21; Tuttle Decl. ¶ 12. More than half of those sub-recipients report that prohibiting abortion referrals would make it more difficult for their clinics to recruit

medical providers, such as doctors and nurses. *Id*; Castellano-Garcia Decl. ¶¶ 11-12. These changes will result in fewer patient appointments, longer wait times between appointments, and longer distances that patients must travel to see providers. Rabinovitz Decl. ¶ 45; McKinney Decl. ¶ 13; Thomas Decl. ¶ 16; Nestor Decl. ¶ 14; Brindis Decl. ¶¶ 91-93; Wilburn Decl. ¶ 20. For example, if all qualified family planning abortion providers in California were to close, 18 counties would be left without a Title X-funded health center. Rabinovitz Decl. ¶ 43.

The Essential Access Title X network also plays a critical role in ensuring access to quality contraception; without it, patients will have fewer options. Patients served by Title X-funded health centers in California are more likely to adopt or continue using long-acting and reversible contraceptive methods ("LARCs") as compared to patients served by non-Title X-funded health centers. *Id.* ¶ 46; Kost Decl. ¶¶ 42-46; 119-121 (describing a 35 percent reduction in women using LARCs after Texas changed its family planning program by disqualifying agencies providing abortion); Nestor Decl. ¶ 8; Brindis Decl. ¶¶ 23-32. LARCs are highly effective in preventing pregnancy because they obviate the need for daily administration and use at the time of intercourse. Rabinovitz Decl. ¶ 46; Kost Decl. ¶ 45; Brindis Decl. ¶¶ 21, 32.

Medical providers and public health experts confirm what common sense tells us—erecting unnecessary obstacles to accessing care and quality contraception will cause unintended pregnancies and STIs to spike. Rabinovitz Decl. ¶ 46; Kost Decl. ¶¶ 82, 97, 101, 123; Brindis Decl. ¶¶ 51-56; McKinney Decl. ¶13; Thomas Decl. 16; Ferrer Decl. ¶ 17; Tosh Decl. ¶¶ 41-43, 47. Diminished access will disproportionately harm low-income women and other underserved populations, including people of color and at-risk youth, like homeless and LGBTQ teens. Rabinovitz Decl. ¶ 45; Thomas Decl. ¶ 3-4, 6-7; McKinney Decl. ¶ 3-5; Tuttle Decl. ¶ 4; Kost Decl. ¶¶ 19, 95; Brindis Decl. ¶¶ 67-73; Forer Decl. ¶ 38; Ferrer Decl. ¶¶4-5, 10; Tosh Decl. ¶¶ 13, 45. The Final Rule will create a two-tiered system in which low-income individuals who rely on Title X for contraception will no longer have access to all available methods of contraception, while those who can afford private insurance will have the luxury of choice. Ferrer Decl. ¶ 10; Castellano-Garcia ¶ 12.

The Fresno Economic Opportunity Commission ("Fresno EOC") Community Health

Center's HEARTT program is a telling example. HEARTT is a transport service through which Fresno EOC provides teens with confidential pregnancy options counseling and STI screening. Thomas Decl. ¶¶ 7, 9–14. Fresno EOC prides itself on being a LGBTQ "safe-space" and "teen-friendly clinic," making the Final Rule's new requirements around family involvement and minors particularly onerous. *See supra* Section I.A.1. Fresno EOC will no longer be able to accept Title X funds if the Final Rule goes into effect, as it can't risk imperiling its trusted relationships with the at-risk youth. *Id.* There is no other service like HEARTT in Fresno County, and rates of STIs and unintended pregnancies will increase once it stops operating. Thomas Decl. ¶¶ 13, 16.

Loss of programs like HEARTT will not be unique. Title X-supported features, such as extended clinic hours, bilingual aids or interpreters, online appointment scheduling, and outreach and education about pregnancy and STIs, will all decline. *See* McKinney Decl. ¶¶ 3-13; Thomas Decl. ¶¶ 2-16; Nestor Decl. ¶¶ 2-14; Tuttle Decl. ¶ 5; Forer Decl. ¶ 39; McCarthy Decl. ¶ 5.

In addition to harming adolescents, dismantling the Title X network will put low-income women in particular risk, as they historically suffer from higher rates of unintended pregnancies than the general population. Rabinovitz Decl. ¶ 47; Brindis Decl. ¶ 91; Ferrer Decl. ¶¶ 4-5. This rise in unintended pregnancies will negatively affect patients' ability to achieve their personal, educational, and professional goals. *See* Kost Decl. ¶¶ 62-65 (noting that "that the ability to determine for oneself whether and when to have children is also related to an individual's mental health and happiness"); Ferrer Decl. ¶ 2. For these reasons, the Final Rule will inflict irreparable harm upon Essential Access, its network, its mission, and patients who rely on Title X.

B. The Final Rule will interfere with the provider-patient relationship

For sub-recipients that attempt compliance, the Final Rule will undermine the relationship between providers like Dr. Marshall and their patients, with incalculable public health costs. Rabinovitz Decl. ¶ 36; Marshall Decl. ¶¶ 12-23; Forer Decl. ¶ 34-35; *see also* Kost Decl. ¶ 95.

First, as explained above, the Final Rule prohibits providers from providing abortion counseling or referrals, even where a patient explicitly requests it. Conversely, the Final Rule requires a provider to give a prenatal referral to pregnant patients, even if the patient has already decided to terminate her pregnancy. *Id.* Those requirements have immediate, irreversible

consequences, because abortion is a time-sensitive procedure. Each day that the Final Rule delays a patient seeking abortion counseling or referral from accessing a provider who will discuss it needlessly increases the patient's health risks. The patient will also be misled into scheduling one or more unnecessary in-person office visits only to learn she must again arrange transportation and time off from work or school to actually obtain the care she seeks. Rabinovitz Decl. ¶ 50; Marshall Decl. ¶¶ 17-22; *see also* Kost Decl. ¶¶ 73, 93, 123. This run-around denies patients access to time-sensitive care. *See* Rabinovitz Decl. ¶ 50; McKinney Decl. ¶ 13; Marshall Decl. ¶¶ 17-22; *see also* Kost Decl. ¶¶ 73, 93, 123.

Second, the Final Rule requires that the referral list of distributed to Title X patients include only those clinics that also offer "comprehensive primary health care." But this category of clinics excludes abortion providers that are otherwise qualified to assist a patient seeking an abortion. Rabinovitz Decl. ¶ 51. In some areas, the only qualified abortion provider is a specialized facility that does not provide primary care services. Rabinovitz Decl. ¶ 51. For example, women in rural Northern California will have to travel more than five hours in order to visit a provider that qualifies for the list *and* offers abortion services. *See id.*

Third, by precluding any medical professional aside from a doctor or "advanced practice provider" from referring patients for abortion, the Final Rule shrinks the number of medical professionals who may provide non-directive pregnancy options counseling that includes abortion referrals. Rabinovitz Decl. ¶¶ 52, 56; McKinney Decl. ¶¶ 11–13; *see also* Kost Decl. ¶ 86. In California, this will exacerbate the current shortage of physicians and nurse practitioners, which health care professionals already describe as a "crisis." Castellano-Garcia Decl. ¶¶ 11-12.

Fourth, the Final Rule requires providers to screen adolescent patients and involve their families in counseling, even when these patients deliberately request or seek out confidential services. Rabinovitz Decl. ¶ 57. That screening will have a chilling effect, leading fewer adolescents to seek care; those that do will be less transparent with their doctors. Rabinovitz Decl. ¶ 57; Thomas Decl. ¶ 7–16. At-risk teens in the most need of access to reproductive care and contraception will be made more vulnerable. *Id.*

Finally, the Final Rule harms patients by prohibiting providers from referring for abortion

even where an abortion is medically necessary. An abortion referral may be medically necessary even under circumstances that fall short of a documented emergency (the Rule's lone exception permitting abortion referral), but where the patient's health risks are nonetheless time-sensitive. Rabinovitz Decl. ¶ 53; Marshall Decl. ¶¶ 13, 17-21; *see also* Kost Decl. ¶ 94. The lack of an explicit exception for medically necessary abortion referrals needlessly impedes patients' timely access to care, with irreversible consequences. Marshall Decl. ¶¶ 16-23.

C. The Final Rule will require Essential Access to divert enormous resources away from patient care and towards compliance

Implementation of the Final Rule would also cause Essential Access irreparable economic harm. Though economic harm is "not normally considered irreparable," it is irreparable here because Essential Access and its sub-recipients will be forced to expend enormous resources on compliance, but "will not be able to recover monetary damages connected to the" Final Rule. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citing 5 U.S.C. § 702). The Final Rule's physical separation requirement obligates Essential Access and its sub-recipients to either abandon any *non*-Title X-funded activity that discusses or that could be construed as discussing abortion ("prohibited activities"), or open "mirror" offices to continue participating in the Title X program. Rabinovitz Decl. ¶¶ 65–66; McKinney Decl. ¶ 10; Tosh Decl. ¶¶ 39-40. This requirement's reach is staggering: "prohibited activities" providing abortion with non-Title X funds, giving abortion referrals, or even allowing abortion-related brochures to sit on a table within the same space where Title X services are provided. Rabinovitz Decl. ¶ 59.

Consider Essential Access's training arm, the Learning Exchange, a nationally-recognized resource for healthcare professionals across the country. Rabinovitz Decl. ¶ 61. Through the Learning Exchange, Essential Access offers training on pregnancy options, including how to provide patients with medically accurate, unbiased, non-judgmental information about abortion, adoption, and parenting. *Id.* ¶ 62. To comply with the Final Rule, Essential Access will need to separately house—with a separate staff, under a separate roof, and using separate workstations, email addresses, and phone numbers—any component of the Learning Exchange that falls within the definition of "prohibited activities." *Id.* ¶ 65. Essential Access conducts many other non-Title X funded activities that will have to be separated in this same way, ranging from its advocacy

efforts—which includes meeting with health care policy decision-makers, drafting letters of support and providing public testimony on reproductive health care issues, and participation in ballot initiative campaigns—to its adolescent health programs, such as TeenSource.org, Hookup, and TalkWithYourKids, which have a combined reach of over 650,000 individuals. *Id.* ¶¶ 63–64. Complying with the physical separation requirement to preserve these activities under the Final Rule will require extraordinary expenditures of time and money. *Id.* ¶¶ 36, 59–60, 70–71. Essential Access estimates the costs of separation for its own organization at $325,000 for the first year, and $212,500 for every year after. *Id.* ¶ 66.

This harm is imminent. Given the complexity of opening a "mirror" office, Essential Access must begin compliance efforts as soon as the Final Rule takes effect. *Id.* ¶¶ 66, 68. The same short fuse applies to its sub-recipients. McKinney Decl. ¶ 10. To that end, Essential Access must devote resources towards preparing and administering sub-recipient trainings, and developing new policies and workflows to instruct sub-recipients on how to implement the Final Rule (to the extent that this can even be discerned). Rabinovitz Decl. ¶¶ 68–69.

Implementation of the separation requirement costs more than just money; it will siphon resources that Essential Access otherwise devotes to its core operations and its mission, harming its organizational interests. Rabinovitz Decl. ¶ 67. Courts recognize such harm is irreparable. *See Valle del Sol Inc.*, 732 F.3d at 1029. Worse, compliance will create new health risks for patients by requiring Essential Access sub-recipients to maintain duplicate financial, management, and record systems. Rabinovitz Decl. ¶¶ 67, 70–71. Non-integrated medical records systems threaten patient health by increasing the risk of error due to incomplete medical histories, missing data, lost test results, incorrect medication, dosage instructions, and allergy warnings, and other miscommunications across patient records. *Id.* ¶ 70. Sub-recipients estimate that implementing the separation requirements alone will cost on average over $119,000 per agency. Rabinovitz Decl. ¶ 68. This harm applies to Title X centers nationwide that will be compelled to forgo Title X funds. Kost Decl. ¶¶ 76-77. In short, irreparable harm is imminent.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR PLAINTIFFS

When the government is a party, the final two *Winter* factors (balance of the equities and

public interest) merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citations and internal quotation marks omitted). There is, however "a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.*

In addition to that substantial public interest, the court must "consider the hardships to all individuals covered by the" government action. *Golden Gate Rest. Ass'n v. City & County of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008). Here, "the public interest favors the exercise of First Amendment rights" by providers like Dr. Marshall, who are constrained from offering comprehensive options counseling by the new Rule. *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). In addition, "[t]he general public has an interest in the health of state residents"—in this case, primarily low-income individuals who rely on Title X for their family planning care. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Without access to Title X funded clinics, they stand to lose not only access to high quality contraceptive care, but also their primary source of healthcare. *Cf.* Kost Decl. ¶ 118. The strong public interest in preventing disruption in healthcare for millions of Americans weighs heavily in Plaintiffs' favor. Defendants, by contrast, will not be prejudiced by a continuation of the "status quo" under which Title X has operated for decades. *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 710 (9th Cir. 1988).

IV. THE COURT SHOULD ISSUE A NATIONWIDE INJUNCTION

Plaintiffs are entitled to a nationwide injunction because it is "necessary to give Plaintiffs a full expression of their rights." *See Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017) (per curiam), *rev'd on other grounds Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

First, where a law is unconstitutional on its face, a nationwide injunction is warranted. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). For the reasons described in Sections I.D-E above, the Final Rule is unconstitutional, making invalidation across the board the proper remedy. ***Second***, where, as here, Plaintiffs are likely to prevail on a "challenge under the APA," the "ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409

(D.C. Cir. 1998).

Third, this relief is appropriate because the Final Rule will have a seismic effect on the Title X program nationally. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*."). Title X serves four million patients each year and has raised the national standards for contraceptive care, birth outcomes, prevention and treatment of STIs, and early detection of cervical cancer. Kost ¶¶ 35-58. The Final Rule threatens to roll back these achievements by pushing out qualified providers who cannot abide its unlawful counseling or prohibitively expensive separation requirements. *Id.* ¶ 77. In one-fifth of all 3,142 U.S. counties, a Title X site is the ***only*** safety-net family planning center. Title X-funded centers that remain in the program will be forced to omit nondirective pregnancy options counseling and abortion referrals in violation of the QFP's national, evidence-based clinical recommendations. *Id.* ¶¶ 22-28, 73. At the same time, the Final Rule has opened the door to increased funding for "non-traditional" providers unqualified to offer comprehensive contraceptive care. *Id.* ¶ 123.

The Title X program has been successful precisely because it created nationwide consensus about acceptable standards of family planning care and provided the funds for states and local agencies to meet those standards. If a nationwide injunction is not granted, that consensus will be replaced by a patchwork of treatment approaches and wide disparities in patients' access to care. *Id.* ¶¶ 78-79. Allowing "uneven application of nationwide" Title X policy "flies in the face of" of the intent of the statute, which was to raise the standard of family planning care nationally. *See Regents*, 908 F.3d at 512.

Finally, a nationwide injunction is necessary because Title X programs are "are not islands"; rather, recipients nationwide draw from a single pool of funding, such that "[t]he conditions imposed on one can impact the amounts received by others." *City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (citing *City of Chicago* with approval). In *City of Chicago*, the

Seventh Circuit held unconstitutional conditions imposed upon recipients of a grant program. *Id.* at 277-78. In affirming a nationwide injunction barring enforcement of the conditions, the Seventh Circuit noted that funding recipients "are interconnected" because "[f]unding . . . is allocated among states and localities from one pool based on a strict formula." *Id.* "[W]here the conditions imposed preclude all funding to those who refuse to comply," thereby redirecting the funds to "compliant" entities, "only nationwide relief can provide proper and complete relief." *Id.*

That logic applies with equal force here. For fiscal year 2019, the HHS Appropriations Act provides over $286 million to be distributed among Title X recipients based on the Secretary's judgment regarding which projects "best promote" the goals of Title X. If, however, the Final Rule is enjoined in some states and not others, would-be grantees will be subject to wholly different requirements. "Non-compliant" grantees operating under the current regulations (which may still be in effect in their state) would be precluded from seeking funding, and that funding would be redirected towards "compliant" grantees in states where the Final Rule had taken effect. Forcing applicants to compete for a federal grant on unfair terms constitutes irreparable injury warranting relief. *City of L.A. v. Sessions*, 293 F. Supp. 3d 1087, 1100-01 (C.D. Cal. 2018). Here, a nationwide injunction is the only appropriate remedy.[23]

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court GRANT their Motion.

[23] If the Court declines to issue a nationwide injunction, there is no question that the record supports a California-wide injunction. Essential Access is California's sole Title X grantee. Implementation of the Final Rule will cause Essential Access irreparable harm, disrupting the Title X program across the state. In the alternative, the Court should stay the effective date of this regulation until the conclusion of the review proceedings, pursuant to 5 U.S.C. § 705. Courts assessing requests for a Section 705 stay apply the same four-factor test which applies to a request for a preliminary injunction. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1119 n. 20 (N.D. Cal. 2018). Plaintiffs have satisfied this test as discussed above.

Dated: March 21, 2019

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ESSENTIAL ACCESS HEALTH, INC.; MELISSA MARSHALL, M.D.,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case No. 3:19-cv-01195-EMC

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: April 18, 2019
Time: 12:30 p.m.
Dept: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

Date Filed: March 4, 2019

Trial Date: None Set

TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

The motion for preliminary injunction by Plaintiffs Essential Access Health, Inc. and Melissa Marshall, M.D. came before this Court for consideration on April 18, 2019. Based upon the parties' submissions to the Court, the applicable law, the relevant pleadings and papers on file in this action, and the arguments of counsel, the Court hereby **GRANTS** Plaintiffs' motion for a preliminary injunction and **ORDERS** as follows:

Preliminary Injunction

The Court, for the purposes of this Preliminary Injunction, finds that Plaintiffs have demonstrated a likelihood of success on the merits on their claims under the Administrative Procedure Act, 5 U.S.C. § 706, and the First and Fifth Amendments to the United States Constitution. The Court also finds that without a preliminary injunction, Plaintiffs face irreparable and immediate injury. The Court further finds that the balance of equities tips in favor of Plaintiffs.

Accordingly, **IT IS HEREBY ORDERED** that:

Defendants Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Does 1-25; and their officers, agents, servants, employees, attorneys, and any other persons who are in active concert or participation with them (collectively, "Defendants") are hereby enjoined from implementing or enforcing the new rule promulgated by Defendants on March 4, 2019, titled "Compliance with Statutory Program Integrity Requirement" and published at 84 Fed. Reg. 7714.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Edward M. Chen