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

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court held that Department of Health and Human Services (HHS) regulations (1988 regulations) prohibiting Title X projects from referring patients for abortion as a method of family planning, and requiring Title X programs to be physically separate from abortion related activities, were authorized by Title X, were not arbitrary and capricious, and were constitutional. Relying on that holding, HHS issued a new rule in 2019 that is, in all material respects, indistinguishable from the 1988 regulations. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Notwithstanding *Rust*'s holding, Plaintiff brings this suit asserting that the current Rule, *inter alia*, violates Title X, is arbitrary and capricious, and violates the Constitution. As Defendants explained in their opening brief, these claims fail and the Court should enter summary judgment for Defendants. *See* Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Defs.' Cross Mot. for Summ. J. (Defs.' MSJ), ECF No. 82-1.

Plaintiff's opposition brief, *see* Pl's. Mem. in Opp'n to Defs.' Cross Mot. for Summ. J. & Reply in Supp. of Pl.'s Mot. for Summ. J. (Pl.'s Opp'n), ECF No. 84, largely doubles down on the remarkable arguments asserted in its summary judgment motion: that this Court can effectively overrule a Supreme Court decision based on a single clause in an appropriations rider, an obscure provision in the Affordable Care Act (ACA), or later Supreme Court cases *reaffirming* the decision; that the Court can substitute its judgment for the predictive expertise of the agency charged with administering the Title X program; that, notwithstanding black-letter administrative law prohibiting courts from imposing procedural requirements on agency rulemaking beyond those imposed by the Administrative Procedure Act (APA) or other statute, the Court should do just that and find an APA violation based on noncompliance with internal Executive Branch housekeeping requirements; and that Baltimore, as a city, can be discriminated against on the basis of sex. As

set forth below and in Defendants' opening brief, these arguments fail, and the Court should enter summary judgment for Defendants on all claims asserted in Plaintiff's complaint.

ARGUMENT

Plaintiff begins its brief with a lengthy statement of "material facts and legal arguments" that Plaintiff assertedly raised in its summary judgment motion and that Defendants purportedly "do not dispute." *See* Pl.'s Opp'n at 1-4. As discussed below, Plaintiff attempts to rely on these "facts" to support its arbitrary and capricious claims, but it is the administrative record, not Plaintiff's statement of the facts, on which this Court must base its inquiry. *See, e.g.*, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." (citation omitted)). Under the APA standard of review, "[a]gency action may not be set aside as arbitrary and capricious if the action has a rational basis in the administrative record," *Gates v. King*, 129 F.3d 1259 (4th Cir. 1997), and as Defendants explained in their motion and describe further below, HHS has easily satisfied this deferential standard here. The fact that Defendants did not treat Plaintiff's summary judgment motion as a complaint, admitting or denying its allegations line-by-line as in an answer, does not concede any point relevant to the disposition of this case. The Court should treat Plaintiff's contentions regarding undisputed facts and arguments as the red herrings that they are and ignore them.[1]

[1] As made clear in Defendants' preliminary injunction briefing, it is false that Defendants "do not dispute that the Rule is inseverable." Pl.'s Opp'n at 2. Defendants hereby incorporate by reference their argument, based on the express severability statement in the Rule's preamble, that if the Court vacates any part of the Rule, it should allow the remainder to remain in effect. Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. (Defs.' PI Opp'n) at 44-45, ECF No. 25 (citing 84 Fed. Reg. at 7725). Plaintiff has had an opportunity to respond to that argument, *see generally* Pl's. Reply in Supp. of Mot. for Prelim. Inj., ECF No. 34, so can claim no prejudice as the result of Defendants raising it here.

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

Plaintiff continues to press the argument that the Rule violates Title X itself and two later-enacted statutory provisions. But as Defendants have explained, the Supreme Court has held that Title X authorizes materially indistinguishable regulations. Plaintiff's attempt to show that this authorization has been silently repealed is inconsistent with the text of the relevant statutes and fails to meet the high standard necessary to overcome the presumption against implied repeals.

A. The Rule Does Not Violate Section 1554 of the ACA

1. Plaintiff does not dispute that it failed to raise its argument based on § 1554 of the ACA before HHS during the rulemaking process. Rather, it asks the Court to excuse that waiver because others made generic objections that contained language that happened to resemble language in § 1554 but, as Plaintiff admits, did not reference that statutory provision with "precise legal citations." Pl.'s Opp'n at 5. Plaintiff would have it be otherwise, but this omission is fatal to its argument. As the D.C. Circuit has explained, "failure to raise a particular question of statutory construction before an agency constitutes waiver of the argument in court," notwithstanding the fact that a party raised other "technical, policy, or legal arguments before the agency," because "respect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *NRDC, Inc. v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994) (citations omitted); *see also Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (party must raise "specific argument" it presses in court before the agency, "not merely the same general legal issue"); Defs.' MSJ at 11-12.[2]

[2] For the same reasons, the fact that HHS listed the entire ACA as a source that it relied upon in promulgating the Rule, *see* Pl.'s Opp'n at 5 n.1, does not mean that it considered the particular statutory argument that Plaintiff is making here (but that was not raised in any comments)—*i.e.*,

Plaintiff, meanwhile, cites no authority establishing the requisite proposition that a litigant can preserve a challenge to an agency's statutory authority without ever citing the relevant statutory provision. Nor has the Fourth Circuit recognized any exception to the waiver doctrine for all "purely legal questions." *See* Pl.'s Opp'n at 6 (citing *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 182 (4th Cir. 2018), *cert. granted* 140 S. Ct. 36 (2019)). Rather, it has credited the general rule that "legal questions must first be presented to the agency," but concluded that there is a "narrow" exception where the issue "fail[s] to implicate the agency's expertise in any meaningful manner." *Cowpasture River*, 911 F.3d at 182-83 (citations omitted). That exception does not apply here given HHS's expertise in administering the ACA—§ 1554 included.

Nor is the waiver doctrine inapplicable here merely because the Rule is now in effect. As Defendants explained in their opening brief, this fact does not all of a sudden permit Plaintiff to rely, in its present facial challenge, on arguments regarding the validity of the Rule that it could have raised, but did not raise, during the rulemaking process. *See* Defs.' MSJ at 11. Put simply, "a party is barred from making facial claims that were not raised in the rulemaking process." *Koretoff*, 707 F.3d at 400 (Williams, J., concurring).

Plaintiff attempts to rely on language from Judge Williams' concurring opinion in *Koretoff* to contend that its case is a "limited exception[]" to the general rule that "courts do not hear claims that the agency has had no opportunity to respond to," *id*., because, Plaintiff contends, HHS "may act without affording a pre-deprivation hearing and the affected party can and does immediately challenge the action in court," Pl.'s Opp'n at 6 (quoting *Koretoff*, 707 F.3d at 400 (Williams, J.,

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that the Rule violates the obscure "Access to therapies" provision of that voluminous legislation—much less that Plaintiff's waiver should be excused on that basis. *See Koretoff*, 707 F.3d at 398 ("[A]gencies have no obligation to anticipate every conceivable argument about why they might lack statutory authority.").

concurring)). That exception has no application here because, contrary to Plaintiff's suggestion, HHS does employ "enforcement proceedings," *id*. at 6, with respect to Title X grants, which require HHS to provide a grantee notice prior to terminating funding based on noncompliance with applicable regulations, 45 C.F.R. § 75.373, and "an opportunity to object and provide information and documentation challenging the suspension or termination action," *id*. § 75.374. The grantee can then appeal any termination decision to the Departmental Appeals Board (DAB), *see id*.; 42 C.F.R. § 59.10; 45 C.F.R. part 16, and seek judicial review of any decision by the DAB, *e.g.*, *W. Va. Dep't of Health & Human Res. v. Sebelius*, 172 F. Supp. 3d 904, 912 n.7 (S. D. W. Va. 2016). Where HHS decides to terminate a grant based on non-compliance with the Rule—*i.e.*, "apply[] the Rule" to a grantee in the relevant legal sense, Pl.'s Opp'n at 6—the grantee can raise arguments in that proceeding and then "extend the attack on appeal from the agency" in court, *Koretoff*, 707 F.3d at 400 (Williams, J., concurring), notwithstanding its failure to raise those arguments in the rulemaking proceedings. But the "price for a ticket to facial review is to raise objections in the rulemaking," *id*. at 401, and it is undisputed that Plaintiff failed to do so here with respect to its argument about § 1554.

2. Waiver aside, Plaintiff's § 1554 argument is meritless. *See* Defs.' MSJ at 12-14. The Rule merely places conditions on what the government chooses to fund and thus does not "create," "impede," "interfere with," "restrict," or "limit" anything. *See* 42 U.S.C. § 18114. Plaintiff offers an expansive reading of § 1554 that would prohibit both the funding conditions at issue here as well as countless others, but it is implausible that Congress would have imposed such significant limitations on HHS's authority in one of the ACA's "Miscellaneous Provisions." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."). And § 1554

reflects no congressional intent, "manifest" or otherwise, to eliminate HHS's authority, recognized by the Supreme Court in *Rust*, to promulgate regulations materially indistinguishable from the current Rule. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007). Plaintiff's summary treatment of these arguments in its opposition brief notwithstanding, the Court should enter judgment for Defendants on Plaintiff's Count I.

B. The Rule Does Not Violate the Nondirective Provision

Plaintiff's argument that the Rule conflicts with an appropriations rider requiring that pregnancy counseling be nondirective similarly fails for reasons Defendants have explained. *See* Defs.' MSJ at 9-10, 14-19. By definition, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything, and the Rule's separate requirement that patients be referred for prenatal health care does not render "directive" the mere prohibition of abortion referrals. This prenatal health care requirement does not direct a decision about abortion—it merely refers women for necessary care while they are pregnant, even if they obtain an abortion later. *See id*. at 14-15. The rider, moreover, is limited to "pregnancy counseling," a term that does not encompass referrals, let alone with sufficient clarity to repeal § 1008 of the Public Health Service Act (PHSA) by implication. In this program and more generally, counseling and referrals are distinct. *See id*. at 15-17.

Plaintiff errs in insisting that, under its construction, the nondirective provision "did not impliedly repeal *Rust*." Pl.'s Opp'n at 7. Plaintiff necessarily contends that the nondirective provision eliminated HHS's statutory authority under § 1008, indisputably recognized by the Supreme Court in *Rust*, to issue materially indistinguishable regulations.[3] By definition, that is a

[3] Plaintiff cites Defendants' summary judgment motion for the proposition that "HHS itself believes the [nondirective provision] requires Title X grantees to engage in nondirective pregnancy counseling." Pl.'s Opp'n at 7. Defendants have never stated, either in briefing or in the Rule itself, that Title X grantees *must* provide pregnancy counseling, only that, to the extent such counseling

repeal of § 1008. *See Home Builders*, 551 U.S. at 664 n.8 (2007) ("Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands. . . ."). Put differently, had § 1008 explicitly delegated HHS authority "to prohibit Title X projects from referring their patients for abortion as a method of family planning," no one would dispute that subsequent legislation stripping HHS of that authority would constitute a repeal. That § 1008, combined with the express rulemaking authority granted under § 1006 of the PHSA, implicitly delegated the same authority is irrelevant under *Chevron*. *See also* Defs.' MSJ at 18-19. The Court should enter judgment for Defendants on Count II.

C. As *Rust* Decided, The Rule Does Not Violate Title X

Plaintiff does not dispute that 42 U.S.C. § 300a-5[4] was in place at the time the Supreme Court decided *Rust* and held unequivocally that the "broad language of Title X plainly allows" the materially indistinguishable 1988 regulations. 500 U.S. at 184. Nonetheless, Plaintiff contends *Rust*'s holding does not control its claim that the Rule conflicts with the Title X statute because, according to Plaintiff, this specific statutory provision "was not brought to the Supreme Court's attention." Pl.'s Opp'n at 8. Putting aside the fact that *Rust* acknowledged that Title X authorizes

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is offered, it must be nondirective in accordance with the appropriations rider. *See* Defs.' MSJ at 22 (stating that "HHS continues to recognize [that the nondirective provision] requires that if pregnancy counseling is offered it must be nondirective"). As Defendants have explained, this interpretation of the nondirective provision, unlike Plaintiff's reading, harmonizes the rider with *Rust*. *See* Defs.' PI Opp'n at 20-21.

[4] In full, the statutory text provides:

> The acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this subchapter (whether by grant or contract) shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information.

42 U.S.C. § 300a-5.

"voluntary family planning projects," 500 U.S. at 178, and rejected the argument that the 1988 regulations impermissibly interfered with "a woman's right to make an informed and voluntary choice by placing restrictions on the patient-doctor dialogue," *id*. at 202, § 300a-5 *was* raised in briefing before the Supreme Court in *Rust*, as Defendants have previously pointed out. *See* Reply in Supp. of Defs.' Mot. to Dismiss at 5, ECF No. 72 (citing Reply Brief for State Petitioners at 6-7, *Rust* (nos. 89-1391, 1392), 1990 WL 505761 ("Title X itself provides that '[t]he acceptance by any individual of family planning services . . . shall be voluntary.' By withholding relevant information from Title X beneficiaries, the Secretary prevents them from making the informed, voluntary family planning decisions that Congress intended to facilitate." (quoting 42 U.S.C. § 300a-5)). *Rust*'s statutory holding controls this claim that the Rule violates Title X.

In all events, the Rule does not "coerc[e] patients into having an abortion or foregoing one," Pl.'s Opp'n at 8—much less coerce them into accepting any Title X services—so the Rule cannot be contrary to HHS's regulatory requirement, implementing § 300a-5, that Title X projects "provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning." 42 C.F.R. § 59.5(a)(2); *see* Defs.' MSJ at 19-20. Because *Rust* has already decided the issue of whether the Rule is consistent with Title X (it is), and because the Rule does not, in any event, condition eligibility for other HHS programs on an individual's acceptance of Title X services, as § 300a-5 forbids, the Court should enter judgment for Defendants on Count III.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S ARBITRARY AND CAPRICIOUS CLAIMS

Plaintiff also cannot succeed on its claims that the Rule is arbitrary and capricious. Plaintiff's arguments are mere policy disagreements in the guise of APA claims, and Plaintiff's most recent brief covers no new ground. Agency action must be upheld in the face of an arbitrary

and capricious claim 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). HHS did precisely that. While Plaintiff clearly disagrees with the policy judgments contained in the Rule, it cannot show that HHS acted unlawfully.

First, Plaintiff continues to press its assertion that HHS did not explain an alleged "reversal" from its 2000 Title X regulations with respect to Defendants' interpretation of the nondirective provision. Pl.'s Opp'n at 9-10. Plaintiff is incorrect, and the passage Plaintiff quotes, *id*. at 10, cannot be read to reflect a decision by HHS that the nondirective provision required suspension of the 1988 regulations. HHS was clear in the preamble to the 2000 regulations that it changed the 1988 regulations because of its "experience." 65 Fed. Reg. 41,270, 41,271 (July 3, 2000). More generally, and contrary to Plaintiff's claim, HHS clearly acknowledged that the 2000 regulations required Title X projects to provide abortion referrals and nondirective counseling on abortion, and HHS explained at length the reasons for the changes in the Rule. *See* 84 Fed. Reg. at 7716, 7758-59. Nothing more is required by the APA. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

Second, Plaintiff rehashes its claim that HHS ignored medical evidence and medical ethics requirements. Although now framed under the guise of what Plaintiff claims Defendants do or do not "dispute" or "admit," Pl.'s Opp'n at 11-12, Plaintiff's argument is still meritless. The Court need only review the preamble to see that HHS thoughtfully considered the concerns raised by some commenters that the Rule would be inconsistent with medical ethics or standards. *See* 84 Fed. Reg. at 7724, 7748. HHS explained that the Rule permits medical professionals to share full and accurate information with the patient up to the limit of what, in the agency's best interpretation,

is allowed by the Title X statute, including nondirective abortion counseling, *id.* at 7724, and that both Congress and the Supreme Court have blessed similar limitations as those contained in the Rule—in the context of both Title X and in protecting the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs, *id.* at 7748. Plaintiff cannot show that HHS acted unreasonably.

By claiming that HHS did not "display an awareness" that the Rule reflects a policy change from the 2000 regulations with respect to medical ethics, Pl.'s Opp'n at 12, Plaintiff again overstates what the APA requires. Agencies must acknowledge a change in position and provide a reasoned explanation for that change. *See Encino Motorcars*, 136 S. Ct. at 2125-26. They need not—as Plaintiff would have it—address every statement or rationale underpinning the prior policy. HHS acknowledged differences between the 2000 regulations and the Rule and explained the reasons for the change—including by addressing some commenters' concerns regarding medical ethics. For the same reason, the objection based on supposed inconsistencies between the Rule and the 2014 Quality Family Planning (QFP) guidelines also fails. HHS acknowledged it was departing from its prior approach under the 2000 regulations, and the QFP guidelines did not (and could not) go beyond what was permitted by those regulations. *See* Defs.' MSJ at 23.

Third, Plaintiff claims that Defendants did not consider the consequences of the Rule—and that Defendants have somehow admitted as much. *See* Pl.'s Opp'n at 13. Plaintiff is incorrect on both counts. HHS exercised its expert judgment to project that, while any calculation of future program participation would be inherently speculative, it did not ultimately anticipate "a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. And having considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was necessary to comply with Title X, notwithstanding its predicted costs. *See id*. at 7783. That decision was not

arbitrary and capricious simply because Plaintiff and other interested grantees disagree with HHS's predictive or policy judgments. The evidence before HHS "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty," and this Court cannot "second-guess[] the Secretary's weighing of risks and benefits." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019).

Fourth, Plaintiff continues to claim that HHS inadequately weighed the costs and benefits of the Rule, Pl.'s Opp'n at 14-16, even though HHS explicitly acknowledged the uncertainty regarding costs and that some commenters provided high cost estimates for the physical separation requirement, 84 Fed. Reg. at 7781-82. Plaintiff's real objection, however, appears to be to HHS's policy decision to adopt the physical separation requirement in the first place, rather than to whether HHS adequately weighted the costs. *See* Pl.'s Opp'n at 14 ("There was, in the most literal sense, no need to adopt the Separation Requirement."). But that decision is, of course, not Plaintiff's to make. As to the actual weighing of costs and benefits, the principle that "a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative polic[i]es." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (citation omitted).

HHS administers the Title X program and is best situated to consider potential effects on that program, and it expressly did so here. 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." 84 Fed. Reg. at 7781. 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 providers' compliance costs and the possibility that some incumbent providers might withdraw from the program, HHS simply made a different judgment than Plaintiff, which it was permitted to do.

Finally, Plaintiff questions HHS's decision to restrict nondirective pregnancy counseling to physicians and advance practice providers (APPs). Again misstating Defendants' position, Plaintiff claims HHS does "not dispute that HHS failed to explain why an advanced degree is necessary." Pl.'s Opp'n at 16. But HHS sensibly required that those who use federal funds to provide counseling concerning a medical condition (pregnancy) "receive at least a graduate level degree in the relevant medical field and maintain a federal or State-level certification and licensure to diagnose, treat, and *counsel* patients." 84 Fed. Reg. at 7728 (emphasis added).

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

A. HHS Provided the Public With a Meaningful Opportunity to Comment on Its Proposed Rule

As explained in Defendants' opening brief, the 60-day comment period that HHS provided here, which is a length of time that courts routinely uphold and which resulted in the submission of more than 500,000 comments, did not deprive the public of a meaningful opportunity to comment on the Rule. *See* Defs.' MSJ at 25-28. In response, Plaintiff again fixates on certain alleged technical deficiencies with the process HHS employed *prior to* publication of the proposed rule. *See* Pl.'s Opp'n at 17-18, 19. But as Defendants have also explained, the APA says nothing about "the agency's actions leading up to the announcement of [a] rulemaking." *Id*. at 18; *see* Defs.' MSJ at 28-29. Rather, the APA requires agencies to publish "[g]eneral notice of proposed rule making . . . in the Federal Register" *and then* "give interested persons an opportunity to

participate in the rule making through submission of" comments." 5 U.S.C. § 553(b), (c). Plaintiff identifies no statute that required HHS to "engage[] in . . . outreach about the Proposed Rule," "place the Proposed Rule on the Regulatory Agenda," or give the OIRA any particular period of time to review a proposed rule prior to publication. *See* Pl.'s Opp'n at 17. Thus, it is necessarily true that any finding that HHS promulgated the Rule "without observance of procedure required by law, 5 U.S.C. § 706(2)(D), based on noncompliance with "Executive Orders and OMB guidance," Pl.'s Opp'n at 17, 19, would impermissibly impose "procedural requirements on agency rulemakings beyond that required by statute." *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 308 (D.D.C. 2016) (citation omitted). Because it is established that "courts lack authority" to do so, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015), Plaintiff's claim must fail.

In light of these well-established principles, Plaintiff's utter lack of authority to support its contention that failure to provide Plaintiff's preferred level of "pre-comment-period notice," Pl.'s Opp'n at 18, could somehow violate the APA is striking. Plaintiff cites only one case in this entire section of its opposition brief. *See id*. at 18, 19 (citing *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012)). But that case neither found that "the agency's actions leading up to the announcement of the rulemaking" are relevant to a court's analysis under the APA, Pl.'s Opp'n at 18, nor "rejected," in any relevant sense, Defendants' argument that requiring compliance with "Executive Orders and controlling OMB guidance," *id*. at 19, would violate the principle that, beyond procedural requirements imposed by statute, a court lacks authority to "impose upon the agency its own notion of which procedures are best." *See* Defs.' MSJ at 29 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978)). To the contrary, that case found that the agency erred by placing limitations on the type of comments it would receive and consider in response to its proposed rule. *See N.C. Growers' Ass'n*, 702 F.3d

at 769-70 (finding that agency deprived public of meaningful opportunity to comment where its proposed rule included a "content restriction" providing that the agency would not consider certain comments about certain topics). This decision provides no support for Plaintiff's position: it does not mention *Vermont Yankee* or its progeny, any Executive Order, any OMB guidance, or anything else about what the APA requires of an agency prior to its publication of a proposed rule. And unlike in *N.C. Growers' Ass'n*, where the 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," 702 F.3d at 769-70, HHS did not limit in any way the topics that commenters could address in submitting comments on the proposed rule here.

HHS was required only to provide the public with a meaningful opportunity to comment on the proposed rule, not to give Plaintiff however much time it may have needed to "fully explore relevant statutory authorities" and to "marshal more and better evidence of the Rule's likely consequences." Pl.'s Opp'n at 18. By providing a 60-day comment period, HHS provided that opportunity, and, once again, Plaintiff cites no cases reaching a contrary conclusion. The Court should enter judgment for Defendants on this claim.

B. Plaintiff's Logical Outgrowth Claim is Meritless

Plaintiff's second procedural argument – that the Rule's provision requiring that nondirective pregnancy counseling be offered only by physicians or APPs was not a logical outgrowth of the proposed rule – fails for the reasons set forth in Defendants' opening brief. *See* Defs.' MSJ at 29-30. Plaintiff's opposition brief does nothing to rebut this argument. The relevant question is not whether any of the comments in the record "address[] whether counseling should be limited to APPs, and if so, who should qualify as an APP." Pl.'s Opp'n at 19. It is whether the agency put the public on notice that the requirement ultimately adopted in the final rule was under

consideration, which HHS plainly did by proposing a limitation on who could offer nondirective pregnancy counseling. As another court rejecting an identical claim reasoned, "[t]he Proposed Rule signaled that the agency was considering limiting counseling responsibilities to individuals with advanced medical degrees, so it cannot be said that the Final Rule 'finds no roots in the agency's proposal.'" *California v. Azar*, 385 F. Supp. 3d 960, 1020 (N.D. Cal. 2019) (quoting *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)).

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

A. The Rule Does Not Violate the First Amendment

Plaintiff acknowledges, as it must, that *Rust* addressed First Amendment challenges to the substantially similar 1988 regulations, and that *Rust* remains good law. *See* Pl.'s Opp'n at 20. Plaintiff forwards a number of theories as to why its First Amendment claim can still prevail, but none of them have merit.

Plaintiff claims, first, that *Rust*'s holding that the 1988 regulations did not impinge on the doctor-patient relationship no longer applies because "patients in the Title X program have become more reliant on their doctors" over the last thirty years. *Id*. at 21. That argument goes nowhere. The Supreme Court's holding in *Rust* did not turn on a factual determination of how much patients relied on their doctors; rather, the Court explained that the 1988 regulations did not "require[] a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 500 U.S. at 200. So too with the Rule. "Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," given that the program "does not provide post conception medical care." *Id.* And doctors are "always free to make clear that advice regarding abortion is simply

beyond the scope of the [Title X] program." *Id.* Plaintiff's attempt to distinguish *Rust* remains unconvincing.

Next, Plaintiff claims that *Rust* no longer applies because "Congress has modified the Title X Program in important aspects after *Rust*." Pl.'s Opp'n at 21. Plaintiff would have the Court believe that Congress intended to change the nature of the Title X program through § 1554 and through the appropriation rider requiring that pregnancy counseling be nondirective. *Id*. at 21-22. But Plaintiff again vastly overstates the importance of those provisions and their impact on the Title X program. Nothing in Title X has changed since *Rust* was decided in 1991, of course, and Plaintiff points to nothing that suggests Congress intended to change the nature of the Title X program through § 1554 of the ACA or through a single line in the appropriations rider. Title X is the same as it was when the Supreme Court concluded in *Rust* that substantially similar regulations did not violate the First Amendment, and therefore Plaintiff's argument fails.

Likewise, Plaintiff's argument that the Rule violates the First Amendment by allegedly withholding information from patients is flatly wrong. As Defendants have explained, even more so than the regulations upheld in *Rust*, the Rule permits nondirective pregnancy counseling discussing abortion, and it also allows providers to explain that the Rule does not allow abortion referrals. There is no withholding of information that could plausibly give rise to a First Amendment violation. *Rust*, moreover, clearly forecloses Plaintiff's argument. *See Rust*, 500 U.S. at 193-94 (indicating that 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"). Try as it might, Plaintiff cannot escape the Supreme Court's holding. And while Plaintiff additionally contends that the Rule violates the First Amendment by "selectively withholding information from patients on the basis of its viewpoint," Pl.'s Opp'n at 22, that assertion is likewise wrong as a matter of

logic and foreclosed by *Rust*'s holding that the government may choose not to subsidize speech (including speech encouraging or referring for abortions as a method of family planning). The argument is also directly at odds with Plaintiff's concession two pages earlier that "*Rust* forecloses challenges to government-messaging programs on the basis that they unconstitutionally discriminate on the basis of viewpoint." *Id*. at 20.

In all events, even if *Rust* had somehow been called into question, this Court is "obligated to follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363 (4th Cir. 2013) (cleaned up).

B. The Rule Does Not Violate Equal Protection

Plaintiff's latest brief doubles down on the remarkable claim that the Rule constitutes unconstitutional sex discrimination. Pl.'s Opp'n at 23-25. Initially, Plaintiff lacks standing to bring this claim for reasons previously discussed. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 36-37, ECF No. 67-1. In addition, this argument is foreclosed not only by *Rust* itself, but also by the Supreme Court's subsequent instruction that "the constitutional test applicable to government abortion-funding 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) (citation omitted). Plaintiff asserts that *Bray* "did not involve constitutional sex discrimination claims." Pl.'s Opp'n at 25. But, as Defendants have explained, in concluding that "government abortion-funding restrictions [are not judged by] the heightened-scrutiny standard that our cases demand for sex-based discrimination," *Bray*, 506 U.S. at 273, the Court necessarily concluded that abortion-funding restrictions do not involve sex discrimination. *See* Defs.' MSJ at 34; *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir.

2000) ("The rationality of distinguishing between abortion services and other medical services . . . has long been acknowledged by Supreme Court precedent."). And *Bray* does not stand alone. *See also Harris v. McRae*, 448 U.S. 297, 322-23 (1980); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977).

Plaintiff tries to distinguish this case from the Supreme Court's jurisprudence regarding abortion funding, noting that "Title X does not involve government funding for abortion." Pl.'s Opp'n at 25. But that is exactly the point, and it is among the reasons that HHS determined the challenged Rule to be necessary. Plaintiff's Equal Protection claim must be analyzed under the framework established in *Bray* because Plaintiff challenges a Rule that prohibits federal funds to be used to refer for abortion as a method of family planning. Plaintiff also continues to claim that the Rule is unlawful because it allegedly "treats women differently from men," *id*., but that was also true in the cases discussed above. To the degree Plaintiff argues that women will be disproportionally affected by the Rule—a noncognizable disparate-impact theory, *see Washington v. Davis*, 426 U.S. 229, 239 (1976)—or that the Rule "furthers sex stereotypes," Pl.'s Opp'n at 24-25, that is because only women can become pregnant. If the Rule were to constitute sex discrimination because it places abortion-related restrictions on the use of Title X funding, then every statute or regulation touching abortion—including the regulations at issue in *Rust*—would discriminate against (or in favor of) women. But that is not the law. *Cf. Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is sex-based classification. . . ."). Accordingly, the Court should enter judgment for Defendants on Count VI.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment, grant Defendants' motion for summary judgment, and enter summary judgment in Defendants' favor.[5]

Dated: December 16, 2019

Respectfully submitted,

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[5] If the Court ultimately disagrees with Defendants and decides to award Plaintiff summary judgment with respect to any of its claims, the scope of relief should be limited. Defendants dispute that the extreme remedy of vacatur is proper in this case, *see* Pl.'s Opp'n at 26, and submit, as they have previously argued, that any remedial order "should be no broader than necessary to provide Baltimore relief, and should therefore extend to the City only." Defs.' PI Opp'n at 43-44.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT