UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A/ MAINE FAMILY PLANNING, on behalf of itself, its staff, and its patients;

and

J. DOE, DO, MPH, individually and on behalf of Dr. Doe's patients,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services;

OFFICE OF POPULATION AFFAIRS;

and

DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary for Population Affairs,

Defendants.

Case No. 1:19-cv-00100-LEW

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Americans United for Life (AUL) is the oldest and most active pro-life non-profit advocacy organization dedicated to advocating for comprehensive legal protections for human life from conception to natural death. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has nearly 50 years of experience relating to abortion jurisprudence. AUL attorneys are highly-regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country.

It is AUL's long-time policy position that public funds appropriated or controlled by federal and state governments should not be allocated to providers of elective abortions and instead should be allocated towards comprehensive and preventive women's health care providers. In furtherance of its mission, AUL seeks to maintain the constitutionality of laws restricting public funds from subsidizing abortion businesses and advocate against the creation of new precedents that would undermine the permissible policy choices of states. To that end, AUL filed a Comment in support of the Rule during the public notice and comment period.[1] AUL has also filed *amicus* briefs in every Supreme Court case involving the rights of States and the federal government not to use public funds and resources to subsidize elective abortions or abortion providers. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991);

[1] *See* Comment from Rachel N. Busick, Staff Counsel, Ams. United for Life, to Alex M. Azar, Secretary, U.S. Dep't Health & Human Servs., on Proposed Rule to Ensure Compliance with Statutory Program Integrity Requirements in Title X of the Public Health Service Act, (July 31, 2018), https://aul.org/wp-content/uploads/2018/07/AUL-Comment-on-Title-X-Proposed-Rule-re-Program-Integrity.pdf.

Webster v. Reprod. Health Servs., 492 U.S. 490, 507 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

AUL's *amicus* brief specifically addresses the arguments raised in Section I.D. of Plaintiffs' Motion for Preliminary Injunction, explaining the contours of the right to abortion and the limits to that right inherent in *Maher*, *Harris*, *Webster*, and *Rust*; the correct articulation and application of the undue burden standard after *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); and how Maine Family Planning's admission that it misused Title X funds for abortion supports the Rule as necessary and beneficial.

ARGUMENT

I. Title X statutorily excludes abortion from the scope of its projects and funding.

Congress enacted Title X of the Public Health Service Act in 1970 to provide financial support for healthcare organizations offering family planning services. 42 U.S.C § 201 *et seq.* Specifically, Title X funds are allocated to projects that "offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." *Id.* § 300(a). Section 1008 of the Act (also enacted in 1970), explicitly excludes abortion from the scope of "family planning" and states that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Likewise, the 2019 Continuing Appropriations Act also explicitly conditioned the allocation of Title X funds to family planning projects provided that the funds "shall not be expended for abortions" and

"that all pregnancy counseling shall be nondirective." Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. 115–245, 132 Stat. 2981 (2018). Thus, abortion is statutorily excluded from the scope of Title X projects and Title X funds, and any discussion of abortion must be nondirective.

In accord with the statutory mandates above, the Rule Plaintiffs are seeking to enjoin was issued, in part, to "ensure[] compliance with statutory program integrity provisions governing the program and, in particular, the statutory prohibition on funding programs where abortion is a method of family planning."[2] As such, the Rule requires "clear financial and physical separation between Title X funded projects and programs or facilities where abortion is a method of family planning," and prohibits directive counseling on or referrals for abortion.[3]

Despite the fact that abortion is statutorily excluded from Title X projects and funding, Plaintiffs claim that the Rule violates their patients' Fifth Amendment Due Process Clause right to choose abortion before viability. *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' Mem.") 31–39. This is absurd. The right to choose an abortion is not implicated, much less infringed upon by the Rule. To understand why the Rule does not violate the right to abortion, this Brief will explain what the right

[2] Press Release, U.S. Dep't of Health & Human Servs., HHS Releases Final Title X Rule Detailing Family Planning Grant Program (Feb. 22, 2019), https://www.hhs.gov/about/news/2019/02/22/hhs-releases-final-title-x-rule-detailing-family-planning-grant-program.html (summarizing the Rule, Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (March 4, 2019)).
[3] *Id.*

to abortion does and does not include, what the undue burden standard requires, and why the undue burden standard does not apply to the Rule.

II. The right to abortion does not include a right to Title X funding.

A. The right to abortion is a personal right of a woman to choose abortion, not a right of Plaintiffs to provide abortion.

In 1973, the U.S. Supreme Court recognized for the first time a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The right created in *Roe* was clarified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and has been consistently, specifically, and narrowly defined as the personal right *of a woman* to "terminate her pregnancy."[4] Most recently in 2016, the Supreme Court in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), reaffirmed that the right in *Casey* was that *of a woman* "to decide to have an abortion." *Id.* at 2300. Thus, even though *Hellerstedt* modified the undue burden standard, as discussed below in *infra* Section III.B, it did not modify the underlying right to abortion.

In some instances, the Supreme Court has held that abortion providers, such as Plaintiffs in this case, can assert third-party standing to enforce the rights of their patients, but the right they are enforcing is *the woman's* personal right to choose an abortion, not their personal right to provide abortions. *See Singleton v. Wulff*, 428

[4] *See, e.g.*, *Roe*, 410 U.S. at 153 ("a woman's decision whether or not to terminate her pregnancy"); *Maher v. Roe*, 432 U.S. 464, 474 (1977) ("her freedom to decide whether to terminate her pregnancy"); *Harris v. McR*ae, 448 U.S. 297, 312, 316 (1980) ("the freedom of a woman to decide whether to terminate her pregnancy"); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 n.1 (1983) ("terminate her pregnancy"); *Casey*, 505 U.S. at 844, 846 ("terminate her pregnancy"); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("to terminate her pregnancy").

U.S. 106, 118 (1976) ("[I]t generally is appropriate to allow a physician to assert *the rights of women patients* as against governmental interference with the abortion decision." (emphasis added)).[5] Plaintiffs, however, ignore that the abortion right is a personal right of a woman to choose abortion, and instead shift the focus from their patients to their own "right" to provide abortions on the government's dime, claiming that "[t]he government can only 'treat *abortion providers* differently' in its programs as long as 'the difference in treatment does not unduly burden a woman's right to obtain an abortion.'" Pls.' Mem. 32 (emphasis added) (quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind.*, 699 F.3d 962, 988 (7th Cir. 2012)).[6] But any right of Plaintiffs to provide abortions is solely derivative of a woman's right to terminate her pregnancy. *See Casey*, 505 U.S. at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). As such, Plaintiffs' rights cannot be greater than the rights of the woman. And as discussed below, since a woman's right to abortion does not include a

[5] *But see Hellerstedt*, 136 S. Ct. at 2321–23 (Thomas, J., dissenting) (noting that "the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake" and calling into question the appropriateness of this practice); Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserves A Closer Look*, 84 Notre Dame L. Rev. 1369 (2009) (arguing that abortion providers generally fail to meet the prudential requirements for asserting third-party standing on behalf of their patients).

[6] Plaintiffs quote the Seventh Circuit for this proposition. In that case, the Seventh Circuit applied the undue burden standard while determining the constitutionality of a state funding law because it incorrectly assumed that *Maher*, *Harris*, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Rust v. Sullivan*, 500 U.S. 173 (1991) held that "the government's refusal to subsidize abortion does not unduly burden a woman's right to obtain an abortion." *See Planned Parenthood of Ind.*, 699 F.3d at 987–88. But *Maher*, *Harris*, *Webster*, and *Rust* all predate *Casey*'s undue burden standard, as Plaintiffs aptly point out (*see* Pets.' Mem. 32). And in *Webster*, no Justice joined Justice O'Connor's opinion, which would have determined the constitutionality of the statute at issue on the basis that the statute did not impose an undue burden. 492 U.S. at 530 (O'Connor, J., concurring in part and concurring in the judgment). Rather than *Casey* and *Hellerstedt* replacing the Court's analysis in *Maher*, *Harris*, *Webster*, and *Rust*, as Plaintiffs assume (*see* Pets.' Mem. 33 & nn.30–32), the better interpretation, as explained in *infra* Section III.C–D, is that the undue burden standard does not apply to government funding laws and *Rust* remains the controlling precedent. Thus, Plaintiffs' reliance on the Seventh Circuit's statement is misplaced.

right to government funding for her abortion, Plaintiffs do not have the greater right to government funding to provide abortion services.

B. The right to abortion does not include a right to government funding for abortion services.

The remedy Plaintiffs seek is an injunction against the Rule so they can continue to receive Title X funds without having to comply with the Rule's separation, counseling, and referral requirements. But it is well established that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507 (1989); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."). This includes abortion. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977). That is why the Supreme Court has consistently upheld the power of federal and state governments to "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (quoting *Maher*, 432 U.S. at 474).

For example, in *Maher v. Roe*, the Supreme Court held that a state's ban on public funding for nontherapeutic abortions "does not impinge upon the fundamental right recognized in *Roe*," because the ban "places no obstacles—absolute or

otherwise—in the pregnant woman's path to an abortion." 432 U.S. at 474. In *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment, which denied federal public funding for certain medically necessary abortions, because "[t]he Hyde Amendment, like the [funding ban] at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." 448 U.S. 297, 312, 315 (1980). "[R]ather, by means of unequal subsidization of abortion and other medical services, [the Hyde Amendment] encourages alternative activity deemed in the public interest." *Id.* "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316. In *Webster v. Reproductive Health Services*, the Supreme Court upheld a state ban "on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions," because to hold otherwise in light of *Maher* and *Harris* would "strain[] logic." 492 U.S. at 509, 511. The Court reiterated that the increased difficulty a woman may encounter to attain an abortion under the restrictions left her in no different or worse position than she would have been if the government had not provided those services in the first place. *Id.* at 509 (citing *Harris*, 448 U.S. at 317).

Maher, *Harris*, and *Webster* make clear that the right to abortion does not include the right to government funding; that the federal and state governments may choose not to fund or subsidize abortion through their resources, in their programs, and with their limited public funds; and that the government may use funds for

"unequal subsidization of abortion and other medical services" to actively encourage alternatives to abortion.

C. The right to abortion does not include a right to government funding for non-abortion-related services.

If the right to abortion does not contain a right to government funding for abortion, it "strains logic" to reach a contrary result that the right to abortion includes a right to public funding for non-abortion-related services. *See Webster*, 492 U.S. at 509. This is exactly what the Supreme Court held in *Rust v. Sullivan*. In *Rust*, the Supreme Court found that similar Title X regulations, which conditioned the receipt of federal funds on forgoing abortion counseling and referral, as well as on maintaining physical and financial separation from the prohibited abortion activities within a Title X project, were constitutional and did not violate the First or Fifth Amendments. 500 U.S. at 178–81. The Supreme Court rejected the argument that the conditions on Title X grant funding were unconstitutional because they "penalize[ed]" protected rights funded outside the scope of Title X. *Id.* at 199 n.5. Since Title X grant funds are government subsidies, "the recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." *Id.* By accepting the grant funds, a recipient "voluntarily consents to any restrictions placed on [the funds]." *Id.*

Applying *Rust*, the Supreme Court reaffirmed this position more recently in *Agency for International Development v. Alliance for Open Society International, Inc.* (*AOSI*), when it explained that the government's policy requirement violated the unconstitutional conditions doctrine because it went "*beyond* preventing recipients

from using private funds in a way that would undermine the federal program" by requiring recipients "to pledge allegiance to the Government's policy." 570 U.S. 205, 220 (2013) (emphasis added). *Rust* and *AOSI* make clear that giving potential recipients a choice between accepting government subsidies and declining the subsidy and financing their own unsubsidized program—such as the choice Plaintiffs face—does not violate the Constitution. *See Rust*, 500 U.S. at 199 n.5.

D. The right to abortion does not include a right to Title X funding.

Since Plaintiffs' patients do not have a right to government funding for their abortions, Plaintiffs do not have a greater derivative right to government funding to provide abortions. Consistent with Congress' direction that the scope of Title X projects is limited to family planning, from which abortion is explicitly excluded, the Rule merely ensures compliance and integrity with the statutory text and the government's policy choices by conditioning Title X funding on forgoing certain activities, such as providing abortions, directive abortion counseling, and abortion referrals, within a Title X project. Plaintiffs and Plaintiffs' patients remain free to provide, counsel in favor of, refer for, and undergo abortion procedures outside of Title X projects.

Like in *Maher*, the Rule's condition on funding does not create an obstacle to a woman's right to choose abortion; she is free to obtain an abortion outside of the Title X projects and may even receive abortion services from Title X grantees if they choose to provide those services separate from their Title X services. *See* 432 U.S. at 474. Like in *Harris*, the government's choice to subsidize family planning under Title X

does not mean that the government must also subsidize abortion. *See* 448 U.S. at 315–16. Like in *Webster*, under the Rule, Title X beneficiaries, including Plaintiffs' patients are in no worse position than if the federal government had never allocated federal funds under Title X; in fact, they are in an equal position since they can still receive benefits either through Plaintiffs if they choose to comply or through other Title X grantees if Plaintiffs choose to opt out of providing Title X services. *See* 492 U.S. at 509. Similarly, Title X grantees, including Plaintiffs, are in the same position as if the federal government had chosen not to allocate funds under Title X—they remain free to provide, counsel in favor of, and refer for abortions and use private, non-government allocated funds to finance their services. If, however, Plaintiffs want to receive Title X funding, they simply must keep their abortion services separate from Title X projects.

As the Supreme Court explained in *Rust*, Title X grant funds are subsidies, and recipients are not compelled to operate a Title X project. *See* 500 U.S. at 199 n.5. If Plaintiffs do not want to adhere to the Rule they can "simply decline the subsidy." *See id*. Conversely, if Plaintiffs accept Title X funds, they "voluntarily consent[]" to the regulations placed upon the funds. *See id.* There is no material difference between the regulations upheld in *Rust* and the Rule at issue here, and in fact, the Rule is even *more* permissive than in *Rust* because it allows nondirective counseling on abortion, rather than prohibiting all abortion counseling. Unlike in *AOSI*, the Rule does not require recipients to pledge alliance to or adopt the government's policy as its own, nor does it condition activities outside of the program, *see* 570 U.S. at 220; it

only requires that recipients act consistently with the regulations ensuring compliance and integrity with Title X's statutory requirements. In short, there is no constitutional right to receive Title X funds for abortion or non-abortion-related services based on the right to abortion.

III. The undue burden standard does not apply to the Rule.

Plaintiffs claim that the Rule violates the Fifth Amendment by creating an undue burden on their patients' "right to choose abortion before viability" because the burdens the Rule imposes "vastly outweigh any potential benefits." Pls.' Mem. 31–32; *id.* at 33 n.31 (Since the Rule goes beyond "refusing to assist" a pregnant woman by funding her abortion and instead interferes with Plaintiffs' patients' "ability to obtain abortions," it must be analyzed under *Hellerstedt*'s "balancing framework."). Plaintiffs, however, erroneously assume that the undue burden standard applies to the Rule and incorrectly state that the undue burden standard is a strict "balancing test" where a regulation can *only* be upheld "if the benefits it advances outweigh the burdens it imposes." *Id.* at 32; *see also id.* at 33 ("[T]he relevant question is whether the Rule's burdens outweigh its benefits when applied to Plaintiffs' patients."). As discussed below, the undue burden standard is not a strict balancing test, nor does it apply to government funding regulations.

A. The undue burden standard is not a strict balancing test and requires finding that a law creates a substantial obstacle.

After the Supreme Court recognized the right to abortion in *Roe*, it created the undue burden standard in *Casey* in 1992 to determine whether laws regulating abortion procedures violated the Constitution. "[A]n undue burden is an

unconstitutional burden," and there is an undue burden when "a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion) (emphasis added). In 2016 in *Whole Woman's Health v. Hellerstedt*, the Supreme Court modified, but did not replace, *Casey*'s undue burden standard. The Court clarified that the "undue burden" standard requires "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887–98 (opinion of the Court)); *see also id*. at 2310 (stating that the district court applied the correct legal standard when it "weighed the asserted benefits against the burdens"). The Supreme Court's clarification in *Hellerstedt* in no way abolished *Casey*'s underlying requirement that a law must create a substantial obstacle to be an undue burden.

For instance, in *Hellerstedt* the Court explicitly relied on *Casey* to invalidate two provisions of Texas's H.B. 2 (Texas' law regulating abortion). *See, e.g.*, *id.* at 2300 ("We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*."); *id.* at 2309 ("We begin with the standard, as described in *Casey*."); *id.* ("The rule announced in *Casey*, however, requires . . . ."). Nowhere did the Court imply that where there is no benefit, *any* demonstrated burden—no matter how minimal—renders the law unconstitutional. Rather, *Casey*'s standard "asks courts to consider whether any burden imposed on abortion access is '*undue*.'" *Id.* at 2310 (emphasis added). A burden is undue when the requirement places a "substantial obstacle to a woman's choice." *Id*. at 2313

(quoting *Casey*, 505 U.S. at 895 (opinion of the Court)). Ultimately, after weighing the benefits and burdens, the Court invalidated the two provisions because "[e]ach place[d] a *substantial obstacle* in the path of women seeking a previability abortion." *Id.* at 2300 (emphasis added). Thus, Plaintiffs are incorrect that the undue burden standard is a strict balancing test where a regulation's benefits *must* outweigh its burdens. Rather, Plaintiffs have the burden to prove that a regulation causes a substantial obstacle. *See id.* at 2313 (finding that based on the record in that case, "petitioners *satisfied their burden to present evidence of causation* . . . that H. B. 2 in fact led to the clinic closures" (emphasis added)); *see also id.* ("In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts."); *id.* at 2344 (Alito, J., dissenting) ("[T]here can be no doubt that H. B. 2 caused some clinics to cease operation.").

B. The undue burden standard applies specifically to laws regulating abortion procedures.

When read in context, the undue burden standard created in *Casey* and modified in *Hellerstedt* applies "when determining the constitutionality of laws *regulating abortion procedures*." *Id.* at 2310 (emphasis added). The Supreme Court has never applied or indicated that the undue burden standard applies to *any* law tangentially related to abortion or to an abortion provider no matter how attenuated the regulation is to the abortion procedure itself (such as the policy choice of the government to provide subsidies for non-abortion family planning services). It does not make sense that the undue burden standard is applicable to *any* regulation that might happen to apply to an abortion provider. For example, if the last abortion clinic

in a state has to close down because it unlawfully sold drug products or committed Medicaid fraud, this would presumably create an undue burden on the ability of women in that state to choose abortion. However, it defies reason that the undue burden standard would apply in such a way that abortion providers can get a free pass to disregard or de facto invalidate any regulation they claim they cannot (or will not) comply with, so long as enforcing the law would allegedly prevent them from continuing to provide abortions. As such, the undue burden standard does not apply to a regulation just because it affects abortion providers, including government funding regulations, as explained below.

C. The undue burden standard does not replace *Rust* and does not apply to government funding regulations.

Plaintiffs argue that the undue burden standard applies to the Rule because they erroneously conclude that *Casey*'s undue burden standard replaced the Supreme Court's analysis in *Rust*. Pls.' Mem. 33; *id.* at 33 n.30 (noting that *Rust* did not weigh the benefits against the burdens, "as is required today"). The Supreme Court, however, has never indicated that its decision in *Rust* is suspect and has continued to rely on *Rust* post-*Casey*. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (favorably citing *Rust*); *AOSI*, 570 U.S. at 216–17 (same); *see also Planned Parenthood of Greater Ohio v. Hodges*, No. 16-4027, 2019 U.S. App. LEXIS 7200, slip op. at *4–5 (6th Cir. Mar. 12, 2019) (en banc) (relying on *Rust* to uphold constitutionality of state law conditioning government funding on not providing abortions). While Plaintiffs are correct that *Rust* predates *Casey*, *Casey* was only decided just over one year after *Rust*, and nowhere in *Casey* did the Court cite

Rust, much less indicate that the undue burden standard replaced its recent opinion. This is unsurprising considering the undue burden standard applies to regulations of abortion procedures while *Rust* involved regulations related to the scope and funding of a government program. The absence of a single reference to *Rust* in *Casey* and the Court's continued reliance on *Rust* reveals that *Rust* remains a controlling precedent and that the undue burden standard does not apply to government funding regulations. And since *Casey's* undue burden standard does not apply, then *Hellerstedt*'s modification of *Casey*'s undue burden standard certainly does not apply as well.

It is telling that in the six other lawsuits seeking to enjoin the Title X Rule, none of the other preliminary injunction motions, including one brought by Planned Parenthood and the American Medical Association, raise an undue burden claim.[7] The absurdity of applying the undue burden standard to government funding regulations can be seen when one considers the two possible outcomes: the law either has no effect on Plaintiffs' ability to provide abortions or it has an effect on their ability to provide abortion. If the law has no effect, then there is obviously no burden—much less an *undue* burden—on the right of a woman to choose an abortion. If the law does have an effect on Plaintiffs' ability to provide abortions, as they claim

[7] *See* Cal.'s Notice of Mot. & Mot. for Prelim. Inj., with Mem. of Points & Auths., *California v. Azar*, No. 19-1184 (N.D. Cal. Mar. 21, 2019); Pl. States' Mot. for Prelim. Inj., *Oregon v. Azar*, No. 19-317 (D. Or. Mar. 21, 2019); Pls.' Mot. for a Prelim. Inj., *Am. Med. Ass'n v. Azar*, No. 19-318 (D. Or. Mar. 21, 2019); Pls.' Notice of Mot. & Mot. for Prelim. Inj., *Essential Access Health, Inc. v. Azar*, No. 19-1195 (N.D. Cal. Mar. 21, 2019); State of Wash.'s Mot. for Prelim. Inj., *Washington v. Azar*, No. 19-3040 (E.D. Wash. Mar. 22, 2019) (consolidated with *Nat'l Fam. Planning & Reprod. Health Ass'n v. Azar*); The Nat'l Fam. Planning & Reprod. Health Ass'n Pls.' Mot. for Prelim. Inj., *Washington*, No. 19-3040 (Mar. 22, 2019) (same).

(*see, e.g.*, Pls.' Mem. 1–2), then there must be a direct correlation between those funds and abortion. The remedy for finding an undue burden would be invalidation of the Rule's regulation, which in this case would require Title X funds to continue to be given to Plaintiffs and to support their abortion services. But Title X statutorily excludes abortion from the scope of its funding and the government has the right to allocate its public funds consistent with its policy choices and away from abortion. *See Rust*, 500 U.S. at 192–93. Since the application of the undue burden standard to government funding regulations creates a contradictory result, it cannot be the proper standard. Thus, consistent with logic and Supreme Court precedent, the undue burden standard does not apply to the Rule.

IV. Maine Family Planning uses Title X funds to support abortion in violation of Title X.

Plaintiffs admit that regardless of whether Maine Family Planning (MFP) accepts Title X funds, that 50% to 85% of the clinics providing abortion services in Maine will be forced to stop providing abortion. Pls.' Mem. 32; *see also id.* at 1–2 ("[I]f MFP is forced to leave the Title X program, it will have to close more than half of its clinics entirely, causing thousands of women in Maine to lose access to *both* family planning services and abortion services."); *id.* at 35 (indicating that if MFP does not implement the Rule, 11 to 15 rural clinics offering abortion will close). Assuming that MFP refuses to comply with the Rule and voluntarily foregoes Title X funding, their clinics offering abortion services would not have to close *unless* MFP uses Title X funds in some way to support their abortion services. Thus, by stating that its clinics will close without Title X funding, MFP voluntarily admits that—in blatant disregard

of Title X's statutory requirements—it uses Title X funds to directly support its abortion services. This admission supports the agency's rationale behind the Rule's counseling, referral, and separation requirements and shows why the Rule's regulations are necessary and beneficial, and in no way arbitrary or capricious.

CONCLUSION

This Court should deny Plaintiffs' motion for preliminary injunction.

Dated: April 17, 2019

Respectfully Submitted,

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*Certification for admission *pro hac vice* filed

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically filed the foregoing document with the Clerk of Court by CM/ECF, which automatically sends notice of the filing to all counsel of record.

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