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

MOTION TO DISMISS

Defendants respectfully move to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The reasons for this Motion are set forth in the accompanying memorandum.

Dated: August 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS[1]

[1] This memorandum exceeds the page limits set forth in Civil L.R. 105.3. On August 15, 2019, the parties filed a consent joint motion to expand the page limits for this memorandum supporting Defendants' motion to dismiss and Plaintiff's memorandum in response to the motion. ECF No. 66. Defendants recognize that the timing of the motion to expand the page limits gave the Court a very limited window in which to rule, and Defendants apologize to the Court. Given the number of claims presented in Plaintiff's Complaint, and in light of Plaintiff's consent, Defendants respectfully renew their request for leave to file a forty-five page memorandum in support of their motion to dismiss.

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INTRODUCTION

Plaintiff's challenge to the federal regulation at issue is a transparent attempt to evade the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). When *Rust* was decided, as now, Title X of the Public Health Service Act (PHSA) authorized the Department of Health and Human Services (HHS) to make grants for family-planning services and issue regulations to implement the statute. Title X is a limited program: it does not fund medical care for pregnant women, and instead narrowly addresses preconception family planning. In addition, Congress directed in § 1008 of the PHSA that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In accordance with the limited nature of the program and § 1008, HHS in 1988 issued regulations that, among other things, prohibited Title X projects from referring patients for abortion as a method of family planning and required Title X programs to be physically separate from abortion-related activities. 53 Fed. Reg. 2922 (Feb. 2, 1988). In *Rust*, the Supreme Court held that those regulations were authorized by Title X, were not arbitrary and capricious, and were constitutional.

Relying on the Supreme Court's holding in *Rust*, HHS in 2019 issued a final rule that effectively reinstated the 1988 regulations (which had been rescinded in the interim). 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Plaintiff makes no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and the Court has recognized that the challenged portions of the Rule are "essentially a reversion back" to the 1988 regulations. Mem. Op. at 9, ECF No. 43 (PI Opinion). Instead, Plaintiff contends, primarily, that Congress implicitly and indirectly amended Title X through a clause in an appropriations rider and an obscure provision (Section 1554) of the Affordable Care Act (ACA). Motions panels of the Fourth Circuit and Ninth Circuit correctly rejected this remarkable argument either expressly or by necessary implication, *see Mayor & City*

Council of Baltimore v. Azar, No. 19-1614, 2019 WL 3072302 (4th Cir. July 2, 2019); *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019), *reh'g en banc granted* 927 F.3d 1045 (9th Cir. 2019), and this Court should too. The statutory text has not changed since the Supreme Court upheld materially indistinguishable regulations in *Rust*. And it is implausible that Congress abrogated a high-profile Supreme Court decision *sub silentio* through an appropriations rider or a mousehole in the ACA—after it had tried (and failed) to do so expressly. Plaintiff, moreover, has waived any challenge based on Section 1554 of the ACA because neither it nor anyone else raised this provision during the notice-and-comment process.

Plaintiff likewise cannot show that the Rule is arbitrary and capricious. HHS did not act irrationally in adopting regulations implementing its permissible interpretation of § 1008 or in making reasonable predictions using its expertise. The agency thoroughly explained its reasoning and articulated a rational justification for the choices it made—choices the Supreme Court has already upheld in substantial part. Moreover, there is no merit to Plaintiff's claim that the Rule violates procedural requirements mandated by the Administrative Procedure Act (APA).

Plaintiff's claims based on the Constitution and the Religious Freedom Restoration Act (RFRA) also fail. As an initial matter, Plaintiff lacks standing to assert claims based purely on harm suffered by hypothetical third parties not before the Court. Moreover, *Rust* squarely forecloses Plaintiff's contention that the Rule violates the First Amendment, and its logic disposes of Plaintiff's separate claim under RFRA (a claim that is inadequately pled in any event): the government's mere decision not to subsidize certain types of abortion referrals and counseling within the Title X program does not infringe on any protected speech or substantially burden the religious exercise of Title X providers. Plaintiff's sex discrimination claim similarly fails for the simple reason that the Rule does not discriminate on the basis of sex, facially or otherwise. Rather,

it imposes conditions on the receipt of federal funding through the Title X program, consistent with § 1008 and *Rust*. Finally, Plaintiff's claim that the Rule is impermissibly vague fails under any conceivable standard because the Rule is clear and just as specific as the materially identical provisions sustained in *Rust*.

For these reasons and the reasons explained below, the Court should dismiss this suit, in its entirety, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

In 1970, Congress enacted Title X of the PHSA to create a limited grant program for certain types of preconception family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes HHS to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4(a).

Section 1008, however, directs that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. "That restriction was intended to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities." *Rust*, 500 U.S. at 178-79 (emphasis added) (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.)). As a sponsor of § 1008 explained,

"the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec 37,375 (1970) (statement of Rep. Dingell).

The Secretary's initial regulations, which remained largely unchanged until the late 1980s, did not provide additional guidance on the scope of § 1008. Instead, they simply required that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). During this period, HHS construed § 1008 and its regulations "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning" and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923 (describing previous HHS guidelines and internal memoranda). The Department nevertheless permitted, and then in guidelines issued in 1981, required, Title X projects to offer "nondirective 'options couns[e]ling' on pregnancy termination (abortion), prenatal care, and adoption and foster care when a woman with an unintended pregnancy requests information on her options, followed by referral for these services if she so requests." *Id*. HHS also permitted funding recipients to maintain Title X services and abortion-related services at "a single site." 52 Fed. Reg. 33,210, 33,210 (Sept. 1, 1987) (discussing prior policy).

In the late 1980s, HHS changed course. It issued a notice of proposed rulemaking in 1987 explaining that its past policy had "not provided clear standards for grantees and HHS personnel" that abortion "'referral' and counseling are clearly covered by the prohibition in section 1008," and that its prior assumption that "referrals for abortion do not indeed 'encourage or promote' abortion" was "unreasonable," as "providing a referral for abortion facilitates the obtaining of [an] abortion." 52 Fed. Reg. at 33,210-11. In 1988, the Secretary issued a final rule that prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals

for, abortion as a method of family planning. 53 Fed. Reg. at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the regulations placed limitations on the list of providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id*. (§ 59.8(a)(3)). And to maintain program integrity, the regulations required that grantees keep their Title X-funded projects "physically and financially separate" from all prohibited abortion-related activities. *Id*. (§ 59.9). The Supreme Court upheld these regulations, concluding that they were authorized by Title X, were not arbitrary and capricious, and were consistent with the Constitution. *Rust*, 500 U.S. at 183-203.

After *Rust*, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991." H.R. Rep. No. 102-204, at 1 (1991). Both Houses passed a bill, the "Family Planning Amendments Act of 1992," that would have codified HHS's 1981 guidelines by conditioning Title X funding on a grantee's promise to provide, "upon request," "nondirective counseling and referrals" concerning specific options, including "termination of pregnancy." S. 323, 102d Cong. § 2 (1991). President Bush vetoed the legislation. S. Doc. No. 102-28 (1992).

In 1993, President Clinton and HHS suspended the 1988 regulations so that the 1981 guidance went back into effect. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7464 (Feb. 5, 1993) (interim rule). Three years later, Congress added a rider to its annual HHS appropriations act requiring that any funds provided to Title X projects "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. No. 104-134, tit. II, 110 Stat. 1321, 1321-221 (1996). That "nondirective provision" has appeared in every annual HHS appropriations act since 1996. *E.g.*, Pub. L. No. 115-245, div. B., tit. II, 132 Stat. 2981, 3070-71 (2018).

In 2000, HHS finalized a new rule, which, like the 1981 guidelines and the vetoed Family Planning Amendments Act, required Title X projects to offer and provide upon request

"information and counseling regarding" specific options, including "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule also eliminated the physical-separation requirement in the 1988 regulations. *See id*. at 41,275-76. In adopting these new regulations, HHS acknowledged that the 1988 regulations were "a permissible interpretation of the statute," 65 Fed. Reg. at 41,277, but justified the shift in approaches on the basis of "experience," *id*. at 41,271.

In 2010, Congress enacted the ACA. Included within the Act's "Miscellaneous Provisions" subchapter and titled "Access to therapies," § 1554 provides that "[n]otwithstanding any other provision of [the ACA]," the Secretary "shall not promulgate any regulation that" (1) "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care"; (2) "impedes timely access to health care services"; (3) "interferes with communications regarding a full range of treatment options between the patient and the provider"; (4) "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; (5) "violates the principles of informed consent and the ethical standards of health care professionals"; or (6) "limits the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 18114. Nothing in § 1554 mentions Title X or abortion.

On June 1, 2018, the Secretary issued a notice of proposed rulemaking designed to "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children." 83 Fed. Reg. 25,502, 25,505 (June 1, 2018). After receiving more than 500,000 comments, the Secretary issued a final rule in March 2019, 84 Fed. Reg. 7714, the challenged provisions of which are materially indistinguishable from the 1988 regulations upheld in *Rust*.

In implementing Title X, and especially § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.16(a). As the Secretary explained, "[i]f a Title X project refers for, encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." 84 Fed. Reg. at 7759. In the Secretary's view, this is "the best reading" of § 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id*. at 7777. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes restrictions on the list of providers that may be given at the same time as the required referral for prenatal care for pregnant women. 42 C.F.R. § 59.14(c)(2). Because § 1008 only addresses abortion "as a method of family planning," the Rule permits referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Id*. § 59.14(b)(2), (e)(2).

The Rule is also less restrictive than the 1988 regulations, however, in that it allows, but does not require, "[n]ondirective pregnancy counseling," *id*. § 59.14(b)(1)(i), which may include the neutral presentation of information about abortion, provided it does "not encourage, promote or advocate abortion as a method of family planning." *Id*. § 59.16(a); *see* 84 Fed. Reg. at 7745-46. In the Rule's preamble, HHS explained that in nondirective counseling, "abortion must not be the only option presented" and providers "should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented, consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions." 84 Fed. Reg. at 7747. In HHS's view, such limited, nondirective counseling—

"[u]nlike abortion referral—"would not be considered encouragement, promotion, support, or advocacy of abortion as a method of family planning" in violation of § 1008. *Id*. at 7745.

Like the 1988 regulations, the Rule also requires that Title X projects remain physically separate from any abortion-related activities conducted outside the grant program. 42 C.F.R. § 59.15. As the Secretary explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." 84 Fed. Reg. at 7766. And because without physical separation "it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin," the Secretary concluded that reinstating this requirement was necessary to avoid "the appearance and perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id*. at 7764. Indeed, the Secretary's determination that "the 2000 regulations fostered an environment of ambiguity surrounding appropriate Title X activities" was only reinforced by "the many . . . public comments that argued Title X should support statutorily prohibited activities, such as abortion." *Id*. at 7721-22; *see id*. at 7728-30.

The Rule's preamble contains an express severability statement directing that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." *Id*. at 7725.

II. PROCEDURAL HISTORY

On April 12, 2019, Plaintiff, the Mayor and City Council of Baltimore, filed a complaint asserting ten claims for relief. Compl., ECF No. 1 (Complaint). Plaintiff moved for a preliminary injunction, and the Court granted that motion on May 30, ordering that the Rule is "enjoined as to enforcement in the State of Maryland." ECF No. 44 (PI Order). The government appealed and

sought a stay of the preliminary injunction from this Court and the Fourth Circuit. The Court denied the government's stay motion, ECF No. 56, but a divided Fourth Circuit panel granted a stay of the Court's preliminary injunction pending appeal, *Baltimore*, 2019 WL 3072302. Plaintiff has since moved for reconsideration en banc. ECF No. 27, *Baltimore* (4th Cir. July 3, 2019).

On July 22, 2019, Defendants moved for a stay of district court proceedings pending appeal of the Court's preliminary injunction. ECF No. 62. A hearing on that motion is scheduled for August 20. Pursuant to the Court's July 16 Order, requiring Defendants to respond to Plaintiff's Complaint by August 16, ECF No. 61, Defendants hereby move to dismiss this suit.

ARGUMENT

Defendants move to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and 12(b)(6). "Because standing is an element of subject matter jurisdiction, a defendant's motion to dismiss for lack of standing should be treated under Rule 12(b)(1)." *McInnes v. Lord Baltimore Emp. Ret. Income Account Plan*, 823 F. Supp. 2d 360, 362 (D. Md. 2011). Plaintiff bears the burden of alleging the elements of standing. *See Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 619 (4th Cir. 2018). To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must accept as true all well-pleaded facts in the complaint, but not "legal conclusions drawn from the facts." *Retfalvi v. United States*, 930 F.3d 600 (4th Cir. 2019). In reviewing a Rule 12(b)(6) motion, the Court considers "documents that are explicitly incorporated into the complaint by reference," *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016), and "matters of public record," *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 508 (4th Cir. 2015) (citation omitted).

I. THE SUPREME COURT'S DECISION IN *RUST V. SULLIVAN* UPHELD MATERIALLY INDISTINGUISHABLE REGULATIONS

In *Rust*, the Supreme Court upheld regulations that implemented § 1008 by "limit[ing] the ability of Title X fund recipients to engage in abortion-related activities" in multiple respects. 500 U.S. at 177-78. Those regulations "broadly prohibit[ed]" Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'" and specifically proscribed them from providing either a "referral for," or "counseling concerning," abortion as a method of family planning, "even upon specific request." *Id*. at 179-80. Instead, because "Title X is limited to preconceptional services" and "does not furnish services related to childbirth," the regulations required the projects to "refer every pregnant client 'for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.'" *Id*. This list could "not be used indirectly to encourage or promote abortion," such as by (i) "weighing the list of referrals in favor of health care providers which perform abortions," (ii) "including on the list of referral providers health care providers whose principal business is the provision of abortions," (iii) "excluding available providers who do not provide abortions," or (iv) "steering clients to providers who offer abortion as a method of family planning." *Id*. at 180 (citation omitted). Finally, all Title X projects were required to "be organized so that they are 'physically and financially separate' from prohibited abortion activities." *Id*.

The Supreme Court rejected the arguments that these regulations exceeded the Secretary's authority under Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. *Rust*, 500 U.S. at 183-203. The Court first held that the regulations were "plainly allow[ed]" under the "broad directives provided by Congress in Title X in general and § 1008 in particular." *Id*. at 184; *see id*. at 184-90. As it observed, "to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services,

and other related medical, informational, and educational activities,'" Congress mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id*. at 178-79 (emphasis added). That "broad language" justified both the "ban on [abortion] counseling, referral, and advocacy within the Title X project," *id*. at 184, as well as the requirement "mandating separate facilities, personnel, and records," *id*. at 187.

Specifically, the Secretary had concluded that if a program promotes, encourages, advocates, provides counseling concerning, or refers for abortion as a method of family planning, then the program is one "where abortion is a method of family planning." *See, e.g.*, 53 Fed. Reg. at 2923, 2933. The Supreme Court agreed that this is, at the very least, a "permissible construction" of § 1008, and rejected the argument that the counseling and referral restrictions were arbitrary and capricious. *See Rust*, 500 U.S. at 186-87. The Court found that the Secretary provided a reasoned analysis for the restrictions, crediting the Secretary's explanation that this interpretation is "more in keeping with the original intent of the statute," even if it constituted a "sharp break from the Secretary's prior construction." *Id*.; *see also id*. at 195 n.4 (recognizing "Congress's intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning'"). The Court also credited the Secretary's determination that "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id*. at 187 (citation omitted).

The Court likewise held that "the Secretary's interpretation of the statute that separate facilities are necessary, expressly in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. As the Secretary had explained, the collocation of Title X

clinics and abortion clinics would result in the economic reality—or at least the public perception—of taxpayer dollars being used to subsidize abortion as a method of family planning. *See* 53 Fed. Reg. at 2940-41. The Supreme Court concluded that the physical-separation requirement was based on a "permissible construction of the statute," and it deferred to the Secretary's judgment that the requirement was needed to "assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Rust*, 500 U.S. at 188.

More generally, the Supreme Court drew a clear distinction between impeding abortion and choosing not to subsidize it. *See Rust*, 500 U.S. at 192-203 (rejecting constitutional challenges). The Court first dismissed the objection that the 1988 regulations engaged in viewpoint discrimination by prohibiting "all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." *Id*. at 192. As the Court explained, the government may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id*. at 192-93. Here, the Secretary had permissibly chosen "to subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion,'" through taxpayer dollars, in a congressionally created program that excluded "abortion as a method of family planning." *Id*. at 193.

Nor, in the Court's judgment, did the regulations "significantly impinge upon the doctor-patient relationship." *Rust*, 500 U.S. at 200. Although the principal dissent insisted that "the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand" that Title X providers furnish their patients "with the full range of information and

options regarding their health and reproductive freedom," including "the abortion option," *id*. at 213-14 (Blackmun, J., dissenting), the majority took a different view. As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "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. *Id*. at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as he "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id*. "In these circumstances," the Court concluded, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id*.

Finally, the Supreme Court held that the "mere decision to exclude abortion-related services from a federally funded *preconceptional* family planning program" could not "impermissibly burden" a woman's right to obtain an abortion. *Id*. at 201-02. "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected," and thus instead "may validly choose to fund childbirth over abortion." *Id*. at 201. Although "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive" abortion-related services "from a Title X project," there is no constitutional requirement that "the Government distort the scope of its mandated program" to provide them. *Id*. at 203. "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral," for instance, "leaves her in no different position than she would have been if the Government had not enacted Title X." *Id*. at 202.

The regulations upheld by the Supreme Court are materially indistinguishable from the regulations challenged here. Both prohibit Title X projects from referring pregnant women for—

or otherwise encouraging, promoting, or advocating—abortions as a method of family planning, even upon specific request. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. §§ 59.14(a), 59.16(a). Both require Title X projects to refer a pregnant woman out of the Title X program for prenatal care. *Compare Rust*, 500 U.S. at 179-80, *with* 42 C.F.R. § 59.14(b)(1). Both place restrictions on the list of providers given in conjunction with, or at the time of, such referral to prevent Title X projects from steering women toward abortion. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.14(c). And both mandate that Title X projects remain physically separate from prohibited abortion activities. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.15. In fact, the Rule is less restrictive than the 1988 regulations—which prohibited any counseling on abortion as a method of family planning—in that it permits, but does not require, nondirective pregnancy counseling that may include the neutral presentation of information about abortion, so long as the counseling does not encourage or promote that procedure. *Compare Rust*, 500 U.S. at 179, *with* 42 C.F.R. § 59.14(b)(1(i), (e)(5); 84 Fed Reg. at 7745-46.

None of this is disputed. The relevant statutory text has not changed. And rather than overrule *Rust* (or even call it into question), the Supreme Court has repeatedly reaffirmed it. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*AOSI*"), 570 U.S. 205, 216-17 (2013). The Secretary therefore acted lawfully in effectively reinstating regulations already upheld by the Supreme Court, and Plaintiff's suit seeking to overrule that decision should be dismissed.

II. PLAINTIFF'S STATUTORY CLAIMS LACK MERIT

Since its enactment, the Title X statute has broadly mandated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As explained in the Rule, if a program refers patients for—or

otherwise promotes, encourages, or advocates—abortion as a method of family planning, then the program, by definition, is one "where abortion is a method of family planning." 84 Fed. Reg. at 7759. The Supreme Court, in finding that this construction is, at the very least, "permissible," credited HHS's explanation that this reading of § 1008 is "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187.

Plaintiff does not provide an alternative interpretation of § 1008, under which a program that makes referrals for, or otherwise promotes or encourages, abortion is not a program "where abortion is a method of family planning." Instead, it tries to sidestep the text of § 1008 and the Supreme Court's decision in *Rust* by concluding that the Secretary's restrictions on abortion referrals and counseling are no longer permissible in light of a six-word clause in an appropriations rider and an ancillary provision of the ACA. As described below, that conclusion cannot be squared with either the text of either provision on which Plaintiff relies or the presumption against implied repeals, which requires a "clear and manifest" intent to repeal a statute, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 441 U.S. 644, 663 (2007), and "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). There is no indication that Congress had any intent—much less a "clear and manifest" one—to eliminate HHS's statutory authority for these regulations.

A. The Nondirective Provision Does Not Supplant *Rust*

As noted above, the appropriations rider on which Plaintiff relies provides that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." This language does not abolish HHS's authority to adopt regulations that are materially indistinguishable from those upheld by the Supreme Court in *Rust*.

Start with the prohibition on abortion referrals. By definition, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything. True, the Rule also requires that patients be referred for prenatal health care. But the existence of that separate requirement does not somehow render "directive" the mere prohibition of abortion referrals. This is especially true given that the prenatal-referral requirement is severable from the abortion-referral prohibition. *See* 84 Fed. Reg. 7725. The Court need not rely on the severability statement, however, because a prenatal-care referral likewise does not "direct" a patient to forgo obtaining an abortion—such care is necessary for the health of the mother *while* she is pregnant, as she by definition is at the time of the referral, regardless of whether she *later* chooses to obtain an abortion outside the auspices of Title X. *See, e.g.*, *id*. at 7748, 7761-62; *see also id*. at 7750 (explaining that because "pregnancy may stress and affect extant health conditions," "comprehensive primary health care may be critical to ensure that pregnancy does not negatively impact such conditions"). Similarly, the restrictions on the list of providers 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." *Id*. 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.

In any event, the nondirective provision is limited to "pregnancy counseling," a term that does not apply to referrals, let alone with sufficient clarity to repeal § 1008 by implication. In this program and in general, counseling and referrals are distinct. "[P]regnancy counseling" involves providing information about medical options, which is different from referring a patient to a specific doctor for a specific form of medical care. *See, e.g.*, 84 Fed. Reg. at 7716. That much is clear from Congress's own words on the subject, which demonstrate that Congress knows how to

regulate both "counseling" and "referrals" in this area. *See, e.g.*, 42 U.S.C. § 300z-10(a) ("Grants or payments may be made only to programs or projects which do not provide abortions or *abortion counseling or referral*." (emphasis added)).[2] Most notably, when Congress tried (and failed) to overturn *Rust* through the Family Planning Amendments Act, as noted above it used language expressly requiring Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *See* S. 323, 102d Cong. § 2 (1991). The appropriations rider later passed in 1996, by contrast, requires only that "pregnancy counseling" be nondirective and says nothing about "referrals," much less referrals for "termination of pregnancy" (or "abortion") specifically.

For its part, HHS has similarly used "counseling" and "referral" as distinct terms in guidance and regulations concerning the limits of Title X funds on abortion-related activities. For example, both its 1981 guidelines and the 2000 regulations used the same formulation as the vetoed Family Planning Amendments Act: Title X projects were required to provide "nondirective counseling"—including on "[p]regnancy termination"—and "referral upon request." 65 Fed. Reg. at 41,279 (§ 59.5(a)(5)); *accord* 1981 Guidelines § 8.6; *see also* 53 Fed. Reg. at 2923 (describing 1981 guidelines). And when HHS eliminated the prohibition on abortion referrals in the 2000 regulations, it viewed the appropriations rider as directly applying only to counseling, not to referrals. *Compare* 65 Fed. Reg. 41,273, *with id*. at 41,275. If it were actually "clear and manifest" that Congress had repealed Title X's authorization to prohibit abortion referrals through the

[2] *See also, e.g.*, 18 U.S.C. § 248(e)(5) ("The term 'reproductive health services' . . . includes . . . counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."); 42 U.S.C. § 300z-1(a)(4)(B) (defining "necessary services" to include "adoption counseling and referral services"); *id*. § 1395w-22(j)(3)(B) (conscience exemption for coverage of "counseling or referral" services through Medicare Advantage managed care plans); *id*. § 1396u-2(b)(3) (same with respect to Medicaid managed care plans).

appropriations rider, *Home Builders*, 551 U.S. at 663, then presumably HHS would have said as much in 2000. Instead, HHS responded to the argument that suspension of the 1988 regulations was unlawful by explaining that those regulations were "a permissible interpretation of the statute," but in the agency's view, "not the only permissible interpretation of the statute." 65 Fed. Reg. at 41,277. For HHS, "the crucial difference between" the 1988 regulations and the 2000 regulations was "one of experience." *Id*. at 41,271. Despite discussing the nondirective provision, *id*. at 41,273, HHS never concluded that it required suspension of the 1988 regulations.

Although the Court previously rejected this distinction based on a provision of the Children's Health Act of 2000, 42 U.S.C. § 254c-6(a)(1), PI Opinion at 20, Defendants respectfully submit that the Court misinterpreted that statute. Section 254c-6(a)(1) requires the Secretary to make grants to "adoption organizations for the purpose of developing and implementing programs to train [staff] in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women." While the Court read this is as indicating that referrals are "included" in nondirective counseling, the term "included" instead modifies the "other courses of action" potentially addressed in pregnancy counseling—namely, abortion or carrying to term. More fundamentally, a statement in the Rule's preamble acknowledging that § 254c-6(a)(1) reflects a legislative intent that "adoption information and referrals be included as part of any nondirective counseling," 84 Fed. Reg. at 7733, has no bearing on whether Congress considered referrals to be *a type* of counseling (as opposed to something that merely may occur at the same time as counseling). *See* 42 C.F.R. § 59.14(b)(1) (nondirective pregnancy counseling may occur at the same time as prenatal referral). As the Ninth Circuit motions panel recognized, the Rule "treats referral and counseling as distinct terms, as has Congress and HHS under previous administrations." *California*, 927 F.3d at 1077.

With respect to counseling, the Rule expressly permits "nondirective pregnancy counseling, which may discuss abortion." 42 C.F.R. § 59.14(e)(5); *see also* 84 Fed. Reg. at 7746 (explaining that the Rule allows "nondirective pregnancy counseling even if such counseling includes abortion among other options"). Defendants thus respectfully submit that the Court mischaracterized this provision when it previously stated that the Rule "prohibits physicians in Title X facilities from counseling patients about abortion." PI Opinion at 17. Properly construed, the Rule's provision allowing Title X projects to provide "nondirective pregnancy counseling" is perfectly consistent with the nondirective provision.

Plaintiff argues that the counseling provisions are "directive" because they "force[] providers to discuss irrelevant information a patient does not wish to discuss." Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. at 20 (PI Mem.), ECF No. 11-1; *see also* Compl. ¶ 116. Plaintiff is correct that the Rule requires, in light of § 1008, that "abortion must not be the only option presented," 84 Fed. Reg. at 7747, but the neutral presentation of other options in addition to abortion is not *directing* the woman to choose one of those options. Nor does "discuss[ing] the possible risks and side effects to both mother and unborn child of any pregnancy option presented," *id*., direct a woman to forgo an abortion, any more than discussing the potential risks of pregnancy to her own health directs her to obtain one.

At bottom, Plaintiff's challenge to the Rule's counseling restrictions is premised on the assumption that, in requiring that pregnancy counseling be "nondirective," Congress also mandated that counseling on abortion be treated equally as counseling on carrying the child to term or adoption. But "[n]ondirective counseling does not require equal treatment of all pregnancy options—rather, it just requires that a provider not affirmatively endorse one option over another." *California*, 927 F.3d at 1077. Indeed, when Congress wants pregnancy options to be treated on an

"equal basis," it knows how to say so explicitly. *See* 42 U.S.C. § 254c-6(a)(1) (requiring grants for programs to train relevant staff "in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"). The same is true when Congress wishes nondirective counseling to address specific options, as confirmed by the vetoed Family Planning Amendments Act. *See supra* p. 5. Here, by contrast, Congress simply required that "all pregnancy counseling shall be nondirective," and that narrow directive does not require equal treatment between childbirth and abortions—particularly where Congress previously excluded "programs where abortion is a method of family planning" from receiving funding. *See Rust*, 500 U.S. at 193 (affirming government's authority to "subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars).

If there were any doubt as to whether the appropriations rider implicitly and indirectly eliminated the Secretary's authority under Title X to issue the counseling and referral restrictions here, ordinary interpretative principles would make clear that it did not. Plaintiff's claim rests on the remarkable conclusion that, in passing the nondirective provision, the 1996 Congress resurrected the vetoed Family Planning Amendments Act in different form, while simultaneously ordering that Title X funds "shall not be expended for abortions." Put differently, Congress would have needed to abrogate a high-profile Supreme Court decision; after it had tried and failed to do so expressly; in a clause that does not mention abortion, pregnancy, referrals, advocacy, § 1008, or *Rust*; and in a manner that was so subtle that not even HHS recognized what had happened when it issued its 2000 regulations, concluding that it was permitted (but not required) to provide for abortion counseling and referrals.

That construction of the appropriations rider is implausible on its face and contrary to fundamental principles of statutory interpretation. Congress is presumed neither to implicitly repeal prior legislation—especially through appropriations riders—nor to "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001), yet Plaintiff (and the Court in granting the preliminary injunction motion) has assumed that the 1996 Congress did both. The far more likely explanation—suggested by the accompanying directive that Title X funds "shall not be expended for abortions"—is that the 1996 Congress was concerned about abuses that had occurred under the 1981 regulations, which HHS had essentially reinstated in 1993, and wanted to ensure that Title X projects did not use pregnancy counseling to push their clients towards abortion. *See* 53 Fed. Reg. at 2924 (under the 1981 guidelines, "the practice o[f] nondirective counseling has been the subject of widespread abuse, with many providers foregoing any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions"). Indeed, far from an attempt to abrogate *Rust*, the appropriations rider was a compromise measure offered in response to an effort, driven in part by these concerns, to defund the Title X program. *See* 141 Cong. Rec. H8248-62 (Aug. 2, 1995). Accordingly, a sponsor of the rider promised that, under this legislation, "not a penny of [Title X] funds can be used to provide abortion services" and "[c]ounselors in these programs may not suggest that a client choose abortion." *Id*. at H8250 (Rep. Greenwood). At a minimum, this history undercuts the notion that the appropriations rider was simply a variant of the Family Planning Amendments Act.

In finding that Plaintiff was likely to succeed on this claim, the Court determined that the presumption against implied repeals did not apply because *Rust* "held that the 1988 rule was one permissible interpretation of Section 1008." PI Opinion at 19. Respectfully, however, that reasoning acknowledges that, before 1996, Title X had at a minimum delegated authority to HHS

to issue the regulations at issue, and it concludes that the appropriations rider stripped that authority away. The congressional elimination of a statutory delegation of authority, however, is by definition a repeal, whether that delegation was an explicit or implicit one. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (statutory ambiguity constitutes an "implicit" "legislative delegation to an agency"); *see also Home Builders*, 551 U.S. at 664 n.8 ("It does not matter whether [an] alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." (collecting cases)). But there is no evidence here that Congress intended to repeal or amend portions of Title X or the Supreme Court's interpretation of that statute in *Rust*. Accordingly, Plaintiff's claim, which forms Count II of its Complaint, fails as a matter of law.

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

Plaintiff's claim based on § 1554 of the ACA fares no better. As with the appropriations rider, there is nothing in the text of this statutory provision suggesting that Congress intended to erase the Secretary's pre-existing authority to adopt regulations materially indistinguishable from the ones upheld in *Rust*.

At the outset, Plaintiff has waived any challenge to the Rule under § 1554. *See California*, 927 F.3d at 1078. "As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency." *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994). And it is undisputed that none of the 50,000-plus comments HHS received even invoked § 1554, much less argued that it eliminated the agency's authority to adopt regulations materially indistinguishable from ones upheld by the Supreme Court. Plaintiff cannot rectify this problem by pointing to comments raising various

substantive objections to the Rule, without expressly invoking § 1554 as a legal bar. *See* Pl.'s Reply in Supp. of Mot. for Prelim. Inj. at 10-11 (PI Reply), ECF No. 34. Preservation requires that the "specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Here, HHS had no "opportunity to consider the matter, make its ruling, and state the reasons for its action," *Pleasant Valley Hosp.*, 32 F.3d at 70, when no commenter put HHS on notice that § 1554 could have any conceivable bearing on § 1008.

Nor is it impossible for a party to waive a challenge to "the scope of the agency's power." PI Reply at 12. Although "agencies are required to ensure that they have authority to issue a particular regulation," they "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." *Koretoff*, 707 F.3d at 398. Contrary to Plaintiff's claim, this does not mean that a plainly unlawful rule "would be allowed to stand in perpetuity," PI Reply at 13, as nothing stops regulated parties from raising a "statutory argument[] if and when the Secretary applies the rule" to them, *Koretoff*, 707 F.3d at 399. But "the price for a ticket to facial review is to raise objections in the rulemaking," *id*. at 401 (Williams, J., concurring), and it is uncontested that neither Plaintiff nor anyone else did so with respect to § 1554.

This omission is unsurprising, as nothing in § 1554 abrogates Title X's authorization for the Rule. *See Rust*, 500 U.S. at 187. None of the Rule's provisions violates § 1554 because the Rule does not create, impede, interfere with, restrict, or violate anything. Instead, it simply limits what the government chooses to *fund* through the Title X grant program. As the Supreme Court explained in *Rust*, the Secretary's decision "to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy,'" but simply "leaves her in no different position than she would have been in if the Government had not

enacted Title X." *Rust*, 500 U.S. at 201-02. Although repackaged as a statutory argument, Plaintiff's argument that the referral restrictions violate § 1554 is substantively the same as the constitutional arguments rejected in *Rust*. *See California*, 927 F.3d at 1078-79.

For similar reasons, Plaintiff's argument that the counseling and referral restrictions do not comport with providers' ethical obligations, and therefore violate § 1554, is erroneous. *See* Compl. ¶¶ 149-50. As HHS explained, *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. Indeed, in the face of a dissent arguing that the restrictions violated doctors' ethical responsibilities, *Rust*, 500 U.S. at 213-14 (Blackmun, J., dissenting), the Court explained that "[n]othing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold," *id*. at 200 (majority opinion). Because Title X "does not provide post conception medical care . . . 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," and, in any event, doctors remained "free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id*. The present Rule gives providers that same option, *see* 42 C.F.R. § 59.14(e)(5), and, even more, expressly allows providers to offer nondirective counseling on abortion specifically, *id*. § 59.16(a).

HHS also explained that Congress presumes that not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal conscience statutes giving medical providers (who likewise believe they are not violating medical ethics) that option. *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). If a doctor's

failure to refer for abortion is actually a violation of medical ethics, it is unclear why "[f]ederal and State conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs (or, under State law, more generally)." *Id*. at 7748.

And again, even if this were a closer question, settled rules of statutory construction would dispose of Plaintiff's theory. If Title X's specific delegation of authority to the Secretary to adopt the Rule somehow conflicted with the general directives in § 1554, "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). And more fundamentally, it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule (and a silent abrogation of a high-profile Supreme Court precedent) in the mousehole of § 1554. *See supra* p. 21. That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 of the PHSA, especially since the ACA is littered with "notwithstanding" clauses that use the common phrase "notwithstanding any other provision of law." *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i); *see Family Planning Ass'n of Maine v. HHS*, 2019 WL 2866832, at *17 (D. Me. July 3, 2019); *see also Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." (citation omitted)). For all of these reasons, the Court should dismiss Count I of Plaintiff's Complaint.

C. *Rust* Forecloses Plaintiff's Title X Claim

In Count III of its Complaint, Plaintiff argues that the Rule violates Title X itself, specifically the requirement that "grants for Title X programs 'shall offer a broad range of acceptable and effective family planning methods and services' and a 'comprehensive program of family planning.'" Compl. ¶ 165 (quoting 42 U.S.C. §§ 300(a), 300a(a)). This argument necessarily fails because neither provision mentions abortion and both predate *Rust*, which held that materially indistinguishable regulations were permissible under Title X. *See supra* Part I. It also fails because the Rule expressly incorporates both statutory requirements. *See* 42 C.F.R. § 59.2. Plaintiff may believe that a Title X project cannot provide a "broad range of acceptable and effective family planning methods" without providing or promoting abortions, but Congress disagreed, when it expressly required both that Title X projects offer a "comprehensive program of family planning services" and that "none" of the Title X funds "shall be used in programs where abortion is a method of family planning." 42 U.S.C. §§ 300a(a), 300a-6.

In its preliminary injunction motion, Plaintiff argued that the Rule violates the additional requirement that Title X services remain "voluntary." *See* PI Mem. at 21 (quoting 42 U.S.C. § 300a-5). This argument fails for the same reasons discussed above, and for the additional reason that Title X services must be "voluntary" only in the sense that accepting family planning services under the program "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 of information." 42 U.S.C. § 300a-5. The Rule specifically incorporates this requirement in 42 C.F.R. § 59.5(a)(2), which is unchanged from the 2000 regulations.

III. THE RULE IS NOT ARBITRARY AND CAPRICIOUS

Counts VII and VIII of Plaintiff's Complaint allege the same thing: that the Final Rule is arbitrary and capricious. Agency action must be upheld in the face of such a challenge so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) ("Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid."). The Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this deferential standard for the reasons Defendants have previously explained in their opposition to Plaintiff's preliminary injunction motion, *see* ECF No. 25 (PI Opp.) at 25-37, which Defendants incorporate by reference here, and as discussed below.

Fundamentally, HHS promulgated the Rule to ensure that federal funds are not expended in violation of the agency's interpretation of § 1008. *See* 84 Fed. Reg. at 7723-24. As explained above, the Supreme Court determined in *Rust* that this interpretation is, at the very least, permissible and justifies counseling and referral restrictions, as well as physical-separation requirements, materially indistinguishable from those at issue here. Thus, HHS's reasoning for adopting the Rule—that existing regulations failed to implement properly § 1008, and that restrictions on abortion referrals and physical-separation requirements are necessary to ensure compliance with the statutory prohibition on funds in programs where abortion is a method of

family planning—was accepted in *Rust* and should be accepted here as well. *See Arent v. Shalala*, 70 F.3d at 610, 616 (D.C. Cir. 1995) (citing *Rust* as an example of a situation in which "what is permissible under *Chevron* is also reasonable under *State Farm*").

Plaintiff nevertheless contends that the Rule is arbitrary and capricious for a number of reasons, all of which reflect an attempt to second-guess HHS's predictive judgment and substitute Plaintiff's views for that of the agency. The Court should reject these attempts.

1. Plaintiff argues that HHS did not adequately explain its decision to "reverse[] a previously settled agency position." Compl. ¶¶ 205-06 (citing *Fox*, 556 U.S. at 516). An agency, however, is not held to a "heightened standard" when it changes policy, and it need only demonstrate that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515. As discussed above and below, HHS plainly satisfied this standard here. And contrary to Plaintiff's contentions, a "more detailed justification" is not necessary here because the Rule does not "rest[] upon factual findings that contradict those which underlay [HHS's] prior policy," and the 2000 regulations did not "engender[] serious reliance interests that must be taken into account." *Id.*

As to the first element, the Rule does not rest on "factual findings" in conflict with the factual record underlying the 2000 regulations, but rather a policy and legal judgment; namely HHS's renewed interpretation of § 1008 and its determination that the Rule is necessary to properly implement the best reading of that statute. That judgment is valid even if it differs from Plaintiff's judgment and that of some prior administrations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). As for reliance, Plaintiff has no legally cognizable reliance interests in the continued receipt of discretionary Title X grants under the conditions it

prefers—and certainly no interest beyond the stated duration (usually one year) of a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Empls.*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests because the relevant "contract provisions . . . will expire on their own in a few years' time"); *see also* PI Opp. at 36-37. And in any event, HHS did account for the costs of complying with the separation requirements in its analysis, *see* 84 Fed. Reg. at 7718, 7781-82, and the agency's explanation is sufficiently detailed under any standard of review.

2. Plaintiff also asserts that HHS failed to justify the counseling and referral restrictions "on legal or practical grounds and fail[ed] to account for [their] many negative health consequences." Compl. ¶ 208; *see also id*. ¶ 220. This is not the case. As noted above, these restrictions were based on HHS's legal and policy judgment that they represented a better interpretation of § 1008 than the provisions in the 2000 regulations because a program that refers patients for abortion as a method of family planning, or otherwise promotes, encourages, or advocates for such abortion, is a program "where abortion is a method of family planning." 84 Fed. Reg. at 7745-46. HHS also explained how the 2000 regulations were in tension with a number of federal conscience-protection statutes and, with respect to referral for abortion at least, with § 1008 itself. *Id*. And HHS considered the "health consequences" associated with the Rule, but simply disagreed with Plaintiff and other commenters who argued that such consequences would be negative because the counseling and referral provisions purportedly conflict with "medical ethics and professional responsibility rules," and would thus "many" providers to leave the program. *See* Compl. ¶¶ 208-09. HHS considered these concerns and provided a reasoned response for adopting a different view, which is all that the APA requires.

In particular, HHS determined that, properly understood, the Rule is consistent with medical ethics obligations, as well as multiple Supreme Court decisions and other legal authorities.

See 84 Fed. Reg. at 7724, 7748. Indeed, as noted above, *Rust* upheld a nearly identical version of the counseling and referral restrictions that had the same implications, 500 U.S. at 199, in the face of a dissent contending that these restrictions would violate ethical responsibilities, *id*. at 213-14 (Blackmun, J., dissenting). That objection did not prevail then and should not now.

As for the claim that the Rule would cause providers to exit the program, *e.g.*, Compl. ¶¶ 208, 212, such departure threats essentially seek to award certain grantees veto power over otherwise legally permissible and reasoned policy judgments that Congress authorized HHS to make. *See* PI Opp. at 33. That tactic did not work in *Rust*, and it should not work here either. *See* Planned Parenthood Amicus Brief at 13 n.45, *Rust* (No. 89-1391), 1990 WL 10012649 (arguing that 1988 regulations would "force[]" "many providers" to "close or drastically curtail services"). Here, HHS considered the effect the Rule would have on Title X patients and concluded that the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." *See* 84 Fed. Reg. at 7723; *see also id*. at 7780-81; PI Opp. at 34. There is no basis to reject the Secretary's well-reasoned view concerning the effect of the counseling and referral restrictions on the provision of Title X services.

Plaintiff further challenges the counseling and referral provisions on the ground that they are supposedly inconsistent with "QFP" guidelines issued by HHS and the Centers for Disease Control and Prevention. *See* Compl. ¶¶ 89, 121. This argument is likewise meritless because it ignores that HHS was entitled to change course and adopt a policy with respect to pregnancy counseling and abortion referrals that differed from the one it adopted in the 2000 regulations and espoused in guidance documents implementing those regulations. HHS provided a reasonable explanation for departing from its prior policy and adopting the position, blessed by the Supreme

Court in *Rust*, that § 1008 prohibits abortion referral as a method of family planning and does not require the provision of counseling on abortion. *See* 84 Fed. Reg. at 7716-17.

Nor is the Rule's "emergency" exception for abortion referrals arbitrary and capricious. *See* Compl. ¶ 211. Instead, it strikes an appropriate balance between § 1008, which HHS reasonably interprets as prohibiting referral for abortion *as a method of family planning*, and the need to provide medically necessary services when referral for abortion is based, instead, on an "emergency medical situation." *See* 84 Fed. Reg. at 7762. The Rule takes the same approach as the 1988 regulations and makes even more clear that "[r]eferrals for abortion for emergency care purposes are not prohibited." *Id*. at 7747. Indeed, *Rust* rejected the "claim that the regulations would not, in the circumstances of a medical emergency, permit a Title X project to refer a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services," and explained that "we do not read the regulations to bar abortion referral or counseling in such circumstances." 500 U.S. at 195.

Contrary to Plaintiff's allegation that HHS offered an "unsupported and illogical rationale" for the Rule's mandatory prenatal care referral requirement, Compl. ¶ 219, HHS reasonably determined that prenatal care is medically necessary for all pregnant patients. 84 Fed. Reg. at 7761. "Because prenatal care is essential in order to optimize the health of the mother and unborn child, and to help ameliorate the current health inequality as it relates to low income women," HHS explained, "referring low income pregnant women for prenatal care is of increased importance." *Id*. at 7762; *see also id*. at 7750; *supra* p. 16. To the extent Plaintiff argues that prenatal care is not medically necessary for women who seek and obtain abortions, Compl. ¶ 111, it puts the cart before the horse. At the time of the consultations contemplated by the Rule, the patient has not yet had an abortion, and abortion-related services are not part of the Title X scheme. Because Title

X likewise does not fund prenatal care *services*, the Rule simply (and reasonably given their medical necessity) requires the pregnant women be given a prenatal care referral—as was required in the regulations *Rust* upheld. That a patient might *later* obtain an abortion *outside* the Title X project is no basis for withholding information *within* that project.

As a final attack on the counseling and referral provisions, Plaintiff alleges that the decision in the Rule to limit pregnancy counseling to doctors and advanced practice providers (APPs), was "unexplained." *See* Compl. ¶ 210. To the contrary, HHS required that those who provide nondirective pregnancy counseling using HHS funds be qualified to do so because pregnancy is a medical condition, and pregnancy counseling discusses several medical options. In fact, as discussed below, HHS initially proposed to allow only physicians to provide such counseling, but, in response to comments, decided to expand this definition to include those qualified by their "advanced medical degrees, licensing, and certification requirements." 84 Fed. Reg. at 7728 n.41. HHS therefore considered which types of health care providers to allow to provide nondirective pregnancy counseling, and reasonably drew the line at APPs.

3. As for the physical-separation requirements, Plaintiff similarly contends that HHS failed to "meaningfully explain[]" the requirements and "ignored many of the harms" they would impose. Compl. ¶¶ 213-14; *see also id*. ¶ 220. But as discussed above, *Rust* held that HHS's predictive judgment about how best to comply with § 1008 was a reasonable basis for the same physical-separation requirement. 500 U.S. at 187. Here, as in *Rust*, the agency justified its policy with the explanation that the prior regulations "failed to implement properly the statute," *id*., amply discussed and considered the relevant reliance interests, comments received, and the previous approaches, and ultimately "reaffirm[ed the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. The agency also explained that the requirement was 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 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. While Plaintiff might disagree, it cannot demonstrate that the agency's conclusion that physical collocation would impermissibly subsidize abortion was arbitrary and capricious. *See* 84 Fed. Reg. at 7764.

Plaintiff also quibbles with HHS's assessment of the costs that physical separation would impose on providers. *See* Compl. ¶ 214. But the Rule permits the Secretary to consider a provider's particular circumstances and "allows case-by-case determinations on whether physical separation is sufficiently achieved to take the unique circumstances of each program into consideration." 84 Fed. Reg. at 7766. The principle "that a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative polic[i]es." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (citation omitted). In any case, Plaintiff brings a facial challenge. Even if some current grantees will incur compliance costs that exceed HHS's "estimate[d] . . . average," 84 Fed. Reg. at 7781, that would hardly render the estimate irrational or every application of the Rule invalid.

Finally, Plaintiff accuses HHS of "'entirely fail[ing] to consider' the harms to public health" caused by the physical-separation requirements to the extent they will, according to Plaintiff, force providers to leave the Title X program. PI Mem. at 27; *see also, e.g.*, Compl. ¶ 214. As discussed above, however, HHS exercised its expert judgment to project that, while any calculation of future program participation would be inherently speculative, it did not anticipate "a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. And

having considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was necessary to comply with Title X, notwithstanding its predicted costs. That decision was not arbitrary and capricious simply because Plaintiff disagrees with HHS's predictive judgments. *See BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (Kavanaugh, J.) ("We owe substantial deference to an agency's predictive judgments." (cleaned up)). And as for the allegation that separation would make it more difficult for Title X grantees to provide coordinated care, Compl. ¶ 214, HHS explained that "[i]t is not uncommon for people to have different health care providers for different health care needs" and elaborated that, '[i]f Title X services and abortion services are separate, it is no more difficult for Title X providers to maintain two electronic records, one for Title X services and another for abortion services, than to keep abortions services and other services separate within the same [electronic health records] system." 84 Fed. Reg. at 7767. This analysis was not arbitrary and capricious.

In the end, HHS made a legal and policy judgment (already blessed by the Supreme Court) that the Rule was necessary to implement HHS's interpretation of § 1008. Plaintiff may dislike this conclusion, but its "policy disagreement" is no basis for setting the Secretary's judgment aside. *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 380 (D.C. Cir. 2013). Because Plaintiff's arbitrary-and-capricious claims fail as a matter of law, the Court should dismiss Counts VII and VIII.

IV. PLAINTIFF'S PROCEDURAL CHALLENGES ARE MERITLESS

In Count IX, Plaintiff alleges that the Rule was promulgated "without observance of procedure required by law." S*ee* Compl. ¶¶ 222-231. Plaintiff's arguments are meritless.

First, relying on Executive Orders 12,866 and 13,563, Plaintiff attacks HHS's regulatory impact analysis as failing to "sufficiently identify and quantify the costs and benefits of the rulemaking." Compl. ¶¶ 227-28. But "[a]n Executive Order devoted solely to the internal

management of the executive branch—and one which does not create any private rights—is not subject to judicial review." *Meyer v. Bush*, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993). The orders on which Plaintiff relies fit this bill. *See* Exec. Order 12,866, § 10 (Sept. 30, 1993) (order "is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States"); Exec. Order 13,563, § 7(d) (Jan. 18, 2011) (similar). Thus, alleged violations of these "Executive Orders 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).

Plaintiff also argues that HHS's proposed rule provided insufficient notice of the requirement that nondirective pregnancy counseling be offered only by physicians or APPs. Compl. ¶¶ 229-30. But an agency's final rule may affect "substantial changes" to a proposed rule so long as "the changes are a 'logical outgrowth' of the original proposal and the notice and comments upon it." *Kennecott v U.S. EPA*, 780 F.2d 445, 452-53 (4th Cir. 1985). To determine whether the notice was adequate, courts ask whether a complaining party should have anticipated that a particular requirement might be imposed, and whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *See, e.g.*, *Int'l Union, UMWA v. MSHA*, 626 F.3d 84, 94-95 (D.C. Cir. 2010). Plaintiff received sufficient notice under this standard, as the question of which types of providers and/or staff may engage with and provide information to patients was squarely presented. Indeed, HHS initially proposed to allow *only physicians* to provide either a list of providers to patients or nondirective counseling, *see* 83 Fed. Reg. at 25,531; 25,507; 25,518, but, in response to comments, decided to allow both physicians and APPs to offer nondirective

counseling, 84 Fed. Reg. at 7761. Because this question was presented, and HHS adopted a *less* restrictive approach in response, Plaintiff's notice-and-comment claim is meritless. *See California v. Azar*, --- F. Supp. 3d ----, 2019 WL 1877392, at *42 (N.D. Cal. Apr. 26, 2019) (rejecting logical outgrowth challenge to same provision).

V. PLAINTIFF'S CONSTITUTIONAL CLAIMS AND ITS CLAIM UNDER RFRA FAIL

The Supreme Court in *Rust* held that the counseling, referral, advocacy, and separation provisions of the 1988 regulations (1) did not violate the First Amendment rights of program participants; (2) did not improperly condition funding on the relinquishment of a constitutional right; and (3) did not violate a woman's right to choose abortion. Plaintiff nonetheless argues that the Rule violates the First Amendment and the Fifth Amendment, is unconstitutionally vague, and substantially burdens the free exercise of religion. Plaintiff lacks standing to raise many of these arguments, which in any event fail.

A. Plaintiff Lacks Standing to Assert the Rights of Third Parties

As a threshold matter, Plaintiff lacks standing to bring its claims under RFRA and the Fifth Amendment's equal protection component because it has not alleged that it, as a city, will suffer the harm alleged in those claims. Indeed, Baltimore does not—and cannot—argue that the city itself (1) has a sincere religious belief that is substantially burdened by the Rule or (2) is being discriminated against on the basis of sex. As to the former, concerning RFRA, Plaintiff alleges only that the Rule "violates rights of religious conscience" purportedly held by unidentified "physicians and other health care providers." Compl. ¶ 169. And with respect to equal protection, Plaintiff alleges discrimination against, and injury on behalf of, all "women." *Id*. ¶ 196. Plaintiff identifies *no individual* who has allegedly been harmed and alleges *no* facts connecting the injuries

suffered by purely hypothetical individuals to the city itself or otherwise demonstrating that it has a "personal stake in the outcome" of this case. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Instead, Plaintiff apparently seeks to raise these claims on behalf of (unidentified) third parties. Third party standing, however, "is generally forbidden." *Bailey v. Atl. Auto. Grp.*, 992 F. Supp. 2d 560, 566 (D. Md. 2014). Rather, "a litigant must assert his or her own rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). In some limited instances, courts have made exceptions to this rule, but the cases have required that "the party asserting the right must have a 'close' relationship with the third party," and that "the third party must be hindered in bringing suit to vindicate its own rights." *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 408 (D. Md. 2012) (citing *Kowalski v. Tesmer*, 543 U.S. 129-30 (2004)). With respect to its RFRA and equal protection claims, however, Plaintiff has alleged *no* relationship between itself and the hypothetical individuals harmed, nor does Plaintiff allege any impediment to those individuals bringing suit to vindicate their own rights (and none is apparent). *See, e.g.*, *Lewis v. Richmond City Sheriff's Office*, 2014 WL 2203949, at *3 (E.D. Va. May 27, 2014) (finding that "[a]ssertions of an amorphous, theoretical relationship do not suffice" to establish third party standing, and that "the Court must clearly define the relationship between the plaintiff and the third party, instead of resorting to mere conjecture").

B. Plaintiff's First Amendment Claim Lacks Merit

Plaintiff claims that the Rule violates the First Amendment because it requires Plaintiff's providers to violate professional medical ethics, intrudes upon the relationship between medical providers and their patients, and requires Plaintiff to "espouse the federal government's view of appropriate options for pregnant women." Compl. ¶¶ 182-185. This claim is foreclosed by *Rust*.

In *Rust*, the Supreme Court expressly considered the contention that the 1988 "regulations violate 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 (citation omitted). And the Court rejected it. *Id*. at 192-200. As the Court explained, the 1988 regulations simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded," and the Constitution generally permits "the Government [to] choose not to subsidize speech." *Id*. at 194-95, 200. In other words, Plaintiff's providers remain free to refer for abortion outside the Title X project, but they cannot require the government to pay for that service—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. Further, as discussed above, the Court rejected the contention that the 1988 regulations required medical providers to violate their medical ethics because, among other reasons, "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." *Id*. at 200; *see supra* p. 13.

Plaintiff relies on recent precedent, particularly *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018), to argue that *Rust*'s holding was "narrow[]" and that the Rule violates the First Amendment notwithstanding that holding. Compl. ¶¶ 78, 180. But Plaintiff does not (and cannot) contend that *Rust* has been overruled, and *NIFLA* does not call its First Amendment holding into question. Indeed, it did not even mention *Rust* or address government *subsidization* of speech at all because that case involved a law purporting to *compel*

certain pregnancy clinics to provide particular notices. *See NIFLA*, 138 S. Ct. at 2368-78. And even if *NIFLA* could plausibly be read as calling *Rust* into question (which it cannot), *Rust* would still be binding here. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Moving beyond *Rust*, Plaintiff argues that the Rule's restriction on who can provide nondirective counseling imposes a "speaker-based ban," Compl. ¶ 210, against health care providers who lack medical or other advanced degrees, in violation of the First Amendment rights of such providers, *id*. ¶ 186. Putting aside that this narrow attack would obviously not be a basis for invalidating the entire Rule, this contention gets Plaintiff nowhere because, again, the Rule is merely a government decision *not to fund* nondirective pregnancy counseling in Title X unless the counseling is given by medical professionals that the government has determined are medically qualified. *See* 84 Fed. Reg. at 7728.

Finally, Plaintiff claims that the Rule imposes an unconstitutional condition on the receipt of Title X funding. Compl. ¶¶ 188-89. Again, however, its claim runs headlong into *Rust*, which held precisely the opposite. In particular, the challengers maintained that "the restrictions on the subsidization of abortion-related speech contained in the [1988] regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." 500 U.S. at 196. The Supreme Court rejected that claim because the 1988 regulations did "not force the Title X grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities." *Id*. Just like the Title X providers

in *Rust*, Plaintiff remains free to "engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *AOSI*, 570 U.S. at 217 (quoting *Rust*, 500 U.S. at 196).[3] The Court should therefore dismiss Count V of the Complaint.

C. Plaintiff's Claim Under the Religious Freedom Restoration Act Lacks Merit

Even if Plaintiff somehow had standing to assert a RFRA claim on behalf of hypothetical medical providers and physicians, *but see supra* Part V.A, it fails to state such a claim.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the challenged conduct is (1) "in furtherance of a compelling governmental interest," and (2) "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. To establish a prima facie RFRA claim, a plaintiff must 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); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013). A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Liberty Univ.*, 733 F.3d at 100 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). Plaintiff's claim plainly fails to meet these standards.

Here, Plaintiff fails to adequately allege that the Rule imposes a "substantial burden" on any individual's religious belief. As discussed above, all Plaintiff alleges is that some unidentified

[3] Plaintiff alleges that the Rule imposes speech restrictions when providers furnish services "not funded by Title X." Compl. ¶ 187. Plaintiff does not explain, however, how the Rule differs from the 1988 regulations, which the Supreme Court upheld against an unconstitutional conditions challenge after concluding that they "govern the scope of the Title X *project*'s activities, and leave the grantee unfettered in its other activities." *Rust*, 500 U.S. at 196-97. *Rust* controls, and the Court should not credit Plaintiff's bare legal conclusion about the scope of the Rule.

health providers' religious beliefs "require them to fully inform their patients about *all* their medical options and to make appropriate referrals." Compl. ¶ 169 (emphasis in original). Plaintiff does not allege any facts about specific physicians whose particular religious practice requires them to take actions that the Rule prohibits within the Title X program. Nor does it identify any particular exercise of religion, much less any such exercise that is grounded in the sincerely held religious belief of any identifiable individual. Because of these failures, Plaintiff does not adequately plead that the Rule imposes a "substantial burden" on any individual's religious belief. These bare allegations "do not suffice" to state a claim under Rule 12(b)(6), *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and Plaintiff's RFRA claim should be dismissed on that basis.

Even putting this (and Plaintiff's lack of standing) aside, the government's decision not to subsidize referrals for (or other activities that encourage or promote) abortion as a method of family planning does not impose a substantial burden on an individual's engagement in that activity. As the Fourth Circuit has recognized in rejecting a RFRA claim based on a government's refusal to subsidize an individual's preferred disability accommodation at a sectarian school, "the fact that a person has a constitutional right (or . . . an analogous statutory right) does not necessarily impose upon the government an obligation to subsidize that right." *Goodall by Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995) (citing, *inter alia*, *Rust*); *see also Fordham Univ. v. Brown*, 856 F. Supp. 684, 696 (D.D.C. 1994) (denying RFRA claim while noting that "[i]n no way is a failure to subsidize a 'burden'"); *Battles v. Anne Arundel Cty. Bd. of Educ.*, 904 F. Supp. 471, 477 (D. Md. 1995) (rejecting RFRA challenge to state education laws because the government is "not required to 'subsidize' [an individual's] particular religious beliefs").

In essence, Plaintiff's RFRA claim is a repacking of its claim that the Rule violates "basic medical ethics," *see, e.g.*, Compl. ¶ 120, which, as discussed above, *Rust* rejected when presented

as a First Amendment claim. *See Rust*, 500 U.S. at 192-200; *supra* pp. 12-13. The same logic dooms Plaintiff's RFRA claim. Where Plaintiff has identified no individual whose religious practice has allegedly been burdened by the Rule and challenges only the government's refusal to subsidize an alleged religious practice, "the general rule that the Government may choose not to subsidize speech"—here, medical providers' abortion-related counseling and referrals—"applies with full force." *Rust*, 500 U.S. at 200. The Court should dismiss Count IV of the Complaint.[4]

D. Plaintiff's Equal Protection Claim Lacks Merit

Even if Plaintiff had standing to pursue a claim on behalf of all women that the Rule violates the Due Process Clause's equal protection guarantee (which it does not), the Court should dismiss that claim. When sex discrimination is alleged, courts assess (i) whether the classification is facially based upon sex and, if not, (ii) whether there are other factors—such as the purpose of the law or the existence of a disparate impact—that demonstrate an invidious intent to discriminate on the basis of sex. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). With regard to "this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution." *Id*. (citations omitted). Sex-based distinctions are subject to intermediate scrutiny, meaning that the distinction must be substantially related to an important governmental interest. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). All other distinctions that do not target a protected class or burden a fundamental right are subject to rational-basis review. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Under this

[4] In any event, Plaintiff's RFRA claim provides no basis for enjoining the myriad provisions and applications of the Rule that not even Plaintiff alleges impose a substantial burden on an individual's exercise of religion. *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may . . . obtain appropriate relief against a government."); *Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006); *State of Neb., Dep't of Health & Human Servs. v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006).

standard, "a classification must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*. at 320 (citation omitted).

Plaintiff contends that the Rule is unlawful because it "specifically targets and harms women." Compl. ¶ 196. But the Rule does not discriminate on the basis of sex, facially or otherwise. It imposes certain requirements on the receipt of federal funds through the Title X grant program, consistent with § 1008. Thus, the Rule does not treat men more favorably, and, indeed, there are no sex-based distinctions in the Rule at all. To the degree Plaintiff argues that women will be disproportionately affected by the Rule, that flows from the fact that the Rule relates to abortion and only women can become pregnant. If that constituted sex discrimination, then every statute or regulation touching abortion—including the regulations at issue in *Rust*—would discriminate against (or in favor of) women. But that is not the law.

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court explained that "the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id*. at 273 (citations omitted); *see also id*. at 272-73. Accordingly, rational basis review is the appropriate test, and the Rule easily clears that low hurdle because it is rationally related to legitimate government interests, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988); s*ee also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) ("The rationality of distinguishing between abortion services and other medical services . . . has long been acknowledged by Supreme Court precedent."). Indeed, avoiding the use of federal funds to promote or encourage abortion is an important government interest, as the Supreme Court recognized in *Rust*, 500 U.S. at 192-93.

For the same reasons, and given the important government interest at stake, the Rule would also satisfy intermediate scrutiny were it to apply. The Court should dismiss Count VI.

E. Plaintiff's Vagueness Claim Lacks Merit.

Finally, Plaintiff cannot prevail on its claim that the Rule is unconstitutionally vague, *see* Compl. ¶¶ 232-236, for the reasons explained in Defendants' preliminary injunction opposition brief, *see* PI Opp. at 37-40. In short, the Rule does not impose any penalties, but instead sets conditions on government funding. And "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). Moreover, Plaintiff brings a facial challenge. As such, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation] when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted). And even for criminal statutes, "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the [regulatory] margin." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019).

The Rule easily clears this lenient vagueness standard, notwithstanding Plaintiff's alleged confusion about how to comply with the requirements that providers not "promote" or "support" abortion and that abortion facilities be kept physically separate from Title X activities. *See* Compl. ¶¶ 118, 122; PI Mem. at 29-30. HHS explained that if a pregnant woman "requests information on abortion and asks the Title X project to refer her for an abortion," a provider may "offer[] her nondirective pregnancy counseling, which may discuss abortion, but [may] neither refer[] for, nor encourage[] abortion." 84 Fed. Reg. at 7789; *see also id*. at 7789-90 (providing examples of permissible and impermissible actions and activities). And the factors governing separation are

essentially the same factors set forth in the 1988 regulations.[5] In any event, Plaintiff has "within its grasp an easy means for alleviating the alleged uncertainty"—to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities; Plaintiff's "cho[oice] to remain in the lurch . . . cannot demonstrate an injury sufficient to confer standing" to press a vagueness claim. *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).[6] Plaintiff therefore cannot prevail on its vagueness challenge.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case with prejudice.

Dated: August 16, 2019

Respectfully submitted,

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[5] Indeed, the challengers in *Rust* raised similar vagueness arguments, and the Supreme Court did not even bother to address them. *See* Brief for Petitioners at 44-45 n.48, *New York v. Sullivan* (No. 89-1392), 1990 WL 505760.

[6] The Rule's preamble encourages providers to contact the program to implement compliance. *See* 84 Fed. Reg. at 7766. Even where this process does not resolve a grantee's concern, there are procedures available to obtain clarity, and a grantee can work with the program to resolve concerns. And if there is an impasse leading to remedial action, a grantee may take appeals that can eventually proceed to federal court. 84 Fed. Reg. at 7766; 42 C.F.R. § 59.10

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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