Nos. 19-1614 & 20-1215

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Baltimore asks this Court to be the first court of appeals to hold that an agency acted irrationally by doing what the Supreme Court has already declared reasonable. HHS adopted the Rule after concluding that the best reading of Title X prohibits using grant money for abortion referrals and collocating abortion-related services with Title X services. And the Supreme Court has held that HHS's interpretation not only is reasonable, but also justifies materially indistinguishable abortion-referral and physical-separation provisions (and even a ban on abortion counseling, which the Rule omits). As the en banc Ninth Circuit recently held, HHS's adoption of materially the same restrictions for materially the same reasons plainly constitutes reasoned decisionmaking.

Despite HHS's undeniably reasonable conclusion that the Rule's restrictions reflect the best reading of Title X, and its thorough consideration of comments, Baltimore argues that it was impossible for HHS to rationally adopt the Rule merely because certain commenters disagreed with the agency's consideration of the Rule's effects and costs. In doing so, Baltimore would compel HHS to set aside its independent judgment in favor of the assertions of certain commenters that the City deems more reliable than the agency. The Court should reject that attempt to upend arbitrary-and-capricious review. The APA provided Baltimore and the various organizations on which it relies an opportunity to comment, not an opportunity to veto.

Baltimore's remaining claims already have been rejected by the district court, the en banc Ninth Circuit, or the Supreme Court itself, and the City provides no good

justification for this Court to chart a different course. At the very least, Baltimore offers no plausible reason why its *municipal* injury would require a *statewide* remedy, much less the *nationwide* relief that the district court denied (and that is not properly before this Court). Nor does it explain why it must be free of *all* the Rule's provisions merely because it deems the abortion-referral and physical-separation restrictions flawed.

ARGUMENT

I. The Rule Is Lawful.

A. The Justification for the Rule is Reasonable.

1. HHS adopted the Rule's abortion-referral and physical-separation provisions because it concluded they reflect the best reading of § 1008. Baltimore does not and cannot seriously contend that it was *irrational* for HHS to conclude that the Rule was a more faithful implementation of § 1008 than its predecessor. The Supreme Court has already held that such an interpretation is rational, *see Rust v. Sullivan*, 500 U.S. 173 (1991), and the en banc Ninth Circuit recently concluded that such an interpretation was both lawful and reasonable notwithstanding statutory arguments identical to Baltimore's, *see Becerra ex rel. California v. Azar*, 950 F.3d 1067, 1074, 1084 (9th Cir. 2020).

Baltimore similarly does not challenge the reasonableness of HHS's conclusion that its prior regulations were inconsistent with federal conscience laws. As HHS explained, multiple statutes prohibit it from conditioning funds on a provider's willingness to refer patients for abortions—regardless of what reasons the provider might have for not offering such referrals, *see, e.g.*, Pub. L. No. 115-245, § 507(d)(1), 132

Stat. 2981, 3118 (2019) (Weldon Amendment); 42 U.S.C. § 238n(a) (Coats-Snowe Amendment). And that is precisely what HHS's prior regulations did. *See* 84 Fed. Reg. 7714, 7716, 7745-46, 7778 (Mar. 4, 2019) (discussing 2000 rule).

Nor does Baltimore challenge the conclusion that more faithful compliance with the law would be reason enough to promulgate the Rule. No one could seriously contend that when a statute requires an agency to take a particular approach, it must do so on that basis alone. *See Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015), *discussed in* Resp. Br. 32. It follows that even where the statute is ambiguous, "an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). And *Rust* applied that sensible principle in this very context when it held that HHS's conclusion that the relevant restrictions were "more in keeping with the original intent of the statute" was "sufficient to support the Secretary's revised approach," notwithstanding the Court's conclusion that § 1008 was "ambiguous," 500 U.S. at 187. Baltimore thus cannot dispute that it was manifestly reasonable for HHS to decide that adherence to the best reading of § 1008 and federal conscience laws was "of greater importance" than "cost," 84 Fed. Reg. at 7783.

2. Instead, Baltimore's arguments reduce to one unprecedented contention: that notwithstanding HHS's reasonable conclusion that the Rule's restrictions reflect the best reading of Title X, HHS could not rationally adopt the Rule in the face of comments disagreeing with the agency's conclusions regarding medical ethics, the

Rule's effects, and the costs for some existing grantees. But if—as Baltimore does not contest—HHS reasonably concluded that the Rule reflected the *better* reading of the governing statutes and that compliance with that reading was *more important* than the asserted costs that might follow, that is indisputably an exercise in "reasoned decisionmaking." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

a. Baltimore's insistence that HHS's interpretation is "by no means the 'better' reading" and that "HHS was not required to promulgate the new Rule" (Resp. Br. 38, 40) does not detract from this commonsense conclusion. To begin, the Secretary's interpretation is clearly the better one. A program that refers patients for abortion as a method of family planning is plainly a "program[] where abortion is a method of family planning." 42 U.S.C. § 300a-6; 84 Fed. Reg. at 7759. Moreover, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale," Title X funds plainly "would be supporting abortion as a method of family planning." 84 Fed. Reg. at 7766. And it can hardly be contested that a physical-separation requirement will help avoid the "perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id.* at 7764.

Accordingly, the Supreme Court has already held that it is reasonable for HHS to conclude that its interpretation is the better reading. The Court deemed reasonable HHS's conclusion that an abortion-referral restriction is "more in keeping with the original intent of the statute," and held that HHS could therefore adopt the restriction

on that basis. *See Rust*, 500 U.S. at 187. And it likewise held that the Secretary could require physical separation on the basis of his "interpretation of the statute that separate facilities are necessary," "especially in light of the express prohibition of § 1008," and the fact that "Congress intended that Title X funds be kept separate and distinct from abortion-related activities." *Id.* at 190. Baltimore thus cannot contest that HHS may reasonably decide to adhere to what it deems the best interpretation of the statute, regardless of cost.

b. Nor is Baltimore correct that HHS failed to preserve this argument, or that these statutory justifications may be ignored because HHS "gave some consideration to" comments about other issues. Resp. Br. 37. As the government consistently argued before the district court, "HHS's reasoning for adopting the Rule … was accepted in *Rust* and should be accepted here as well." SJA1123. In the Rule, HHS explained that the purpose of the rulemaking was "to ensure compliance with, and enhance implementation of, the statutory requirement that none of the funds appropriated for Title X may be used in programs where abortion is a method of family planning and related statutory requirements," 84 Fed. Reg. at 7714, and that "[w]hile cost is an important consideration in any rulemaking, compliance with statutory program integrity provisions is of greater importance," *id.* at 7783. Even the most cursory reading of the Rule reveals that HHS promulgated it because it better effectuates Congress's instruction in § 1008 and the underlying policy that taxpayer funds should not be used to facilitate abortions. *See, e.g.*, *id.* at 7723, 7764, 7766, 7777.

And, in any event, this Court "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) (quotation marks omitted); *cf. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (an agency action may not be vacated if an error "had no effect on the underlying agency action being challenged") (discussing 5 U.S.C. § 706). Baltimore's observation that agencies typically must consider costs (Resp. Br. 32) does not affect that conclusion.

B. HHS Adequately Addressed the Costs and Effects of the Rule.

In any event, as the en banc Ninth Circuit explained, HHS's consideration of medical ethics, reliance interests, and compliance costs was patently reasonable. *California*, 950 F.3d at 1074, 1084, 1100-03. Baltimore's contrary arguments would not only require HHS to abandon its own expert judgment in favor of the views of existing grantees and certain professional organizations, but would likewise prohibit the agency from changing course unless it found commenters to agree with its position. And they would require HHS to predict with impossible precision the decisions of third-party grantees and the uncertain costs that those entities might bear. Such requirements would be more than merely novel; they would make it virtually impossible for an agency to change its grant program without the consent of its existing grantees.

The Ninth Circuit recognized that result, and properly rejected it. *See California*, 950 F.3d at 1100-02. Baltimore discounts the en banc court's thorough reasoning because it "did not have the full Record." Resp. Br. 40. Yet the bulk of what Baltimore

asserts that the Ninth Circuit failed to consider is not new evidence, but repackaged legal arguments about statements in the preamble that the district court here did not consider either. *See* Resp. Br. 42-43. Baltimore also fails to acknowledge that all of the critical facts were publicly available, including the public comments and passages from the Rule that Baltimore cites here. *See California*, 950 F.3d at 1083 n.11. Indeed, many of the various comments that Baltimore invokes now were cited in the many briefs before the Ninth Circuit. There, as here, those comments did not show that HHS's consideration of medical ethics, reliance interests, or compliance costs was unreasonable.

1. Medical Ethics

Baltimore accepts that HHS considered and responded to comments alleging that the Rule would force Title X providers to violate medical ethics; it simply contends that the agency's response was "inadequate." Resp. Br. 15. But HHS's analysis was, if anything, *more* thorough than the analysis that the Supreme Court found sufficient in *Rust*. Gov't. Br. 24, 29-30. Nothing in the City's brief justifies a different result now.

a. Baltimore begins by denigrating HHS's discussion of the role medical ethics play in a limited federally funded program like Title X, *see* 84 Fed. Reg. at 7748, as "irrational," insisting that "the scope of a federally funded program has nothing to do with requirements of medical ethics." Resp. Br. 16-17. But the City later asserts (at 26) that "[p]ublicly funded programs are not required to abide by the requirements of medical ethics." That, after all, is its only substantive response to the fact that Congress

and the majority of state legislatures have prohibited abortion referrals (or even abortion counseling) in a variety of publicly funded programs. Gov't. Br. 34. The City never explains how to reconcile these two assertions, or why Title X should receive different treatment.

To be clear, the government does not contend that participants in publicly funded programs should disregard the principles of medical ethics. *Contra* Resp. Br. 16-17. Rather, the point is that the proper application of those principles is informed by context: What is expected from a general practitioner is different from a doctor providing services pursuant to a limited program funded by the federal government. That is the lesson of *Rust*, which explained that "the doctor-patient relationship established by the Title X program" is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and thus "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." 500 U.S. at 200. Nor is a provider compelled "to represent as his own any opinion that he does not in fact hold," as the doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* Both now and then, providers may explain to patients seeking abortion referrals that a Title X clinic simply "does not refer for abortion," 42 C.F.R. § 59.14(e)(5), so nothing in "the Rule requires" doctors to "surreptitiously withhold[] information about abortion," Resp. Br. 18. Indeed, given their ability to advise patients about the Rule's limits, it is

difficult to see (and Baltimore never explains) how providers could violate the AMA's *Code of Ethics*, which prohibits only "withholding information without [a] *patient's knowledge or* consent." 84 Fed. Reg. at 7745 (emphasis added) (quotation marks omitted); *see* Gov't. Br. 27-28.

Baltimore nonetheless insists that categorical ethical rules apply to Title X providers without any consideration of context, but never addresses the absurdities associated with that approach. For example, if Title X providers always must give "patients access to relevant medical information" upon request (Resp. Br. 17), then HHS could not even prohibit them from offering information about non-FDA-approved contraceptives. *See* Gov't. Br. 28. Likewise, if Title X providers always must "*provide any and all appropriate referrals*" (Resp. Br. 11), then HHS could not prevent them from giving referrals in areas outside the family-planning context (such as to their recommended orthopedists) or for services the federal government may not wish to promote (such as to nearby medical-marijuana dispensaries). Nothing in the APA requires such a startling regime.

b. For similar reasons, Baltimore misunderstands *Rust*'s treatment of medical ethics. The City does not dispute that the challengers in *Rust* raised the same medical-ethics objections as those pressed here, that Justice Blackmun's dissent reiterated them, and that the majority nevertheless held that even that rule—which prohibited both abortion referrals and counseling—was neither arbitrary nor an impermissible interference with the doctor-patient relationship. Instead, Baltimore merely makes the

technical point (at 19-21) that the relevant explanation occurred in the Court's First Amendment analysis. But the *reason* the City argues the current Rule violates medical ethics is that it allegedly prevents doctors from providing "honest information" and constitutes "an assault on … the patient-provider relationship" (Resp. Br. 13), and it is undeniable that *Rust* rejected the same characterization of a more restrictive regime. *See* 500 U.S. at 200. That the rejection occurred in a discussion of the First Amendment is of no moment. Confirming the point, the AMA explains that the ethical issue here is whether HHS can "restrain physicians' speech to their patients." AMA Br. 12.

c. Even outside the context of a limited government program like Title X, a refusal to refer for abortions does not violate medical ethics given that many federal and state conscience laws expressly give providers that option. 84 Fed. Reg. at 7748. Baltimore's attempts to explain these laws away are entirely unpersuasive. If, as the City insists, doctors must "*provide any and all appropriate referrals*, including for abortion" (Resp. Br. 11), then declining to refer for an abortion is unethical regardless of whether one is "*permitt[ed]*" or "*forc[ed]*" to do so. Resp. Br. 17-18. Similarly, that some doctors with conscience objections may voluntarily choose to "refer their patients to *other* providers who can engage in" abortion referrals (Resp. Br. 18) is irrelevant given that Congress and many States impose no such conditions on a provider's ability to decline to refer for an abortion. And Baltimore provides no support for its remarkable assertion (at 18-19) that Congress and state legislatures simply ignored "the dictates of medical ethics" in enacting their conscience statutes.

Nor has Baltimore provided any evidence substantiating its claim that the conscience statutes are merely "*exemptions* from" otherwise-applicable rules requiring abortion referrals. Resp. Br. 19. If anything, Maryland's own conscience law indicates the opposite is true. That law allows providers to "refus[e]" to "refer" for an abortion, unless, *inter alia*, the refusal would be "contrary to the standards of medical care." Md. Code, Health-Gen. § 20–214(a), (d). In other words, declining to provide an abortion referral, by itself, is not, in Maryland's judgment, "contrary to the standards of medical care." More generally, it is hard to square Baltimore's theory with the fact that various federal and state statutes protecting refusals to make abortion referrals, including Maryland's, apply even if the refusing provider has no religious or moral objection to abortion referrals whatsoever. *See, e.g., id.*; Weldon Amendment, 132 Stat. at 3118.

d. Ultimately, Baltimore's argument reduces to an appeal to the alleged "expertise" of its preferred professional organizations. Resp. Br. 22. But like the district court, the City concedes (at 11) that "HHS was not required to demonstrate that any professional organization supported the Rule," thereby rendering its lengthy discussion of these groups immaterial. Nor, as Baltimore apparently believes, did the Secretary need a "special justification" for disagreeing with the purported expertise of various organizations in the field of medical ethics. *Cf. Department of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). Nothing in the APA authorizes such a heightened standard of review; rather, the Secretary's "policymaking discretion" permits him to part ways with "technocratic expertise" whether inside or outside his agency. *Id.*

Such disagreement was particularly justified here. Baltimore has yet to identify any provider (much less one participating in federally funded family-planning program) who has ever been disciplined by any entity with actual authority over medical ethics for failing to provide an abortion referral upon demand—not under the 1988 rule, not since HHS began enforcing the challenged Rule last July, and not in any other context. Gov't. Br. 34-35. Nor does the City contest that such discipline would be quite surprising given that (i) the federal government and most States prohibit abortion referrals (or even counseling) in various publicly funded programs, while still others (including Maryland) permit any provider to decline to give such referrals for any reason (Gov't. Br. 34); (ii) that the health departments of 28 States continue to participate in the Title X program (Gov't. Br. 31); (iii) that at least 14 States explicitly reject Baltimore's understanding of medical ethics (Ohio Supp. Br. 5-23), and (iv) that the AMA itself has confirmed that a provider's compliance with the challenged referral restriction "does not warrant discipline." AMA Br. 13.

Instead, the City urges this Court to consult only "the basic values that guide the practice of medicine"—by which it means the hortatory statements of particular professional organizations. Resp. Br. 24; *see* AMA Br. 13 (acknowledging "the *Code* itself is not a regimen for physician discipline"). But the States and the federal government undeniably have a significant "'interest in protecting the integrity and ethics of the medical profession'"—especially when it comes to abortion and even when their judgments are not shared by doctors' guilds. *Gonzales v. Carhart*, 550 U.S. 124, 157

(2007); *see id.* at 176 (Ginsburg, J., dissenting) (noting that the "record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the [partial-birth abortion ban], as well as statements from nine professional associations, including ACOG, … attesting that [partial-birth abortion] carries meaningful safety advantages" and that "[n]o comparable medical groups supported the ban"). Baltimore offers no authority for the remarkable proposition that agencies and courts should disregard States' judgments in this area.

Even on its own terms, Baltimore's appeal to non-binding authority comes up short. The City has yet to identify any "opinion from the AMA's *Code of Medical Ethics* directly addressing abortion," *California*, 950 F.3d at 1102 n.34, and the AMA all but admits nothing in the *Code* directly addresses abortion referrals. AMA Br. 11-12. And again, the *Code* contemplates that doctors may withhold information so long as they inform patients that they are doing so, and the Rule expressly permits Title X providers to inform their patients that they cannot provide abortion referrals within this federal program. *See supra* I.B.1.a. In all events, Baltimore never disputes that the Supreme Court has treated an opinion from the *Code*—indeed, one, unlike here, backed by "the judgment of 49 States"—as merely "one reasonable understanding of medical practice." *Gonzales v. Oregon*, 546 U.S. 243, 272-73 (2006); *see* Gov't. Br. 35-36.

Nor does Baltimore offer any tenable response to the fact that since HHS began enforcing the Rule's referral restriction last July, most Title X providers, including the health departments of 28 States, have chosen to remain in the program—and done so

without any apparent ethical sanction. Gov't. Br. 30-31. The City's suggestion (at 22) that the overwhelming majority of Title X providers are knowingly violating medical ethics in exchange for grants is neither substantiated nor fair to the many medical professionals who remain committed to the mission of Title X. And as with the other times Baltimore raises *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), its invocation here is a red herring: this factual development is not a "post hoc rationalization[] for agency action" (Resp. Br. 21), but confirmation of reasoning already given. No one thinks HHS would have done anything differently had it *known*, rather than *predicted*, that most Title X providers would remain in the program, and nothing in *Chenery* requires this Court to blind itself to the facts on the ground where, as here, a remand to the agency "would be an idle and useless formality,'" *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 545 (2008).[1]

2. Reliance Interests

Baltimore fares no better in its assertions that HHS inadequately considered the Rule's effects on the availability of Title X services. Based on its experience in

[1] Baltimore also claims (at 21) that an Internet article from a critic of the Rule establishes that "roughly half of incumbent Title X providers *have* withdrawn from the program," but the article itself says no such thing. Rather, it states that "approximately *one-quarter* of all sites that received Title X funding as of June 2019[] *likely* left the Title X network because of" the Rule, and it acknowledges that there has been "no reduction" in services in at least 20 States and the District of Columbia. Ruth Dawson, Guttmacher Inst., *Trump Administration's Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half* (Feb. 26, 2020), https://perma.cc/M8HH-YQ3R (emphases added).

administering the grant program, HHS predicted that the Rule likely would not decrease the provision of Title X services because HHS could supply existing providers with additional funds and because the removal of the abortion-referral requirement would likely attract new participants. 84 Fed. Reg. at 7780-81. Those expert predictions of uncertain future outcomes are entitled to deference and HHS did not need to "produce some special justification for drawing its own inferences and adopting its own assumptions." *California*, 950 F.3d at 1100 (quotation marks and alterations omitted).

Baltimore does not contest that this Court owes deference to that prediction, and barely defends the district court's reasoning. *See* Resp. Br. 26-32. Instead, Baltimore misconstrues a few sentences from the preamble, claiming (at 26-27) that "HHS mistakenly believed that there was 'no evidence' in the Record that providers would withdraw from the program." The district court did not rely on that argument, and for good reason. HHS acknowledged that some providers might withdraw. *See* 84 Fed. Reg. at 7768, 7782. And the agency correctly observed that commenters "did not provide evidence" or "actual data"—much less "compelling evidence"—showing that the *net* amount of Title X services would decrease. 84 Fed. Reg. at 7775, 7780, 7785. The reason was simple: the comments Baltimore invokes merely noted the likelihood that *some* providers would withdraw, or the effects that would follow if those providers withdrew and all else remained equal. But that was not evidence that the *net* amount of services would decrease; that amount would depend on how many of the remaining

participants would expand their services, and how many new participants would join the program. *See* Gov't. Br. 39.

The other passage Baltimore quotes is taken out of context and has nothing to do with this case. When HHS said that it found "no evidence to support the assertion that the final rule will drive current providers from the Title X program," it was responding to comments about the Rule's (unchallenged) rescission of a requirement that new applicants consult with existing grantees whenever their application would affect the existing grantees. 84 Fed. Reg. at 7748-49. HHS rejected those comments because the change "d[id] not reflect a preference for new applicants over previous grantees" and did not necessarily mean that existing providers would lose in competitions for future grants. *Id.*

Nor, contrary to the City's suggestion (at 28), does the APA compel HHS to provide "evidence" about which entities would likely remain or join the program. Rather, "even in the absence of evidence, [an] agency's predictive judgment (which merits deference)" satisfies arbitrary-and-capricious review so long as it "makes … sense." *Fox*, 556 U.S. at 521. And here, as in *Fox*, the agency's prediction was "an exercise in logic rather than clairvoyance." *Id.* HHS reasonably concluded that predicting providers' future decisions would be inherently speculative, 84 Fed. Reg. at 7775, 7782, and the agency naturally lacked a list of those providers who had been deterred from participating in the program for conscience reasons. In those

"conditions of uncertainty," *Department of Commerce*, 139 S. Ct. at 2571, HHS reasonably relied on its expertise to make a prediction about the net result of countervailing effects.

Indeed, HHS's prediction seems likely to have come to pass. HHS has issued over $30 million in supplemental awards to remaining providers to fill the gaps from departing providers—just as it had predicted. Gov't. Br. 39. And although the first six months of the new regime led to an overall reduction in services—an unsurprising result given that new grantees will not be eligible to apply for grants until later *this* year—that reduction was nowhere near as stark as Baltimore claims. *See, e.g.*, *supra* note 1; Kaiser Family Found., *The Status of Participation in the Title X Federal Family Planning Program* (Dec. 20, 2019) (estimating approximate 26% reduction in services), https://perma.cc/UDP7-SVVB.

3. Compliance Costs

As for HHS's consideration of compliance costs related to the physical-separation requirement, Baltimore incorrectly claims that the agency's estimate is contrary to the evidence because HHS declined to adopt some commenters' assertions that the costs would run in the hundreds of thousands. But HHS considered the comments, slightly modified its estimates because of them, and explained why the commenters' predictions rested on a misunderstanding of the physical-separation requirement. 84 Fed. Reg. at 7766-67, 7781-82. In particular, it observed that commenters had incorrectly assumed they would have to build new facilities. *Id.* HHS clarified that misconception, and, based on its expertise in running the Title X program

for decades, predicted that most affected providers could comply by shifting services around their existing facilities. *See id.* at 7766-67, 7781.

Baltimore similarly ignores HHS's explanation when it asserts (at 34) that the agency "entirely failed to account for ongoing" costs. HHS explained that "[c]ommenters' insistence that requiring physical and financial separation would increase the cost for doing business only confirms the need for such separation," because that would mean that "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale." 84 Fed. Reg. at 7766. Baltimore does not and cannot contend that such a conclusion was irrational.

Baltimore criticizes (at 33) HHS's rough numerical estimates because the agency had little data on which to base the estimate, aside from the comments that HHS had found mistaken. Yet HHS acknowledged the "substantial uncertainty" surrounding the cost question, 84 Fed. Reg. at 7781, and that uncertainty did not compel the agency "to accept the commenters' pessimistic cost predictions." *California*, 950 F.3d at 1101 (quotation marks omitted). Baltimore does not explain what else HHS should have relied on once it determined that commenters' assertions about costs hinged on incorrect assumptions.

Baltimore also argues that, contrary to HHS's explanation, *no* provider was compliant with the physical-separation requirement before the Rule, because at that time they all were making abortion referrals as part of their Title X services. But its sole basis for that claim is that the 2000 rule had required participants to provide

abortion referrals as part of their Title X services. That is no longer the situation, making compliance with the physical-separation requirement relevant only for those providers who are making abortion referrals as part of their *non*-Title X services. To the extent that Baltimore contends that *all* existing providers would continue to make abortion referrals as part of *non*-Title X services, and that those providers would incur costs to separate those services, it has cited no evidence to that effect or authority that HHS needed to assume as much.

C. Baltimore's Alternative Bases for Affirmance are Meritless.

1. As the district court held, HHS complied with the APA by providing a standard 60-day comment period. SJA1318-1320. Baltimore identifies no authority suggesting that a 60-day period was inappropriate, and the 500,000 comments (including extensive comment from Baltimore) that HHS received during that period—incidentally, the same period allowed for the 1988 and 2000 rules—demonstrates that the agency did not "blindsid[e]" commenters. Resp. Br. 47-48.

2. Baltimore lacks standing to bring an equal-protection challenge to the referral restrictions on behalf of Title X patients, *see Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002), and its claim is meritless. The district court correctly held that the Rule easily satisfies the rational-basis review applicable to restrictions on abortion funding. SJA1325-26; *see also Bray v. Alexandria Women's Health Clinic*, 506 US. 263, 273 (1993); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000) (acknowledging the "[t]he rationality of distinguishing between abortion

services and other medical services"). Rather than perpetuate sex-based stereotypes (Resp. Br. 49), the Rule's prenatal-referral requirement reflects that prenatal care is *medically necessary* for pregnant patients but not for "non-pregnant Title X patients, whether they are non-pregnant women or men." SJA1326. Even assuming Baltimore is correct that this requirement promotes childbirth over abortion, that preference would be rational. *Cf. Rust*, 500 U.S. at 192-93.

3. Baltimore's remaining claims are foreclosed by *Rust*.

a. As explained in our panel briefs, incorporated by reference, the assertion that the same restrictions upheld in *Rust* violate a subsequently enacted appropriations rider or an unrelated provision of the ACA is meritless. That contention violates the "aversion to implied repeals" that "is especially strong in the appropriations context." *Maine Cmty. Health Options v. United States*, No. 18-1023, 2020 WL 1978706, at *10 (U.S. Apr. 27, 2020) (alterations omitted).

b. Baltimore's claim that the Rule violates Title X's voluntariness requirement does "not merit much discussion." *California*, 950 F.3d at 1095 n.26 (rejecting identical argument). Nothing about the requirement that accepting Title X services "be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service of assistance," 42 U.S.C. § 300a-5, compels providers to refer for abortion. Indeed, as the district court explained, *Rust* held that "[t]he broad language of Title X," which included the same voluntariness requirement, allowed the same restriction. SJA1321; *see Rust*, 500 U.S. at 178. And the Rule itself "reaffirms" the principle that

Title X services are voluntary, SJA1321, by preserving the longstanding prohibition on "coercion … to employ or not employ any particular method of family planning," 42 C.F.R. § 59.5(a)(2).

c. In rejecting Baltimore's First Amendment claim, the district court recognized that *Rust* upheld an identical referral restriction against a materially indistinguishable claim. SJA1322. Then as now, the restrictions imposed limits on which activities the government funds, and no asserted change to the program alters that conclusion. *See* SJA1322-24 (rejecting Baltimore's arguments).

II. The Permanent Injunction Is Overbroad.

A. Baltimore offers little defense of the district court's decision to enjoin almost every provision of the Rule after analyzing only some of them, despite the preamble's express severability statement, 84 Fed. Reg. at 7725. Although the City suggests the government must justify severability, it is the *plaintiff's* burden to show why relief is necessary with respect to each provision of the Rule (Gov't. Br. 50), and Baltimore makes no attempt to do so. It does not explain how provisions requiring, for example, reporting of sexual abuse or periodic reporting for purposes of oversight, 42 C.F.R. §§ 59.5, 59.17, are so intertwined with the abortion-referral or physical-separation provisions that HHS could not have intended to issue them independently.

Instead, Baltimore merely makes the unremarkable observation that a severability provision is not *always* dispositive and the meritless assertion that the government forfeited an argument that the City was required to raise and that the district court

addressed. Resp. Br. 58-59; *see* SJA1110, 1117, 1220 & n.1 (portions of government briefs addressing severability). Given that Baltimore has made no showing that the remaining provisions are inseverable, the presumption created by the severability statement controls. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

B. Baltimore's putative justification for the statewide scope of the district court's relief is also insufficient. Constitutional and equitable principles require vacating the injunction insofar as it extends beyond Baltimore. *See* Gov't. Br. 43-48; Op. Br. 43-45; Reply Br. 24-25. The City's only defense of the need for a statewide injunction is that Baltimore will be harmed by the withdrawal of providers elsewhere in Maryland and in nearby States. Resp. Br. 56. But Maryland sought and was denied relief against the Rule in a separate suit, statewide relief would not remedy the asserted harms caused by providers withdrawing in *other* States, and the overwhelming majority of providers in nearby States remain in the program regardless, *see, e.g.*, Kaiser, *supra*. Baltimore also does not explain why statewide relief is appropriate given that its own complaint requested a permanent injunction limited to the City and its subgrantees. JA78; *see* Gov't. Br. 47.

C. Even more flawed is Baltimore's bid to *expand* the judgment nationwide.

1. Baltimore cannot seek to expand the judgment below without a cross appeal, an option it has not pursued. The district court thrice denied the City's request for nationwide relief—including its Rule 59(e) motion (*see* Gov't. Br. 3)—and Baltimore has not cross-appealed to reverse and expand the judgment. And whether or not it is

"strictly jurisdictional," "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Supreme Court's] holdings has ever recognized an exception to the [cross-appeal] rule." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999); *see Jennings v. Stephens*, 574 U.S. 271, 276 (2015) (similar).[2]

2. In any event, Baltimore is incorrect (and the government did not concede) that the APA authorizes, let alone requires, nationwide vacatur. The defects with overbroad injunctions raised in the government's prior briefs apply with equal force to nationwide vacaturs, and there is no textual argument for why the APA's provision that a "reviewing court shall … hold unlawful and set aside agency action" would allow, much less require, a district court to set aside agency action *universally*, rather than as applied to the parties. 5 U.S.C. § 706(2). Indeed, Baltimore's position would mean district courts *must* enter nationwide relief whenever they find agency action unlawful. But as this Court has explained, "[n]othing in the language of the APA" requires an unlawful regulation be "set[ ] aside … for the entire country." *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 394 (4th Cir. 2001). Baltimore cannot distinguish this precedent (Resp. Br. 54-55) on the ground that it involved an injunction rather than

[2] The City may not even be able to file such a cross appeal at this time, as it is not clear that the district court entered a final judgment as to all of Baltimore's claims. *See* SJA1330. Although the parties may appeal the district court's *injunction* under 28 U.S.C. § 1292(a)(1), they cannot appeal the district court's *vacatur* under § 1291 until the district court renders a final judgment or a certification under Rule 54(b). (While the government's opening supplemental brief (at 3) stated that the district court entered a final judgment, the government cannot waive a limit on this Court's jurisdiction.)

vacatur, for on the City's theory, this Court was *required* to grant nationwide vacatur of the rule at issue, rendering the injunction's scope largely immaterial.

Indeed, nothing in text, history, or precedent suggests that Congress took the dramatic step of even *authorizing* nationwide relief in the APA. Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice," *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), which did not include universal relief, and this Court will "not lightly assume that Congress has intended to depart from established [equity] principles," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Nothing in the APA overcomes that presumption. To the contrary, Section 703, which governs the "form of proceeding for judicial review," contemplates "form[s] of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," that have long been limited to the parties. 5 U.S.C. § 703. Section 706, by contrast, "does not deal with remedial orders at all," but simply "directs the court not to decide [a case] in accordance with [an unlawful] agency action." John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, Yale J. on Reg. (Apr. 12, 2020), https://perma.cc/N7ZY-JXGR. And as noted, it certainly does not authorize a vacatur order that is nationwide rather than limited to the parties.

At an absolute minimum, the mistaken proposition that courts *may* vacate an agency action nationwide does not establish that they *must*. *See Hecht*, 321 U.S. at 328

(statute providing that injunction "shall be granted" permitted exercise of ordinary equitable discretion); 5 U.S.C. § 702(1) (providing that nothing in the APA's authorization of judicial review "affects … the power or duty of the court to … deny relief on any other … equitable ground"). No court of appeals has embraced that view, and this Court should not be the first, as the district court acted particularly reasonably in refusing to vacate the Rule nationwide given that the en banc Ninth Circuit had just *upheld* the Rule.

CONCLUSION

The district court's permanent injunction should be vacated in whole or at least as to its overbroad scope.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,468 words, according to the count of Microsoft Word.

s/ Jaynie Lilley
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