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November 18, 2019

Via CM/ECF

Ms. Patricia S. Connor
Office of the Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3538

Re: *Mayor and City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir.)
FRAP 28(j) Notice of Supplemental Authority

Dear Ms. Connor:

On September 12, the court below denied Defendants' motion to dismiss eight of Plaintiff's ten claims for relief. On September 26, the court set a schedule for summary judgment briefing. Plaintiff moved for summary judgment on October 31 ("MSJ"). On November 15, Defendants filed a response in opposition and cross-motion for summary judgment ("CMSJ"). The MSJ and CMSJ are enclosed with this letter. Together the motions establish the following undisputed facts relevant to this Court's decision—

1. The Rule requires medical providers to violate established codes of medical ethics, including statutory codes of ethics. MSJ 8.

2. Defendants have not identified any code of medical ethics under which the Rule's counseling restrictions would be considered ethical. MSJ 8-9.

3. Defendants have not identified any professional medical organization that takes the position that it is consistent with medical ethics to withhold relevant medical information from a patient who is requesting it. MSJ 8-9.

4. Defendants have not identified a single physician who believes it is consistent with medical ethics for a physician to obstruct a patient's access to safe and legal medical treatment because the physician disagrees with the patient's decision to pursue that treatment. MSJ 8-9.

Defendants thus rely solely on the holding in *Rust* and the existence of conscience statutes—and no other evidence—to argue that the Rule conforms to "the ethical standards of health care professionals," 42 U.S.C. § 18114(5). *See* CMSJ 13 & n.2, 22.

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Respectfully Submitted,

By /s/ Andrew Tutt

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enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Mayor and City Council of Baltimore ("Baltimore City") is entitled to summary judgment that HHS's Rule, entitled *Compliance With Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019) ("the Rule") is unlawful for the following reasons.

First, the Rule violates the "Nondirective Mandate," the rider included in every annual Title X appropriation since 1996, requiring that "all pregnancy counseling shall be nondirective." Continuing Appropriations Act, 2019, Pub. L. 115–245, 132 Stat. 2981, 3070–71 (2018) ("Non-directive Mandate"); *see also* 65 Fed. Reg. 41,272-73.

Second, the Rule violates the "Non-Interference Mandate," a provision of the Affordable Care Act (ACA) that bars HHS from "promulgat[ing] any regulation" that interferes with full disclosure of treatment information between doctors and patients or otherwise unreasonably interferes with patient access to timely health care. 42 U.S.C. § 18114 (enacted as ACA § 1554) ("Non-Interference Mandate").

Third, the Rule violates Title X's "Non-Coercion Mandate," which provides that "[t]he acceptance by any individual of family planning services ... provided through [Title X] ... shall be voluntary," 42 U.S.C. § 300a-5. HHS *itself* interprets this to require grantees to "[p]rovide services without subjecting individuals to any coercion ... to employ or not to employ any particular methods of family planning." 45 Fed. Reg. 37,433, 37,437 (June 3, 1980); *accord* 84 Fed. Reg. at 7731-7732, 7735, 7745.

Fourth, the Rule violates the Administrative Procedure Act (APA) because it is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). The Rule is arbitrary and capricious because: (1) HHS failed to explain or even acknowledge its change in position on the best interpretation of the Nondirective Mandate; (2) HHS's explanation that it "disagrees" that the Rule infringes on the legal, ethical, and professional obligations of medical professionals is inadequately explained

and contrary to the evidence before the agency; (3) HHS inadequately considered the reliance interests that its abrupt policy reversal would disrupt, and its explanation for disregarding those interests was contrary to the evidence before it; (4) HHS inadequately considered the likely costs and benefits of the physical and financial separation requirement; and (5) HHS adopted unexplained and irrational limitations on who may engage in pregnancy counseling.

Fifth, the Rule violates the APA because HHS promulgated it without observance of procedure required by law. 5 U.S.C. § 706(2)(D). HHS: (1) unreasonably declined to hold open the comment period long enough to provide commenters a meaningful opportunity to comment on the Proposed Rule, to their material prejudice; and (2) fundamentally altered a key component of the Rule—*who* may engage in nondirective counseling—without offering interested parties any opportunity to comment on the decision at all.

Sixth, the Rule violates the First Amendment because it: (1) unconstitutionally restricts private speech on the basis of viewpoint; (2) unconstitutionally interferes with the doctor-patient relationship; (3) selectively withholds information from patients on the basis of viewpoint; and (4) violates patients' rights to receive truthful and unbiased information from their doctors.

Seventh, the Rule violates the Fifth Amendment's equal protection guarantee because it constitutes "gender-based government action,"—as both (1) a sex-based classification and (2) a Rule that promotes sex stereotypes—and Defendants cannot provide an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531 (1996).

STATEMENT OF UNDISPUTED FACTS

I. The Title X Program

1. Title X is the only federal program specifically dedicated to funding family planning services. *See* Public Health Service Act ("PHSA"), 84 Stat. 1506, as amended 42 U.S.C. §§ 300 to 300a-6. Title X provides lump-sum grants that may be used both to cover the costs of family

planning care for the un- or under-insured and to pay for non-service costs like purchasing contraceptives or training staff. *Id.* § 300; *see also* Opinion on Prelim. Inj. at 4, ECF 43 ("PI Op."). Title X funds may not be used to pay for abortion services. 42 U.S.C. § 300a-6.

2. Title X programs provide quality sexual and reproductive healthcare, including contraceptive supplies and information, to all who need them on a voluntary and confidential basis, with priority given to individuals with low income. Kost Decl., PEP112 ¶ 30.[1] In addition to offering a broad range of effective contraception, Title X-funded clinics provide contraceptive education and counseling; breast and cervical cancer screening; testing, referral, and prevention education for sexually transmitted infections/diseases ("STIs/STDs"), including human immunodeficiency virus ("HIV"); and pregnancy diagnosis and counseling. Kost. Decl., PEP109 ¶ 15, PEP118-120 ¶¶ 52-58. Women prefer Title X-funded clinics over other healthcare outlets. Bailey Decl., PEP67-68 ¶¶ 47-50. These sites offer more effective types of contraception and better contraceptive counseling, provide a greater variety of services on site, and have better appointment availability. *Id.*, PEP63-66 ¶¶ 36-45.

A. Baltimore City's Title X Program

3. Baltimore City has participated in the Title X program since its inception. Before the Rule took effect, the Baltimore City Health Department received $1,430,000 annually in funding subject to Title X rules through subgrants from the Maryland Department of Health. It directly operates three community clinics and four school-based health centers that provided Title X services, and it provided funding to ten additional subgrantees in Baltimore.[2]

[1] For ease of reference, Plaintiff's Exhibits are continuously numbered and referenced here as "Plaintiff's Exhibit Pages" or "PEPs."

[2] "Baltimore City" refers to the Plaintiff, Mayor and City Council of Baltimore. "Baltimore" refers to the city as an entity.

4. The Title X program served as the final safety net for healthcare for one third of women living in Baltimore. In 2017, 16,000 patients in Baltimore received care through Title X clinics, including 7,670 patients at clinics with funding overseen by Baltimore City. Of these patients, 86 percent had incomes at or below the federal poverty line, and 99.8 percent had incomes at or below 250 percent of the line. Hager Decl., PEP381 ¶ 7.

5. The services provided by Baltimore's existing network of qualified Title X providers have had a significant positive impact on family health and well-being and on public health generally. Title X-provided contraception has decreased unintended pregnancy and abortion rates across the United States. Kost Decl., PEP114 ¶ 35. Baltimore City in particular has used Title X funding in its public health efforts, including a 55% reduction in teen pregnancy over the last ten years. Hager Decl., PEP383 ¶ 11. Baltimore City has relied on the Title X funding to reduce unintended pregnancy, treat and reduce the spread of sexually transmitted infections, screen for breast and cervical cancer, and ensure healthcare access for its most vulnerable residents. Mobley Decl., PEP366, ¶ 17. Title X providers in Baltimore have worked especially hard to earn the trust of patients who often distrust and fear medical institutions. *Id.* PEP371 ¶ 43.

6. Until recently, Planned Parenthood operated additional Title X sites within Baltimore. In August 2019, as a result of the Rule, Planned Parenthood, which serves forty percent of Title X patients, withdrew.[3] Moreover, all the State-funded Planned Parenthood clinics in at least eight states, including Maryland, will no longer operate using Title X money.[4] Clinics have already

[3] *See* Pam Belluck, *Planned Parenthood Refuses Federal Funds Over Abortion Restrictions*, N.Y. Times (Aug. 19, 2019), https://nyti.ms/34nIqM8.

[4] *See* Carter Sherman, *6 States Are Now Rejecting Federal Money Because of Trump's Abortion 'Gag Rule,'* Vice News (Aug. 30, 2019), https://bit.ly/2kpNSfZ (explaining that all of the clinics in six states have already rejected money and the clinics in Maryland and Massachusetts will follow).

begun to close, including two in Ohio that served more than 6,000 patients a year.[5]

II. HHS's New Rule

7. On May 22, 2018, HHS released a notice of proposed rulemaking entitled *Compliance With Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 (June 1, 2018) ("Proposed Rule"). *See* PI Op. at 9.

8. Among other things, the Proposed Rule included provisions that severely limited, and in many circumstances barred, Title X recipients from providing their patients with referral and counseling for abortion services, and mandated referrals for prenatal care for women who became pregnant. The Proposed Rule also included provisions requiring strict physical separation between Title X services and any healthcare services that did not comply with the new restrictions on abortion referrals, counseling, and services. The Proposed Rule also barred anyone at a Title X project but physicians from engaging in Nondirective Counseling.

9. The nation's leading non-partisan medical associations, counting more than 90 percent of the nation's OB-GYNs among their members, submitted comments opposing the changes contemplated by the Proposed Rule. The groups included the American Medical Association ("AMA"), PEP443-448, the American College of Obstetricians and Gynecologists ("ACOG"), PEP583-601, the American College of Physicians ("ACP"), PEP661-670, the American Academy of Family Physicians ("AAFP"), PEP456-460, the American Academy of Nursing ("AAN"), PEP464-470, and the American Academy of Pediatrics ("AAP"), PEP602-613.

10. On March 4, 2019, HHS published the final Rule entitled *Compliance With Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R.

[5] *See* Nicquel Terry Ellis, *'Teetering on a public health crisis.' New Title X policy forces Ohio Planned Parenthood clinics to close*, USA Today (Sept. 9, 2019), https://bit.ly/2m6OMyG.

pt. 59) ("Rule"). The Rule's referral restrictions and separation requirements were unchanged.

11. Most of the Rule's provisions, including its limitations on referrals, were scheduled to go into effect on May 3, 2019, 84 Fed. Reg. at 7714, and indeed now are in effect nationwide. Compliance with the separation requirement is required by March 4, 2020. *Id.* at 7714.

A. The Counseling Restrictions

12. "The Final Rule imposes broad restrictions on what health care providers under the Title X program may inform pregnant patients." PI Op. at 9. The Rule states that "[a] Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. 7,788 (to be codified at 42 C.F.R. §§ 59.5(a)(5), 59.14(a) (abortion-referral ban)). The Rule provides that to meet this requirement Title X grantees may not provide any information about abortion providers, identified as such, to a patient. *Id.*; *see also* PI Op. at 9.

13. The Rule bars trained medical providers, such as registered nurses, from engaging in pregnancy counseling unless they have an advanced degree *and* are licensed to diagnose and treat patients, *i.e.*, qualify as an "advance practice provider." § 59.2.

14. Providers may not provide a patient an abortion referral except in an emergency. If a patient specifically asks for a referral for pregnancy termination during pregnancy counseling, providers are prohibited from offering the patient anything more than a list of "comprehensive primary health care providers"—most of whom must *not* provide any abortions. *Id.* at 7789 The list cannot identify which providers actually provide the abortion services she is requesting, and staff are prohibited from answering patient questions about which providers on the list actually provide abortions. *Id.* Because the list is limited to "comprehensive primary health care providers," specialized reproductive healthcare providers are excluded. *See* PI Op. at 9.

15. In Baltimore, six of the nine providers to whom patients are routinely referred for

abortions are specialized reproductive healthcare providers, which therefore must be excluded from the list. Mobley Decl., PEP375 ¶ 60. The nonspecialized providers permitted on the list are harder for patients to access and may charge thousands of dollars for an abortion, rather than a few hundred. *Id.* ¶¶ 59-60.

16. Even as Title X providers are prohibited from referring for pregnancy termination (even if the patient asks for it) providers are required to refer all pregnant patients for prenatal care (even if the patient has expressly stated she does not want one). 84 Fed. Reg. 7789 (to be codified at 42 C.F.R. §§ 59.14(b)(1)). *See also* PI Op. at 9.

B. Separation Requirement

17. The Rule requires that Title X activities be "physically and financially separate" (defined as having an "objective integrity and independence") from prohibited activities. These "activities" include not just the provision of abortion services, but also any counseling that does not meet the counseling restrictions. 84 Fed. Reg. at 7789; *see also* Op. at 10. Whether this criterion is met is to be determined through a "review of facts and circumstances," with relevant factors including but not limited to:

> (a) The existence of separate, accurate accounting records; (b) The degree of separation from facilities (e.g., treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities; (c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

Id. The preamble notes that physical separation at a "free-standing clinic," like one of the Baltimore City clinics, "might require more circumstances to be taken into account in order to satisfy a clear separation between Title X services" and abortion referrals, because having the "same entrances, waiting rooms, signage, examination rooms, and the close proximity between Title X

and impermissible services" presents "greater opportunities for confusion" than at a hospital. *Id.* at 7767. The Rule does not specify which additional circumstances would be taken into account.

18. Baltimore City is unable to implement these separation requirements. Hager Decl., PEP389-390 ¶ 34. Compliance with the Rule would therefore prevent Baltimore City healthcare providers working *outside* the Title X program from providing patients with complete and accurate information about all of their medical options, including abortion.

C. The Adolescent Health Restrictions

19. The Rule requires providers to "encourage family participation" in the health services provided to minors, regardless of state laws, such as Maryland's, that explicitly permit minors to consent on their own behalf to treatment for or advice about contraception, pregnancy, sexually transmitted infections, and related care. *Compare* § 59.17 *with* Md. Code Ann. Health-Gen. § 20-102(c). When the provider is aware that family participation would be counter-productive or even dangerous, and that encouraging such participation would be detrimental to the patient, the Rule's requirement to encourage family participation will destroy the delicate trust between Baltimore teenagers and their medical providers, deterring minors from seeking needed healthcare. Mobley Decl., PEP372-373 ¶¶ 50-51; *see id.*, PEP371-372 ¶¶ 40-49.

D. Medical Ethics

20. The Rule requires medical providers to violate medical ethics, including statutory codes of ethics. AMA Comm't, PEP446; AAFP Comm't, PEP459; AAN Comm't, PEP468; ACOG Comm't, PEP586; Stanwood Decl., PEP3-4 ¶ 5; Wynia Decl., PEP324-331 ¶¶ 11-29; Mobley Decl., PEP366-368 21-24; Dzirasa Decl., PEP396 ¶ 10; *see also* Op. at 17-18.

21. HHS has not identified any code of medical ethics under which the Rule's counseling restrictions would be considered ethical. Nor has HHS identified any professional medical organization that takes the position that it is ethical to withhold relevant medical information from a

patient who is requesting it. HHS has not identified a single physician who believes it is consistent with medical ethics for a physician to obstruct a patient's access to safe and legal medical treatment because the physician disagrees with the patient's decision to pursue that treatment.

III. Procedural Irregularities In the Promulgation of the Rule

A. Irregular Procedures and Lack of Adequate Notice

22. The Proposed Rule moved through the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB)—a process that even for an insignificant rule typically takes months—in less than two weeks. *See* Hassan & Harris Comm't, PEP893; *see also* Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 Tex. L. Rev. See Also 171, 174 (2014) (discussing 2013 Administrative Conference of the United States (ACUS) study finding, among other things, that historically rules spend at least 50 days under OIRA review, and in recent years it has been more than 90 days).

23. The Proposed Rule never appeared on the public Fall 2017 or Spring 2018 Regulatory Agendas, *see* Hassan & Harris Comm't, PEP892, even though agencies are supposed to place anticipated regulatory actions on the Agenda twelve months in advance. *See* OMB, *About the Unified Agenda*, PEP956; OIRA, *Memorandum: Spring 2018 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions*, PEP961; *see also* Exec. Order No. 12,866, § 4(b), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) ("Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA").

24. There was no early outreach to affected stakeholders, as required under Executive Order 13563 § 2(c) and associated OMB/OIRA guidance. *See* Hassan & Harris Comm't, PEP892. Despite that lack of public engagement, OMB denied stakeholder groups' requests for meetings during the two weeks the Proposed Rule was under Regulatory Review prior to its proposal in

the Federal Register. *See id*, PEP893.

25. The American Bar Association and ACUS each recommend that agencies give commenters at *minimum* sixty days to prepare and submit comments on a *typical* rule.[6] Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. 629, 641–42 (2017). But those recommendations are framed against the backdrop of the typical regulatory review process. That process often gives regulated parties several months or even years of prior notice. *See* Heinzerling, *supra*, at 174. The additional notice provided by posting proposed regulatory actions on the Regulatory Agenda, and a searching OIRA review, plays a significant role in the adequacy of the typical 60-day comment period. *See* Walker, *supra*, at 645 ("[The] Unified Regulatory Agenda is a *critical resource* for the public to understand an agency's regulatory plans for the near future." (emphasis added)). That additional notice is often necessary for interested parties to fully evaluate the statutory authority for proposed rules; the interaction between proposed rules and other federal, state, and local laws and policies; and the impact and compliance costs associated proposed rules.

26. Numerous commenters, including the Baltimore City Health Department, the State of New York, Planned Parenthood, and two United States Senators, sought extensions of the comment period, informing HHS and OMB that under the comment timeline HHS provided they would be unable to investigate both legal and factual issues necessary to meaningfully

[6] *See* ACUS, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011) ("agencies should use a comment period of *at least* 60 days" for significant regulatory actions (emphasis added)); *see also* ACUS, Recommendation 76-3, Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking (1976) (recommending a second comment period when comments "present new and important issues or serious conflicts of data").

comment.[7] Despite these requests, HHS refused to extend the comment period.

B. Surprise Changes to the Final Rule

27. HHS's Proposed Rule would have allowed only "medical doctors" to engage in pregnancy counseling. *See* 83 Fed. Reg. 25531, 25507, 25518. Numerous commenters explained that many Title X providers are not medical doctors, but instead include, for example, registered nurses, nurse practitioners, and certified nurse midwives, and that (at minimum) the Rule needed to permit these personnel also to provide counseling within the scope of their practice.[8]

28. Rather than adopt these suggestions, HHS adopted a solution that not a single commenter recommended or had an opportunity to comment on, permitting "Advanced Practice Providers" ("APPs") to offer nondirective counseling in addition to medical doctors. 84 Fed. Reg. at 7761. Commenters had no ability to anticipate this change nor any opportunity to explain to the agency why this solution would be insufficient.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, the Court grants summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 47 U.S. 317, 322 (1986); *Henson v. Graham*, No. CIV.A. RDB-14-2058, 2015 WL 3456778, at *2 (D. Md. May 28, 2015).

[7] *See* Md. Cong. Delegation Comm't, PEP773 (quoting a letter from the Baltimore City Health Department); *see also* Planned Parenthood ("PPFA") Comm't, PEP851; Hassan & Harris Comm't, PEP893; N.Y. State Comm't, PEP462-63; Legal Voice Comm't, at PEP452-54; Governor of Conn. Comm't, PEP450; Universal Healthcare Found. of Conn. Comm't, PEP673.

[8] *See* Maine Family Planning Comm't, PEP430; State Att'ys Gen. Comm't, PEP626; Provide, Inc. Comm't, PEP546; State of Vt. Comm't, PEP479; Worby Comm't, PEP555; Christian Health Care Professional Comm't, PEP455.

ARGUMENT

I. The Rule Is Contrary to Law and Arbitrary and Capricious

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

The Rule violates the Non-Interference Mandate. The Non-Interference Mandate clearly limits HHS's authority: HHS *shall not* promulgate regulations creating unreasonable barriers to health care, requiring doctors to violate medical ethics, or restricting doctors from communicating all relevant information to their patients. *See* 42 U.S.C. § 18114. The Rule's directive counseling requirements and its draconian separation requirements violate the Non-Interference Mandate for the reasons this Court has already explained. PI Op. at 17-18. At minimum, the Rule requires physicians in the Title X program to violate medical ethics in direct contravention of the Mandate. *See id.* And by imposing unnecessary physical and financial separation requirements that most existing Title X providers cannot realistically meet, the Rule violates the Mandate's prohibition on erecting unreasonable barriers to care. *See id.* at 18.

"Waiver" is not an available defense to Baltimore City's Non-Interference Mandate claims. As Defendants have stated, both to this Court and the Fourth Circuit, "nothing stops regulated parties from raising a statutory argument if and when the Secretary applies the rule to them." Defs.' Mot.to Dismiss, ECF 67-1, at 23 (citing *Koretoff v. Vilsack*, 707 F.3d 394, 399 (D.C. Cir. 2013) (per curiam)). Defendants are now applying the Rule to Baltimore City (it is undisputed that the Rule is in effect nationwide). Waiver is therefore no longer an issue in this case.[9]

[9] Additionally, the Rule's violation of the Non-Interference Mandate was not waived and is not subject to waiver. Numerous commenters raised the substance of the issues covered by the Non-Interference Mandate, *see California v. Azar*, 385 F. Supp. 3d 960, 993–95 (N.D. Cal. 2019) (collecting comments), which is sufficient to put an agency on notice of an issue. *See 1000 Friends of Md. v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001). Moreover, purely legal questions, like those raised by the Non-Interference Mandate, are not subject to waiver. *See Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 182 (4th Cir. 2018). Finally, the Administrative Record also shows that HHS in fact considered the Non-Interference Mandate in fashioning the

Defendants' other arguments against the Non-Interference Mandate, rejected earlier by the Court, remain unconvincing. The Mandate's "notwithstanding" clause does not limit its reach. *See* PI Op. at 18. The Rule is not ethical or otherwise consistent with the Non-Interference Mandate. And it is immaterial that Title X is a grant program. The Rule still interferes with doctor-patient communications, requires physicians in the program to violate medical ethics, and creates unreasonable barriers for individuals seeking medical care by threatening to withhold funds.

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

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

The Court has already determined that the Rule's bar on abortion referrals and its mandatory prenatal referrals each violate the Nondirective Mandate. *See* PI Op. at 18-20. Dictionaries, other statutes, HHS's regulations, usage of the term within the medical field, and HHS's own comments in the preamble to the Rule all show that "nondirective counseling" "encompasses referrals." *Id.* at 19-20; *see California v. Azar*, 385 F. Supp. 3d 960, 986–92 (N.D. Cal. 2019). And, as this Court has held, "[r]equiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is coercive, not 'nondirective.'" PI Op. at 20. Similarly, "[r]equiring providers to provide a referral list" on which a majority of the providers "do not provide abortion, even if the client specifically requests an abortion

Rule, meaning that applying the waiver doctrine—designed to ensure an agency has "an opportunity to consider the matter"—does not make sense here. *1000 Friends of Md.*, 265 F.3d at 228.

referral, is coercive, not 'nondirective.'" *Id.* Additionally, "[r]equiring providers to exclude abortion as one of multiple options available to a client facing an unwanted pregnancy, especially if she has asked about that option, is coercive, not 'nondirective.'" *Id.*

Defendants' counterarguments remain unpersuasive. The Nondirective Mandate does not conflict with *Rust* and therefore does not "supplant" or "impliedly repeal" it. PI Op. at 19; MTD Op. at 13. And requiring health care providers to withhold medically relevant information and to refuse to provide it when asked for is directive.

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

The Rule violates Title X's "voluntariness" requirement. That claim was never addressed or analyzed in *Rust* and thus *Rust* does not foreclose it. Title X provides in relevant part that: "The acceptance by any individual of [Title X] family planning services or ... information (including educational materials) ... shall be voluntary." 42 U.S.C. § 300a-5. Since 1980, HHS has understood that provision to mean that Title X grantees must "[p]rovide services without subjecting individuals to any coercion to ... employ or not to employ any particular methods of family planning." 45 Fed. Reg. 37,433, 37,437 (June 3, 1980); *accord* Program Guidelines For Project Grants For Family Planning Services, HHS 5 (Jan. 2001), PEP904 (stating under the headings "5.0 Legal Issues" and "5.1 Voluntary Participation" that "[u]se by any individual of project services must be solely on a voluntary basis. Individuals must not be subjected to coercion to receive services or to use or not to use any particular method of family planning."). HHS's new Rule does not purport to depart from this longstanding interpretation of Title X's voluntariness requirement; indeed, it reaffirms it multiple times. *See* 84 Fed. Reg. at 7724, 7731 ("This final rule continues the historical Title X emphasis that family planning must be voluntary—the definition of 'family planning' adopted by the final rule and, thus, applicable to the Title X program

explicitly states that 'family planning methods and services are never to be coercive and must always be strictly voluntary.'").

The Rule's requirement that providers withhold referrals for pregnancy termination (even when requested) and provide referrals for prenatal care (even when declined)—is *coercive*. It is "coercion to ... employ or not to employ any particular methods of family planning." 45 Fed. Reg. 37,437. As this Court has already explained: "Requiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is *coercive*;" as is "[r]equiring providers to provide a referral list" on which a majority of the providers "do not provide abortion, even if the client specifically requests an abortion referral;" as is "[r]equiring providers to exclude abortion as one of multiple options available to a client facing an unwanted pregnancy, especially if she has asked about that option." PI Op. at 20 (emphasis added). The Rule is thus inconsistent with the unambiguous text of 42 U.S.C. § 300a-5 and inconsistent with HHS's *own* longstanding and unchanged interpretation of that provision.

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

The Rule is arbitrary and capricious. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." PI Op. at 20-21 (quoting 5 U.S.C. § 706). In reviewing a rule, courts "must engage in a searching and careful inquiry of the [administrative] record, so that we may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Id.* at 21 (quoting *Casa De Maryland v. DHS*, 924 F.3d 684, 703 (4th Cir. 2019)). An agency rulemaking is arbitrary and capricious if, in coming to its decision, the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

Where, "as here, an agency adopts a rule that directly contradicts prior agency conclusions of fact and law, it must acknowledge that it is doing so and give a reasonable justification for the change." *Id.* at 21-22 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)); *accord Casa De Maryland*, 924 F.3d at 703. An agency must justify its decision to adopt a particular interpretation of a statute it administers based on the evidence before it at the time of the rulemaking; the agency cannot simply declare that it believes one interpretation constitutes the "better" interpretation of the statute. *See id.* at 22-23; *see Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 559 (D.C. Cir. 2016) ("[A]gency action is always subject to arbitrary and capricious review under the APA, even when it survives *Chevron* Step Two.").

1. Failure to Explain Departure From Prior Interpretation of the Nondirective Mandate

The Rule is arbitrary and capricious because HHS failed to explain or even acknowledge its change in position on the best interpretation of the Nondirective Mandate. In the 2000 Rule, HHS concluded that the Nondirective Mandate *requires* physicians to provide, as a part of pregnancy counseling, when requested, abortion information, including "nondirective counseling and referrals," and that it was adopting that policy *as a result of* the Mandate. 65 Fed. Reg. at 41273. In discussing the "requirement for nondirective counseling and referral," HHS noted that the four most recent appropriations bills "*required* that pregnancy counseling in the Title X program be 'nondirective'" and that "Congress has also repeatedly indicated that it considers this requirement to be an important one." *Id.* (emphasis added). "*Consequently*, the Secretary ... decided to reflect this fundamental program policy in the regulatory text." *Id.* (emphasis added).

HHS further concluded that the Nondirective Mandate *required* the provision of counseling and referral for abortion on request because "totally omitting information on a legal option or removing an option from the client's consideration necessarily steers her toward the options presented and is a *directive* form of counseling." *Id.* (emphasis added). The 2000 preamble states unambiguously that HHS understood the Nondirective Mandate to require nondirective "referral" and concluded that "the regulatory text should reflect the requirement for nondirective counseling and *referral*." *Id.* (emphasis added). In the new Rule, HHS nowhere explains why it reversed its almost 20-year conclusion that the Nondirective Mandate not only permits but *requires* physicians to provide abortion referrals. HHS does not even display an awareness that it is changing its earlier interpretation of the Nondirective Mandate, in contravention of *Encino Motorcars.*

2. Unexplained and Unreasonable Violation of Medical Ethics

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

HHS's cursory statements that it "disagrees" that the Rule violates medical ethics—that is, its implicit conclusion that the Rule *is* consistent with medical ethics, *see* 84 Fed. Reg. at 7724, 7748—are unsupported by any record evidence whatsoever. Major medical organizations including the AMA, ACOG, AAFP, ACP, AAP, AAN, and numerous additional organizations and individuals, all told HHS that the Rule would violate medical ethics and place physicians in an ethically compromised situation. Facts ¶ 9. Four States and Planned Parenthood told HHS that the "the professional and ethical" violations would be so profound "they would be forced to exit the program if the proposed regulations [were] finalized." PPFA Comm't, PEP791.[10] HHS cited no evidence of any kind showing that any organization or even any individual physicians consider the Rule consistent with medical ethics, and there does not appear to be any evidence in the record that would support that conclusion.

Defendants' argument that the Rule necessarily must be ethical because *Rust* upheld a similar counseling restriction is both incorrect and a non-sequitur. So is Defendants' argument that, because Congress has enacted federal conscience statutes, the Rule necessarily must be ethical. Neither *Rust* nor federal conscience statutes can establish the standards of medical ethics. HHS did not say that it chose to enact the Rule *despite* its inconsistency with medical ethics; HHS said that the Rule *is* consistent with medical ethics. Because that is flatly incorrect, and supported by no evidence, the Rule is inadequately justified and arbitrary and capricious.

3. Inadequate Consideration of Reliance Interests and Consequences

The Rule is arbitrary and capricious because HHS inadequately considered the reliance interests that would be disrupted by its abrupt change in agency policy, and because HHS's

[10] In fact, several commenters explained that providers would have to withdraw, and as a result, beneficiaries would have significantly reduced access to care. AMA Comm't, PEP447; ACOG Comm't PEP594-96; AAN Comm't PEP566-67; AAP Comm't, PEP 611-12; PPFA Comm't, PEP791-98; Guttmacher Comm't, PEP656-68.

explanation for its decision to disregard those interests was contrary to the evidence before it. HHS stated in the Rule that "[t]he Department finds *no evidence* to support the assertion that the final rule will drive current providers from the Title X program." 84 Fed. Reg. at 7749 (emphasis added). It stated: "*commenters did not provide evidence* that the rule will negatively impact the quality or accessibility of Title X services. And the Department believes that this rule will likely improve quality and accessibility for Title X services." *Id.* at 7780 (emphasis added). It stated: "[c]ommenters offer *no compelling evidence* that this rule will increase unintended pregnancies or decrease access to contraception." *Id.* at 7785 (emphasis added). It stated that it was "*not aware, either from its own sources or from commenters*, of actual data that could demonstrate a causal connection between the type of changes to Title X regulations contemplated in this rule-making and an increase in unintended pregnancies, births, or costs associated with either." *Id.* at 7775 (emphasis added). HHS asserted its belief that "these final rules will contribute to *more clients being served, gaps in service being closed, and improved client care*." *Id.* at 7723 (emphasis added).

These statements run counter to the evidence before the agency. They are so implausible that they cannot be ascribed to a difference in view or the product of agency expertise. At minimum, the fact that numerous existing Title X providers explained that they would have to withdraw from Title X if the Rule took effect was certainly *some* evidence "supporting the assertion that the final rule [would] drive current providers from the Title X program," 84 Fed. Reg. at 7749—making the agency's assertion that there was "no evidence supporting the assertion" flat wrong.

HHS had before it significant evidence that the Rule would seriously disrupt existing reliance interests, limit access to Title X care, and force an enormous number of providers out of the Title

X program.[11] HHS relied on only one single letter as evidence that new providers would enter the program to fill gaps in services. *See* 84 Fed. Reg. at 7780 & n.138. Commenters not only informed HHS that they would be forced to withdraw from the program because it would require them to violate medical ethics, but also provided HHS with the "actual data" that HHS said it did not have before it, 84 Fed. Reg. at 7780. *See* Brindis Comm't, PEP888-889; PPFA Comm't, PEP857.

Commenters provided HHS with realistic cost estimates for compliance with the separation requirements that showed that HHS's cost estimate was unreasonably low.[12] Evidence provided by commenters showed that HHS's cost estimates were not simply incorrect—but incorrect by *orders of magnitude*. HHS's per site cost estimates for compliance with the separation requirement lack any basis in evidence and are arbitrary and capricious.

Commenters also provided HHS with evidence that—by causing a widespread withdrawal of providers from the Title X program—the Rule would limit access to contraception and other types of reproductive health care, harming women's health. HHS failed to account for these effects because it "[did] not anticipate that there will be a decrease in the overall number of facilities offering services" and that "the net impact on those seeking services from current grantees will be *zero*." 84 Fed. Reg. 7782. That conclusion is so patently contrary to the evidence before the agency that it cannot be ascribed to a reasonable difference of interpretation. Numerous commenters provided HHS with studies showing defunding even one major provider (Planned

[11] Baltimore City Health Dep't Comm't, PEP531; City Health Dep't Leaders Comm't, PEP535; PPFA Comm't, PEP791-96; Guttmacher Comm't PEP565-66; NFPRHA Comm't 723, 727; Ryan Health Comm't PEP660; AMA Comm't PEP447.

[12] *See* Family Planning Council of Iowa Comm't, PEP655 (explaining that cost of establishing a site in Iowa was $85,000); Ctr. Reprod. Rights Comm't, PEP765 (explaining that "the cost of implementing an additional electronic health record system would cost tens of thousands, if not hundreds of thousands of dollars for large practices"); PPFA Comm't, PEP808 (relying on cost estimate studies to estimate average renovation costs of $625,000 for Planned Parenthood sites).

Parenthood) from a generally available grant program severely negatively impacts patient access to care. *See* Brindis Comm't, PEP882, 888-89; PPFA Comm't PEP857. One commenter even provided HHS with a detailed chart showing the impact on contraception access state-by-state if Planned Parenthood alone withdrew from the Title X program. Guttmacher Comm't 557-78. HHS's decision to ignore these impacts was unlawful. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the ... effect[ ] [of a rule] is *uncertain* is no justification for *disregarding* the effect entirely" (emphases in original)). At minimum, HHS's assertions that "*commenters did not provide evidence* that the rule will negatively impact the quality or accessibility of Title X services," 84 Fed. Reg. 7780, and that it was "*not aware, either from its own sources or from commenters*, of actual data that could demonstrate a causal connection between the type of changes to Title X regulations contemplated in this rulemaking and an increase in unintended pregnancies, births, or costs associated with either," *id.* at 7775 (emphasis added), were both contrary to the record before the agency.

Defendants are incorrect that HHS was entitled to disregard the consequences of the Rule because Defendants believe the commenters' warnings about the negative consequences of the Rule were "threats." *See* Mot. Dis., ECF 67-1, at 30; Def. Reply Supp. Mot. Dis., ECF No.72, at 15. Even if HHS had reached that conclusion, it would have been required to explain its reason for reaching it—especially because many of the commenters who raised concerns about the negative health consequences of the Rule were not grantees and had no power to "threaten" the agency. Instead, HHS simply stated without evidence that not only would there be *no* negative consequences as a result of the Rule, in fact the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." 84 Fed. Reg. at 7723. The Rule does not point to any evidence supporting that conclusion, and indeed, no evidence in the record does.

4. Inadequate Consideration and Explanation of Costs and Benefits.

The Rule is arbitrary and capricious because HHS inadequately considered the likely costs and benefits of the physical and financial separation requirement. HHS nowhere meaningfully explains why the previous regulations were inadequate, and—as the record plainly shows—they are not. For decades, those regulations have ensured that Title X funds are not used to provide abortions. The Rule cites no evidence of misuse of funds over the past half-century. Instead, HHS invoked "risk[s]" of "appearance[s]," "perceptions," and "potential" misuse of funds, 84 Fed. Reg. at 7764-65, without pointing to anything to suggest that those risks or perceptions are anything more than rank speculation. In short, HHS devised the Separation Requirement as a solution in to the "risk" of the "appearance" of a nonexistent problem. That does not suffice for reasoned decision-making. *See Natural Res. Def. Council v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988).

In addition to citing no quantifiable benefits to the Separation Requirement, the Rule drastically underestimates its costs. HHS estimated that affected grantees will incur average costs of $30,000, but provides no support for that estimate. 84 Fed. Reg. 7782. The *evidence* before the agency, however, showed that this invented number is nowhere close to the actual cost of compliance: Planned Parenthood estimated average capital costs of nearly $625,000 per affected service site. PPFA Comm't, PEP807-08. Furthermore, HHS entirely failed to account for ongoing (not just one-time) costs, including those associated with required duplication of staff and contracts for goods and services—costs that can reach millions of dollars for some grantees.[13]

[13] *See* City Health Dep't Leaders Comm't, PEP535; PPFA Comm't, PEP808-09; Brown Comment, 2-3, https://bit.ly/2PBwvpz.

HHS's estimate of the *number* of affected sites is also obviously and demonstrably wrong. HHS estimated that the total compliance costs for the separation requirement would be $36.08 million, 84 Fed. Reg. at 7782, based on their estimate that 15 percent of sites "do not comply with physical separation requirements" because they provide abortions, combined with their inadequate estimate of $30,000 in compliance costs per site. *Id*. at 7781. HHS's estimate of the number of affected sites should have been closer to 100 percent, because according to Defendants, merely making abortion referrals during pregnancy counseling violates the separation requirement. *See id.* at 7717 (explaining that making a referral for abortion constitutes using abortion as a method of family planning). Because every Title X grantee made abortion referrals before the Rule took effect, the estimated total cost—even using HHS's own per-site number—should have been closer to $240 million than the $36.08 million the agency estimated.

Even though it affects billions of dollars in annual health care expenditures, and the health care systems of every city and State, the Rule is riddled with these sorts of basic errors. Defendants are incorrect that HHS was entitled to select a manifestly irrational estimate of the costs of complying with the separation requirement because the cost of compliance was difficult to quantify. *See Pub. Citizen*, 374 F.3d at 1219. Difficult to quantify or not, HHS's estimated compliance costs are illogical and unsupported on their face and therefore arbitrary and capricious.

5. Unexplained and Irrational Limitation on Who May Engage in Pregnancy Counseling

The Rule's prohibition on pregnancy counseling by any personnel in the Title X Program other than "Advanced Practice Providers" is unexplained and irrational. That change, which excludes a substantial proportion of provider personnel from engaging in pregnancy counseling of any kind, lacks evidentiary support or even a stated rationale. *See* 84 Fed. Reg. at 7716, 7727-

7728. Commenters told HHS that its Proposed Rule—restricting pregnancy counseling to physicians alone—was irrational. HHS's slight modification to its restriction in the Rule is just as irrational. HHS does not contend, and there is no evidence to support the view, that other personnel lack the qualifications for pregnancy counseling. As many commenters explained, before HHS enacted the Rule, a large percentage of patients received pregnancy counseling through nurses and medical assistants without advanced degrees.[14] At minimum, HHS violated the APA by *entirely failing to address* these comments.

E. Failure to Observe Required Procedures (Count IX)

1. HHS Deprived the Public of a Meaningful Opportunity to Comment

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

There is no minimum length for a comment period in the APA. *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984). Sixty days is generally accepted as the "reasonable *minimum* time for comment" on a typical rule. *Id.* But "there is scarcely anything talismanic about" a "particular

[14] *See* Maine Family Planning Comm't, PEP430; State Att'ys Gen. Comm't, PEP626; Provide, Inc. Comm't, PEP546; State of Vt. Comm't, PEP479; Worby Comm't, PEP555; Christian Health Care Professional Comm't, PEP455.

length of time." *Id.* Even sixty days may be "an inadequate time to allow people to respond to proposals that are complex or based on scientific or technical data." *Id.* at 1201. Where an issue warrants "caution" because of its sensitivity or difficulty "[t]he need for a meaningful comment period" is "particularly acute." *Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010). Courts are "strict in reviewing an agency's compliance with procedural rules" and "in reviewing an agency's procedural integrity, the court relies on its own independent judgment." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (internal citations omitted).

HHS deprived the public of a "meaningful opportunity" to comment on the Proposed Rule. HHS radically departed from rulemaking procedures, depriving Baltimore of a meaningful opportunity to comment, by engaging in zero outreach about the Proposed Rule, failing to place the Proposed Rule on the Regulatory Agenda, and rushing the Proposed Rule through OIRA. *See* Facts ¶¶ 22-24. Many commenters thus sought extensions of the comment period. *Id.* ¶ 26.

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

The need for an extended comment period was "particularly acute" in this case. *Hollingsworth*, 558 U.S. at 193. The last time HHS finalized a Rule of this magnitude—the 2000 Rule—it took seven *years*. *See* 65 Fed. Reg. 41270 (July 3, 2000) (final rule); 58 Fed. Reg. 7462 (Feb. 5, 1993) (proposed rule). HHS's Rule would reverse a rule that was seven years in the making and an agency policy that had endured for nearly fifty years. Yet HHS held open the comment period on the new Rule for only two *months*, without giving the public any advance notice that the Rule was even being contemplated. The Rule applies to over $286 million in annual Title X spending and affects the lives of over 4 million low-income Americans, along with health care services provided by every State, and most major cities, including Baltimore City. Title X saves the health care system over $7 billion annually by preventing diseases and unintended pregnancies, and massively reduces the incidence of abortion. Guttmacher Comm't, PEP575. The Proposed Rule was likely to result (and has resulted, Facts ¶ 6) in over forty percent of existing providers leaving the Title X program, along with at least four States. Failure to give parties more than sixty days to investigate the legal and factual basis for the Rule and provide comment to the agency prejudiced Baltimore City.

Defendants are simply incorrect that Baltimore City seeks to layer *additional* procedural requirements on HHS, beyond those already required by the APA. Def. Reply Supp. Mot. Dis., at 17-18. The APA requires that HHS provide commenters a meaningful opportunity to comment. It does not have a prescribed comment period, but rather requires that the length of a comment period be proportional to the complexity and importance of a contemplated rule. The additional notice provided by posting proposed regulatory actions on the Regulatory Agenda, and in-depth OIRA review, plays a significant role in the adequacy of the "typical" 60-day comment period. Here, by *not* engaging in that pre-comment period review, HHS created a need for a longer

comment period to ensure a meaningful opportunity to comment. That does not create any new procedural requirements.

2. The Rule's Restriction of Pregnancy Counseling To Advanced Practice Providers (APPs) Is Not a "Logical Outgrowth" of the Proposed Rule

The Rule's limitations on who may engage in pregnancy counseling is not a "logical outgrowth" of the Proposed Rule. A "final rule the agency adopts must be a logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citation omitted). The Proposed Rule provided that only physicians would be allowed to engage in pregnancy counseling. Commenters told HHS that numerous other individuals at Title X providers were qualified to engage in pregnancy counseling. Facts ¶ 27. HHS then finalized the Rule by modestly expanding the scope of who may engage in pregnancy counseling, on the basis of educational and professional criteria on which no commenter had an opportunity to comment. Commenters had no way of anticipating that HHS would try to address the limitation the way that it did. Because commenters could not have anticipated HHS's solution, HHS's rule is not a logical outgrowth of the Proposed Rule, and HHS must reopen the comment period to permit commenters to address HHS's proposed solution.

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

Based on the record now before the Court, the Rule violates the First Amendment for four reasons, none of which are foreclosed by the holding in *Rust*. To be sure, *Rust* upheld the 1988 Rule against a "facial" First Amendment challenge. 500 U.S. at 192-95, 196-200**.** But all four reasons for holding that the *new* Rule violates the First Amendment depend on arguments not addressed or analyzed in *Rust*, facts specific to the new Rule, statutory changes that occurred after *Rust* was decided, or subsequent Supreme Court precedents that bear more directly on the legality of the new Rule than *Rust* does.

First, the Rule violates the First Amendment because it unconstitutionally interferes with the doctor-patient relationship. In *Rust*, the Supreme Court explained that "[i]t could be argued" that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. But, the Court continued, "[w]e need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Id.* Unlike the 1988 Rule, the new Rule does "significantly impinge upon the doctor-patient relationship" by destroying the trust that Baltimore's patients have in their doctors. Mobley Decl., PEP371 ¶ 41. Numerous women consider their relationship with their Title X provider to be the most important doctor-patient relationship in their lives, and patients are likely to feel misled and betrayed by their health care provider if the provider refuses to provide necessary and pertinent medical counseling. *Id.* ¶¶ 46-49. That distinguishes the facts here from the facts at issue in *Rust*.

The Supreme Court's holding in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), makes clear that the Rule unconstitutionally impinges on the doctor-patient relationship. In *Velazquez*, the Court held unconstitutional a law that prohibited federally funded Legal Services lawyers from providing certain advice and making certain legal arguments. *Id.* at 542-43. The Court struck down the provision specifically because lawyers have a professional obligation to represent the interests of their clients. *Id.* As Justice Scalia recognized in his dissent, under the reasoning in *Velazquez*, the Supreme Court should have struck down the 1988 Rule in *Rust* because doctors have a similarly powerful professional obligation to their patients. *Id.* at 554 (Scalia, J., dissenting). The Supreme Court has continually reaffirmed and strengthened the *Velazquez* principle, holding that where the government manipulates the content of professional

speech, especially in a health care setting, its actions must, at minimum, meet intermediate scrutiny—and likely strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375-76 (2018); *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011). Where Supreme Court decisions arguably conflict, lower courts are bound to follow the cases that more directly control. *See, e.g.*, *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363-64 (4th Cir. 2013); *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 164 (3d Cir. 2016). Because the Rule prevents physicians from providing professional advice that they believe is in the best interests of their patients, it violates the First Amendment in light of *Velazquez*.

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

The Supreme Court's later cases leave no doubt that to the extent Title X was a government-messaging program when *Rust* was decided, it no longer is. As the Supreme Court explained recently, courts "must exercise great caution before extending our government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). "[T]he government-speech doctrine ... is susceptible to dangerous misuse" for "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, [the] government could silence or muffle the

expression of disfavored viewpoints." *Id.* The Nondirective Mandate and Non-Interference Mandate show that Congress intends to fund "private" physician speech in the Title X program, not "government speech," and therefore that Title X is not a government-messaging program. *See Rosenberger*, 515 U.S. at 834 (holding that where the government creates a program that is not a government-speech program, the government "may not discriminate based on the viewpoint of private persons whose speech it facilitates").

Third, the Rule violates the First Amendment by selectively withholding information from patients on the basis of viewpoint. The Supreme Court has held that the government may not exclude certain disfavored topics or teachers from public school classrooms or remove certain disfavored books from libraries on the basis of their viewpoint. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-72 (1982) (plurality) (holding that a school board may not remove books from school libraries on the basis of their viewpoint); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (holding that the government may not "cast a pall of orthodoxy over the classroom"); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923). Just as the government may not selectively remove certain viewpoints from government-funded programs—schools and libraries—it may not selectively remove certain viewpoints from government-funded health care services programs. No *Pico* claim was made or analyzed in *Rust* and *Rust* does not speak to it. The Rule "cast[s] a pall of orthodoxy" over Title X providers' discussions with their patients, and therefore the Rule violates the First Amendment. *Keyishian*, 385 U.S. at 603.

Fourth, the Rule violates the First Amendment by violating patients' rights to receive truthful expert information and counsel from their doctors. The First Amendment enshrines a right to "receive information and ideas." *Va. State Bd. Pharm. v. Va. Citizens Consumer Council, Inc.*, 425

U.S. 748, 757 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Supreme Court has repeatedly reaffirmed that "people will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather than to close them." *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Va. State Bd. Pharm*, 425 U.S. at 770); *accord Sorrell*, 564 U.S. at 578. "[Z]eal to protect the public from 'too much information' [cannot] withstand First Amendment scrutiny." *Meese v. Keene*, 481 U.S. 465, 482 (1987). This claim was never analyzed in *Rust* and *Rust* does not speak to it. Restricting access to medically relevant information in the Title X program violates the First Amendment by denying patients' rights to receive information.

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

Based on the record now before the Court, the Rule violates the Fifth Amendment Due Process Clause's protections against sex discrimination because it targets women for differential treatment from men without an "exceedingly persuasive justification" for doing so. *See United States v. Virginia*, 518 U.S. 515, 531 (1996). Where the government targets one sex for differential treatment, its action must meet intermediate scrutiny. *Id.* at 533; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *accord Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003). A rule violates constitutional protection against sex discrimination *either* because it discriminates against women on its face *or* because it was motivated by an unconstitutional purpose to discriminate. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). A sex-discrimination claim was not raised or analyzed or decided in *Rust* and therefore *Rust* does not foreclose this claim. A rule

discriminates against women on its face both (1) when it treats women differently from men; and (2) when it classifies on the basis of pregnancy and in doing so reflects or attempts to enforce sex-role stereotypes. *Hibbs*, 538 U.S. at 730-36; *see id.* at 731 & n.5, 734 & n.6, 736 (2003); *see also Nashville Gas Co. v. Satty*, 434 U.S 136, 142 (1997).

1. The Rule Discriminates Against Women On Its Face Because It Specifically Treats Women Differently From Men

First, the Rule discriminates against women on its face because it treats women and men differently. If a woman seeks advice about her health care treatment options at a Title X clinic, the Rule limits the information or advice she can receive about some of her health care options because she is a woman, and mandates certain referrals. *See* 42 C.F.R. § 59.14. In contrast, if a *man* seeks advice about any of his health care treatment options at a Title X clinic, the Rule places absolutely no restrictions whatsoever on the information or advice he may receive about any medical condition he might have; nor does it mandate any specific referrals.[15]

[15] Specifically, if a woman becomes pregnant, the Rule imposes (1) mandated referral for prenatal care even where a woman refuses the referral; (2) limitations on the types of providers who may provide "nondirective counseling" about abortion; (3) specialized counseling rules prohibiting referrals for abortion, even where a woman requests it. Facts ¶¶ 12-16. The Rule also allows grantees to refuse to provide *any* counseling to a pregnant woman, much less "nondirective" counseling that includes counseling about abortion. 42 C.F.R. § 59.14(b) (indicating that grantees *may*, but are not required to, provide nondirective counseling pregnancy counseling). By contrast, the Rule does not impose on any men seeking reproductive health services: (1) mandated referral for any reproductive health care services, including for men whose partners are pregnant; (2) any limitations on who may provide counseling for reproductive health services; (3) any limitations on the substance of counseling about their own reproductive health care needs, including any referrals they may request for reproductive health care services. *Id.* (no mandated referrals for any reproductive health care men need); *id.* (while counseling "may" be allowed to pregnant women, no counseling is allowed about pregnancy options for men whose partners are pregnant; only women may receive such counseling); *id.* (no limitations on who may counsel men on reproductive health care options). Men are deprived of counseling about pregnancy options and a healthy prenatal environment—information that is important for men whose partners are pregnant, especially when the partner is at higher risk of complications during pregnancy, or where the man undertakes behaviors that could be unhealthy for a developing pregnancy, such as smoking.

2. The Rule Discriminates Against Women On Its Face Because It Classifies On the Basis of Pregnancy Because of the Stereotype That Women Need to Be Protected From Making Bad Family Planning Decisions

The Rule is also an unlawful sex classification because it discriminates on the basis of pregnancy to enforce unconstitutional stereotypes. *See, e.g.*, *Hibbs*, 538 U.S. at 730-36. In *Hibbs*, Chief Justice Rehnquist determined that a pattern of state laws awarding maternity leave to women and not men violated the Equal Protection Clause because the tradition reflected different sex-role expectations of male and female employees. *Hibbs*, 538 U.S. 730-31. *Hibbs* affirmed that a law applicable to pregnancy is sex discrimination subject to heightened scrutiny when it is enacted because of stereotypes rather than physical differences between men and women.[16]

Here, the restrictions on counseling and referrals for pregnant women are not based on "the different physical needs of men and women," *see id.* at 733 n.6, but reflect different sex-role expectations of male and female patients. If a woman visits a Title X clinic and tells her health care provider that she is pregnant, the Rule requires the provider to coerce her into motherhood by prohibiting a referral for abortion, but mandating referral to a prenatal care provider. *See* 42 C.F.R. § 59.14. If a man visits a Title X clinic and tells his health care provider that his wife is pregnant, the Rule does not require the provider to encourage him to become a father, or allow any counseling about healthy pregnancy, much less information about abortion.

The Rule treats pregnant patients differently from other patients because of stereotypes about women. Rules that restrict women's autonomy to end an unwanted pregnancy under the guise of "protecting" them enforce an unlawful stereotype—that women's place is in the home while men are responsible for civic engagement. Haugeberg Decl., PEP10 ¶¶ 15-17 (discussing history of

[16] *See also, e.g.*, *Weisenfeld v. Weinberger*, 420 U.S. 636 (1992); *Frontiero v. Richardson*, 411 U.S. 677 (1973); Cary Franklin, *The Anti-Stereotyping Principle Unconstitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010).

laws regulating reproductive health care, designed to enforce "women's obligations as wives and mothers", and "women's place in the home"). The Rule, particularly the prohibition on referrals for abortion and the mandatory referral to prenatal care, "resurrect the stereotype that government prioritizes women's identities as mothers or potential mothers." *Id.* PEP41 ¶ 83. Just like old laws restricting information about family planning methods, the Rule reveals "a deep mistrust of women's abilities to make informed and responsible judgments." *Id.* PEP42 ¶ 85; *see id.* PEP19-23 ¶¶ 29-38 (explaining that regulation of abortion and contraception, as well as information about these services, was designed to prevent women from controlling their fertility); *id.* PEP30-31 ¶¶ 57-61 (explaining that Title X was the continuation of an effort in the late 1960s and early 1970s to liberalize access to reproductive health care).

Because the Rule constitutes sex discrimination, the Government must meet heightened scrutiny by coming forward with persuasive *evidence* that there is an "exceedingly persuasive justification" for the Rule that "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 533 (internal citations omitted). That they cannot do. The claim that the Rule is needed to enforce the statutory ban on funding for abortion activities is patently false. Any attempt to justify the Rule as woman-protective is not an exceedingly persuasive justification serving important governmental objectives; nor is it substantially related to the achievement of those objectives. In fact, it is simply further confirmation that the Rule is intended to enforce outdated sex-role stereotypes in violation of the Fifth and Fourteenth Amendments.

II. The Rule is Inseverable

The APA requires that courts "set aside agency action" "not in accordance with law." 5 U.S.C. § 706(2)(A). The test for severability is "essentially an inquiry into ... intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *North Carolina v.*

FERC, 730 F.2d 790, 795–96 (D.C. Cir. 1984) (severability "depends on the issuing agency's intent"). "Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). Severability clauses are rarely decisive of the severability decision. *See Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990). A court should set aside a rule where upholding only a portion of the rule would result in "a scheme sharply different from what" the agency contemplated, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). This is especially true because the agency is best positioned to respond to the court's ruling by crafting a new rule through notice and comment. If this Court deems either the Rule's counseling restrictions or its separation requirements—or both—to be unlawful, it should set aside the Rule. In light of the centrality and importance of those provisions there is "substantial doubt" that the agency would have promulgated the Rule in the absence of one or both of those central provisions.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Summary Judgment.

Dated: November 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 1, 2019, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants identified on the Notice of Electronic Filing.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As Defendants have explained, 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, as relevant here, 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 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 Plaintiff's sex discrimination claim 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*.

For these reasons and the reasons explained below, the Court should enter summary judgment in Defendants' favor pursuant to Rule 56.

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 published 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

Plaintiff filed its complaint on April 12, 2019 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. This 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 moved for reconsideration en banc, ECF No. 27, *Baltimore* (4th Cir. July 3, 2019), but the Fourth Circuit denied Plaintiff's rehearing motion on September 3, 2019, ECF No. 73. The Fourth Circuit panel assigned to the case heard oral argument on the merits of the government's appeal on September 18, 2019.

Defendants moved to dismiss this suit on August 16, 2019. ECF No. 67. On September 12, 2019, the Court granted in part and denied in part Defendants' motion to dismiss, concluding that Plaintiff had failed to state a claim with respect to Counts IV and X of its Complaint, but that the remaining claims could proceed to the merits. ECF No. 74. Defendants filed a notice of filing of the Administrative Record and mailed an electronic copy of the Administrative Record to the Court on October 15, 2019. *See* ECF No. 77. Defendants now move for summary judgment as to Plaintiff's remaining claims.

ARGUMENT

Defendants move for summary judgment on Plaintiff's remaining claims pursuant to Rule 56, and Defendants likewise oppose Plaintiff's cross motion for summary judgment. Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For claims brought under the APA, a motion for summary judgment is the appropriate vehicle for summary disposition of the case with one significant caveat: "the district judge sits as an appellate tribunal" to resolve issues at summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S STATUTORY CLAIMS.

As Defendants have explained previously, the Supreme Court's decision in *Rust v. Sullivan* upheld regulations that are materially indistinguishable from those Plaintiff challenges here. *See* ECF No. 67-1 at 10-14. The Title X statute broadly mandates, now and at the time *Rust* was decided, 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's argument that this holding no longer applies, and that the challenged provisions of the Rule are no longer permissible in light of a six-word clause in an appropriations rider and an ancillary provision of the ACA, cannot be squared with either the text of those later-enacted provisions or the presumption against implied repeals. That presumption 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," *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). Title X still plainly authorizes the Secretary's regulations, and there is no indication that Congress had any—much less "clear and manifest"—intent to eliminate that authority with its later enactments.

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

Although Plaintiff now contends that the Rule "violates" an obscure provision of the ACA addressing "Access to therapies," Plaintiff did not raise that argument during notice-and-comment rulemaking and has thus waived it. The Court has not addressed this argument, either in granting Plaintiff's motion for a preliminary injunction or in finding that Plaintiff's allegations "sufficiently put the Government on notice as to the nature of the claim[]," Mem. Order at 14, ECF No. 74, but it is generally "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). Here, it is undisputed that none of the more than 500,000 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. Waiver is thus appropriate, and Plaintiff's arguments to the contrary are not persuasive.

Plaintiff primarily argues that, because the Rule is currently in effect and Defendants "are now applying [it] to Baltimore City," waiver is "no longer an issue," pointing to language in Defendants' motion to dismiss briefing suggesting that parties can "rais[e] a statutory argument if and when the Secretary applies the rule to them." MSJ at 12. But Plaintiff is not, in fact, raising an as-applied challenge based on specific HHS action enforcing the Rule against Plaintiff. HHS has, in fact, taken no action against Plaintiff. Rather, Plaintiff contends, as it did when it first filed the Complaint, that the Rule is facially invalid based on its asserted conflict with certain statutory and constitutional requirements, and seeks an order setting the Rule aside in its entirety. The case law on which Defendants have previously relied—which simply recognizes that waiver doctrine does not prevent a party from raising an argument that it failed to make during agency rulemaking when the "rule is brought before this court for review of *further agency action applying it*," i.e., action beyond mere promulgation of the rule itself, *Koretoff v. Vilsack*, 707 F.3d 394, 399 (D.C. Cir. 2013) (emphasis added) (quoting *Murphy Exploration & Prod. Co. v. U.S. Dep't of Interior*, 270 F.3d 957, 958 (D.C. Cir. 2001)))—is thus inapplicable to Plaintiff's facial challenge. Whether or not the Rule is currently in effect, it remains the case that "the price for a ticket to facial review is to raise objections in the rulemaking." *Id*. at 401 (Williams, J., concurring).

Plaintiff also asserts, in a footnote, a grab bag of passing arguments against waiver. But it is not enough, as Plaintiff contends, that commenters raised the "substance of the issues covered" by § 1554 during the rulemaking. Pl.'s MSJ at 12 n.9. Rather, preservation requires that the "specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff*, 707 F.3d at 398 (D.C. Cir. 2013). Plaintiff does not argue that any of the

comments it references actually invoked § 1554, or more importantly invoked that statutory provision as legal bar to the Rule, and thus 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. Similarly, it is not the case that "purely legal questions" are immune from waiver. Pl.'s MSJ at 12 n.9. Instead, agencies "have no obligation to anticipate every conceivable argument about why they might lack" statutory "authority to issues a particular regulation." *Koretoff*, 707 F.3d at 398; *see also California v. Azar*, 927 F.3d 1068, 1078 (9th Cir. 2019) (finding it "likely" that "any challenge to the Final Rule relying on § 1554 is waived"), *reh'g en banc granted* 927 F.3d 1045 (9th Cir. 2019). The nature of the argument Plaintiff failed to raise, then, imposes no obstacle to straightforward application of the waiver doctrine.[1]

In any event, Plaintiff's substantive argument regarding § 1554 is meritless. The Rule merely limits what the government chooses to fund and thus does not "create," "impede," "interfere with," "restrict," "violate," or "limit" anything. *See* 42 U.S.C. § 18114. As the Supreme Court explained in *Rust*, there is a fundamental distinction between impeding something and choosing not to subsidize it. *See Rust*, 500 U.S. at 201-02 (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"). Although repackaged as a statutory argument, Plaintiff's

[1] Plaintiff also contends, without any citation or support, that the Administrative Record "shows that HHS in fact considered [§ 1554] in fashioning the Rule." Pl.'s MSJ at 12 n.9. To the extent Plaintiff is reprising an argument from its briefing on Defendants' motion to stay proceedings, *see* Pl.'s Opp'n to Defs.' Mot. for a Stay at 9 n.2, ECF No. 63, Defendants have explained that the source of authority on which Plaintiff previously relied to make that assertion—a table listing 108 "sources" consulted during the rulemaking process—referenced only the "Affordable Care Act," "Section 1001," and not § 1554 in particular, *see* Defs.' Reply in Support of Mot. for Stay at 3 n.1, ECF No. 64. There is thus no support for Plaintiff's contention that HHS's "actual" consideration of § 1554 defeats waiver here.

central claim—that the Rule's 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, Pl.'s MSJ at 12, is erroneous. 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 certain 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).[2]

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 of § 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

[2] As HHS also noted, the presence of multiple statutes allowing medical providers the option not to refer for, or promote, abortion provides further evidence that such activity does not violate medical ethics. *See* Defs.' MTD at 24-25.

(2017). And more fundamentally, it is implausible that Congress tucked away the "elephant" of 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 Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). 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 § 1554 may only 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 Dog. 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 enter judgment for Defendants on Count I.

B. 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." Like the ACA provision discussed above, this language does not abolish HHS's authority, confirmed in *Rust*, to adopt the restrictions at issue in this case.

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 on abortion referrals. This is especially true

given that the prenatal-referral requirement is severable from the abortion-referral prohibition. *See* 84 Fed. Reg. at 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 is, by definition, at the time of 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. Contrary to Plaintiff's contention, Pl.'s MSJ at 13, counseling and referrals are distinct, both in the Title X program and in general. "[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 counselling or referral*. (emphasis added)); *see also* Defs.' MTD at 17 n.2 (listing other examples). Most notably, when

Congress tried (and failed) to overturn *Rust* through the Family Planning Amendments Act, 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 that 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. *See* Defs.' MTD at 17. 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. at 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 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 that in the agency's view, "not the only permissible interpretation of the statute." 65 Fed. Reg. at 41,277. Despite discussing the appropriations rider, *id*. at 41,273, HHS did not conclude that it required suspension of the 1988 regulations. *See also id*. at 41,271 (noting that the "crucial difference" between the 1988 and 2000 regulations was "one of experience").

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." The term "included" modifies the "other courses of action" potentially addressed in pregnancy counseling—namely, abortion or carrying to term; it does not indicate that referrals are "included in" nondirective counseling. 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 included as part of any nondirective counseling. 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.

Moreover, because the Rule expressly permits Title X providers to offer "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5), Defendants respectfully submit that the Court previously mischaracterized this provision when it 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. "Nondirective counseling does not require equal treatment of all pregnancy options." *California*, 927 F.3d at 1077. When Congress wants pregnancy options to be treated on an equal basis, it knows how to say so explicitly, and it did not do so in the appropriations rider. *See* Defs.' MTD at 19-20.

Finally, 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 interpretive 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 abrogated *Rust* and resurrected the vetoed Family Planning Amendments Act in different form, while simultaneously ordering that Title X funds "shall not be expended for abortions," all without mentioning abortion, pregnancy, referrals, advocacy, § 1008, or *Rust*. 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, as noted above, to "hide elephants in mouseholes," *Whitman*, 531 U.S. at 468, yet Plaintiff has assumed that the 1996 Congress did both. The far more likely explanation—suggested by the accompanying directive that Title X funds "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 (noting that, 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").[3]

In finding that, despite all of this, Plaintiff was likely to succeed on the merits of 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

[3] Indeed, the appropriations rider was a compromise measure offered in response to an effort to defund the Title X program. *See* 141 Cong. Rec. H8248-62 (Aug. 2, 1995). Accordingly, a sponsor promised that, under the legislation, "not a penny of [Title X] funds can be used to provide abortion servicers" 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 riders was simply a variant of the Family Planning Amendments Act.

delegated authority to HHS to promulgate the regulations at issue, and it concludes that the appropriations rider stripped that authority away. But the congressional elimination of a statutory delegation of authority 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 ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have previously recognized that implied amendments are no more favorable than implied repeals." (collecting cases)). But there is no evidence that Congress intended to repeal or amend portions of Title X or the Supreme Court's interpretation of that statute in *Rust*. Accordingly, Defendants are entitled to judgment on Count II.

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

Plaintiff next contends that the Rule violates Title X itself—specifically the requirement that Title X services remain "voluntary." *See* Pl.'s MSJ at 14-15 (quoting 42 U.S.C. § 300a-5). But this statutory provision predates *Rust*. Indeed, *Rust* acknowledged the general Title X voluntariness principle, 500 U.S. at 178, yet held unequivocally that "[t]he broad language of Title X plainly allows the Secretary's construction of the statute" in the materially indistinguishable 1988 regulations, *id*. at 184. Plaintiff's argument is thus foreclosed by *Rust*.

Even putting *Rust* aside, the statutory provision upon which Plaintiff relies requires only that Title X services be "voluntary" 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 of assistance from, or to participation in, any other program of the entity or individual that provided such service or information." 42 U.S.C. § 300a-5. In arguing to the contrary, Plaintiff essentially restates its

argument with respect to the nondirective provision. *See* Pl.'s MSJ at 15 (citing Court's conclusion that the Rule violates nondirective provision for the proposition that the Rule "is inconsistent with the unambiguous text of 42 U.S.C. § 300a-5"). As explained above, the Rule does not violate the nondirective provision. But even putting that aside, Title X imposes no requirement that providers be required to counsel about and refer for abortion.[4] Instead, it requires only that receipt of Title X services not affect a patient's eligibility for other programs, a requirement that the Rule specifically abides by in 42 C.F.R. § 59.5(a)(2) (which is unchanged from the 2000 regulations). Defendants are entitled to judgment on Count III.

II. 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 alley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) ("Review

[4] Plaintiff argues that the Rule is "inconsistent with HHS's *own* longstanding and unchanged interpretation" of 42 U.S.C. § 300a-5, Pl.'s MSJ at 15. But as HHS explained, Plaintiff's concern is "unfounded" because the Rule confirms that "family planning methods and services are never to be coercive and must always be strictly voluntary" and ensures that family planning remain "voluntary" by "providing a variety of methods and services so that the individual patient can make an informed choice, based on her own lifestyle and needs." 84 Fed. Reg. at 7724-25. The Rule thus reflects no departure from HHS's prior interpretation and, for the reasons explained above, does not violate Title X.

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 prior briefing, which Defendants incorporate here by reference, 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 Defendants have explained, 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 (or more restrictive than) 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 the use of Title X 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 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.

First, Plaintiff asserts that HHS failed to explain what Plaintiff alleges is a departure from the 2000 regulations with respect to Defendants' interpretation of the nondirective provision. *See* Pl.'s MSJ at 16-17. But contrary to Plaintiff's claim, and as Defendants have explained, HHS

never concluded in the 2000 regulations that the nondirective provision required suspension of the 1988 regulations. For HHS, the "crucial difference between" the 1988 regulations and the 2000 regulations was simply "one of experience." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000) (2000 regulations). Thus, there was no reversal of position as to HHS's interpretation of the nondirective provision—which HHS continues to recognize requires that if pregnancy counseling is offered it must be nondirective, *see, e.g.*, 84 Fed. Reg. at 7733—and therefore no need for any additional explanation than what exists in the Rule's preamble.

Next, Plaintiff asserts that the Rule is arbitrary and capricious because Plaintiff finds lacking HHS's explanation of the Rule's consistency with medical ethical requirements. *See* Pl.'s MSJ at 17-18. HHS, however, considered precisely this concern and explained at length why, properly understood, the Rule is consistent with medical ethical obligations, as well as multiple Supreme Court decisions and other legal authorities. *See* 84 Fed. Reg. at 7724, 7748. Among other reasons, HHS explained that *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, which it would not have done had that rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. HHS also pointed to the many federal conscience statutes that give medical providers the option of not referring for, or promoting, abortion as evidence that neither Congress, nor the medical providers with conscience objections, believe that not referring for, or promoting, abortion violates medical ethics. *See* 84 Fed. Reg. at 7748; *see also id*. at 7716, 7746-47 (discussing statutes); 7780-81 (discussing medical providers with conscience objections to counseling on, or referring for, abortion). Plaintiff may disagree as a matter of policy with HHS's decision, but Plaintiff cannot show that HHS's decision was unreasonable.

Plaintiff also incorrectly claims that HHS failed to explain why it created supposed inconsistencies between the Rule and the Quality Family Planning ("QFP") guidelines issued in 2014. *See* Pl.'s MSJ at 17. HHS continues to expect Title X providers to follow QFP guidelines to the extent they are consistent with the Rule. To the extent those guidelines conflict with the Rule, HHS acknowledged it was departing from its prior approach under the 2000 regulations, and the QFP guidelines did not (and indeed could not) go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

Plaintiff goes on to claim that HHS did not adequately consider reliance interests and consequences of the Rule, *see* Pl.'s MSJ at 18-21, pointing again to the fact that some commenters indicated that they would exit the program if the proposed rule were to go into effect. But as Defendants have explained, grantees should not be able to use threats of departure from a competitive grant program to veto otherwise permissible and reasoned policy judgments. *See* MTD at 30. Here, HHS concluded that the Rule would "contribute to more clients being served, gaps in service being closed, and improved care." 84 Fed. Reg. at 7723; *see also id.* at 7780-81; PI Opp. at 34. And in all events, HHS concluded that "compliance with statutory program integrity provisions is of greater importance" than the "cost" of departing from the status quo, 84 Fed. Reg. at 7783, and the APA does not permit courts to second-guess that policy judgment.

Plaintiff further argues that HHS acted arbitrarily and capriciously by instituting the physical and financial separation requirements as a solution "a nonexistent problem." Pl.'s MSJ at 22. Even the 2000 regulations Plaintiff prefers required some financial separation, and although Plaintiff may disagree with HHS's policy judgment to require further separation, HHS adequately explained that such requirements were necessary to address the risk and perception that Title X funds would be used for other prohibited purposes (such as to 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.

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

Finally, Plaintiff claims that the Rule's provision restricting nondirective pregnancy counseling to physicians and advance practice providers (APPs) "is unexplained and irrational." Pl.'s MSJ at 23-24. To the contrary, 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 because of their advanced qualifications to perform counseling services.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S PROCEDURAL CHALLENGES.

Plaintiff asserts two arguments that HHS failed to follow required procedures, only one of which was actually pled in the Complaint. In any event, Plaintiff's arguments are meritless and the Court should enter judgment for Defendants on Count IX.

A. HHS Provided a Meaningful Opportunity for Comment

Plaintiff first argues that HHS deprived the public of a meaningful opportunity to comment on the proposed rule, primarily because it declined requests from commenters to extend the comment period beyond 60 days. *See* Pl.'s MSJ at 24-27. As an initial matter, Plaintiff did not plead this claim, which appeared for the first time in Plaintiff's brief opposing Defendants' motion to dismiss. But as Defendants pointed out, *see* Defs.' Reply in Support of MTD at 17, ECF No. 72, it is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," *Weakley v. Homeland Sec. Sols., Inc.*, No. 3:14-cv-785 (REP-RCY), 2015 WL 11112158, at *5 (E.D. Va. May 19, 2015), and it is similarly established that "a plaintiff may not amend her complaint through argument" in a summary judgment brief, *Caudill v. CCBCC, Inc.*, 651 F. Supp. 2d 499, 510 (S.D. W. Va. 2009) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004)). The Court should thus not consider these "new issues" and "new claims" that "were not contained in Plaintiff's Complaint. *Hooker v. Disbrow*, No. 1:16-cv-1588-GBL-JFA, 2017 WL 1377696, at *4 (E.D. Va. Apr. 13, 2017).

In any event, Plaintiff's new claim fails on the merits. As Plaintiff recognizes, the APA requires only that the public be a given a "meaningful opportunity" to comment on a proposed

rule. Pl.'s MSJ at 24 (quoting *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012)). "This opportunity to participate is all the APA requires. There is no requirement concerning how many days the [agency] must allow for comment or that the [agency] must reopen the comment period at the request of one of the participants." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Here, HHS provided a 60-day comment period—not counting the additional days when the NPRM was available on HHS's website, starting on May 22, 2018—which is well within the bounds of a typical rulemaking. *See id.* (noting that courts have "uniformly upheld comment periods of 45 days or less"); *Inv. Co. Inst. v. Depository Insts. Deregulation Comm.*, No. 82-3037, 1982 WL 1340, at *2 (D.D.C. Oct. 27, 1982) (noting that the "APA sets no specific minimum time period for rulemaking comments to which interested parties are guaranteed" and that "other courts have upheld comments periods as short as seven days"); *In re Home Health Litig.*, No. 90-1537 (RCL), 1992 WL 114316, at *5 (D.D.C. Mar. 31, 1992) (upholding 30-day comment period because it satisfied the APA standard for "sufficient advance notice following rulemaking," and citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-47 (1978), for the proposition that "a court may not add rulemaking requirements to those set forth in the APA").

Plaintiff provides no basis for concluding that HHS deprived it (or anyone else) of a meaningful opportunity to comment. HHS made plain that it was proposing to rescind the 2000 rule and replace it with regulations materially indistinguishable from the prior 1988 regulations, and provided the public 60 days to comment on the full scope of its proposal. Thus, this is not a situation, as in the cases Plaintiff cites, where the agency's structuring of the notice-and-comment process deprived the public of a meaningful opportunity to comment. *Cf. N.C. Growers' Ass'n*, 702 F.3d at 769-70 (agency "stated that it would not receive or consider comments that were not

only 'relevant and important,' but were integral to the proposed agency action and the conditions that such action sought to alleviate"); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (agency's notice was "too open-ended to allow for meaningful comment on [its] approach," and did not "solicit comment on the overall framework under consideration"). Instead, Plaintiff focuses on the length of the comment period that HHS provided. But Plaintiff identifies no case finding a 60-day comment period unreasonable, and the one case it cites for the proposition that the "need for an extended comment period" here was "particularly acute," Pl.'s MSJ at 26, is wholly inapposite. *See Hollingsworth v. Perry*, 558 U.S. 183, 192-93 (2010) (addressing non-APA challenge to district court's procedure for amending its local rules and noting that, in the distinct context of agency rulemaking, agencies "usually provide a comment period of [at least] thirty days" (citation omitted)).[5]

Plaintiff's argument is further undercut by the fact that, notwithstanding the allegedly "inadequate comment period," Pl.'s MSJ at 25, HHS received over 500,000 comments, including comments from Plaintiff, which raised multiple challenges to the Rule on both legal and policy

[5] Plaintiff also misleadingly suggests that a longer comment period was necessary because the previously effective 2000 rule took "seven years" to "finalize[]." Pl.'s MSJ at 26. But that delay was not because HHS spent the entire time grappling with concerns raised by comments. Rather, HHS originally proposed in 1993 to revoke the 1988 regulations and replace them with the "compliance standards operative before their issuance." 58 Fed. Reg. 7464, 7464 (Feb. 5, 1993). That same day, however, HHS also issued an interim rule suspending the 1988 regulations and making effective during the pendency of the proposed rulemaking "the compliance standards that were in effect prior to" the 1988 regulations. 58 Fed. Reg. 7462, 7462 (Feb. 5, 1993). In other words, the 2000 final rule did little to change the status quo that was put in place in 1993, and indeed HHS made that rule immediately effective because "the policies adopted in the [2000] regulations . . . are already largely in effect, by virtue of the suspension of the [1988 regulations] and the reinstitution of the pre-1988 policies and interpretation effected by the interim rule of February 5, 1993." 65 Fed. Reg. at 41,277-78. The better comparison for the current Rule is the materially indistinguishable 1988 version, upheld in *Rust*, which provided for a 60-day comment period. *See* 53 Fed. Reg. 2922, 2922 (Feb. 2, 1988). The 1993 NPRM also allowed for a 60-day comment period. *See* 58 Fed. Reg. at 7464.

grounds, and which HHS addressed in a lengthy final rule. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (rejecting challenge to 30-day comment period because agency "is not required to provide more than 30-days for public comment," and the period was not insufficient to allow the plaintiffs "to consider the rule and its supporting analysis and provide meaningful comment, especially in light of the comments that they and other interested parties submitted in response to th[e] proposed rule"). In light of the robust comment period that occurred, Plaintiff can hardly assert that it was deprived of a meaningful opportunity to comment merely because it alleges it did not get to raise certain issues (such as "the economic impact and compliance costs associated with" the proposed rule and the proposal's "public health impacts," Pl.'s MSJ at 25) that were indisputably raised before the agency and which even now form the basis for Plaintiff's summary judgment claim, *see id*. at 18-23. *See also id*. at 25 (arguing that longer comment period would have allowed commenters to "even more squarely raise[]" some issues and "marshal[] stronger evidence" against the Rule).

Plaintiff also asserts that HHS "radically departed from rulemaking procedures" prior to issuing the proposed rule. *Id*. at 25. But the procedures that HHS is alleged to have "departed from" are imposed not by the APA or any other statute, but, according to Plaintiff, by certain executive orders devoted to "the internal management of the executive branch." *Meyer v. Bush*, 981 F.2d 1288, 1297 n.8 (D.C. Cir. 1993); *see* Pl.'s MSJ at 25 (arguing that HHS violated the APA by "engaging in zero outreach," "failing to place the Proposed Rule on the Regulatory Agenda, and rushing the Proposed Rule through OIRA"); *id*. at 9 (confirming that these "requirements" are imposed by Executive Orders 12,866 and 13,563). But by their terms, the executive orders on which Plaintiff relies are "intended only to improve the internal management of the Federal Government and do[] not create any right or benefit, substantive or procedural, enforceable at law

or equity by a party against the United States." Exec. Order 12,866, § 10 (Sept. 30, 1993); *see also* Exec. Order 13,563, § 7(d) (similar). They thus "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).

At bottom, Plaintiff's claim is an impermissible attempt to impose "procedural requirements on agency rulemakings beyond that required by statute." *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 308 (D.D.C. 2016). It is a bedrock principle of administrative law, however, that courts have no authority to do so. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (explaining that the APA establishes "the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures," and that, beyond these requirements, "courts lack authority 'to impose upon an agency its own notion of which procedures are best'" (quoting *Vermont Yankee*, 435 U.S. at 524, 549)). Plaintiff cites no authority for the proposition that noncompliance with procedural requirements deriving from outside the APA or another statute supports a claim under the APA—and much less that an agency deprives the public of a meaningful opportunity to comment on a *proposed rule* (which is all the APA requires) by failing to comply with internal procedural requirements that only apply *before* the proposed rule is published. The Court should reject this claim.

B. The Rule's Provision Limiting Nondirective Pregnancy Counseling to APPs is a Logical Outgrowth of the Proposed Rule

Plaintiff's other procedural argument is that the proposed rule provided insufficient notice of the requirement that nondirective pregnancy counseling be offered only by physicians or APPs. Pl.'s MSJ at 27. 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 logical outgrowth claim is meritless. Indeed, a district court in a related challenge to the Rule rejected a materially indistinguishable logical-outgrowth challenge to the same provision. *California v. Azar*, 385 F. Supp. 3d 960, 1020-21 (N.D. Cal. 2019).

IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CONSTITUTIONAL CLAIMS.

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. Defendants are entitled to summary judgment on these claims.

A. Plaintiff Cannot Prevail on Its First Amendment Claim.

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*—Plaintiff's arguments to the contrary notwithstanding.

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's various attempts to distinguish *Rust* fail, and its First Amendment claim likewise cannot succeed. To start, Plaintiff seizes on the *Rust* Court's remark that "[i]t could be argued" that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200. But as Plaintiff acknowledges, the Court nonetheless rejected the First Amendment challenge because the 1988 "regulations do not significantly impinge upon the doctor-patient relationship," *id.* at 200. This is not a factual conclusion, as Plaintiff suggests, *see* Pl.'s MSJ at 27-28, but a legal holding that the regulation did not violate the First Amendment. Plaintiff thus cannot evade *Rust* by asserting that *others* believe—contrary to the Supreme Court—that the materially identical regulations here "significantly impinge upon the doctor-patient relationship," *id*. at 28 (citing Mobley Decl. ¶ 41). And while Plaintiff asserts that "*Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), makes clear that the Rule violates the First Amendment by unconstitutionally impinging on the doctor-patient relationship," *id*., *Velazquez* reaffirmed *Rust*. *See* 531 U.S. at 540-41.

Plaintiff next argues that *Rust* is no longer good law because, according to Plaintiff: (1) the Supreme Court has since clarified that *Rust* was a government-speech case; and (2) "[t]he Supreme Court's later cases leave no doubt that to the extent Title X was a government-messaging program when *Rust* was decided, it no longer is." Pl.'s MSJ at 29-30. But as to the latter proposition, the decisions Plaintiff cites *approvingly* discuss *Rust*,[6] and the remaining source on which Plaintiff relies is a concurring opinion that also favorably cites *Rust*.[7]

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

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

Plaintiff finally asserts that the Rule violates the First Amendment by violating "patients' rights to receive truthful and unbiased information from their doctors." Pl.'s MSJ at 2, 30-31. But the Rule does no such thing. Unlike even the regulation sustained in *Rust*, the Rule permits nondirective pregnancy counseling discussing abortion, and it also allows providers to explain *why* abortion referrals cannot be provided (*i.e.*, because the Rule does not permit it). In any event, *Rust* forecloses this argument as well. As the Court explained, the 1988 regulations (like the Rule) simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded," and the Constitution generally permits "the Government [to] choose not to subsidize speech." *Id*. at 194-95, 200. Thus, a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id*. at 193-94. Plaintiff's assertion that *Rust*'s directly-on-point holding "does not speak to" this argument, Pl.'s Opp'n at 31, goes nowhere. And while Plaintiff additionally contends that "the Rule violates the First Amendment by selectively withholding information from patients on the basis of viewpoint," *id*. at 2, 30, that assertion is likewise wrong as a matter of logic and foreclosed by *Rust*'s holding that the government may choose not to subsidize speech (including speech encouraging or referring for abortion as a method of family planning).

B. Plaintiff Cannot Prevail on Its Equal Protection Claim.

As a threshold matter, even though the Court found that Baltimore's standing allegations as to its Equal Protection claim were "sufficient to survive" a motion to dismiss, ECF No. 74 at 12, they cannot withstand scrutiny at summary judgment. *See* Defs.' MTD at 12-15. In any event, Plaintiff's argument is foreclosed by the Supreme Court's subsequent instruction 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." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). In concluding that "government abortion-funding restrictions [are not judged by] the heightened-scrutiny standard that our cases demand for sex-based discrimination," the Court necessarily concluded that abortion-funding restrictions *do not involve* sex discrimination. *Id.* at 273; *see also Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (federal law providing reimbursement under Medicaid for medically necessary services generally but not for all medically necessary abortions not predicated on a suspect classification); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (rejecting claim that welfare regulation providing funds for childbirth but not for nontherapeutic abortions discriminated against a suspect class).

Plaintiff's remaining arguments in support of this claim are likewise insubstantial. Plaintiff asserts the Rule's restrictions on abortion counseling and referrals is a sex-based classification because these provisions are abortion-specific. *See* Pl.'s Opp'n at 32 ("[I]f a *man* seeks advice about any of his health care treatment options at a Title X clinic, the Rule places absolutely no restrictions whatsoever on the information or advice he may receive about any medical condition he might have."). But this is just a restatement of the position that the Supreme Court has rejected in the cases discussed above. Plaintiff also contends that the Rule promotes unconstitutional sex stereotypes because "the Rule requires the provider to encourage [a pregnant woman] to become a mother by referring her to a prenatal care provider," while "if a man visits a Title X clinic and tells his health care provider that his wife is pregnant, the Rule does not require the provider to encourage him to become a father." Pl.'s Opp'n at 13. But the Rule requires prenatal care referral for pregnant women because HHS determined that prenatal care is medically necessary for both the pregnant woman and unborn child, 84 Fed. Reg. at 7761, a consideration that obviously does

not apply to *non-pregnant* Title X patients (whether those non-pregnant patients are men or women).

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in Defendants' favor and deny Plaintiff's motion for summary judgment.

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Respectfully submitted,

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