UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Distilled to its essence, this lawsuit seeks to overrule the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). Then, as now, section 1008 of the Public Health Service Act (PHSA) provided that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In 1988, the Department of Health and Human Services (HHS) promulgated regulations extremely similar to the rule challenged here. Those regulations "require[d] a ban on . . . referral . . . and advocacy [of abortion] within the Title X project" and "mandate[d] that Title X programs be organized so that they are physically and financially separate from [abortion-related] activities." *Rust*, 500 U.S. at 184, 188. The Supreme Court upheld those regulations as authorized by Title X, not arbitrary and capricious, and consistent with the First and Fifth Amendments. *Id*. at 184-203.

Plaintiffs nevertheless seek to enjoin a March 4, 2019 HHS Final Rule, the major components of which are materially indistinguishable from those upheld in *Rust*. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations blessed in *Rust*, and Congress has not amended the statute *Rust* authoritatively interpreted. To the contrary, Congress *attempted* to overrule *Rust* through legislation that would have permitted abortion referrals within the Title X program, but its efforts were vetoed. *Rust* thus squarely controls.

Plaintiffs nonetheless try to sidestep *Rust* in a number of ways, none of them persuasive. They principally argue that Congress silently superseded section 1008 and *Rust* in two provisions—(1) a one-line rider Congress began adding to appropriations bills in 1996, which provides that "all pregnancy counseling shall be nondirective" (the nondirective provision); and (2) section 1554 of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18114 (section 1554),

which says nothing specific about abortion or abortion-related services. This argument—an implied repeal on steroids—is implausible. Neither the nondirective provision nor section 1554 even mentions abortion, section 1008, or *Rust*, much less creates a clear statutory conflict. And Plaintiffs cite no legislative history suggesting that Congress sought to smuggle such a major change on a highly controversial subject into these subsequent provisions.

The problems with Plaintiffs' statutory arguments do not end there. As for the nondirective provision, the presumption against implied repeals "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *TVA v. Hill*, 437 U.S. 153, 190 (1978), and there is a "very strong presumption that [appropriations bills] do not" substantively change existing law, *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). Plaintiffs come nowhere close to rebutting the "very strong presumption" here: The text of the nondirective provision nowhere mentions abortion, *Rust*, or (unlike the legislation that Congress unsuccessfully tried to enact following *Rust*) referrals. Instead, that provision, if anything, supports the Rule, which allows pregnancy counseling—including counseling about abortion—so long as it is nondirective.

As for section 1554, Plaintiffs have waived any challenge based on this provision because they never allege that they (or anyone else) raised this issue during the notice-and-comment process. That omission is understandable. Section 1554 concerns the *denial* of information and services. But as *Rust* held, restrictions such as those in the Rule *deny* nothing; they are merely limitations on what the government *funds*. And even if section 1554 and section 1008 did somehow conflict, section 1554 supersedes only contrary requirements in the ACA—not preexisting requirements elsewhere in the U.S. Code, such as section 1008 of the PHSA.

Plaintiffs' remaining attempts to evade *Rust* fare no better. Neither vetoed legislation nor disavowed agency interpretations can overrule Supreme Court precedent, and the Rule is far from

arbitrary and capricious. HHS thoroughly explained its reasoning and articulated a rational justification for the choices it made—choices the Supreme Court has upheld in substantial part.

Lacking a foothold in the U.S. Code, Plaintiffs leap to the Constitution, but here too, *Rust* disposes of their claims. Indeed, Plaintiffs acknowledge that *Rust* rejected challenges under the First Amendment, Fifth Amendment, and unconstitutional-conditions doctrine to provisions that, if anything, were *more restrictive* than those here. Although Plaintiffs contend that *Rust* is inconsistent with intervening Supreme Court precedent, the cases they invoke have nothing to do with the principles applied in *Rust*, and the Supreme Court reaffirmed *Rust* a mere six years ago. In any event, none of this matters now: Only the Supreme Court can reconsider its own precedent.

Given Plaintiffs' failure to establish a likelihood of success on the merits, they cannot obtain the extraordinary relief they seek. But even setting the merits aside, Plaintiffs also fail to meet the equitable criteria for a preliminary injunction. Their speculative predictions of injury fail to establish that they will suffer irreparable harm in the absence of relief. An injunction would, however, irreparably harm the government (and the public) by setting aside its laws and by forcing HHS to disburse taxpayer dollars in violation of Title X and at the risk they will be used (or perceived to be used) to subsidize abortion as a method of family planning.

Finally, any relief should be limited in two respects. First, it should be confined to Plaintiffs and not extended nationwide. In the lead-up to *Rust*, each court that enjoined the 1988 regulations limited relief to the parties before it, and Plaintiffs—an entity operating solely in Maine and a local physician—provide no good reason for a broader remedy here. Second, any relief should be limited to particular provisions found unlawful. The Rule's preamble contains an express severability statement and, as a practical matter, the Rule's major components can operate independently. There is accordingly no basis for enjoining the entire Rule throughout the country.

LEGAL AND FACTUAL BACKGROUND

In 1970, Congress enacted Title X of the PHSA to subsidize certain types of family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. Nothing material in the statutory text has changed since the 1970s, or, for that matter, since the Supreme Court decided *Rust* in 1991. Section 1001(a) authorizes the HHS Secretary to make grants and enter into contracts with certain entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Section 1006(a) directs that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a). And section 1008 requires that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id*. § 300a-6. As a sponsor explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (Rep. Dingell).

I. PRIOR REGULATORY INTERPRETATIONS AND *RUST V. SULLIVAN*

HHS's initial regulations for the Title X program required only that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971); 42 C.F.R. § 59.5(a)(9) (1971). Between the time of those regulations and 1988, however, HHS interpreted Title X both to prohibit projects from engaging in activities that "in any way promot[e] or encourag[e] abortion as a method of family planning," and to "requir[e] that the Title X program 'be separate and distinct from any abortion activities of a grantee.'" 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988). In 1981, HHS also issued guidelines that required Title X projects to offer "nondirective" counseling about pregnancy termination, followed

by referral for abortions if requested. *Id*. At the time, HHS "took the view that activity which did not have the principal purpose or effect of promoting abortion was permitted." *Id*.

In 1988, the agency modified its approach in some respects. The Secretary adopted final regulations to address uncertainty and confusion concerning the use of Title X funds and to effectuate more faithfully the underlying policy embodied in section 1008 against the use of Title X funds in any way to encourage or promote abortion. *See* 53 Fed. Reg. at 2923-2925; Proposed Rules, 52 Fed. Reg. 33,210, 33,211-22 (Sept. 1, 1987). Those 1988 regulations bear a striking resemblance to the ones Plaintiffs challenge here. The 1988 regulations:

- Prohibited Title X projects from engaging in abortion counseling and referrals, even upon specific request. *See* 53 Fed. Reg. at 2945 (section 59.8(a)(1)).
- Required referrals "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child" to every client. *See id*. (section 59.8(a)(2)).
- Prohibited Title X projects from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning." *Id.* (section 59.10).
- Prohibited providers from using a list of prenatal and/or social services to indirectly encourage or promote abortion. *Id.* (section 59.8(a)(3)).
- Prohibited providers from "including on the list of referral providers health care providers whose principal business is the provision of abortions." *Id.*
- Required all abortion services to be separate and distinct from a Title X funded project, including by requiring Title X grantees to structure their Title X project "so that it is physically and financially separate" from other parts of a grantee's organization that might provide abortion services. *Id*. (section 59.9).

The 1988 regulations were challenged as unauthorized by Title X, arbitrary and capricious, and impermissible under the First and Fifth Amendments. The Supreme Court rejected these attacks in *Rust*, concluding that the regulations were based on a permissible interpretation of the statute and were not arbitrary and capricious. 500 U.S. at 183-91. The Court accepted as reasonable the Secretary's explanation that the "prior policy failed to implement properly the

statute and that it was necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," as well as that "the new regulations [were] more in keeping with the original intent of the statute, [were] justified by client experience under the prior policy, and [were] supported by a shift in attitude against the elimination of unborn children by abortion." *Id*. at 187 (internal quotation marks omitted). The Court rejected the constitutional challenges as well. *Id*. at 192-203.

In February 1993, the President suspended the 1988 regulations and directed HHS to propose new regulations. *See* 58 Fed. Reg. 7455 (Jan. 22, 1993). HHS issued a proposed rule, which it finalized in 2000. *See* 65 Fed. Reg. 41,270 (July 3, 2000); 58 Fed. Reg. 7464 (Feb. 5, 1993). The 2000 regulations removed the provisions of the 1988 regulations that (1) prohibited Title X projects from providing abortion counseling or referrals; (2) required grantees to physically separate their Title X project from any abortion activities; and (3) implemented compliance standards for Title X projects designed to eliminate the promotion or encouragement of abortion as a method of family planning. *See* 65 Fed. Reg. at 41,280. The new regulations required grantees to provide counseling concerning, and referrals for, abortion in certain situations. *Id.* at 41,279.

II. THE FINAL RULE

On June 1, 2018, HHS published a proposed rule soliciting comments on proposed changes to the 2000 regulations. *See* Proposed Rules, 83 Fed. Reg. 25,502 (June 1, 2018) (NPRM). HHS explained that its proposed changes were based on its interpretation of Title X, and, in particular, section 1008. *Id.* at 25,505. As HHS noted, the changes would "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children." *Id.*

On March 4, 2019, after considering public comments, HHS published in the Federal Register the Final Rule at issue. *See* 84 Fed. Reg. 7714. The Rule adopted the proposals from the proposed rule with only modest changes. As discussed in detail below, the Rule for all intents and purposes restores the 1988 regulations that the Supreme Court upheld in *Rust*. *See infra* Part I.A. In fact, the Rule is more permissive than the 1988 regulations in one significant respect: It allows (but does not require) nondirective counseling discussing abortion. *See, e.g.*, 84 Fed. Reg. at 7716.

HHS explained that the Rule provides much needed clarity regarding the Title X program's role as a family planning program that is statutorily forbidden from funding programs/projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7721. As HHS observed, the Rule is necessary because the 2000 regulations "fostered an environment of ambiguity surrounding appropriate Title X activities"—an assessment confirmed by many of the comments submitted in response to the proposed rule that apparently assumed abortion was a permissible method of family planning within the Title X program. *Id.* at 7721-22; *see id*. at 7729-30. HHS explained that the Final Rule rectifies this ambiguity by clearly delineating between Title X and non-Title X activities and by providing grantees with clear direction on how to ensure that no Title X funds are expended where abortion is a method of family planning. *Id.* at 7722.

The Rule will become effective on May 3, 2019, although grantees have until July 2, 2019, to comply with the financial separation requirement, and until March 4, 2020, to comply with the physical separation requirement. 84 Fed. Reg. at 7714. Plaintiffs—Maine Family Planning (MFP) and a physician at one of its clinics—moved for a preliminary injunction to block implementation of the Rule. *See* Mem. in Supp. of Mot. for Prelim. Inj. ("PI Mem."), ECF No. 17-1.

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Plaintiffs fail to satisfy any of these requirements.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Most of Plaintiffs' arguments bear a striking resemblance to those the Supreme Court rejected in *Rust*, and their remaining claims are without merit. Because Plaintiffs have no realistic likelihood of prevailing on the merits, their motion should be denied for that reason alone.

A. *Rust* Rejected Arguments Indistinguishable From Those Plaintiffs Advance

Plaintiffs' challenge to the Rule fails in significant part for a simple reason: The Supreme Court has already upheld materially indistinguishable—if anything, stricter—regulations against both statutory and constitutional challenges. Section 1008 provides that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In *Rust*, the Court held that this text authorized regulations that (1) barred both counseling concerning the use of abortion and abortion referrals as a method of family planning within the Title X program, (2) broadly prohibited a Title X project from advocating abortion as a method of family planning, and (3) mandated financial and physical separation between Title X projects and prohibited abortion activities. 500 U.S. at 183-91. The Court rejected multiple constitutional challenges to these requirements as well.

The text of Title X and section 1008 has not changed since *Rust*. The regulatory provisions Plaintiffs principally challenge—which prohibit abortion referrals as a method of family planning and mandate the physical separation of Title X projects from abortion activities—are materially indistinguishable from those upheld in *Rust*. Indeed, Plaintiffs make no serious effort to distinguish the Rule from the 1988 regulations, and their objections to the Rule are for the most part indistinguishable from those the Supreme Court rejected in *Rust*.

The counseling and referral restrictions: The Rule prohibits referrals for abortion as a method of family planning but permits nondirective pregnancy counseling, including counseling concerning abortion, so long as "[a] Title X project [does] not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89. The 1988 regulations prohibited both "counseling" and "referral for abortion as a method of family planning" in a Title X project, 53 Fed. Reg. at 2945, and *Rust* held that this interpretation was "plainly allow[ed]" under "the broad directives" of Title X, 500 U.S. at 184. The Rule's more modest approach—barring referrals but permitting nondirective counseling—is therefore even more defensible.

Plaintiffs do not explain what features of the restrictions on abortion counseling and referral here distinguish this case from *Rust* in a way that favors them. Indeed, the aspects of the Rule that Plaintiffs attack were all features of the 1988 regulations *Rust* upheld:

a. Plaintiffs complain that the Rule generally bans abortion referrals within the Title X program. PI Mem. at 8. So did the 1988 regulations. *See Rust*, 500 U.S. at 184.

b. Plaintiffs object that the Rule mandates referrals for prenatal care. PI Mem. at 8-9. Again, so did the 1988 regulations. *Compare* 42 C.F.R. § 59.14(b)(1) (effective May 3, 2019) ("once a client served by a Title X project is medically verified as pregnant, she shall be referred

to a health care provider for medically necessary prenatal health care"), *with* 53 Fed. Reg. at 2945 ("once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child").

c. Plaintiffs protest that, under the Rule, providers may refuse to provide information about abortion (even if a patient directly requests abortion-related information) and must furnish information about alternatives (even if the patient does not want this information). PI Mem. at 9, 15. But the 1988 regulations "expressly prohibited [a Title X project] from referring a pregnant woman to an abortion provider, even upon specific request." *Rust*, 500 U.S. at 180. And they were even more stringent on counseling, prohibiting *any* "counseling concerning the use of abortion as a method of family planning," *id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)), whereas the Rule allows providers to furnish "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5) (effective May 3, 2019).

d. Plaintiffs object that the Rule permits a provider to furnish a pregnant patient with a "list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care) some, but not the majority, of which also provide abortion as part of their comprehensive health care services." 42 C.F.R. § 59.14(c)(2) (effective May 3, 2019); *see* PI Mem. at 9. But the 1988 regulations similarly prohibited providers from "including on the list of referral providers health care providers whose principal business is the provision of abortions," "excluding available providers who do not provide abortions," and "weighing the list of referrals in favor of health care providers which perform abortions." *Rust*, 500 U.S. at 180.

More fundamentally, any attempt to distinguish the counseling and referral restrictions here from those in *Rust* cannot be reconciled with *Rust*'s categorical reasoning. *Rust* broadly held that

section 1008 "plainly allows" a "ban on [abortion] counseling, referral, and advocacy" within the Title X program. 500 U.S. at 184. Here, where only referral and advocacy are banned, the Rule is certainly permissible under *Rust*. Even if Plaintiffs could identify some differences in their favor between the prohibitions here and those considered in *Rust*—and they hardly try to—*Rust* obviously would encompass these restrictions.

The program integrity requirements: The Rule's program integrity requirements likewise are materially indistinguishable from the 1988 regulations upheld in *Rust*. The *Rust* Court held that the 1988 requirements—"mandating separate facilities, personnel, and records"—were "not inconsistent with the plain language of Title X" and "[c]ertainly . . . cannot be judged unreasonable." 500 U.S. at 187-88, 190. It thus accepted HHS's view that "meeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program," and that "[h]aving a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program." *Id*. at 188 (quoting 53 Fed. Reg. at 2940).

Plaintiffs do not—and cannot—identify any material differences between these requirements and those upheld in *Rust*. Both mandate that "[a] Title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited under section 1008"; both provide that a "project must have an objective integrity and independence from prohibited activities"; and both direct that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient." And both set forth a list of four basically identical factors that the Secretary will use to determine whether the requisite separation exists: (i) separate accounting records (the Rule adds the requirement that such records be "accurate"); (ii) facilities separation;

(iii) separate personnel (the Rule adds records and workstations to this requirement); and (iv) the extent to which identification of the Title X project is present and abortion-related materials are absent. *Compare* 84 Fed. Reg. at 7789, *with* 53 Fed. Reg. at 2945.

B. Neither The Nondirective Provision Nor The ACA Silently Overrule *Rust*

Rust's on-point statutory holding—and the remarkable overlap between Plaintiffs' arguments and the ones *Rust* rejected—disposes of the claim that the materially indistinguishable Rule is unlawful. By necessity, Plaintiffs therefore take a more creative approach, arguing that two subsequent provisions—(1) an appropriations rider requiring that any pregnancy counseling in a Title X program be "nondirective," and (2) section 1554 of the ACA, which mentions neither abortion nor abortion-related activities—silently supplant *Rust*. *See* PI Mem. at 14.

This argument—that Congress silently overruled portions of *Rust* by enacting two separate statutes and leaving the language of section 1008 unchanged—misconstrues both subsequent provisions and "runs foursquare into [the] presumption against implied repeals." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007). Even putting aside this presumption, the notion that the two provisions supersede *Rust* is implausible. Neither the nondirective provision nor section 1554 mentions abortion, section 1008, or *Rust*, and neither was accompanied by any legislative history suggesting that Congress intended to overrule *Rust*. To the contrary, when Congress *did* attempt to pass a law that would have permitted abortion referrals within the Title X program, that legislation was vetoed. Plaintiffs' efforts to evade *Rust* fail.

1. <u>The Nondirective Provision Does Not Supplant *Rust*.</u>

Since 1996, Congress has included a rider in its annual HHS appropriations act that—in addition to stating that funds appropriated to Title X projects "shall not be expended for abortions"—requires that "all pregnancy counseling shall be nondirective." *E.g.*, HHS

Appropriations Act 2019, Pub. L. No. 115-245, Div. B, 132 Stat. 2981, 3071. Consistent with this requirement, the Rule permits providers to provide "[n]ondirective pregnancy counseling," which "may discuss abortion." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. §§ 59.14(b)(1)(i), (e)(5)).

a. Plaintiffs nevertheless contend that the Rule violates the nondirective provision, primarily because the Rule "prohibits referrals for abortion but requires referrals for prenatal care." PI Mem. at 15. In other words, Plaintiffs read the nondirective provision to *require* that Title X providers make abortion referrals upon request (and to bar HHS from mandating prenatal referrals). But the nondirective provision says nothing about abortion referrals, much less directs Title X providers to offer them. This is clear for at least three reasons.

First, reading the nondirective provision to *require* abortion referrals conflicts with the Supreme Court's authoritative interpretation of Title X itself—*i.e.*, that Title X delegated authority to HHS to *prohibit* referrals for abortion as a method of family planning (and to permit mandatory referrals of pregnant patients for prenatal care). *See Rust*, 500 U.S. at 184-87. Plaintiffs' argument, then, must be that the nondirective provision silently repealed both section 1008 and *Rust*.

Repeals by implication, however, "are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (internal quotation marks and brackets omitted). The same is true with respect to judicial interpretations of statutory provisions, such as the one in *Rust*: "A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (quoting Antonin Scalia & Brian A. Garner, READING LAW 331 (2012)); *see also, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2009) (requiring "a clear

expression" of congressional intent to "abrogate" Supreme Court's interpretation of a statute). Even when an "earlier ambiguous provision has already been construed by the jurisdiction's high court to have a meaning that does not fit as well with a later statute as another meaning," any "[l]egislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction." Scalia & Garner, *supra*, at 331. Put differently, it makes no difference that section 1008 contains an *implicit* rather than *explicit* delegation of authority to HHS to prohibit referrals for abortion as a method of family planning.

Here, Plaintiffs' argument that Congress silently supplanted *Rust* and repealed part of Title X in an appropriations rider is particularly weak because the doctrine "disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Hill*, 437 U.S. at 190. Because such acts have "the limited and specific purpose of providing funds for authorized programs," *id.*, there is a "very strong presumption that they do not" substantively change existing law, *Calloway*, 216 F.3d at 9. Plaintiffs cannot overcome that "very strong presumption" here because the nondirective provision expresses no clear indication that Congress wanted to override the Supreme Court's interpretation of Title X in *Rust*. The provision neither mentions *Rust* nor alters Title X, and Plaintiffs point to nothing in the legislative record evincing such an intent.

Second, even putting these presumptions aside, there is no conflict between the Rule and the nondirective provision. The latter provision does not use the word "referral" or dictate terms upon which a Title X provider must make (or refrain from making) referrals for medical care outside of the Title X program. Instead, it addresses only "counseling," which is different than the actual *referral* of a patient for medical care. "Counseling" does not, in its common usage, necessarily include within its definition the act of "referral." While the former is defined in purely

verbal terms, *i.e.*, the "furnishing of advice or guidance," the latter entails the further, active step of "sending or directing to another for information, service, consideration, or decision." BLACK'S LAW DICTIONARY (10th ed. 2014). Accordingly, Congress, HHS, and the Supreme Court have long recognized that *counseling* a patient and *referring* a patient for particular services are different. Counseling and referrals are discussed distinctly in the 1981 guidance, the 1988 regulations, *Rust*, the 2000 regulations, and most notably, Congress's *failed* attempt to overturn *Rust* with the Family Planning Amendment Act of 1992, discussed below. *See, e.g.*, *supra* pp. 4-5 (discussing 1981 guidance); *infra* pp. 22-23 (discussing 1993 guidance and 2000 regulations); *infra* pp. 15-16 (discussing failed 1992 legislation and nondirective provision).

Accordingly, there is no conflict—much less an irreconcilable one—between Title X, as interpreted by the Supreme Court, and the nondirective provision. Instead, the Rule harmonizes the two statutes by prohibiting abortion referrals, consistent with the interpretation of Title X upheld in *Rust*, while requiring that any pregnancy counseling offered (including counseling on abortion) be nondirective. *See* 84 Fed. Reg. at 7730. The Court thus can give effect to the nondirective provision, which does not govern referral activities, without encroaching upon section 1008 or the Supreme Court's interpretation in *Rust*.[1]

Third, if there were any doubt that the nondirective provision did not silently repeal section 1008 and *Rust*—and that "counseling" does not mean "referrals" within the context of the Title X program—the immediate aftermath of *Rust* should erase it. In an explicit attempt to overturn that decision, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme

[1] The unwarranted assumption that "counseling" includes "referrals" also explains Plaintiffs' misguided claim that the Rule violates the nondirective provision by requiring referral of pregnant patients for prenatal care. The requirement that a Title X project *refer* a pregnant woman for medically necessary prenatal care has nothing to do with the mandate that pregnancy *counseling* be nondirective. Rather, it reflects HHS's judgment that "such care is medically necessary to maintain or improve the health of both the mother and the unborn baby." 84 Fed. Reg. at 7759.

Court in 1991 to restrict the provision of information on abortion to Title-Ten patients." H.R Rep. No. 102-204 at 1 (Sept. 13, 1991), accompanying H.R. 3090. Both houses of Congress passed a bill, the "Family Planning Amendments Act of 1992," that would have amended Title X to explicitly condition Title X funding upon a project's agreement to "provide to individuals information regarding pregnancy management options" upon request. *See* S.323, 102nd Cong. (1991). The bill defined "pregnancy management options" to mean "nondirective counseling *and referrals* regarding (A) prenatal care and delivery; (B) infant care, foster care, and adoption; and (C) *termination of pregnancy*." *Id*. (emphases added).

That bill was vetoed, *see* Message From the President, S. Doc. No. 102-28, 102nd Cong. (1992), and when Congress returned in 1996 to enact the nondirective provision, which *did* become law, it used entirely *different* language. The nondirective provision addresses counseling, but says nothing about referral. It says nothing about *Rust*. And it does not even require counseling, but merely provides that *if* pregnancy counseling occurs, it must be nondirective. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). And this history confirms that the term "counseling" refers only to counseling, not to referrals as well, and that the appropriations rider in no way intends to or actually supersedes *Rust* (much less by *requiring* Title X providers to offer abortion referrals).

b. Plaintiffs fare no better in claiming that the Rule violates the nondirective provision by directing "that medical professionals may furnish information about abortion only in conjunction with information about prenatal care or adoption," while "'[i]nformation about maintaining the health of the mother and unborn child' may be furnished alone." PI Mem. at 15.

The requirement that providers discuss multiple options with patients in a neutral manner—*i.e.*, that "abortion must not be the only option presented," 84 Fed. Reg. at 7747—merely calls for nondirective counseling. And the fact that the Rule does *not require* abortion counseling *in all instances* does not run afoul of the nondirective provision. That provision mandates only that "all pregnancy counseling shall be nondirective," not that all Title X providers furnish pregnancy counseling in all instances, much less on a particular option (abortion). Indeed, when Congress wants to ensure that nondirective pregnancy counseling (when offered) includes discussion of a specific option, it knows how to do so. *See* 42 U.S.C. § 254c-6(1) (requiring HHS to fund the training of, *inter alia*, Title X clinic staff "in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"); *see also* 84 Fed. Reg. at 7730 (discussing this legislation). Congress included no such language with respect to abortion in the nondirective provision.

Likewise, the Rule does not run afoul of the nondirective provision by allowing (but not requiring) a provider to furnish information about maintaining the health of the mother and unborn child during pregnancy. Contrary to Plaintiffs' assertion, Congress did not *ban* Title X providers from providing pregnant women with knowledge about maintaining their health during pregnancy. Not even the 2000 regulations—which Plaintiffs wish to revert to—prohibit giving prenatal care information, even where no abortion counseling occurs. 65 Fed. Reg. at 41,279. Instead, those regulations (like the 1988 regulations before them) distinguish between the terms "referral," "information," and "nondirective counseling." *Id.*

2. Section 1554 of the ACA Does Not Supplant *Rust*.

Plaintiffs' claim based on section 1554 of the ACA fares no better. That provision states, "[n]otwithstanding any other provision of this [the Affordable Care] Act, the Secretary of Health and Human Services 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.

To start, Plaintiffs have waived any challenge based on section 1554. A plaintiff "must first utilize the opportunity for comment [on an agency regulation] before it may raise issues" in federal court, or else arguments are "waived." *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1041 n.9 (10th Cir. 2006) (quotation marks omitted) (collecting cases). "Th[is] rule applies with no less force to a statutory interpretation claim not brought to an agency's attention," because "[r]espect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004). Here, Plaintiffs never allege that they (or anyone else) raised any purported

inconsistency between the Rule and section 1554 during the notice-and-comment process, and the government is aware of no such objection.

Waiver aside, this argument is meritless. It is extraordinary to now claim that the Rule "directly violates" section 1554, PI Mem. at 14, when *neither* Plaintiff (or, as best as the government can tell, anyone else) noticed any supposed conflict between the Rule and this provision during the notice-and-comment process. And before turning to specifics, consider the fundamental implausibility of Plaintiffs' argument. It is a basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Plaintiffs contend, however, that Congress (1) abrogated a Supreme Court decision on an *extremely* controversial subject; (2) *after* it had tried and failed to do so expressly; (3) in a provision that does not mention abortion, pregnancy, Title X, section 1008, or *Rust*; (4) without generating any meaningful legislative history; and (5) in a manner that was so subtle in effecting this transformational change that apparently no one thought to invoke it in comments opposing the Rule. That is, to put it mildly, an unlikely proposition.

Turning to specifics, section 1554 obviously does not impliedly repeal section 1008 as interpreted in *Rust*. Section 1554 does not refer to abortion or even pregnancy; it does not refer to section 1008; and it does not refer to *Rust*. And as far as Defendants are aware, it was not the subject of any meaningful legislative history, and Plaintiffs provide none.

Nor are section 1554 and section 1008 in irreconcilable conflict. All six subjects of section 1554's sub-sections, *see supra* p. 18, involve the *denial* of information or services. But the Rule denies nothing. It is merely a limit on what the government chooses to *fund*. As *Rust* explained, when the government places restrictions on the use of Title X funds, it "is not denying a benefit to

anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. There is no conflict here.

In any event, section 1554 expressly applies "[n]otwithstanding any other provision *of this Act*," 42 U.S.C. § 18114 (emphasis added)—*i.e.*, the ACA. But Section 1008 is not part of the ACA. Nor are Sections 1001 and 1006 of Title X of the PHSA, which authorize the Secretary to award grants and issue Title X regulations. Had Congress intended section 1554 to sweep beyond the ACA, it could have simply specified that section 1554 applies "notwithstanding any other provision of law." Such language is frequently used in American law in general, and in the ACA specifically—21 times, by the government's count. *See, e.g.*, 42 U.S.C. § 18032(d)(3)(D)(i). Indeed, when Congress wanted to use the ACA to amend the PHSA, it knew how to do so. *See, e.g.*, ACA, Pub L. No. 111-148, § 1001, 124 Stat. 119, 130-38 (March 23, 2010) ("Amendments to the Public Health Service Act."). Thus, by its own terms, section 1554 does not apply to Title X of the PHSA or its implementing regulations.

This reading comports with common sense. Section 1554's sub-sections are quite open-ended. They do not specify, for example, what constitutes an "unreasonable barrier[]," "appropriate medical care," "all relevant information," or "the ethical standards of health care professionals." Combined with the absence of any meaningful legislative history, there is a substantial question whether section 1554 claims are reviewable under the APA at all. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (APA bars review of agency decision where, among other circumstances, "'statutes are drawn in such broad terms that in a given case there is no law to apply'" (citation omitted)). Even within the ACA, HHS routinely issues regulations placing criteria and limits on what the government will fund, and on what will be covered in ACA programs. Under Plaintiffs' standardless interpretation of section 1554, it is

far from clear that the government could ever impose any limit on any parameter of a health program—even if the program's own statute requires it—or how a court could begin to evaluate such challenges. Indeed, the government is unaware of any instance where a court invalidated a regulation under section 1554, and Plaintiffs have identified none. And even if section 1554 claims are reviewable, it is inconceivable that Congress intended to subject the entire U.S. Code to these general, undefined concepts—and that it did so without leaving any meaningful legislative history.

Other principles point in the same direction. On top of the presumption against elephants in mouseholes, *see supra* p. 19, "it is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Thus, even if section 1554 applied to regulations implementing section 1008 (it does not), even if sections 1554 and 1008 were in conflict (they are not), and even if Plaintiffs had preserved this challenge (they have not), section 1008 as interpreted in *Rust* would prevail over section 1554. Section 1554 is at best a general prohibition of certain types of regulations (very broadly described). Section 1008, however, is a much more specific prohibition concerning funding of Title X programs/projects where abortion is a method of family planning. And in *Rust*, the Supreme Court held that section 1008 authorized HHS to adopt regulations materially indistinguishable from the ones here. Section 1554, by contrast, does not speak specifically to abortion or, for that matter, Title X at all. Plaintiffs offer no good reason why the general should govern the specific here.

C. *Rust* Forecloses Plaintiffs' Claim That The Rule Is Contrary to Title X

Plaintiffs next insist that the Rule violates Title X itself, notwithstanding *Rust*'s direct holding to the contrary. *Compare Rust*, 500 U.S. at 184-91, *with* PI Mem. at 20-22. In doing so, they principally rely on the *vetoed* Family Planning Amendments Act of 1992, *see supra* pp. 15-16, but Plaintiffs offer no support for the remarkable claim that failed legislation can repeal statutes

and abrogate Supreme Court precedent. That omission is not surprising: Under the Constitution, Congress "must enact a statute with the President's signature (or by a two-thirds majority to override a veto)" if it wishes to alter statutory law; "naked legislative history has no legal effect." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) (collecting cases).[2]

Plaintiffs likewise misfire in arguing that Congress, by appropriating funds for Title X each year since the 1993 guidance and 2000 regulations, implicitly ratified the interpretation embodied in those earlier executive actions. *See* PI Mem. 21-22. To start, while "ratification may be effected through appropriations acts," the "appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944). Here, the appropriations rider requires that pregnancy counseling, if offered, be "nondirective," but does not include any definition of that term, much less a clear indication that Congress intended to adopt a particular interpretation of that language. *Cf. New York v. Sullivan*, 889 F.2d 401, 408 (2d Cir. 1989) (rejecting similar challenge to the 1988 regulations because "the reauthorization of funding [through appropriations] does not imply Congress was aware of, much less endorsed, every expenditure of funds by the agency"), *aff'd by Rust*, 500 U.S. 173.

Second, the 1993 guidance (in place when Congress first enacted the nondirective mandate) makes clear that the definition of counseling does not, standing alone, include referrals. To the contrary, it requires, in distinct phrases, that Title X projects (1) provide nondirective counseling, and (2) refer patients for abortion upon request. *See* 58 Fed. Reg. at 7464 (requiring providers to "provide nondirective counseling . . . *and* to refer her for abortion, if that is the option she selects") (emphasis added). The 2000 regulations likewise repeatedly use the terms "counseling" and

[2] Plaintiffs invoke two dated cases that used vetoed legislation to interpret a term in the Equal Access to Justice Act, but neither held that failed legislative efforts can repeal statutes or abrogate Supreme Court precedent. *See* PI Mem. at 21.

"referral" separately. 65 Fed. Reg. at 41,272-75, 41,279 (July 3, 2000). Congress, in its appropriations rider, chose only to include the former term, while excluding reference to the latter.

Finally, even if Congress had ratified Plaintiffs' view of the 1993 guidance or the 2000 regulations, "the ratification of one agency policy by Congress does not preclude a change in that policy." *Massachusetts v. HHS*, 899 F.2d 53, 61 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, 500 U.S. 173 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 45 (1983)). As the Supreme Court explained in *State Farm*, although an "agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation, in the case before us, even an unequivocal ratification—short of statutory incorporation—of [the regulation] would not connote approval or disapproval of an agency's later decision to rescind the regulation." 463 U.S. at 45 (internal citations omitted); *see also Massachusetts*, 899 F.2d at 60-61 (rejecting similar ratification challenge to the 1988 regulations based on Congress's "repeated amendments, reauthorizations and reenactments of Title X" when HHS's pre-1988 regulations were in effect). The same is true here.

D. The Final Rule Is Not Arbitrary And Capricious

Much of what remains of Plaintiffs' APA case amounts to garden variety arbitrary-and-capricious claims. These arguments face a high hurdle. Agency action must be upheld in the face of such attacks if the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted). Under this deferential standard of review, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Puerto Rico Tel. Co. v.*

Telecomm. Regulatory Bd. of Puerto Rico, 665 F.3d 309, 319 (1st Cir. 2011) ("The agency's actions are presumed to be valid; if the agency's decision is supported by a rational basis, we will affirm."). The Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this deferential review.

1. *Rust* Forecloses Plaintiffs' Arbitrary-and-Capricious Claims.

HHS had a simple and compelling basis for promulgating the Final Rule: To ensure compliance with federal law, and in particular section 1008's command that "none of the funds appropriated" for Title X "be used in programs where abortion is a method of family planning." 83 Fed. Reg. at 25,505. HHS reads this statute, as it did in 1988, to establish "a broad prohibition on funding, directly or indirectly, activities that treat abortion as a method of family planning." 84 Fed. Reg. at 7723; *see also* 53 Fed. Reg. at 2922 (explaining that section 1008 "creates a wall of separation between Title X programs and abortion as a method of family planning"). Based on that interpretation, HHS determined that the intervening 2000 regulations are inconsistent with section 1008 to the extent they "require referral for abortion as a method of family planning, allow the use of funds for building infrastructure that could be used for abortion services, and do not require clear physical separation between Title X activities and abortion-related services." 84 Fed. Reg. at 7723. HHS thus determined that the Final Rule is necessary to rectify the problems with the 2000 regulations and to properly implement section 1008.

The Supreme Court has already approved of this reasoning. In *Rust*, it determined that: (1) Title X authorizes HHS to prohibit abortion "counseling, referral, and advocacy within the Title X project," 500 U.S. at 184; (2) Title X authorizes HHS to require physical separation of Title X and non-Title X projects, *id.* at 188-90; and (3) HHS's interest in ensuring compliance with its interpretation of section 1008 justified separation, counseling, and referral requirements materially

indistinguishable from, if not stricter than, those in the Rule, *id*. at 184-91. The Supreme Court's rejection of the arbitrary-and-capricious arguments in *Rust*, *see id*., is equally controlling here.

Plaintiffs dismiss *Rust* by noting that the 1988 regulations partially relied upon reports from the Office of Inspector General (OIG) and the General Accounting Office (GAO), which, Plaintiffs contend, "cannot form the basis of any credible analysis of the Title X program 36 years later." PI Mem. at 24-25. Supreme Court precedents, however, do not have a shelf life, and that is particularly true here. *Rust* accepted the Secretary's determination that the 1988 "regulations [were] more in keeping with the original intent of the statute," 500 U.S. at 187, and the Secretary here likewise determined that the Rule reflected a superior interpretation of section 1008, *see* 84 Fed. Reg. at 7723. This is not a ground that is any less applicable now than it was 30 years ago, nor is it one that the Secretary must support with new evidence or information. Put another way, there is no indication that *Rust* would have come out differently had the Secretary not relied on the GAO and OIG reports in issuing the 1988 regulations. To the contrary, the First Circuit rejected an arbitrary-and-capricious challenge to the 1988 regulations notwithstanding its conclusion that these "reports provide[d] a very slim reed of support." *Massachusetts*, 899 F.2d at 63.[3]

[3] *Rust* also accepted the Secretary's explanation that the "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," 500 U.S. at 187, and HHS made a similar determination here, *see supra* p. 7. That HHS relied in part on the GAO and OIG reports in issuing the 1988 regulations does not call the *current* assessment of the Secretary into question. As in 1988, the Secretary adequately explained why the Rule reflects a better implementation of the statute and why the clear guidance prescribed in the Rule is useful. That is all that the APA requires.

2. *Rust* Aside, the Rule's Requirements Are Not Arbitrary and Capricious.

Even if *Rust* were not dispositive here, HHS also detailed the problems with the 2000 regulations and adequately explained the need to impose anew the program integrity and counseling and referral provisions. That analysis easily survives arbitrary-and-capricious review.

Program Integrity Requirements: HHS explained that allowing Title X projects to operate in shared spaces with non-Title X activities increases the risk that Title X and other funds will be commingled, that Title X funds will be used for prohibited purposes, and that the public will be deprived of the assurance, required by Congress, that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. 84 Fed. Reg. at 7764-65. As the agency observed, these concerns are particularly acute because Title X projects use flexible grants that give considerable "latitude and versatility to grantees on how funds are used." 83 Fed. Reg. at 25,508; *see also* PI Mem. at 5 ("Unlike fee-for-service programs like Medicaid, Title X grant money is provided in a lump sum. . . ."). That flexibility raises the specter of projects using Title X funds to build infrastructure used to support abortion, which HHS chronicled. *See* 84 Fed. Reg. at 7773. In addition, HHS observed, various comments expressing support for the 2000 regulations revealed that, as a matter of economic reality, those regulations had the effect of indirectly supporting abortion-related activities. *See id.* at 7776 (explaining that if "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, [Title X funds] would be supporting abortion as a method of family planning"). Indeed, MFP's own assertion that not accepting Title X funds will require it to close "50%-70% of Maine's abortion sites," PI Mem. at 35; *see id*. at 12-13, only confirms the legitimacy of HHS's concerns.

Given these realities, HHS determined that even using the "strictest accounting and charging of expenses, a shared facility greatly increases the risk of confusion and the likelihood

that a violation of the Title X prohibition will occur." 84 Fed. Reg. at 7764; *cf. Marina Mercy Hosp. v. Harris*, 633 F.2d 1301, 1304 (9th Cir. 1980) ("In a program as complex and ripe with potential for abuse as Medicare, the Secretary has broad discretion to control excessive costs by adopting general prophylactic rules."). That analysis can hardly be characterized as arbitrary and capricious.

Plaintiffs nevertheless contend that the program integrity requirements are not supported by evidence. *See* PI Mem. at 23-25. The APA, however, "imposes no general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.). Rather, agencies need only "justify [their] rules with a reasoned explanation," and they can, "of course, adopt prophylactic rules to prevent problems before they arise." *Id*. HHS has done so here.

In any event, HHS's concerns were more than "theoretical." PI Mem. at 23. HHS relied on a study showing that abortions are increasingly being performed at "sites that focus primarily on contraceptive and family planning services"—*i.e.*, precisely the type of sites that receive Title X funds. *See* 84 Fed. Reg. at 7765. HHS also pointed to examples of overbilling in the Medicaid program as demonstrating a need for clarity with respect to permissible and impermissible activities. *See id*. at 7725. As HHS explained, when abortions are performed at Title X facilities that are not clearly separated, it confuses the public about whether federal funds are being used for services that Title X prohibits—as evidenced by the fact that many commenters apparently assumed that abortion was a permissible method of family planning within the Title X program, *see id*. at 7729-30—and increases the likelihood that funds will be used for improper purposes. The more abortions that are performed at the type of nonspecialized clinics that often house Title X services, the higher both risks. *See id*. at 7765. Given these concerns, HHS concluded that it

need not "suffer the flood before building the levee," *Stilwell*, 569 F.3d at 519, and adopted the separation requirements to increase transparency, promote accountability, and "facilitate auditing and enforcement of program requirements," 84 Fed. Reg. at 7765.

Plaintiffs' remaining objections are meritless. Relying on the projections of some commenters, Plaintiffs contend that the program integrity requirements will "substantially reduce the number of Title X providers," PI Mem. at 26, and lead to "substantially worse health outcomes," *id*. at 28. But HHS was under no obligation to adopt these projections or respond "in a manner that satisfies the commenter[s]"; it needed only to address the comments in "a reasoned manner," which it plainly did. *FBME Bank Ltd v. Mnuchin*, 249 F. Supp. 3d 215, 222 (D.D.C. 2017). HHS recognized that it would be "very difficult" to forecast how entities would respond to the Rule, but ultimately concluded that it "does not anticipate that there will be a decrease in the overall number of facilities offering services, since it anticipates other, new entities will apply for funds, or seek to participate as subrecipients, as a result of the final rule." 84 Fed. Reg. at 7782. And as to the quality of patient care, HHS determined that the Rule would "contribute to more clients being served, gaps in service being closed, and improved client care." *Id*. at 7723.

Plaintiffs also assert that HHS underestimated how much it would cost MFP to comply with the separation requirements. *See* PI Mem. at 26. But the Rule permits the Secretary to consider a provider's particular circumstances and "allows case-by-case determinations on whether physical separation is sufficiently achieved to take the unique circumstances of each program into consideration." 84 Fed. Reg. at 7766. The principle that "a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003). In any event, Plaintiffs bring a facial challenge. Even if *some* current grantees

will incur compliance costs that exceed HHS's "estimate[d] . . . average," 84 Fed. Reg. at 7781, that would hardly render the agency's estimate irrational or every application of the Rule invalid.

In the end, HHS made a legal and policy judgment (already blessed by the Supreme Court) that the separation requirements were necessary prophylactic measures to further HHS's interpretation of section 1008 and prevent misuse of Title X funds. Plaintiffs may dislike this conclusion, but their "policy disagreement" with HHS is no basis for setting the Secretary's judgment aside. *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 380 (D.C. Cir. 2013).

Counseling and Referral Restrictions: HHS explained that the 2000 regulations were in tension with a number of other federal conscience protection statutes and, with respect to referral for abortion, with section 1008 itself. 84 Fed. Reg. at 7746. HHS stated that it "has now reconsidered this issue and believes the approach taken in this final rule is a better interpretation of section 1008." *Id*. In reaching this conclusion, HHS reasoned that "it is not necessary for women's health that the federal government use the Title X program to fund abortion referrals, directive abortion counseling, or give to women who seek abortion the names of abortion providers" because such information is available from other sources. *Id*. This determination is consistent with *Rust*, which endorsed the same restrictions on abortion referrals (and even more stringent provisions on abortion counseling). *See* 500 U.S. at 193. Any challenge to these provisions, then, is necessarily limited. *See Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995) (citing *Rust* as an example of a situation in which "what is permissible under *Chevron* is also reasonable under *State Farm*"). Plaintiffs nevertheless offer up a welter of objections to the Secretary's analysis, none of which is persuasive.

First, Plaintiffs claim that HHS "ignore[d]" certain comments indicating that the Final Rule "is incompatible with health care professionals' ethics obligations and the standard of care." PI

Mem. at 29. To the contrary, HHS considered this concern and concluded that the Rule, in allowing physicians and advanced practice providers to provide nondirective pregnancy counseling and requiring them to refer for medical emergencies and other situations requiring medically necessary non-Title X care, is consistent with medical ethical obligations, federal conscience statutes, *Rust*, and other Supreme Court cases. 84 Fed. Reg. at 7724, 7748. As HHS explained, "section 1008 and its implementing regulations are simply a matter of Congress's choice of what activities it will fund, not about what all clinics or medical professionals may or must do outside the context of the federally funded project." *Id*. at 7748; *see Rust*, 500 U.S. at 195-96. Thus, rather than ignore the concerns that Plaintiffs raise here, HHS considered them and simply adopted a different view. And again, *Rust* upheld a nearly identical version of the counseling and referral provisions that had the same implications, *see* 500 U.S. at 199, in the face of a dissent contending that "the ethical responsibilities of the medical professional demand" that Title X patients be "provide[d] with the full range of information and options regarding their health and reproductive freedom," including "the abortion option." *Id.* at 213-14 (Blackmun, J., dissenting). That objection did not prevail then, and there is no reason why it should do so now.

Second, Plaintiffs assert that HHS "rejected without discussion" its 2014 Title X guidelines that, according to Plaintiffs, are inconsistent with the Rule. PI Mem. at 29. But this argument adds nothing to the equation. The Rule's counseling and referral provisions are based on HHS's reasoned determination to depart from the policy reflected in the 2000 regulations—and explicated in the 2014 guidelines—and to adopt instead the position, upheld by the Supreme Court in *Rust*, that section 1008 prohibits abortion referral as a method of family planning and does not require abortion counseling. *See* 84 Fed. Reg. at 7716-17. HHS was therefore entitled to adopt a position different from the one espoused in the 2000 regulations *and* the 2014 guidance.

Third, Plaintiffs insist that HHS did not set forth "any analysis" of the Rule's impact on patients and health care. PI Mem. at 30. But HHS did consider the effect the Rule would have on Title X patients and concluded that it would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. As the agency explained, it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," *id*. at 7780, as polling data reveals that a substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place, *id*. at 7781 n.139. After analyzing this issue in detail, HHS concluded that the counseling and referral provisions "will result in more Title X applicants" and/or subrecipient providers. *Id*. at 7780-81.

Plaintiffs take issue with this analysis, primarily by asserting that the conscience statutes already protect such providers. *See* PI Mem. at 31. But that misses the point. HHS did not rely on the conscience statutes for the separation requirements or the prohibition on abortion referrals as a method of family planning—the basis for those sets of requirements was section 1008. Rather, HHS relied on the conscience statutes for those portions of the Rule providing that objecting grantees are *not required* to engage in nondirective abortion counseling. *See* 84 Fed. Reg. at 7746-47. Specifically, the 2000 regulations mandated that Title X grantees provide counseling and referrals for abortion. That requirement violated—or was at least in tension with—the conscience statutes because it effectively precluded providers with religious objections to abortion counseling and referrals from receiving Title X grants. In addition, HHS observed that many grantees and providers may not know of their rights under these statutes and that, even if the previous referral requirement was not in tension with those statutes, it could deter qualified providers from participating in Title X projects and otherwise create ambiguity. *See id*. at 7716-17.

Plaintiffs also contend that these "new providers" will not "offer a 'broad range' of 'effective' family planning methods and services" to the detriment of Title X patients. PI Mem. at 31. But HHS explained that, even if individual service sites might offer a limited number of family planning methods, each Title X project, as a whole, must "provide[] a broad range of family planning methods and services, including contraception and natural family planning." 84 Fed. Reg. at 7732; *see also* 42 C.F.R. § 59.5(a)(1) (effective May 3, 2019) (each "project" must "provide a broad range of family planning methods (including contraceptives, natural family planning, and other fertility awareness based methods)").

Fourth, in response to HHS's observation that "[i]nformation about abortion and abortion providers is widely available and easily accessible, including on the internet," 84 Fed. Reg. at 7746, Plaintiffs accuse HHS of ignoring that some people may not have ready access to a phone or the Internet. PI Mem. at 30. But HHS was simply observing that information about abortion remains available outside the Title X project. Whether Plaintiffs agree with HHS's framing is beside the point. Instead, the question is whether the government must fund abortion-related information and services that are outside the scope of the congressionally created program. And *Rust* held that it does not—at a time when the Internet was in its infancy. *See* 500 U.S. at 203.

Fifth, Plaintiffs contend that the Rule "fails to explain" the requirement that pregnant patients be referred for prenatal care. PI Mem. at 30. But HHS explained why such referrals are "medically necessary": "Because prenatal care is essential in order to optimize the health of the mother and unborn child, and to help ameliorate the current health inequality as it relates to low income women," HHS observed, "referring low income pregnant women for prenatal care is of increased importance." 84 Fed. Reg. at 7762. And contrary to Plaintiffs' claim that such care is unnecessary for women who ultimately obtain abortions, *see* PI Mem. at 30, the fact that a patient

might *later* obtain an abortion *outside* the auspices of Title X is no basis for withholding information on medically necessary services *within* the Title X project.

Finally, Plaintiffs assert that HHS failed to explain why the Rule limits nondirective pregnancy counseling to physicians and advanced practice providers (such as physician assistants and advanced practice registered nurses). PI Mem. at 30; *see* 84 Fed. Reg. at 7728. But HHS considered which types of health care professionals to allow to provide such medical services and reasonably drew the line at advanced practice providers, who have "advanced medical degrees, licensing, and certification requirements." 84 Fed. Reg. at 7728 n.41. In fact, the NPRM would have allowed *only physicians* to provide nondirective counseling. *See* 83 Fed. Reg. at 25,507. In response to comments, HHS simply adopted a *less* restrictive approach. *See* 84 Fed. Reg. at 7728.

3. HHS Adequately Explained Why a Policy Change Was Appropriate.

Perhaps recognizing the weakness of their arbitrary-and-capricious challenge, Plaintiffs seek to ratchet up the standard, insinuating that HHS must provide a "more detailed justification" than the APA ordinarily requires because the agency changed policies. PI Mem. at 23 (quoting *Fox*, 556 U.S. at 515). But *Fox* squarely *rejected* the notion that a "heightened standard" should apply where an agency changes policy, and held that "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." 556 U.S. at 514-15. As discussed above, HHS plainly met these requirements. A "more detailed justification" is required only when an agency's new policy "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id*. at 515. Neither circumstance exists here.

As to the first, the Rule rests on HHS's renewed interpretation of section 1008 and the need for prophylactic measures to address the risk or perception that taxpayer funds will be used to fund abortion—not "factual findings that contradict those which underlay [the] prior policy[.]" *Id.* That policy and legal judgment—one blessed by the Supreme Court—is legitimate even if it differs from Plaintiffs' judgment and that of some prior administrations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[T]he agency. . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." (internal citation omitted)).

As to the second, although Plaintiffs assert that HHS failed to acknowledge the "serious reliance interests" created by the 2000 regulations, PI Mem. at 25 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)), Plaintiffs have no legally cognizable reliance interests in the continued receipt of Title X grants under the conditions they prefer. In contrast to the agency action at issue in *Encino Motorcars*, which concerned private parties' substantive statutory rights, 136 S. Ct. at 2126-27, the Rule here addresses discretionary funding decisions. Title X grants are generally available for only one year, 42 C.F.R. § 59.8(b), and HHS regulations provide that "[n]either the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application," *id.* § 59.8(c). A discretionary funding program cannot create legally cognizable reliance interests—and certainly not beyond the stated duration (generally one year) of a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests because the relevant "contract provisions . . . will expire on their own in a few years' time"). In all events, HHS's explanation is sufficiently detailed under any standard of review.

E. Plaintiffs' Constitutional Claims Are Foreclosed by *Rust* and Meritless

The Supreme Court in *Rust* held that the 1988 regulations (1) did not violate the First Amendment rights of program participants; (2) did not improperly condition funding on the relinquishment of a constitutional right; and (3) did not violate a woman's Fifth Amendment right to choose abortion. *See* 500 U.S. at 192-203. Plaintiffs nevertheless seek to relitigate each of these holdings and toss in a vagueness challenge as well. *See* PI Mem. at 31-47. But the Supreme Court has reaffirmed—not rejected—*Rust*, and Plaintiffs' attempts to evade this precedent are meritless.

1. First Amendment

In *Rust*, the Supreme Court squarely rejected the claim that the 1988 regulations contravened the First Amendment "by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500 U.S. at 192; *see id.* at 192-200. As the Court explained, the 1988 regulations simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded," and the Constitution generally permits "the Government [to] choose not to subsidize speech." *Id.* at 194-95, 200. Both then and now, doctors remain free to refer for abortion outside the Title X project, but they cannot require the government to pay them for doing so—a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id.* at 193-94.

Given this controlling precedent, Plaintiffs suggest that *Rust* has been undermined by no less than six subsequent Supreme Court decisions—namely, *Janus*, 138 S. Ct. 2448; *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*); *Reed v. Town of*

Gilbert, 135 S. Ct. 2218 (2015); *Sorrell v. IMS Health Inc.*, 564 U.S. 622 (2011); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); and *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). *See* PI Mem. at 39-45. But the first four (*Janus*, *NIFLA*, *Reed*, and *Sorrell*) had nothing to do with *Rust*. Those decisions did not address government *subsidization* of speech at all, but rather laws that *restricted* or *compelled* speech. Understandably, none of those precedents even mentions *Rust* given the settled rule that, as a general matter, "if a party objects to the condition on the receipt of federal funding, its recourse is to decline the funds," even "when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (*AOSI*) (collecting cases); *see also id.* at 216-17 (reaffirming *Rust*). And the latter two cases—*Velazquez* and *Rosenberger*—reaffirmed *Rust*. *See Velazquez*, 531 U.S. at 540-41; *Rosenberger*, 515 U.S. at 833. And even if any of those decisions could plausibly be read as calling *Rust* into question—which they cannot—*Rust* would still be binding here. *See United States v. Jiménez-Banegas*, 790 F.3d 253, 259 (1st Cir. 2015) ("[T]he Supreme Court has clearly stated that [lower courts] should not conclude that its more recent cases have, by implication, overruled an earlier precedent.").

Perhaps realizing that *Rust* remains good law, Plaintiffs seize on (PI Mem. at 40) that Court's remark that it "need not resolve" whether "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." *Rust*, 500 U.S. at 200. But the reason for that comment was that the 1988 "regulations do not significantly impinge on the doctor-patient relationship," *id.*, and Plaintiffs make no effort to distinguish those regulations from the Rule.

Finally, it makes no difference that the Rule contains a "speaker-based" provision addressing who can provide nondirective pregnancy counseling. PI Mem. at 44. Again, the Rule

is merely a government decision *not to fund* nondirective pregnancy counseling in Title X unless the counseling is given by qualified medical professionals—*i.e.*, those qualified "due to their advanced education, licensing, and certification to diagnose and treat patients while advancing medical education and clinical research." 84 Fed. Reg. at 7728. Indeed, even if the Rule *directly regulated* entry into a profession—which, as a mere funding decision, it does not—it would not violate the First Amendment. *See Lowe v. SEC*, 472 U.S. 181, 228 (1985) ("Regulations on entry into a profession, as a general matter, are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession." (citation omitted)).

2. Unconstitutional Conditions

Plaintiffs' argument that the Rule is "an unconstitutional condition on MFP's right to freedom of speech" similarly runs headlong into *Rust*. PI Mem. at 45. In *Rust*, the challengers maintained that "the restrictions on the subsidization of abortion-related speech contained in the [1988] regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." 500 U.S. at 196. The Supreme Court rejected that claim because the 1988 regulations did "not force the Title X grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities." *Id*

Plaintiffs admit that *Rust* "rejected a free speech unconstitutional conditions claim," and make no attempt to distinguish the challenged Rule from the 1988 regulations with respect to this issue. PI Mem. at 45. Instead, they suggest that the Supreme Court silently overruled *Rust* in *AOSI*, *see id.* at 45-46, when in reality, the Court reaffirmed it. *See AOSI*, 570 U.S. at 216-17; *see also supra* p 36. (Strangely, Plaintiffs suggest that a district court in North Carolina has overruled *Rust* as well. *See* PI Mem. at 46.) Plaintiffs also try to distinguish *Rust* on the ground that they

are pursuing an "as-applied" claim, but never explain why that matters. *Id.* at 45. Just like the Title X providers in *Rust*, Plaintiffs remain free to "engage in abortion advocacy; [they] simply [are] required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *AOSI*, 570 U.S. at 217 (quoting *Rust*, 500 U.S. at 196).

3. Fifth Amendment

Rust likewise disposes of Plaintiffs' Fifth Amendment claim. There, the Supreme Court reaffirmed that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." 500 U.S. at 201. Under settled precedent, the government has no "affirmative duty to 'commit any resources to facilitating abortion,'" it "may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical decisions relating to childbirth but not to those relating to abortion,'" and such funding decisions "'place[] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" *Id*. (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 (1989), and *Harris v. McRae*, 448 U.S. 297, 315 (1980), and mentioning *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state regulation denying Medicaid funding for nontherapeutic abortions)). In light of the "more extreme restrictions" it had previously upheld, the Supreme Court ruled that it would "strain logic" to hold that the 1988 regulations' "exclu[sion of] abortion-related services from a federally funded *preconceptional* family planning program is unconstitutional." *Id*. at 202. Because the limitations on Title X funding "leave[] a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all," the 1988 regulations did not "impermissibly burden a woman's Fifth Amendment rights." *Id*. at 201. Plaintiffs nevertheless contend that *Rust* is no longer good law and distinguishable from their case. *See* PI Mem. at 32-34. Neither assertion is correct.

a. Plaintiffs begin with the remarkable claim that the Supreme Court silently overruled *Rust* by adopting the "undue burden analysis" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). PI Mem. at 33. Indeed, Plaintiffs go so far as to suggest that these two decisions undermine "*Rust*'s holding that the government does not create an undue burden by refusing to directly fund abortion." *Id.* at 33 n.31. But nothing in *Casey*, *Whole Women's Health*, or any other Supreme Court decision has called *Rust*—or, for that matter, *Maher*, *Harris*, or *Webster*—into question. To the contrary, when *Rust* was decided in 1991, the Supreme Court required that "any regulation touching upon the abortion decision must survive strict scrutiny." *Casey*, 505 U.S. at 871 (joint opinion). A year later, the Court would abandon that framework for the *less stringent* "undue burden" standard. *See id.* at 871, 876; *see also, e.g.*, *Jane L. v. Bangerter*, 102 F.3d 1112, 1115 (10th Cir. 1996) (recognizing that *Casey* "rejected the strict scrutiny standard applied by cases after *Roe* to evaluate regulations bearing upon the abortion decision"). If anything, *Rust* is *more* consistent with the Supreme Court's abortion jurisprudence now than it was when it was decided. *See Casey*, 505 U.S. at 874-75 (joint opinion) (citing *Maher* and *Harris* approvingly).

Plaintiffs' own authority proves the point: *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana*, 699 F.3d 962, 988 (7th Cir. 2012), *quoted in* PI Mem. at 32, reaffirmed *Rust* and noted that the Supreme Court had upheld the 1988 regulations because they "did not place an undue burden on a woman's right to obtain an abortion," *id*. at 988. Contrary to Plaintiffs' claims, *Rust*—along with *Maher*, *Harris*, and *Webster*—remains good law. *See also, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) ("Case after case establishes that a government may refuse to subsidize abortion services.") (citing *Rust*,

Harris, and *Maher*). And even if *Casey* or *Whole Women's Health* could be read as calling *Rust* into question—which they cannot—*Rust* would still be binding on this Court. *See supra* p. 36.

b. Undeterred, Plaintiffs claim that *Rust* is "distinguishable procedurally and factually," but their proposed distinctions get them nowhere. PI Mem. at 33. First, Plaintiffs highlight that *Rust* involved a facial challenge, but never explain why that matters. *See id*. at 33-34. That is not surprising, as their "as-applied undue burden claim" is just another attempt to relitigate *Rust*. *Id.* at 33. According to Plaintiffs, "the Rule will cause either 85% of abortion sites in Maine to stop providing [abortions] (if MFP implements the Rule)"—due to the costs associated with physical separation—"or the closure of 50%-70% of Maine's abortion sites, including the most rural (if the Rule forces MFP out of the Title X program)"—because Title X funding is integral to MFP's budget. PI Mem. at 34-35; *see id.* at 10-13. But Plaintiffs cannot point to the second horn of this dilemma without conceding that they are using Title X funding to subsidize abortion-related services, a practice *Rust* squarely held the government has the right to prevent. *See* 500 U.S. at 201-03. Put differently, the only burden on abortion access that Plaintiffs allege is one the Supreme Court has already sanctioned.

Second, Plaintiffs contend that *Rust* "considered only burdens associated with the Rule's counseling and referral restrictions," thereby leaving open the question whether "the separation requirement" alone creates an undue burden. PI Mem. at 34; *see id.* at 34 n.32. But the Supreme Court broadly held that the 1988 "*regulations* do not impermissibly burden a woman's Fifth Amendment rights," *Rust*, 500 U.S. at 201 (emphasis added), even though "[t]he undisputed record below ma[de] clear that at least 50% of Title X clinics lack the resources" to comply with the program integrity requirements, Brief for Petitioners at 28, *Rust* (No. 89-1391), 1990 WL 505724; *see also Massachusetts*, 889 F.2d at 59 ("Appellees submitted numerous affidavits stating that the

[1988] regulations would require many clinics to either give up their Title X funding or to terminate family planning services altogether.") (discussing program integrity requirements). Plaintiffs also fail to articulate a theory for why the counseling and referral restrictions would be constitutional under *Rust*, whereas the program integrity requirements would not be. In fact, despite their initial disclaimer, Plaintiffs eventually rely on the counseling and referral provisions to support their undue-burden claim. *See* PI Mem. at 37-38 (arguing that the Rule's restrictions on Title X providers from "providing information to their patients about where to find . . . abortion providers" will create an undue burden). Their only justification for returning to this previously abandoned position is the untenable assertion that *Rust* has been overruled by "*Casey* and [*Whole Women's Health*]." *Id.* at 34 n.32. In all events, a Title X clinic that finds the physical separation requirement to be financially prohibitive is free to leave the program, and any loss of abortion-related services resulting from that decision cannot constitute an undue burden under *Rust*. *See supra* pp. 38-39.

4. Vagueness

Finally, Plaintiffs' half-hearted argument that the Rule is unconstitutionally vague fails at every step. *See* PI Mem. at 45-46. This vagueness claim boils down to a claimed confusion about when and how to apply the Rule in certain hypothetical situations. But that argument does not get out of the starting gate: Because Plaintiffs mount a facial challenge, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation] when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted); *cf. Rust*, 500 U.S. at 195 (rejecting argument about hypothetical application of rule because the cases under review "involve only a facial challenge to the regulations"). Indeed, even for criminal statutes, "a core of meaning is

enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the [regulatory] margin." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019). Thus, even if the Rule, in hypothetical applications, could possibly give rise to borderline situations, that does not render it impermissibly vague as a facial matter.

That is especially true because the Rule does not impose any penalties, but instead sets conditions on government funding. And "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *NEA v. Finley*, 524 U.S. 569, 589 (1998). Accordingly, the Supreme Court has upheld even "opaque" funding provisions that "could raise substantial vagueness concerns" had "they appeared in a criminal statute or regulatory scheme." *Id.* at 588. The Rule easily clears this lenient vagueness standard.

In any event, Plaintiffs have "within [their] grasp an easy means for alleviating the alleged uncertainty"—namely, to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities—and their "*cho[ice]* to remain in the lurch . . . cannot demonstrate an injury sufficient to confer standing" to press a vagueness claim. *National Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (addressing vagueness challenge by Title X grantee). Specifically, the Rule's preamble encourages providers to contact the program to implement compliance:

> [T]he Department welcomes regular interaction with grantees and subrecipients, should they have questions. Project officers are available to help grantees successfully implement the Title X program in compliance with both the statute and the regulation. The Department encourages grantees to contact the program office with questions, discuss ways to comply . . . , and put a workable plan in place.

84 Fed. Reg. at 7766. Even where this process does not resolve a grantee's concern, there are procedures available to obtain clarity. *See* 42 C.F.R. § 59.10 (referencing 45 C.F.R. Part 75, which addresses remedies for noncompliance, and referencing the appeal procedures found in 45 C.F.R. Part 16). Thus, a grantee can work with the program to resolve concerns, and if there is an impasse

leading to remedial action, a grantee may take appeals that can eventually proceed to federal court. And as to the physical separation requirement in particular, HHS has delayed requiring compliance until May 2020 to "give grantees and subrecipients time to make arrangements to comply with [the requirements] if they choose to seek Title X funds (or to participate in a Title X project) and also [separately] offer abortions as a method of family planning." 84 Fed. Reg. at 7766.

Turning to specifics, the Rule *does* explain how "providers can offer any options counseling on abortion" consistent with its provisions. PI Mem. at 47. Specifically, if a pregnant woman "requests information on abortion and asks the Title X project to refer her for an abortion," a provider may "offer[] her nondirective pregnancy counseling, which may discuss abortion, but [may] neither refer[] for, nor encourage[] abortion." 84 Fed. Reg. at 7789. And the Rule's program integrity requirement, which provides that HHS will determine whether objective integrity and independence exist based on a review of facts and circumstances and a list of factors relevant to this determination, is just as clear as the one in the 1988 regulations upheld in *Rust*. *See supra* pp. 11-12. Although Plaintiffs complain that the Rule does not specify whether "compliance require[s] separate entrances and rooms, or entirely separate buildings," PI Mem. at 47, the preamble provides guidance on the subject, although the answer will depend on "the individual circumstances" of the particular "Title X service site." 84 Fed. Reg. at 7767.

Finally, the challengers in *Rust* raised similar vagueness arguments, and the Supreme Court did not even bother to address them. *See* Brief for Petitioners at 44-45 n.48, *New York v. Sullivan* (No. 89-1392), 1990 WL 505760 ("[T]he separation requirement, as well as the counseling, referral and advocacy ban are unconstitutionally vague. . . . A Title X project cannot know what is required or prohibited by the physical separation requirement or, for that matter, by the

prohibitions against 'encouraging', 'counseling' or 'promoting' 'abortion as a method of family planning.'"). There is no reason why Plaintiffs' arguments should be taken more seriously.

II. PLAINTIFFS WILL SUFFER NO IRREPARABLE HARM

Merits aside, a party "seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiffs cannot do so.

Although they primarily claim irreparable injury from "constitutional violation[s]," PI Mem. at 47, they have failed to establish a likelihood of success on their constitutional claims. *See supra* Part I.E. Plaintiffs likewise come up short in relying on compliance costs. *See* PI Mem. at 48. "[O]rdinary compliance costs are typically insufficient to constitute irreparable harm," *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (collecting cases), and Plaintiffs offer no reason why this case should be treated any differently. To the contrary, Plaintiffs—unlike regulated parties who must absorb significant costs to comply with federal regulations—can simply forgo receiving taxpayer funds if it would be more costly on balance to comply. And if the costs of compliance are less than Title X funding, Plaintiffs will come out ahead. Either way, there is no irreparable injury here. *See United States v. City of Los Angeles*, 595 F.2d 1386, 1391 (9th Cir. 1979) (agency actions "cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of time and [monetary] resources").

Plaintiffs next argue that the Rule will irreparably injure Title X patients, PI Mem. at 48, but "the issuance of a preliminary injunction requires a showing of irreparable harm *to the movant* rather than to one or more third parties." *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 622 (1st Cir. 1995). Plaintiffs face the same problem with their assertion that the

Rule will cause various non-party "health care professionals" to "violate their ethical principles." PI Mem. at 48-49. In any event, the Rule does no such thing. *See supra* p. 30.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PLAINTIFFS' MOTION

On the other side of the ledger, the government (and the public) will "suffer[] a form of irreparable injury" if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). That is particularly true here, as the government has a compelling interest in following longstanding federal law prohibiting the use of Title X funds for programs where abortion is a method of family planning. *See* 42 U.S.C. § 300a-6. Granting Plaintiffs their desired injunction would thwart lawful regulations intended to avoid any risk or perception that federal funds will be used to subsidize abortion, an unquestionably irreparable injury to the government and the public.

The need to avoid that harm significantly outweighs any of Plaintiffs' asserted injuries. At bottom, Plaintiffs simply desire to receive government subsidies on the terms that they prefer. But "the government may 'make a value judgment favoring childbirth over abortion, and implement that judgment by the allocation of public funds,'" by "subsidiz[ing] family planning services which will lead to conception and child birth, and declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 192-93 (citation omitted). Accordingly, the balance of equities and public interest make preliminary injunctive relief inappropriate.

IV. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED

A. Any Injunctive Relief Should Be Limited To The Plaintiffs

At a minimum, any injunction should be no broader than necessary to provide Plaintiffs relief, and should therefore be limited to redressing the injuries of the parties before this Court. As the Supreme Court recently confirmed, any "remedy" ordered by a federal court must "be limited

to the inadequacy that produced the injury in fact that the plaintiff has established"; a court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it"; and "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933-34 (2018); *see also Doe v. Shanahan*, 917 F.3d 694, 740 (D.C. Cir. 2019) (Williams, J., concurring in result) (recognizing the implications of *Gill* for nationwide injunctions). Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (noting that nationwide injunctions "are legally and historically dubious"). These principles apply with even greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *accord Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983).

Here, Plaintiffs fail to show that a nationwide injunction is necessary to redress their alleged injuries. Indeed, leading up to the Supreme Court's decision in Rust, each district court to enjoin the 1988 regulations limited that relief to the parties before it. *See W. Va. Ass'n of Cmty. Health Centers, Inc. v. Sullivan*, 737 F. Supp. 929, 956-57 (S.D. W. Va. 1990); *Planned Parenthood Fed'n of Am. v. Bowen*, 687 F. Supp. 540, 544 (D. Colo. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137, 148 (D. Mass. 1988). Plaintiffs provide no tenable reason why this case should be treated differently.

To start, Plaintiffs' decision to bring facial APA claims, *see* PI Mem. at 50, does not necessitate a nationwide remedy. *See, e.g., California v. Azar*, 911 F.3d 558, 582-84 (9th Cir. 2018) (vacating nationwide scope of injunction in facial challenge under the APA); *Los Angeles*

Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664-65 (9th Cir. 2011) (same); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392-94 (4th Cir. 2001) (same), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). A court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), and the APA's general instruction that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), is insufficient to mandate such a departure. Indeed, the Supreme Court held that not even a provision directing that an injunction "shall be granted" was sufficient to displace traditional principles of equitable discretion, *Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944), and Congress is presumed to have been aware of that holding when it enacted the APA two years later. In fact, the APA confirms that, absent a special review statute, "[t]he form of proceeding for judicial review" is simply the traditional "form[s] of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and that the statutory right of review does not affect "the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground," *id.* § 702(1). The Supreme Court therefore has confirmed that, even in an APA case, "equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). Accordingly, this Court should construe the "set aside" language in section 706(2) as applying only to the named Plaintiffs, especially as no federal court had issued a nationwide injunction before Congress's enactment of the APA in 1946, nor would do so for more than fifteen years thereafter, *see Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring); *see also Virginia Soc'y for Human Life*, 263 F.3d at 394 ("Nothing in the language of the APA . . . requires us to exercise such far-reaching power.").

Nor do the Rule's "nationwide effects" require a nationwide injunction. PI Mem. at 13; *see id.* at 50 (claiming the Rule will be "felt by healthcare providers and states across the country" (citation omitted)). The Supreme Court recently explained that, under Article III, the proper remedy in a constitutional vote-dilution challenge brought by an individual voter entailed "revising only such districts as are necessary to reshape the voter's district" rather than "restructuring all of the State's legislative districts," notwithstanding that the alleged gerrymandering was "statewide in nature" rather than limited to each plaintiff's particular district. *Gill*, 138 S. Ct. at 1930-31. This holding confirms that it is the scope of the plaintiff's injury and not the defendant's policy that governs the permissible breadth of an injunction under Article III. *See also California*, 911 F.3d at 572 (vacating nationwide scope of injunction against agency rules, even though "the agencies' own regulatory impact analysis" estimated that the rules "would affect between 31,700 and 120,000 women *nationwide*" (emphasis added)). If Plaintiffs wish to obtain an "injunction" that provides "classwide relief," they must present "a properly certified class." *Brown v. Trustees of Bos. Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (citing *Zepeda*, 753 F.2d at 727-28 n.1); *see also Donovan v. Burger King Corp.*, 672 F.2d 221, 229 (1st Cir. 1982) (vacating nationwide scope of injunction).

Nationwide relief would be particularly harmful here given that three other district courts in California, Oregon, and Washington are currently considering similar challenges. If the government prevails in all three other jurisdictions, a nationwide injunction would render those victories meaningless as a practical matter. It would also preclude appellate courts from testing Plaintiffs' factual assertions against the Rule's operation in other jurisdictions. For example, in *Rust* itself, the claim that the program integrity requirements in the 1988 regulations would "be applied in an arbitrary manner" was refuted by the fact that in the states where those regulations

"ha[d] been implemented," there had been "no issues of compliance." Brief for Respondent at 45 n.48, *Rust* (No. 89-1391), 1990 WL 10012655; *see also California*, 911 F.3d at 583 ("The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives.").

In addition, other states—especially those that have taken measures to ensure that their own funds are not used to subsidize family planning through abortion—have welcomed the Rule. *See* ECF No. 42-1 (amicus curiae brief of 13 states in support of the Rule). There is no reason why the views of *Maine* Family Planning should dictate how Title X functions in Arkansas, Ohio, or anywhere else in the country. *See California*, 911 F.3d at 583 ("The detrimental consequences of a nationwide injunction are not limited to their effects on judicial decisionmaking. There are also the equities of non-parties who are deprived the right to litigate in other forums."). That is especially true given that Plaintiffs operate solely in Maine, place great weight on the particular impact the Rule will purportedly have on healthcare access in Maine, and bring a number of as-applied challenges. *See, e.g.*, PI Mem. at 36 (discussing challenges "specific" to Maine, including "economic conditions, geography, rurality, and harsh winter weather conditions").

B. Any Injunctive Relief Should Be Limited To Particular Provisions

Similarly, should the Court decide that any part of the Rule is unlawful, the Court should allow the remainder to go into effect. In determining whether severance is appropriate, courts look to both the agency's intent and whether the regulation can function sensibly without the excised provision(s). *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Here, the intent of the agency is clear: The Rule's preamble provides that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. Nor is there any functional reason why

the entire Rule must fall if the Court agrees with Plaintiffs' attacks on particular provisions. The separation requirements can operate independently of the referral provisions (and vice versa). And there is certainly no logical basis for enjoining the entire Rule if the Court agrees with some of Plaintiffs' various challenges to more ancillary provisions (such as requiring that nondirective counseling be provided by physicians or advanced practice providers). None of these provisions should be enjoined, but there is certainly no compelling justification for extending any injunctive relief beyond any particular allegedly offending provision(s).[4]

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

Dated: April 15, 2019

Respectfully submitted,

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[4] Finally, Plaintiffs argue that if the Court does not enjoin the Rule, it should stay its effective date pursuant to 5 U.S.C. § 705. *See* PI Mem. at 50. As Plaintiffs correctly observe, courts considering requests for such relief apply the same test as when considering a request for a preliminary injunction. Plaintiffs have not satisfied that standard, and even if they had, nationwide relief would be inappropriate for the reasons discussed.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT