No. 19-1614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APPELLANTS' REPLY BRIEF

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INTRODUCTION AND SUMMARY

Baltimore's response only underscores how extraordinary this injunction is. Like the district court, the City accepts that *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld regulations materially indistinguishable from the ones challenged here based on statutory text that has not changed. It nevertheless contends that a single district court can effectively overrule the Supreme Court through an injunction based on a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA).

Motions panels of this Court and the Ninth Circuit correctly rejected that remarkable position, and Baltimore makes little effort to address those decisions. *See* Doc. 23; *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019) (per curiam), *reh'g en banc granted*, 927 F.3d 1045 (9th Cir. July 3, 2019); *see also Family Planning Ass'n of Maine v. HHS*, No. 19-100, 2019 WL 2866832 (D. Me. July 3, 2019) (declining to enjoin the Rule). As those panels recognized, Congress did not amend Title X (much less abrogate a high-profile Supreme Court decision) *sub silentio* through a clause in an appropriations rider or a mousehole in the ACA. Nor do Baltimore's predicted harms outweigh injuries to the government that the Supreme Court has already acknowledged, such as preventing taxpayer dollars from promoting abortion. In any event, nothing justifies enjoining every provision of the Rule as applied to every Title X provider in Maryland.

ARGUMENT

I. The Rule Is Lawful

Baltimore does not dispute that the challenged provisions of the Rule are materially indistinguishable from or less restrictive than their analogues upheld in *Rust*. Nor does the City deny that the relevant portions of Title X remain unchanged. Instead, Baltimore begins its brief by disparaging *Rust* as "one of the most extreme applications of the controversial *Chevron* doctrine ever rendered by the Supreme Court"—a doctrine the City likewise calls into question. Br.1; *see* Br.10-11. Although the City's rhetoric and denigration of *Chevron* come as a surprise, it is entirely predictable that Baltimore feels compelled to criticize *Rust*, since many of its objections to the current Rule are simply recycled versions of arguments made and rejected in that case. *See infra* pp. 4-5, 8, 15, 17, 19. But while Baltimore may disagree with Supreme Court precedent, this Court remains bound by *Rust* and *Chevron*, and the City would not have gone to such lengths if this precedent were actually "irrelevant." Br.42.

In any event, Baltimore's denigration of *Chevron* is a red herring, because *Rust* adopted by far the best interpretation of § 1008. Indeed, the City makes virtually no attempt to explain how a program that refers patients for, or otherwise promotes, abortion as a method of family planning does not run afoul of § 1008's prohibition on funding programs "where abortion is a method of family planning." 42 U.S.C. § 300a-6; *see* 84 Fed. Reg. 7714, 7759 (Mar. 4, 2019). The closest it comes is to suggest that § 1008 solely requires that "federal funds should not be used to perform" abortions

(Br.17), but when Congress wants to prevent only the federal funding of abortion performance, it knows how to do so. *See, e.g.*, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979) ("[N]one of the funds provided by this joint resolution shall be used to perform abortions."). Section 1008, by contrast, reveals "Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning.'" *Rust*, 500 U.S. at 195 n.4. Accordingly, even the preamble to the 2000 regulations acknowledged that construing § 1008 "to prohibit only the use of funds for abortions … is not considered to be the better reading." 65 Fed. Reg. 41,270, 41,272 (July 3, 2000). Rather, HHS "has consistently, since 1972," read § 1008 as prohibiting "activities that 'promote or encourage' abortion as a method of family planning," *id.*, and Baltimore has yet to explain how an abortion referral is not most naturally, let alone permissibly, understood to qualify as such an activity. After all, the Supreme Court in *Rust* observed that under the 1988 regulations, a referral "list may not be used indirectly to encourage or promote abortion, 'such as … by "steering" clients to providers who offer abortion as a method of family planning.'" 500 U.S. at 180. By that logic, referring "clients to providers who offer abortion as a method of family planning" directly "promote[s] abortion."

Baltimore protests that *Rust* was a "*Chevron* step two" case (Br.42), but that simply means that the Supreme Court did not hold that the materially indistinguishable regulations were *compelled* by § 1008. It does not mean that the Court disagreed with the proposition that those regulations reflected the *better* reading of the statute. Nor

does it change the fact that the Court at a minimum upheld those regulations as a reasonable interpretation of § 1008—a statute that has not changed. Accordingly, rather than grapple with § 1008's language or the Supreme Court's analysis, Baltimore relies on the allegedly "unambiguous text" of two "later-enacted statutes." Br.9. But properly understood, neither law strips HHS of its authority under Title X to reinstate the 1988 regulations—let alone adopt less restrictive regulations—much less does so with the requisite clarity to accomplish an implied repeal.

A. The Appropriations Rider

Start with the appropriations rider, which provides that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018). If anything, this rider reinforces § 1008 by further ensuring that pregnancy counseling is not used to "direct" patients *toward* abortion. Baltimore's arguments to the contrary do not withstand scrutiny.

1. With respect to the referral restrictions, Baltimore contends that a failure to provide an abortion referral is directive because it "withhold[s] medically relevant information." Br.48. But that is simply a repackaged variant of a First Amendment argument rejected in *Rust* that is even weaker under the appropriations rider. Given the limited, preconceptional nature of the Title X program, "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her," *Rust*, 500 U.S. at

200—and especially for that reason, it cannot possibly be understood to *direct* her to maintain the status quo. No reasonable patient could treat a mere failure to direct a certain course of conduct as an implicit direction not to engage in such conduct, regardless of whether it is medically necessary.

Far from Baltimore's extravagant suggestion that the Rule reflects "information control and censorship tactics … associated with totalitarian regimes" (Br.2), the Rule merely refuses to fund the propagation of certain information because such federal spending would exceed the scope of the federal program and violate a federal statute. Providers are "always free" to respond to a client's request by explaining that referrals for abortion are "simply beyond the scope of the program"; "[n]othing" in the Rule "requires a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 500 U.S. at 200. Baltimore's hypothetical regulation "prohibit[ing] prenatal referrals" (Br.49) would comply with the appropriations rider for the same reasons. *Cf. Rust*, 500 U.S. at 193 ("A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program.").

The City fares no better in challenging the separate requirement that pregnant patients be referred for prenatal care. Although Baltimore invokes a statement in the preamble to the 2000 regulations that "[r]equiring a referral for prenatal care and delivery or adoption where the client rejected those options would seem coercive and inconsistent with the concerns underlying the 'nondirective' counseling requirement"

(Br.49), even that remark did not conclude such referrals *would be* directive, and common sense confirms otherwise. Even when unwanted, prenatal-care referrals do not *direct* a decision about abortion—they merely refer patients for care while they are pregnant, even if they obtain an abortion later. Gov.Br.23-24. In addition, the Rule permits providers to explain that abortion is outside the scope of the program, and that if a patient wants to seek an abortion she can find information about that elsewhere, but in the meantime, they can provide her with a list of providers who can offer her care while she is pregnant. *See* 42 C.F.R. § 59.14(e)(5). Providers could even include an express disclaimer that the prenatal-care referral is a general requirement and should not be taken as directing the patient's ultimate decision about her pregnancy. And even if the required prenatal-care referral were directive (either facially or only when unwanted), that would not justify the wholesale invalidation of the separate prohibition on abortion referrals. The provisions are contained in different subsections, 42 C.F.R §§ 59.16(a), 59.16(b)(1), which are severable, 84 Fed. Reg. at 7725.

In any event, Congress's requirement that "pregnancy counseling" be "nondirective" does not speak to the issue of "referrals," much less require HHS to allow referrals for abortion or to prohibit referrals for prenatal care specifically. (Accordingly, Baltimore's hypothetical regulation "mandat[ing] abortion referrals" (Br.49) would not violate the appropriations rider, although it would violate § 1008 by promoting abortion. *See* 84 Fed. Reg. at 7745.) Despite conceding that Congress and HHS "frequently pair the word 'counseling' with 'referrals'" (Br.55), Baltimore insists

that in the rider, Congress meant for "counseling" to capture both activities. Although the City dismisses those other couplings as merely reflecting an abundance of caution, it never explains why, if that were true, Congress would have decided to forgo its usual belt-and-suspenders approach in the appropriations rider. Br.55.

Moreover, even materials cited by Baltimore often use the terms separately (*see* Br.50-56), and if counseling clearly included referrals, then none of these authorities would have needed to discuss referrals at all. (And that is true whether or not Congress used "counseling" and "referrals" as "technical terms of art." Br.54.) For example, Baltimore points to (Br.53) statements in the Rule's preamble indicating that a separate statute, 42 U.S.C. § 254c-6(a)(1), reflects a legislative intent that "adoption information and referrals be included as part of any nondirective counseling," 84 Fed. Reg. at 7733, but that has no bearing on whether Congress considers referrals a *type* of counseling (as opposed to something that may occur *at the same time* as counseling). And given HHS's longstanding position—reflected in this Rule and its predecessors (Gov.Br.24-26)—that referrals and counseling are distinct, Baltimore places far too much weight on the Department's brief discussion of this separate statute. At most, the few instances Baltimore identifies as implying that counseling may include referrals suggest the term "nondirective counseling" is ambiguous and thus cannot supply the clear mandate necessary to overcome both the presumption against implied repeals and the judicial deference owed to HHS's reasonable interpretation. Gov.Br.27.

2. Baltimore's challenge to the Rule's counseling provisions fares no better. The City neither disputes that the Rule *permits* "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5), nor attempts to defend much of the district court's incorrect conclusions with respect to counseling. *See* Gov.Br.28-29. Instead, Baltimore apparently objects to the fact that Title X providers are "not required to provide" nondirective pregnancy counseling under the Rule. Br.36. But in providing that "all pregnancy counseling shall be nondirective," the appropriations rider does not mandate any pregnancy counseling at all—especially in a "*preconceptional* family planning program" such as Title X, *Rust*, 500 U.S. at 202. In any event, Baltimore (as opposed to Title X patients) has no standing to complain about—and is certainly not irreparably harmed by—what the Rule does "not require[]" other providers to do. Br.36.

Baltimore also contends that the appropriations rider "require[s] equal treatment between childbirth and abortions"—in essence, a fairness doctrine for pregnancy counseling. Br.57 (quotation marks omitted). But nothing in the appropriations rider prohibits HHS from choosing "to subsidize family planning services which will lead to conception and childbirth, [while] declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 193 (rejecting similar viewpoint-discrimination argument). To the contrary, when Congress wishes specific pregnancy options to be given equal treatment, it knows how to say so explicitly. *See* 42 U.S.C. § 254c-6(a)(1) (requiring training to ensure that "adoption" is treated "on an equal basis with all other courses of action included in nondirective counseling"); Gov.Br.29-30. Here, Congress merely provided that "all

pregnancy counseling shall be nondirective," while prohibiting the funding of "programs where abortion is a method of family planning," 42 U.S.C. § 300a-6; *see* Gov.Br.30. Indeed, if "nondirective" already required that all pregnancy options—adoption included—be treated equally, then Congress's explicit instruction in § 254c-6(a)(1) that adoption be treated "on an equal basis" with other pregnancy options would be gratuitous, a superfluity that Baltimore never addresses.

3. Even if this were a closer question, settled interpretive principles would dispose of Baltimore's construction. The City does not dispute that there is a heightened presumption against implied repeals through appropriations legislation. Gov.Br.22. Instead, it contends that the presumption is inapplicable here (Br.45), even as it asserts the rider changed the law by "constrain[ing]" HHS's preexisting "regulatory authority under Title X." Br.9; *see* Br.42-46. By definition, that is a repeal of § 1008 in relevant respect. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 n.8 (2007) ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands.").

Put differently, had § 1008 explicitly delegated HHS authority "to prohibit Title X projects from referring their patients for abortion as a method of family planning," no one would dispute that subsequent legislation stripping the Department of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006, *implicitly* delegated the same authority is irrelevant under *Chevron*. Gov.Br.33. And that is especially true where the Supreme Court has already

authoritatively construed Title X to contain that delegation—and where that construction is in fact the best interpretation of the statute—a scenario none of Baltimore's authorities address. *See* Antonin Scalia & Brian A. Garner, *Reading Law* 331 (2012) (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.").

Accordingly, Baltimore's construction of the rider *does* "irreconcilably conflict" (*contra* Br.45) with § 1008 (and § 1006) by "displac[ing] earlier, inconsistent commands" in those provisions, *Home Builders*, 551 U.S. at 663 n.8 (2007). Specifically, the City's reading would displace the implicit delegation of authority to the Secretary to prohibit abortion referrals within the Title X program, not to mention the better reading of § 1008 standing alone. Nor is it "undisputed" that the 2000 regulations "reasonably and lawfully interpreted § 1008" (Br.45); rather, regardless of whether those regulations could survive under the *Chevron* deference Baltimore denigrates, the Secretary has concluded that the "referral provision" in those regulations "violate[d] § 1008" properly construed. 84 Fed. Reg. at 7716. The Rule reflects a reading that preserves both the operative provisions of Title X as well as the appropriations rider by allowing, but not requiring, nondirective counseling and prohibiting abortion referrals. *See id.* at 7745.

Baltimore similarly misfires in contending that HHS conceded that the appropriations rider narrowed "its regulatory authority" under § 1008 (Br.46) by

acknowledging that the rider imposes additional requirements on the Title X program. Such general acknowledgements have no bearing on the question here: whether the rider implicitly erased HHS's preexisting authority under § 1008 to forbid referring for, or otherwise promoting, abortion as a method of family planning.

More generally, Baltimore doubles down on the facially implausible theory that Congress smuggled into an appropriations rider providing that Title X funds "shall not be expended for abortions" an implied repeal of § 1008 and silent abrogation of *Rust*, after it had tried, and failed, to do so expressly, in the vetoed Family Planning Amendments Act of 1992. *See* Gov.Br.25, 31-32. According to the City, the 1996 Congress enacted the rider "to lock in" (Br.58) not only the existing regulatory requirement that "all pregnancy counseling shall be nondirective," but mandatory abortion referrals and counseling as well. But the Congress responsible for the 1996 appropriations rider declined to enact legislation that would have done exactly that—namely, the Family Planning Amendments Act of 1995, which, like its 1992 predecessor, would have required Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *Compare* H.R. 833, 104th Cong. § 2 (1995), *with* S. 323, 102d Cong. § 2 (1991). "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), and that principle alone

should put an end to Baltimore's fanciful theory. *Contra* Br.55 (dismissing these "unenacted statutes" as having "'no interpretative value'").[1]

Indeed, if it were actually "clear and manifest" that the appropriations rider had stripped HHS of its authority to reinstitute the 1988 regulations, *Home Builders*, 551 U.S. at 663, then the Department presumably would have said as much when it issued the 2000 regulations. Gov.Br.26. Baltimore tries to explain this conspicuous omission on the theory that at that time, HHS "had no occasion to reach the question" whether the rider "compelled [the] repeal" of the 1988 regulations because the agency justified its change in positions on policy grounds. Br.56. But HHS has repeatedly relied on both legal and policy rationales for its changed positions in this area, including in the Rule here. *See, e.g.*, 84 Fed. Reg. at 7716 (explaining that the "referral provision" in the "2000 regulations" "violates Section 1008"); *see also* 53 Fed. Reg. 2922, 2923 (Feb. 2, 1988) (explaining that the 1981 guidelines contravened § 1008). In the 2000 regulations, by contrast, HHS concluded that the 1988 "Rule was, in the Secretary's view, a permissible interpretation of the statute, but not the only permissible interpretation," 65 Fed. Reg. at 41,277, and offered only tentative remarks about potential tension between portions of the 1988 regulations and the appropriations rider, *see supra* pp. 5-6 (addressing unwanted referrals for prenatal care). At a minimum, this history undercuts Baltimore's

[1] Congress's various attempts to pass the Family Planning Amendments Act also confirm that it knows how to "affect HHS's subsequent authority to enact a rule similar to the rule *Rust* upheld" without "expressly mention[ing] *Rust*" (Br.8), but did not do so in the appropriations rider.

assertion that the appropriations rider "unambiguously bars HHS" from prohibiting abortion referrals. Br.4.

B. Section 1554 Of The Affordable Care Act

Baltimore is on no firmer ground in contending that § 1554 of the ACA implicitly eliminated HHS's authority to reinstate both the referral and counseling restrictions as well as the physical-separation requirement, especially when the district court never applied this statutory provision to the latter. Gov.Br.39 n.3.

1. To start, Baltimore does not deny that it failed to raise this argument before HHS, but instead asks this Court to excuse that waiver because others made generic objections containing language that happened to resemble language in § 1554. *See* Br.58-60. But merely notifying HHS of *substantive* objections did not give the agency a chance to address a question of *statutory interpretation* implicating various rules of construction. *See infra* Pt. I.B.2. Accordingly, HHS plainly did not have an opportunity to apply its expertise in administering the ACA with respect to this issue. By contrast, when HHS received comments relying on § 1554 in other rulemakings, it responded by invoking its authority to administer § 1554 and provided interpretive arguments in addition to policy ones. *See* 84 Fed. Reg. 23,170, 23,223-24 (May 21, 2019); 83 Fed. Reg. 57,592, 57,608 (Nov. 15, 2018); 83 Fed. Reg. 57,536, 57,551-52 (Nov. 15, 2018). And the generalized statements from this Court's precedent that Baltimore invokes do not establish the requisite proposition that a litigant can preserve a challenge to an

agency's statutory authority without ever citing the relevant statutory provision. *See 1000 Friends of Maryland v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001), *quoted in* Br.58.

Baltimore adds that its § 1554 argument is "not subject to waiver" because it is "purely legal" (Br.60-61), but fails to meaningfully respond to our explanation that statutory-authority arguments can be waived at least with respect to facial challenges, because agencies "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." Gov.Br.35 (quoting *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam)). That does not mean a plainly unlawful rule "would be allowed to stand in perpetuity" (Br.62), as nothing stops regulated entities from raising a "statutory argument[] if and when the Secretary applies the rule" to them. Gov.Br. 35 (quoting *Koretoff*, 707 F.3d at 399). Nor has this Court held otherwise. Rather, it has merely concluded that although "'usually legal questions must first be presented to the agency,'" there is a "narrow" exception when the issue "'fail[s] to implicate the agency's expertise in any meaningful manner.'" *Conpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 182-83 (4th Cir. 2018). That exception does not apply here given HHS's expertise in administering the ACA—§ 1554 included.

2. In any event, Baltimore's § 1554 argument is meritless, which is presumably why none of the 500,000-plus comments on the proposed Rule raised it. The Rule merely limits what the government chooses to fund and thus does not "create," "impede," "interfere with," "restrict," "violate," or "limit" anything. *See* 42 U.S.C. § 18114. As the Supreme Court explained in *Rust*, there is a fundamental

distinction between impeding something and choosing not to subsidize it, and that reasoning disposes of Baltimore's claim, whether it is packaged as a constitutional or statutory argument. 500 U.S. at 201-02; *see* Gov.Br.35-36; *compare, e.g.*, Br.43 ("*Rust* held that the 1988 Rule did not facially violate the Fifth Amendment by unlawfully *restricting access* to abortion.") (emphasis added), *with* Br.5 (contending § 1554 precludes HHS from adopting regulations that "*restrict access* to certain benefits") (emphasis added).

That basic difference does not render § 1554 a dead letter, as HHS does more than engage in the "expenditure of funds." Br.62. For example, the Department also directly regulates health insurance under the ACA, *see generally* 45 C.F.R. pt. 147, and thus § 1554 may constrain its authority to promulgate health-insurance regulations that it otherwise could in theory adopt, such as one "limit[ing] the availability of health care treatment for the full duration of a patient's medical needs," 42 U.S.C. § 18114(6); *cf. Wickline v. California*, 192 Cal. App. 3d 1630 (Cal. Ct. App. 1986) (addressing premature discharge from hospital based on requirement that insurer authorize medical services before they are rendered).

By contrast, accepting Baltimore's expansive construction of terms such as "creates," "impedes," or "interferes" to include a refusal to provide government subsidies would have dramatic consequences for Title X and the government's authority more generally. For example, if § 1554 "control[s] the Secretary's expenditure of funds" (Br.62), then HHS could not, on Baltimore's theory, even adopt a regulation declining to provide Medicare coverage for a particular procedure, *see, e.g.*, *Heckler v. Ringer*, 466

U.S. 602, 607 (1984), as such an action purportedly could "impede[] timely access to health care services" (and perhaps erect an "unreasonable barrier[] to the ability of individuals to obtain appropriate medical care" as well). 42 U.S.C. § 18114(1)-(2). Baltimore's reading would effectively halt HHS from making even minor changes to the Title X program—or to many other programs—any time a provider or patient arguably was adversely affected.

If Congress had in fact imposed such significant limitations on HHS's authority, it presumably would not have done so through generalities in one of the ACA's "Miscellaneous Provisions." *See* Gov.Br.38-39. Baltimore's reliance on § 1554's language (Br.46) does not make this provision any less of a mousehole or the City's theory any less of an elephant: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and § 1554 qualifies as both. Nor does Baltimore explain why the general should govern the specific here or offer any additional reason why the presumption against implied repeals is inapplicable. *See* Gov.Br.38-39. And while Baltimore dismisses as irrelevant (Br.65) the fact that § 1554 applies "[n]otwithstanding any other provision of this Act," 42 U.S.C. § 18114—thereby signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA* (but not Title X)—it never addresses why Congress used that language when it repeatedly used the common phrase "notwithstanding any other provision of law" elsewhere in the Act. *See* Gov.Br.38-39.

3. Baltimore's remaining arguments only underscore how sweeping (and thus implausible) its reading of § 1554 is.

a. For example, Baltimore contends that a failure to provide abortion referrals and counseling "violates … the ethical standards of health care professionals," 42 U.S.C. § 18114(5), despite acknowledging that Congress has enacted legislation giving medical providers this option. Br.63-64. The City dismisses these conscience laws on the theory that while "Congress can enact laws that violate medical ethics," it has nonetheless prohibited HHS from doing so. Br.64. The far more sensible inference, however, is simply that, like the Supreme Court in *Rust*, Congress does not believe "the ethical standards of health care professionals" require them to provide abortion referrals, let alone do so on the federal government's dime. And it is Congress's (and HHS's) views on medical ethics—not those of the American Medical Association or Baltimore's declarant (Br.63)—that matter here, as nothing in § 1554 suggests that Congress took the extraordinary step of allowing the "boards of professional healthcare organizations" to "capture[] the agency." *Family Planning Ass'n of Maine*, 2019 WL 2866832, at *17.[2]

[2] Baltimore also accepts that the Supreme Court in *Rust* upheld more restrictive regulations against a First Amendment challenge in the face of a dissent arguing that they compelled doctors to violate medical ethics, but dismisses that fact on the theory that it is not a holding. Br.63-64. In doing so, the City fails to address the more fundamental point that Congress's limitations on the Title X program no more violate a physician's ethical responsibilities than her First Amendment rights. *See supra* Pt. I.A.

b. Baltimore is no more persuasive in contending that the Rule's physical-separation requirement violates § 1554, a claim that even the district court did not rely on in support of its order. Although the City acknowledges that the 2000 regulations already mandate financial separation (Br.38), it contends that requiring physical separation as well will raise unreasonable barriers and impede timely access to health care because "Planned Parenthood … and at least four states" have promised to leave the Title X program rather than comply. Br.66. Baltimore identifies no authority, however, for the extraordinary proposition that an agency administering a competitive grant program must accede to the wishes of a subset of current grantees to satisfy § 1554, and nothing in the ACA gives Baltimore, Planned Parenthood, or any other provider a permanent veto over any proposed change to the Title X regulatory scheme. In any event, HHS sensibly predicted that any incumbent providers that withdraw likely will be replaced by new providers who were previously discouraged from joining the program by the abortion-referral requirement in the 2000 regulations, or who will otherwise be willing to compete for and accept federal funds under the Rule. *See* Gov.Br.40.

In support of its misguided challenge, Baltimore also contends that "HHS has not identified any actual benefits" from the physical-separation requirement (Br.65), but the City never refutes HHS's conclusion that subsidizing abortion through collocation of Title X clinics and abortion clinics would violate § 1008. *See* 84 Fed. at 7766. As a matter of basic economic reality, the collocation of Title X and abortion clinics

necessarily results in financial support for abortion-related activities and the perception that Title X clinics offer abortion-related services. That conclusion is just as reasonable now as it was thirty years ago. *See Rust*, 500 U.S. at 187-90; 53 Fed. Reg. at 2940-41.

* * *

Aside from its actual challenges to the Rule, Baltimore raises a variety of objections in the introduction and factual statement of its brief that were neither pressed nor passed upon below, are not explained now, and in all events lack merit. For example, it criticizes (Br.39) the requirement that Title X providers encourage family participation in minors' decisions to seek family planning services, 42 C.F.R. § 59.5(a)(14), but fails to mention that Title X itself provides that "[t]o the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection," 42 U.S.C. § 300(a). Baltimore also takes issue with the requirement that any pregnancy counseling be provided by medical professionals who are licensed with a relevant graduate degree (including physician assistants and nurse practitioners), 42 C.F.R. §§ 59.2, 59.14(b)(i), denouncing it as a "speaker-based ban … on which the public did not have an opportunity to offer comment." Br.35. But the Rule merely declines to fund pregnancy counseling in Title X unless it is given by qualified medical professionals, and the government generally "may choose not to subsidize speech." *Rust*, 500 U.S. at 200. Nor did this requirement come out of the blue: HHS initially proposed to allow only physicians to provide nondirective counseling, *see* 83 Fed. Reg. 25,502, 25,507, 25,518

(June 1, 2018), but relaxed that requirement to include other medical professionals in response to comments, *see* 84 Fed. Reg. 7727-28. These belated and undeveloped objections are an even thinner basis for sustaining the injunction than the flawed arguments that were actually advocated and adopted below.

II. Merits Aside, The Preliminary Injunction Must Be Vacated

A. The Balance Of The Equities Precludes Injunctive Relief

1. Baltimore's asserted injuries to public health are speculative and, as a motions panel of this Court necessarily concluded, outweighed by the harms to the Government. *See* Doc. 23. To start, the warnings of dire public-health consequences depend on crediting Baltimore's own predictions about the effect of implementing the Rule over HHS's predictions that implementation of the "final rule will have the *opposite* effect." *California*, 927 F.3d at 1080. Specifically, they depend on Baltimore's view that only the existing network of Title X providers can provide effective care. *See, e.g.*, Br.67. HHS, however, came to the opposite conclusion: that public health would benefit from the Rule, which would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. While the net effect of the Rule is necessarily "difficult to quantify," *id.* at 7783, HHS's predictions about changes to the Title X provider landscape are entitled to greater deference than the City's speculation that only existing providers can serve Title X patients well.

Baltimore's predictions also appear to have been overstated. Since this Court stayed the injunction, Baltimore has been maintaining its family-planning services using

its own resources, *see* Doc. 43-1, at 10, and neither it nor the State of Maryland (the grantee of which Baltimore is a sub-grantee) has withdrawn from the Title X program. The City's brief also fails to mention a recently enacted Maryland state law that appears to shield it from any adverse effects in the event that the State of Maryland were to withdraw from the Title X program. *See* Md. Code Ann., Health-Gen. § 13-3402 (2019) (If Maryland does not accept "Title X program funds" because Title X "[d]oes not require family planning providers to provide a broad range of acceptable and effective medically approved family planning methods and services," the Governor is directed to replace the Title X federal funds with "State funds at the same level of total funds provided to the Program in the immediately preceding fiscal year.").

In all events, Baltimore's predictions are necessarily predicated on its view of the merits. Its assertion that it and other nearby providers "will be forced to withdraw" from the program due to ethical objections to the referral and counseling restrictions (Br.12), depends on its claim that those restrictions force providers to violate medical ethics. To the extent the City suggests these objections are independent of medical ethics, any harm to the public that may result from its unilateral decision to withdraw from the program based on its own ideological preferences cannot fairly be attributed to the government for purposes of the balance of equities, much less overcome the government's significant interest in enforcing its reasonable (indeed, better) interpretation of § 1008. Similarly, Baltimore's assertion that the physical-separation requirement is so "onerous … that few providers can realistically meet" it (Br.37),

depends on crediting their predictions as to those costs over HHS's reasoned judgment. *See* 84 Fed. Reg. at 7781-82. And if the Rule truly threatened Baltimore with "extraordinary and irreparable harms" (Br.67), it is (still) unclear why the City waited for over forty days to challenge it. *See* Gov.Br.42-43.

2. On the other side of the ledger, the government has a significant interest in enforcing statutes, *see Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)—an interest that is heightened when the Supreme Court has already upheld the government's construction of a statute now reflected in a regulation that a litigant seeks to enjoin. The government also has a weighty interest in declining to promote abortion through federal funds, *see, e.g.*, *Rust*, 500 U.S. at 192-93, particularly when the Supreme Court has already upheld HHS's judgment that certain activities would do so (in violation of law), and sanctioned the remedial steps HHS proposes to ensure that taxpayer dollars are not being used for that purpose. Indeed, Baltimore's asserted harms—the closure of certain clinics and curtailment of lawful Title X services—confirm that, under the 2000 regulations, Title X funds were used to promote abortion.

B. The Preliminary Injunction Is Overbroad In Multiple Respects

As we explained, the injunction here impermissibly covers every Title X provider in Maryland and every provision of the Rule. Gov.Br.43-47. Baltimore's one-page response does not rehabilitate these defects in the injunction's scope. *See* Br.68.

1. At a minimum, constitutional and equitable principles require vacating the preliminary injunction insofar as it provides statewide relief. Gov.Br.43-46. Baltimore

neither disputes that every court to enjoin the 1988 regulations in the lead-up to *Rust* did so on a party-specific basis nor explains why broader relief is necessary now. Nor does the City deny that an injunction covering Maryland creates an inequitable "one-way-ratchet" under which a victory by the government will not stop others from "run[ning] off to the 93 other districts for more bites at the apple," *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part), as starkly illustrated by the fact that the injunction obtained by Maryland in another jurisdiction has been stayed pending appeal. Gov.Br.45-46.

Baltimore instead cites (Br.68) two decisions—*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987)—in support of the injunction without further explanation. But those cases merely confirm that in some situations, such as school desegregation, providing full relief for the plaintiffs before the court necessarily affects non-parties. *See McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (distinguishing such cases); *see also Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (citing *Bresgal* for the proposition that injunctions affecting non-parties "are appropriate if necessary to afford relief to the prevailing party"). Here, by contrast, Baltimore cannot establish that a statewide injunction is necessary to redress any of its alleged injuries through generic assertions concerning unidentified providers in unspecified "surrounding areas." Gov.Br.44-45; *cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (affidavit asserting injury "from development on Forest Service land … does not suffice" to

establish standing "because it does not identify any particular site"). And even if the City could, issuing a statewide injunction on that basis would still be an abuse of discretion as an equitable matter, given that there is no justification for ordering the government to devote even more federal funds to promoting abortion when none of the "surrounding areas" has brought suit on its own behalf and Maryland has already had its bite at the apple. Gov.Br.45.

2. Finally, Baltimore offers little defense of the district court's decision to enjoin every provision of the Rule. *See* Gov.Br.46-47. Although it contends (Br.68) that the government has waived this argument—which it believes is incorrect on the merits only "as to most provisions," Doc. 21, at 10—it is *the plaintiff's* burden to justify why an injunction is necessary with respect to each provision of the Rule, and Baltimore has failed to do so. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (Courts "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before [them]."). If Baltimore wishes to obtain an injunction of the entire Rule, it is incumbent on the City to explain how each of the Rule's provisions—which, when combined, span six pages of the Federal Register—is either unlawful or inseverable. *See* 84 Fed. Reg. at 7786-91. It has not done so.

In any event, the government plainly has not "refus[ed] to identify any specific provisions that are lawful and severable with any clarity." Br.68; *see, e.g.*, Gov.Br.23 (explaining that if prenatal-referral requirement is deemed unlawful, it can be severed from the prohibition on abortion referrals); Gov.Br.47 (noting that the requirement that

Title X projects comply with sexual-abuse reporting laws is lawful and severable). Baltimore has not shown that such provisions would not "have been promulgated" absent the allegedly unlawful aspects of the Rule, and indeed cannot do so. Br.68. For example, the prenatal-referral requirement rests on HHS's judgment concerning what care is medically necessary, *see, e.g.*, 84 Fed. Reg. at 7748, 7761-62, whereas the prohibition on abortion referrals rests on § 1008, *see, e.g.*, *id.* at 7717, and could easily function without mandatory prenatal-care referrals. And Title X projects plainly can comply with sexual-abuse reporting requirements whether or not they are allowed to use federal funds for abortion referrals. *See* 42 C.F.R. § 59.17.

CONCLUSION

The district court's preliminary injunction should be vacated in whole or at least as to its overbroad scope.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains of 6,470 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Jaynie Lilley
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