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-RDB

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that Department of Health and Human Services (HHS) regulations (1988 regulations) prohibiting Title X projects from referring patients for abortion as a method of family planning, and requiring Title X programs to be physically separate from abortion related activities, were authorized by Title X, were not arbitrary and capricious, and were constitutional. Relying on that holding, HHS issued a new rule in 2019 that is, in all material respects, indistinguishable from the 1988 regulations. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Notwithstanding *Rust*'s holding, Plaintiff brings this suit asserting that the current Rule, *inter alia*, violates Title X, is arbitrary and capricious, and violates the Constitution. As Defendants explained in moving to dismiss Plaintiff's Complaint, these claims fail as a matter of law. *See* Defs.' Mem. in Support of Mot. to Dismiss ("MTD"), ECF No. 67-1.

Rather than engage with the arguments asserted in Defendants' motion, Plaintiff's opposition brief, *see* Pl.'s Resp. in Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Opp'n"), ECF No. 71, largely doubles down on the remarkable arguments asserted in its Complaint: that a district court can effectively overrule a Supreme Court decision based on a single clause in an appropriations rider, an obscure provision in the Affordable Care Act (ACA), or later Supreme Court cases *reaffirming* the decision; that Baltimore, as a city, can have sincere religious beliefs or be discriminated against on the basis of sex (or assert the rights of others who it does not even bother to identify); and that the Court should substitute its judgment for the predictive expertise of the agency charged with administering the Title X program. These arguments, however, fail as a matter of law, and a motion to dismiss is an appropriate vehicle for resolving Plaintiff's purely legal claims. For the reasons set forth below and in Defendants' opening brief, the Court should dismiss Plaintiff's Complaint with prejudice.

ARGUMENT

Plaintiff's Complaint presents purely legal questions that can be resolved on the basis of the pleadings and the publicly available documents included in HHS's administrative record. Because each of Plaintiff's claims fails as a matter of law, the Court should grant Defendants' motion to dismiss.

I. Plaintiff Fails To State A Claim Based On § 1554 Of The ACA

Plaintiff's § 1554 claim fails for all the reasons Defendants explained in their opening brief, which Plaintiff barely attempts to rebut. *See* MTD at 22-25. To start, Plaintiff does not deny that it failed to raise its § 1554 argument before HHS, but instead asks the Court to excuse that waiver because others made generic objections containing language that happened to resemble language in § 1554. But merely notifying HHS of *substantive* objections did not give the agency a chance to address a question of *statutory interpretation*. Accordingly, HHS plainly did not have an opportunity to apply its expertise in administering the ACA with respect to this issue. Plaintiff adds that its § 1554 argument is "not subject to waiver" because it is purely legal. Pl.'s Opp'n at 4. But Plaintiff fails to meaningfully respond to Defendants' 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." *See* MTD at 23.

In any event, Plaintiff'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 Plaintiff's claim. *See* 500 U.S. at 201-02; MTD at 23-24. It is implausible that Congress would have imposed such significant limitations on HHS's authority in one of the ACA's "Miscellaneous Provisions." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

II. Plaintiff's Claim Based On The Appropriations Rider Fails

Plaintiff's argument that the Rule conflicts with an appropriations rider requiring that pregnancy counseling be nondirective similarly fails for reasons Defendants have explained. *See* MTD at 15-22. By definition, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything. Even indulging Plaintiff's characterization of the Rule, "withhold[ing] medically relevant information" is not "directive" counseling. Pl.'s Opp'n at 6. 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.

Nor does the Rule's separate requirement that patients be referred for prenatal health care somehow render "directive" the mere prohibition of abortion referrals. This requirement does not direct a decision about abortion—it merely refers women for necessary care while they are pregnant, even if they obtain an abortion later. *See* MTD at 16. Similarly, the restrictions on the list of providers, *see* Pl.'s Opp'n at 5, are consistent with—and further—the nondirective provision

by ensuring providers do not "steer clients to abortion or to specific providers because those providers offer abortion as a method of family planning." 84 Fed. Reg. at 7747. HHS's authority to prohibit Title X projects from directly referring clients for an abortion as a method of family planning necessarily includes the authority to take steps to prevent them from doing so indirectly. The rider, moreover, is limited to "pregnancy counseling," a term that does not apply to referrals, let alone with sufficient clarity to repeal § 1008 of the Public Health Service Act (PHSA) by implication. In this program and more generally, counseling and referrals are distinct. *See* MTD at 16-17.

Plaintiff further errs in insisting that its construction of the nondirective provision "does not conflict with *Rust*." *See* Pl.'s Opp'n at 5-6. Plaintiff does not dispute that, in *Rust*, the Supreme Court held that § 1008 authorizes HHS to issue materially indistinguishable regulations, but contends that the nondirective provision eliminated that authority. By definition, that is a repeal of § 1008 (and abrogation of *Rust*) in relevant respect. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 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 of the PHSA, implicitly delegated the same authority is irrelevant under *Chevron*. *See also* MTD at 22.

III. Plaintiff's Claim That The Rule Violates Title X Is Meritless

Plaintiff fails to address Defendants' arguments with respect to Plaintiff's wholly unsupported claim that the Rule violates 42 U.S.C. §§ 300(a) and 300a(a). *See* Compl. ¶ 165. That argument is therefore waived, but in any case fails for the reasons explained. *See* MTD at 26.

Plaintiff does continue to press its unfounded claim, however, that the Rule renders Title X services involuntary, in violation of 42 U.S.C. § 300a-5. Pl.'s Opp'n at 6. That provision—in place at the time of *Rust*—simply directs that "[t]he acceptance by any individual of family planning services or family planning or population growth information" provided through the Title X program "shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information." 42 U.S.C. § 300a-5. Nothing in the Rule violates that directive. To the contrary, the Rule preserves a regulatory provision implementing this statutory directive. *See* 42 C.F.R. § 59.5(a)(2). Again, similar statutory arguments were advanced in *Rust*, and the Supreme Court never embraced them. *See, e.g.*, Reply Brief for State Petitioners at 6-7, *Rust* (Nos. 89-1391, 1392), 1990 WL 505761; *see also Rust* 500 U.S. at 202 (rejecting constitutional argument that the 1988 regulations "interfere with a woman's right to make an informed and voluntary choice").

IV. Plaintiff Fails To State A RFRA Claim

Nothing in Plaintiff's opposition salvages its meritless RFRA claim. As an initial matter, Plaintiff cannot assert a RFRA claim on behalf of *itself*. Plaintiff claims that it is a "person" entitled to RFRA's protection, Pl.'s Opp'n at 7, but even assuming that were true (which it is not[1]),

[1] RFRA prohibits certain actions by "government"—a term that, prior to the Supreme Court's decision in *City of Boerne v. Flores*, included cities. 521 U.S. 507, 516 (1997) (citing prior version of 42 U.S.C. § 2000bb-2(1) that defined "government" to include any "State, or . . . subdivision of

Plaintiff misses the point. Unless it has established an official religion during the pendency of this litigation—in which case Baltimore has bigger problems, *see* U.S. Const. amend. I (Establishment Clause); *see also Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947) (Establishment Clause "made applicable to the states by the Fourteenth" Amendment)—Plaintiff cannot have a sincere religious belief that is substantially burdened by the Rule (as RFRA requires).

Nor can Plaintiff assert its RFRA claims on behalf of third parties (whose existence Plaintiff does not adequately plead in any event). Plaintiff contends that the limitations imposed by third-party standing doctrine are merely an element of prudential (rather than Article III) standing and that APA claims are not subject to prudential standing limits. Pl.'s Opp'n at 2-3. Plaintiff's discussion of this issue is doubly confused. For one, contrary to Plaintiff's suggestion, *id*. at 2, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) did not decide whether third-party standing limitations were rooted in Article III, principles of prudential standing, or an element of the underlying cause of action. *See id.* at 127 n.3 (noting this uncertainty but explaining that "[t]his case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day").

Second, the Court's point in *Lexmark* was that certain restrictions on the APA cause of action (such as the "zone of interests" test) are doctrinally best understood as limits on the statutory cause of action rather than as "prudential standing." *See id*. at 125-127. The Court did not remotely suggest, however, that the choice of doctrinal *label* in any way *substantively* altered the well-established law that those limits apply to APA cases. *See id*.; *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 488 (1998) ("We have interpreted § 10(a) of the APA

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a State"). It would be inconsistent with principles of statutory construction to interpret "person" as used in RFRA to include cities when Congress used a different term in the same provision, *i.e.*, "government," to refer to cities.

to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact."). Indeed, Plaintiff relies on *Warth v. Seldin*, Pl.'s Opp'n at 2, but that case concluded that even where Article III standing is satisfied, a plaintiff still "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." 422 U.S. 490, 499 (1975).

Plaintiff's assertion that Defendants somehow "waived" their third-party standing challenge, Pl.'s Opp'n at 3, is likewise without merit.[2] In short, there is no question that, however it is conceived, the limitations imposed by third-party standing doctrine apply with full force here. And for the reasons explained in Defendants' opening brief, *see* MTD at 37, Plaintiff does not meet the requirements for third-party standing here.

As previously explained, Plaintiff also fails adequately to allege that the Rule imposes a "substantial burden" on any individual's religious belief or even to identify individuals whose "religion" purportedly requires them to give or receive referrals for (or engage in any other activities that encourage or promote) abortion as a method of family planning within a government program. MTD at 40-41. Plaintiff asserts that "the Rule violates tenets of multiple faith traditions," including denominations of Judaism and Islam, as well as Episcopalianism and Unitarian Universalism. Pl.'s Opp'n at 7. But a Court's role in conducting RFRA's substantial

[2] Defendants argued at length in their motion to dismiss that Baltimore did not have standing to assert the rights of third parties. *See* MTD at 36-37. Defendants were not required to ruminate on the unsettled question whether third-party standing is jurisdictional or prudential in order to preserve the claim; simply raising it was sufficient. In any event, nothing would prevent Defendants from presenting the issue for the first time in this reply brief. If lack of third-party standing is a jurisdictional defect, it can of course be raised at any time. *See* Fed. R. Civ. P. 12(h)(3). And even if it were merely an issue going to the merits of Plaintiff's RFRA claim (as Plaintiff argues), it can still be raised at any time before or at trial. *See* Fed. R. Civ. P. 12(h)(2).

burden analysis is not to determine, in the abstract, whether a particular agency regulation may conflict with, for example, "denominations of Judaism" or "denominations of Islam." *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (noting that it is not for a Court to say whether asserted religious beliefs are "mistaken or insubstantial"); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (Constitution forbids civil courts from disturbing church decisions on "religious issues of doctrine or polity"). Rather, to establish a prima facie RFRA claim, a plaintiff must plausibly allege (1) an exercise of religion, (2) that is grounded in a *sincerely held* religious belief, and (3) that is substantially burdened by the challenged government action. *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Plaintiff does not adequately plead that the Rule imposes a "substantial burden" on any identified individual's sincerely held religious belief.

Finally, as Defendants previously explained, the RFRA claim fails on the merits given the well-established Fourth Circuit case law making clear that the government's failure to subsidize is not a substantial burden on religious exercise for RFRA purposes. *See* MTD at 41 (collecting cases). And Plaintiff's RFRA claim is in any event just a repackaging of its claim that the Rule violates "basic medical ethics," *see, e.g.*, Compl. ¶ 120, which *Rust* rejected when presented as a First Amendment claim. MTD at 41-42. Plaintiff offers no response on either point.

V. Plaintiff's First Amendment Claim Fails As A Matter Of Law

In *Rust*, the Supreme Court expressly considered the contention that the 1988 regulations contravened the First Amendment "by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500

U.S. at 192. And *Rust* rejected it. *Id*. at 192-200. The Supreme Court has not overruled *Rust*, but rather has recently reaffirmed it. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Devel. v. All. For Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). Even if other Supreme Court decisions had called *Rust* into question—which they do not—*Rust* would unquestionably continue to bind this Court, as only the Supreme Court has "the prerogative of overruling its own decisions." *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Plaintiff's various attempts to distinguish *Rust* fail, and its First Amendment claim likewise should be dismissed. To start, Plaintiff seizes on the *Rust* Court's remark 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." 500 U.S. at 200. But as Plaintiff acknowledges, the Court nonetheless rejected the First Amendment challenge because the 1988 "regulations do not significantly impinge upon the doctor-patient relationship," *id.* at 200. This is not "a factual conclusion," Pl.'s Opp'n at 8, but a legal holding that the regulation did not violate the First Amendment. Plaintiff thus cannot evade *Rust* by asserting that *others* believe—contrary to the Supreme Court—that the materially identical regulations here "significantly impinge upon the doctor-patient relationship," *id*. (citing Compl. ¶¶ 7, 90, 182). And while Plaintiff asserts that "*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," *id*., *Velazquez* reaffirmed *Rust*. *See* 531 U.S. at 540-41.

Plaintiff next argues that *Rust* is no longer good law because, according to Plaintiff: (1) the Supreme Court has since clarified that *Rust* was a government-speech case; and (2) "[t]he 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." Pl.'s Opp'n at 9-10. But as to the latter proposition, all of the decisions Plaintiff cites *approvingly* discuss *Rust*,[3] and the remaining source on which Plaintiff relies is a concurring opinion that also favorably cites *Rust*.[4]

Plaintiff further asserts that "the Rule violates the First Amendment by violating patients' rights to receive truthful and unbiased information from their doctors," Pl.'s Opp'n at 10, but the Rule does no such thing. Unlike even the regulation sustained in *Rust*, the Rule permits nondirective pregnancy counseling discussing abortion, and it also allows providers to explain *why* abortion referrals cannot be provided (*i.e.*, because the Rule does not permit it). In any event, *Rust* forecloses this argument as well. As the Court explained, the 1988 regulations (like the Rule) simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded," and the Constitution generally permits "the Government [to] choose not to subsidize speech." *Id*. at 194-95, 200. Thus, a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id*. at 193-94. Plaintiff's assertion that *Rust*'s directly-on-point holding "does not speak to" this argument, Pl.'s Opp'n at 11, goes nowhere. And while Plaintiff additionally contends that "the Rule violates the First Amendment by selectively withholding information from patients on the basis of viewpoint," *id*. at 11, that assertion is likewise wrong as a matter of logic and foreclosed by *Rust*'s holding that the government may choose not to subsidize speech (including speech encouraging or referring for abortions as a method of family planning).

[3] *See Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) (plurality opinion); *Open Soc'y Int'l*, 570 U.S. at 216-17; *Velazquez*, 531 U.S. at 540-41; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832-33 (1995).

[4] *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

Plaintiff's final argument—that the Rule violates the First Amendment because, according to Plaintiff, it was motivated by a desire "to force certain health care providers out of the Title X program in order to suppress their viewpoint," *id*. at 12—is a nonstarter. Plaintiff cites nothing in the Complaint that made this allegation, and, as discussed below, Plaintiff may not amend its Complaint in opposing a motion to dismiss. This argument is also illogical on its face: the Rule simply refuses to subsidize referrals for (or other activities that encourage or promote) abortion as a method of family planning within the Title X program, and Plaintiff nowhere even explains what "viewpoint" it believes the Rule is clandestinely attempting to suppress. Nor does Plaintiff offer any facts plausibly supporting its viewpoint-suppression theory.[5] In any event, *Rust* rejected a similar argument that the 1988 regulations "invidiously discriminate[d] on the basis of viewpoint," 500 U.S. at 192, finding that the government can permissibly "subsidize family planning services which will lead to conception and childbirth, [while] declining to 'promote or encourage abortion,'" *id*. at 193. Plaintiff's First Amendment claim should be dismissed.

VI. Plaintiff's Equal Protection Claim Should Be Dismissed

Plaintiff's opposition doubles down on the remarkable claim that the Rule constitutes unconstitutional sex discrimination. Pl.'s Opp'n at 12-15. Initially, Plaintiff lacks standing to bring this claim for reasons previously discussed. MTD at 36-37; *see also* pp. 6-7, *supra*. In any event, this argument is foreclosed not only by *Rust* itself, but also by the Supreme Court's subsequent instruction that "the constitutional test applicable to government abortion-funding

[5] Plaintiff references alleged "procedural irregularities and inadequate reasoning that accompany the Rule," Pl.'s Opp'n at 12, but, as discussed elsewhere, HHS adequately justified the Rule and Plaintiff's claim of procedural irregularity lacks merit. *See* pp. 13-21, *infra*. And even if those claims were meritorious, there is no logical connection between Plaintiff's assertion that the Rule was supported by inadequate reasoning and procedurally invalid on the one hand, and Plaintiff's assertion that the Rule was motivated by an improper purpose on the other.

restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). Plaintiff asserts that *Bray* did not "involve[] constitutional sex discrimination claims." Pl.'s Opp'n at 14. But in concluding that "government abortion-funding restrictions [are not judged by] the heightened-scrutiny standard that our cases demand for sex-based discrimination," the Court necessarily concluded that abortion-funding restrictions *do not involve* sex discrimination.[6] And *Bray* does not stand alone. *See Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (federal law providing reimbursement under Medicaid for medically necessary services generally but not for all medically necessary abortions not predicated on a suspect classification); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (rejecting claim that welfare regulation providing funds for childbirth but not for nontherapeutic abortions discriminated against a suspect class).

Plaintiff's remaining arguments in support of this claim are likewise insubstantial. Plaintiff asserts the Rule's restrictions on abortion counseling and referrals is a sex-based classification because these provisions are abortion-specific. *See* Pl.'s Opp'n at 13 ("[I]f 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."). But this is just a restatement of the position that the Supreme Court has rejected in the cases discussed above. Plaintiff also contends that the Rule promotes unconstitutional sex stereotypes because "the Rule requires the provider to encourage [a pregnant woman] to become

[6] For this reason, there is likewise no merit to Plaintiff's argument that Defendants' prior quotation from *Bray*—which in turn cited to *Maher* and *Harris*—was somehow "misleading[]." Pl.'s Opp'n at 14. These cases, in addition to *Rust*, are directly on point and foreclose Plaintiff's claim that the Rule's abortion referral and counseling provisions constitute sex discrimination.

a mother by referring her to a prenatal care provider," while "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." Pl.'s Opp'n at 13. But the Rule requires prenatal care referral for pregnant women because HHS determined that prenatal care is medically necessary for the pregnant woman and unborn child, 84 Fed. Reg. at 7761, a consideration that obviously does not apply to *non-pregnant* Title X patients (whether those non-pregnant patients are men or women).

Finally, Plaintiff invokes its potpourri of procedural objections to the Rule as evidence the Rule plausibly reveals an intent to discriminate against women. Pl.'s Opp'n at 13. But putting aside that these procedural objections lack merit, *see* pp. 16-21, *infra*, Plaintiff offers no logical connection between its procedural objections—which even the many plaintiffs in other suits challenging the Rule have generally not raised—and its entirely conclusory claim that the Rule was motivated by sex-based discrimination.

VII. Plaintiff's Arbitrary-And-Capricious Claims Fail As A Matter Of Law

Plaintiff cannot establish that HHS acted arbitrarily and capriciously in promulgating the Rule for all the reasons set out in Defendants' opposition to Plaintiff's preliminary injunction motion, *see* ECF No. 25 ("PI Opp.") at 25-37, and in Defendants' motion to dismiss. *See* MTD at 27-34. Accordingly, Counts VII and VIII of Plaintiff's Complaint should be dismissed, and Plaintiff's opposition brief offers nothing to change that conclusion.

First, Plaintiff asserts that HHS failed to explain what Plaintiff alleges is a departure from the 2000 regulations with respect to Defendants' interpretation of the nondirective provision. *See* Pl.'s Opp'n at 16. But contrary to Plaintiff's claim, and as Defendants have explained, HHS never concluded in the 2000 regulations that the nondirective provision required suspension of the 1988 regulations. For HHS, the "crucial difference between" the 1988 regulations and the 2000

regulations was simply "one of experience." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000) (2000 regulations). Thus, there was no reversal of position as to HHS's interpretation of the nondirective provision—which HHS continues to recognize requires that all pregnancy counseling that is offered be nondirective, *see, e.g.*, 84 Fed. Reg. at 7733—and therefore no need for any additional explanation than what exists in the Rule's preamble.

Next, Plaintiff asserts that the Rule is arbitrary and capricious because Plaintiff finds lacking HHS's explanation of the Rule's consistency with medical ethical requirements. *See* Pl.'s Opp'n at 16-17. HHS, however, considered precisely this concern and explained at length why, properly understood, the Rule is consistent with medical ethical obligations, as well as multiple Supreme Court decisions and other legal authorities. *See* 84 Fed. Reg. at 7724, 7748. Among other reasons, HHS explained that *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, which it would not have done had that rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. HHS also pointed to the many federal conscience statutes that give medical providers the option of not referring for or promoting abortion as evidence that neither Congress, nor the medical providers with conscience objections, believe that not referring for or promoting abortion violates medical ethics. *See* 84 Fed. Reg. at 7748; *see also id*. at 7716, 7746-47 (discussing statutes); 7780-81 (discussing medical providers with conscience objections to counseling on, or referring for, abortion). Plaintiff may disagree as a matter of policy with HHS's decision, but Plaintiff cannot show that HHS's decision was unreasonable.

Plaintiff also incorrectly claims that HHS failed to explain why it created supposed inconsistencies between the Rule and the Quality Family Planning ("QFP") guidelines issued in 2014. *See* Pl.'s Opp'n at 17. HHS continues to expect Title X providers to follow QFP guidelines

to the extent they are consistent with the Rule.[7] To the extent those guidelines conflict with the Rule, HHS acknowledged it was departing from its prior approach under the 2000 regulations, and the QFP guidelines did not (and indeed could not) substantively go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

Plaintiff goes on to claim that HHS did not adequately consider reliance interests and consequences of the Rule, *see* Pl.'s Opp'n at 17-18, pointing again to the fact that some commenters indicated that they would exit the program if the proposed rule were to go into effect. But as Defendants have explained, grantees should not be able to use threats of departure to veto otherwise permissible and reasoned policy judgments. *See* MTD at 30. Here, HHS concluded that the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." 84 Fed. Reg. at 7723; *see also id*. at 7780-81; PI Opp. at 34. And in all events, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, 84 Fed. Reg. at 7783, and the APA does not permit courts to second-guess that policy judgment.

Plaintiff further argues that HHS acted arbitrarily and capriciously by instituting the physical and financial separation requirements "as a solution in search of a nonexistent problem." Pl.'s Opp'n at 19. Even the 2000 regulations Plaintiff prefers required some financial separation, and although Plaintiff may disagree with HHS's policy judgment to require further separation, HHS adequately explained that such requirements were necessary to address the risk and perception that Title X funds would be commingled with other funds and used for other prohibited purposes (such as to build infrastructure or otherwise indirectly support Title X projects' abortion

[7] HHS, *Announcement of Availability of Funds for Title X Family Planning Services Grants* at 14-15 (2019), https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services-amended.pdf

business), depriving the public of the statutorily-mandated assurance that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7764-66, 7773; *see also* PI Opp. at 27-29.

Finally, as to the evaluation of cost, HHS, which administers the Title X program, is best situated to consider the potential effects on that program and it expressly did so. *See* 84 Fed. Reg. at 7781-82. Although commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities" to comply with the physical-separation requirement, HHS reasonably anticipated "that entities will usually choose the lowest cost method to come into compliance," such as "shift[ing] their abortion services" to one of their multiple "distinct facilities." *Id.* at 7781. And in any event, HHS "acknowledg[ed] that there is substantial uncertainty regarding the magnitude of the[] effects" of the physical-separation requirement, and provided an "estimate" of "an average" that was "an increase from [the] averaged estimate . . . in the proposed rule." *Id.* at 7781-82. Thus, in considering the compliance costs on providers and the possibility that some incumbent providers might withdraw from the program, HHS simply made a different judgment than Plaintiff, which it of course was permitted to do. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."). The Court should dismiss Counts VII and VIII.

VIII. Plaintiff Fails To State A Claim That HHS Did Not Follow Required Procedures

In its Complaint, Plaintiff alleged that the Rule was promulgated "without observance of procedure required by law," *see* Compl. ¶ 223, because, according to Plaintiff, (1) HHS did not adequately quantify the costs and benefits of the Rule as provided for in certain Executive Orders, *id*. ¶¶ 227-228; and (2) the Rule's provision restricting nondirective pregnancy counseling to

physicians and advance practice providers (APPs) was not a logical outgrowth of the proposed rule, *id*. ¶¶ 229-30. Defendants have explained why both claims are meritless. MTD at 34-36.

In its opposition brief, Plaintiff does not respond to any of these arguments, instead choosing to ignore the claims it asserted in the Complaint and adopt a new theory, primarily that HHS violated the APA's procedural requirements when it declined to "give parties more than sixty days" to comment on the proposed rule. *See* Pl.'s Opp'n at 20-23. In doing so, Plaintiff has abandoned its arguments regarding HHS's cost-benefit analysis and adoption of the physician/APP limitation. *See, e.g.*, *Ferdinand-Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 777 (D. Md. 2010) (failure to respond to argument in motion to dismiss abandons claim). Moreover, because it is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," *Weakley v. Homeland Sec. Sols., Inc.*, No. 3:14-cv-785 (REP-RCY), 2015 WL 11112158, at *5 (E.D. Va. May 19, 2015) (citation omitted), this Court should not consider the "new issues" and "new claims" that "were not contained in Plaintiff's Complaint," *Hooker v. Disbrow*, No. 1:16-cv-1588-GBL-JFA, 2017 WL 1377696, at *4 (E.D. Va. Apr. 13, 2017).

In any event, those claims fail on their merits. As Plaintiff recognizes, the APA requires only that the public be given a "meaningful opportunity" to comment on a proposed rule. Pl.'s Opp'n at 20 (quoting *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012)). "This opportunity to participate is all that the APA requires. There is no requirement concerning how many days the [agency] must allow for comment or that the [agency] must re-open the comment period at the request of one of the participants." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Here, HHS provided a sixty-day comment period, which is well within the bounds of a typical rulemaking. *See id*. (noting that courts have "uniformly upheld comment periods of 45 days or less"); *Inv. Co. Inst. v. Depository Insts. Deregulation Comm.*, No.

82-3037, 1982 WL 1340, at *2 (D.D.C. Oct. 27, 1982) ("APA sets no specific minimum time period for rulemaking comments to which interested parties are guaranteed" and "other courts have upheld comment periods as short as seven days"); *In re Home Health Litig.*, No. 90-1537 (RCL), 1992 WL 114316, at *5 (D.D.C. Mar. 31, 1992) (upholding thirty-day comment period because it satisfied the APA standard for "sufficient advance notice following rulemaking," and citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-47 (1978), for the proposition that "a court may not add rulemaking requirements to those set forth in the APA").

Plaintiff provides no basis for concluding that HHS deprived it of a meaningful opportunity to comment. HHS made plain that it was proposing to rescind the 2000 regulations and replace them with rules materially indistinguishable from the prior 1988 regulations, and provided the public sixty days to comment on the full scope of its proposal. *See* 83 Fed. Reg. 25,502 (June 1, 2018) (notice of proposed rulemaking). Thus, this is not a situation, as in cases Plaintiff cites, where the agency's structuring of the notice-and-comment process deprived the public of a meaningful opportunity to comment. *Cf. N.C. Growers' Ass'n*, 702 F.3d at 769-70 (agency "stated that it would not receive or consider comments that were not only 'relevant and important,' but were integral to the proposed agency action and the conditions that such action sought to alleviate"); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (agency's notice was "too open-ended to allow for meaningful comment on [its] approach," and did not "solicit comment on the overall framework under consideration"). Instead, what Plaintiff contends is that HHS violated the APA merely because it did not accede to the requests of some commenters to extend the comment period beyond sixty days. But Plaintiff identifies no case finding a sixty-day comment period unreasonable, and the one case it cites for the proposition that the "need for an extended comment period" here was "particularly acute," Pl.'s Opp'n at 22, is completely

inapposite. *See Hollingsworth v. Perry*, 558 U.S. 183, 192-93 (2010) (addressing non-APA challenge to district court's procedure for amending its local rules and noting that, in the distinct context of agency rulemaking, agencies "usually provide a comment period of [at least] thirty days" (citation omitted)).[8]

Plaintiff's argument is further undercut by the fact that, notwithstanding the allegedly "inadequate comment period," Pl.'s Opp'n at 22, HHS received over 500,000 comments, including comments from Plaintiff, which raised multiple challenges to the Rule on both legal and policy grounds, and which HHS addressed in a lengthy Final Rule. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (rejecting argument that seven-day comment period was too short where agency received "45 comments and 42 letters addressing its proposed rule," "reviewed the comment received," and "took them into account in its decision"); *Conference of State Bank Supervisors v. OTS*, 792 F. Supp. 837, 844 (D.D.C. 1992) (rejecting challenge to 30-day comment period because agency "is not required to provide more than 30-days for public comment," and the period was not insufficient to allow the plaintiffs "to consider the rule and its supporting analysis and provide meaningful comment, especially in light of the comments that they and other

[8] Plaintiff also suggests that a longer comment period was necessary because the previously effective 2000 rule took "seven years" to "finalize[]." Pl.'s Opp'n at 22. But that delay was not because HHS spent the entire time grappling with concerns raised by comments. Rather, HHS proposed in 1993 simply to revoke the 1988 regulations and replace them with the "compliance standards operative before their issuance." 58 Fed. Reg. 7464, 7464 (Feb. 5, 1993). That same day, however, HHS issued an interim rule suspending the 1988 regulations and making effective during the pendency of the proposed rulemaking "the compliance standards that were in effect prior to" the 1988 regulations. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). In other words, the 2000 final rule did little to change the status quo that was put in place in 1993, and indeed HHS made that rule immediately effective because "the policies adopted in the [2000] regulations . . . are already largely in effect, by virtue of the suspension of the [1988 regulations] and the reinstitution of the pre-1988 policies and interpretations effected by the interim rules of February 5, 1993." 65 Fed. Reg. at 41,277-78. The better comparator for the current Rule is the materially indistinguishable 1988 regulations, upheld by the Supreme Court in *Rust*, which provided for a sixty-day comment period. *See* 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988).

interested parties submitted in response to th[e] proposed rule"). In light of the robust comment period that occurred, Plaintiff can hardly assert that it was deprived of a meaningful opportunity to comment, and its speculation that, with more time, Plaintiff and other commenters would have "more squarely raised" some issues, and "marshaled stronger evidence" against the Rule, Pl.'s Opp'n at 22, is insufficient to show that Plaintiff was prejudiced by the notice-and-comment process here.

Plaintiff also asserts that that HHS "radically departed from rulemaking procedures before announcing the proposed rule." Pl.'s Opp'n at 21. But the procedures that HHS is alleged to have "departed from" are imposed not by the APA or any other statute, but, according to Plaintiff, by Executive Orders 12866 and 13563. *See id*. at 21 (asserting that HHS did not do "early outreach" as is "required under Executive Order 13563" and complaining that the Rule was not placed on the "Regulatory Agenda" compiled by the Office of Information and Regulatory Affairs, an office that, according to its website, is responsible for implementation of Executive Orders 12866 and 13563[9]). But as explained in Defendants' opening brief, an agency's compliance with these Executive Orders, "devoted solely to the internal management of the executive branch," *Meyer v. Bush*, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993), "cannot give rise to a cause of action" under the APA, *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, 19 F. Supp. 3d 111, 118 n.1 (D.D.C. 2014), *vacated on other grounds*, 799 F.3d 1065 (D.C. Cir. 2015); *see* MTD at 34-35.

Plaintiff does not even attempt to respond to this argument, and instead impermissibly seeks to impose "procedural requirements on agency rulemakings beyond that required by statute." *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 308 (D.D.C. 2016) (citation omitted). It is a bedrock

[9] *See* https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.myjsp (cited in Pl.'s Opp'n at 21).

principle of administrative law, however, that courts have no authority to do so. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (the APA establishes "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures," and that, beyond these requirements, "courts lack authority 'to impose upon an agency its own notion of which procedures are best" (quoting *Vermont Yankee*, 435 U.S. at 524, 549)). Plaintiff cites no authority for the proposition that alleged noncompliance with procedural requirements deriving from outside the APA or another statute supports a claim under the APA. Plaintiff's claim fails as a matter of law.

IX. Plaintiff Fails To State A Claim That The Rule Is Impermissibly Vague

Finally, and largely for the reasons set forth in Defendants' opening brief, Plaintiff's vagueness claim fails. Once again, Plaintiff does not grapple with Defendants' arguments, instead looking past them to contend that courts apply the vagueness analysis "more strictly" when "First Amendment rights are at stake." Pl.'s Opp'n at 23. It ignores, however, the fundamental point that this case arises in "the context of selective subsidies"—not an exercise of the government's coercive regulatory authority—and that, as such, the "consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998); *see also Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 948 (9th Cir. 1983) ("Our tolerance should be even greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely a reduction of a government subsidy."). The case Plaintiff cites, addressing a state law requiring that civil servants be removed from their employment for "treasonable or seditious utterances or acts," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 597 (1967) (cited in Pl.'s Opp'n at 23), has no application here.

Moreover, despite the fact that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation]," MTD at 44 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)), Plaintiff continues to rely on hypothetical applications of the Rule to plead its vagueness claim. Plaintiff offers no reason why the hypotheticals it offers render the Rule impermissibly vague as a facial matter, particularly where, as Defendants have argued, Plaintiff is able to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities. *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006); *see* MTD at 44-45 & n.6.

In any event, as explained in the motion to dismiss, the Rule does provide guidance on the hypothetical applications Plaintiff describes. For example, Plaintiff takes issue with the Rule's emergency care exception, arguing that it "does not specify whether [an abortion] referral is allowed when a pregnancy endangers the patient's health or even life." Pl.'s Opp'n at 24. But the provision in the Rule authorizing (indeed, requiring) Title X providers to refer patients to "an appropriate provider of medical services needed to address" a situation requiring "emergency care," 42 C.F.R. § 59.14(b)(2), provides a clear safe harbor to grantees to refer women to abortion providers as needed to address medical emergencies that place a patient's life in danger. *See Rust*, 500 U.S. at 195 (declining to read analogous 1988 regulations in a way that would prevent a Title X project from "refer[ring] a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services").

Plaintiff also argues that the separation requirements are vague, but the factors set forth in the Rule to determine separation are essentially the same as the factors in the 1988 regulations upheld by *Rust*. As in the 1988 regulations, the current Rule empowers the Secretary to determine whether the requisite independence exists by reference to "the existence of separate accounting

records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities." *Id*. at 181. HHS has explained that it "welcomes regular interaction with grantees and subrecipients, should they have questions" as to these requirements and has made available project officers "to help grantees successfully implement the Title X program in compliance with both the statute and the regulation." 84 Fed. Reg. at 7766. And HHS has delayed requiring compliance with the physical separation requirements until May 2020 to "give grantees and subrecipients time to make arrangements to comply with [the requirements] if they choose to seek Title X funds (or to participate in a Title X project) and also [separately] offer abortions as a method of family planning." *Id*.

Finally, Plaintiff asserts that the Rule's restriction on provider actions that "encourage, promote or advocate abortion as a method of family planning," Pl.'s Opp'n at 24 (quoting 42 C.F.R. § 59.16), renders the Rule unconstitutionally vague. Plaintiff neglects to mention, however, that under the 2000 regulations it seeks to preserve, "the funding of abortion or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited." 65 Fed. Reg. at 41, 271. In other words, both the 2000 regulations and the challenged Rule permit nondirective counseling—including on abortion—while simultaneously prohibiting any counseling that promotes or encourages abortion. *Compare id*. at 41,273 (2000 regulations) (Title X providers "may not steer or direct clients toward selecting any option, including abortion, in providing options counseling"), *and id*. (2000 regulations) (noting that under the pre-1988 regulations, providers "were not permitted to provide options counseling that promoted abortion or encouraged patients to obtain abortion"), *with* 84 Fed. Reg. at 7746 (Rule) ("Title X projects and service providers must be careful that nondirective counseling related to abortion does not

diverge from providing neutral, nondirective information into encouraging or promoting abortion as a method of family planning.").

Indeed, the Rule provides significant guidance on how a provider could offer nondirective counseling "without encouraging, promoting, advocating, or referring for abortion." Pl.'s Opp'n at 24; *see* 42 C.F.R. § 59.16(b) (providing eight examples to illustrate what is permissible and what is prohibited); 84 Fed. Reg. at 7747 (offering "guidance on the requirement of nondirective pregnancy counseling"). Plaintiff has yet to explain why the Rule's continuation of that approach violates the Constitution, especially when Congress itself has imposed similar limitations elsewhere, *see, e.g.*, 42 U.S.C. § 300z-10(a) ("grants may be made only to projects or programs which do not advocate, promote, or encourage abortion").

CONCLUSION

For the foregoing reasons, and those stated in Defendants' memorandum in support of their motion to dismiss, the Court should dismiss this case with prejudice.

Dated: August 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT