IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants.*	Case No. 1:19-cv-01103

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Treatises

INTRODUCTION

The Mayor and City Council of Baltimore's ("Baltimore") Complaint states ten claims for relief. At this early stage, Baltimore has alleged sufficient facts to state a plausible claim under all ten claims. Defendants' motion to dismiss therefore should be denied. Baltimore would be glad to provide oral argument in support of this opposition to Defendants' motion.

This opposition relies to a limited extent on facts and documents subject to judicial notice. The Court may consider such facts and documents without converting the motion under Rule 12(d). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Courts "routinely take judicial notice of information contained on state and federal government websites." *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017).

BACKGROUND

The Court's statement of the facts in its memorandum opinion granting Baltimore's motion for preliminary injunction correctly states the case. *See* Opinion at 3-15, ECF 43 ("Op.")

STANDARD OF REVIEW

"Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Galante v. Ocwen Loan Servicing LLC*, No. CIV.A. ELH-13-1939, 2014 WL 3616354, at *8 (D. Md. July 18, 2014) (Hollander, J.) (quoting *Hartmann v. Calif. Dept. of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013)). "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (citation omitted); *accord Davison v. Randall*, 912 F.3d 666, 691 (4th Cir. 2019).

ARGUMENT

I. BALTIMORE HAS STANDING TO BRING ALL THE CLAIMS ASSERTED IN THE COMPLAINT

Defendants do not dispute that Baltimore has plausibly alleged Article III standing. Nor could they. Baltimore has suffered an injury in fact, fairly traceable to Defendants' actions, and its injury is likely to be redressed by a favorable ruling. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Thus, standing is no barrier to any of Baltimore's claims, including its claims under the Religious Freedom Restoration Act ("RFRA") and the Fifth Amendment. Defendants argue that Baltimore lacks "third party standing" to bring RFRA and Fifth Amendment claims. *See* Memo. Supp. Motion to Dismiss at 37, ECF 67-1, ("MTD"). But the Administrative Procedure Act (APA) grants parties with Article III standing the right to sue to "set aside agency action" "not in accordance with law" or "contrary to constitutional right." 5 U.S.C. § 706. By doing so, Congress granted an express right of action to persons who otherwise might be barred by so-called "prudential" standing rules. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (explaining that Congress has this power); *accord Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 & n.3 (2014) ("[T]hird-party standing is closely related to the question whether a person in the litigant's position will have a right of action on the claim."); *see PDK Labs. Inc. v. DEA*, 362 F.3d 786, 791-94 (D.C. Cir. 2004).

Because Baltimore has Article III standing to challenge the Rule, and the APA authorizes Baltimore to seek judicial review to test the Rule's legality, Baltimore has standing to raise all of its claims. *See* 3 Richard J. Pierce, Jr., Administrative Law Treatise § 16.9, at 1521 (5th ed. 2010) ("An injured plaintiff has standing under the APA unless Congress intended to *preclude* judicial review at the behest of parties in plaintiff's class." (emphasis added)); *see also White*

Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., dissenting) (same), *rev'd by Michigan v. EPA*, 135 S.Ct. 2699 (2015). Defendants waived any argument that Baltimore is outside the "zone of interests" protected by RFRA and the Fifth Amendment by failing to raise it in their motion to dismiss. As the health care provider for thousands of its citizens, Baltimore would have third-party standing to assert its patients' interests in any event. *See* Compl. ¶ 40; *see also Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976).

II. *RUST v. SULLIVAN* DOES NOT FORECLOSE ANY OF BALTIMORE'S CLAIMS IN THIS CASE

Rust v. Sullivan, 500 U.S. 173 (1991), does not foreclose any of Baltimore's claims. The Nondirective Mandate and the Non-Interference Mandate were enacted after *Rust* and do not conflict with *Rust*. Op. at 16, 19. The Rule's substantive reasonableness, the adequacy of HHS's justification for it, and the adequacy of the public procedures used to craft it, are to be tested against the actions of the agency *today*, not 30 years ago. *See id.* at 22. Finally, Baltimore's other claims—that the Rule violates Title X itself, RFRA, and Equal Protection, and the specific First Amendment arguments Baltimore now raises—were not analyzed in *Rust*. Judicial decisions are not binding precedent for points that were not addressed. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *United States v. More*, 7 U.S. 159, 172 (1805) (Marshall, C.J.) (explaining that in an earlier case "[n]o question was made … as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.").

III. THE COMPLAINT STATES TEN PLAUSIBLE CLAIMS FOR RELIEF

A. The Rule Violates the Non-Interference Mandate (Count I)

The Rule violates the Non-Interference Mandate. The Non-Interference Mandate places a clear limitation on HHS's authority: HHS *shall not* promulgate regulations unreasonably creating barriers to health care, requiring doctors to violate medical ethics, or restricting doctors from communicating all relevant information to their patients. *See* 42 U.S.C. § 18114.

The Rule's directive counseling requirements and its draconian separation requirements violate the Non-Interference Mandate for the reasons this Court has already explained. Op. at 17-18. At minimum, the rule requires physicians in the Title X program to violate medical ethics in direct contravention of the Mandate. *See id.* And by imposing unnecessary physical and financial separation requirements that most existing Title X providers could not realistically meet, the Rule violates the Mandate's prohibition on erecting unreasonable barriers to care. *See id.* at 18.

Defendants' counterarguments, rejected earlier by the court, are unconvincing. The "notwithstanding" clause does not limit the Non-Interference Mandate's reach. *See id.* at 18; *but see* MTD at 25. The Rule's violation of the Non-Interference Mandate is not waived and not subject to waiver. *See Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 182 (4th Cir. 2018) (purely legal questions are not subject to waiver); *1000 Friends of Md. v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001) (raising an issue by implication is sufficient); *but see* MTD at 22-23. Moreover, the fact that the Administrative Record shows that HHS in fact considered the Non-Interference Mandate in fashioning the Rule means that the waiver doctrine—designed to ensure an agency has "an opportunity to consider the matter"—does not make sense here. *1000 Friends of Md.*, 265 F.3d at 228 (quoting *Unemp't Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)). The fact that *Rust* upheld a similar rule, and that Congress has enacted other

conscience statutes, does not make the new Rule ethical or consistent with the Non-Interference Mandate. *Contra* MTD at 24-25. And it is immaterial that Title X is a grant program. *Contra id.* at 23-24. The Rule still interferes with doctor-patient communications, requires physicians in the program to violate medical ethics, and creates unreasonable barriers for individuals seeking appropriate medical care by threatening to withhold money. *Contra id.*

B. The Rule Violates the Nondirective Mandate (Count II)

The Rule violates the Nondirective Mandate. Starting in 1996, five years after *Rust*, and in every year since, Congress has included a Title X rider in its appropriations acts. *E.g.*, Pub. L. No. 104-134, 110 Stat. 1321-221 (1996); *see also* Continuing Appropriations Act, 2019, P.L. 115-245, Div. B, Title II, §§ 207 and 208 (2018) (the "Nondirective Mandate"). In the rider, Congress mandates "that all pregnancy counseling shall be nondirective." *Id.*

The Rule's bar on abortion referrals, and its requirement of prenatal referrals, each violate the Nondirective Mandate for the reasons this Court has already given. *See* Op. at 18-20. Dictionaries, other statutes, HHS's regulations, usage of the term within the medical field, and HHS's own comments in the preamble to the Rule all show that "nondirective counseling" "encompasses referrals." *Id.* at 19-20. Moreover, "[r]equiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is coercive, not 'nondirective.'" *Id.* at 20. Similarly, "[r]equiring providers to provide a referral list that is limited to those that do not provide abortion, even if the client specifically requests an abortion referral, is coercive, not 'nondirective.'" *Id.* Additionally, "[r]equiring providers to exclude abortion as one of multiple options available to a client facing an unwanted pregnancy, especially if she has asked about that option, is coercive, not 'nondirective.'" *Id.*

Defendants' counterarguments remain unpersuasive. Contrary to Defendants' assertion, the Nondirective Mandate does not conflict with *Rust* and therefore does not "supplant" or

"impliedly repeal" anything in *Rust*. MTD, at 15, 20-22. And contrary to Defendants' assertion, prohibiting abortion referrals forces health care providers to engage in directive counseling by requiring them to withhold medically relevant information and to refuse to provide it when asked for it. *See id.* at 16. The Nondirective Mandate does not require "equal[ity]" between options, as Defendants argue, *see id.* at 19-20, but rather the provision of "neutral, nondirective information" to patients, which includes abortion referrals when requested. *See* 84 Fed. Reg. at 7746.

C. The Rule Violates Title X's Requirement That Title X Services Be "Voluntary" and Non-Coercive (Count III)

The Rule violates Title X's "voluntariness" requirement. This claim was never analyzed in *Rust* and thus *Rust* does not foreclose it. The Title X program requires that services be "strictly voluntary" and "never . . . coercive." 84 Fed. Reg. at 7724 ("[F]amily planning methods and services are never to be coercive and must always be strictly voluntary"); *id.* at 7728 & 7731; *see* 42 U.S.C. § 300a-5, 84 Stat. 1504 § 2 ("services . . . shall be voluntary"). As HHS previously warned, if providers were to disregard patients' decisions about their health care and, for example, provide information that the patient does not want or need, "there would be a real question as to whether the counseling was truly nondirective or whether the client was being steered to choose a particular option." 65 Fed. Reg. 41273. By requiring physicians to make prenatal referrals even when unwanted, and to withhold abortion information even when requested, the Rule eliminates the ability of patients to make fully informed "voluntary" choices about their medical care, in violation of Title X.

D. The Rule Violates the Religious Freedom Restoration Act (RFRA) (Count IV)

The Rule violates RFRA, 42 U.S.C. § 2000bb *et seq.*, because Baltimore has plausibly alleged that it substantially burdens religious exercise and cannot withstand strict scrutiny. RFRA prohibits the government from substantially burdening a "person's" exercise of religion

except in furtherance of a compelling governmental interest and through the least restrictive means of furthering that compelling interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-96, 705 (2014). RFRA protects not only Baltimore's religiously observant physicians and patients, but also Baltimore itself because corporations are "person[s]" protected by RFRA. *See id.* at 707-708. At the pleading stage, Baltimore need not identify a specific individual to make out a plausible RFRA claim. *See Lujan*, 504 U.S. at 561.

Baltimore has plausibly alleged that the Rule interferes with the religious exercise of Baltimore, its patients, and its physicians. The Rule violates tenets of multiple faith traditions, including Episcopalianism, *see* http://bit.ly/2NqKqxP (discussing "Childbirth and Abortion"), Unitarian Universalism, *see* http://bit.ly/2KSuUZN (discussing "Right to Choose"), denominations of Judaism, *see* https://bit.ly/2Hp669L, and denominations of Islam, *see* http://bit.ly/2NyqBoj. Once Baltimore has established that the Rule impinges on religious exercise, the burden shifts to the government to prove that the Rule meets the requirements of strict scrutiny because "[f]ederal courts have no business addressing" "whether the religious belief asserted in a RFRA case is reasonable." *Hobby Lobby*, 573 U.S. at 724. The only question is whether the penalty—here, ejection from the Title X program—is a "substantial burden." *Id.* Because the Rule interferes with religious exercise, and eliminating access to Title X would also substantially burden religious exercise for Baltimore, physicians, and patients, *see id.* at 721, the government must produce *evidence* at summary judgment or trial showing that the Rule is narrowly tailored to achieve a compelling government interest. *See id.* at 728.

E. The Rule Violates the First Amendment (Count V)

The Rule violates the First Amendment for five different reasons, none of which are foreclosed by the holding in *Rust*. To be sure, *Rust* upheld the 1988 Rule against a "facial" First Amendment challenge. 500 U.S. at 192-95, 196-200**.** But all five reasons for holding that the

new Rule violates the First Amendment depend on arguments not addressed or analyzed in *Rust*, facts specific to the new Rule, changes to the Title X statute that occurred after *Rust* was decided, or subsequent Supreme Court precedents that bear more directly on the legality of the new Rule than *Rust* does.

First, the Rule violates the First Amendment because it unconstitutionally interferes with the doctor-patient relationship. In *Rust*, the Supreme Court explained that "[i]t could be argued" that "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 Court continued, "[w]e need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Id.* That is a *factual* conclusion, not a holding, and Baltimore has plausibly alleged that the new Rule does *in fact* "significantly impinge upon the doctor-patient relationship" by destroying the trust that Baltimore's patients have in their doctors. *See, e.g.*, Compl. ¶¶ 7, 90, 182. The fact that numerous women consider their relationship with their Title X provider to be the most important doctor-patient relationship in their lives, *see id.* ¶ 40, and the fact that patients are likely to feel misled and betrayed by their health care provider if the provider refuses to provide necessary medical counseling, *see id.* ¶ 7 (alleging that the Rule will cause irreparable harm to doctor-patient relationships), distinguishes the facts here from the facts at issue in *Rust*, *id.* ¶ 182-84.

The Supreme Court's holding in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), makes clear that the Rule violates the First Amendment by unconstitutionally impinging on the doctor-patient relationship. In *Velazquez*, the Court held unconstitutional a law that prohibited federally funded Legal Services Corporation lawyers from providing certain advice and making

certain legal arguments. *Id.* at 542-43. The Court struck down the provision specifically because lawyers have a professional obligation to represent the interests of their clients. *Id*. As Justice Scalia recognized in his dissent, under the reasoning in *Velazquez*, the Supreme Court should have struck down the 1988 Rule in *Rust* because doctors have a similarly powerful professional obligation to their patients. *Id.* at 554 (Scalia, J., dissenting). The Supreme Court has continually reaffirmed and strengthened the *Velazquez* principle, holding that where the government manipulates the content of professional speech, especially in a health care setting, its actions must, at minimum, meet intermediate scrutiny—and likely strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375-76 (2018); *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011). Where Supreme Court decisions arguably conflict, lower courts are bound to follow the cases that more directly control. *See, e.g.*, *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363-64 (4th Cir. 2013); *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 164 (3d Cir. 2016). Because the Rule prevents physicians from providing professional advice that they believe is in the best interests of their patients, it violates the First Amendment in light of *Velazquez*.

Second, the Rule violates the First Amendment because it unconstitutionally restricts private speech on the basis of its viewpoint. The Supreme Court has clarified in its decisions after *Rust* that the 1988 Rule's restrictions were permissible because Title X was, at that time, a government messaging program, and therefore the regulated speech was "government speech." *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 216-17 (2013); *Velazquez*, 531 U.S. at 540-41; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832-33 (1995).

The Supreme Court's later cases leave no doubt that to the extent Title X was a government-messaging program when *Rust* was decided, it no longer is. As the Supreme Court explained recently, courts "must exercise great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). "[T]he government-speech doctrine … is susceptible to dangerous misuse" for "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, [the] government could silence or muffle the expression of disfavored viewpoints." *Id.* Congress's enactment of the Nondirective Mandate and Non-Interference Mandate show, at least plausibly, that Congress intends to fund "private" physician speech in the Title X program, not "government speech," and therefore that Title X is not a government-messaging program. *See Rosenberger*, 515 U.S. at 834 (holding that where the government creates a program that is not a government-speech program, the government "may not discriminate based on the viewpoint of private persons whose speech it facilitates").

Third, the Rule violates the First Amendment by violating patients' rights to receive truthful and unbiased information from their doctors. The First Amendment enshrines a right to "receive information and ideas." *Va. State Bd. Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Supreme Court has repeatedly reaffirmed that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Va. State Bd. Pharm*, 425 U.S. at 770); *accord Sorrell*, 564 U.S. at 578. "[Z]eal to protect the public from 'too much information'

[cannot] withstand First Amendment scrutiny." *Meese v. Keene*, 481 U.S. 465, 482 (1987). This claim was never analyzed in *Rust* and *Rust* does not speak to it. Baltimore has made a plausible showing that restricting access to medically relevant information in the Title X program violates the First Amendment by denying patients' rights to receive information.

Fourth, the Rule violates the First Amendment by selectively withholding information from patients on the basis of viewpoint. The Supreme Court has held that the government may not exclude certain disfavored topics or teachers from public school classrooms or remove certain disfavored books from libraries on the basis of their viewpoint. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 (1982) (plurality) (holding that a school board may not remove books from school libraries on the basis of their viewpoint); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (holding that the government may not "cast a pall of orthodoxy over the classroom"); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923). Just as the government may not selectively remove certain viewpoints from government-funded programs—schools and libraries—it may not selectively remove certain viewpoints from government-funded health care services programs. This claim was never analyzed in *Rust* and *Rust* does not speak to it. Baltimore has made a plausible showing that the Rule "cast[s] a pall of orthodoxy" over Title X providers' discussions with their patients, and therefore the Rule violates the First Amendment.

Fifth, the Rule violates the First Amendment because it was intended to withhold a benefit from certain individuals on the basis of their viewpoint. Government action, neutral on its face, but *motivated* by a desire to suppress a particular viewpoint, is unconstitutional. *See Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1417 (2016); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 736 (2010)

(Alito, J., dissenting) (citing *Crawford v. Board of Ed. of L.A.*, 458 U.S. 527, 544 (1982)). This claim was never analyzed in *Rust* and *Rust* does not speak to it. Baltimore has made a plausible showing that the procedural irregularities and inadequate reasoning that accompany the Rule reveal that it is a pretext for HHS's unlawful motive to force certain health care providers out of the Title X program in order to suppress their viewpoint.

F. The Rule Violates the Equal Protection Component of the Fifth Amendment's Due Process Clause (Count VI)

The Rule violates the Fifth Amendment Due Process Clause's protections against sex discrimination because it targets women for differential treatment from men without an "exceedingly persuasive justification" for doing so. *See United States v. Virginia*, 518 U.S. 515, 531 (1996). Where the government targets one sex for differential treatment its action must meet intermediate scrutiny. *Id.* at 533; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *accord Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *see also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003) (applying a "heightened scrutiny" analysis). The Rule targets women for differential treatment by imposing specialized counseling requirements only on women who become pregnant. 42 C.F.R. § 59.14 (only women receive post-conceptional counseling); *see Hibbs*, 538 U.S. 721, 731 & n.5, 734 & n.6, 736 (2003) (classification on the basis of pregnancy is tantamount to classification on the basis of sex where it promotes sex-based stereotypes); *see also Nashville Gas Co. v. Satty*, 434 U.S 136, 142 (1997) (imposition of a burden on pregnant women—depriving them of job seniority after a pregnancy leave—constituted sex discrimination under Title VII). A rule violates equal protection *either* because it discriminates on its face or because it was motivated by an unconstitutional purpose to discriminate. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). A sex-

discrimination claim was not raised or analyzed or decided in *Rust* and therefore *Rust* does not foreclose this clam.

The Rule plausibly constitutes unconstitutional sex-discrimination for three different reasons. *First*, the Rule constitutes unconstitutional sex discrimination because it is a sex-based classification. *See Adkins v. Rumsfeld*, 464 F.3d 456, 468 (4th Cir. 2006). If a woman seeks advice about her health care treatment options at a Title X clinic, the Rule limits the information she can receive about pregnancy because she is a woman. *See* 42 C.F.R. § 59.14. In contrast, if a *man* seeks advice about any of his health care treatment options at a Title X clinic, the Rule places absolutely no restrictions whatsoever on the information or advice he may receive about any medical condition he might have. *Second*, the Rule constitutes unconstitutional sex discrimination because it promotes unconstitutional sex stereotypes. *See, e.g.*, *Hibbs*, 538 U.S. at 730-36 (laws that promote gender stereotypes must meet intermediate scrutiny); *Virginia*, 518 U.S. at 533-34. If a woman visits a Title X clinic and tells her health care provider that she is pregnant, the Rule requires the provider to encourage her to become a mother by referring her to a prenatal care provider. *See* 42 C.F.R. § 59.14. But if a man visits a Title X clinic and tells his health care provider that his wife is pregnant, the Rule does not require the provider to encourage him to become a father. The Rule promotes the outdated stereotype that women are exclusively responsible for family planning. *Third*, the Rule plausibly reveals an intent to discriminate against women in violation of *Feeney*, 442 U.S. at 274. The Rule clearly has a disparate impact on women, and even without further development of the record, there is evidence—such as the improper rulemaking process—that suggests that the purpose of the Rule is to discriminate on the basis of sex. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining factors courts look to in judging intent to discriminate).

Because the Rule plausibly constitutes sex-based discrimination, the Government must meet heightened scrutiny by coming forward with persuasive *evidence* at summary judgment or trial showing that there is an "exceedingly persuasive justification" for the Rule that "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 533 (internal citations omitted).

The cases cited by Defendants, MTD at 43, are irrelevant here. Neither *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), nor *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), involved constitutional sex discrimination claims. *See Bray*, 506 U.S. at 266-68 (holding that 42 U.S.C. § 1985(3) did not provide a federal cause of action against private persons obstructing access to abortion clinics); *Greenville*, 222 F.3d at 172-73 (rejecting argument that strict scrutiny should apply to targeted regulation of abortion providers—facilities and physicians—because it discriminated against the "fundamental right" to abortion). And the quote Defendants misleadingly use from *Bray* cites to two cases challenging bans on Medicaid funding for abortion, neither of which involved sex discrimination claims. *Bray* at 273 (citing *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980)).

As *Maher* made clear, provision of government funding is not some constitution-free zone. While the government is free to decide what it funds, "the manner in which it dispenses benefits is subject to constitutional limitations." *Maher*, 432 U.S. at 469-70. Finally, Defendants' warning that if the Rule constitutes sex discrimination, "then every statute or regulation touching abortion … would discriminate against (or in favor of) women," MTD at 43, is incorrect. The Rule is not unconstitutional because it treats abortion differently. The Rule is unconstitutional because it treats *women* differently. The Rule is an impermissible sex-classification

that discriminates against *women* on its face, *see* 42 C.F.R. § 59.14 (referring exclusively to women and using only female pronouns), and promotes unconstitutional sex-stereotypes by promoting the idea that only *women* are responsible for making family-planning decisions.

G. The Rule Is Arbitrary and Capricious Because It Is Inadequately Explained and Substantively Unreasonable (Counts VII and VIII)

The Rule is arbitrary and capricious. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Op. at 20-21 (quoting 5 U.S.C. § 706). In conducting their review, courts "must engage in a searching and careful inquiry of the [administrative] record, so that we may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Id.* at 21 (quoting *Casa De Maryland v. DHS*, 924 F.3d 684, 703 (4th Cir. 2019)). An agency rulemaking is arbitrary and capricious if, in coming to its decision, the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)). Where, "as here, an agency adopts a rule that directly contradicts prior agency conclusions of fact and law, it must acknowledge that it is doing so and give a reasonable justification for the change." *Id.* at 21-22 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). An agency must justify its decision to adopt a particular interpretation of a statute it administers based on the evidence before it at the time of the rulemaking; the agency cannot simply declare that it believes one interpretation constitutes the "better" interpretation of the statute. *See id.* at 22-23; *see Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 559

(D.C. Cir. 2016) ("[A]gency action is always subject to arbitrary and capricious review under the APA, even when it survives *Chevron* Step Two.").

1. Failure to Explain Departure From Prior Interpretation of the Nondirective Mandate. The Rule is arbitrary and capricious because HHS failed to explain or even acknowledge the change in its position on the best interpretation of the Nondirective Mandate. In the 2000 Rule, HHS concluded unequivocally that the Nondirective Mandate *requires* physicians to provide abortion information when requested—including "nondirective counseling and referrals"—as a part of pregnancy counseling, and that it was adopting that policy in the regulations *as a result of* the Mandate. 65 Fed. Reg. at 41273. In discussing the "requirement for nondirective counseling and referral," HHS noted that the four most recent appropriations bills "*required* that pregnancy counseling in the Title X program be 'nondirective'" and stated that "Congress has also repeatedly indicated that it considers this requirement to be an important one." *Id.* (emphasis added). "*Consequently*, the Secretary … decided to reflect this fundamental program policy in the regulatory text." *Id*. (emphasis added). HHS further concluded that the Nondirective Mandate *required* the provision of counseling and referral for abortion on request because "totally omitting information on a legal option or removing an option from the client's consideration necessarily steers her toward the options presented and is a *directive* form of counseling." *Id.* (emphasis added). In the new Rule, HHS nowhere explains why it reversed its conclusion that the Nondirective Mandate requires physicians to provide abortion referrals. HHS does not even display an awareness that it is changing its earlier interpretation of the Nondirective Mandate, in contravention of *Encino Motorcars.*

2. Medical Ethics. The Rule is arbitrary and capricious because HHS's explanation in the preamble that HHS "disagrees" that the Rule infringes on the legal, ethical, and professional

obligations of medical professionals is inadequately explained and contrary to the evidence before the agency. *See* 84 Fed. Reg. at 7724, 7748. HHS nowhere explains (1) why it departed from its view—expressed in the 2000 Rule—that medical ethics require nondirective counseling and referral, *see* 65 Fed. Reg. 41273-74; (2) why it departed from its own evidence-based assessment of the importance of nondirective counseling and medically appropriate referrals (as reflected in the Quality Family Planning Guidelines that Title X grantees are required to follow and which HHS reaffirmed in the December 2017 QFP Update, Compl. ¶¶ 89-91); and (3) what, if any, evidence the agency had showing that requiring doctors to withhold medically relevant information from patients is consistent with medical ethics. The Rule fails to explain why the agency changed its position on medical ethics and how the evidence before the agency supports its new conclusion.

3. Inadequate Consideration of Reliance Interests and Consequences. The Rule is arbitrary and capricious because HHS inadequately considered the reliance interests that would be disrupted by its abrupt change in agency policy, and because HHS's explanation for why it disregarded those interests was contrary to the evidence before the agency. HHS stated in the Rule that "[t]he Department finds *no evidence* to support the assertion that the final rule will drive current providers from the Title X program." 84 Fed. Reg. at 7749 (emphasis added). HHS stated in the Rule that "*commenters did not provide evidence* that the rule will negatively impact the quality or accessibility of Title X services. And the Department believes that this rule will likely improve quality and accessibility for Title X services." *Id.* at 7780. HHS stated in the Rule that "[c]ommenters offer *no compelling evidence* that this rule will increase unintended pregnancies or decrease access to contraception." *Id.* at 7785 (emphasis added). HHS stated that it was "*not aware, either from its own sources or from commenters,* of actual data that could

demonstrate a causal connection between the type of changes to Title X regulations contemplated in this rulemaking and an increase in unintended pregnancies, births, or costs associated with either." *Id.* at 7775 (emphasis added). HHS asserted its belief that "these final rules will contribute to *more clients being served, gaps in service being closed, and improved client care*." *Id.* at 7723 (emphasis added).

All of these statements run counter to the evidence before the agency. Some of them are so implausible that they could not be ascribed to a difference in view or the product of agency expertise. HHS had before it significant evidence that the Rule would seriously disrupt existing reliance interests, limit access to Title X care, and force an enormous number of providers out of the Title X program. BCHD Comment 3, http://bit.ly/2Gho8JF; Health Officers Comment 2, http://bit.ly/2V0ES1k; Planned Parenthood Comment 15-20, 30-33, http://bit.ly/2Dg5UYi; Guttmacher Comment 9-10, http://bit.ly/2PdgLXO; NFPRHA Comment 33, 37, http://bit.ly/2VVVOmw; Ryan Health Comment 3, http://bit.ly/2Gpdphs; AMA Comment 4, http://bit.ly/2Zexyyi. HHS relied on only one single letter as evidence that new providers would enter the program, specifically faith-based providers, that might be able to fill gaps in services. *See* 84 Fed. Reg. at 7780 & n.138. Commenters not only informed HHS that they would be forced to withdraw from the program because it violated medical ethics, but also provided HHS with the "actual data," *id.* at 7775, that HHS said it did not have before it. *See* Brindis Comment 12-13, http://bit.ly/2VM9Uag; Planned Parenthood Comment 81, http://bit.ly/2Dg5UYi.

4. Inadequate Consideration and Explanation of Costs and Benefits. The Rule is arbitrary and capricious because HHS inadequately considered the likely costs and benefits of the physical and financial separation requirement. HHS nowhere meaningfully explains why the current regulations are inadequate, and—as the record plainly shows—they are not. For decades,

those regulations have ensured that Title X funds are not used to provide abortions, and Title X providers have long relied on and complied with them. The Rule cites no evidence of misuse of funds over the past half-century. Instead of evidence, HHS invoked "risk[s]" of "appearance[s]," "perceptions," and "potential" misuse of funds, 84 Fed. Reg. at 7764-65, without pointing to anything to suggest that those risks or perceptions are anything more than speculation. In short, HHS devised the Separation Requirement as a solution in search of a nonexistent problem. That does not suffice for reasoned decision-making. *See Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988).

In addition to citing no quantifiable benefits to the Separation Requirement, the Rule drastically underestimates its costs. HHS estimated that affected grantees will incur average costs of $30,000, 84 Fed. Reg. 7782, but HHS provides no support for its cost estimate. The evidence before the agency showed that this unexplained number is nowhere close to the actual cost of compliance: Planned Parenthood estimated average capital costs of nearly $625,000 per affected service site. Planned Parenthood Comment 31-32, http://bit.ly/2Dg5UYi; *see also* NFPRHA Comment 37, http://bit.ly/2VVVOmw. Furthermore, HHS entirely failed to account for ongoing (not just one-time) costs, including those associated with required duplication of staff and contracts for goods and services—costs that can reach millions of dollars for some grantees. *See* Health Officers Comment 2, http://bit.ly/2V0ES1k; Planned Parenthood Comment 32-33, http://bit.ly/2Dg5UYi.

The Rule is arbitrary and capricious for additional reasons, but these reasons are alone sufficient for Baltimore's complaint to survive a motion to dismiss.

H. HHS's Rulemaking Process Deprived the Public of a Meaningful Opportunity to Participate in Violation of the Administrative Procedure Act (Count IX)

The Rule must be vacated and remanded to the agency because the agency failed to give Baltimore and the public a meaningful opportunity to comment. The APA requires agencies to "give interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). "The important purposes of this notice and comment procedure cannot be overstated." *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012). The fundamental question is whether the agency gave interested parties a "meaningful opportunity" to comment. *Id.* at 763, 770; *see Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019). "That means enough time with enough information to comment." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

There is no minimum length for a comment period in the APA. *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984). Sixty days is generally accepted as the "reasonable *minimum* time for comment" on a typical rule. *Id.* But "there is scarcely anything talismanic about" a "particular length of time." *Id.* Even sixty days may be "an inadequate time to allow people to respond to proposals that are complex or based on scientific or technical data." *Id.* at 1201. Where an issue warrants "caution" because of its sensitivity or difficulty "[t]he need for a meaningful comment period" is "particularly acute." *Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010). Courts are "strict in reviewing an agency's compliance with procedural rules" and "in reviewing an agency's procedural integrity, the court relies on its own independent judgment." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (internal citations omitted).

Baltimore has made a plausible claim that HHS deprived the public of a "meaningful opportunity" to comment on the proposed rule. Baltimore has plausibly alleged that HHS radically departed from rulemaking procedures before announcing the proposed rule depriving Baltimore of a meaningful opportunity to comment. The Proposed Rule was moved through the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB)—a process that even for an insignificant rule typically takes months—in less than two weeks. *See* Hassan & Harris Comment, http://bit.ly/2JJiF1h. The Proposed Rule never appeared on the public Fall 2017 or Spring 2018 Regulatory Agendas, *see id.*, even though agencies are supposed to place anticipated regulatory actions on the Agenda twelve months in advance. *See* OMB, *About the Unified Agenda*, http://bit.ly/2JPVcLT. There was no early outreach to affected stakeholders, as is required under Executive Order 13563, § 2(c) and associated OMB/OIRA guidance. *See* Hassan & Harris Comment, http://bit.ly/2JJiF1h. Despite that lack of public engagement, OMB denied stakeholder groups' requests for meetings during the two weeks the Proposed Rule was under Regulatory Review prior to its proposal in the Federal Register. *See id.* Numerous commenters, including the Baltimore City Health Department, the State of New York, Planned Parenthood, and two United States Senators, sought extensions of the comment period, informing HHS and OMB that under the comment timeline HHS provided they would be unable to investigate both legal and factual issues necessary to meaningfully comment on the proposed rule. *See* Maryland State Congressional Delegation Comment, at 2, http://bit.ly/2KSnS7x (quoting a letter from the Baltimore City Health Department); *see also* Planned Parenthood Comment, at 75, http://bit.ly/2Dg5UYihttp://bit.ly/2Dg5UYi; Hassan & Harris Comment, at 2, http://bit.ly/2JJiF1h; New York State Comment, at 1-2, http://bit.ly/2L4OTmZ; Legal Voice Comment, at 1-2, http://bit.ly/2TYBnVV; Governor of

Connecticut Comment, at 1, http://bit.ly/2KUdJr3; Universal Healthcare Foundation of Connecticut Comment, at 2, http://bit.ly/2Ul3L3p.

Lack of notice and opportunity for comment prejudiced Baltimore. The inadequate comment period deprived Baltimore and other commenters of sufficient opportunity to evaluate and bring to HHS's attention: (1) the statutory authority for the proposed rule and the limits on HHS's authority to promulgate it; (2) the interaction of the proposed rule with other federal, state, and local laws and policies; (3) the economic impact and compliance costs associated with the proposed rule; and (4) the public health impacts of the proposed rule. Commenters would have even more squarely raised the Non-Interference Mandate, 42 U.S.C. § 18114, had HHS held the comment period open for a longer period. Commenters would also have marshaled stronger evidence that HHS's cost estimates for the Rule were wildly inaccurate. *See* 84 Fed. Reg. at 7785 (claiming commenters submitted insufficient evidence on the cost estimates of the rule); *see also id.* at 7781 (similar); *see also* Compl. ¶ 228 (the Rule did not sufficiently identify and quantify the costs of the rulemaking).

The need for an extended comment period was "particularly acute" in this case. *Hollingsworth*, 558 U.S. at 193. The last time HHS finalized a Rule of this magnitude—the 2000 Rule—it took seven *years*. *See* 65 Fed. Reg. 41270 (July 3, 2000) (final rule); 58 Fed. Reg. 7462 (Feb. 5, 1993) (proposed rule). HHS's Rule reversed a rule that was seven years in the making and an agency policy that had endured for nearly fifty years. Yet HHS held open the comment period on the new Rule for only two *months*, without giving the public any notice that the Rule was even being contemplated. The Rule applies to over $286 million in annual Title X spending and affects the lives of over 4 million low-income Americans, along with health care services provided by every State. Compl. ¶¶ 1, 51, 53, 56, 60, 136. Title X saves the health care system

over $7 billion annually by preventing diseases and unintended pregnancies, and is responsible for massively reducing the incidence of abortion in this country by promoting contraception and family planning. Guttmacher Comment 19, http://bit.ly/2PdgLXO. The proposed Rule was likely to result—and has resulted, *see* Press Release (Aug. 19, 2019), https://bit.ly/30xzUs5—in over forty percent of existing providers leaving the Title X program, along with at least four States. Compl. ¶ 140. Baltimore has plausibly alleged that HHS needed to give parties more than sixty days to investigate the legal and factual basis for the Rule and provide comment to the agency, and that its failure to do so prejudiced Baltimore.

I. The Rule Is Unconstitutionally Vague (Count X)

The Rule violates the Fifth Amendment Due Process Clause because it is unconstitutionally vague. A regulation is unconstitutionally vague in violation of the Due Process Clause "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). When First Amendment rights are at stake, courts apply the vagueness analysis more strictly. The rationale for this rule is that "'First Amendment freedoms need breathing space to survive.'" *Keyishian*, 385 U.S. at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).

Baltimore has plausibly alleged that multiple provisions of the Rule are unconstitutionally vague because they invite arbitrary enforcement or do not afford a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, or both. *See, e.g.*, Compl. ¶ 119 (alleging HHS admits "it may provide further guidance to grantees on [counseling] issue"); *id.* ¶¶ 122, 153, 232-236. The Rule purports to permit a medical provider to discuss "nondirective pregnancy counseling" under 42 C.F.R. § 59.14(b)(1)(i), 84 Fed. Reg. at 7789. Yet it is impossible to discern what a provider may discuss with respect to abortion,

particularly considering the Rule's vague prohibition of provider actions that "assist women to obtain abortions," "increase the availability or accessibility of abortion," or "encourage, promote or advocate abortion as a method of family planning." 42 C.F.R. § 59.16. The Rule is also ambiguous as to whether Title X providers may refer patients for abortions in cases where an abortion is medically necessary but not a medical emergency. *See* § 59.14(b)(2) (allowing referral to an "appropriate provider of medical services" when "emergency care is required"). The Rule provides only one example of an emergency warranting an abortion referral—a life-threatening ectopic pregnancy—but does not specify whether such a referral is allowed when a pregnancy endangers the patient's health or even life, other than in an imminent emergency. § 59.14(e)(2). The Rule's failure to adequately distinguish between permissible and prohibited medical advice will chill a substantial amount of legitimate—and, in many instances, life-saving—speech. A provider attempting to counsel a patient on her specific health risks may lose Title X funding if she steps into the Rule's vast grey area. The government has failed to provide a single example of how a provider could possibly provide complete nondirective pregnancy counseling without encouraging, promoting, advocating, or referring for abortion, and admits that it "anticipates" that it may need to "provide further guidance to grantees on this issue." Compl. ¶ 119. The Rule's halfhearted nod to "options" counseling does not alleviate the ambiguity: when viewed in light of the prohibition on referrals or "support" for abortion, and the severe consequences of a misstep, the options-counseling provision is illusory.

The separation requirements are also vague and subjective, including the requirement that recipients have separate facilities, separate staff, and separate medical record systems from any programs that refer for abortion. Compl. ¶¶ 10, 12, 97, 122-23, 153. These questions surrounding the basic interpretation and implementation of several key provisions of the Rule are

immediate and not, as the government argues, merely hypothetical. Accordingly, at least for purposes of a motion to dismiss, Baltimore has plausibly alleged that the Rule is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Dated: August 26, 2019

Respectfully submitted,

By: */s/ Andre M. Davis*
Andre M. Davis #00362
City Solicitor

Suzanne Sangree #26130
Senior Counsel for Public Safety & Director of Affirmative Litigation

CITY OF BALTIMORE
DEPARTMENT OF LAW
City Hall, Room 109
100 N. Holliday Street
Baltimore, MD 21202
443-388-2190
andre.davis@baltimorecity.gov
suzanne.sangree2@baltimorecity.gov

Priscilla J. Smith (*pro hac vice*)
Faren M. Tang (*pro hac vice*)
REPRODUCTIVE RIGHTS & JUSTICE PROJECT
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
priscilla.smith@ylsclinics.org
127 Wall Street
New Haven, CT 06511
faren.tang@ylsclinics.org

Stephanie Toti (*pro hac vice*)
LAWYERING PROJECT
25 Broadway, Fl. 9
New York, NY 10004
646-490-1083
stoti@lawyeringproject.org

ARNOLD & PORTER KAYE SCHOLER LLP

Andrew T. Tutt (*pro hac vice*)
Drew A. Harker (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
(202) 942-5999 (fax)
andrew.tutt@arnoldporter.com
drew.harker@arnoldporter.com

Marisa A. White (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
(303) 836-8689 (fax)
marisa.white@arnoldporter.com

Counsel for Mayor and City Council of Baltimore

CERTIFICATE OF SERVICE

I certify that on August 26, 2019, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants identified on the Notice of Electronic Filing.

/s/ Andre M. Davis
Andre M. Davis
City Solicitor

CITY OF BALTIMORE
DEPARTMENT OF LAW
City Hall, Room 109
100 N. Holliday Street
Baltimore, MD 21202
443-388-2190
andre.davis@baltimorecity.gov