IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

MOTION FOR SUMMARY JUDGMENT

Defendants respectfully move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The reasons for this Motion are set forth in the accompanying memorandum.

Dated: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Bradley P. Humphreys
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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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