UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-00100-LEW**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendants hereby move to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In the alternative, Defendants move, pursuant to Federal Rule of Civil Procedure 56, for summary judgment on all claims asserted in the Amended Complaint. The reasons for this motion are set forth in the following memorandum of law.

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INTRODUCTION

Plaintiffs' 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 issued regulations in 1988 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 issued a final rule in 2019 that, in the respects challenged here, effectively reinstated the 1988 regulations (which had been rescinded in the interim). 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations upheld in *Rust*. Instead, they try to sidestep *Rust* in a number of ways, but none of them are persuasive. As this Court has already concluded, it "is not free to disregard binding Supreme Court precedent that addresses the controversy before [it]." Decision & Order on Mot. for Prelim. Inj. (PI Order) at 27, ECF No. 77. This case now comes before the Court on the merits, but the Court should reach the same conclusion it reached in

denying Plaintiffs preliminary injunctive relief: *Rust* controls and Plaintiffs' arguments to the contrary fail.

First, as *Rust* squarely held, the Rule is consistent with Title X, which is unchanged since *Rust* was decided. Contrary to Plaintiffs' remarkable arguments, the Rule is not, nevertheless, contrary to other expressions of congressional intent, such as vetoed legislation. Nor has Congress amended Title X implicitly and indirectly through a clause in an appropriations rider or an obscure provision (§ 1554) of the Affordable Care Act (ACA). It is implausible that Congress abrogated a high-profile Supreme Court decision *sub silentio* through these ancillary provisions after it had tried (and failed) to do so expressly. And in any event, Plaintiffs have waived any challenge based on § 1554 of the ACA because neither they nor anyone else raised it during the notice-and-comment process. In light of *Rust*, and as explained more fully below, Plaintiffs' statutory claims are meritless and should be dismissed.

Second, Plaintiffs cannot show that the Rule is arbitrary and capricious. HHS acted rationally in adopting regulations implementing its permissible interpretation of § 1008 and 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.

Finally, there is no merit to Plaintiffs' constitutional claims. *Rust* squarely forecloses the contention that the Rule violates either the First Amendment or the Fifth Amendment. And Plaintiffs' equal protection claim similarly fails for the simple reason that the Rule does not discriminate on the basis of sex. The Rule merely imposes conditions on the receipt of federal funding through the Title X program, consistent with § 1008, *Rust*, and multiple other Supreme Court decisions.

For these reasons and those explained below, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, the Court should enter summary judgment in Defendants' favor under 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." 52 Fed. Reg. at 32,210-11. The notice also stated that abortion "'referral' and counseling are clearly covered by the prohibition in section 1008." *Id.* And HHS concluded that its prior assumption that "referrals for abortion do not indeed 'encourage or promote' abortion" was "unreasonable" because "providing a referral for abortion facilitates the obtaining of [an] abortion." *Id.*

In 1988, the Secretary issued a final rule that prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals for, abortion as a method of family planning. 53 Fed. Reg. at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the regulations placed limitations on

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

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

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

In 2000, HHS finalized a new rule, which, like the 1981 guidelines and the vetoed Family Planning Amendments Act, required Title X projects to offer and provide upon request "information and counseling regarding" specific options, including "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule

also eliminated the physical-separation requirement in the 1988 regulations. *See id*. at 41,275-76. In adopting these new regulations, HHS acknowledged that the 1988 regulations were "a permissible interpretation of the statute," 65 Fed. Reg. at 41,277, but justified the shift in approaches on the basis of "experience," *id*. at 41,271.

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

On June 1, 2018, the Secretary issued a notice of proposed rulemaking (NPRM) 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 published 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); *see also* 84 Fed. Reg. at 7747 n.6 ("Similarly, in cases involving rape and/or incest, it would not be considered a violation of the prohibition on referral for abortion as a method of family planning if a patient is provided a referral to a licensed, qualified, comprehensive health service provider who also provides abortion . . . .").

The Rule is also less restrictive than the 1988 regulations, however, in that it allows, but does not require, "[n]ondirective pregnancy counseling," 42 C.F.R. § 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 also contains a number of provisions that have little to do with § 1008, such as a requirement that Title X projects comply with state and local laws that mandate notification or reporting of sexual abuse, 42 C.F.R. § 59.17. Given the Rule's breadth, its 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." 84 Fed. Reg. at 7725.

II. Procedural History

Plaintiffs—Maine Family Planning (MFP) and a physician at one of its clinics—filed their original complaint on March 6, 2019, asserting various claims under the Administrative Procedure Act (APA) and the Constitution. ECF No. 1. Plaintiffs moved for a preliminary injunction against the Rule, *see* ECF No. 17, which the Court denied on July 3, 2019, finding that Plaintiffs had failed to demonstrate a likelihood of success with respect to any of their claims, PI Order at 29-60. Plaintiffs appealed the Court's decision, ECF No. 85, and then voluntarily dismissed that appeal on October 23, 2019, *see* ECF No. 93. Plaintiffs then sought the Court's leave to file an amended complaint for the purpose of addressing "changed . . . [c]ircumstances" since the case was filed, namely that "the challenged regulation is now in effect, and [MFP] is no longer a participant in the Title X program." Pls.' Mot. for Leave to File Am. Compl. at 2, ECF No. 97. The Court granted Plaintiffs leave, ECF No. 98, and Plaintiffs filed their Amended Complaint on November 22, 2019, ECF No. 99 ("Am. Compl."). The Amended Complaint drops the claim that the Rule is unconstitutionally vague, but otherwise asserts substantively the same claims asserted in the original complaint.

The Rule is currently in effect nationwide. After federal district courts in Washington, Oregon, and California issued preliminary injunctions against the Rule, a Ninth Circuit motions panel issued a unanimous per curiam order on June 20, 2019, staying those injunctions pending appeal. *See California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). The decision concluded that HHS is likely to prevail on the merits, emphasized that the Rule is "reasonable and in accord with § 1008," as confirmed by *Rust*, and rejected the plaintiffs' arbitrary-and-capricious claims and claims based on the appropriations rider and § 1554 of the ACA. *Id*. at 1075—80.[1] On September

[1] An *en banc* panel of the Ninth Circuit initially ordered that the motion panel decision not be cited as precedent, *see California v. Azar*, No. 19-15974, Order (9th Cir. July 3, 2019), but later clarified

23, 2019, an en banc panel of the Ninth Circuit heard argument, which addressed the merits of the preliminary injunction orders. The stay of the preliminary injunctions, and likewise the Rule, remain in effect while the Ninth Circuit *en banc* panel considers the preliminary injunction appeals. Similarly, a federal district court in Maryland preliminarily enjoined the Rule, but the injunction was stayed pending appeal by a divided Fourth Circuit panel. *See Mayor & City Council of Baltimore v. Azar*, 778 Fed. Appx. 212 (4th Cir. 2019). The Fourth Circuit panel assigned to the case heard oral argument on the merits of the government's appeal on September 18, 2019.

On June 24, 2019, Defendants provided Plaintiffs with a copy of the certified administrative record. *See* ECF No. 74. Defendants have also lodged a copy of the voluminous record with the clerk's office. *See* ECF No. 109. Pursuant to the schedule entered by this Court in its December 16, 2019 Order, ECF No. 103, Defendants file the instant motion to dismiss Plaintiffs' suit or, in the alternative, for summary judgment.

STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A Rule 12(b)(6) motion tests the "legal sufficiency" of a complaint, *Bennett v. Roark Capital Grp., Inc.*, 738 F. Supp. 2d 157, 158 (D. Me. 2010), and should be granted if a complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "While the court draws all reasonable factual inferences in the light most favorable to a plaintiff, it rejects unsupported allegations, bald assertions, and legal conclusions." *Van Dyke v. Town of Dexter*, No. 1:18-cv-263-NT, 2018 WL 6251362, at *2 (D. Me. Nov. 29, 2018). In deciding a Rule 12(b)(6) motion, courts consider "not only the complaint but also matters fairly incorporated within it and

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that the panel's stay order had not been vacated and denied the plaintiffs' motions for an administrative stay of the order, *California v. Azar*, No. 19-15974, Order (9th Cir. July 11, 2019).

matters susceptible to judicial notice," such as the Rule itself. *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003).

Because Plaintiffs challenge administrative agency action under the APA, the "entire case on review is a question of law and can be resolved on the agency record in the context of a motion to dismiss under Rule 12(b)(6)." *Akpan v. Cissna*, 288 F. Supp. 3d 155, 163 (D.D.C. 2018) (citation omitted). In the alternative, Defendants move for summary judgment under Rule 56 because, as has often been recognized, summary judgment is an appropriate "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Minuteman Health, Inc. v. HHS*, 291 F. Supp. 3d 174, 189-90 (D. Mass. 2018) (quoting *Coe v. McHugh*, 968 F. Supp. 2d 237, 240 (D.D.C. 2013)); *see also Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997) (summary judgment has a "special twist in the administrative law context" because "the APA standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid").

Whether the court resolves this case under Rule 12(b)(6) or Rule 56, its role is "not to determine whether a dispute of fact remains," *Boston Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016), but rather to "sit[] as an appellate tribunal," *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001), and decide the legal question "whether the agency action was arbitrary and capricious," *Boston Redevelopment Auth.*, 838 F.3d at 47; *see also Akpan*, 288 F. Supp. 3d at 163 ("A district court reviewing an agency action under the APA's arbitrary and capricious standard does not resolve factual issues." (citation omitted)).

ARGUMENT

I. The Supreme Court's Decision in *Rust v. Sullivan* Upheld Materially Indistinguishable Regulations.

In *Rust*, the Supreme Court upheld regulations that implemented § 1008's prohibition on the use of Title X funds "in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, by "limit[ing] the ability of Title X fund recipients to engage in abortion-related activities" in multiple respects. 500 U.S. at 177-78. Those regulations "broadly prohibit[ed]" Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'" and specifically proscribed them from providing either a "referral for," or "counseling concerning," abortion as a method of family planning, "even upon specific request." *Id*. at 179-80. Instead, because "Title X is limited to preconceptional services" and "does not furnish services related to childbirth," the regulations required the projects to "refer every pregnant client 'for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.'" *Id*. This list could "not be used indirectly to encourage or promote abortion," such as by (i) "weighing the list of referrals in favor of health care providers which perform abortions," (ii) "including on the list of referral providers health care providers whose principal business is the provision of abortions," (iii) "excluding available providers who do not provide abortions," or (iv) "steering clients to providers who offer abortion as a method of family planning." *Id*. at 180 (quotation marks omitted). Finally, all Title X projects were required to "be organized so that they are 'physically and financially separate' from prohibited abortion activities." *Id*.

The Supreme Court rejected the arguments that these regulations exceeded the Secretary's authority under Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. *Rust*, 500 U.S. at 183-203. The Court first held that the regulations were "plainly

allow[ed]" under the "broad directives provided by Congress in Title X in general and § 1008 in particular." *Id*. at 184; *see id*. at 184-90. As it observed, "to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities,'" Congress mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id*. at 178-79 (emphasis added). That "broad language" justified both the "ban on [abortion] counseling, referral, and advocacy within the Title X project," *id*. at 184, as well as the requirement "mandating separate facilities, personnel, and records," *id*. at 187.

Specifically, the Secretary had concluded that if a program promotes, encourages, advocates, provides counseling concerning, or refers for abortion as a method of family planning, then the program is one "where abortion is a method of family planning." *See, e.g.*, 53 Fed. Reg. at 2923, 2933. The Supreme Court agreed that this is, at the very least, a "permissible construction" of § 1008, and rejected the argument that the counseling and referral restrictions were arbitrary and capricious. *See Rust*, 500 U.S. at 183, 186-87. The Court found that the Secretary provided a reasoned analysis for the restrictions, crediting the Secretary's explanation that this interpretation is "more in keeping with the original intent of the statute," even if it constituted a "sharp break from the Secretary's prior construction." *Id*. at 186-87; *see also id*. at 195 n.4 (recognizing "Congress's intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family planning'"). The Court also credited the Secretary's determination that "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id*. at 187 (quotation marks omitted).

The Court likewise held that "the Secretary's interpretation of the statute that separate facilities are necessary, expressly in light of the express prohibition of § 1008, cannot be judged unreasonable." *Rust*, 500 U.S. at 190. As the Secretary had explained, the collocation of Title X clinics and abortion clinics would result in the economic reality—or at least the public perception—of taxpayer dollars being used to subsidize abortion as a method of family planning. *See* 53 Fed. Reg. at 2940-41. The Supreme Court concluded that the physical-separation requirement was based on a "permissible construction of the statute," and it deferred to the Secretary's judgment that the requirement was needed to "assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Rust*, 500 U.S. at 188.

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

Nor, in the Court's judgment, did the regulations "significantly impinge upon the doctor-patient relationship." *Id*. at 200. Although the principal dissent insisted that "the legitimate

expectations of the patient and the ethical responsibilities of the medical profession demand" that Title X providers furnish their patients "with the full range of information and options regarding their health and reproductive freedom," including "the abortion option," *id*. at 213-14 (Blackmun, J., dissenting), the majority took a different view. As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. *Id*. at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as he "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id*. "In these circumstances," the Court concluded, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id*.

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

notwithstanding the claim that "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services," as "even these Title X clients are in no worse position than if Congress had never enacted Title X." *Id*. at 203.

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

None of this is disputed. The relevant statutory text has not changed. And rather than overrule *Rust* (or even call it into question), the Supreme Court has repeatedly reaffirmed it. *See, e.g., Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 216-17 (2013). The

Secretary therefore acted lawfully in effectively readopting regulatory provisions already upheld by the Supreme Court, and Plaintiffs' suit seeking to overrule that decision should be dismissed.

II. Plaintiffs' Statutory Claims Lack Merit.

Since its enactment, the Title X statute has broadly mandated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As explained in the Rule, if a program refers patients for—or otherwise promotes, encourages, or advocates—abortion as a method of family planning, then the program, by definition, is one "where abortion is a method of family planning." 84 Fed. Reg. at 7759. The Supreme Court agreed that this is, at the very least, a "permissible construction"; indeed, it is by far the better interpretation of the plain text of § 1008, and the Court itself 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.

Plaintiffs do not provide an alternative interpretation of § 1008, under which a program that makes referrals for, or otherwise promotes or encourages, abortion is not a program "where abortion is a method of family planning." Instead, they seek to sidestep the text of § 1008 and the Supreme Court's decision in *Rust* by concluding that the Secretary's restrictions on abortion referrals and counseling are no longer permissible in light of a six-word clause in an appropriations rider and an ancillary provision of the ACA. As described below, that conclusion cannot be squared with the text of the statutory provisions on which Plaintiffs rely. Nor is it consistent with the presumption against implied repeals, which requires a "clear and manifest" intent to repeal a statute, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 441 U.S. 644, 663 (2007), and "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

A. The Nondirective Provision

Plaintiffs contend that the Rule "violates the law" because it "contravene[s]" language in an appropriations rider, Am. Compl. ¶ 182, that provides that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." *See supra* p. 5. This language does not abolish HHS's authority to adopt regulations that are materially indistinguishable from those upheld by the Supreme Court in *Rust*.

Start with the prohibition on abortion referrals. By definition, a doctor's *failure* to refer a patient for abortion does not *direct* the patient to do anything. True, the Rule also requires that patients be referred for prenatal health care. But contrary to Plaintiffs' contention, Am. Compl. ¶ 75, the existence of that separate requirement does not somehow render "directive" the mere prohibition of abortion referrals. This is especially true given that the prenatal-referral requirement is severable from the abortion-referral prohibition. *See* 84 Fed. Reg. at 7725; *cf. Massachusetts v. HHS*, 873 F.2d 1528, 1552-55 (1st Cir. 1989) (Torruella, J., concurring in part and dissenting in part) (concluding that prenatal referral requirement in 1988 regulations could be severed from the restrictions on abortion counseling and referral), *on reh'g en banc*, 899 F.2d 53 (1st Cir. 1990), *cert. granted, judgment vacated sub nom. Sullivan v. Massachusetts*, 500 U.S. 949 (1991). The Court need not rely on the severability statement, however, because a prenatal-care referral likewise does not "direct" a patient to forgo obtaining an abortion—such care is necessary for the health of the mother *while* she is pregnant, as she by definition is at the time of the referral, regardless of whether she *later* chooses to obtain an abortion outside the auspices of Title X. *See, e.g.*, 84 Fed. Reg. 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"). By contrast, when HHS

wants a prenatal-care referral to lead to delivery, it knows how to say so, as the 2000 regulations illustrate. *See* 65 Fed. Reg. at 41,279 (§ 59.5(a)(5) (requiring counseling and referral for "[p]renatal care *and delivery*" upon request) (emphasis added).

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. As this Court has recognized, "[t]he history of Title X regulation permits a line of demarcation between counseling and referrals." PI Order at 30. Specifically, "pregnancy 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.

This is also clear from Congress's own words on the subject, which demonstrate that Congress knows how to legislate on both "counseling" and "referrals" in this area. *See, e.g.*, 42 U.S.C. § 300z-10(a) ("Grants or payments may be made only to programs or projects which do not provide abortions or *abortion counseling or referral*." (emphasis added)).[2] Most notably,

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

when Congress tried (and failed) to overturn *Rust* through the Family Planning Amendments Act, as noted above, it used language expressly requiring Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *See* S. 323, 102d Cong. § 2 (1991). The appropriations rider later passed in 1996, by contrast, requires only that "pregnancy counseling" be nondirective and says nothing about "referrals," much less referrals for "termination of pregnancy" (or "abortion") specifically.

For its part, HHS has similarly used "counseling" and "referral" as distinct terms in guidance and regulations concerning the limits of Title X funds on abortion-related activities. For example, both its 1981 guidelines and the 2000 regulations treated counseling and referral as separate activities: Title X projects were required to provide "nondirective counseling"—including on "[p]regnancy termination"—and "referral upon request." 65 Fed. Reg. at 41,279 (§ 59.5(a)(5)); *accord* 1981 Guidelines § 8.6; *see also* 53 Fed. Reg. at 2923 (describing 1981 guidelines). Similarly, the 2000 regulations discussed the "referral requirement" separately from "counseling," and even discussed counseling and referrals in two separate subsections of the preamble. 65 Fed. Reg. at 41,272-74 (counseling); *id*. at 41,274-76 (referral). And when HHS eliminated the prohibition on abortion referrals in the 2000 regulations, it viewed the appropriations rider as directly applying only to counseling, not to referrals. *Compare* 65 Fed. Reg. 41,273, *with id*. at 41,275.

If it were actually "clear and manifest" that Congress had repealed Title X's authorization to prohibit abortion referrals through the appropriations rider, *Home Builders*, 551 U.S. at 663, then presumably HHS would have said as much in 2000. Instead, HHS responded to the argument that suspension of the 1988 regulations was unlawful by explaining that those regulations were "a permissible interpretation of the statute," but in the agency's view, "not the only permissible

interpretation of the statute." 65 Fed. Reg. at 41,277. For HHS, "the crucial difference between" the 1988 regulations and the 2000 regulations was "one of experience." *Id*. at 41,271. Despite discussing the nondirective provision, *id*. at 41,273, HHS never concluded that it required suspension of the 1988 regulations.

Turning to the Rule's provisions addressing counseling, the Rule expressly permits "nondirective pregnancy counseling, which may discuss abortion." *See* 42 C.F.R. § 59.14(e)(5); *see also* 84 Fed. Reg. at 7746 (explaining that the Rule allows "nondirective pregnancy counseling even if such counseling includes abortion among other options"). Plaintiffs allege that this provision of the Rule authorizes "directive options counseling," *see* Am. Compl. ¶¶ 76-77, but properly construed, the Rule's provision allowing Title X projects to provide "nondirective pregnancy counseling" is perfectly consistent with the nondirective provision.

For example, although HHS stated that, in light of § 1008, "abortion must not be the only option presented," 84 Fed. Reg. at 7747, the neutral presentation of other options in addition to abortion is not *directing* the woman to choose one of those options. Nor does "discuss[ing] the possible risks and side effects to both mother and unborn child of any pregnancy option presented," *id*.; *see* Am. Compl. ¶ 76, direct a woman to forgo an abortion, any more than discussing the potential risks of pregnancy to her own health directs her to obtain one. *Cf. Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 883 (1992) (joint opinion) (upholding similar informed-consent requirement and analogizing it to "require[ment] that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donors as well as risks to himself"). And besides, even if these limitations were somehow "directive" when a woman seeks information solely on abortion, that would not justify dismissing

the Rule's counseling restrictions as facially invalid, let alone doing so based merely on guidance that does not appear in the regulatory text.

At bottom, Plaintiffs' challenge to the Rule's counseling restrictions is premised on the assumption that, in requiring that pregnancy counseling be "nondirective," Congress also mandated that counseling on abortion be treated equally as counseling on carrying the child to term or adoption. But "[n]ondirective counseling does not require equal treatment of all pregnancy options—rather, it just requires that a provider not affirmatively endorse one option over another." *California*, 927 F.3d at 1077. Indeed, when Congress wants pregnancy options to be treated on an "equal basis," it knows how to say so explicitly. *See* 42 U.S.C. § 254c-6(a)(1) (requiring grants for programs to train relevant staff "in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"). The same is true when Congress wishes nondirective counseling to address specific options, as confirmed by the vetoed Family Planning Amendments Act. *See* S. 323, 102nd Cong. § 2 (requiring "nondirective counseling and referral on request" regarding (A) "prenatal care and delivery"; (B) "infant care, foster care, or adoption services"; and (C) "pregnancy termination"). Here, by contrast, Congress simply required that "all pregnancy counseling shall be nondirective," and that narrow directive does not require equal treatment between childbirth and abortions—particularly where Congress previously excluded "programs where abortion is a method of family planning" from receiving funding. *See Rust*, 500 U.S. at 193 (affirming government's authority to "subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars).

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

That construction of the appropriations rider is implausible on its face and contrary to fundamental principles of statutory interpretation. Congress is presumed neither to implicitly repeal prior legislation—especially through appropriations riders—nor to "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001), yet Plaintiffs contend that the 1996 Congress did both. The far more likely explanation—suggested by the accompanying directive that Title X funds "shall not be expended for abortions"—is that the 1996 Congress was concerned about abuses that had occurred under the 1981 regulations, which HHS had essentially reinstated in 1993, and wanted to ensure that Title X projects did not use pregnancy counseling to push their clients towards abortion. *See* 53 Fed. Reg. at 2924 (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").

Indeed, far from an attempt to abrogate *Rust*, the appropriations rider was a compromise measure offered in response to an effort, driven in part by these concerns, to defund the Title X

program. *See* 141 Cong. Rec. H8248-62 (Aug. 2, 1995). Accordingly, a sponsor of the rider promised that, under this legislation, "not a penny of [Title X] funds can be used to provide abortion services" and "[c]ounselors in these programs may not suggest that a client choose abortion." *Id*. at H8250 (Rep. Greenwood). At a minimum, this history undercuts the notion that the appropriations rider was simply a variant of the Family Planning Amendments Act.

Plaintiffs have argued that the presumption against implied repeals does not apply because *Rust* merely found that § 1008 is ambiguous. *See* Pls.' Reply in Supp. of Mot. for Prelim. Inj. (PI Reply) at 2-3, ECF No. 63. But before 1996, Title X had, at a minimum, delegated authority to HHS to issue the regulations at issue. The congressional elimination of a statutory delegation of authority (which Plaintiffs read the nondirective provision to effectuate), however, is by definition a repeal, whether that delegation was an explicit or implicit one. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (statutory ambiguity constitutes an "implicit" "legislative delegation to an agency"); *see also Home Builders*, 551 U.S. at 664 n.8 ("It does not matter whether [an] alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." (collecting cases)). But there is no evidence here that Congress intended to repeal or amend portions of Title X or the Supreme Court's interpretation of that statute in *Rust*. Accordingly, Plaintiffs' claim based on the nondirective provision fails as a matter of law.

B. Section 1554 of the ACA

Plaintiffs' claim based on § 1554 of the ACA fares no better. This Court previously rejected this argument, noting that it did not read § 1554 to "prevent the Department from

administering its own health services grant program." PI Order at 36. The Court should reach the same conclusion on the merits here.

At the outset, Plaintiffs have waived any challenge to the Rule under § 1554. *See California*, 927 F.3d at 1078. It is settled that "[t]he failure to raise an argument before an agency constitutes a waiver of that argument on judicial review." *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 109 (1st Cir. 2015). And it is undisputed that none of the 500,000-plus comments HHS received even invoked § 1554, much less argued that it eliminated the agency's authority to adopt regulations materially indistinguishable from ones upheld by the Supreme Court. Plaintiffs cannot rectify this problem by pointing to comments raising various substantive objections to the Rule as a policy matter, without, as Plaintiffs acknowledge, "specifically citing Section 1554." PI Reply at 5 n.1. Preservation requires that the "specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Nor does it matter that Plaintiffs' arguments with respect to § 1554 go to the scope of HHS's authority to issue the Rule. *See* PI Reply at 4. Although "agencies are required to ensure that they have authority to issue a particular regulation," they "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." *Koretoff*, 707 F.3d at 398. A party can raise such "statutory arguments if and when the Secretary applies the rule" to them, *id*. at 399, but "the price for a ticket to facial review is to raise objections in the rulemaking," *id*. at 401 (Williams, J., concurring), and it is uncontested that neither Plaintiffs nor anyone else did so with respect to § 1554.

This omission is unsurprising, as nothing in § 1554 abrogates Title X's authorization for the Rule. *See Rust*, 500 U.S. at 187. None of the Rule's provisions violates § 1554 because the Rule does not create, impede, interfere with, restrict, or violate anything. Instead, it simply limits

what the government chooses to *fund* through the Title X grant program. As the Supreme Court explained in *Rust*, the Secretary's decision "to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy,'" but simply "leaves her in no different position than she would have been in if the Government had not enacted Title X." *Id*. at 201-02. And that is true even if "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services" outside of the Title X program. *Id*. at 203. Although repackaged as a statutory argument, Plaintiff's assertion that the restrictions on referrals and counseling violate § 1554 is substantively the same as the constitutional arguments rejected in *Rust*.

Indeed, accepting an expansive construction of terms such as "creates," "impedes," or "interferes" to include a refusal to provide government subsidies, as Plaintiffs' claim requires, would have dramatic consequences for Title X and the government's authority more generally. For example, HHS could not even adopt a regulation declining to provide Medicare coverage for a particular procedure, *see, e.g.*, *Heckler v. Ringer*, 466 U.S. 602, 607 (1984), as such an action purportedly could "impede[] timely access to health care services" (and perhaps erect an "unreasonable barrier[] to the ability of individuals to obtain appropriate medical care" as well). Plaintiffs' reading of § 1554 would effectively halt HHS from making even minor changes to the Title X program—or to many other programs—any time a provider or patient arguably was adversely affected. If Congress had in fact imposed such significant limitation on HHS's authority, it presumably would not have done so through generalities in one of the ACA's "Miscellaneous Provisions."

And again, even if this were a closer question, settled rules of statutory construction would dispose of Plaintiffs' theory. If Title X's specific delegation of authority to the Secretary to adopt

the Rule somehow conflicted with the general directives in § 1554, "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). And more fundamentally, it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule (and a silent abrogation of a high-profile Supreme Court precedent) in the mousehole of § 1554. *See supra* p. 23. That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. *See* PI Order at 36. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 or § 1006 of the PHSA (allowing for promulgation of rules), 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 also Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." (cleaned up)). For all of these reasons, Plaintiffs' claim based on § 1554 of the ACA fails.

C. Title X

Notwithstanding *Rust*, Plaintiffs contend that the Rule is not a "permissible construction of Title X," Am. Compl. ¶¶ 188-89, primarily because it is inconsistent with *vetoed* legislation and "the legislative history leading up to Title X," *id.* ¶ 189; *see also* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. (PI Mem.) at 21, ECF No. 17-1. This remarkable claim that failed legislation can repeal statutes and abrogate Supreme Court precedent is meritless. Under the Constitution, Congress "must enact a statute with the President's signature (or by a two-thirds majority to override a veto)" if it wishes to alter statutory law; "naked legislative history has no legal effect."

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (collecting cases). And Plaintiffs' reference to legislative history predating Title X's enactment—and thus predating *Rust*—cannot undo the fact that the Supreme Court has already found materially indistinguishable regulations "plainly allow[ed]" by Title X. *Rust*, 500 U.S. at 184. Neither Title X nor HHS's authority under the statute has changed since Title X was enacted or since *Rust* was decided.

Plaintiffs' reference to "Congress' legislative actions . . . since Title X's enactment," Am. Compl. ¶ 189, fares no better. To the extent Plaintiffs mean to argue, as they did in their preliminary injunction briefing, that Congress has implicitly ratified HHS's 2000 regulations through its annual appropriations, *see* PI Mem. at 21-22, that argument is meritless, as Defendants have previously explained. *See* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. (PI Opp'n) at 22-23, ECF No. 48. Congressional ratification can only be achieved through an appropriations act where the act "plainly show[s] a purpose"—absent here—"to bestow the precise authority which is claimed," *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944), and, in any event, "the ratification of one agency policy by Congress does not preclude a change in that policy," which HHS has validly effectuated here, *see Massachusetts v. HHS*, 899 F.2d 53, 61 (1st Cir. 1990) (en banc), *abrogated on other grounds by Rust*, 500 U.S. 173.

Plaintiffs' Amended Complaint also contains the bare contention that the Rule is inconsistent with "Congress's mandate that Title X projects provide 'comprehensive' and 'voluntary' services." Am. Comp. ¶ 188 & n.182 (citing 42 U.S.C. § 300a & 42 U.S.C. § 300a-5). These arguments necessarily fail because both statutory provisions predate *Rust*, which confirmed HHS's statutory authority to promulgate essentially the same regulations. *See Rust*, 500 U.S. at 188-89 (rejecting argument that separation requirement was inconsistent with Congress' "intent" to create "a comprehensive, integrated system of family planning services");

id. at 202 (rejecting argument that 1988 regulations impermissibly interfered with "a woman's right to make an informed and voluntary choice"). Moreover, the Rule only applies to "the award of grants under section 1001 of the [PHSA] (42 U.S.C. 300) to assist in the establishment of voluntary family planning projects," 42 C.F.R. § 59.1(a)—not the formula grants authorized by Section 1002 of the PHSA, 42 U.S.C. § 300a. And it specifically incorporates the requirement 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 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. *See* 42 C.F.R. § 59.5(a)(2).

III. The Rule Is Not Arbitrary and Capricious.

Plaintiffs' "second cause of action" contends that the Rule is arbitrary and capricious. *See* Am. Compl. ¶¶ 197-208. These arguments face a high hurdle, and this Court has already largely rejected them when denying Plaintiffs' preliminary injunction motion. *See* PI Order at 36-45. Agency action must be upheld if 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 of U.S. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard of review, "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 Puerto Rico Tel. Co. v. Telecomm. Regulatory Bd. of Puerto Rico*, 665 F.3d 309, 319 (1st Cir. 2011) ("The agency's actions are presumed to be valid; if the agency's decision is supported by a rational basis, we will affirm."). As Defendants have previously explained, *see* PI Opp'n at 23-34, and as outlined below, the Rule—the major

components of which have already been upheld by the Supreme Court—easily satisfies this deferential review.

Fundamentally, HHS promulgated the Rule to ensure that federal funds are not expended in violation of the agency's interpretation of § 1008. *See* Fed. Reg. at 7723-24. As explained above, the Supreme Court determined in *Rust* that this interpretation is, at the very least, permissible and justifies counseling and referral restrictions, as well as physical-separation requirements, materially indistinguishable from those at issue here. Thus, HHS's reasoning for adopting the Rule—that existing regulations failed to implement properly § 1008, and that restrictions on abortion referrals and physical-separation requirements are necessary to ensure compliance with the statutory prohibition on funds in programs where abortion is a method of family planning—was accepted in *Rust* and should be accepted here as well. *See Arent v. Shalala*, 70 F.3d at 610, 616 (D.C. Cir. 1995) (citing *Rust* as an example of a situation in which "what is permissible under *Chevron* is also reasonable under *State Farm*").

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

1. Start with the physical-separation requirement. Here, as in *Rust*, HHS justified its policy with the explanation that the prior regulations "failed to implement properly the statute," *Rust*, 500 U.S. at 187; amply discussed and considered the relevant reliance interests, comments received, and the previous approaches; and ultimately "reaffirm[ed the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. HHS also explained that the requirement was necessary to address the risk and perception that Title X funds would be commingled with other funds and used for other prohibited purposes (such as to build infrastructure or otherwise indirectly support Title

X projects' abortion business), depriving the public of the statutorily mandated assurance that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7764-66, 7773; *see also* PI Opp'n at 26-29. While Plaintiffs might disagree, they cannot demonstrate that the agency's conclusions about physical collocation was arbitrary and capricious. *See* 84 Fed. Reg. at 7764.

Plaintiffs contend that the Rule did not adequately assess the harms that, in the view of some commenters, the separation requirement would impose, including an asserted "reduc[tion in] the number of Title X providers." PI Mem. at 26; *see* Am. Compl. ¶¶ 203-04. Yet, HHS was under no obligation to adopt any particular projections submitted by commenters or respond "in a manner that satisfies the commenter[s]"; it needed only to address the comments in "a reasoned manner," which HHS plainly did. *FBME Bank Ltd v. Mnuchin*, 249 F. Supp. 3d 215, 222 (D.D.C. 2017). And, as discussed above, the agency exercised its expert judgment to project that, while any calculation of future program participation would be inherently speculative, it did not anticipate "a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782. And as to the quality of patient care, HHS determined that the Rule would "contribute to more clients being served, gaps in service being closed, and improved client care." *Id*. at 7723; *see also id*. at 7780-81. Having considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was necessary to comply with Title X, notwithstanding its predicted costs. That decision was not arbitrary and capricious just because Plaintiffs disagree with HHS's predictive judgments. *See BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (Kavanaugh, J.) ("We owe substantial deference to an agency's predictive judgments." (cleaned up)).

Plaintiffs have also argued that HHS underestimated how much it would cost MFP to comply with the separation requirements. *See* PI Mem. at 26; *see also* Am. Compl. ¶ 141. But this Court has already said that Plaintiffs have "significantly overplayed their economic impact hand," and that they have "not demonstrated a likelihood of success on the merits." PI Order at 41. The same reasoning applies here. The Rule permits the Secretary to consider a provider's particular circumstances and "allows case-by-case determinations on whether physical separation is sufficiently achieved to take the unique circumstances of each program into consideration." 84 Fed. Reg. at 7766. The principle that "a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits of alternative pol[i]cies." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (citation omitted). In any event, Plaintiffs bring a facial challenge. Even if *some* current grantees will incur compliance costs that exceed HHS's "estimate[d] . . . average," 84 Fed. Reg. at 7781, that would hardly render the agency's estimate irrational or every application of the Rule invalid.

2. Turning to the counseling and referral restrictions, HHS explained that the 2000 regulations were in tension with a number of other federal conscience protection statutes and, with respect to referral for abortion, with § 1008 itself. 84 Fed. Reg. at 7746. HHS stated that it "has now reconsidered this issue and believes the approach taken in this final rule is a better interpretation of section 1008." *Id*. In reaching this conclusion, HHS reasoned that "it is not necessary for women's health that the federal government use the Title X program to fund abortion referrals, directive abortion counseling, or give to women who seek abortion the names of abortion providers" because such information is available from other sources. *Id*. This determination is consistent with *Rust*, which endorsed the same restrictions on abortion referrals (and even more stringent provisions on abortion counseling). *See* 500 U.S. at 193.

Contrary to Plaintiffs' contentions, *see, e.g.*, Am. Compl. ¶ 94; PI Mem. at 29, HHS expressly considered and responded to comments arguing that the Rule would force providers to violate medical ethics. *See* 84 Fed. Reg. at 7724, 7748. As HHS explained, Congress presumes that not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal conscience statutes giving medical providers that option (medical providers who likewise believe they are not violating medical ethics). *See id.* at 7748; *see also id.* at 7716 (discussing statutes), 7746-47 (same), 7780-81 (discussing medical providers with conscience objections to counseling on or referring for abortion). If a doctor's failure to refer for abortion is actually a violation of medical ethics, it is unclear why "[f]ederal and State conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs (or, under State law, more generally)." *Id.* at 7748. It also unclear why Congress and many States have excluded abortion referrals in various publicly funded programs if medical ethics mandate such referrals. *See, e.g.*, 42 U.S.C. § 300z-10; Ark. Code § 20-16-1602; Cal. Health & Safety Code § 124180(b); Minn. Stat. § 145.925 subd. 1a; 72 Pa. Stat. §§ 1702-D, 1703-D; 42 R.I. Gen. Laws § 42-12.3-3(b); Va. Code § 32.1-325.A.7; Wis. Stat. § 253.07. HHS's view is entirely reasonable.

Furthermore, as HHS explained, *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, and the Secretary reasonably concluded that the Supreme Court would not have done so had the rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. Indeed, the Supreme Court reached the conclusion that it did in *Rust* in the face of a dissent contending that these restrictions would violate ethical responsibilities. *Rust*, 500 U.S. at 213-14 (Blackmun, J., dissenting). That objection did not prevail then and should not now. As this Court

explained, "given the ability to provide pregnant patients nondirective pregnancy counseling and to explain that the Title X program requires referrals for prenatal services and does not permit abortion, Title X program providers are not required to misinform or mislead their patients concerning health care options." PI Order at 42.

Plaintiffs have also asserted that HHS "rejected without discussion" its 2014 Title X Quality Family Planning (QFP) guidelines that, according to Plaintiffs, are inconsistent with the Rule. PI Mem. at 29; *see also* Am. Compl. ¶¶ 57-58. But this Court already determined that Plaintiffs' argument is unpersuasive. *See* PI Order at 45. The Rule's counseling and referral provisions are based on HHS's reasoned determination to depart from the policy reflected in the 2000 regulations—and explicated in the 2014 guidelines—and to adopt instead the position that § 1008 prohibits abortion referral as a method of family planning and does not require abortion counseling. *See* 84 Fed. Reg. at 7716-17. HHS was therefore entitled to adopt a position different from the one espoused in the 2000 regulations *and* the 2014 guidance.[3]

As they did with respect to the separation requirements, Plaintiffs challenge HHS's assessment of the impact of the counseling and referral provisions on patients and health care. Am. Compl. ¶¶ 95-99; PI Mem. at 30. But as noted above, HHS did consider the effect the Rule would have on Title X patients and concluded that it would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. As the agency explained, it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," *id*. at 7780, as polling data reveals that a

[3] 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 in place at the time of the Rule did not (and indeed could not) substantively go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place, *id*. at 7781 n.139. After analyzing this issue in detail, HHS concluded that the counseling and referral provisions "will result in more Title X applicants" and/or subrecipient providers. *Id*. at 7780-81.

Ultimately, it is HHS, which administers the Title X program, that is best situated to consider the potential effects of that program, and it expressly did so here, considering the compliance costs on providers and the possibility that some incumbent providers might withdraw from the program. *See id*. at 7781-82. Again, HHS simply determined that the benefits of complying with Title X, under the best reading of that statute, outweighed any costs that the Rule would impose. *See supra* p 31; *see also* 84 Fed. Reg. at 7783. Plaintiffs may disagree, but that does not permit them (or the Court) to "substitute [their] judgment for that of the agency." *State Farm*, 463 U.S. at 43.

3. Plaintiffs also attack the Rule for "rescind[ing] longstanding regulatory requirements without any reasoned explanation." Am. Compl. ¶ 201. At the outset, as this Court observed, "[i]n *Rust*, the Supreme Court similarly considered a new rule that upset a relatively longstanding regulatory scheme." PI Order at 40. That should be the end of the matter. But, in any event, an agency is not held to a "heightened standard" when it changes policy, and it need only demonstrate that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 514-15. As discussed above, HHS plainly satisfied this standard here. And contrary to Plaintiffs' contention, *see* PI Mem. at 23, a "more detailed justification" is not necessary here because the Rule does not "rest[] upon factual findings that contradict those which

underlay [HHS's] prior policy," and the 2000 regulations did not "engender[] serious reliance interests that must be taken into account." *Id.* at 515.

As to the first, the Rule rests on HHS's renewed interpretation of § 1008 and the need for prophylactic measures to address the risk or perception that taxpayer funds will be used to fund abortion—not "factual findings that contradict those which underlay [the] prior policy." *Id.* That policy and legal judgment—one blessed by the Supreme Court—is legitimate even if it differs from Plaintiffs' judgment and that of some prior administrations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[T]he agency. . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." (internal citation omitted)).

As for reliance, Plaintiffs have no legally cognizable reliance interests in the continued receipt of Title X grants under the conditions they prefer—and certainly no interest beyond the stated duration (usually one year, *see* 42 C.F.R. § 59.8(b)) of a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests because the relevant "contract provisions . . . will expire on their own in a few years' time"). And in any event, 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.

In the end, HHS made a legal and policy judgment (already blessed by the Supreme Court) that the separation requirements were necessary prophylactic measures to further HHS's interpretation of § 1008 and prevent misuse of Title X funds. Plaintiffs may dislike this conclusion, but their "policy disagreement" with HHS is no basis for setting the Secretary's judgment aside. *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 380 (D.C. Cir. 2013).

IV. Plaintiffs' Constitutional Claims Are Foreclosed by *Rust* and Meritless.

The Supreme Court in *Rust* held that 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 Fifth Amendment right to choose abortion. Plaintiffs' nonetheless seek to relitigate each of these holdings and toss in an equal protection challenge as well. These arguments fail.

A. First Amendment

In *Rust*, the Supreme Court squarely rejected the claim that the 1988 regulations contravened the First Amendment "by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500 U.S. at 192; *see 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. Both then and now, doctors remain free to refer for abortion outside the Title X project, but they cannot require the government to pay them for doing so—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. The same logic, not to mention *Rust*'s explicit holding, applies equally here and forecloses Plaintiffs' First Amendment claims. As this Court has already concluded, "Plaintiffs fail to identify a meaningful way in which the Final Rule differs from the 1988 Regulations for purposes of a First Amendment inquiry," and the Court is "not free to overlook controlling precedent." PI Order at 56; *see also* PI Opp'n at 35-36

(explaining that *Rust* remains good law and that subsequent Supreme Court cases do not prevent its applicability here).

Plaintiffs invoke the unconstitutional conditions doctrine, contending that the Rule requires MFP to "adopt policies and standards of care for patients that violate [MFP's] First Amendment rights," Am. Compl. ¶ 220, but that does not distinguish this case from *Rust*. There, the challengers similarly maintained that "the restrictions on the subsidization of abortion-related speech contained in the [1988] regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." *Rust*, 500 U.S. at 196. The Supreme Court rejected that claim because the 1988 regulations "did not force the Title X grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities." *Id*. This Court should reject Plaintiffs' claim for the same reason.

B. Fifth Amendment

Rust likewise disposes of Plaintiffs' Fifth Amendment claim because the Supreme Court held that the restrictions at issue in the Rule do not violate a woman's Fifth Amendment abortion right. In *Rust*, the Supreme Court reaffirmed that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." 500 U.S. at 201. Under settled precedent, the government has no "affirmative duty to 'commit any resources to facilitating abortion,'" it "may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion,'" and such funding decisions "'place[] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" *Id*. (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 (1989), and *Harris v. McRae*, 448 U.S. 297, 315 (1980), and

mentioning *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state regulation denying Medicaid funding for nontherapeutic abortions)).

In light of the "more extreme restrictions" it had previously upheld, the Supreme Court ruled that it would "strain logic" to hold that the 1988 regulations' "exclu[sion of] abortion-related services from a federally funded *preconceptional* family planning program is unconstitutional." *Id*. at 202. Because the limitations on Title X funding "leave[] a pregnant woman with the same choice as if the Government had chosen not to fund family-planning services at all," the 1988 regulations did not "impermissibly burden a woman's Fifth Amendment rights." *Id*. at 201. All of this is true of the Rule, which disposes of Plaintiffs' current claim that the Rule violates the Fifth Amendment.

Nonetheless, Plaintiffs contend that the Rule imposes an "unconstitutional condition" on MFP's receipt of Title X funds to the extent its implementation requires MFP to "impose an undue burden on [its] patients' fundamental right to choose abortion before viability," Am. Compl. ¶ 215, and Plaintiffs have previously argued that the "undue burden" standard announced in cases decided after *Rust* dictates a different result and that *Rust* is otherwise distinguishable. *See* PI Mem. at 32-34. The Court correctly rejected these arguments, finding that "the standard in *Rust* remains," PI Order at 46, and controls Plaintiffs' challenge to "a government agency's affirmative choice not to subsidize an activity—even if that activity is protected by the Constitution," *id*. at 51; *see also* PI Opp'n at 40-41 (explaining why Plaintiffs' attempts to distinguish *Rust* "procedurally and factually" are unpersuasive). The Court should do so again here.

C. Equal Protection

Plaintiffs' final claim is that the Rule imposes an unconstitutional condition to the extent it "discriminates on the basis of sex." Am. Compl. ¶ 237. But the Rule plainly does not discriminate

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

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court explained that "the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id*. at 273 (citations omitted); *see also id*. at 272-73. Accordingly, rational basis review is the appropriate test, and the Rule easily clears that low hurdle because it is rationally related to legitimate government interests, *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 (1988). Indeed, avoiding the use of federal funds to promote or encourage abortion is an important government interest, as the Supreme Court recognized in *Rust*, 500 U.S. at 192-93. For the same reasons, and given the important government interest at stake, the Rule would also satisfy intermediate scrutiny were it to apply. Plaintiffs' claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case or grant summary judgment to Defendants.

Dated: January 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, 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
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