No. 20-454

In the Supreme Court of the United States

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
BRINTON LUCAS
Assistant to the Solicitor General
MICHAEL S. RAAB
JAYNIE LILLEY
JOSHUA DOS SANTOS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Title X of the Public Health Service Act, which authorizes federal funding for family planning services, provides 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. In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld a regulation that, among other things, prohibited recipients of Title X funds from making elective-abortion referrals in Title X clinics and also required them to maintain physical separation between those clinics and any abortion-related activities. This Court explained that those referral and separation provisions were authorized by statute, the product of reasoned decisionmaking, and consistent with the Constitution. Relying on that decision, the Department of Health and Human Services issued a final rule in 2019 that reinstated materially indistinguishable referral and separation provisions. The questions presented are as follows:

1. Whether the rule falls within the agency's statutory authority.

2. Whether the rule is the product of reasoned decisionmaking.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Diane M. Foley, M.D., in her official capacity as Deputy Assistant Secretary, Office of Population Affairs; and the Office of Population Affairs.

Respondent (plaintiff-appellee below) is the Mayor and City Council of Baltimore.

RELATED PROCEEDINGS

United States District Court (D. Md.):

Mayor & City Council of Baltimore v. *Azar*, No. 19-cv-1103 (May 30, 2019) (granting preliminary injunction)

Mayor & City Council of Baltimore v. *Azar*, No. 19-cv-1103 (Feb. 14, 2020) (granting permanent injunction)

Mayor & City Council of Baltimore v. *Azar*, No. 19-cv-1103 (Apr. 15, 2020) (denying motion to alter or amend the judgment)

United States Court of Appeals (4th Cir.):

Mayor & City Council of Baltimore v. *Azar*, No. 19-1614 (July 2, 2019) (panel decision staying preliminary injunction)

Mayor & City Council of Baltimore v. *Azar*, Nos. 19-1614 and 20-1215 (Sept. 3, 2020) (decision on hearing en banc)

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The Acting Solicitor General, on behalf of Alex M. Azar II, Secretary of Health and Human Services, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals affirming a permanent injunction (App., *infra*, 1a-132a) is not published in the Federal Reporter but is available at 2020 WL 5240442. An order of the court of appeals staying a preliminary injunction (App., *infra*, 226a-231a) is not published in the Federal Reporter but is reprinted at 778 Fed. Appx. 212. The opinion of the district court granting a permanent injunction (App., *infra*, 135a-177a) is reported at 439 F. Supp. 3d 591. The opinion of the district court granting a preliminary injunction

(App., *infra*, 180a-211a) is reported at 392 F. Supp. 3d 602. The opinion of the district court denying respondent's motion to alter or amend the judgment (App., *infra*, 213a-225a) is not published in the Federal Supplement but is available at 2020 WL 1873947.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 3, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 232a-249a.

STATEMENT

In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court upheld a regulation imposing various restrictions and requirements to enforce a statutory prohibition on using certain federal funds for family planning services "in programs where abortion is a method of family planning," 42 U.S.C. 300a-6. Relying on that precedent, the Department of Health and Human Services (HHS) reinstated a materially indistinguishable version of that regulation in 2019, and the en banc Ninth Circuit upheld it, *Becerra ex rel. California* v. *Azar*, 950 F.3d 1067 (2020), petition for cert. pending, No. 20-429 (filed Oct. 1, 2020). In this case, however, the district court preliminarily and then permanently enjoined the rule's enforcement within Maryland, App., *infra*, 133a-134a, 135a-177a, 178a-179a, 180a-211a, and then the court of appeals granted initial en banc review and affirmed, after a panel had stayed the preliminary injunction pending appeal, *id.* at 1a-132a.

A. Statutory And Regulatory Background

1. In 1970, Congress enacted Title X of the Public Health Service Act to create a limited grant program for certain types of family planning services. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1506-1508. The statute authorizes HHS to make grants to, 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." 42 U.S.C. 300(a). The statute also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." 42 U.S.C. 300a-4(a). Section 1008 of the statute commands, however, 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.

2. HHS's initial Title X regulations did not provide guidance on the scope of Section 1008. See 36 Fed. Reg. 18,465 (Sept. 15, 1971). Since 1972, however, the agency has construed the provision "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. 2922, 2923 (Feb. 2, 1988) (describing prior agency opinions).

Starting in the 1970s, HHS nevertheless permitted, and then, in guidelines issued in 1981, required, Title X recipients 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." 53 Fed. Reg. at 2923. The agency also allowed funding recipients to provide "Title X family planning services and separately funded, abortion-related activities" at "a single site." *Id.* at 2924.

3. In 1988, HHS changed course. The agency issued a final rule prohibiting Title X providers from providing referrals for, or counseling about, abortion as a method of family planning, even upon a patient's specific request. 53 Fed. Reg. at 2945. Instead, providers were required 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." *Ibid.* And to prevent evasion of the abortion-referral prohibition, the 1988 rule barred providers from using this list (or any other referrals) "as an indirect means of encouraging or promoting abortion," such as by "'steering' clients to providers who offer abortion as a method of family planning." *Ibid.* The 1988 rule also required that grantees keep their Title X projects "physically and financially separate" from all prohibited abortion-related activities. *Ibid.*

In *Rust*, this Court upheld the 1988 rule's prohibition on abortion referrals and counseling as well as its requirement of physical separation. 500 U.S. at 183-203. As this Court explained, HHS's primary conclusion—that a Title X program which provides referrals for, or counseling about, abortion as a method of family planning is in fact one "'where abortion is a method of family planning'"—was at least a "permissible construction" of Section 1008. *Id.* at 184, 187 (citation omitted); see 53 Fed. Reg. at 2923, 2933. And even if the 1988 rule "represent[ed] a sharp break from the Secretary's prior construction" of Section 1008, the Court observed, he

had "amply justified his change of interpretation with a 'reasoned analysis,'" by, among other things, concluding "that the new regulations are more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 186-187 (citation omitted). This Court likewise held that the physical-separation requirement was "based on a permissible construction of the statute," and that HHS had made a "reasoned determination" that this requirement was "necessary to implement" Section 1008. *Id.* at 188, 190. It also rejected arguments that the 1988 rule contravened the First and Fifth Amendments, drawing a clear distinction between impeding abortion and declining to subsidize it. See *id.* at 192-203.

4. In 1993, President Clinton and HHS suspended the 1988 rule and the 1981 guidelines went back into effect. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). HHS then finalized a new rule in 2000, which, like the 1981 guidelines, required Title X clinics to offer and provide upon request "information and counseling regarding" (i) "[p]renatal care and delivery," (ii) "[i]nfant care, foster care, or adoption," and (iii) "[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. See *id.* at 41,275-41,276.

5. In 2019, HHS reversed course again. Following notice and comment, the agency issued a final rule with referral and physical-separation provisions materially indistinguishable from those upheld in *Rust*. 84 Fed. Reg. 7714 (Mar. 4, 2019); 42 C.F.R. 59.1-59.19. Like its 1988 predecessor, the rule prohibits Title X projects from providing referrals for abortion as a method of family planning. 84 Fed. Reg. at 7788-7789 (42 C.F.R.

59.14(a)). As HHS explained, "[i]f a Title X project refers for * * * 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." *Id.* at 7759. To prevent evasion of this prohibition, the rule, like its 1988 predecessor, prohibits implicit abortion referrals by imposing restrictions on the list of providers that may be given in conjunction with a required referral for prenatal care for pregnant women. See *id.* at 7789 (42 C.F.R. 59.14(b)(1) and (c)(2)). For example, Title X clinics may not "identify which providers on the list perform abortion." *Ibid.* (42 C.F.R. 59.14(c)(2)). If a pregnant client "requests information on abortion and asks the Title X project to refer her for an abortion," the rule, like its 1988 predecessor, explains that a provider may "tell[] her that the project does not consider abortion a method of family planning and, therefore, does not refer for abortion." *Ibid.* (42 C.F.R. 59.14(e)(5)). And because Section 1008 addresses abortion only "as a method of family planning," the rule, like its 1988 predecessor, not only permits, but requires, referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Ibid.* (42 C.F.R. 59.14(c)(2) and (e)(2)).

The rule is more permissive, in fact, than its 1988 predecessor, as it allows, but does not require, "nondirective pregnancy counseling, which may discuss abortion," 84 Fed. Reg. at 7789 (42 C.F.R. 59.14(e)(5)); see *ibid.* (42 C.F.R. 59.14(b)(1)(i)), so long as such counseling does not "promote" abortion as a method of family planning, *id.* at 7788 (42 C.F.R. 59.14(a)); see *id.* at 7745-7746. In the agency's view, such limited 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 Section 1008. *Id.* at 7745.

Also like its 1988 predecessor, the rule requires that Title X clinics remain physically separate from any abortion-related activities. 84 Fed. Reg. at 7789 (42 C.F.R. 59.15). As HHS 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." *Id.* at 7766. To give Title X recipients "time to make arrangements," however, HHS gave them a "transition period"—a year from the rule's publication date—to comply with the physical-separation requirement, during which they could consult with the agency about compliance and implement any necessary changes. *Id.* at 7766-7767.

In HHS's view, the referral and physical-separation provisions represent "the best reading" of Section 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." 84 Fed. Reg. at 7777; see, *e.g.*, *id.* at 7765 (explaining that the physical-separation requirement will "help assure fidelity to the text and purpose of section 1008"). Accordingly, after considering and addressing significant comments about the rule's alleged effects, see *id.* at 7722-7783, HHS ultimately concluded that "compliance with statutory program integrity provisions is of greater importance" than "cost," *id.* at 7783.

B. Procedural History

1. The Mayor and City Council of Baltimore (Baltimore) challenged the rule under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* See App., *infra*, 181a-182a. At Baltimore's request, the

district court issued a preliminary injunction preventing enforcement of the entire rule within Maryland based on its conclusion that the referral provisions were likely unlawful. *Id.* at 183a; see *id.* at 203a-205a. Although the court acknowledged that these provisions were "essentially a reversion" to those upheld in *Rust*, it concluded that HHS could not reinstate them in light of "later-enacted laws." *Id.* at 189a, 198a.

Specifically, the district court concluded that the referral provisions contravened (1) an appropriations rider providing that, within the Title X program, "all pregnancy counseling shall be nondirective," Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 117, 133 Stat. 2558; see App., *infra*, 202a; and (2) Section 1554 of the Patient Protection and Affordable Care Act (ACA), which prohibits HHS from adopting a regulation that, among other things, "interferes with communications regarding a full range of treatment options between the patient and the provider," restricts "full disclosure of all relevant information to patients making health care decisions," "creates any unreasonable barriers" to obtaining "appropriate medical care," or "impedes timely access to health care services." Pub. L. No. 111-148, § 1554, 124 Stat. 259 (42 U.S.C. 18114); see App., *infra*, 200a.

The government appealed. A divided panel of the court of appeals stayed the preliminary injunction and later heard oral argument on the merits. See App., *infra*, 19a-20a, 226a-231a.

2. While the preliminary-injunction appeal was pending, however, the district court entered a permanent injunction on the different theory that the referral provisions and physical-separation requirement were arbi-

trary and capricious. App., *infra*, 133a-134a. Specifically, the court concluded that HHS had failed to adequately address comments alleging that (1) the referral provisions contravened medical ethics; (2) the rule would disrupt reliance interests; and (3) the likely costs of complying with the physical-separation requirement during the transition period were higher than the agency's estimate. *Id.* at 153a-163a. The court again limited its relief to Title X recipients in Maryland, *id.* at 163a-164a, and denied a subsequent motion to expand relief nationwide, *id.* at 213a-225a.

3. The government again appealed. The court of appeals consolidated the new appeal with the preliminary-injunction appeal, granted initial hearing en banc on both, and affirmed the permanent injunction by a 9-6 vote. App., *infra*, 1a-132a.

a. The en banc majority agreed with the district court that the rule's abortion-referral prohibition was contrary to law. App., *infra*, 39a-58a. In the majority's view, that prohibition, when combined with the rule's prenatal-referral requirement, violated the appropriations rider requiring that Title X pregnancy counseling be "'nondirective'" because, in the context of a patient who "has requested" an abortion referral, that treatment of referrals was not "neutral" between abortion and childbirth. *Id.* at 47a; see *id.* at 40a-41a. The majority further deemed the referral prohibition to violate Section 1554 on the theory that it "'interferes with communications'" between providers and patients; prevents "'full disclosure of all relevant information'"; and "creates 'unreasonable barriers,'" and "'impedes timely access,'" to healthcare. *Id.* at 51a (citations omitted).

The majority also concluded that the rule was arbitrary and capricious for two reasons. App., *infra*, 25a-

39a. First, it held that HHS had not offered a "satisfactory explanation for disagreeing with every major medical organization" over whether the referral prohibition requires providers to violate medical ethics. *Id.* at 26a; see *id.* at 25a-35a. Second, it ruled that HHS had given a "conclusory response" to comments claiming that the likely costs of coming into compliance with the physical-separation requirement during the transition period exceeded the agency's estimate. *Id.* at 36a (citation omitted); see *id.* at 36a-39a.

b. Judge Diaz concurred in the judgment. App., *infra*, 69a. He would have affirmed solely on the ground that the rule contravenes the appropriations rider and Section 1554. *Ibid.*

c. Judge Wilkinson dissented. App., *infra*, 70a-72a. He observed that "[b]efore us is a milder version of a rule that the Supreme Court has already upheld," and he therefore could not "understand why the result here, out of simple respect for our highest Tribunal, would not be open and shut." *Id.* at 71a. In ruling otherwise, he noted, the majority had "snubbed" the "agency, Congress, and not incidentally, the Supreme Court[]." *Ibid.*

d. Judge Richardson, joined by Judges Wilkinson, Niemeyer, Agee, Quattlebaum, and Rushing, also dissented. App., *infra*, 73a-132a. He stressed that the majority had "thumb[ed] its nose at the Supreme Court," "rip[ped] open a circuit split," and abandoned "the limited role of courts, particularly inferior ones, in our constitutional structure." *Id.* at 75a. As he explained, the appropriations rider, which "applies only to 'counseling,'" had no bearing on HHS's "*referral* regulations." *Id.* at 91a-92a (citation omitted). And so too for Section 1554, which concerns only "affirmative interference rather than a decision not to offer a subsidy." *Id.* at 109a.

Judge Richardson further explained why HHS's rule was the product of reasoned decisionmaking. App., *infra*, 114a-131a. He noted that, "[a]s in *Rust*, the agency determined that the better interpretation of § 1008's prohibition" warranted the referral and physical-separation provisions, and observed that "an agency may justify its policy choices by explaining why those choices best comply with the statutory mandate." *Id.* at 117a. Moreover, he demonstrated at length how the majority's conclusion that the rule was arbitrary and capricious had simply "disregard[ed] inconvenient agency analysis." *Id.* at 119a; see *id.* at 114a-129a.

REASONS FOR GRANTING THE PETITION

The rule's abortion-referral prohibition and physical-separation requirement are materially indistinguishable from their 1988 counterparts upheld in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), and were adopted for the same reasons. The en banc Fourth Circuit nevertheless held that HHS acted unlawfully in adopting them. That remarkable conclusion warrants this Court's review because it is plainly incorrect and defies *Rust*, creates a square conflict with the contrary conclusion of the en banc Ninth Circuit, and requires HHS to allow federal funds to be used to promote abortion in contravention of an Act of Congress.

The majority's determination that Congress implicitly abrogated this Court's decision in *Rust* through an appropriations rider and an ancillary ACA provision cannot be squared with the text of those statutes or ordinary interpretive principles. The refusal of a Title X provider to refer a pregnant patient for an abortion, for instance, does not counsel, let alone direct, her to do anything; it simply declines to facilitate an abortion with taxpayer dollars, consistent with the best reading of

Section 1008. Nor does a prohibition on abortion referrals in the Title X program erect an obstacle to timely healthcare or interfere with provider-patient communications. Rather, it simply refuses to subsidize certain types of such activity, which is inherent in a federal grant program of limited scope.

The majority likewise erred in holding that HHS acted arbitrarily by doing what this Court has already declared reasonable. As in 1988, the agency concluded that the referral and physical-separation provisions reflected the best interpretation of Section 1008 and should be adopted for that reason alone. And HHS went on to consider and address comments raising concerns about medical ethics and compliance costs, even though it ultimately concluded that compliance with the statute was more important than any costs Title X recipients might incur to continue obtaining federal funding. That was more than sufficient to satisfy the APA.

I. THE DECISION BELOW IS INCORRECT

A. The Rule Falls Within HHS's Statutory Authority

The court of appeals did not contest HHS's conclusion that if a program refers patients for (or otherwise promotes) abortion as a method of family planning, then that program is, by definition, one "where abortion is a method of family planning." 84 Fed. Reg. at 7759. That is by far the better reading of Section 1008, and the en banc majority never offered an alternative. Instead, it concluded that Congress divested HHS of its authority to prohibit abortion referrals through an appropriations rider and an ancillary ACA provision. But properly construed, neither of those laws conflicts with the agency's pre-existing Title X authority, much less does so with the requisite clarity to accomplish an implied repeal.

1. Since 1996, Congress has attached a rider to every HHS appropriations bill providing both that Title X funds "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Further Consolidated Appropriations Act, 2020, § 117, 133 Stat. 2558; accord Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-221. Nothing in the latter clause abolishes HHS's authority to reinstate the prohibition on abortion referrals that this Court upheld in *Rust*.

a. To begin, a Title X provider's refusal to refer a patient for an abortion does not *direct* her to do anything. Because the Title X "program does not provide postconception medical care," a provider'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," *Rust*, 500 U.S. at 200—much less direct her to refrain from getting an abortion. Indeed, providers are "always free" to respond to a client's request by explaining that referrals for abortion are "simply beyond the scope of the program"; "[n]othing" in the rule "requires a doctor to represent as his own any opinion that he does not in fact hold." *Ibid.* If a pregnant woman asks a Title X provider "to refer her for an abortion," the rule, like its 1988 predecessor, permits the provider to explain that "the project does not consider abortion a method of family planning and, therefore, does not refer for abortion." 84 Fed. Reg. at 7789 (42 C.F.R. 59.14(e)(5)). Given that background, no reasonable patient could treat a Title X provider's refusal to refer her for an abortion as an implicit direction not to obtain one.

The en banc majority concluded that the referral prohibition nevertheless was directive because the

current rule, like its 1988 predecessor, *also* requires that pregnant patients be referred for prenatal care. See App., *infra*, 40a-41a; cf. *Rust*, 500 U.S. at 192-193 (rejecting similar viewpoint-discrimination argument that combined the referral prohibition and prenatal-referral requirements). But the existence of that separate requirement does not somehow render *directive* the mere prohibition on abortion referrals—especially since HHS provided that the rule's various provisions are severable, see 84 Fed. Reg. at 7725. In any event, a prenatal-care referral likewise does not "direct" a patient to forgo obtaining an abortion—such care is necessary for the health of the patient *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 *Becerra ex rel. California* v. *Azar*, 950 F.3d 1067, 1089 (9th Cir. 2020) (en banc), petition for cert. pending, No. 20-429 (filed Oct. 1, 2020); 84 Fed. Reg. at 7748, 7761-7762. By contrast, when HHS wants to direct referrals for "[p]renatal care *and delivery*," it knows how to do so, as the 2000 rule confirms. 65 Fed. Reg. at 41,279 (emphasis added).

At bottom, the majority appeared to assume that in requiring that pregnancy counseling be "nondirective," Congress mandated that abortion be treated the same as childbirth or adoption. See App., *infra*, 43a-44a, 47a. But the neutral presentation of information about options aside from abortion is not *directing* a woman to choose one of those options. Had Congress wanted Title X providers to treat abortion, childbirth, and adoption on an "equal basis," it knew how to say so explicitly. In 2000, Congress enacted legislation directing HHS to fund the training of staff of various health centers, in-

cluding Title X clinics, "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." 42 U.S.C. 254c-6(a)(1) (emphasis added). Indeed, if the rider already required "the presentation of all options on an equal basis," such training would have been "unnecessary," as "the staff would have already been required to do so." *Becerra*, 950 F.3d at 1091.

b. In any event, the "nondirective" requirement for "counseling" does not extend to *referrals*. Both in the Title X program and more generally, the two activities are distinct—"counseling involves an exchange of information and discussion of options," which is not the same as referring "a patient to an appropriate specialist to pursue her chosen next steps." App., *infra*, 95a (Richardson, J., dissenting); see *id.* at 92a-96a (collecting dictionaries and HHS materials); *Becerra*, 950 F.3d at 1085-1086 (similar).

Again, when Congress wants to regulate both "counseling" and "referrals" in this area, it knows how to do so. 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."); see also App., *infra*, 96a-97a (Richardson, J., dissenting) (collecting statutes). Notably, when Congress tried to abrogate *Rust* in 1991, it passed a bill, vetoed by President Bush, that would have required Title X recipients to provide "nondirective counseling, and referral" concerning specific options upon request, including "pregnancy termination," S. 323, 102d Cong., 1st Sess. § 2 (1991); see App., *infra*, 12a. HHS's 2000 rule and 1981 guidelines used a similar formulation: Title X projects were required to offer "nondirective counseling on each

of the options"—including "[p]regnancy termination"—"and referral upon request." 65 Fed. Reg. at 41,279; see Pet. App. at 71a, *Rust*, *supra* (No. 89-1391).

The en banc majority dismissed this distinction based on its observation that referrals may be given "during" (or "as part of") nondirective counseling. App., *infra*, 42a (citations and emphases omitted); see *id.* at 42a-43a. But the fact that referrals "may occur at the same time as counseling" does not mean they are "a type of counseling" covered by the rider itself. *Becerra*, 950 F.3d at 1087.

2. The en banc majority fared no better in concluding that Section 1554 of the ACA divested HHS of its authority to prohibit abortion referrals within the Title X program. Captioned "Access to therapies" and located in the ACA's "Miscellaneous Provisions" subchapter, Section 1554 provides: "Notwithstanding any other provision of this Act," HHS "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." ACA § 1554, 124 Stat. 258, 259 (42 U.S.C. 18114) (capitalization altered; emphasis omitted).

Nothing about a prohibition on abortion referrals within the Title X program "creates any unreasonable

barriers," "impedes timely access," "interferes with communications," or otherwise violates Section 1554—which explains why that statutory provision was "never mentioned in any of the half-million public comments offered during the rulemaking," App., *infra*, 104a-105a (Richardson, J., dissenting). Rather, the referral prohibition merely limits what activities HHS funds. See *Becerra*, 950 F.3d at 1094. If HHS expressly prohibited Title X providers from giving referrals in areas outside the context of family planning (such as their recommended orthopedists) or for services the government may not wish to promote (such as nearby medical-marijuana dispensaries), for example, no one could reasonably think that these limitations contravened the ACA.

In concluding otherwise, the majority "repackage[d] constitutional assertions" that this Court "rejected in *Rust*." App., *infra*, 112a (Richardson, J., dissenting). As this Court explained in upholding the 1988 rule, HHS's prohibition on abortion referrals within the Title X program "'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 if the Government had not enacted Title X." *Rust*, 500 U.S. at 201-202 (citation omitted). Likewise, that prohibition does "not significantly impinge upon the doctor-patient relationship," as "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." *Id.* at 200, 203.

Although the majority dismissed this analysis as limited to constitutional claims, App., *infra*, 52a-53a, that "distinction—based on only the source of challenge—misses the logical point," *id.* at 113a (Richardson, J.,

dissenting). If the refusal to fund abortion referrals "does not burden or interfere with a client's health care at all, then it does not matter whether the client's health care rights were created by the Constitution or a statute." *Becerra*, 950 F.3d at 1094 (citation omitted).

In conflating affirmative regulation with failure to subsidize, the majority transformed an ancillary ACA provision into a far-reaching mandate threatening to obliterate traditional limits on government healthcare spending. For example, if, as the majority concluded, a refusal to fund abortion *referrals* "creates 'unreasonable barriers' to 'appropriate medical care,' and 'impedes timely access' to health care services," in light of "the time-sensitive nature of pregnancy," App., *infra*, 51a (citation omitted), then Section 1554 would presumably deprive HHS of any independent regulatory authority to decline to fund abortions (or any other medical procedures) *themselves*. But "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,'" *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626-1627 (2018) (citation omitted), and there is no basis to conclude that it tucked away such a sweeping mandate overriding HHS's extant statutory authority in the mousehole of a "miscellaneous provision[]" in the ACA, 124 Stat. 258 (capitalization and emphasis omitted).

3. At a minimum, the en banc majority's construction of the appropriations rider and Section 1554 would conflict with "the 'strong presumption' that repeals by implication are 'disfavored.'" *Epic Sys. Corp.*, 138 S. Ct. at 1624 (brackets and citation omitted); see *Becerra*, 950 F.3d at 1084-1085. That presumption, which "is 'especially' strong 'in the appropriations context,'" *Maine Cmty. Health Options* v. *United States*, 140 S. Ct. 1308,

1323 (2020) (citation omitted), disposes of the implausible theory that, through the 1996 appropriations rider, Congress implicitly abrogated *Rust* and divested HHS of its authority to prohibit abortion referrals—let alone after Congress had tried and failed to do so explicitly, and while simultaneously directing that Title X funds "shall not be expended for abortions." See p. 15, *supra*.

The presumption likewise forecloses the remarkable theory that a miscellaneous ACA provision stripped HHS of its authority to maintain limitations on government healthcare spending in a variety of contexts. See p. 18, *supra*. That is particularly true given that Section 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. 18114 (emphasis added), signaling that Section 1554 may implicitly displace otherwise-applicable provisions *in the ACA*. By contrast, when Congress wanted to indicate that an ACA provision could implicitly repeal pre-existing statutory provisions like Section 1008, it used the phrase "[n]otwithstanding any other provision of law." *E.g.*, 42 U.S.C. 18032(d)(3)(D)(i); see App., *infra*, 107a-108a (Richardson, J., dissenting).

The majority dismissed the presumption on the theory that it was considering whether the rule "is 'not in accordance with the law,' as the law now stands." App., *infra*, 48a (citation omitted). But that is merely another way of saying that by passing the rider in 1996 and the ACA in 2010, Congress stripped HHS of its delegated authority, recognized in *Rust*, to prohibit abortion referrals within the Title X program. And the legislative elimination of a statutory delegation of authority is by definition a repeal, whether that delegation is characterized as an explicit or an implicit one.

B. HHS Engaged In Reasoned Decisionmaking

The court of appeals further erred in holding that HHS's decision to reinstate the referral and physical-separation provisions upheld in *Rust* was arbitrary and capricious. The standard of review for arbitrary-and-capricious claims is "deferential" and "'narrow'"; courts are to "determine only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted). In conducting this limited 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, 513-514 (2009) (citations omitted). HHS's decision to adopt the same provisions upheld by this Court in *Rust*, for the same reasons, easily passes that test.

1. In ruling on Baltimore's arbitrary-and-capricious claim, the en banc majority did not take issue with HHS's judgment that the abortion-referral prohibition and physical-separation requirement reflected the best reading of Section 1008 and that compliance with that reading was more important than the asserted costs that might follow. See p. 7, *supra*. Instead, it faulted HHS for inadequately responding to comments alleging that the abortion-referral prohibition contravened medical ethics and that the costs of compliance with the physical-separation requirement could prove significant. See App., *infra*, 25a-39a. But if, as the majority did not contest, HHS reasonably concluded that the challenged provisions represented the best reading of Congress's command and that fidelity to that directive

was more important than the practical effects, those objections are beside the point.

When a statute requires an agency to take a particular approach, it must do so on that basis alone. See *Michigan* v. *EPA*, 576 U.S. 743, 755-756 (2015). 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) (citation omitted). So even if Section 1008 does not *compel* a prohibition on referrals for abortions within the Title X program, for example, HHS was entitled to conclude that such a restriction was the *best* reading of Section 1008 and adopt that interpretation for this reason alone. It cannot be arbitrary and capricious for an agency to decline to adopt a *worse* reading of an ambiguous statute merely because the better reading of the text comes with practical costs. If the agency properly concludes that Congress already made the judgment by using certain words, it is entitled to follow Congress's lead, even if that interpretation is not the only permissible one. At the very least, the choice between fidelity to the best textual reading and practical consequences involves the sort of "value-laden decisionmaking and the weighing of incommensurables" entrusted to accountable agencies. *Department of Commerce*, 139 S. Ct. at 2571.

In *Rust*, this Court applied that sensible approach in this very context. It held that HHS's conclusion that materially indistinguishable provisions were "more in keeping with the original intent of the statute" was "sufficient to support the Secretary's revised approach," notwithstanding this Court's conclusion that Section 1008 was "ambiguous." *Rust*, 500 U.S. at 187. And it so

held despite arguments, like the ones presented here, (1) that the abortion-referral prohibition was inconsistent with a physician's "ethical dut[y]" to provide "referral for all medical alternatives," Pet. Br. at 21 & n.33, *Rust*, *supra* (No. 89-1391); and (2) that HHS had "offered no rebuttal to the comments suggesting that costs" associated with the physical-separation requirement "would be significant and even prohibitive," Pet. Br. at 31, *New York* v. *Sullivan*, No. 89-1392 (July 27, 1990). This Court felt no need to expressly engage with those claims in holding that "the Secretary amply justified his change of interpretation with a 'reasoned analysis,'" *Rust*, 500 U.S. at 187 (citation omitted), which strongly suggests, if not dictates, that the various considerations the en banc majority invoked should be immaterial to the arbitrary-and-capricious inquiry here.

2. In any event, HHS both acknowledged and responded to comments concerning medical ethics and compliance costs. See, *e.g.*, 84 Fed. Reg. at 7724, 7748, 7766-7777, 7781-7782. The en banc majority did not contest that fact; rather, it concluded that HHS's explanation on both counts was not "satisfactory." App., *infra*, 26a; see *id.* at 35a-39a. But the agency's discussion was, if anything, more thorough than the analysis this Court found sufficient in *Rust*, and the majority failed to justify reaching a different conclusion now.

a. i. HHS's discussion of medical ethics easily satisfies the APA's requirements. The agency acknowledged that "[m]any commenters" had asserted that a prohibition on abortion referral "would directly conflict with the requirements or codes of ethics of medical professional associations." 84 Fed. Reg. at 7745. For example, these associations maintained "that patients should receive full and accurate information," and that

the *Code of Medical Ethics* of the American Medical Association (AMA) provides that "'withholding information without [the] patient's knowledge or consent is ethically unacceptable.'" *Ibid.*

HHS agreed with the commenters that "[i]n general, medical ethics obligations require the medical professional to share full and accurate information with the patient," but it explained why the rule "adequately accommodates" those "ethical obligations." 84 Fed. Reg. at 7724. Under the rule, Title X providers could offer "nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion." *Ibid.* They could "discuss the risks and side effects of each option." *Ibid.* They could ensure that clients may "ask questions and * * * have those questions answered by a medical professional." *Ibid.* And they could—indeed, had to—"refer for medical emergencies." *Ibid.* The only thing they could not do was use federal funds to "refer[] for abortion as a method of family planning." *Ibid.* But as HHS observed, that modest restriction was "not inconsistent" with "medical ethics" for several reasons. *Id.* at 7748.

First, HHS explained that the referral prohibition was merely "a matter of Congress's choice of what activities it will fund, not about what all clinics or medical professionals may or must do outside the context of the federally funded project." 84 Fed. Reg. at 7748. Or as this Court put it in *Rust*, whatever might be expected from a doctor in private practice, "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," much less a referral for an abortion specifically. 500 U.S. at 200. Again, had HHS prohibited Title

X providers from giving referrals to their recommended orthopedists or to local medical-marijuana dispensaries, no one could reasonably think that complying with these limitations would put their medical licenses in jeopardy. Likewise, given that these providers remain free to inform their patients "that the project does not consider abortion a method of family planning and, therefore, does not refer for abortion," 84 Fed. Reg. at 7789 (42 C.F.R. 59.14(e)(5)), it is difficult to see how they could violate the AMA's *Code of Medical Ethics*, which proscribes only "'withholding information without [the] patient's *knowledge or* consent,'" *id.* at 7745 (emphasis added).

Second, HHS observed, "[f]ederal and [s]tate conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions." 84 Fed. Reg. at 7748; see also *id.* at 7716, 7746-7747 (discussing statutes). This reveals that Congress and state legislatures—as well as the providers who rely on these laws—believe that declining to provide an abortion referral is consistent with medical ethics. See *id.* at 7748; see also *id.* at 7744-7745, 7780-7781 (discussing providers with conscience objections to abortion referrals). HHS made the same point in adopting the 1988 rule. See 53 Fed. Reg. at 2932 (explaining that "'conscience'" laws make it "apparent that there is no absolute ethical imperative upon physicians to counsel or refer for abortion").

Third, HHS observed that in *Rust*, this Court upheld a prohibition "on both referral for, and counseling about, abortion in the Title X program." 84 Fed. Reg. at 7748. As the agency explained, it was unlikely that this Court would have "upheld a rule that required the violation of medical ethics." *Ibid.*

ii. The en banc majority failed to explain why this analysis was insufficient. It did not even address HHS's reliance on the limited nature of the Title X program. And insofar as it engaged with the agency's reasoning, it failed to demonstrate any defect. The majority dismissed HHS's reliance on the conscience laws, for example, based on a distinction between "[a]llowing" physicians to refuse to provide abortion referrals and "*prohibiting*" them from providing such referrals. App., *infra*, 32a. But allowing a doctor *to unilaterally choose* not to refer for abortion is incompatible with the existence of an ethical duty to provide such referrals—indeed, it follows that he breaches no ethical duty by complying with *a legal duty* not to provide them, especially one imposed as a condition of federal funding.

The majority relatedly suggested that conscience statutes only concern cases "[w]here conscience implores physicians to deviate from standard practices," App., *infra*, 33a (citation omitted), but that ignores that various conscience statutes protect refusals to refer for abortion even when the provider has no religious or moral objection to the practice whatsoever, see, *e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Tit. V, § 507(d)(1), 132 Stat. 3118 (Weldon Amendment). Indeed, Maryland's conscience statute allows providers to "refus[e]" to "refer" for an abortion for any reason unless the refusal would result in death or serious injury or otherwise be "contrary to the standards of medical care," Md. Code Ann., Health-General II § 20-214(a)(2) and (d)(2) (LexisNexis 2019), indicating that Baltimore's own State has concluded that "declin-

ing to refer for a non-emergency abortion does not inherently violate the standards of medical care," App., *infra*, 122a n.27 (Richardson, J., dissenting).

Likewise, the majority dismissed HHS's reliance on *Rust* on the theory that because this Court was considering an alleged "First Amendment violation," its decision "did not purport to speak to medical ethics." App., *infra*, 29a. But the *reason* the majority gave for why the current referral prohibition violates medical ethics is that it "*prohibits* physicians from sharing full and accurate information," *id.* at 28a, and that was the same objection presented and rejected in *Rust*. Faced with the argument that "the ethical responsibilities of the medical profession demand" that Title X providers give their patients "the full range of information and options regarding their health and reproductive freedom," including "abortion," *Rust*, 500 U.S. at 213-214 (Blackmun, J., dissenting), this Court held that a prohibition on abortion referrals (and even on abortion counseling) did not "significantly impinge upon the doctor-patient relationship" because the limited nature of the Title X program does not "justify an expectation on the part of the patient of comprehensive medical advice," *id.* at 200 (majority opinion). It is immaterial that this rejection of the same argument occurred in a constitutional analysis.

iii. Ultimately, the en banc majority placed significant weight on the assertion that "every major medical organization in the country" found the referral prohibition contrary to medical ethics. App., *infra*, 30a. But even accepting that characterization, it would not subject the agency to a less deferential form of review under the APA, as the majority suggested. See *ibid.* (concluding that HHS "cannot easily brush off" the evidence from

"the medical community"). Given that the Secretary's "policymaking discretion" permits him to disagree with "technocratic expertise" even within the agency, *Department of Commerce*, 139 S. Ct. at 2571, he certainly may reject the views of "outside commenters," *Becerra*, 950 F.3d at 1100 n.31. And contrary to the majority's suggestion, he needs no "special justification" for doing so. *Department of Commerce*, 139 S. Ct. at 2571; cf. *Gonzales* v. *Carhart*, 550 U.S. 124, 166 (2007) (explaining that courts cannot "strike down legitimate abortion regulations" simply because "some part of the medical community [is] disinclined to follow" them).

If anything, HHS's disagreement with outside commenters was particularly justified here. Unlike state authorities, these professional organizations have no regulatory power over medical ethics. And the majority identified no provider (much less one participating in a federally funded family planning program) who has ever been disciplined by any entity with authority over medical ethics for failing to provide an abortion referral upon request—not under the 1988 rule, not since HHS began enforcing the current referral prohibition in July 2019, and not in any other context. Such discipline would be quite surprising given that the majority of States (and the federal government) prohibit abortion referrals (or even abortion counseling) in various publicly funded programs, see Gov't Supp. C.A. Br. 34 n.7, while still others, Maryland included, permit medical providers to refuse to do so, see pp. 24-26, *supra*. Consistent with that background, the majority of incumbent Title X providers, including nearly 30 state health departments, have remained in the program without any apparent ethical sanction since the referral prohibition began being enforced last July, indicating that neither

those providers nor their state regulators believe that compliance with the rule is unethical. See HHS, Office of Population Affairs, *Title X Family Planning Directory* (Sept. 2020), https://go.usa.gov/xGFVn; HHS, *HHS Issues Supplemental Grant Awards to Title X Recipients* (Sept. 30, 2019), https://go.usa.gov/xvDEU.

b. The en banc majority was no more persuasive in concluding that HHS had given a "conclusory response" to comments asserting that the likely costs of complying with the separation requirement during the transition period exceeded the agency's estimate of $30,000. App., *infra*, 36a (citation omitted). To start, even when Congress requires an agency to consider "cost of compliance," it need not "conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Michigan*, 576 U.S. at 759. Rather, unless Congress specifies otherwise, "[i]t will be up to the Agency to decide * * * how to account for cost." *Ibid.* In adopting the 1988 rule, for example, HHS declined to make any concrete estimate of the costs of compliance with the physical-separation requirement. See 53 Fed. Reg. at 2940. The majority offered no justification for why HHS should be punished for attempting to give a rough estimate of those costs this time around while ultimately concluding that "compliance with statutory program integrity provisions is of greater importance," 84 Fed. Reg. at 7783.

In any event, nothing about that rough estimate was "conclusory." App., *infra*, 36a (citation omitted). HHS acknowledged that commenters had criticized it for "underestimat[ing] the costs related to the new physical separation requirements." 84 Fed. Reg. at 7781. But the agency declined to adopt their "extremely high cost estimates based on assumptions that they would have to

build new facilities." *Ibid.* As HHS explained, it did not expect that Title X recipients would "necessarily engage in construction of new facilities to comply with the new requirements." *Ibid.* Instead, the agency predicted, those entities would "usually choose the lowest cost method to come into compliance." *Ibid.* For example, "Title X providers which operate multiple physically separated facilities and perform abortions may shift their abortion services * * * to distinct facilities, a change which likely entails only minor costs." *Ibid.*

Having rejected the assumption underlying the commenters' estimates, HHS acknowledged the difficulty in estimating average compliance costs. It observed that the commenters "themselves did not provide sufficient data to estimate these effects across the Title X program," and that "there is substantial uncertainty regarding the magnitude of these effects." 84 Fed. Reg. at 7781. That was particularly true because these costs were likely to "vary across covered entities depending on their circumstances." *Ibid.* For example, a Title X clinic in "a hospital that also performs some abortions" would be less likely to violate the physical-separation requirement than "a free-standing clinic," as "it is highly unlikely that a Title X clinic and abortion facilities would be collocated within a hospital." *Id.* at 7767. Accordingly, HHS explained that compliance would be assessed on a case-by-case basis, and it would work with providers to find solutions to satisfy the physical-separation requirement. See *id.* at 7766, 7767, 7781.

The agency nevertheless "updated quantitative estimates in response to these comments" from "an averaged estimate between $10,000 and $30,000 in the proposed rule" to an "average of between $20,000 and $40,000, with a central estimate of $30,000." 84 Fed.

Reg. at 7781-7782. In doing so, however, HHS emphasized that the physical-separation requirement should "have minimal effect on the majority of current Title X providers." *Id.* at 7781. As it explained, a report from the Congressional Research Service indicated that only around 10% of Title X clinics offer abortion as a method of family planning. *Ibid.* And even accounting for other Title X providers who share resources with unaffiliated entities offering that procedure, HHS estimated that only between 10% and 30% of all Title X clinics, with a central estimate of 20%, would be subject to the physical-separation requirement at all. *Ibid.*

The majority concluded that the commenters were entitled to "more explanation" for why their high-cost estimates were rejected, and criticized HHS for "blindly assuming" that lower-cost methods were available. App., *infra*, 38a n.16, 39a. But the APA provides no basis for elevating the assertions of grant recipients over the predictions of an expert agency. To the contrary, "even in the absence of evidence," an "agency's predictive judgment * * * merits deference," *Fox*, 556 U.S. at 521, and the "pessimistic[] prediction[s]" of these commenters were "simply evidence for the Secretary to consider," *Department of Commerce*, 139 S. Ct. at 2571. By "penalizing" HHS "for departing from" commenters' estimates, the majority "substitut[ed] [its] judgment for that of the agency." *Ibid.*

The majority also criticized HHS's rough numerical estimates as unsubstantiated by "studies" or further justification. App., *infra*, 37a (citation omitted). But this demanded "a false precision that is not required by law." *Id.* at 128a (Richardson, J., dissenting). Indeed, the majority never explained what HHS should have

used to estimate compliance costs once it had determined that the commenters' high-cost estimates rested on incorrect assumptions.

II. THE DECISION BELOW WARRANTS FURTHER REVIEW

As discussed, the court of appeals' decision is irreconcilable with this Court's decision in *Rust*. As the dissenting judges forcefully explained, the majority "thumb[ed] its nose at [this] Court" by choosing to become "the first Circuit bold enough to skirt *Rust*." App., *infra*, 75a (Richardson, J.). At a bare minimum, this Court should have the last word on whether Congress implicitly abrogated *Rust* in an appropriations rider or an ancillary ACA provision.

In addition, the Fourth Circuit's decision squarely conflicts with the Ninth Circuit's decision in *Becerra*, *supra*, several times over. The latter court held that, in adopting the final rule, HHS (1) complied with the appropriations rider, 950 F.3d at 1085-1091; (2) acted consistently with Section 1554 of the ACA, *id.* at 1091-1095; (3) reasonably addressed comments contending that the rule violated medical ethics, *id.* at 1102-1103 & nn.34-36; and (4) reasonably responded to comments asserting that the agency's estimates of the costs of complying with the separation requirement were too low, *id.* at 1101 & n.32. Moreover, those issues are all important ones, as indicated by the fact that each court of appeals chose to hear these appeals en banc—indeed, before an appellate panel even had the opportunity to issue a decision on the merits.

The majority below did not deny that it had "rip[ped] open a circuit split" on multiple fronts. App., *infra*, 75a (Richardson, J., dissenting). Instead, it rejected the Ninth Circuit's analysis as "unpersuasive," *id.* at 33a,

and repeatedly embraced the reasoning of "the dissenting judges" in that case, *id.* at 41a; see *id.* at 39a, 46a. It also criticized the Ninth Circuit for resolving the merits of the arbitrary-and-capricious arguments because that court "did not have the full administrative record before it." *Id.* at 33a. But as the Ninth Circuit emphasized, all of the critical facts, including "all public comments," are publicly available. *Becerra*, 950 F.3d at 1083 n.11. And like the plaintiffs and dissenters in *Becerra*, the majority here did not "identify additional arguments that could [have been] made" to the Ninth Circuit "after submission of the full record." *Ibid.*

The majority also asserted that "the Ninth Circuit's discussion of medical ethics nowhere mentions the precise issue raised here: HHS's failure to justify or explain its conclusion that the Final Rule is consistent with medical ethics in the face of overwhelming contrary evidence." App., *infra*, 34a. That is incorrect. See *Becerra*, 950 F.3d at 1103 (holding that "HHS examined the relevant considerations arising from commenters citing medical ethics and rationally articulated an explanation for its conclusion"); *id.* at 1114 n.13 (Paez, J., dissenting) (contending that "[t]he majority is wrong to conclude" that HHS presented "a 'plausible explanation outlining its rationale for rejecting the evidence and reaching a different conclusion'" from "'the leading expert on medical ethics'") (citation omitted).

Finally, the effects of the decision below are significant. By forcing HHS to disburse taxpayer dollars in furtherance of a policy that it has determined violates the best reading of Section 1008, the injunction here undermines the government's weighty interest in avoiding the use of federal funds to promote or subsidize abortion. See, *e.g.*, *Rust*, 500 U.S. at 192-193. The injunction

also requires HHS to administer the Title X grant program under two different regulatory regimes: one for Maryland and one for the rest of the country. And because the conflicting decisions were issued by en banc courts, only this Court's review can correct that untenable situation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
BRINTON LUCAS
Assistant to the Solicitor General
MICHAEL S. RAAB
JAYNIE LILLEY
JOSHUA DOS SANTOS
Attorneys

OCTOBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 19-1614

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; DIANE FOLEY, M.D., IN HER OFFICIAL CAPACITY AS THE DEPUTY ASSISTANT SECRETARY, OFFICE OF POPULATION AFFAIRS; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; OFFICE OF POPULATION AFFAIRS, DEFENDANTS-APPELLANTS

OHIO; ALABAMA; ARKANSAS; INDIANA; KANSAS; LOUISIANA; NEBRASKA; OKLAHOMA; SOUTH CAROLINA; SOUTH DAKOTA; TENNESSEE; TEXAS; UTAH; WEST VIRGINIA, AMICI SUPPORTING APPELLANTS,

NEW YORK, NEW YORK CITY HEALTH + HOSPITALS AND 10 LOCAL GOVERNMENTS; NATIONAL HEALTH LAW PROGRAM; ADVOCATES FOR YOUTH; AMERICAN MEDICAL STUDENT ASSOCIATION; AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE; COMMUNITY CATALYST; THE ENDOCRINE SOCIETY; FAMILIES USA; IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA; JUVENILE LAW CENTER; THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS; NATIONAL COUNCIL OF JEWISH WOMEN; NARAL PRO-CHOICE AMERICA; NATIONAL ABORTION FEDERATION; NATIONAL IMMIGRATION LAW CENTER; NATIONAL INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL PARTNERSHIP

FOR WOMEN & FAMILIES; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S LAW CENTER; NORTHWEST HEALTH LAW ADVOCATES; POSITIVE WOMEN'S NETWORK-USA; POWER TO DECIDE; UNION FOR REFORM JUDAISM; CENTRAL CONFERENCE OF AMERICAN RABBIS; WOMEN OF REFORM JUDAISM; MEN OF REFORM JUDAISM; UNITE FOR REPRODUCTIVE & GENDER EQUITY; WHITMAN-WALKER HEALTH; WOMENHEART; YWCA OF THE USA; NATIONAL CENTER FOR LESBIAN RIGHTS; GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY; THE LGBT MOVEMENT ADVANCEMENT PROJECT; NATIONAL LGBTQ TASK FORCE; EQUALITY FEDERATION; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES; FAMILY EQUALITY COUNCIL; THE NATIONAL CENTER FOR TRANSGENDER EQUALITY; HIV MEDICINE ASSOCIATION; GLBTQ LEGAL ADVOCATES & DEFENDERS; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; THE HUMAN RIGHTS CAMPAIGN; TRANSGENDER LAW CENTER; BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM; THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW; NATIONAL CENTER FOR YOUTH LAW; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN MEDICAL ASSOCIATION; SOCIETY FOR ADOLESCENT HEALTH AND MEDICINE; SOCIETY FOR MATERNAL-FETAL MEDICINE; ZACHARY D. CLOPTON; AMANDA FROST; SUZETTE MALVEAUX; MILA SOHONI; ALAN TRAMMELL; CALIFORNIA; NEVADA; COLORADO; CONNECTICUT; DELAWARE; HAWAII; ILLINOIS; MAINE; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEW JERSEY; NEW MEXICO; NEW YORK; NORTH CAROLINA; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; VIRGINIA; WASHINGTON; DISTRICT OF COLUMBIA, AMICI SUPPORTING APPELLEE

No. 20-1215

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; DIANE FOLEY, M.D., IN HER OFFICIAL CAPACITY AS THE DEPUTY ASSISTANT SECRETARY, OFFICE OF POPULATION AFFAIRS; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; OFFICE OF POPULATION AFFAIRS, DEFENDANTS-APPELLANTS

KENTUCKY; ALABAMA; ARKANSAS; INDIANA; LOUISIANA; NEBRASKA; OHIO; OKLAHOMA; SOUTH CAROLINA; SOUTH DAKOTA; TENNESSEE; TEXAS; UTAH; WEST VIRGINIA, AMICI SUPPORTING APPELLANTS

AMERICAN MEDICAL ASSOCIATION; ZACHARY D. CLOPTON; AMANDA FROST; SUZETTE MALVEAUX; MILA SOHONI; ALAN TRAMMELL; CALIFORNIA; NEVADA; COLORADO; CONNECTICUT; DELAWARE; DISTRICT OF COLUMBIA; HAWAII; ILLINOIS; MAINE; MARYLAND; MASSACHUSETTS; MICHIGAN; MINNESOTA; NEW JERSEY; NEW YORK; NORTH CAROLINA; OREGON; PENNSYLVANIA; RHODE ISLAND; VERMONT; VIRGINIA; WASHINGTON; NEW MEXICO,
AMICI SUPPORTING APPELLEE

Argued: May 7, 2020
Decided: Sept. 3, 2020

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Richard D. Bennett, District Judge.
(1:19-cv-01103-RDB)

ON REHEARING EN BANC

Before: GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

THACKER, Circuit Judge:

In these consolidated appeals, we address the propriety of the district court's preliminary and permanent injunctions. These injunctions halt implementation of a Health and Human Services ("HHS") rule that, inter alia, prohibits physicians and other providers in Title X programs from referring patients for an abortion, even if that is the patient's wish. Instead, it requires them to refer the patient for prenatal care. *See Compliance With Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714-01 (March 4, 2019) (the "Final Rule"). The Final Rule also requires entities receiving Title X funds, but offering abortion-related services pursuant to another source of funds, to physically separate their abortion-related services from the Title X services.

The Mayor and City Council of Baltimore ("Baltimore" or "Appellee") filed suit against Alex Azar II; Dr. Diane Foley; HHS; and the Office of Population Affairs, the office that administers Title X (collectively, "Appellants" or the "Government"), alleging, in pertinent part, that the Final Rule violates the Administrative Procedure Act ("APA") because it is arbitrary, capricious, and not in accordance with law. The district court first issued a preliminary injunction, concluding that the Final

Rule is likely not in accordance with law, and the Government appealed. While the appeal of the preliminary injunction was pending and after discovery, the district court issued a permanent injunction on different grounds—specifically, the promulgation of the Final Rule was arbitrary and capricious—and the Government appealed from that judgment as well. We consolidated the appeals, and a majority of the full court voted to hear both cases en banc.

We affirm in part and dismiss in part. We uphold the grant of the permanent injunction on two grounds. First, the Final Rule was promulgated in an arbitrary and capricious manner because it failed to recognize and address the ethical concerns of literally every major medical organization in the country, and it arbitrarily estimated the cost of the physical separation of abortion services. Second, the Final Rule contravenes statutory provisions requiring nondirective counseling in Title X programs and prohibiting interference with physician/patient communications. Because we affirm the permanent injunction in Case No. 20-1215, the appeal of the preliminary injunction in Case No. 19-1614 is moot, and we, therefore, dismiss it.

I.

Congress enacted Title X in 1970 "[t]o promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government[.]" Pub. L. No. 91-572, 84 Stat. 1504 (Dec. 24, 1970). Under Title X, the Secretary of HHS ("Secretary") is

> authorized to make grants to and enter into contracts with public or nonprofit private 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). "Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate," *id.* § 300a-4(a), and HHS has never allowed grantees to use Title X funds to "provide" abortions as a method of family planning, *e.g.*, 42 C.F.R. § 59.5(a)(5) (2000); *see id.* § 59.9 (2000).[1]

The parties disagree about the propriety of HHS's interpretation of the following provision in Title X: "None 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 (emphasis supplied) (also referred to as "Section 1008" of the Public Health Service Act). HHS's interpretation of this provision has morphed over the last 50 years.

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[1] Reading Judge Wilkinson's dissenting opinion, one would think this court invalidated a congressional prohibition on federal funding of abortion. Not so. The Final Rule *itself* is a change from previous policy. And nothing in this opinion requires—or even allows—federal funding of abortions.

A.

HHS's Changing Interpretation of Section 1008

1.

1970-1988

For the first 18 years of the Title X program, HHS interpreted Section 1008 "not only as prohibiting the provision of abortion but also as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning." *Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Servs. Projects*, 53 Fed. Reg. 2922-01, 2923 (Feb. 2, 1988) (explaining history of Section 1008 interpretation); *see also* 36 Fed. Reg. 18465, 18466 (Sept. 15, 1971); 42 C.F.R. § 59.5(9) (1972). Further, HHS "interpreted [S]ection 1008 as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923. In its advisory opinions, the Office of General Counsel of HHS "generally took the view that activity which did not have the immediate effect of promoting abortion or which did not have the principal purpose or effect of promoting abortion was permitted." *Id.*

Then, in 1981, HHS "went a step further" and

> required Title X projects to engage in abortion-related activities under certain circumstances. These guidelines for the first time required nondirective "options counseling" 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. These guidelines were premised on a view that "non-directive" counseling and referral for abortion were not inconsistent with the statute and were justified as a matter of policy in that such activities did not have the effect of promoting or encouraging abortion.

53 Fed. Reg. at 2923. This approach was maintained until 1988.

2.

1988-1991

In 1988, the Secretary issued new regulations, which prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals for, abortion as a method of family planning. *See Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Planning Servs. Projects*, 53 Fed. Reg. 2922 (Feb. 2, 1988) (hereinafter, the "1988 Rule"). The 1988 Rule provided:

- "[A] Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.";
- "Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.";

- "A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion as a method of family planning.";
- "Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; provided, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning."

Id. at 2945. The aspect of the 1988 Rule that prohibited counseling on and referrals for abortion came to be referred to as the "Gag Rule." *See Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 229 (D.C. Cir. 1992) (explaining that the 1988 Rule "established a much broader prohibition on abortion counseling or referrals including a 'gag rule' applicable to all Title X project personnel against informing or discussing with clients the availability of abortion as an option for individual planning or treatment needs").

In 1991, the Supreme Court upheld the 1988 Rule in the face of administrative and constitutional challenges. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

First, the *Rust* plaintiffs challenged the 1988 Rule as exceeding the Secretary's authority, and as arbitrary and capricious. *See Rust*, 500 U.S. at 183. The Court applied the familiar two-step test pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which asks (1) if the statute is silent or ambiguous with respect to the issue; and (2) if so, whether the agency's interpretation is "based on a permissible construction of the statute." *Rust*, 500 U.S. at 184 (quoting *Chevron*, 467 U.S. at 842-43). The Court determined that at *Chevron* step one, Section 1008's language —"[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"—was ambiguous. *Id.* At step two, the Court—citing the "substantial deference" accorded to the agency authorized with administering the statute—decided that HHS interpreted Section 1008 in a "permissible" way. *Id.* at 184-85. The Court explained,

> Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

Id. at 185. The Court explained that HHS sufficiently justified a "revised approach" to Section 1008 by explaining that the 1988 Rule was "more in keeping with the original intent of the statute"; "justified by client experience under the prior policy"; and "supported by a shift in attitude against" abortion. *Id.* at 187.

Second, the *Rust* plaintiffs brought constitutional attacks, claiming that the 1988 Rule violated the First Amendment "by impermissibly discriminating based on viewpoint" because the Rule "prohibit[s] all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." *Rust*, 500 U.S. at 192 (internal quotation marks omitted). They also asserted that the 1988 Rule violated a woman's Fifth Amendment right "to choose whether to terminate her pregnancy." *Id.* at 201. The Court rejected both claims. On the First Amendment claim, the Court reasoned, "Nothing in [the 1988 Rule] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200. On the Fifth Amendment claim, the Court "reaffirmed the long-recognized principle," that the Due Process Clause does not "generally confer . . . [an] affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 201 (internal quotation marks omitted).

3.

1991-2010

In the wake of *Rust*, President George H.W. Bush, addressing "widespread concern" that the 1988 Rule

would interfere with the physician-patient relationship, issued a memo to the Secretary on November 5, 1991, "urging that the confidentiality of the doctor-patient relationship be preserved and that operation of the Title X program be compatible with free speech and the highest standards of medical care." *Nat'l Family Planning*, 979 F.2d at 230 (internal quotation marks omitted). President Bush then issued four "directives" to which HHS was to adhere in implementing the 1988 Rule, including that referrals "may be made by Title X programs to full-service health care providers that perform abortions," but not if that is the provider's "principal activity." *Id.*

Before the 1988 Rule could be fully implemented, Congress passed a bill that would have prohibited the Secretary from awarding Title X funds to an applicant unless the applicant agreed to provide "nondirective counseling and referrals" concerning specific options upon request, including "termination of pregnancy." *Family Planning Amendments Act of 1992*, S. 323, 102d Cong. § 2 (1991). However, President Bush vetoed the legislation on September 25, 1992. *See* Actions Overview, S.323—102nd Congress (1991-1992), https://www.congress.gov/bill/102nd-congress/senate-bill/323/actions (saved as ECF opinion attachment). He explained that, although he had "reiterated [his] commitment to preserving the confidentiality of the doctor/patient relationship," he had "repeatedly informed Congress that [he] would disapprove any legislation that would transform this program into a vehicle for the promotion of abortion." *Veto—S. 323: Message from the President of the United States* at 1, available at https://www.senate.gov/reference/Legislation/Vetoes/Messages/

BushGHW/S323-Sdoc-102-28.pdf (Sept. 26, 1992) (saved as ECF opinion attachment).

In 1993, HHS suspended the 1988 Rule, and the 1981 Guidelines went back into effect on an interim basis. *See* 58 Fed. Reg. 7462 (Feb. 5, 1993). President William J. Clinton explained in a Memorandum to the Secretary, "The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients." Mem., *The Title X "Gag Rule,"* 58 Fed. Reg. 7455 (Jan. 22, 1992). Then in 1996, Congress added a rider to its annual HHS appropriations act that stated: "[A]mounts provided to [Title X] projects . . . shall not be expended for abortions, [and] *all pregnancy counseling shall be nondirective*." *Omnibus Consol. Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, 1321-221 (April 26, 1996) (emphases supplied) (the "Nondirective Mandate").

The Nondirective Mandate has appeared in every annual HHS appropriations bill since 1996. *See, e.g.*, *Further Consol. Appropriations Act, 2020*, Pub. L. No. 116-94, 133 Stat. 2534, 2558 (Dec. 20, 2019).

In 2000, HHS issued a new rule which, like the 1981 Guidelines, required Title X projects to offer and provide "information and counseling" regarding "pregnancy termination," and "referral upon request," if the patient desires. *Standards of Compliance for Abortion-Related Servs. in Family Planning Servs. Projects*, 65 Fed. Reg. 41270, 41279 (July 3, 2000). Providers were not to offer information or counseling "with respect to

any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling." *Id.* The agency explained, "If [Title X] projects were to counsel on an option even where a client indicated that she did not want to consider that option, there would be a real question as to whether the counseling was truly nondirective or whether the client was being steered to choose a particular option." *Id.* at 41273.

2010

Congress enacted the Affordable Care Act ("ACA") in 2010. In Subchapter VI, the ACA provides:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services 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 (the "Noninterference Mandate").

2018-2020: The Final Rule

On June 1, 2018, HHS issued a notice of proposed rulemaking "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." *Proposed Rules: Compliance with Statutory Program Integrity Requirements*, 83 Fed. Reg. 25502, 25502 (June 1, 2018). The notice provided a deadline for comments of July 31, 2018—a little over eight weeks. Even within this short time period, HHS received more than 500,000 comments.

On March 4, 2019, HHS issued the Final Rule. HHS explained that it was amending the Title X regulations "to clarify grantee responsibilities under Title X, to remove the requirement for nondirective abortion counseling and referral, to prohibit referral for abortion, and to clarify compliance obligations with state and local laws." 84 Fed. Reg. at 7714. Parts of the Final Rule essentially revive the Gag Rule provisions of the 1988 Rule:

- "A Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89.
- "[O]nce a client served by a Title X project is medically verified as pregnant, she shall be referred to a health care provider for medically necessary prenatal health care." *Id.* at 7789.

- A Title X provider "may . . . choose to provide" "[a] list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care)," but that list "may be limited to those that do not provide abortion, or may include licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some, but not the majority, of which also provide abortion as part of their comprehensive health care services. Neither the list nor project staff may identify which providers on the list perform abortion." *Id.*
- A Title X provider "may . . . choose to provide" "[n]ondirective pregnancy counseling, when provided by physicians or advanced practice providers [(APPs)[2]]" but "is not required to." *Id.* at 7789, 7760. As part of nondirective counseling, "abortion must not be the only option presented by physicians or APPs." *Id.* at 7747.
- "Each option discussed in [pregnancy] counseling must be presented in a nondirective manner. This involves presenting the options in a factual, objective, and unbiased manner and (consistent with other Title X requirements and restrictions) offering factual resources that are objective, rather than presenting the options in a subjective or coercive manner." Physicians or APPs "should discuss the possible risks and side effects to both

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[2] An APP is defined in the Final Rule as a "medical professional who receives at least a graduate level degree in the relevant medical field and maintains a license to diagnose, treat, and counsel patients." 84 Fed. Reg. at 7787.

mother and unborn child" of any option, including abortion. *Id.*

- "Referrals for abortion as a method of family planning may not be offered. If the patient is provided a list or the contact information of licensed, qualified, comprehensive primary health care service providers (including providers of prenatal care), the list—and the Title X staff—must not identify to the woman which, if any, providers on the list offer abortion." *Id.*

The Government posits that the discretion to provide nondirective counseling actually makes it "less restrictive than the 1988 [Rule]." Appellants' Br. 9.[3] In the Final Rule, HHS likewise explained:

> In response to commenters who contend the rule will be challenged in court, [HHS] believes the Supreme Court's decision in *Rust* provides broad support for the approach taken in this rule. Although the rule differs in some respects from the 1988 [Rule] upheld in *Rust*, some of those differences arise from the [HHS]'s desire to implement statutory provisions that did not exist at the time the 1988 [Rule was] adopted. Other differences, such as the permission for nondirective pregnancy counseling—which implements an appropriations rider that was adopted as early as 1996 and has been regularly included in HHS's appropriations through fiscal year 2019—are

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[3] References to "Appellants' Br." and "Appellee's Br." refer to the initial briefs filed in Case No. 19-1614. References to "Appellants' Supp. Br." and "Appellee's Supp. Br." refer to the briefs filed in furtherance of the consolidated en banc proceedings in Case Nos. 19-1614 and 20-1215.

> more permissive than the 1988 [Rule] and less susceptible to the type of challenges that plaintiffs brought (unsuccessfully) in *Rust*.

84 Fed. Reg. at 7725 (footnote omitted). Putting all of this together, under the Final Rule, Title X physicians and APPs can technically *counsel* on abortion, but abortion cannot be "the only option presented," even if the patient does not want to receive counseling about other options; the patient's options must be presented in a "factual, objective, and unbiased manner"; and for any option presented, the provider must discuss the "risks and side effects to both mother and unborn child." *Id.* at 7747. And physicians and APPs may not *refer* the patient for an abortion, even if that is her desire during the course of nondirective counseling.

B.

On April 12, 2019, Baltimore filed a "Complaint for Vacatur of Unlawful Agency Rule and Declaratory and Injunctive Relief" (the "Complaint") against the Government. Baltimore then sought a preliminary injunction on April 16, 2019. On May 30, 2019, the district court granted the preliminary injunction. The Complaint contained ten counts, and the district court based its preliminary injunction on the likelihood of success on the merits on the first two:

- Count I—The Final Rule violates § 706 of the APA[4] because it is contrary to the Noninterference Mandate;

[4] Section 706 of the APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found

- Count II—The Final Rule violates § 706 of the APA because it is contrary to the Nondirective Mandate;
- Count III—The Final Rule exceeds HHS's authority under the Title X statute;
- Count IV—The Final Rule is contrary to the Religious Freedom Restoration Act of 1993;
- Count V—The Final Rule is contrary to the First Amendment;
- Count VI—The Final Rule is contrary to the Equal Protection Clause of the Fifth Amendment;
- Count VII—The Final Rule is arbitrary and capricious because it is inadequately justified;
- Count VIII—The Final Rule is arbitrary and capricious because it is objectively unreasonable;
- Count IX—The Final Rule violates the APA because HHS did not observe procedure required by law;
- Count X—The Final Rule is unconstitutionally vague.

On June 6, the Government filed a notice of interlocutory appeal and a motion to stay the injunction in the district court, the latter of which was denied on June 19, 2019. A stay was granted by a divided panel of this

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to be . . . arbitrary, capricious, an abuse of discretion, or otherwise *not in accordance with law*." 5 U.S.C. § 706(2)(A) (emphasis supplied).

court on July 2, 2019. *See* Order, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir. filed July 2, 2019), ECF No. 23. A panel of this court heard argument in September 2019.[5]

While the appeal of the preliminary injunction as to Counts I and II was pending, the district court continued with proceedings on Counts III, V, VI, VII, VIII, and IX. On February 14, 2020, the district court granted summary judgment to the Government as to Counts III, V, VI, and IX, and it granted summary judgment to Baltimore on Counts VII and VIII. The district court then issued a permanent injunction for the entire state of Maryland, enjoining the Government from implementing or enforcing the Final Rule. The Government filed a notice of appeal and a motion for stay of the permanent injunction in the district court. The district court denied the motion to stay on March 4, 2020. In this court, the Government filed a motion to consolidate and a motion for stay of the permanent injunction. Baltimore filed a motion for initial en banc consideration of the permanent injunction appeal. On March 30, 2020, we granted the Government's motion to consolidate and Baltimore's motion for initial en banc review, and we denied the Government's motion for stay.

Meanwhile, on February 24, 2020, the same day the Government filed its notice of appeal, Baltimore filed a motion to clarify the judgment, asking the district court to "clarify that the [Final] Rule is VACATED by entering a minute order on the docket so specifying." Mot. to Clarify at 1, *Mayor & City Council of Baltimore v.*

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[5] Meanwhile, on September 12, 2019, the district court dismissed without prejudice Counts IV and X.

Azar, No. 1:19-cv-1103 (filed Feb. 24, 2020), ECF No. 96. Two days later, the district court issued an order explaining the "Final Rule is VACATED AND SET ASIDE in the State of Maryland." Mem. Order at 1, *Azar*, No. 1:19-cv-1103 (filed Feb. 26, 2020), ECF No. 99.

Then, on March 13, 2020, Baltimore filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), claiming, "the remedy awarded by the [district court] is incorrect in one respect," that is, the district court "purported to vacate and set aside the challenged agency action only within the State of Maryland. The [APA] requires, however, that agency action found to be unlawful at the final judgment stage of a case be vacated and set aside *on a nationwide basis*." Mot. to Alter or Amend at 1, *Azar*, No. 1:19-cv-1103 (filed March 13, 2020), ECF No. 103 (emphasis supplied). On April 15, 2020, the district court denied the Rule 59(e) motion, explaining that Baltimore was seeking a "nationwide injunction" of the Final Rule, instead of "the state-wide injunction [the district court] had ordered." Mem. Op. at 5, *Azar*, No. 1:19-cv-1103 (filed April 15, 2020), ECF No. 115. Further, the district court reasoned, "[T]he APA does not require a reviewing court vacating a rule to do so on a nationwide basis. There is no authority in either Fourth Circuit or Supreme Court jurisprudence that mandates such a finding." *Id.* at 7. Baltimore did not file a notice of appeal of this April 15 order, and the time to do so has expired. Therefore, as explained below, we do not consider it.

II.

A party seeking a permanent injunction must demonstrate "actual success" on the merits, rather than a mere "likelihood of success" required to obtain a preliminary

injunction. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987). The party must demonstrate (1) "it has suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *Id.* We review the district court's legal conclusions de novo, and any factual findings for clear error. *See Legend Night Club v. Miller*, 637 F.3d 291, 297 (4th Cir. 2011). In this case, even though "the district court did not discuss the test for granting a permanent injunction, we discern no abuse of discretion in the court's decision to issue the injunction." *Id.* at 302.[6]

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[6] We primarily discuss herein the district court's conclusions that the Final Rule is arbitrary, capricious, and not in accordance with law and therefore, it violates the APA. In other words, Baltimore has demonstrated "actual success" on the merits. As for the remaining permanent injunction factors, the district court decided to issue an injunction, rather than monetary damages, so that Baltimore would "avoid irreparable harm." S.J.A. 1317. And Baltimore has clearly shown irreparable harm, hardship, and that the public interest favors an injunction in this case. The record is replete with support. For example, Dr. Cynthia Mobley, board-certified pediatrician and a medical director at the Baltimore City Health Department, attested that in 2017, Title X clinics in Baltimore served over 16,000 patients in more than 22,000 clinical visits. *See* S.J.A. 953. Title X services include contraceptive services; breast and cervical cancer screenings; testing, referral, and prevention education for sexually transmitted infections and HIV; and pregnancy diagnosis

III.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In reviewing a rule, courts "must engage in a searching and careful inquiry of the administrative record, so that we may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Casa de Maryland v. Dep't of Homeland Sec.*, 924 F.3d 684, 703 (4th Cir. 2019) (alterations and internal quotation marks omitted). We ask whether the agency:

> [r]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). An agency "must examine

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and counseling. *See id.* at 954. According to Dr. Mobley, one in three women in Baltimore City need publicly-funded health care in order to access contraception. In addition, "[l]ow-income women often rely on Title X providers as their sole health care provider." *Id.* But the Final Rule "force[s] the City of Baltimore to provide substandard care to the patients in [the] community," and "subject[s] the City to potential liability for any complications from this substandard care." *Id.* at 964.

Citations to the "J.A." refer to the Joint Appendix, and citations to the "S.J.A." refer to the Supplemental Joint Appendix, filed by the parties in these consolidated appeals.

the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

In these appeals,[7] Baltimore contends the Final Rule is arbitrary and capricious, and also not in accordance with law. We agree on all counts, and even though the district court's permanent injunction relied only on the arbitrariness and capriciousness of the Final Rule, we see fit to rest our decision affirming the permanent injunction on all of these grounds. *See Strawser v. Atkins*, 290 F.3d 720, 728 n.4 (4th Cir. 2002) ("[W]e may affirm on any ground revealed in the record."). The

[7] We note that this decision only concerns appeals of the preliminary and permanent injunctions issued by the district court, which we possess jurisdiction to entertain pursuant to 28 U.S.C. § 1292(a)(1). We do not speak to the validity of the district court's grant of summary judgment on Counts VII and VIII because the district court has yet to resolve Counts I and II on the merits, and it dismissed Counts IV and X without prejudice; thus, there is no final appealable order over which we may exercise our appellate jurisdiction on that issue. *See* 28 U.S.C. § 1291; *Domino Sugar Corp. v. Sugar Workers Local Union* 392, 10 F.3d 1064, 1067 (4th Cir. 1993). However, "an appeal from an order granting or refusing an injunction brings before the appellate court the entire order, not merely the propriety of injunctive relief, and [we] may consider and decide the merits of the case," *Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 88 (4th Cir. 1967), "to the extent they relate to the propriety of granting the injunctive relief," 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2962 (3d ed.); *see also Pashby v. Delia*, 709 F.3d 307, 318 (4th Cir. 2013). Thus, we address the merits arguments made in furtherance of summary judgment, but only as they bear on the propriety of the permanent injunction.

Government itself recognized the legal issues underlying the preliminary injunction "present potential alternative grounds to affirm the permanent injunction." Appellants' Supp. Br. 15.

A.

The Final Rule was Promulgated in an Arbitrary and Capricious Manner

In issuing the permanent injunction on Counts VII and VIII, the district court concluded that the Final Rule was arbitrary and capricious for three reasons: HHS (1) inadequately explained its decision "to disagree with comments by every major medical organization regarding the Final Rule's contravention of medical ethics"; (2) inadequately considered the "reliance interests that would be disrupted by its change in policy"; and (3) inadequately considered the "likely costs and benefits of the physical separation requirement." S.J.A. 1309 (internal quotation marks omitted). We affirm on the first and third grounds.

1.

Medical Ethics

First, the district court, after a "searching and careful inquiry of the record," found that "literally all of the nation's major medical organizations have grave medical ethics concerns with the Final Rule." S.J.A. 1309 (internal quotation marks omitted). In the face of "grave concerns" from the medical community, HHS merely stated—with no support—that it "disagrees with the commenters contending the [Final Rule] infringes on the legal, ethical, or professional obligations of medical professionals." *Id.* at 1311 (alteration and internal

quotation marks omitted). Further, HHS stated it "believes" the Final Rule accommodates medical ethical obligations, and "believes" the rule is "not inconsistent" with medical ethics. *Id.* (internal quotation marks omitted).

These reasons fall flat. An agency, although entitled to deference, cannot simply state it "believes" something to be true—against the weight of all the evidence before it—without further support. Indeed, it is the "agency's responsibility" to offer an explanation why it made a certain decision, when "every indication in the record points the other way." *State Farm*, 463 U.S. at 56-57 (internal quotation marks omitted). The arbitrary and capricious standard of review is not a carte blanche for agencies to issue a rule, and then defend it only by saying, "because we said so." As explained below, HHS lacks a satisfactory explanation for disagreeing with every major medical association, and thus, it has not "articulate[d] a satisfactory explanation for its action." *Id.* at 43.

a.

No Satisfactory Reasoning

Several medical organizations submitted comments to HHS about the Final Rule, and *all of them* stated that the Final Rule would violate the established principles of medical ethics. For example, the American College of Obstetricians and Gynecologists ("ACOG")—which comprises 90% of the nation's obstetricians-gynecologists—cautioned that the Final Rule "would put the patient-physician relationship in jeopardy by placing restrictions on the ability of physicians to make available important medical information, permitting physicians to

withhold information from pregnant women about the full range of their options, and erecting greater barriers to care, especially for minority populations." S.J.A. 171. It further explained that because Title X projects "do not have to provide any referrals to abortion providers, even if directly requested by the patient," the Final Rule "represent[s] an improper intrusion into the patient-physician relationship." *Id.* at 173.

The American Medical Association ("AMA"), citing to its Code of Medical Ethics, explained that the prohibition on abortion referrals and restrictions on counseling "would not only undermine the patient-physician relationship, but also could force physicians to violate their ethical obligations . . . to counsel patients about all of their options in the event of a pregnancy and to provide any and all appropriate referrals." S.J.A. 189. The American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Pediatrics, and the American College of Physicians raised similar concerns. *See id.* at 32-35; 48-53; 192-202; 247-55. Planned Parenthood Federation of America and four states (Washington, New York, Hawaii, and Oregon) all notified HHS that they would have to exit the Title X program because the restrictions are "fundamentally at odds with the professional and ethical obligations of health care professionals." *Id.* at 371. The American Academy of Nursing likewise stated the Final Rule "prioritize[s] ideology over evidence-based professional recommendations," and urged HHS "to remain religiously and morally neutral in its funding, policies, and activities to ensure . . . the ethical obligations of healthcare providers are not compromised." *Id.* at 53. Indeed, the Government itself now concedes that

no "professional organization of any kind" takes the position that the Final Rule's restrictions on referrals are in line with medical ethics. *Id.* at 1263-64 (summary judgment hearing on January 27, 2020).

In response to these comments, HHS merely stated that it "disagrees" that the Rule "infringes on the legal, ethical, or professional obligations of medical professionals" and it "believes" the Rule is "not inconsistent" with medical ethics. 84 Fed. Reg. at 7724. Notwithstanding, HHS clearly recognizes that "medical ethics obligations require the medical professional to share *full and accurate* information with the patient, in response to her specific medical condition and circumstance." *Id.* (emphasis supplied). But, it fails to address head-on the arguments of all of these medical organizations that the Rule *prohibits* physicians from sharing full and accurate information. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) ("An agency cannot simply disregard . . . inconvenient facts[.]").[8]

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[8] The primary dissent accuses the majority of "disregard[ing] inconvenient agency analysis." Richardson Dissenting Op. at 113. But just because an agency puts words to a page does not mean it has provided a "sufficiently reasoned basis." *Id.* Here, the agency fails to respond to (or in some cases, even acknowledge) the medical community's concerns. Rather, HHS simply repeats how its Final Rule permits nondirective pregnancy counseling—it does not explain how nondirective pregnancy counseling allows physicians to share full and accurate information, such as, for example, a complete list of outside physicians who may perform abortions. And the agency does not respond at all to the myriad other ethical concerns of the medical community, i.e., erecting barriers to care, especially to minorities, and the inability of physicians to refer a patient for an abortion even when she asks for one. In our view, this "analysis" is nothing but a long-winded "because we said so."

HHS unsuccessfully attempts to rely on *Rust v. Sullivan* as its silver bullet. It explains,

> In *Rust*, the Supreme Court upheld the prohibition in the 1988 regulations on both referral for, and counseling about, abortion in the Title X program. The Department does not believe the Court in *Rust* upheld a rule that required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards.

84 Fed. Reg. at 7748. It also argues that *Roe v. Wade* "favorably quoted the proceedings of the American Medical Association House of Delegates 220 (June 1970), which declared 'Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.'" *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 144 n.38 (1973)).

But *Rust* never discussed medical ethics, nor did it make any suggestion or presumption as to whether the 1988 Rule was supported by the views of the medical community at that time. The Supreme Court held only that the 1988 Rule did not so "significantly impinge upon the doctor-patient relationship" that it rose to the level of a First Amendment violation. *Rust*, 500 U.S. at 200. Thus, *Rust* did not purport to speak to medical ethics requirements.

In briefing, the Government contends that HHS "did not need to identify a professional medical organization that espoused the same view." Appellants' Supp. Br. 13. It also notes that "[t]he majority of incumbent pro-

viders have remained in the program without any apparent ethical sanction." *Id.* at 30. Even if the Government is correct,[9] that is not the end of the story.

First, even if HHS did not need to identify a particular medical organization that supported its view, it nonetheless cannot easily brush off the swell of evidence in the record before the agency that the medical community finds this Rule to be repugnant to the ethical rules governing the profession. Thus, by announcing that HHS merely "disagrees" with every major medical organization in the country, without more, the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action" and "offer[] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43; *see also Sierra Club, Inc. v. United States Forest Serv.*,

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[9] Of note, as of late February 2020, roughly one in every four Title X service sites had withdrawn from the Title X program in response to the Final Rule, which slashed the national patient capacity in half, "jeopardizing care for 1.6 million female patients nationwide." Ruth Dawson, *Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half*, Guttmacher Institute (Feb. 26, 2020), http://bit.ly/3csjZle (saved as ECF opinion attachment). Planned Parenthood, which alone served roughly 40 percent of Title X patients, has also withdrawn on the basis that "withhold[ing] important information from patients" is "unethical and dangerous." Sarah McCammon, *Planned Parenthood Officials Say They've Halted Use Of Title X Family Planning Funds* (July 17, 2019), https://www.npr.org/2019/07/17/742841170/planned-parenthood-officials-say-theyvehalted-use-of-title-x-family-planning-fu (saved as ECF opinion attachment). More than 20 states and the District of Columbia sued HHS to enjoin the Final Rule before it took effect. *See California by & through Becerra v. Azar*, 950 F.3d 1067, 1082 (9th Cir. 2020) (en banc), 950 F.3d 1067 (9th Cir. 2020).

897 F.3d 582, 594 (4th Cir. 2018); *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 103 (4th Cir. 2006) (The APA "require[s] more of the agency" than a "rubber-stamp.").

Second, the fact that some providers have remained in the Title X program says nothing about the reasonableness of the Final Rule at the time it was issued. *See, e.g.*, *Secs. & Exch. Comm'n v. Chenery*, 318 U.S. 80, 87 (1943) (explaining courts can uphold an agency decision only on the basis "upon which the record discloses that its action was based"); *accord State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

b.

Conscience Statutes

The Government also contends that HHS "observed that the various conscience statutes reveal there is no absolute ethical imperative upon physicians to counsel or refer for abortion." Appellants' Supp. Br. 30 (internal quotation marks omitted). The Final Rule likewise explains, "Federal 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)." 84 Fed. Reg. at 7748. HHS believes the Final Rule's restrictions are necessary "to ensure compliance with [the] federal conscience laws," such as the Church Amendments, [10]

[10] The Church Amendments, first enacted in the 1970s, are statutes that, inter alia, prohibit requiring an entity to make its facilities available for abortion if abortion "is prohibited by the entity on the basis of religious beliefs or moral convictions," 42 U.S.C. § 300a-7(b),

Coats-Snowe Amendment,[11] and Weldon Amendment.[12] *Id.* at 7746.

To the extent HHS relies on the federal conscience statutes (or state statutes, for that matter)[13] to support the ethical nature of the Final Rule, this reliance is of no moment. Conscience statutes are not relevant to the question of whether the Final Rule's restrictions are ethical. Allowing a physician with a conscience objection to decline to refer a patient for abortion is quite different from *prohibiting* a physician from providing full and accurate information about and referring for abortion, when that physician feels ethically bound to do so. Indeed, as the ACOG Committee on Ethics states,

> Conscientious refusals that conflict with patient well-being should be accommodated only if the primary

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and prohibit federal grant recipients from discriminating against individuals who refused to assist with abortion because of their "religious beliefs or moral convictions," *id.* § 300a-7(c).

[11] The Coats-Snowe Amendment, enacted in 1996, prohibits the Government from discriminating against a health care entity because it refuses to engage in certain abortion-related activities, such as training. *See* 42 U.S.C. § 238n(a).

[12] The Weldon Amendment, an appropriations rider first included in health care bills in 2004, prohibits discrimination by recipients of federal grants against health care entities that refuse to "provide, pay for, provide coverage of, or provide referrals for abortions." *Consolidated Appropriations Act*, 2005, Pub. L. No. 108-447, 118 Stat. 2809, Sec. 211 (Dec. 8, 2004).

[13] The district court reasoned, "In HHS's explanation for its disagreement with the comments on medical ethics, it does not mention the conscience statutes." J.A. 1312. But because the Final Rule *does* rely on conscience statutes throughout the text, even if perhaps not in the precise context of ethics, we will proceed to address the Government's substantive arguments on this point.

> duty to the patient can be fulfilled. All health care providers must provide accurate and unbiased information so that patients can make informed decisions. Where conscience implores physicians to deviate from standard practices, they . . . have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that patients request.

The Limits of Conscientious Refusal in Reproductive Medicine, No. 385, at 1 (Nov. 2007), *reaffirmed* 2019, http://bit.ly/2XRZZ4I (saved as ECF opinion attachment); *see also* S.J.A. 41 (Comment, Nat'l Ass'n of Catholic Nurses) (explaining that if a patient determines that her chosen course is abortion, and a provider is unable to offer an abortion referral for conscience reasons, the provider should "offer[] a transfer of care to the client"). The Final Rule fails to recognize or appreciate this distinction.

c.

The Ninth Circuit Decision is Unpersuasive and Inapposite

The Government relies on the Ninth Circuit's recent en banc decision in *California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc), which vacated preliminary injunctions of the Final Rule issued by three district courts. The Ninth Circuit decided as a matter of law that the Final Rule was "not arbitrary and capricious," *California*, 950 F.3d at 1104, but we find this decision unpersuasive and inapposite.

First, the Ninth Circuit did not have the full administrative record before it, *see California*, 950 F.3d at

1082-84 & n.11, and so could not "engage in a searching and careful inquiry of the administrative record" that is necessary before a court can adequately "consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Casa de Maryland*, 924 F.3d at 703 (alteration and internal quotation marks omitted); *see California*, 950 F.3d at 1112 (Paez, J., dissenting) ("We do not have the complete administrative record before us, and neither did the district courts when they issued the preliminary injunctions. Deciding the merits of Plaintiffs' arbitrary and capricious claim is therefore premature.").

Second, the Ninth Circuit's discussion of medical ethics nowhere mentions the precise issue raised here: HHS's failure to justify or explain its conclusion that the Final Rule is consistent with medical ethics in the face of overwhelming contrary evidence. *See California*, 950 F.3d at 1101-03 & n.34. Moreover, the Ninth Circuit failed to recognize that HHS did not cite any evidence supporting its conclusion regarding medical ethics, and HHS provided no reason for its decision to "disagree" with the AMA's conclusion. 84 Fed. Reg. at 7724.[14]

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[14] The Government also relies on a recent district court case, which granted the Government's motion to dismiss a complaint challenging the Final Rule in Maine on, inter alia, arbitrary and capricious grounds. *See The Family Planning Ass'n of Me. v. U.S. Dep't of Health and Human Servs.*, --- F. Supp. 3d ---, 2020 WL 3064426 (D. Me. June 9, 2020). We likewise find this decision to be of no moment to the particular arbitrary and capricious arguments made here. First, the Maine district court opined that the Supreme Court had "already deemed [the Final Rule's] rationale" to be "acceptable and reasonable" in *Rust*. *Id.* at *5. Not so. As explained above, *Rust* did not

d.

Therefore, because HHS failed to satisfactorily explain its disagreement with the proliferation of negative comments from the medical community, and failed to appreciate the distinction between conscience laws as a shield for physicians—rather than a sword for the government to wield as it shoves its way inside the examination room with a woman and her physician—its decision that the Final Rule is "not inconsistent" with medical ethics is arbitrary and capricious.

2.

Physical Separation

The Final Rule also states that by March 4, 2020, Title X providers were to ensure "clear physical and financial separation between a Title X program and any activities that fall outside the program's scope." 84 Fed. Reg. at 7715. In particular, the separation rule is meant to "protect the statutory integrity of the Title X program, to eliminate the risk of co-mingling or misuse of Title X funds, and to prevent the dilution of Title X

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decide the precise challenges presented here: that every major medical organization finds the Final Rule to violate medical ethics, and the agency fails to explain its disagreement. Second, the Maine court misstates the plaintiff's argument in saying HHS's views of medical ethics are not "arbitrary and capricious just because they are not preferred by industry experts." *Id.* at *6. Rather, the argument made in that case and by Baltimore in this case is that HHS "inexplicably and unreasonably disregarded the views of every major professional medical organization." Baltimore Letter at 1-2, *Mayor & City Council of Baltimore v. Azar*, No. 20-1215 (4th Cir. filed June 15, 2020), ECF No. 83; *accord* Am. Compl. ¶ 94, *The Family Planning Ass'n of Me. v. U.S. Dep't of Health and Human Servs.*, No. 1:19-cv-100 (D. Me. filed Nov. 22, 2019), ECF No. 99.

resources." *Id.* Specifically as to the physical separation requirement, the Final Rule "preclude[s] shared physical space and staff with respect to abortion." *Id.* at 7725.

The Final Rule estimates that a Title X provider would face a cost of $30,000 "to come into compliance with physical separation requirements in the first year following publication of a [F]inal [R]ule in this rulemaking." 84 Fed. Reg. at 7782.[15] However, the district court found this to be arbitrary and capricious because "the administrative record reflects comments estimating the likely cost of the requirement far exceeds HHS's estimate of $30,000." S.J.A. 1316. Again, the district court determined that HHS made a "conclusory response" to these "evidence-backed concerns about the serious problems the physical separation requirement will cause," and as such, "'fail[ed] to consider an important aspect of the problem, offer[ed] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (quoting *State Farm*, 463 U.S. at 43). The Government challenges the district court's conclusion that "HHS did not adequately consider the likely costs of the physical separation requirement." *Id.*; *see* Appellants' Supp. Br. 40-43.

In the administrative record, there are multiple comments estimating the likely cost to comply with the physical separation requirement to be much higher than

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[15] The first version of the Rule estimated the cost would be $20,000 per provider. *See* 84 Fed. Reg. at 7782.

$30,000. For example, a comment by City Health Department Leaders from Baltimore, Kansas City, Boston, San Antonio, Chicago, Los Angeles, and Cleveland estimated that the Final Rule would impose ongoing compliance costs, such as the "needless administrative cost of maintaining separate accounts for [] funding streams" and associated staffing needs. S.J.A. 112. Moreover, the "burden imposed upon Title X providers will lead to the shuttering of a number of invaluable clinics across the nation." *Id.* Planned Parenthood estimated average capital costs of nearly $625,000 per affected service site. *Id.* at 387-88. The Family Planning Council of Iowa explained, "it typically costs hundreds of thousands, or even millions, of dollars to locate and open any health care facility (and would also cost much more than $10-30,000 to establish even an extremely simple and limited office), staff it, purchase workstations, set up record-keeping systems, etc." *Id.* at 242.

Yet, here again, HHS has no response. There is no justification in the Final Rule for the $30,000 amount, as evidenced by counsel's vague answer at oral argument. Oral Arg. at 2:45-3:15, *Mayor & City Council of Baltimore*, Nos. 20-1215 & 19-1614 (4th Cir. May 7, 2020) (When asked, "What studies were done by HHS to arrive at the $30,000 estimate for the physical separation?" Government counsel replied, "The agency considered the costs associated with complying with the physical separation requirement and arrived [at the amount] using its expertise at a quantitative as well as qualitative assessment of those costs."). And the Rule itself likewise refers to vague "updated quantitative estimates" made "in response to the[] comments," but does not explain what those estimates are or where they

come from. 84 Fed. Reg. at 7781. For all we can tell, this number was pulled from thin air.

We are not requiring a "false precision," as the primary dissent suggests. Richardson Dissenting Op. at 121. Rather, we expect a figure that makes at least some modicum of sense. In sum, HHS certainly did not provide the "hard and reasoned look" for which the primary dissent gives it credit. *Id.* at 117.[16] HHS failed to consider "an important aspect of the problem," and failed to "offer[] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

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[16] The primary dissent takes the view that HHS did not have to accept the "pessimistic" estimates from some commenters who believed they would have to build new facilities, as long as the agency provided "a reason." Richardson Dissenting Op. at 119. But surely that cannot mean that *any* reason will suffice—for example, blindly assuming those facilities "operate multiple physically separated facilities" and can simply "shift their abortion services." *Id.* at 120. Indeed, the dissent seems to suggest that Title X clinics and a provider who perform or refers for abortion could share a building, *see id.* at 120 n.29, something that the Final Rule indicated is likely impermissible, *see* 84 Fed. Reg. at 7767 ("As long as the Title X clinic and the hospital facilities where abortions are performed are *not collocated or located adjacent to each other within a hospital building or complex*, it is highly likely that the hospital is not violating the requirement that there be physical separation between the Title X funded activities and activities related to abortion as a method of family planning." (emphasis supplied)). Moreover, the Final Rule requires separation not only from clinics where abortions are performed, but also from clinics that engage in other "prohibited activities," which under the Final Rule, include *referring* for abortion or even telling a patient which providers on a list of providers offer abortion. 84 Fed. Reg. 7763.

The Government does not contend that the cost of such drastic measures is not "an important aspect of the problem." Nor could it. Indeed, in some cases the physical separation provision would require clinics to hire new staff, engage in construction, and set up new bookkeeping methods, all of which would easily cost multiples of $30,000. *See California*, 950 F.3d at 1115 n.16 (Paez, J., dissenting) ("[E]ven just hiring a *single* front desk staff member to staff a new entrance to a facility would exceed [$30,000], not to mention all the other costs that would accompany[] creating and maintaining such a facility." (emphasis in original)). These facilities are entitled to more explanation than a passing reference to unspecified assessments. "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

B.

The Final Rule is Not in Accordance with Law

We not only conclude that the Final Rule is arbitrary and capricious, but we also hold that the Final Rule is "not in accordance with law," that is, the Nondirective and Noninterference Mandates. 5 U.S.C. § 706(2)(A). *Rust* establishes that the phrase "in programs where abortion is a method of family planning" is ambiguous under step one of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Rust*, 500 U.S. at 184. Thus, our discussion of the merits is cabined to an analysis of whether HHS's interpretation of Section 1008 in the Final Rule is "permissible"

or "reasonable" at *Chevron* step two. 467 U.S. at 843-44. A regulation cannot survive at step two if it is in excess of an agency's authority or contrary to law pursuant to the APA. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (noting the overlap in *Chevron* step two and the APA standard).

1.

Nondirective Mandate

The Nondirective Mandate dictates that in order for a family planning program to receive Title X funding, "all pregnancy counseling shall be nondirective." *Further Consol. Appropriations Act, 2020*, Pub. L. No. 116-94, 133 Stat. 2534, 2558 (Dec. 20, 2019). HHS defines "[n]ondirective pregnancy counseling" as "the meaningful presentation of options where the physician or [APP] is not suggesting or advising one option over another." 84 Fed. Reg. at 7716 (internal quotation marks omitted). Baltimore argues that the Final Rule would force Title X projects to steer women away from one option—abortion—while at the same time directing them toward another option—carrying the pregnancy to term—***regardless of the patient's stated desires***, which would run contrary to the Nondirective Mandate. The district court agreed:

> Requiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is coercive, not "nondirective." Requiring providers to provide a referral list that is limited to those that do not provide abortion, even if the client specifically requests an abortion referral, is coercive, not "nondirective." Requiring providers to exclude abortion as one of

> multiple options available to a client facing an unwanted pregnancy, especially if she has asked about that option, is coercive, not "nondirective."

J.A. 266. We agree with the district court and the dissenting judges in the Ninth Circuit, who reasoned, "The [Final] Rule is nothing but directive. By its very terms, it requires a doctor to refer a pregnant patient for prenatal care, even if she does not want to continue the pregnancy, while gagging her doctor from referring her for abortion, even if she has requested specifically such a referral." *California*, 950 F.3d at 1107 (Paez, J., dissenting).

The Government does not dispute that HHS has an obligation to comply with the Nondirective Mandate, but it raises a scattershot argument in an attempt to demonstrate that the mandate is inapplicable here. None of the arguments lobbed by the Government are convincing.

a.

Counseling Versus Referrals

The Government first contends—and the primary dissent agrees—that although the Final Rule prohibits referrals to abortion providers, the Nondirective Mandate uses the word "counseling," and, the Government asserts, "counseling" is distinct from "referrals." Appellants' Br. 24. In other words, the Government argues, referrals are categorically excluded from the Nondirective Mandate.

First and foremost, *nowhere* in the Final Rule does HHS state that counseling and referrals are two separate Title X services, such that the Mandate applies only

to the former. To the contrary, in the Rule itself, counseling and referrals are discussed as part of the same course of service, with the "nondirective" term applying to **both**. *See, e.g.*, 84 Fed. Reg. at 7747 ("*Nondirective counseling and referrals* for postconception services . . . are the appropriate approach in the context of pregnancy, so long as they do not include referral for abortion as a method of family planning." (emphasis supplied)); *id.* ("Title X projects should not use nondirective pregnancy counseling, or *referrals* made for prenatal care or adoption *during such counseling*, as an indirect means of encouraging or promoting abortion as a method of family planning." (emphasis supplied)); *id.* ("[Providers] should not use [nondirective pregnancy] *counseling or referrals* to steer clients to abortion. . . . " (emphasis supplied)); *id.* at 7733 ("Congress has expressed its intent that postconception adoption information and *referrals be included as part of any nondirective counseling* in Title X projects. . . . " (emphasis supplied)).

Thus, the idea that referrals are not subject to the Nondirective Mandate is nothing but a convenient litigation position which does not support the validity of the Final Rule. *See Roe v. Dep't of Def.*, 947 F.3d 207, 220 (4th Cir. 2020) ("We consider the record made before the agency at the time the agency acted, so post-hoc rationalizations have traditionally been found to be an inadequate basis for review." (alteration and internal quotation marks omitted)).

The Government's argument and the primary dissent's view are also contrary to Congress's view that nondirective counseling actually includes "referrals." *See, e.g.*, 42 U.S.C. § 254c-6(a)(1) ("The Secretary shall

make grants to . . . adoption organizations for the purpose of . . . 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.").[17] It is difficult to fathom how, if Congress has clearly stated "adoption . . . referrals" are considered to be "part of any nondirective [pregnancy] counseling" on *adoption*, HHS nonetheless believes abortion referrals are not part of nondirective pregnancy counseling on *abortion*. The only explanation for this inconsistency is that the agency implicitly defines nondirective as "anything but abortion"—rather than the definition the agency purports to give, "not suggesting or advising one option over another," 84 Fed. Reg. at 7716. In other words, the Final Rule views certain *types* of referrals as nondirective and other *types* of referrals as directive.[18] The practical result of this ap-

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[17] We disagree with the primary dissent's invocation of the nearest reasonable referent canon on this point. *See* Richardson Dissenting Op. at 94-95. First, the dissent relies on the faulty premise that "referral" is not a "course[] of action," a claim made with scattershot references to a 1985 congressional report and a 2012 ACOG opinion on adoption. *See id.* at 94 n.17. In any event, we need not resort to such linguistic contortions. The Final Rule itself explains how HHS views the phrase "courses of action included in nondirective counseling." *See* 84 Fed. Reg. at 7733 (in interpreting this very phrase, explaining, "Congress has expressed its intent that postconception adoption information *and referrals* be included as part of any nondirective counseling in Title X projects. . . . " (emphasis supplied)).

[18] The analogies in the primary dissent miss the point in two ways. First, as noted, Congress and HHS have indicated that referrals are included in nondirective counseling, so rather than hot dogs and hamburgers, we should use ground beef and hamburgers; and rather

proach is anything but "factual, objective, and unbiased." *Id.* at 7747. This trickery becomes crystal clear when the Final Rule attempts to eschew the Nondirective Mandate under the guise of protecting a woman in the face of a medical "diagnosis." *See id.* at 7748 ("Where care is medically necessary, as prenatal care is for pregnancy, referral for *that care* [as opposed to abortion] is not directive because the need for care preexists the direction of the counselor, and is, instead, the result of a woman's pregnancy diagnosis.").

Finally, we employ the rule of common sense. In reality, a physician cannot make a referral without first speaking with and counseling a patient. In their amicus brief to this court, ACOG, which as noted above represents more than 90% of all obstetrician-gynecologists in the United States, and other reputable and nonpartisan medical organizations[19] echo the commonsense notion that,

> As commonly understood by medical practitioners and in daily medical practice, counseling patients may include and, in some cases, must include, providing referrals. Well-established medical ethical princi-

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than dinner and dessert, we should use the side dish and dinner. Second, even putting this aside and accepting the analogies of the dissent, it does not so much matter whether counseling and referrals have meanings as widely accepted as stop and go, as distinct as hot dogs and hamburgers, or as rule-based as dinner and dessert. The issue is whether the agency meant for the Nondirective Mandate to apply to both counseling and referrals. Clearly, it did.

[19] Specifically, the American Academy of Pediatrics, American College of Physicians, Society for Adolescent Health and Medicine, and the Society for Maternal-Fetal Medicine.

> ples not only recognize referrals as part of counseling, but impose obligations on practitioners to provide patients with appropriate and necessary health care, including information about their treatment options and referrals.

Amicus Br., Am. Coll. of Obstetricians & Gynecologists, at 5. It follows, then, that where a patient has made her preferences known to her physician or APP, and those preferences are rejected by a referral for a service she does not want, the physician or APP has acted in a directive manner. Yet, this is precisely what the Final Rule requires Title X providers to do.

b.

Permissive Nondirective Counseling

Next, in an attempt to cast the Final Rule as benign, the Government and the primary dissent point out that the Final Rule (unlike the 1988 Rule) "*allows, but does not require*, 'nondirective pregnancy counseling, which may discuss abortion,' provided it does 'not encourage, promote or advocate abortion as a method of family planning.'" Appellants' Br. 9 (quoting 84 Fed. Reg. at 7789, 7745-46; 42 C.F.R. §§ 59.16(a); 59.14(e)(5); 59.14(b)(1)(i)) (emphasis supplied); *see* Richardson Dissenting Op. at 79 & n.6. Critically, however, this provision was added to "protect the conscience rights of individuals and entities who decline to perform, participate in, or refer for, abortions," not to protect those women who are seeking information about or have decided to have an abortion. 84 Fed. Reg. at 7716.

But the Government insists "[t]he [Final] Rule expressly permits 'nondirective pregnancy counseling,

which may discuss abortion.'" Appellants' Br. 28 (quoting 84 Fed. Reg. at 7789 (emphasis supplied)). However, an application of this concept reveals how constrained a physician can be in his or her discussion. *See California*, 950 F.3d at 1107 (Paez, J., dissenting) ("What can a doctor even say when confronted with her patient's questions about abortion?").

For example, in a hypothetical example set forth in the Final Rule, a provider "offers [the client] nondirective pregnancy counseling," even though the provider "[cannot] refer for, nor encourage[], abortion." 84 Fed. Reg. at 7789. (And according to earlier parts of the Final Rule, the provider may discuss the "risks and side effects" of abortion, but may not "encourage" abortion. *Id.* at 7724.) Further, in the Final Rule's hypothetical "counseling" session, the Title X physician "tells the client that the project can help her to obtain prenatal care and necessary social services and offers her the list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), assistance, and information for pregnant women," but "**[n]one of the providers on the list provide abortions**." *Id.* (emphasis supplied). In this hypothetical, which is "consistent with" the Final Rule, *id.*, a patient may come in seeking an abortion, but the only counseling done is on prenatal care, and on the list provided, none of the physicians perform abortions. And according to other parts of the Final Rule, even if a physician offers a list of primary health care providers who *do* provide abortions, it cannot indicate which ones provide abortions, and no more than half of the providers on the list can perform abortions. *See id.* at 7761.

Thus, HHS's attempt to *appear* nondirective is deceptive and at odds with reality. Notably, it is also at odds with HHS's *own* statements made in 2000. *See* 65 Fed. Reg. at 41279 ("If [Title X] projects were to counsel on an option even where a client indicated that she did not want to consider that option, there would be a real question as to whether the counseling was truly nondirective or whether the client was being steered to choose a particular option.").

c.

Failure to Refer

Next, the Government is of the view that "[a] Title X provider's *failure* to *refer* a patient for an abortion . . . neither *counsels* nor *directs* the patient to do anything; it simply declines to facilitate an abortion with taxpayer dollars, consistent with the best reading of § 1008." Appellants' Br. 14 (emphases in original). But it is not a "failure" to refer when a provider is *directed* not to do so. Moreover, Congress' use of "nondirective" means that patients are entitled to *neutral* counseling. Being required to refuse (not failing) to refer a patient to a physician who performs abortions when the patient has requested as much, and instead, referring her for prenatal care, is far from neutral.

d.

Rust v. Sullivan

The Government's final argument with respect to the Nondirective Mandate is that because the Nondirective Mandate appeared continually in an appropriations rider beginning in 1996, it could not have supplanted *Rust v. Sullivan* to accomplish an "implied repeal[]" of "HHS's

statutory authorization for these regulations." Appellants' Br. 22. This argument is a paper tiger.

To be clear, Baltimore is not making an implied repeal argument. On Counts I and II, Baltimore is bringing an APA challenge to an agency action that is "not in accordance with the law," as the law now stands. J.A. 48, 50.

In any event, *Rust* was decided before Congress enacted the Nondirective Mandate. As a result, *Rust* simply does not speak to the specific challenges in this case. In *Rust*, the Supreme Court entertained a challenge to the facial validity of the 1988 Rule. *See* 500 U.S. at 181. Applying *Chevron*, the Court held first that the phrase "shall be used in programs where abortion is a method of family planning" in Section 1008 is ambiguous because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Id.* at 184. Then, the Court turned to whether "the agency's answer [wa]s based on a permissible construction of the statute." *Id.* (internal quotation marks omitted). The Court reasoned:

> Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

Id. The Court also relied on the lack of "clear and operational guidance to [Title X grantees]"; "client experience under the prior policy"; and "a shift in attitude against the elimination of unborn children by abortion." *Id.* at 187 (internal quotation marks omitted).

This holding has no applicability in HHS's interpretation in 2019. Because HHS had changed its interpretation of Section 1008, the *Rust* Court determined whether the change was supported by a "reasoned analysis," which involved looking to the Secretary's determinations about "client experience under the prior policy" and "a shift in attitude against" abortion. *Rust*, 500 U.S. at 187. These "justifications"—changes in client trends and attitudes in 1988—were "sufficient to support the Secretary's revised approach." *Id.*; *see also id.* at 186-87 ("An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the *demands of changing circumstances*." (alterations and internal quotation marks omitted) (emphasis supplied)).

These justifications cannot legally control a step two analysis of a *new* agency change in policy 30 years later. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."). And crucially, HHS made this regulatory change in 2019 against the backdrop of newly enacted prohibitions on directive pregnancy counseling and interference with communications regarding patient treatment options.

The Court could not have decided whether the content of the 1988 Rule contravened a provision passed

eight years later. Indeed, as pointed out by the Government, the 1988 Rule prohibited nondirective (or any) counseling on abortion, whereas the Final Rule makes it permissive. *See* Appellants' Br. 21 (Unlike the "1988 regulations," the Final Rule "permits, but does not require, nondirective pregnancy counseling."). The legal and factual background in *Rust* is inapposite.

e.

For these reasons, the Final Rule violates the Nondirective Mandate that has appeared in every HHS appropriations rider since 1996.

2.

The Noninterference Mandate

The Final Rule is also contrary to law because it violates the Noninterference Mandate, a provision in the ACA. The Noninterference Mandate provides that, notwithstanding other ACA provisions, HHS "shall not promulgate" any regulation that "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care"; "impedes timely access to health care services"; "interferes with communications regarding a full range of treatment options between the patient and the provider"; "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; and "violates the principles of informed consent and ethical standards of health care professionals." 42 U.S.C. § 18114(1)-(5).

Prohibiting Title X health care providers from referring a woman for an abortion when she requests it, as

the Final Rule does, quite clearly "interferes with communications" about medical options between a patient and her provider. 42 U.S.C. § 18114(3); *see Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) ("Transforming the physician into the mouthpiece of the [government] undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes."). What is worse, the Final Rule requires health care providers to hide the ball from their patients by giving them a list of providers without telling them which ones actually perform abortions. This is not "full disclosure of all relevant information." 42 U.S.C. § 18114(4). Moreover, considering the time-sensitive nature of pregnancy and access to legal abortion, this attempt to hoodwink patients creates "unreasonable barriers" to "appropriate medical care," and "impedes timely access" to health care services. *Id.* § 18114(1), (2). As the district court noted, the AMA has strongly opposed this rule for its interference in the patient-physician relationship and violation of ethical standards, *id.* § 18114(5), as have over 20 amici in their filings with this court.[20]

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[20] These amici include the City of New York and Local Governments; National Health Law Program; Advocates for Youth; American Medical Student Association; Community Catalyst; The Endocrine Society; Families USA; National Center for Lesbian Rights; Bay Area Lawyers for Individual Freedom; Equality Federation; Family Equality Council; GLMA: Health Professionals Advancing LGBT Equality; The National LGBTQ Task Force; The LGBT Movement Advancement Project; Institute for Policy Integrity at New York University School of Law; National Center for Youth Law; American Academy of Pediatrics; American College of Obstetricians and Gynecologists; American College of Physicians; Society

In a distressingly poignant hypothetical, the primary dissent posits that a "failure to act" by an expert swimmer does not impede or interfere with a nearby drowning person's position, and in the same way, HHS may choose to fund projects that meet its requirements without impeding or interfering with others that do not. Richardson Dissenting Op. at 106. But this case is not about a failure to act. Rather, this case is about placing limits on the ability to act—that is, providing funds on which Title X providers rely to continue serving their low-income patients, but with ethically questionable strings attached. Therefore, rather than the expert swimmer merely failing to act by walking past the drowning person, this case is more akin to the swimmer jumping in to offer aid to the person, but instead, only assisting the person halfway to shore, or, worse yet, blocking the person from being rescued by someone else.

a.

Rust v. Sullivan

Here again, the Government attempts to rely on *Rust v. Sullivan*, quoting from that case: "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral . . . leaves her in no different position than she would have been if the Government had not enacted Title X." Appellants' Br. 20 (quoting *Rust*, 500 U.S. at 202). But this quotation has nothing to do with the challenge here—that is, an APA challenge to the legality of an agency rule promulgation. Rather, the quoted language comes

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for Adolescent Health and Medicine; and Society for Maternal-Fetal Medicine.

from *Rust*'s analysis of whether the 1988 Rule violated a woman's Fifth Amendment right to choose whether to terminate her pregnancy. That inquiry involved due process questions of whether the Government had a "constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Rust*, 500 U.S. at 201.

As it did with the Nondirective Mandate, the Government also contends that the ACA cannot act as an implied repeal of HHS's authority to promulgate the Final Rule. But as explained above, the Government wholly misconstrues the issue. Again, *Rust* does not control here because the ACA Noninterference Mandate was enacted after that decision. Moreover, since *Rust*, Congress has explicitly recognized in the ACA the importance of removing barriers to full disclosure in a health care setting and preserving a private and plenary consultation between a patient and her health care provider. In addition,

> as a factual matter, the Final Rule's referral list restrictions go far beyond anything in the 1988 [Rule]. The new restrictions: (1) permit a Title X project to give a patient who *specifically requests* a referral for abortion a referral list that contains *no* abortion providers; (2) require the project to compile a list of providers, a majority of whom are not responsive to the patient's request; (3) prevents the project from identifying which providers on the list *are* responsive to the patient's needs; and (4) *does not require the project to even alert the patient that the list is incomplete and non-responsive*. Because of these provisions, patients in need of time-sensitive medical care

> will be delayed or altogether prevented from obtaining that care because they will receive referrals that they do not realize are not for the services they requested. In other words, under the Final Rule, the Government would be subsidizing the misdirection of unsuspecting patients. Unlike in *Rust*, the Final Rule may well make patients worse off than if they had not sought help from a Title X project to begin with.

California v. Azar, 385 F. Supp. 3d 960, 997-98 (N.D. Cal. 2019) (citations omitted) (emphases in original), *vacated and remanded*, 950 F.3d 1067.[21]

b.

Waiver

The Government also argues that the argument that the Final Rule contravenes the ACA Noninterference Mandate was not raised to the agency during the comment period and therefore, it is waived. *See* Appellants' Br. 34. Not so.

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[21] The Government believes that Congress's use of the phrase "[n]otwithstanding any other provisions of this Act," 42 U.S.C. § 18114—rather than "notwithstanding any other law"—means that it intended to eclipse HHS's rulemaking authority as to the ACA, but it did not intend to do so regarding provisions outside of the ACA. We disagree. Read literally, that provision does not limit the scope of the Noninterference Mandate. Rather, the phrase simply means that the Mandate cannot be narrowed by other provisions *of the ACA*. In considering a provision outside the ACA, the directive stands that HHS "shall not promulgate *any regulation*" that interferes with patient communications, etc. 42 U.S.C. § 18114 (emphasis supplied).

"As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved." *1000 Friends of Md. v. Browner*, 265 F.3d 216, 227 (4th Cir. 2001) (internal quotation marks omitted). To do otherwise would "usurp[] the agency's function" and would "deprive[] the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n v. Aragan*, 329 U.S. 143, 155 (1946). However, if the public's comments "sufficiently raised the question" that is challenged in court, the issue is not waived. *Browner*, 265 F.3d at 228. In *Browner*, the comments "[did] not include a separately delineated section devoted to" the claim at issue, and were "perhaps . . . phrased somewhat generally," but they "nonetheless refer[red] (at least implicitly) to" the issue on appeal. *Id.*

Like in *Browner*, the concerns raised in this lawsuit regarding the ACA Noninterference Mandate were sufficiently raised at the administrative level. There were multiple comments raised about the authority to interfere with medical conversations between physicians and patients. *See, e.g.*, Comment HHS-OS-2018-0008-69480, https://www.regulations.gov/document?D=HHS-OS-2018-0008-69480 (July 23, 2018) (saved as ECF opinion attachment) ("There is no legitimate medical or legal justification for the proposed rule, which is contrary to the standards of the medical profession, an invasion of patient privacy, and clearly discriminatory in both intent and effect. It is therefore plainly contrary to the public interest and likely unlawful.").

Commenters also told HHS that the Rule would erect unreasonable barriers to care, impede timely access to

care, interfere with physician-patient communications, deny patients access to medically relevant information, and require doctors to violate medical ethics. *See, e.g.*, HHSOS-2018-0008-30266, http://bit.ly/2Xl8Han (saved as ECF opinion attachment) ("Patient's [sic] have a right to unbiased, informed consent about all of their options. This rule does a great disservice to women and puts unreasonable barriers on general providers of care and hurts the honest, open conversation that healthcare providers should be having with their patients." (June 29, 2018)); HHS-OS-2018-0008-198615, http://bit.ly/2VJantI (saved as ECF opinion attachment) (Final Rule "creates barriers to receiving the information needed to obtain abortion care" (Aug. 1, 2018)); HHS-OS-2018-0008-179339, http://bit.ly/2ZjlEDt (saved as ECF opinion attachment) (from ACOG: "The Proposed Rule would interfere with the patient-physician relationship, restrict the information available to patients, and hinder the ability of physicians to practice medicine in accordance with their ethical obligations." (Aug, 1, 2018)); HHS-OS-2018-0008-106624, https://bit.ly/2Yd6opK (saved as ECF opinion attachment) (from the American Academy of Nursing: "[T]he proposed rule would inject politics and ideology into the examination room by prohibiting providers from giving patients information on how and where to access abortion. This restriction would undermine the health professional's ethical obligations and hinder open and honest conversations between patients and their providers." (July 27, 2018)); HHS-OS-2018-0008-188772, http://bit.ly/2Ul3L3p (saved as ECF opinion attachment) (from the Universal Health Care Foundation of Connecticut: "[The] 'gag rule' goes completely against the ethical standards of health care

professionals, jeopardizing an open, trusting relationship with their patients." (Aug. 1, 2018)).

Significantly, HHS responded to these comments, fully recognizing that "medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance." 84 Fed. Reg. at 7724; *see also id.* (The Final Rule "adequately accommodates medical professionals and their ethical obligations."). Moreover, HHS listed the ACA as one of the statutes it considered in promulgating the Final Rule, *see* Reply Add., *Mayor & City Council of Baltimore v. Azar,* No. 19-1614 (4th Cir. filed May 30, 2019), ECF No. 43-2, at 3 (No. 29), and stated that it "consulted upon" this list in drafting the Final Rule, *see id.* at 1. It also noted other ACA provisions implicated by the Final Rule. *See* 84 Fed. Reg. at 7737 & n.65 (quoting 42 U.S.C. 300gg-13(a)(4) as added by the Affordable Care Act, Public Law 111-148, 124 Stat. 119, 131, sec. 1001). For these reasons, HHS was clearly aware (1) of the Noninterference Mandate; (2) that the ACA can affect the provisions of the Final Rule; and (3) of specific challenges to the protections set forth in that statute. This issue is not waived.[22]

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[22] To the extent our conclusion means HHS considered the Noninterference Mandate and thus, we must afford due deference to HHS's interpretation of the Noninterference Mandate in the Final Rule, we would nonetheless find the interpretation of the Noninterference Mandate to be unreasonable and impermissible for the reasons stated in Section III.A., *supra.* Indeed, HHS has demonstrated, and continues to demonstrate, a contradictory view of medical ethics. *Compare* 84 Fed. Reg. at 7724 ("[M]edical ethics obligations require the medical professional to share full and accurate information with

c.

Thus, we conclude that the district court was correct in holding that, on the merits, the Final Rule violates the ACA Noninterference Mandate.

3.

The primary dissent relies heavily on *Rust*, a case decided before the Nondirective and Noninterference Mandates, both of which altered the landscape of health care funding and patient privacy and protection. The dissent downplays these Mandates, describing Baltimore as "scour[ing] the congressional record for some other statute that might preclude the regulations." Richardson Dissenting Op. at 86. But the dissent does not, and cannot, argue these laws are any less "lawful" than any other statute or appropriation passed by Congress. And by describing HHS as a "democratically responsive agency" and an "expert and accountable agency," the dissent skirts dangerously close to elevating agency action to congressional edict. Richardson Dissenting Op. at 82, 110; *see also id.* at 84-85, 108.

C.

Scope and Vacatur

The parties also disagree about the proper substantive and physical scope of the injunction.

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the patient, in response to her specific medical condition and circumstance."), *with id.* at 7760 (Title X staff must "not identify which providers on the list, if any, perform abortions"), *and* S.J.A. 1263-64 (in summary judgment hearing on January 27, 2020, Government counsel conceding that no "professional organization of any kind" takes the position that the Final Rule's restrictions on referrals are in line with medical ethics).

1.

Severability Statement

First, the Government points to a severability statement in the Final Rule, which provides, "The Department believes that each component of the rule is legally supportable, individually and in the aggregate. To 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. Thus, the Government contends that, should the court find the referral and counseling restrictions and physical separation requirements to be contrary to law or arbitrary and capricious, we should only enjoin those aspects of the Final Rule. We disagree and uphold the injunction of the entire Final Rule.

The Supreme Court has held that the inclusion of a severability clause in a statute "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the . . . offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Id.*; *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (Unless "it is evident that the [lawmaking body] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

To determine whether we should merely excise the offending section of the Final Rule, we ask, "Would the

[rulemaking body] have passed the statute without the [offending] section?" *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). "Severance and affirmance of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own." *North Carolina v. Envtl. Prot. Agency*, 531 F.3d 896, 929 (D.C. Cir. 2008) (internal quotation marks omitted); *see also MD/DC/DE Broadcasters Ass'n v. Fed. Commc'ns Comm'n*, 253 F.3d 732, 739 (D.C. Cir. 2001) (Tatel, J., dissenting from denial of rehearing en banc) (explaining, "[a]gency intent has always been the touchstone of our inquiry into whether an invalid portion of a regulation is severable").

Despite the severability clause, the Final Rule is not severable because it is clear HHS "intended the [Final Rule] to stand or fall as a whole," and the agency desired "a single, coherent policy, the predominant purpose of which" is to reinstitute the 1988 Rule. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 191. We have "substantial doubt" that HHS would have adopted the remaining portions of the Final Rule without the prohibitions on abortion counseling and referrals, restrictions on referral lists, physical separation requirement, and exclusion of abortion as one of multiple options available to a client facing an unwanted pregnancy. *See North Carolina*, 531 F.3d at 929. This conclusion is supported by the language of the Final Rule itself. It labels the prohibition of abortion referrals and physical separation requirement as "[m]ajor [p]rovisions." 84 Fed. Reg. at 7715. It also states:

> The primary purpose of this rule is to finalize, with changes in response to public comments, revisions to

> the Title X family planning regulations proposed on June 1, 2018. *This rule, promulgated pursuant to the Department's authority, will 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*, as well as related statutory requirements.

Id. (footnotes omitted) (emphasis supplied). Without the challenged provisions, the Final Rule loses its primary purpose.

For these reasons, the substantive scope of the district court's injunction is proper.

2.

Physical Scope

Next, the Government challenges the district court's decision to enjoin enforcement of the Final Rule throughout the state of Maryland, rather than limiting relief to Baltimore City and its subgrantees. The Government contends, "Neither Baltimore nor the district court articulated a tenable justification for that sweeping relief." Appellants' Supp. Br. 44.

The scope of injunctive relief "rests within the 'sound discretion' of the district court." *South Carolina v. United States*, 907 F.3d 742, 753 (4th Cir. 2018) (quoting *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002)). But its "powers are not boundless." *Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010). The district court's choice of relief "should be carefully addressed to the circumstances of the case," *Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d

379, 393 (4th Cir. 2001), *overruled on other grounds by Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012), and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

A district court abuses its discretion if its injunctive order "is guided by erroneous legal principles or rests upon a clearly erroneous factual finding," or it "otherwise acts arbitrarily or irrationally in its ruling." *South Carolina*, 907 F.3d at 753 (internal quotation marks omitted). "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

The district court offered the following explanation in support of a statewide injunction:

> Baltimore City is close in proximity to multiple other States and municipalities whose people make use of its health system. Loss of funding in neighboring states will put pressure on Baltimore's health system, as mobile patients come from neighboring communities to make use of Baltimore's resources. In this case, a permanent injunction that is limited to Maryland is narrowly tailored to avoid irreparable harm to the sole Plaintiff, Baltimore City.

S.J.A. 1318. This finding is based on a declaration submitted to the district court by Charlotte Hager, Health Administrator for the Baltimore City Health Department, who stated:

> Baltimore's public health services will have to spend more non-Title X funds due to the loss of Title X

> funds by providers in Maryland and neighboring states. Because the Baltimore City Health Department serves as the final safety net for the community, loss of Title X services for residents of Baltimore and surrounding areas would mean further strain on city funds in order to meet the health care needs of residents as well as non-residents who use the city health care system.

Decl. Charlotte Hager ¶ 19, S.J.A. 972. Thus, the district court reasoned that if Title X providers elsewhere in Maryland or in nearby states are forced to exit the Title X program or must offer a limited array of reproductive health services, women in Maryland and other nearby states—who would have sought services elsewhere—will necessarily be funneled to Title X providers in Baltimore. For example, without the statewide injunction, a Virginia woman seeking an abortion referral would be obliged to travel to a Title X provider in Baltimore. By contrast, with the statewide injunction, she could obtain a referral from a Maryland Title X provider located closer to the Virginia-Maryland border.

Importantly, the district court's conclusion is buttressed by other evidence in the record, including:

- Title X providers must accept all patients, regardless of their ability to pay for services, and "are already stretched thin trying to meet the demand for services in their communities," S.J.A. 722;
- For 60% of Title X patients, their Title X provider was their only source of medical care in the last year, *see id.* at 708;

- Some nationwide providers and several states notified the Department of Health and Human Services that they would be forced to exit the Title X program if the Final Rule went into effect, *see id.* at 371;
- In 2017, Baltimore's Title X network served 16,000 people—86% of whom had incomes at or below the federal poverty line, *see id.* at 969;
- Of those persons served in Baltimore, 7,670 people were served by Title X providers that receive funding from Baltimore City's grant, *see id.* at 970;
- Title X providers are already "the final safety net" for one-third of women in Baltimore City, *id.* at 969; and
- Maryland's Title X providers are often some of the only family planning providers in Maryland that accept Medicaid, and 22% of Maryland residents are enrolled in Medicaid or the Children's Health Insurance Program, *see id.* at 970.

Therefore, in concluding that a statewide injunction is necessary to afford Baltimore complete relief, the district court was not guided by erroneous legal principles or factual findings, nor did it otherwise act arbitrarily or irrationally in its ruling. We affirm the statewide scope of the permanent injunction as a permissible exercise of the district court's broad discretion.

3.

Vacatur

Finally, in its supplemental response brief in Case No. 20-1215, Baltimore argues that as to the district court's February 14, 2020 opinion, "The district court erred . . . by purporting to limit the geographic scope of the vacatur to Maryland. It does not make sense to speak of 'vacatur' in party-based or geographic terms" because vacatur "does not operate like an injunction." Appellee's Supp. Br. 52, 51. We reject this argument. Baltimore essentially requests that we amend the judgment of the district court to expand the vacatur of the Final Rule on a program-wide basis. It may not seek this relief without filing a cross- appeal.

"A cross-petition is required . . . when the respondent seeks to alter the judgment below." *Nw. Airlines, Inc. v. Cty. of Kent, Mich.*, 510 U.S. 355, 364 (1994); *see also El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee . . . may not attack the [lower court] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." (internal quotation marks omitted)); *JH ex rel. JD v. Henrico Cty. Sch. Bd.*, 326 F.3d 560, 567 n.5 (4th Cir. 2003) (explaining that, without a cross appeal, the prevailing party may not present an argument that would "lead to a reversal or modification of the judgment" (alteration and internal quotation marks omitted)).

The district court was clear in its February 14, 2020 opinion that it was "set[ting] aside the Final Rule" as arbitrary and capricious, and enjoining enforcement of

the Rule in Maryland. S.J.A. 1317. Its clarifying orders explained that the Rule was "vacated . . . in the State of Maryland," and reasoned, "[w]hile the Court did not explicitly state that the Final Rule was vacated and set aside in Maryland, vacatur in the State of Maryland was the precise effect of the ruling." *Id.* at 1336; *see also* Mem. Op. at 11, *Mayor & City Council of Baltimore v. Azar*, No. 1:19-cv-1103 (D. Md. filed April 15, 2020), ECF No. 115 ("While vacatur and injunctive relief may be distinct remedies, in this case, their result is the same: the proscription of enforcement of the HHS Final Rule in the State of Maryland.").

Now, in its supplemental response brief, Baltimore asks us to "correct [this] error" because "an order vacating agency action under [the APA] cannot be restricted geographically or to the parties." Appellee's Supp. Br. 55, 53. But if we were to adopt Baltimore's argument and remove the geographic scope from the district court's vacatur of the Final Rule, it "would require us to modify the court's judgment below and enlarge [Baltimore's] rights thereunder." *Rosenruist-Gestao E Servicos LDA v. Virgin Enterprises Ltd.*, 511 F.3d 437, 447 (4th Cir. 2007). Baltimore has not cross-appealed from the district court's February 26 clarification order, nor its April 15 denial of Baltimore's 59(e) motion. Indeed, the time to do so has passed.[23] *See* Fed. R. App. Proc. 4. Therefore, we decline to consider this argument.

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[23] Baltimore recognizes the potential propriety of filing a cross-appeal, but first notes it would "make this case more complex," and then, places the impetus on this court to instruct them to do so. Appellee's Supp. Br. 56 n.8. We are not so inclined as to advise one party over the other about strategic litigation choices.

D.

Preliminary Injunction Appeal and
Permanent Injunction Appeal

Finally, in Case No. 19-1614, Baltimore has filed a motion to dismiss the appeal as moot. We grant the motion. Because we have affirmed the district court's grant of the permanent injunction on the ground that the Final Rule is not in accordance with law, its preliminary injunction—which was based on the same ground—is moot. "Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). Indeed, now that we have affirmed the permanent injunction, vacatur of the preliminary injunction would offer the Government no relief. *See id.* at 314-15 ("[E]ven if the preliminary injunction was wrongly issued . . . its issuance would in any event be harmless error."); *cf. Int'l Bhd. Of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 236 (4th Cir. 2018) ("A party may recover damages for a preliminary injunction wrongfully entered if and only if the injunction prevented it from doing something that it had the legal right to do.").

IV.

For the foregoing reasons, we affirm the district court's grant of the permanent injunction in Case No. 20-1215. Because we affirm the permanent injunction,

we dismiss the appeal of the preliminary injunction in Case No. 19-1614 as moot.

19-1614—DISMISSED;
20-1215—AFFIRMED

DIAZ, Circuit Judge, concurring in the judgments:

For the reasons ably explained in the majority opinion, I agree that the Final Rule runs afoul of both the Nondirective and the Noninterference Mandates. And because this conclusion is sufficient to affirm the district court's grant of a permanent injunction, I decline to join that portion of the majority opinion holding that the Final Rule was promulgated in an arbitrary and capricious manner. In all other respects, I concur in the judgments.

WILKINSON, Circuit Judge, dissenting:

Section 1008 of the Public Health Service Act reads as follows: "None 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.

The one medical procedure mentioned in the above provision is that of abortion. No other was referenced. There was, for example, no bar to federal funding of cancer screenings or STD treatments. The purpose of singling out this one procedure could only have been Congress's desire not to subsidize the performance of abortion with the federal fisc. The Rule in question permissibly seeks to further this purpose. It may not be the only permissible means of effectuating what was Congress's apparent intent, but, as *Rust v. Sullivan* noted, it was certainly one permissible way of doing so. 500 U.S. 173, 184 (1991). The provision allows agencies some latitude in this regard without running afoul of the statute or the arbitrary and capricious test in the Administrative Procedure Act.

This latitude stems from a distinct sort of ambiguity. Often a statute has an undeniable purpose, but ambiguity exists on how to effectuate that purpose. Such is the case here. Section 1008 is intended to prevent federal subsidization of abortion through the Title X program, and, by doing so, "ensure that Title X funds [are] 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 (quotation omitted); *see also id.* at 198.

While its purpose is clear, Section 1008 is ambiguous on the means that should be used to prevent subsidization. *Rust*, 500 U.S. at 184. Due to this ambiguity, various constructions of the statute—and, by extension, various methods of accomplishing its purpose—are permissible. *Id.* As long as an agency's construction is plausible and furthers "Congress' expressed intent" of preventing subsidization of abortion-related activities, the courts may not interfere. *Id.* at 184, 198.

Rather, as Judge Richardson explains in his fine dissent, we must respect the authority of the administrative agency, Congress, and not incidentally, the Supreme Court's role in delineating the same. Here, in a perfect trifecta, all three have been simultaneously snubbed. Before us is a milder version of a rule that the Supreme Court has already upheld, *see Rust*, 500 U.S. 173, and I cannot understand why the result here, out of simple respect for our highest Tribunal, would not be open and shut.

Federal funding has been the quintessential point of compromise between the opposing factions in this fraught and volatile area. We are not talking about a constitutional issue here: a woman's right to choose does not "carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *see also Rust*, 500 U.S. at 201-203. What we are talking about is the possibility of a statutory compromise through the political process.[*]

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[1] My friends in the majority state that "nothing in this opinion requires—or even allows—federal funding of abortions." Maj. Op. at 10 n.1. Its own opinion, however, notes that the Rule it enjoins

The elements of the compromise may vary in their detail, but the overall components of compromise have remained quite consistent and clear. Congress, on the one hand, does not seek to bar or directly restrain the right established by the Supreme Court in *Roe v. Wade* and its progeny. Congress, on the other hand, seeks to respect those who hold moral or religious objections to the contested practice by withholding federal funds from it. Like all compromises, this one may not be fully acceptable to the heartfelt and passionate views on either side of this debate. But perhaps it is for that very reason that the compromise on federal funding should be respected.

The court today does not respect it. It jettisons the Rule and, in so doing, proceeds to cut the middle from out of the abortion debate. Here too, as Yeats feared, the center may no longer hold. In rejecting statutory compromises such as that before us, the court cedes the field to more absolute forces. This is the last direction in which a torn country needs to travel, and I respectfully note my dissent.

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is one that "prohibits physicians and other providers in Title X programs from referring patients for an abortion." *Id.* at 8.

The self-evident purpose of the statute is to bar federal funding for abortions. The Rule seeks to ensure that this purpose is respected. Invalidating the Rule frees Title X recipients to refer patients directly to abortion providers, who thereupon realize the resulting revenue. Section 1008 certainly affords the implementing agency, here HHS, the latitude to shape Title X counseling in a manner that minimizes such taxpayer subsidies of abortion with federal funds.

RICHARDSON, Circuit Judge, with whom Judges WILKINSON, NIEMEYER, AGEE, QUATTLEBAUM, and RUSHING join, dissenting:

This appeal raises two familiar questions of administrative law. We first ask whether a regulation promulgated by the Department of Health and Human Services ("HHS")—an executive agency accountable to the elected President—reflects a permissible statutory construction. We next ask whether that regulation is a product of reasoned decisionmaking. Although the regulation's subject matter—public funding for abortion—rouses the passions of the public, the judicial role requires us to apply established law just as we would for any other regulation.

In 2019, HHS promulgated a Final Rule amending the regulatory scheme that governs Title X of the Public Health Service Act. Title X authorizes HHS to administer a limited federal-grant system for preconception family-planning programs. HHS's Final Rule interprets § 1008 of Title X, in which Congress barred the use of grant funds "in programs where abortion is a method of family planning." Seeking to bring "much needed clarity" to the scope of Title X, the Final Rule imposes two bright-line requirements on Title X providers. First, it requires Title X programs to be physically and financially separate from abortion providers ("separation requirement"). Second, it prohibits Title X programs from referring clients for abortions or to abortion centers, and it requires them to provide pregnant women with a list of prenatal caregivers ("referral regulations"). At the same time, the Final Rule also carves out a safe harbor for discussions about abortion: Title

X grantees may offer "nondirective pregnancy counseling," meaning objective, free-flowing discussions about any course of action available to a pregnant woman, including abortion.

The Mayor and City Council of Baltimore sued to set aside the Final Rule under the Administrative Procedure Act ("APA"). First, Baltimore argues that the Final Rule exceeds HHS's statutory authority. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Second, Baltimore argues that the Final Rule is not a cogent product of agency expertise. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The district court agreed with Baltimore and now so does the majority. Both are wrong.

In my view, the Final Rule falls well within HHS's established statutory authority, and the record shows that it was a product of reasoned decisionmaking. At the outset, Baltimore's statutory challenge faces a significant problem: The Supreme Court has already ruled that the regulations fall inside the scope of Title X's broad mandate. The 'new' Rule substantially returns the Title X regulations to the version that HHS adopted in 1988, and which the Supreme Court upheld as a permissible interpretation of Title X in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* remains binding precedent, and the relevant text of Title X has not changed. In response to this roadblock, Baltimore asserts that two post-*Rust* congressional enactments require us to deviate from the Supreme Court's holding. But neither renders HHS's interpretation unreasonable. So precedent dictates the same result for the same *Chevron* challenge to the same requirements.

Baltimore's arbitrary-and-capricious challenge similarly fails. In *Rust*, the Supreme Court rejected an arbitrary-and-capricious challenge to remarkably similar regulations, justified on remarkably similar rationales. Yet, in the majority's view, HHS capriciously dismissed commenters' ethical objections to the referral regulations and arbitrarily estimated the costs of the separation requirement. Again, I disagree. Whatever courts or commenters think about the wisdom of an agency's regulations are of no moment. We must uphold regulations against allegations of arbitrariness, capriciousness, whimsicality, or temperamentality so long as the record shows that the agency gave a hard look and a reasonable response to the problem at hand. And because I conclude that the agency considered the issues and drew a rational line from the facts it found to the choices it made, I would reject Baltimore's arbitrary-and-capricious challenge.

In reaching the opposite conclusion, the majority not only thumbs its nose at the Supreme Court but substitutes its own judgment for that of an executive agency accountable to the elected President. Then, brushing aside the traditional limits on our remedial authority, the majority enjoins enforcement of the *entire* Final Rule throughout *all* of Maryland. And since we are the first Circuit bold enough to skirt *Rust* and enjoin the Final Rule, our decision rips open a circuit split. *See California ex rel. Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc). Today's decision ignores text, abandons administrative-law principles, and forsakes the limited role of courts, particularly inferior ones, in our constitutional structure. Because I disagree with the

majority's faulty analysis and flawed result, I respectfully dissent.

I. Background

The issue we face today is not whether abortions are permitted. We instead face legal issues surrounding rules issued to address the use of federal funds for preconception family-planning programs.

In 1970, Congress enacted Title X of the Public Health Service Act. Pub. L. No. 91-572, 84 Stat. 1504 (codified at 42 U.S.C. §§ 300-300a-6). Title X establishes a limited federal-grant system for preconception family-planning programs. *See* § 300(a); *see also Rust*, 500 U.S. at 179. Charged with administering Title X, the Secretary of HHS may "make grants to and enter into contracts with" public and nonprofit providers to achieve Title X's objectives. 42 U.S.C. § 300(a). To advance this responsibility, Congress has authorized the Secretary to promulgate regulations that govern the eligibility for and use of public funds in Title X programs. *See* § 300a-4(a).

In various Title X provisions, Congress outlines the scope of the Secretary's grant-making authority. For instance, § 300b specifies various factors that the Secretary "shall take into account" to determine awards. And § 300a requires state-health authorities to submit plans for a "comprehensive program of family planning services" before they may receive Title X funds.

Section 1008 of Title X likewise limits the scope of taxpayer funding for family-planning programs:

> None of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning.

42 U.S.C. § 300a-6. In 1988, HHS explained that § 1008 "clearly creates a wall of separation between Title X programs and abortion." 53 Fed. Reg. at 2922. And relying on its rulemaking authority, HHS promulgated regulations to "clarify" the § 1008 prohibition and "preserve the distinction between Title X programs and abortion." *Id.* at 2923, 2925.[1]

These 1988 regulations placed three key limitations on the use of Title X funds. First, HHS required physical and financial separation between Title X projects and abortion activities. 42 C.F.R. § 59.9(a) (1988). This separation mandated discrete recordkeeping, facilities, personnel, and identifying materials. Second, the regulations limited "counseling and referral for abortion services." § 59.8 (1988). Among other requirements, providers could not refer for abortions as a method of family planning, and they had to refer pregnant women to a list of providers offering "appropriate prenatal and/or social services." § 59.8(a)(1), (a)(2) (1988).[2] Last,

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[1] The 1988 regulations were only one installment in a long-running saga of agency amendments to Title X regulations. *See, e.g.*, 36 Fed. Reg. 18465 (1971); 45 Fed. Reg. 37433 (1980); 53 Fed. Reg. 2922 (1988); 58 Fed. Reg. 7462 (1993); 65 Fed. Reg. 41270 (2000); 81 Fed. Reg. 91852 (2016); 84 Fed. Reg. 7714 (2019).

[2] This list could not "steer[]" clients to providers who offered abortion. § 59.8(a)(3). So providers could not "weigh[] the list of referrals" in favor of health-care providers that performed abortions, include providers who mainly provided abortions, or exclude providers who did not offer abortions. *Id.*

the 1988 Rule barred Title X grant programs from encouraging, promoting, or advocating for abortion as a method of family planning. § 59.10(a) (1988); *see also Rust*, 500 U.S. at 178-81 (describing these limitations).

Providers challenged the 1988 Rule on statutory and constitutional grounds. And in *Rust*, the Supreme Court considered, among other claims, whether the 1988 HHS regulations "exceed[ed] the Secretary's authority under Title X" or were "arbitrary and capricious." *Id.* at 183.

Applying the familiar *Chevron* framework, the Supreme Court first held that "[t]he broad language of Title X plainly allows the Secretary's construction of the statute." *Id.* at 184. The Court explained that the text of § 1008 is ambiguous because it "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Id.*[3] The Court then reasoned that "the broad directives . . . in Title X in general and § 1008 in particular," coupled with a lack of specific definitions for key terms, such as "method of family planning," placed the HHS regulations well within the range of permissible interpretations. *Id.*

The Supreme Court next held that the regulations were not "arbitrary and capricious" under *State Farm*. The Secretary, the Court explained, "amply justified" the regulations "with a 'reasoned analysis.'" *Id.* at 187 (quoting *State Farm*, 463 U.S. at 41). The Court credited the Secretary's determinations that the 1988 refer-

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[3] The Supreme Court also noted (unsurprisingly) that Title X's legislative history "is ambiguous and unenlightening." *Rust*, 500 U.S. at 186.

ral regulations were "necessary to provide clear operational guidance to grantees," "justified by client experience," and "supported by a shift in attitude against the elimination of unborn children by abortion." *Id.* (internal quotations and citations omitted). And, as for the 1988 separation requirements, the Secretary determined that they "assure[d] that Title X grantees [would] apply federal funds only to federally authorized purposes and [] grantees [would] avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* The Supreme Court "deferred" to this "reasoned determination that the [separation] requirements are necessary to implement the prohibition" of § 1008. *Id.* at 190.[4]

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[4] The Supreme Court in *Rust* also examined—and rejected—challenges that the regulations violated the First and Fifth Amendments. 500 U.S. at 198-99, 201-03.

The First Amendment challenge failed because the regulations were "designed to ensure that the limits of the federal program are observed," and such limits were permissible because of the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," *id.* (cleaned up). The regulations did not affect actions outside the Title X program, and, even within the program, the "regulations do not significantly impinge upon the doctor-patient relationship." *Id.* at 193-201.

The Fifth Amendment challenge failed because "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over those relating to abortion." *Id.* at 201. So "its decision to fund childbirth but not abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Id.* Instead, "unequal subsidization" merely "encourages alternative activity deemed in the public interest." *Id.*

After the Supreme Court upheld the 1988 regulations in *Rust*, they remained in force until 1993. *See* 58 Fed. Reg. 7462 (1993) (interim rule); 65 Fed. Reg. 41270 (2000) (finalized rule). And while the Title X regulations have changed over time, the statutory text has not.[5] Relying on that text, in 2018 HHS published a proposed rule that would substantially return the regulations to the 1988 framework. 83 Fed. Reg. 25502 (2018). HHS considered over half-a-million public comments and adapted its proposal in response. 84 Fed. Reg. 7714, 7722 (2019).

In March 2019, HHS adopted the Final Rule at issue in this appeal. As in 1988, HHS promulgated the 2019 Final Rule to "provide much needed clarity regarding the Title X program's role as a family planning program that is statutorily forbidden from paying for abortion and funding programs/projects where abortion is a

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at 201 (cleaned up). Title X clients whose access was otherwise limited by indigency were "in no worse position than if Congress had never enacted Title X" because these "financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency." *Id.* at 203 (cleaned up).

[5] Baltimore describes a so-called "all-out war" following the 1988 regulations, with Congress "often coming within a handful of votes" of amending Title X in one way or another. Appellee Br. 20; *see also* Majority Op. 14-15. From their read of this history, Baltimore and the majority seem to infer the 1988 regulations were politically unpopular. Maybe. Maybe not. I see no need to recount that history. What matters here is that the relevant text of Title X was not amended. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[R]epeal of statutes, no less than enactment, must conform with Article I.") (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 954 (1983)).

method of family planning." *Id.* at 7721. HHS now imposes some of the same limitations on the use of Title X funds as in 1988 to support the separation mandated by § 1008: The 2019 Final Rule again requires that a "Title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited under Section 1008." 42 C.F.R. § 59.15. Similarly, a "Title X project may not perform, promote, refer for, or support abortion as a method of family planning." 42 C.F.R. § 59.14(a). And like the 1988 regulation, a Title X project may not lobby for or otherwise advocate for abortion as a method of family planning. 42 C.F.R. § 59.16.

The new regulations differ from the 1988 regulations in one significant respect. While the 1988 regulations *prohibited* any family-planning counseling about abortion, 42 C.F.R. § 59.8 (1988), the 2019 regulations now *permit* "nondirective pregnancy counseling" that discusses abortion, 84 Fed. Reg. at 7746. In other words, Title X grantees today may present neutral information about all available options—including abortion.[6]

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[6] Many commenters who oppose the regulations, and the majority, embrace the political label given to the 1988 regulations: the "Gag Rule." Majority Op. 18 ("[T]he Final Rule essentially revive[s] the Gag Rule."). But this terminology—whether by design or lack of care—ignores the very reason for the "Gag Rule" label.

Political foes, as the majority explains, used the adjective "Gag" because the 1988 Rule withheld Title X funding from programs that discussed the "availability of abortion as an option for individual planning." Majority Op. 12 (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 229 (D.C. Cir. 1992)). The 2019 Final Rule contains no such prohibition. To the contrary, it *permits* Title X providers to provide nondirective pregnancy counseling that includes discussion about abortions.

Baltimore's facilities refer patients for abortions as a method of family planning and seek to require the federal government to continue to subsidize that practice. Disagreeing with the Final Rule as "burdensome and unnecessary," J.A. 12, Baltimore launched a two-pronged attack on the 2019 Final Rule under the Administrative Procedure Act. First, Baltimore alleged that the Final Rule exceeded HHS's statutory authority under Title X. *See Chevron*, 467 U.S. at 843. And as its challenge proceeded, Baltimore moved for a preliminary injunction to prevent the Final Rule from taking effect in Maryland. Because the district court found that Baltimore was likely to succeed on the merits of this argument and that other equitable factors supported the preliminary injunction, it granted Baltimore's motion. HHS appealed, and a panel of this Circuit heard oral argument.

But while that appeal was pending, Baltimore continued to advance on the second front. In that portion of the case, Baltimore argued that the 2019 Final Rule was "arbitrary and capricious." *See State Farm*, 463 U.S. at 43. The district court agreed, and it granted a permanent injunction before we could rule on the preliminary injunction. Again, HHS appealed, and in a "sharp break with settled practice," we consolidated the cases for this initial-en-banc review. *See Mayor & City Council of Baltimore v. Azar*, 799 F. App'x 193, 195 (4th Cir. 2020) (Richardson, J., dissenting from the order denying the motion to stay).[7]

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[7] As I would decide each appeal on the legal arguments, I see no need to consider the equitable factors necessary for either a preliminary or permanent injunction.

II. Discussion

Every agency regulation must be supported by two pillars of administrative law. If one pillar crumbles, the regulation falls. Each pillar embodies fundamental legal tenets and functional assumptions that rationalize the modern administrative state. Challengers of agency action often call on the federal courts to inspect the integrity of these pillars. And when called on, ours is a familiar, two-part inquiry.

The first pillar rises from the supposition that the President—and thus executive agencies—execute the will of Congress. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). As executors of congressional will, executive agencies must ground regulations in "a permissible construction of [a] statute." *Chevron*, 467 U.S. at 843; *City of Arlington v. F.C.C.*, 569 U.S. 290, 304 n.4 (2013). The reason is simple: An agency's "power to make rules that affect substantial individual rights and obligations carries with it the responsibility . . . to remain consistent with the governing legislation" that authorizes the agency to act. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). And so an agency's regulatory authority reaches only as far as its congressional mandate reasonably extends. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Accordingly, when called on to examine this first pillar, a court asks whether regulations exceed an agency's statutory authority. Thus, the scope of the congressional text is the touchstone for our inquiry. *See Chevron*, 467 U.S. at 843. In reviewing the text, we examine

"whether the agency's construction of the statute is faithful to its plain meaning, or if the statute has no [one] plain meaning, whether the agency's interpretation 'is based on a permissible construction.'" *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (citing *Chevron*, 467 U.S. at 843); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). If the regulation survives this scrutiny, the first pillar stands firm. But as "the final authorities on issues of statutory construction," the federal courts need not tolerate a regulation "inconsistent with [the agency's] statutory mandate." *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973) (internal quotations and citations omitted); *see also* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.").

The second pillar holds that agencies are subject-matter experts accountable to the elected President, and they bring their reasoned expertise to bear when adopting regulations. *See State Farm*, 463 U.S. at 52-53; *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). With the "enlightenment gained from administrative experience," the Supreme Court teaches that agencies are "often in a better position than [] courts" to determine the best way to fulfill their statutory mandates. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). So when the administrative record shows that an agency employed that expertise by formulating reasoned regulatory policy, its judgment is to be respected by the courts—even when we disagree as to a policy's propriety. *See id.*

So a second question for reviewing courts is whether the administrative record shows that a democratically

responsive agency employed its expertise by conducting a "reasoned analysis." *State Farm*, 462 U.S. at 42; *Rust*, 500 U.S. at 187. If the agency has "cogently explain[ed]" its regulations in a reasoned manner, we will assume its regulation a product of expertise, and give it the deference that expertise is due. *See State Farm*, 462 U.S. at 48. But when an agency fails to provide the necessary reasoned analysis, we lack confidence that the agency applied its expertise. We will then find the regulation "arbitrary" or "capricious," additional grounds by which we may set it aside. *Id.* at 52; *see also* 5 U.S.C. § 706(2)(A).

Baltimore takes a page from the book of Judges, wraps its arms around both these pillars of administrative law, and pulls with all its might. Our inquiry today is limited to whether the pillars that support the 2019 Final Rule survive the strain. So first, we ask whether HHS permissibly construed § 1008—here a classic *Chevron* question. Second, we turn to whether the Final Rule is supported by a reasoned analysis—a record-centric inquiry governed by *State Farm*. As in *Rust*, I would answer both questions in the affirmative. Baltimore is no Samson. The pillars stand firm. Or at least they should.

A. Pillar one: The Final Rule is a permissible construction of the statute

When HHS speaks with the force of law, we generally defer to its reasonable legal interpretation of a genuinely ambiguous statute. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *see also Chevron*, 467 U.S. at 843-44. Of course, a *reasonable* agency interpretation within the zone of ambiguity may differ from the *best*

judicial interpretation of a statute. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also Michigan v. E.P.A.*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring). Rather, it offers one permissible way that an agency might read the law—sometimes one of several. And where an agency interprets the ambiguous text of a "broad mandate," one reasonable interpretation may "sharp[ly] break" from another. *Rust*, 500 U.S. at 186; *see also Chevron*, 467 U.S. at 862. Here, the Title X regulations have been subject to three such breaks: in 1988,[8] in 1993,[9] and now in 2019.[10]

Whether or not interpretive discontinuities are wise as a matter of policy, *see* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1037-60 (2007),[11] they *are* permit-

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[8] *See Rust*, 500 U.S. at 178-81; *compare* 45 Fed. Reg. 37433 (1980), *with* 53 Fed. Reg. 2922 (1988).

[9] *Compare* 53 Fed. Reg. 2922 (1988), *with* 58 Fed. Reg. 7462 (1993); *see also Nat'l Family Planning & Reprod. Health Ass'n, Inc.*, 979 F.2d at 230.

[10] C*ompare* 65 Fed. Reg. 41270 (2000), *with* 84 Fed. Reg. 7714 (2019).

[11] Even the Founders questioned the wisdom of rapid policy change:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, *or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow.* Law

ted as a matter of law. An agency may revise its interpretation of an ambiguous statute so long as the new interpretation is reasonable, *Brand X*, 545 U.S. at 980, and the change itself is reasoned, *State Farm*, 463 U.S. at 42. The Supreme Court justifies this administrative flexibility on structural and policy grounds—regulatory elasticity allows an agency responsive to the elected President to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64; *see also Brand X*, 545 U.S. at 981 (relying on *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Our role as an inferior court is simply to apply this legal framework as given.

HHS has once again reinterpreted Title X, and the reasonableness of this interpretation is the first question before us. Far from "irrelevant," Appellee Br. 42, *Rust* serves as the starting point for the *Chevron* analysis. Today, as in 1988, HHS spoke with the force of law when it engaged in the notice-and-comment rulemaking authorized by Congress. *See* 42 U.S.C. § 300a-4; *Mead*, 533 U.S. at 226-27. And the relevant question in this case—whether HHS has permissibly interpreted § 1008 of Title X—has already been resolved by the Supreme Court. As described above, *Rust* held that the interpretation at issue today was well within the broad scope of Title X's ambiguous statutory text.

To reach this conclusion, *Rust* applied the now-familiar *Chevron* two-step framework. In step one, we ask

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> is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

THE FEDERALIST NO. 62, at 381 (Madison) (C. Rossiter ed., 1961) (emphasis added).

whether a statute is genuinely ambiguous. If applying the traditional tools of statutory interpretation provides an unambiguous answer, the statute has one—and only one—reasonable interpretation. *Chevron*, 467 U.S. at 842-43 & n.9; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019). The analysis thus ends. Either the agency adopts that interpretation, or its administrative action is prohibited. In contrast, where the traditional tools of interpretation fail to resolve a statute's ambiguity, we go to step two. There, we consider whether the agency's interpretation falls "'within the bounds of reasonable interpretation,'" meaning an interpretation "within the zone of ambiguity." *Kisor*, 139 S. Ct. at 2416 (quoting *City of Arlington*, 569 U.S. at 296).

Rust proceeded through both *Chevron* steps, and its holdings at both steps inform the decision today. At step one, the Supreme Court found that it "agree[d] with every court to have addressed the issue that *the language is ambiguous*." *Rust*, 500 U.S. at 184 (emphasis added). The Court explained that the ambiguity arises because § 1008 "does not speak directly to the issues of counseling, referral, advocacy, or program integrity." *Id.* And at step two, the Court held that HHS's interpretation was a reasonable one, falling within the "broad directives" of "Title X in general and § 1008 in particular." *Id.* Title X's language has not changed, and *Rust* remains good law.

Rust thus requires that we find the materially identical regulations to be a reasonable interpretation of § 1008 of Title X. *Accord Becerra*, 950 F.3d at 1084-85. Recognizing the *Rust* roadblock, Baltimore scours the congressional record for some other statute that might

preclude the regulations. Baltimore claims to have discovered two such provisions: (1) an appropriations rider and (2) a "Miscellaneous Provisions" subtitle of the Affordable Care Act ("ACA"). Baltimore argues that these laws, enacted after *Rust*, abrogate HHS's authority to adopt otherwise reasonable regulations under Title X. Appellee Br. 44 ("[T]he legislative and regulatory landscape has shifted since *Rust* such that the new Rule is not a permissible interpretation of § 1008."). I disagree.

1. The appropriations rider does not prohibit the Final Rule

The first statutory provision that allegedly abrogates HHS's authority to issue the Final Rule is an annual appropriations rider. Congress has attached this rider to the appropriation of funds for HHS to carry out Title X in every appropriations act since 1996. The Fiscal Year 2019 rider provides:

> For carrying out the program under [T]itle X of the [Public Health Service] Act to provide for voluntary family planning projects, $286,479,000: Provided, [t]hat amounts provided to said projects under such title shall not be expended for abortions, *that all pregnancy counseling shall be nondirective*, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

Pub. L. No. 115-245, 132 Stat. 2981, 3070-71 (2018) (emphasis added). The majority coins the label "Nondirective Mandate" for the emphasized clause of the rider.

At first glance, the rider's ban on expending funds "for abortions" *reinforces* § 1008's separation between Title X funds and "programs *where abortion is a method of family planning*." And it requires any pregnancy counseling to be "nondirective." 132 Stat. at 3071. So for instance, a program cannot steer a pregnant woman toward or away from obtaining an abortion. *Accord* 84 Fed. Reg. at 7747. And the rider's final clause again forbids the use of public money in political endeavors. *Accord* 42 C.F.R. § 59.16(a)(2). Thus construed, the appropriations rider appears fully compatible with the regulations. And the question here is only whether this construction is permissible.

But Baltimore asks that we squint at the second clause of the rider: "[A]ll pregnancy counseling shall be nondirective." 132 Stat. at 3070-71. In Baltimore's view, this "nondirective counseling mandate" prohibits the 2019 Final Rule's (a) restrictions on referrals for abortion or to abortion centers and (b) required referrals for prenatal care.[12] According to Baltimore, each

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[12] The regulations state:

> "A Title X project may not . . . refer for . . . abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 42 C.F.R. § 59.14(a).
>
> "[O]nce a client served by a Title X project is medically verified as pregnant, she shall be referred to a health care provider

of these *referral* regulations is impermissible "directive" *counseling*.

To begin, I note that HHS spoke with the force of law when it interpreted the appropriations rider. HHS analyzed and considered the rider as part of its statutorily authorized notice-and-comment rulemaking. *See* 42 U.S.C. § 300a-4(a); *see also* 84 Fed. Reg. at 7745 ("The Department has carefully considered the provision of counseling and information about abortion . . . in light of Section 1008 [and] the appropriations riders in place since 1996. . . . "). And in these circumstances, we expect HHS to understand and administer

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for medically necessary prenatal health care." 42 C.F.R. § 59.14(b)(1).

Baltimore also challenges how the regulations regulate the list of referral options. As in the 1988 regulations, the 2019 regulations prohibit providers from steering a pregnant woman to an abortion provider. 42 C.F.R. § 59.14(c). So the referral regulations permit grantees to provide pregnant women with a list that includes abortion providers:

> "A Title X project may not use the provision of any prenatal, social service, emergency medical, or other referral, of any counseling, or of any provider lists, as an indirect means of encouraging or promoting abortion as a method of family planning." 42 C.F.R. § 59.14(c)(1).
>
> "The list of licensed, qualified, comprehensive health care providers . . . may be limited to [facilities] that do not provide abortion, or may include licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some, but not the majority, of which also provide abortion as part of their comprehensive health care services. Neither the list nor project staff may identify which providers on the list perform abortion." 42 C.F.R. § 59.14(c)(2).

This challenge similarly turns on whether "nondirective counseling" includes "referrals."

this rider. *See Sherley v. Sebelius*, 644 F.3d 388, 393-97 (D.C. Cir. 2011) (giving *Chevron* deference to HHS's interpretation of an appropriations rider). So for Baltimore to prevail, the rider must unambiguously preclude the regulations based on the traditional tools of statutory interpretation (*Chevron* step 1) or HHS's construction of the ambiguous rider must be unreasonable (*Chevron* step 2). To determine the regulations' conformity with the rider, we employ our traditional tools of statutory interpretation. *See Kisor*, 139 S. Ct. at 2415.

We start with the relevant text of the rider: "all pregnancy counseling shall be nondirective." 132 Stat. at 3070-71; *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (statutory interpretation starts with the text). By its own terms, this clause applies only to "counseling." And, as HHS emphasizes, the challenged regulations govern "referrals"—not "counseling." *See* 42 C.F.R. § 59.14; *see also* 84 Fed. Reg. at 7716-17, 7724, 7730 (distinguishing between counseling and referrals). Baltimore's argument requires that Congress must have statutorily equated "referrals" and "counseling" so that regulatory differentiation would be an unreasonable interpretation of law. *See Chevron*, 467 U.S. at 843. But I would conclude that "nondirective counseling" and "referral" have distinct meanings as reflected in their usage, the Title X context, and the broader statutory structure. And so HHS's interpretation is permissible.

Counseling is "the giving of advice, opinion, and instruction to direct the judgment or conduct of another." *Counseling*, STEDMAN'S MEDICAL DICTIONARY 451 (28th ed. 2005); *see also, e.g.*, *Counseling*, 3 OXFORD

ENGLISH DICTIONARY 1013 (2d ed. 1989); *accord* Appellee Br. 50-51.[13] Although "[o]rdinarily, a word's usage accords with its dictionary definition," *Yates v. United States*, 574 U.S. 528, 537 (2015), "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948), *aff'd*, 336 U.S. 422 (1949) (Hand, J.) ("[W]ords are chameleons, which reflect the color of their environment.").

Here, the rider's "nondirective" requirement bears directly on the meaning of counseling. Directive means "[h]aving the quality or function of directing, authoritatively guiding, or ruling." *Directive*, 4 OXFORD ENGLISH DICTIONARY 705; *see also* 84 Fed. Reg. at 7716. So "nondirective counseling" is "the giving of advice, opinion, and instruction" *without* "direct[ing] judgment or conduct." *Counseling*, STEDMAN'S MEDICAL DICTIONARY 451. Indeed, this ordinary meaning of nondirective counseling matches the use of that term in the medical context. HHS has explained—and Baltimore agrees—that nondirective counseling is "the meaningful presentation of options where the physician or advanced

[13] For this discussion, we set aside the specialized meaning of psychological counseling. No party invokes that usage here—nor do we believe it to apply.

practice provider is 'not suggesting or advising one option over another.'" 84 Fed. Reg. at 7716; Appellee Br. 47.[14]

In contrast with "nondirective counseling," "referral" is "the process of directing or redirecting (as a medical case or a patient) to an appropriate specialist or agency for definitive treatment." *Referral*, Merriam-Webster's Medical Dictionary Online (2020); *see also Referral*, 13 OXFORD ENGLISH DICTIONARY 467 ("[T]he directing (usu[ally] by a general practitioner) of a patient to a medical consultant for specialist treatment."); *Referral*, BLACK'S LAW DICTIONARY 1533 (11th ed. 2019) ("The act or an instance of sending or directing to another for information, service, consideration, or decision."). In medicine, a "definitive treatment" is "the treatment plan . . . that has been chosen as the best one for a patient after all the other choices have been considered." *Definitive Treatment*, National Cancer Institute Dictionary of Cancer Terms Online (2020); *see also Definitive*, 4 OXFORD ENGLISH DICTIONARY 385 ("Having the function of finally deciding."). As Baltimore concedes based on many of the same sources: "Referral is 'giving advice to' a patient about where to go for appropriate treatment." Appellee Br. 51.

Consistent with HHS's interpretation, these definitions suggest that nondirective counseling and referral are two different—each important—stages of a physician-patient relationship. *Accord* Majority Op. 44 (noting that "a referral" must follow "speaking with and coun-

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[14] Of course, the adjective "pregnancy" limits the subject-matter scope of the nondirective counseling provision.

seling a patient"). While nondirective counseling involves an exchange of information and discussion of options, a referral is the directing of a patient to an appropriate specialist to pursue her chosen next steps. Far from one in the same, a doctor may provide counseling without referral, or referral without counseling. *See* 84 Fed. Reg. at 7748 (Prenatal referral is "the result of the woman's pregnancy diagnosis" and the need "preexists" any discussion with a counselor.). In other words, nondirective counseling involves discussing with the patient the options for *what to do*; referrals concern the provider's direction about *who to see* to have it done.[15]

Moreover, HHS's distinction between the two recognizes the different hats a provider must wear in each stage of the physician-patient relationship. In a nondirective counseling role, a physician aims to "empower the client" by informing her "about a range of options." 84 Fed. Reg. at 7716; *accord* Appellee Br. 48, 50. By refraining from "suggesting or advising one option over another," the provider encourages "clients [to] take an active role in processing their experiences" and to select the appropriate path in a uniquely personal context. 84 Fed. Reg. at 7716.

In contrast, when making a referral, physicians are expected to take an active role in directing a patient to one or more recommended providers. Once the patient has selected a definitive treatment with the counselor's

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[15] *Compare* Appellee Br. 48 ("Non-directive counseling is commonly understood in medicine to mean patient-directed counseling that *presents neutral and unbiased information regarding all options*.") (emphasis added and citation omitted), *with* Appellee Br. 51 ("Referral is 'giving advice to' a patient *about where to go for appropriate treatment*.") (emphasis added).

assistance, there is no need for the neutrality of nondirective counseling. Although always entitled to change her mind tomorrow, the patient has reached her decision today. Thus, if consistent with the congressional and regulatory restrictions, a provider may affirmatively direct a patient to the best specialist to pursue her decision. *See* 42 C.F.R. § 59.14(a) (characterizing "referral" as an "affirmative action").

In any event, equating referrals with nondirective counseling would lead to anomalous legal results. Although Title X pregnancy counseling must be nondirective, referrals are *directive*—they are the *directing of a patient*. So if nondirective pregnancy counseling encompasses referrals, the rider would preclude Title X grantees from referring, or "directing," their pregnant clients anywhere. If Congress intended to bring about such a broad result, it would have said so.

Indeed, Congress often distinguishes between counseling and referrals, and when it means to affect counseling *and* referrals, it so says. *See, e.g.*, 42 U.S.C. § 300z-10(a) ("abortion counseling or referral"); 18 U.S.C. § 248(e)(5) ("counselling or referral services"); 42 U.S.C. § 300z-1(a)(4)(B) ("counseling and referral services"); 42 U.S.C. § 300z-3(b)(1) ("counseling and referral services"); 42 U.S.C. § 300z-3(b)(2) ("counseling and referral services"); 42 U.S.C. § 1395w-22(j)(3)(B) ("counseling or referral service"); 42 U.S.C. § 1396u-2(b)(3)(B) ("counseling or referral service"); 7 U.S.C. § 5936(b)(1)

("counseling and referral for other forms of assistance").[16] Ignoring this distinction here would render Congress's other references to counseling "*and referrals*" superfluous. But we generally interpret statutes to avoid this consequence. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

For these reasons, I would find that the rider's "nondirective counseling" requirement does not impact the referral regulations. This is the best interpretation of the rider, making it at least reasonable under *Chevron*.

Despite all of this, Baltimore (and the majority) points to a statement of purpose in the Children's Health Act of 2000 to suggest that "referrals" may be "included in" "nondirective counseling." Appellee Br. 51-52; Majority Op. 43-44. There, Congress described the "purpose of developing and implementing programs to train the designated staff of eligible health centers 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." Pub. L. No. 106-310, 114 Stat. 1101, 1132, § 1201 (Oct. 17, 2000).

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[16] Reflecting this distinction, the Supreme Court has similarly distinguished between counseling and referrals when interpreting statutes. *See, e.g.*, *Rust*, 500 U.S. at 193 (enumerating "counseling" and "referral" separately); *Bowen v. Kendrick*, 487 U.S. 589, 594 (1988) ("pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, and . . . 'educational services relating to family life.'") (quoting 42 U.S.C. § 300z-1(a)(4)); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("counseling and referral services for low-and moderate-income homeseekers"). That distinction matters for how we interpret the appropriations rider. *See W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 92 (1991).

According to Baltimore, this language points to referrals as one "course[] of action included in nondirective counseling." Appellee Br. 51-52.

This argument is unpersuasive. To begin with, "counseling" and "referrals" are not treated as one and the same throughout the Children's Health Act. *See, e.g.*, 114 Stat. at 1160, § 2401 ("counsel, refer, or treat patients"). And even were this statement read in isolation, it would not require Baltimore's interpretation. A doctor's "referral" is not itself a "course of action." Rather, a referral is the directing of a patient to the next steps in pursuit of her chosen course of action—*e.g.*, abortion, adoption, or keeping the child.[17] So the nearest reasonable referent of "other courses of action included in nondirective counseling" is "adoption" not "referrals." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152-53 (2012) (discussing "the nearest-reasonable-referent" canon). Thus, the Children's Health Act instructs programs to train staff to discuss adoption as a course of action on par with abortion and keeping the

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[17] For related examples linguistically using "courses of action" to refer not to information or referrals from a doctor, but to the action of a patient, *see, e.g.*, H.R. Rep. No. 99-403 at 6 (1985) ("[T]hose requesting information on options for the management of an unintended pregnancy are to be given non-directive *counseling* on the following alternative *courses of action, and referral* upon request: a. *prenatal care and delivery*; b. *infant care, foster care or adoption*; c. *pregnancy termination*.") (emphasis added); The American College of Obstetricians and Gynecologists, Committee Opinion No. 528: Adoption 3 (June 2012) ("when discussing the option of adoption with patients, physicians should guard against advocating for a particular course of action").

child. *See* 84 Fed. Reg. at 7733 ("Congress clearly intended Title X to support family planning through more than preventive services . . . and adoption is one method by which a Title X client who is not pregnant may seek to have children."). It does not suggest that "referrals" are "nondirective counseling." In any event, to the extent there is doubt over how to best read this portion of the Children's Health Act, the other times that Congress has distinguished counseling from referrals in that Act (and other acts) persuade us that the distinction between counseling and referrals in ordinary speech is also reflected in their statutory usage.

Next, the majority takes a different tack, asserting that HHS itself never distinguished counseling and referrals in its Final Rule. Frankly, this assertion boggles the mind. "First and foremost," the majority reasons, "*nowhere* in the Final Rule does HHS state that counseling and referrals are two separate Title X services." Majority Op. 42. So they must be one in the same service. *See id.* And, the majority asserts, HHS's contention to the contrary is just a "convenient litigation position." Majority Op. 43.

There are three apparent problems with this argument. First, the majority improperly imposes a burden of proof where none exists. We give words in statutes and regulations their plain meaning in context. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). And where (as here) the plain meanings of two terms differ, we do not require a legal text to state the obvious. Traffic codes, for instance, instruct drivers to take different actions when a light changes from red to green. There is

no need to state that red and green are different colors. *See, e.g.*, Md. Code, Transp. § 21-202. Yet the majority never wrestles with the plain meanings of these different terms, and it instead concludes that HHS has failed its alleged burden to state the obvious.[18]

Second, the context and usage of these terms within the Final Rule show that HHS considered them distinct. Consider, for example, the following sentence from the Rule: "Unlike abortion referral, nondirective pregnancy counseling would not be considered encouragement, promotion, support, or advocacy of abortion." 84 Fed. Reg. at 7745. "Unlike" in common usage means, "Not like something else . . . ; different from, dissimilar to." *Unlike*, 19 OXFORD ENGLISH DICTIONARY 102. So this reasonably indicates that "abortion referral" is "different from" "nondirective pregnancy counseling." Indeed, the very purpose of contrasting two terms is to highlight a difference. Yet this juxtaposition escapes the majority.

HHS again signals that counseling and referrals are distinct by the very act of imposing disjunctive requirements. *See, e.g.*, 84 Fed. Reg. at 7730 ("[T]he Department has concluded that Title X projects may allow

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[18] At times the majority appears to believe that the possibility that counseling and referrals could overlap or encompass one another suffices. But the issue at hand is not whether the meanings of the two terms *may* overlap, but whether they *must* completely overlap so that HHS adopted an unreasonable interpretation by distinguishing between them. In other words, identifying an interpretation that may be possible bears on the permissible scope of a regulation—but it does not tell us whether a particular interpretation is reasonable under *Chevron* step two.

a physician or [medical professional] to provide nondirective counseling on abortion generally as a part of nondirective pregnancy counseling, . . . but may not refer for abortion as a method of family planning."). Of course, two (in the majority's view) conflicting requirements cannot be imposed on a singular element. This would be contradictory and thus impossible with which to comply. So equating counseling and referrals cannot be correct in context. On the contrary, I would find it abundantly clear that counseling and referrals are distinct within the Final Rule.[19]

And third, even if the Final Rule were ambiguous, we might need to give credence to the agency's interpretation of its own regulation. *See Kisor*, 139 S. Ct. at 2408; *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). This may include the agency's positions advanced for the first time in litigation as long as they reflect the agency's "fair and considered" judgment, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Kisor*, 139 S. Ct. at 2417 n.6, and do not create "unfair surprise," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007); *Kisor*, 139 S. Ct. at 2418. The mere assertion that HHS advances only a litigating position is

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[19] The Final Rule also describes the type of conversation that may take place in counseling about abortion without providing a referral: "A pregnant woman requests information on abortion and asks the Title X project to refer her for an abortion. The counselor tells her that the project does not consider abortion a method of family planning, and therefore, does not refer for abortion. The counselor offers her nondirective pregnancy counseling, which may discuss abortion, but the counselor neither refers for, nor encourages, abortion." 42 C.F.R. § 59.14(e)(5).

yet another example of the majority glossing over what deference HHS may be due.

The majority also asserts that HHS failed to distinguish counseling and referrals because they are discussed together as part of the same course of service suggesting that the 'nondirective' term applies to both. Majority Op. 42. Yet again, this analysis is less than persuasive for four reasons.

Start with the majority's contention that because counseling and referrals are often discussed together, HHS has not adequately distinguished them. First, discussing two items together does not suggest a lack of distinction. On the contrary, it suggests each has independent meaning. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible."). Hotdogs and hamburgers, for instance, are often discussed together. But a hotdog is not a hamburger. And, if they were the same, there would be no need to mention them both.

Second, while these two items are often discussed together, sometimes they are not. This makes the times that the terms are used individually (*e.g.*, where the Final Rule describes "nondirective pregnancy counseling" without reference to referrals, *see* 84 Fed. Reg. at 7747, or prohibits "referrals for abortion" without reference to counseling, *id.*) all the more significant. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (When items "are members of an associated group or series," we give force to the inference that "items not mentioned were excluded by deliberate choice, not inadvertence.") (cleaned up).

Third, consider the majority's implication that because two items are part of the "same course of service" the same restrictions must apply to both. Majority Op. 42. Again, I am not persuaded. Standing in line and riding a roller coaster are part of the same course of service at an amusement park. But different restrictions apply: One must wear restraints on the roller coaster and stay seated, but one need not wear restraints while standing in line. Dinner and dessert are part of the same course of service at a restaurant. But a child might be prevented from selecting a sugary dessert while given free rein of the main menu. Different rules often accompany different steps in the same process.

And fourth, take the majority's assertion that in the phrase, "nondirective counseling and referrals," the adjective nondirective must apply to both counseling and referrals. Majority Op. 42. Again, I disagree. When a sentence takes the form of 'adjective noun_1 *and* noun_2,' the result is generally ambiguous. *See, e.g.*, Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" And "Or,"* 2 TEX. TECH. L. REV. 235, 238-39 (1971). The adjective may modify noun_1 alone or modify both noun_1 and noun_2. Context resolves the ambiguity, and the context here is clear: "Nondirective counseling" has its own unit of meaning. It means "presenting the options in a factual, objective, and unbiased manner and (consistent with other Title X requirements and restrictions) offering factual resources that are objective, rather than presenting the options in a subjective or coercive manner." 84 Fed. Reg. at 7747. This is confirmed by how 'nondirective' is used throughout the Final Rule. "Nondirective" is consistently used directly before "counseling" and never before "referral" alone. Because

"nondirective counseling" itself has a discrete meaning, the adjective nondirective limits "counseling," not "referral."

In sum, the rider is limited to "nondirective counseling" and does not impact the referral regulations. The majority's arguments to the contrary fail, and they do not establish that HHS has adopted an impermissible interpretation of Title X.

2. Section 1554 of the ACA does not prohibit the Final Rule

The second statutory provision that Baltimore argues overcomes HHS's authority to issue the Final Rule is a "Miscellaneous Provisions" subtitle within the ACA:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services 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.

Pub. L. No. 111-148, 124 Stat. 119, 259, § 1554 (Mar. 23, 2010) (codified at 42 U.S.C. § 18114).

These provisions were never mentioned in any of the half-million public comments offered during the rulemaking—including the comments by Baltimore.[20] But Baltimore now argues that § 1554's provisions prohibit the Final Rule's referral regulations and separation requirement. Appellee Br. 23-24. As discussed above, the Final Rule's referral regulations restrict Title X program referrals for abortions or to abortion centers and instruct grantees to provide a regulated list of prenatal caregivers to pregnant clients while permitting grantees to provide nondirective pregnancy counseling. And for its part, the Final Rule's separation requirement provides:

> A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section,

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[20] HHS argues that Baltimore's § 1554 argument has been waived because it was not raised during notice-and-comment rulemaking. Appellants Br. 34-35; *see Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) ("As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved."). I need not decide whether the issue-waiver doctrine bars Baltimore's § 1554 argument because § 1554 does not prohibit the Final Rule on the merits.

To avoid this waiver doctrine, the majority finds that § 1554 was raised and considered in the rulemaking. Majority Op. 54-57. I disagree. But if so, then HHS would be due *Chevron* deference. Yet the majority inadequately considers the deference due.

> from activities which are prohibited under section 1008. . . . Factors relevant to [determining whether a project is separate] shall include:
>
> (a) The existence of separate, accurate accounting records;
>
> (b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination and waiting rooms . . .) in which prohibited activities occur and the extent of such prohibited activities;
>
> (c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and
>
> (d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

42 C.F.R. § 59.15.

Baltimore has failed to demonstrate that § 1554 prohibits these portions of the Final Rule. First, Baltimore has failed to show that § 1554's prohibitions eclipse the Secretary's authority under § 1008 of Title X. Second, even if § 1554 limits HHS's authority under Title X, Baltimore has failed to show that § 1554's provisions prohibit the Final Rule on the merits. Thus, § 1554 does not prohibit the Final Rule, and Baltimore's second effort to show a likelihood of success on the merits also fails.

a. Section 1554 does not eclipse HHS's authority under § 1008

The first reason that Baltimore's § 1554 argument fails is because Baltimore cannot show that § 1554 overcomes the statutory authority recognized in *Rust*. That authority allowing HHS to issue the Final Rule remains intact. Section 1554 of the ACA cabins the

Secretary's rulemaking authority, "[n]otwithstanding any other provision of *this Act* [*i.e.*, the ACA]." § 1554 (emphasis added). "The ordinary meaning of 'notwithstanding' is 'in spite of.'" *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (internal citation omitted). So here, Congress's use of the term "notwithstanding" reflects its intent to "override conflicting provisions of any other section" of the ACA. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993).

In the context of the ACA, a "notwithstanding" clause makes good sense. The ACA is a major piece of legislation with "10 titles stretch[ing] over 900 pages and contain[ing] hundreds of provisions" that provide copious new rulemaking authority. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538-39 (2012). By limiting HHS's power to regulate the healthcare and insurance industries pursuant to expansive new grants of authority, Congress mitigated the chance of unintended consequences in yet-to-be-promulgated rules.

And critically, Congress used "notwithstanding" clauses liberally within the ACA, 124 Stat. 119, specifying the application at different levels of generality—from sentences (§§ 1341, 2101), to paragraphs (§ 1313), to subsections and sections (§ 3105), to subtitles (§ 7003(b)), to titles (§ 1303), to the ACA itself (§ 1554),

and to "any other law or rule of law" (§ 4377), as well as to specific provisions in *other* laws (§ 2022(h)).

In § 1554, Congress chose to apply the six provisions notwithstanding any other provision *of the ACA*—not in spite of "any other law," nor Title X specifically. And we must give effect to the level of generality that Congress has specified—particularly where Congress has repeatedly taken such care in its application of notwithstanding clauses. *See Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).

Even though it only discovered this position at the eleventh hour, Baltimore now claims the "notwithstanding" clause overcomes even Title X. But if Congress, in the ACA, wished to overcome HHS's existing rulemaking authority from other congressional acts, Congress knew precisely what to do. In fact, it did so in other provisions of the ACA. For instance, in § 10325, Congress limited the Secretary's rulemaking authority relating to billing for Skilled Nursing Facilities "[n]otwithstanding *any other provision of law*." Pub. L. No. 111-148, 124 Stat. at 960 (emphasis added). In contrast, its use of the Act-specific provision in § 1554 signals the opposite—an intention not to eclipse existing rulemaking authority outside the ACA. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). The Secretary's authority to set forth standards for Title X grants is "the engine that drives nearly all of Title [X]," and as such, we would expect Congress to amend or abrogate it clearly. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). "Congress," the Supreme Court has held, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. I would therefore conclude that § 1554's general miscellaneous provisions do not overcome the specific authority recognized in *Rust* under § 1008 of Title X.

b. The Final Rule does not violate § 1554

Baltimore also fails to show that the Final Rule actually conflicts with § 1554. The Final Rule's referral regulations and separation requirement do not "create any unreasonable barriers," "impede[] . . . access," "interfere[] with communications," or otherwise violate § 1554. As I noted early on, the Final Rule is not about the legality of abortions. It simply decides which Title X programs the government will *subsidize*, rather than a decision on what conduct to *prohibit*. So grant recipients may either accept the conditions, or they remain in the same position as they were before. *See Rust*, 500 U.S. 201-03.

The verbs used in subsections (1) through (6) of § 1554 ("creates," "impedes," "interferes," "restricts," "violates," and "limits") show that this provision is concerned with affirmative interference rather than a decision not to offer a subsidy. The Oxford English Dictionary defines those verbs: **create** means "[t]o make, form, constitute, or bring into legal existence (an institution, condition, action, mental product, or form, not existing before)"; **impede** means "[t]o retard in progress or action by putting obstacles in the way; to obstruct; to hinder; to stand in the way of"; **interfere** means "[o]f persons: To meddle *with*; to interpose and take part in something, esp[ecially] without having the right to do so; to intermeddle"; **restrict** means "[t]o confine (some person or thing) *to* or *within* certain limits; to limit or

bound"; **violate** means "[t]o break, infringe, or transgress unjustifiably; to fail duty to keep or observe . . . [a] law, commandment, rule, etc."; **limit** means "[t]o confine within limits, to set bounds to (*rarely* in material sense); to bound, restrict." OXFORD ENGLISH DICTIONARY.[21]

These verbs are striking: *each* relates to *affirmative* interference. *See United States v. Williams*, 553 U.S. 285, 294-95 (2008) (interpreting the "string of operative verbs" in 18 U.S.C. § 2252A(a)(3)(B)); *see also Yates*, 574 U.S. 528 (Alito, J., concurring) (interpreting the "list of verbs" in 18 U.S.C. § 1519). In contrast, a choice to subsidize certain services *incentivizes* those services, it does not affirmatively interfere with others. *See generally* ERIK DEAN ET AL., PRINCIPLES OF MICROECONOMICS: SCARCITY AND SOCIAL PROVISIONING 96 (2016) ("Government subsidies reduce the cost of production and increase supply at every given price."). So when the Secretary of HHS exercises the authority to limit the use of Title X's finite funds, he has targeted certain preexisting barriers *to reduce*. And when the use of this authority subsidizes some services or programs and not others, HHS does not create any new barriers for unsubsidized programs.[22]

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[21] Similarly the list of nouns in § 1554—"barriers," "access," "communications," "ability," and "principles"—suggest that affirmative interference involves imposing an obstacle.

[22] Baltimore suggests that the Final Rule has put Title X program beneficiaries in a worse position than they would have otherwise been because they have come to *rely* on the program. Even if Baltimore can assert the reliance interests of other parties, I would conclude that Baltimore's invocation of the reliance interests

Baltimore asks us to equate limits on the use of subsidies with affirmative interference. Appellee Br. 62. In other words, Baltimore contends that HHS's regulations "'create[] . . . unreasonable barriers,' 'impede[] timely access to health care services,' 'interfere[] with communications,' 'restrict[] the ability of health care providers to provide full disclosure,' and 'violate[] the principles of informed consent,'" all by imposing limits on "access to grant funds." *Id.* (quoting 42 U.S.C. § 18114).

But the distinction between action (subsidies) and omissions (non-subsidies) is well- recognized in the law. We do not say that an expert swimmer who sees but walks past a drowning person has in any sense "imped[ed]," "interfer[ed]," or "creat[ed] unreasonable barriers" to that person's rescue. *See Osterlind v. Hill*, 263 Mass. 73, 76 (1928); *see also, e.g.*, *Sidwell v. McVay*, 282 P.2d 756, 758-59 (Okla. 1955) (failure to stop a child from playing with explosives); *Hurley v. Eddingfield*, 156 Ind. 416, 416 (1901) (failure of physician to respond to a call for aid). Whatever the virtues or vices of failing to act, it is clear that a failure to act (or an offer to act only upon the satisfaction of certain conditions)—without a preexisting duty to act—does not affirmatively interfere with the position in which the drowning person would have otherwise been.

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of those benefiting from its administration of the program is ultimately unpersuasive. Reasonable individuals who benefit from the result of government funding do so with the knowledge that those programs may be discontinued—or, as is the case here, simply return to an earlier iteration. *Compare* 53 Fed. Reg. 2922 (1988), *with* 84 Fed. Reg. 7714 (2019). That is particularly true when, as here, the regulation of Title X funding has been repeatedly changed.

So too here. HHS may choose to fund only those projects that meet the program's requirements without "impeding" others. Service providers have no preexisting right to public grant funds, and the choice to limit the use of those funds does not "interfere" with providers' services. A prospective Title X program grantee may make its own choice to refuse funds (or decline to apply for them). *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds."). This creates no unreasonable barrier, impediment of access, interference with communications, restriction on disclosure, or violation of informed consent.

Baltimore's argument to the contrary repackages constitutional assertions that the Supreme Court rejected in *Rust*. There, the Supreme Court explained that HHS's decision to subsidize childbirth but not abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy," simply "leav[ing] her in no different position than she would have been in if the Government had not enacted Title X." *Rust*, 500 U.S. at 201-02;[23] *see also Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (holding that the Hyde Amendment creates no obstacle to an abortion but encourages alternative activity through differential subsidization); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (explaining that Connecticut's decision not to subsidize

[23] The *Rust* Court explained that this conclusion held 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 Title X. 500 U.S. at 203.

elective abortions "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion").[24] So *Rust* confirms that we assess whether a barrier has been created from an unsubsidized baseline, not in comparison to the current scheme of subsidies.

The majority distinguishes the Supreme Court's explanation in *Rust* on the grounds that the Court was addressing a Fifth Amendment claim concerning the right to an abortion. Majority Op. 52-53; *Rust*, 500 U.S. at 201. But this supposed distinction—based on only the source of challenge—misses the logical point. The Supreme Court ultimately rejected the Fifth Amendment arguments based on the general principle that "unequal subsidization" is not an obstacle. *Rust*, 500 U.S. at 201. This argument carries just as much force in the statutory as in the constitutional context, so I see no reason to deviate from *Rust*'s logic. *Cf. Agency for Intern. Dev.*, 570 U.S. at 213, 216-17 (affirming *Rust*'s principle that Congress's power to allocate funds for public purposes includes "the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends").

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[24] Indeed, the Supreme Court has "held in several [other] contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (subsidies for lobbying); *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (subsidies for political candidates); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003) (plurality) (subsidies for libraries). This "basic difference between direct state interference . . . and state encouragement of an alternative activity consonant with legislative policy," *Maher*, 432 U.S. at 475, is "scarcely [a] novel principle[]," *Regan*, 461 U.S. at 549; *see also* U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to tax and spend to provide for the general welfare).

In any event, Baltimore's argument proves too much. And its implications are far reaching. If the withdrawal of a subsidy "creates" an affirmative obstacle, then healthcare subsidies become a one-way ratchet: The government may not later reduce what it once offered without violating § 1554. I doubt Congress intended such sweeping consequences. Rather, § 1554 is best interpreted to prevent the government from *affirmative* interference.

In sum, the Final Rule does not conflict with § 1554—and it certainly does not do so with sufficient certainty to overcome the canons favoring the Final Rule's consistency with § 1554 in cases of doubt.

* * *

When an agency speaks with the force of law, the Supreme Court has carefully delineated the scope of judicial review. As the Supreme Court held in *Rust*, HHS has reasonably interpreted Title X's ambiguous text. And Baltimore has failed to identify a post-*Rust* enactment that renders that interpretation impermissible. *See generally Becerra*, 950 F.3d at 1085-95. Thus, Baltimore does not show that it is likely to succeed on the merits. So I would vacate the district court's preliminary injunction.

B. Pillar two: HHS's Rule is reasoned

Baltimore has also failed in its attempt to pull down the second pillar of administrative law. When agencies responsive to the elected President promulgate regulations, they must "engage in 'reasoned decisionmaking.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan*, 576 U.S.

at 750). "[T]he agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given *reasoned consideration* to all the material facts and issues." *Greater Bos. Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970) (emphasis added); *see Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998). Only then will courts be assured that the course taken by the agency is a product of its judgment and thus worthy of respect. *See Michigan*, 576 U.S. at 749-50; *see also Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

Accordingly, "an agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.'" *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (quoting *State Farm*, 463 U.S. at 43); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (An "agency must give adequate reasons for its decisions."). Otherwise, the APA directs that we "set aside" an agency action as "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A).

Although we are to engage in a careful review of the facts and record, our ultimate standard of review is narrow and deferential: "[A] court is not to substitute its judgment for that of the agency." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (cleaned up); *see also Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (Our review is "highly deferential, with a presumption in favor of finding the agency action valid."). Rather than substituting our inexpert and unaccountable views for those of an expert

and accountable agency, we are limited to confirming that "the agency has [] really taken a 'hard look' at the salient problems." *Greater Bos. Television Corp.*, 444 F.2d at 851; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."). As long as "the agency's explanation is clear enough that its path may reasonably be discerned," *Encino Motorcars, LLC*, 136 S. Ct. at 2125, we must respect its policy choice.

The requirement of reasoned decisionmaking applies whether the agency launches a policy for the first time, or—as here—decides to change course. When changing course, the agency "must show that there are good reasons for the new policy," but it "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one." *Fox*, 566 U.S. at 515; *see also Dep't of Homeland Sec.*, 140 S. Ct. at 1905.

The Supreme Court in *Rust* found nearly identical regulations to be the rational product of reasoned decisionmaking. *Rust*, 500 U.S. at 187. The Court credited the Secretary's reasonable determination that the referral regulations were "necessary to provide clear operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," "more in keeping with the original intent of [§ 1008]," "justified by client experience," and "supported by a shift in attitude against the elimination of unborn children by abortion." *Id.* (internal quotations and citations omitted). And for the

1988 separation requirements, the Supreme Court "deferred" to this "reasoned determination that the [separation] requirements are necessary to implement the prohibition" of § 1008, keeping Title X funds "separate and distinct from abortion-related activities." *Id.* at 190.

HHS relied on *Rust*, and its rationales, throughout in justifying the Final Rule. *See, e.g.*, 84 Fed. Reg. at 7721, 7747, 7766. As in *Rust*, the agency determined that the better interpretation of § 1008's prohibition on spending Title X funds on programs "where abortion is a method of family planning" barred programs accepting those funds from making "*referrals* for abortion as a method of family planning." 84 Fed. Reg. at 7761 (emphasis added); *see also id.* at 7717, 7746. So too for the Final Rule's separation requirement, which HHS found best complied with the statutory command of § 1008. 84 Fed. Reg. at 7764-65; *see also* 84 Fed. Reg. at 7714-15, 7718, 7783. And the Supreme Court recently confirmed that an agency may justify its policy choices by explaining why those choices best comply with the statutory mandate. *Encino Motorcars*, 136 S. Ct. at 2127; *see also Rust*, 500 U.S. at 187 (finding that HHS's conclusion that the restrictions were "more in keeping with the original intent of the statute" supported the agency's regulations implementing § 1008); *see also id.* at 190 (deferring to HHS's reasoned determination that the statutory mandate and congressional intent necessitated the regulations).

Despite *Rust* and HHS's reasoning, the majority finds the Final Rule is arbitrary and capricious on two grounds. First, the majority agrees with Baltimore that HHS's conclusion that the referral regulations are

consistent with medical ethics "is unsupported by the evidence in the Record and inadequately explained." Appellee Supp. Br. 5. Second, the majority determines that HHS inadequately assessed the costs of the separation requirement. Neither ground suffices to overcome *Rust* and permits us to second guess the predictions and policy judgments made by HHS.

1. Medical ethics

Baltimore first argues that HHS inadequately considered medical ethics. The majority agrees, holding that the Final Rule is arbitrary and capricious because "HHS merely stated that it 'disagrees' that the Rule 'infringes on the legal, ethical, or professional obligations of medical professionals' and it 'believes' the Rule is 'not inconsistent' with medical ethics." Majority Op. 29 (citing 84 Fed. Reg. at 7724). Of course, this would not be enough: When "the agency decision" about an important element of a problem "is not accompanied by any explanation, let alone a satisfactory one," its action is arbitrary and capricious. *Sierra Club*, 899 F.3d at 293; *see also, e.g.*, *Fred Meyer Stores, Inc. v. N.L.R.B.*, 865 F.3d 630, 638 (D.C. Cir. 2017).

Yet the majority's analysis mows down a straw man. By focusing on only the first two sentences of HHS's explanation, it does not surprise me that the majority finds the agency's explanation deficient. But a topic sentence is not the entire explanation—it "set[s] up the point to be developed in the paragraph." ROBERT E. BACHARACH, LEGAL WRITING: A JUDGE'S PERSPECTIVE ON THE SCIENCE AND RHETORIC OF THE WRITTEN WORD 104 (2020). So although HHS stated that it "disagrees" with commenters and "believes" the Rule "not inconsistent" with medical ethics, Majority Op. 29, this is

merely how HHS introduced its analysis—not the entirety of it. If an agency "cannot simply disregard . . . inconvenient facts," *Fox*, 556 U.S. at 537, I think judges may not similarly disregard inconvenient agency analysis.

I would find that the agency provided a sufficiently reasoned basis for deciding that the Final Rule did not violate medical ethics. First, the record shows that HHS described what medical ethics generally require: "[S]haring full and accurate information with the patient, in response to her specific medical condition and circumstance." 84 Fed. Reg. at 7724. Quoting from the American Medical Association's *Code of Ethics*, the agency elaborated that it would be "ethically unacceptable" for a provider to "withhold[] information without [a] patient's knowledge or consent." *Id.* at 7745. And HHS acknowledged the "[m]any commenters" claiming that "prohibitions on abortion counseling and referral would directly conflict with" medical ethics. *Id.*; *see also* Majority Op. 28-29 (collecting comments).

Then, HHS explained *why* it believed that the regulations are consistent with medical ethics, despite the objections. *See Fox*, 556 U.S. at 515 ("[I]t suffices 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."). HHS disagreed with the commenters' premise—the regulations do not require providers to withhold information from patients without their knowledge:

> Under the terms of the final rule, a physician or [provider] may provide nondirective pregnancy counseling to pregnant Title X clients on the patient's preg-

> nancy options, including abortion. Although this occurs in a postconception setting, Congress recognizes and permits pregnancy counseling within the Title X program, so long as such counseling is nondirective. The permissive nature of this nondirective pregnancy counseling affords the physician or APP the ability to discuss the risks and side effects of each option, so long as this counsel in no way promotes or refers for abortion as a method of family planning. It permits the patient to ask questions and to have those questions answered by a medical professional. Within the limits of the Title X statute and this final rule, the physician or APP is required to refer for medical emergencies and for conditions for which non-Title X care is medically necessary for the health and safety of the mother or child.

84 Fed. Reg. at 7724.

Simply put, during nondirective counseling, a Title X provider is free to discuss with a patient the full range of options, including abortion. *See also id.* at 7747 (Nondirective counseling "involves presenting the options in a factual, objective, and unbiased manner. . . . Physicians or [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."). If a patient seeks a referral for a non-emergency abortion, the Title X provider is free to explain that "the project does not consider abortion a method of family planning and, therefore, does not refer for an abortion." 84 Fed. Reg. at 7789; *see also id.* at 7748

(Title X is "a matter of Congress's choice of what activities it will fund, not about what all clinics or medical professionals may or must do outside the context of the federally funded project.").[25] So as HHS explains, there is no withholding of information without the patient's knowledge and thus no violation of medical ethics.

I find the agency's explanation clear enough to discern its reasons for rejecting the commenters' contentions. *See Encino Motorcars*, 136 S. Ct. at 2125. And that reasoning shows that HHS took a hard look at those comments, but it disagreed with the premise on which they were based. Whether or not I (or the commenters) agree with the agency's conclusion,[26] HHS has adequately set forth its reasons, and so the Final Rule is

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[25] HHS relied on the limited nature of the Title X federal grant program providing preconception family planning services. In the agency's view, this limitation meant that the agency could, without violating its view of medical ethics, reasonably place limits on what activities to fund (or not fund), while leaving doctor-patient communication outside the non-comprehensive program unaffected. *See* 84 Fed. Reg. at 7724, 7748. And, as HHS noted, "Information about . . . abortion providers is widely available and easily accessible, including on the internet." *Id.* at 7746.

[26] Indeed, many commenters expressed vociferous disagreement with the agency. *See* Majority Op. 28-30 (quoting from the disagreement of various commenters). But organizations may reasonably disagree with an agency on what ethics ultimately require. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018). And as long as the agency explains its reasons, the agency is free to disagree with commenters. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). As the district court acknowledged (and the majority does not dispute), HHS was not required to show that any particular organization endorsed its Final Rule. *See* Majority Op. 31-32; *see also Dep't of Commerce*, 139 S.

neither arbitrary nor capricious on the grounds that it disregarded medical ethics. *See Fox*, 566 U.S. at 515; *see also Dep't of Homeland Sec.*, 140 S. Ct. at 1905.

But the agency did not stop there. In response to "commenters who contend the rule will require health care professionals to violate medical ethics," the agency also looked to "Federal and State conscience laws" as probative of what ethics require. 84 Fed. Reg. at 7748; *see also* Majority Op. 32-33. Those laws, the agency explained, "have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs," 84 Fed. Reg. at 7748, and reflect "personally-held moral principles" of providers, *id.* (quoting *Roe v. Wade*, 410 U.S. 113, 144 n.38 (1973) (quoting American Medical Association House of Delegates 220 (June 1970))). Thus, HHS reasoned, if ethics *permit* providers to decline to refer for abortions, then ethics cannot simultaneously *require* referrals for abortions. *See id.* (citing *Nat'l Inst. of Fam. & Life Advocates*, 138 S. Ct. at 2371-76).[27]

The majority disagrees, arguing that conscience-based restrictions are "not relevant" to "whether the Final Rule's restrictions are ethical." Majority Op. 33. But I think it manifestly reasonable for the agency to

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Ct. at 2569 (refusing to penalize the agency for departing from the inferences, assumptions, and predictions of others).

[27] Take, for example, Maryland's law. It ensures that any doctor for any reason may "refus[e]" to "refer" for an abortion unless the refusal would cause the patient to die, result in serious injury, or be "contrary to the standards of medical care." Md. Code, Health-Gen. §20-214(a), (d). Thus, at least in Maryland's view, declining to refer for a non-emergency abortion does not inherently violate the standards of medical care.

consider laws reflecting "moral principles" as probative of what ethics require. What are "ethics" if not a system "relating to morals[?]" *Ethics*, 5 OXFORD ENGLISH DICTIONARY 421. And it is "well known" that the moral principles that form legitimate ethical theories must be "internally consistent." Richard T. De George, *Ethics and Coherence*, 64 Proceedings and Addresses of the American Philosophical Association 39 (1990). So it was fully reasonable for HHS to draw upon conscience laws as probative of what ethics require and to evaluate its Final Rule accordingly. Whether I (or the American College of Obstetricians and Gynecologists) agree is of no moment.

The Final Rule bars Title X grantees from making abortion referrals as a method of family planning (while permitting referrals for emergency abortions). HHS reasoned that a program that makes referrals for an abortion as a method of family planning is a program "where abortion is a method of family planning, contrary to the [§ 1008] prohibition against the use of Title X funds in such programs." *See* 84 Fed. Reg. at 7717; *see also id.* at 7729, 7745-46, 7759, 7761-62. In doing so, the agency adequately considered the objection that limiting the Title X program in this way violated medical ethics and thus acted neither arbitrarily nor capriciously.

2. Costs of the separation requirement

Next, the parties dispute whether HHS adequately considered the likely cost of the separation requirement. Appellants Supp. Br. 40-43. The majority, like the district court, finds that HHS did not because "the administrative record reflects comments estimating the likely cost of the requirement far exceeds HHS's estimate of $30,000." Majority Op. 37 (quoting S.J.A. 1316).

First, I must address the standard by which we determine whether an agency has adequately considered costs. The Supreme Court has explained that agencies generally "must consider cost—including, most importantly, cost of compliance—before deciding whether [a] regulation is appropriate." *Michigan*, 576 U.S. at 759. But, at the same time, agencies are not required (unless Congress says otherwise) "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* Yet if an agency chooses to account for cost, a reviewing court need only be satisfied that the agency gave a hard and reasoned look at the problem to uphold the regulation. *See Minisink Residents for Envtl. Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 112 (D.C. Cir. 2014); *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987); *Sierra Club v. Sigler*, 695 F.2d 957, 977 n.15 (5th Cir. 1983).[28] In doing so, we must give an agency's predictive judgments about uncertain future events particular deference. *See Fox*, 556 U.S. at 521; *Baltimore Gas*, 462 U.S. at 103.

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[28] *Compare* ADRIAN VERMEULE, LAW'S ABNEGATION 177-78 (2016) ("[W]hile rationality may require paying attention to the advantages and disadvantages of agency decisions, that is not the same as requiring quantification of the advantages and disadvantages.") (internal citations and quotations omitted), *with* Johnathan S. Masur and Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role* 34-35, U. of Chicago Pub. L. Working Paper No. 614 (2017) ("The only way for an agency (or court) to compare costs and benefits is to quantify them and translate them into comparable units—in effect, to monetize them."), *and* JONATHAN BERK ET AL., FUNDAMENTALS OF CORPORATE FINANCE 64 (2d. ed. 2012) ("To evaluate the costs and benefits of a decision, we must value the options in the same terms—cash today.").

HHS rightly began its cost analysis by assessing the scope of the separation requirement. The agency first anticipated that the compliance costs for the separation requirement would only apply to a fraction of the existing providers. *See* 84 Fed. Reg. at 7781-82; *id.* at 7781 (estimating, based on a Congressional Research Service Report, that around 10 percent of existing providers offered abortion as a method of family planning); *id.* (estimating that around 20 percent of all Title X service sites had "their Title X services and abortion services . . . currently collocated" in violation of the separation requirement). In HHS's view, the compliance costs—difficult to predict in any generalized fashion—would have only "minimal effect on the majority of current Title X providers." *Id.*; *see also Becerra*, 950 F.3d at 1098.

Next, the agency turned to the extent of the costs for the providers that would be affected. It determined that "10% to 20%" of Title X sites would be affected, "with a central estimate of 15%." 84 Fed. Reg. at 7781. It then estimated the costs to each impacted site. On average, HHS explained, it would require forty hours of work, divided between management and lawyers, for each impacted grantee to determine how to proceed. *Id.* at 7782. And HHS "estimate[ed] that an average of between $20,000 and $40,000, with a central estimate of $30,000, would be incurred to come into compliance." *Id.* Tallying up these costs, HHS found that the separation requirement would impose "costs of $36.08 million in the first year following publication of a final rule." *Id.*

Acknowledging "the substantial uncertainty regarding the magnitude of these effects," *id.* at 7781, HHS emphasized that the Final Rule permitted "case-by-case

determinations on whether physical separation is sufficiently achieved to take the unique circumstances of each program into consideration" and that the agency would "help grantees successfully implement the Title X program" and develop "workable plan[s]" for complying with the separation requirement, *id.* at 7766; *see also Becerra*, 950 F.3d at 1098. And HHS "encourage[d] grantees to contact the program office with questions, discuss ways to comply with the physical separation requirement, and put a workable plan in place to meet the [one-year] compliance deadline." 84 Fed. Reg. at 7766.

Baltimore and the majority object to this analysis in two ways. First, they claim that "HHS made a 'conclusory response' to [the commenters'] 'evidence-backed concerns'" about HHS's cost estimates. Majority Op. 37 (quoting S.J.A. 1316). Indeed, as HHS acknowledged, some commenters "provided extremely high cost estimates based on assumptions that they would have to build new facilities to comply." 84 Fed. Reg. at 7782. But HHS did not have to accept these pessimistic estimates as long as it provided a reason. *See Dep't of Commerce*, 139 S. Ct. at 2571. And HHS did just that:

> The Department does not anticipate that entities will necessarily engage in construction of new facilities to comply with the new requirements, rather that entities will usually choose the lowest cost method to come into compliance.

84 Fed. Reg. at 7781. HHS then explained how providers could avoid building new facilities:

> For example, Title X providers which operate multiple physically separated facilities and perform abor-

> tions may shift their abortion services, and potentially other services not financed by Title X, to distinct facilities, a change which likely entails only minor costs.

Id. at 7781.[29] And for providers unavoidably and severely impacted, HHS anticipated that they would drop out of the program rather than incur high costs, allowing for other providers—not subject to those costs—to take their place. *See id.* at 7782, 7766 ("If certain grantees and/or subrecipients choose not to continue in the Title X program because they elect not to comply with the physical separation requirements . . . the Department will be in a position to continue to fulfill the purpose of Title X by funding projects sponsored by entities that will comply with the physical separation requirement and provide a broad range of family planning methods and services to low income clients.").[30]

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[29] HHS also highlighted circumstances where programs may be in the same building and still comply with the separation requirement. 84 Fed. Reg. at 7767 ("As long as the Title X clinic and the hospital facilities where abortions are performed are not collocated or located adjacent to each other within a hospital building or complex, it is highly likely that the hospital is not violating the requirement that there be physical separation between the Title X funded activities and activities related to abortion.").

[30] The departure of these high-compliance-cost providers would, in the agency's predictive judgment, be replaced by the expansion of programs offered by existing providers, *see* Fed. Reg. at 7764, 7766, and by the entry of new providers into the program, *see id.* at 7744, 7764, 7780-83. *See also id.* at 7717, 7722.

Second, Baltimore and the majority fault HHS for its $30,000 cost estimate for facilities to come into compliance. In the majority's view, HHS had to perform "studies" rather than rely on "qualitative" and "quantitative" assessments. Majority Op. 38 (quoting Oral Arg. at 2:45-3:15). But here, the majority misses the point by seeking a false precision that is not required by law. The Supreme Court has repeatedly explained that agencies implicitly employ their expertise when making predictive judgements. "A forecast . . . necessarily involves deductions based on the expert knowledge of the agency," *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961), making "complete factual support in the record . . . not possible or required." *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) (citing *FPC*, 365 U.S. at 29). And so, "even in the absence of evidence," the Supreme Court has explained that "predictive judgments" of an agency require deference. *Fox*, 556 U.S. at 521; *see also Dep't of Commerce*, 139 S. Ct at 2569-71; *BNSFR Ry. Co. v. Surface Transport Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008).[31]

And here, the record provides a basis where none is required. The record shows that the agency appropri-

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[31] And while HHS recognized that "cost is an important consideration in any rulemaking," it ultimately rejected less costly alternatives to the separation requirement because "compliance with statutory program integrity provisions is of greater importance and none of the alternatives suggested by commenters guarantees such program integrity." 84 Fed. Reg. at 7783; *see also id.* at 7714. Explaining why a regulation is more consistent with the statutory mandate is enough to justify a policy choice. *See Encino Motorcars*, 136 S. Ct. at 2127; *Rust*, 500 U.S. at 187, 190.

ately recognized and considered the uncertainty surrounding the $30,000 number. First, HHS identified the specific challenges that it faced in reaching a more precise number: insufficient data, vastly different circumstances of grantees that make generalizations difficult, and an expectation that high-cost grantees will be replaced by new applicants. *See* 84 Fed. Reg. at 7766, 7781. Second, HHS updated its estimates in response to submissions from commenters. *Id.* at 7782 ("This estimate is an increase from . . . the proposed rule."). Third, HHS explained why it found competing estimates too high and noted that the data submitted by commenters was insufficient. *Id.* at 7781. Fourth, HHS broke down the remaining elements of the problem into its constituent parts to reach an overall cost estimate. *Id.* at 7781-82; *see also Becerra*, 950 F.3d at 1101 n.32.

In HHS's view, § 1008 "require[s] clear physical separation between Title X projects and places 'where' abortion is a method of family planning." 84 Fed. Reg. at 7765. Prioritizing statutory program integrity, the agency adopted the separation requirement. *Id.* at 7714, 7783. And in the process took a hard and serious look at costs and made a predictive point estimate. HHS's analysis was neither arbitrary nor capricious.

* * *

Rationality is the touchstone of arbitrary and capricious review. Whether or not I agree with the agency's policy choices, this Court may not disturb its regulations so long as the agency has made a rational connection between the facts found and the choices made. Here, the agency has done what is required of it. So I would vacate the district court's permanent injunction.

C. Remedial overbreadth

Although I believe the law requires us to uphold the regulations in full, I would be remiss if I did not object to the overbroad remedy approved by the majority. My colleagues enjoin enforcement of the entire Final Rule throughout the whole State of Maryland. That remedy is overbroad in at least two respects.

First, the majority improperly enjoins enforcement of the *entire* Final Rule (rather than just the unlawful provisions). The doctrine of severability and judicial restraint ordinarily counsel against such sweeping relief. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294-95 (1988). A court should refrain from enjoining more of a regulation than is necessary: "[W]henever a [regulation] contains unobjectionable provisions separable from those found to be un[lawful], it is the duty of [the] court to so declare, and to maintain the [regulation] in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). And the standard for severability is well established. Unless it is evident that the regulations would not have been promulgated without the unlawful provisions, the remainder is not to be impaired. *See Buckley*, 424 U.S. at 108.

This inquiry is straightforward when, as here, a regulation contains a severability clause. The Final Rule provides, "To 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 7726. Despite this explicit statement, the majority purports to divine a clear intent that HHS "intended the [Final Rule] to stand or fall as a whole."

Majority Op. 59. We must presume HHS means what it says and says what it means when interpreting its Final Rule. *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Absent "strong evidence" to the contrary, the unlawful provisions are severable. *Alaska Airlines*, 480 U.S. at 686. I find no such evidence in the Federal Register. Thus, any injunction should be limited to those provisions found unlawful.

Second, the majority improperly enjoins enforcement of the Final Rule throughout the *whole* State of Maryland (rather than just within the City of Baltimore). But the judicial Power is limited to affording necessary relief only to those parties in the case or controversy before us. *See, e.g.*, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). Compounding my doubts that equity permits today's result, *see Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994), the district court identified little actual evidence that justifies extending injunctive relief to the entire state, *see* Majority Op. 61-63. And so, were an injunction proper, I believe it must be limited to the City of Baltimore.

* * *

The judicial role in reviewing agency action is modest. When an agency responsive to the elected President has spoken with the force of law, as judges, we must defer to the agency's reasonable interpretation of an ambiguous statute. And we are forbidden from second guessing the analysis and policy judgments that under-

gird the agency's regulations. Yet the majority oversteps its role and fails to give HHS the deference it is due. Today's decision is wrong, and the resulting circuit split is needless. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: RDB-19-1103

MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFF

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Feb. 14, 2020

ORDER

For the reasons stated in the Memorandum Opinion issued this date, IT IS this 14th day of February 2020, HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment (ECF No. 81) is GRANTED IN PART AND DENIED IN PART;
2. Defendants' Motion for Summary Judgment (ECF No. 82) is GRANTED IN PART AND DENIED IN PART;
3. JUDGMENT IS ENTERED in favor of Plaintiff with respect to Counts VII and VIII;
4. JUDGMENT IS ENTERED in favor of Defendants with respect to Counts III, V, VI, and IX;

5. The Defendants, and all other officers, agents, employees and attorneys of the Department of Health and Human Services, are PERMANENTLY ENJOINED in the State of Maryland from implementing or enforcing the Health and Human Services Final Rule, entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019), *codified at* 42 C.F.R. Part 59.

6. The permanent injunction shall take effect immediately.

7. Plaintiff is not required to post a bond. This Court finds that security is not required under the circumstances of this case

8. The Clerk of this Court shall transmit copies of this Order and accompanying memorandum Opinion to Counsel of record.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: RDB-19-1103

MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFF

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Feb. 14, 2020

MEMORANDUM OPINION

As has been discussed at length in this Court's Memorandum Opinion of May 30, 2019 (ECF No. 43), the Plaintiff Mayor and City Council of Baltimore ("Baltimore City" or "the City") challenges a rule promulgated by the United States Department of Health and Human Services ("HHS" or "the Government") that would amend federal regulations with respect to the funding of family planning services.[1] This Court granted a Preliminary

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[1] It has been preceded by similar lawsuits in United States District Courts in the states of California, Oregon, Washington, and Maine. *California v. Azar*, Case Nos. 19-cv-1184-EMC, 19-cv-1195-EMC (N. D. Cal. filed Mar. 4, 2019); *Oregon v. Azar*, Case Nos. 6:19-cv-0317-MC, 6:19-cv-0318-MC (D. Or. filed Mar. 5, 2019); *Washington v. Azar*, Case No. 1:19-cv-3040-SAB (E.D. Wash. Filed

Injunction against HHS with respect to Counts I and II, alleging violations of the Non-Interference Provision of the Affordable Care Act, 42 U.S.C. § 18114, and the Non-Directive Mandate of the Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018). For the reasons set forth in that Memorandum Opinion of May 30, 2019, this Court held that there was a likelihood of success on the merits with respect to those claims.

On July 2, 2019, a divided panel of the United States Court of Appeals for the Fourth Circuit granted a stay of that injunction pending appeal. (*See* ECF No. 58.)[2] Subsequently, the Fourth Circuit heard oral argument on the interlocutory appeal of the preliminary injunction on September 18, 2019, and a decision has not been rendered. In the interim, community clinics and health centers in Baltimore have been adversely affected as the rule promulgated by HHS has been implemented and remains in effect. Subsequently, this Court dismissed Count IV and Count X of the original ten-count Complaint without prejudice. (ECF No. 74.)

This Court has adhered to a briefing schedule as to the remaining six counts, with Baltimore City and HHS having filed cross-motions for summary judgment. After having held a hearing on January 27, 2020 and hav-

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Mar. 5, 2019); *Family Planning Ass'n of Maine v. HHS*, Case No. 1:19-cv-0100-LEW (D. Me. filed Mar. 6, 2019).

[2] While the dissenting opinion adopted the position of this Court, the majority ruled: "Upon consideration of submissions relative to appellants' motion to stay the district court's preliminary injunction pending appeal, the court grants the motion for stay." (ECF No. 58.)

ing heard the arguments of counsel, this Court has conducted a thorough review of the Administrative Record in this matter. While the Defendant HHS is entitled to Summary Judgment with respect to some of the remaining six counts, specifically Counts III, V, VI, and IX, Baltimore City is entitled to Summary Judgment with respect to Counts VII and VIII. Specifically, after a thorough review of the Administrative Record in this case, this Court holds that the proposed rule as promulgated violates the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, in that it is arbitrary and capricious, being inadequately justified and objectively unreasonable. The Administrative Record reflects that literally every major medical organization in the United States has opposed implementation of this rule. There is almost no professional support for its implementation.

Baltimore City originally brought a ten-Count Complaint pursuant to the Administrative Procedure Act ("APA") against Alex M. Azar II, in his official capacity as the Secretary of Health and Human Services; United States Department of Health and Human Services; Diane Foley, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; and Office of Population Affairs. (Compl., ECF No. 1.) The City challenges the final rule ("Final Rule" or "Rule") entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714 (Mar. 4, 2019), *codified at* 42 C.F.R. Part 59. The Final Rule amends the regulations developed to administer Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, which provides federal funding for family-planning services. (*Id.* at ¶¶ 1, 3.)

After an April 30, 2019 hearing, this Court entered a preliminary injunction on May 30, 2019 as to Counts I and II, enjoining enforcement of the Final Rule in the State of Maryland. (*See* ECF Nos. 43, 44.) Injunctive relief was based on this Court's holding that the Final Rule likely violated provisions of the Affordable Care Act, 42 U.S.C. § 18114, enacted in 2010 (as alleged in Count I), and Congress' Non-Directive Mandate in the Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018) (as alleged in Count II). In short, this Court held that existing laws passed by the United States Congress cannot be circumvented by administrative orders of the executive branch of government. On July 2, 2019, a divided panel of the United States Court of Appeals for the Fourth Circuit granted the Government's Motion to Stay the Injunction Pending Appeal. (*See* ECF No. 58.) That appeal remains pending and therefore, at this time, the preliminary injunction that this Court granted is stayed, and the Final Rule is in effect. The Fourth Circuit held oral argument on the interlocutory appeal of the preliminary injunction on September 18, 2019, and a decision has not yet been issued. *See Mayor and City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir. filed June 6, 2019).

On September 12, 2019, this Court dismissed without prejudice Count IV (Violation of APA § 706—Contrary to Law—Contrary to Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a)) and Count X (Violation of APA—Contrary to Constitutional Right—Unconstitutionally Vague), and allowed Counts I, II, III, V, VI, VII, VIII, and IX to proceed on the merits. (ECF No. 74.) Presently pending are the parties' cross-motions for summary judgment on the remaining

Counts. (ECF Nos. 81, 82.) This Court held a hearing on January 27, 2020, has heard the arguments of counsel, has reviewed the submissions of the parties, and has reviewed the expansive Administrative Record in this case.

The executive branch of government is not entitled to promulgate administrative rules where an agency's explanation "runs counter to the evidence before the agency." *See Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, for the reasons that follow, summary judgment IS ENTERED in favor of Plaintiff on Counts VII and VIII. Specifically, after a thorough review of the Administrative Record in this case, this Court holds that the proposed rule as promulgated violates the Administrative Procedure Act in that it is arbitrary and capricious, being inadequately justified and objectively unreasonable. However, summary judgment IS ENTERED in favor of Defendants on Counts III, V, VI, and IX, alleging that the rule as promulgated is contrary to Title X's voluntariness requirement, contrary to constitutional right pursuant to the First Amendment and Equal Protection under the Fifth Amendment, and without observance of procedure required by law. Accordingly, the Government shall be permanently enjoined from implementing or enforcing any portion of the Final Rule in the State of Maryland.

BACKGROUND

The background of this case was discussed at length in this Court's prior Memorandum Opinion of May 30, 2019 granting Plaintiff's Motion for Preliminary Injunction and this Court's prior Memorandum Order of September 12, 2019, granting in part and denying in part

Defendants' Motion to Dismiss. (*See* ECF Nos. 43, 74.) In brief, almost fifty years ago, in 1970, Congress enacted Title X, the *only* federal program specifically dedicated to funding family planning services. Public Health Service Act, 84 Stat. 1506, *as amended* 42 U.S.C. §§ 300 to 300a-6; (Pl.'s Exhibit 4 at PEP109, ECF No. 81-2.)

Title X addresses low-income individuals' lack of equal access to family planning services by authorizing the Secretary of Health and Human Services to "make grants and to enter into contracts with public or nonprofit private 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." *Id.* § 300(a). Section 1008 of the Act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Consistent with this restriction, HHS has never permitted Title X grantees to use Title X funds to perform or subsidize abortions. *See* 42 C.F.R. §§ 59.5(a)(5), 59.9 (1986).

Title X programs provide sexual and reproductive healthcare with priority given to low-income individuals. (Pl.'s Exhibit 4 at PEP112, ECF No. 81-2.) Services include a broad range of contraceptive options; contraceptive education and counseling; breast and cervical cancer screening; testing, referral, and prevention education for sexually transmitted infections/diseases ("STIs/STDs"), including human immunodeficiency virus ("HIV"); and pregnancy diagnosis and counseling. (*Id.* at PEP109, PEP118-120.)

I. The Final Rule.

On May 22, 2018, HHS posted on its website a notice of proposed rulemaking entitled *Compliance With Statutory Program Integrity Requirements*, 83 Fed. Reg. 25,502 ("Proposed Rule"). *See* 84 Fed. Reg. 7714, 7726 (Mar. 4, 2019). The Proposed Rule was published in the Federal Register on June 1, 2018. *Id.*; 83 Fed. Reg. 25,502 (June 1, 2018). During the 60-day public comment period, HHS received more than 500,000 comments.[3] On March 4, 2019, HHS published the Final Rule in the Federal Register. 84 Fed. Reg. 7714 (Mar. 4, 2019), *codified at* 42 C.F.R. Part 59. The Final Rule contains two key provisions that are central to Baltimore City's claims in this case: (1) the counseling restriction or "Gag Rule" that prohibits health professionals from providing their patients with abortion referral information even when requested, except "[i]n cases in which emergency care is required"; and (2) the separation requirement, which requires that all abortion services, and any medical services not complying with the Gag Rule, be physically separated from clinics that provide Title X services. 84 Fed. Reg. at 7747-48, 7788-89. Most of the Rule's provisions, including the counseling restriction, had an implementation date of May 3, 2019 and are now in effect nationwide.[4] *Id.* at 7714. Compliance with the separation requirement is required by March 4, 2020. *Id.*

A. Gag Rule.

The Gag Rule provision of the Final Rule provides that a "Title X project may not perform, promote, refer

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[3] Discussed *infra* on page 7.

[4] *See infra* at page 9, discussing the status of injunctions.

for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89 (codified at 42 C.F.R. § 59.14(a)). If a client specifically requests a referral to an abortion provider, the Title X grantee can at most offer a list of "comprehensive primary health care providers . . . some, but not the majority" of which may "also provide abortion." *Id.* at 7789. The list cannot identify which providers provide the abortion services she is requesting. The project staff are prohibited from answering a direct inquiry about which providers provide abortion. *Id.* Specialized reproductive health care providers are excluded because the list is limited to "comprehensive primary health care providers." *Id.* At the same time, Title X providers must provide all pregnant patients with a referral for prenatal care, regardless of the patients' wishes, on the basis that prenatal referrals are "medically necessary." *Id.*

The Final Rule does permit referrals for abortion "in cases in which emergency care is required." *Id.* at 7789 (codified at 42 C.F.R. § 59.14(b)(2)). However, the example provided for such emergency is when a "Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client." *Id.* (codified at 42 C.F.R. § 59.14(e)(2)). The Rule also explains that "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." 84 Fed. Reg. at 7747 n.76.

B. Separation requirement.

The separation requirement mandates that Title X activities be "physically and financially separate" (defined as having an "objective integrity and independence") from prohibited activities, such as the provision of abortion services and any referrals for abortion services that do not meet the Gag Rule requirements. 84 Fed. Reg. at 7789 (codified at 42 C.F.R. § 59.15)). "Mere bookkeeping separation of Title X funds from other monies is not sufficient." *Id.* Whether a Title X provider meets this requirement is determined by the Secretary based on "a review of facts and circumstances," including but not limited to the following relevant factors:

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

Id.

The Preamble to the Final Rule explains, "[a]s long as the Title X clinic and the hospital facilities where abortions are performed are not collocated or located adjacent to each other within a hospital building or complex, it is highly likely that the hospital is not violating

the requirement." *Id.* at 7767. However, at a "free-standing clinic, physical separation might require more circumstances to be taken into account in order to satisfy a clear separation between Title X services and abortion services," and such a clinic "would likely present greater opportunities for confusion between Title X and abortion services, including, for example, the same entrances, waiting rooms, signage, examination rooms, and the close proximity between Title X and impermissible services." *Id.* The deadline for physical separation is March 4, 2020. *Id.* at 7714.

II. Administrative Record.

The Administrative Record ("Record" or "AR") contains more than 500,000 comments submitted during the 60-day comment period. The Record comprises more than 400,000 pages and was provided to the Court on two CDs. (*See* ECF Nos. 78, 80.) The Final Rule garnered comments from the American Medical Association (AR 269330); American Academy of Family Physicians (AR 104075); American Academy of Nursing (AR 107970); American College of Obstetricians and Gynecologists (AR 268836); American Academy of Pediatrics (AR 277786); and the American College of Physicians (AR 281203). Literally every major medical organization in the United States has noted its opposition to the Final Rule. In addition, comments were submitted from the Baltimore City Health Department (AR 245402); City Health Department Leaders from Kansas City, Boston, San Antonio, Chicago, Los Angeles, Cleveland, and Baltimore City (AR 245623); State Attorneys General from the States of Washington, Oregon, Vermont, and the Commonwealth of Massachusetts (AR 278551); Planned Parenthood (AR 316400); Guttmacher

Institute (AR 264415); and the American Civil Liberties Union (AR 305722), among many others.

In addition to public comments, the Administrative Record contains previous HHS Title X rules and regulations, executive orders, Supreme Court cases, statutes including the Affordable Care Act and the HHS Appropriations Act of 2018, reports from the United States Congress, and internet news and journal articles. (*See* AR 397110 - AR 407171.)

III. Title X in Baltimore City.

Title X has been providing $1,430,000 each year to the City of Baltimore and serves over 16,000 patients per year. (Pl.'s Exhibit 7 at PEP365, ECF No. 81-2.) As of 2019, the City directly has operated three community clinics and four school-based health centers that provide Title X services, and it has overseen Title X funding to ten subgrantee health clinics in the community, including clinics at Johns Hopkins University, Baltimore Medical System, Family Health Centers of Baltimore, and University of Maryland, in addition to clinics offering comprehensive care in middle and high schools. (Pl.'s Exhibit 8 at PEP380-81, ECF No. 81-2.) Planned Parenthood operated additional Title X sites in Baltimore City until it withdrew its Title X participation in August of 2019 as a result of the Final Rule. (Pl.'s Mot. at 4-5, ECF No. 81-1; Pl.'s Exhibit 8 at PEP390, ECF No. 81-2; Amicus Brief at 14 n.44, ECF No. 89.)

Of the 16,000 women, men, and minors who received care from Title X clinics in Baltimore City in 2017, 86% had incomes at or below the federal poverty line. (*Id.* at PEP381.) Title X centers serve one third of women

in Baltimore City who need publicly funded contraceptive services. (*Id.*) Baltimore City has experienced a 55% reduction in teen pregnancy over the last ten years, which its public health officials attribute to the assistance of Title X funding. (*Id.* at 383; Pl.'s Exhibit 9 at PEP 396-97, ECF No. 81-2.)

IV. Procedural Setting.

This case is one of multiple cases that have been filed across the nation challenging HHS's Final Rule. *See California v. Azar*, Case Nos. 19-cv-1184-EMC, 19-cv-1195-EMC (N. D. Cal. filed Mar. 4, 2019); *Oregon v. Azar*, Case Nos. 6:19-cv-0317-MC, 6:19-cv-0318-MC (D. Or. filed Mar. 5, 2019); *Washington v. Azar*, Case No. 1:19-cv-3040-SAB (E.D. Wash. Filed Mar. 5, 2019); *Family Planning Ass'n of Maine v. HHS*, Case No. 1:19-cv-0100-LEW (D. Me. filed Mar. 6, 2019). Preliminary injunctions were issued by the California, Oregon, and Washington courts. *California v. Azar*, 385 F. Supp. 3d 960 (N.D. Cal. 2019); *Oregon v. Azar*, 389 F. Supp. 3d 898 (D. Or. 2019); *Washington v. Azar*, 376 F. Supp. 3d 1119 (E.D. Wash. 2019). On June 20, 2019, the United States Court of Appeals for the Ninth Circuit granted a stay of the preliminary injunctions that were granted in the California, Oregon, and Washington State cases. *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019) (per curiam). An *en banc* rehearing of the stay decision was held on September 23, 2019 and remains pending. *See* 927 F.3d 1045 (9th Cir. July 3, 2019). In the Maine case, the District Court denied the plaintiff's motion for a nation-wide injunction, which it had previously withdrawn and renewed after the stay of the nation-wide injunctions was granted. *Family Planning Ass'n of Maine v. HHS*, 404 F. Supp. 3d 286 (D. Me. 2019).

In the instant case, Plaintiff originally asserted ten causes of action: (I) Violation of Administrative Procedure Act ("APA"), 5 U.S.C. § 706—Contrary to Law—Contrary to Affordable Care Act ("ACA")'s Non-Interference Provision, 42 U.S.C. § 18114; (II) Violation of APA § 706—Contrary to Law—Contrary to Non-directive Mandate of the Consolidated Appropriations Act of 2018; (III) Violation of APA § 706—Contrary to Law—Contrary to Tile X, 42 U.S.C. §§ 300(a), 300a(a); (IV) Violation of APA § 706—Contrary to Law—Contrary to Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1(a); (V) Violation of APA § 706—Contrary to Constitutional Right—First Amendment; (VI) Violation of APA—Contrary to Constitutional Right—Equal Protection Under Fifth Amendment; (VII) Violation of APA—Arbitrary and Capricious—Inadequately Justified; (VIII) Violation of APA—Arbitrary and Capricious—Objectively Unreasonable; (IX) Violation of APA—Without Observance of Procedure Required by Law; and (X) Violation of APA—Contrary to Constitutional Right—Unconstitutionally Vague. (Compl., ECF No. 1.)

Baltimore City also filed a Motion for Preliminary Injunction (ECF No. 11), which this Court granted on May 30, 2019, enjoining enforcement of the Final Rule in the State of Maryland. (*See* ECF Nos. 43, 44.) The Court's decision addressed the likelihood of success on the merits of only Counts I and II. (ECF No. 43.) The Court declined to address the likelihood of success on the merits of Plaintiff's arbitrary and capricious claims (Counts VII and VIII) because "[t]he 'searching and careful inquiry of the [administrative record]' that is required to determine if it is likely that HHS's rule-

making in this instance was arbitrary and capricious would be more prudently handled on a fully-developed record." (*Id.* at 23 (quoting *Casa de Maryland v. U.S. Dep't of Homeland Security*, 924 F.3d 684, 703 (4th Cir. 2019)).)

On June 6, 2019, Defendants filed a Notice of Interlocutory Appeal (ECF No. 48; USCA No. 19-1614) and a Motion to Stay the Injunction Pending Appeal (ECF No. 49). This Court denied the stay motion (ECF No. 56), but a divided panel of the Fourth Circuit granted Defendants' motion to stay pending appeal (ECF No. 58). Baltimore City filed an Emergency Motion for Rehearing *en banc* to vacate the stay of injunction, and that motion was denied on September 3, 2019. (*See* ECF No. 73.) Oral argument on the interlocutory appeal of this Court's preliminary injunction was held on September 18, 2019, and a decision has not yet been issued.

Defendants also filed a Motion to Stay Proceedings Pending Appeal (ECF No. 62) and a Motion to Dismiss (ECF No. 67). This Court denied the Motion to Stay Proceedings (ECF No. 70) and granted in part and denied in part the Motion to Dismiss (ECF No. 74). Specifically, the Court dismissed without prejudice Count IV (Violation of APA § 706—Contrary to Law—Contrary to Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1(a)) and Count X (Violation of APA—Contrary to Constitutional Right—Unconstitutionally Vague), and allowed Counts I, II, III, V, VI, VII, VIII, and IX to proceed on the merits. (ECF No. 74.)

On October 17, 2019, Defendants filed separately two CDs containing the Administrative Record. (ECF No. 80.) Subsequently, the parties filed cross-motions for

summary judgment on the remaining Counts, for which a hearing was held on Monday, January 27, 2020. (ECF Nos. 81, 82, 91.) The Court has considered the submissions of the parties, has heard the arguments of counsel, and has conducted a careful and searching inquiry of the Administrative Record. For the reasons that follow, Defendant HHS is entitled to Summary Judgment with respect to some of the remaining six counts, specifically Counts III, V, VI, and IX. Baltimore City is entitled to Summary Judgment with respect to Counts VII and VIII. Specifically, after a thorough review of the Administrative Record in this case, this Court holds that the proposed rule as promulgated violates the Administrative Procedure Act in that it is arbitrary and capricious, being inadequately justified and objectively unreasonable.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, in conjunction with the federal-question jurisdiction statute, provides the statutory basis for a court to review a final agency action. Claims seeking review of an agency action under the APA "are adjudicated without a trial or discovery, on the basis of an existing administrative record . . . [and accordingly] are properly decided on summary judgment." *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 659 (D. Md. 2007). The standard set forth in Rule 56 of the Federal Rules of Civil Procedure governing summary judgment, however, "does not apply because of the limited role of a court reviewing the administrative record." *Hospira, Inc. v. Burwell*, No. GJH-14-2662, 2014 WL 4406901, at *9 (D. Md. Sept. 5, 2014) (citing *Roberts v. United*

States, 883 F. Supp. 2d 56, 62-63 (D.D.C Mar. 23, 2012); *Kaiser Found. Hosps. v. Sebelius*, 828 F. Supp. 2d 193, 197-98 (D.D.C. 2011)). Rather, summary judgment is the mechanism by which the court decides as a matter of law whether "the administrative record permitted the agency to make the decision it did." *Id.* (quoting *Kaiser Found. Hosps.*, 828 F. Supp. 2d at 198).

The APA requires a reviewing court to:

> hold unlawful and set aside agency action . . . found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law. . . .

5 U.S.C. §§ 706(2)(A)-(D).

The arbitrary and capricious standard requires a reviewing court to consider whether the agency:

> Relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). A court must uphold an action if the record shows that the agency had a rational basis for the decision; the court may not "substitute its judgment for that

of the agency." *State Farm*, 463 U.S. at 43; *Defenders of Wildlife v. North Carolina Dep't of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014). This is a "highly deferential standard which presumes the validity of the agency's action," *Natural Resources Defense Council v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993), and an agency's decision should only be overruled upon a finding that the agency has "failed to consider relevant factors and committed a clear error of judgment." *Md. Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424, 428 (4th Cir. 2008) (citation omitted); *see also Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009).

When reviewing an agency decision, the Court "must engage in a searching and careful inquiry of the [administrative] record, so that [it] may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." *Casa de Maryland v. U.S. Dep't of Homeland Security*, 924 F.3d 684, 703 (4th Cir. 2019) (quoting *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012)).

ANALYSIS

This case presents a unique procedural posture. Counts I and II are on appeal in conjunction with the United States Court of Appeals for the Fourth Circuit's review of this Court's state-wide preliminary injunction.[5] In addition, Counts IV and X of the original ten-count Complaint were dismissed without prejudice.

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[5] In its Memorandum Opinion and Order granting Plaintiff's Motion for Preliminary Injunction, the Court found that Plaintiff was likely to succeed on the merits of Count I (Violation of Administrative Procedure Act ("APA"), 5 U.S.C. § 706—Contrary to Law—

(ECF No. 74.) The remaining six Counts, specifically Count III (Violation of APA § 706—Contrary to Law—Contrary to Tile X, 42 U.S.C. §§ 300(a), 300a(a)), Count V (Violation of APA § 706—Contrary to Constitutional Right—First Amendment), Count VI (Violation of APA—Contrary to Constitutional Right—Equal Protection Under Fifth Amendment), Count VII (Violation

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Contrary to Affordable Care Act ("ACA")'s Non-Interference Provision, 42 U.S.C. § 18114) and Count II (Violation of APA § 706—Contrary to Law—Contrary to Nondirective Mandate of the Consolidated Appropriations Act of 2018). (ECF Nos. 43, 44.) The Court determined that the Final Rule likely violates the Affordable Care Act's non-interference provision "by creating unreasonable barriers for patients to obtain appropriate medical care, interfering with communications between the patient and health care provider, and restricting full disclosure, which violates the principles of informed consent." (ECF No. 43 at 18.) The Court also determined that the Final Rule likely violates the non-directive mandate of the 2018 appropriations act because "[r]equiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is coercive, not 'nondirective.'" (*Id.* at 20.) The Court rejected Defendants' arguments that *Rust v. Sullivan*, 500 U.S. 173 (1991), foreclosed Plaintiff's claims under Counts I and II because Plaintiff relies on "violations of laws passed by Congress and enacted after *Rust* was decided." (*Id.* at 16.)

This Court will not dispose of Counts I and II as they remain on appeal in connection with the Fourth Circuit's review of this Court's preliminary injunction. *See Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 88 (4th Cir. 1967) ("an appeal from an order granting or refusing an injunction brings before the appellate court the entire order, not merely the propriety of the injunctive relief . . . the appellate court may consider and decide the merits"); *see also* 11A Wright & Miller, Fed. Prac. & Proc. § 2962 (3d ed. 2019) ("If an interlocutory appeal is taken, the appellate court may consider the merits of the case, to the extent they relate to the propriety of granting the injunctive relief. . . . ").

of APA—Arbitrary and Capricious—Inadequately Justified), Count VIII (Violation of APA—Arbitrary and Capricious—Objectively Unreasonable), and Count IX (Violation of APA—Without Observance of Procedure Required by Law) are ripe for review.

I. The Gag Rule and the Separation Requirement provisions of the Final Rule are arbitrary and capricious (Counts VII and VIII).

This Court declined to join with its sister courts in undertaking an arbitrary and capricious analysis in the context of its preliminary injunction finding because such an analysis "would be more prudently handled on a fully-developed record." (ECF No. 43 at 23.) Having carefully reviewed the Administrative Record in this case, this Court is compelled to find that HHS's promulgation of the Final Rule was arbitrary and capricious for three key reasons.[6] First, HHS has inadequately explained its decision to "disagree" with comments by

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[6] Plaintiff asserted two additional grounds supporting its arbitrary and capricious claims. Specifically, Plaintiff argued that HHS failed to explain its departure from HHS's prior interpretation of the non-directive mandate that non-directive pregnancy counseling includes pregnancy referrals, and that HHS inadequately explained the limitation requiring only advanced practice providers ("APPs"). These arguments are unpersuasive because HHS did indeed recognize and explain its departure from its prior interpretations and also explained that "APPs are qualified, due to their advanced education, licensing, and certification to diagnose and treat patients while advancing medical education and clinical research." *See* 84 Fed. Reg. at 7716-17, 7728 & n.41-42. HHS's explanation of its departure is consistent with the principle from *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) that an agency acts arbitrarily and capriciously where it fails to "display awareness that it is changing position" and "show that there are good reasons

every major medical organization regarding the Final Rule's contravention of medical ethics. Second, HHS inadequately considered the "reliance interests" that would be disrupted by its change in policy. Finally, HHS inadequately considered the likely costs and benefits of the physical separation requirement.

A. HHS failed to explain how the Final Rule is consistent with medical ethics.

A "searching and careful inquiry" of the record reveals that literally all of the nation's major medical organizations have grave medical ethics concerns with the Final Rule. HHS had before it comments from the American College of Obstetricians and Gynecologists, the American Medical Association ("AMA"), the American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Pediatrics, and the American College of Physicians. (*See* AR 268836; AR 269330; AR 104075; AR 107970; AR 277786; AR 281203.) Every single one of these organizations stated that the Final Rule would violate the established principles of medical ethics. (*Id.*) The American College of Obstetricians and Gynecologists, which comprises 90% of the nation's obstetricians and gynecologists cautioned that the Rule "would put the patient-physician relationship in jeopardy by placing restrictions on the ability of physicians to make available important medical information, permitting physicians to withhold information from pregnant women about the full range of their options, and erecting greater barriers to care, especially for minority populations." (AR

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for the change." In any event, Plaintiff's claims do not rise and fall on these arguments.

268838.) The American College of Obstetricians and Gynecologists further noted that the prenatal referral requirement "would further limit the care options offered to patients, and is not consistent with evidence-based medicine." (AR 268840.)

The AMA, citing to its *Code of Medical Ethics*, explained that the gag rule "would not only undermine the patient-physician relationship, but also could force physicians to violate their ethical obligations . . . to counsel patients about all of their options in the event of a pregnancy." (AR 269332.) The American Academy of Family Physicians, the American Academy of Nursing, the American Academy of Pediatrics, and the American College of Physicians raised similar concerns. (*See* AR 104075; AR 107970; AR 277786; AR 281203.) Planned Parenthood Federation of America and four states (Washington, New York, Hawaii, and Oregon) all notified HHS that they would have to exit the Title X program because the restrictions are "fundamentally at odds with the professional and ethical obligations of health care professionals." (AR 316414.) The American Academy of Nursing commented that "these rules prioritize ideology over evidence-based professional recommendations and the government's own independent evaluations," and urged HHS "to remain religiously and morally neutral in its funding, policies, and activities to ensure that individuals [] do not receive a limited scope of services and that the ethical obligations of healthcare providers are not compromised." (AR 107975.)

In the face of these grave concerns from all of the nation's leading medical organizations, HHS declared that it "disagrees with commenters contending the proposed

rule . . . infringes on the legal, ethical, or professional obligations of medical professionals." 84 Fed. Reg. at 7724. With absolutely no support from any significant leading medical association in the United States, HHS has responded that, "the Department believes that the final rule adequately accommodates medical professionals and their ethical obligations while maintaining the integrity of the Title X program." *Id.* Further, "[t]he Department believes that medical ethics, regulations concerning the practice of medicine, and malpractice liability standards are not inconsistent with this final rule," because "[t]he Supreme Court upheld similar conditions and restrictions in *Rust* as a constitutionally permissible exercise of Congress's Spending Power." *Id.* at 7748. Finally, Defendants argue that HHS noted that the restrictions are necessary to ensure compliance with the federal conscience statutes, including the Church Amendment, the Coats-Snowe Amendment, and the Weldon Amendment. *Id.* at 7716.

The arbitrary and capricious standard requires this Court to consider whether the agency:

> Relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). An agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found

and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 245-46, 9 L. Ed. 2d 207 (1962)). None of Defendants' explanations square with what is required of the agency under *State Farm*. There is no question that HHS has "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* It has indeed rendered an opinion for which there is no evidentiary support.

As a preliminary matter, Defendants' argument that the conscience statutes explain HHS's decision that the Final Rule is consistent with medical ethics is misplaced. In HHS's explanation for its disagreement with the comments on medical ethics, it does not mention the conscience statutes. 84 Fed. Reg. at 7724, 7748. Accordingly, the Court will not "supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947)).

HHS's entire justification for disagreement with the comments regarding medical ethics is that *Rust* would not have upheld similar regulations if they were inconsistent with medical ethics. *Rust*, however, never addressed the implications of the 1988 regulations on medical ethics and noted only in dicta that "[u]nder the Secretary's regulations . . . a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." 500 U.S. at 203. Furthermore, *Rust* did not evaluate the 2019 Final Rule and the Administrative Record that HHS considered in promulgating it. As the United

States District Court for the Northern District of California explained, "[t]he justifications supporting the 1988 regulations upheld in *Rust* cannot insulate the Final Rule from review now, almost three decades later." *California v. Azar*, 385 F. Supp. 3d 960, 1001 (N.D. Cal. 2019).

Nowhere in the Final Rule does the HHS provide a reasoned basis for its disagreement with the medical ethics concerns outlined by the nation's major medical organizations. HHS did not identify any code of medical ethics, any medical organization, or any medical provider who could confirm HHS's belief that medical ethics permit healthcare providers to comply with the gag rule's restrictive counseling on abortion. At the summary judgment motions hearing of January 27, 2020, Defendants conceded as much in response to this Court's questioning whether there was anything in the record that counters the medical ethics concerns raised by the professional organizations. (*See* Jan. 27, 2020 Hr'g Tr. at 25:23-26:4, ECF No. 92 ("**The Court**: We looked through the record. I can find no record of any professional organization of any kind that has disputed the position taken by those organizations I've just mentioned with respect to the matter of the medical ethics. But if I'm wrong, tell me. **Counsel for HHS**: No, you're right about that point, Your Honor.").)

To be sure, HHS was not required to demonstrate that any professional organization supported the Rule, but it was required to provide a reasoned explanation for its disagreement with the medical ethics concerns of every major medical association in the country, while simultaneously finding the Final Rule consistent with medical ethics. *See State Farm*, 463 U.S. at 43 ("the

agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 245-46, 9 L. Ed. 2d 207 (1962)). This, it did not do. At the motions hearing, Defendants asserted, without explanation, that "the agency unquestionably addressed concerns about medical ethics, it considered them and it came to a different conclusion as to whether medical ethics would be violated." (*See* Jan. 27, 2020 Hr'g Tr. at 33:3-6, ECF No. 92.) It may well be that the agency considered the concerns, but the agency has failed to articulate a satisfactory explanation for its "different conclusion" from the nation's leading medical organizations. Such agency action is plainly arbitrary and capricious.

B. HHS did not account for reliance interests.

HHS also failed to adequately consider how the Rule would disrupt access for many who rely on Title X services. HHS "conclude[d] these final rules will contribute to more clients being served, gaps in service being closed, and improved client care," and stated that "commenters did not provide evidence that the rule will negatively impact the quality or accessibility of Title X services." 84 Fed. Reg. at 7723, 7780. In stark contrast to HHS's assertions, the administrative record is replete with comments by both Title X grantees and nongrantees alike who provided evidence that the Final Rule would leave millions with reduced access to healthcare. HHS had before it evidence from the Baltimore City Health Department, City Health Department Leaders, Planned Parenthood, Guttmacher Institute,

National Family Planning & Reproductive Health Association, and the American Medical Association, among others, all of which detailed how the Rule would limit access to Title X care and force a large number of providers out of the Title X program. (*See* AR 245402; AR245623; AR316400; AR 264415; AR 308011; AR 269330.) Indeed, Planned Parenthood withdrew its Title X participation in August of 2019 as a result of the Final Rule. (Pl.'s Mot. at 4-5, ECF No. 81-1; Pl.'s Exhibit 8 at PEP390, ECF No. 81-2; Amicus Brief at 14 n.44, ECF No. 89.)

For example, the AMA commented that the Final Rule places Title X patients at risk because "[i]n states that have excluded certain providers from their family planning programs, research shows serious public health consequences." (AR 269333.) To support this assertion, the AMA cited a study published in the *New England Journal of Medicine* that found that blocking patients from Planned Parenthood in Texas resulted in a 35% decline in women in publicly-funded programs using the most effective form of birth control and denying women access to the contraceptive care they needed resulted in a 27% increase in births among women who had previously used the most effective form of birth control. (*Id.*)

A public health researcher and professor in the Departments of Pediatrics and Obstetrics, Gynecology & Reproductive Sciences at the University of California, San Francisco, provided HHS with data reflecting the impact of the Rule on Title X providers, concluding that the Rule "radically underestimates the costs that it will impose on patients, providers, and society." (*See* AR 388063-388065.) In addition, the Guttmacher Institute

provided a detailed chart showing the state-by-state impact if Planned Parenthood alone withdrew from the Title X program. (AR 264435-264436.) The chart shows that, as of 2015, 39% of women receiving Title X services in Maryland were served at Planned Parenthood centers. (*See* AR 264435.)

HHS, contrary to the overwhelming evidence in the record, decided that more clients would be served and gaps in service would be closed, resulting in improved client care. HHS cited only one comment that suggested a support for that position. The Christian Medical Association contends that new providers who do not support the provision of abortion services may enter the program. *See* 84 Fed. Reg. at 7780 n.138. However, HHS entirely ignored the evidence that raised concerns about the Final Rule's reducing access to Title X services nationwide.

C. HHS did not account for compliance costs.

HHS did not adequately consider the likely costs of the physical separation requirement. HHS estimated that a Title X provider would face a compliance cost of $30,000.[7] 84 Fed. Reg. at 7782. HHS reasoned that there were uncertainties associated with the requirement and that "entities will usually choose the lowest cost method to come into compliance." *Id.* at 7781-82. In contrast, the administrative record reflects comments estimating the likely cost of the requirement far exceeds HHS's estimate of $30,000. Comments from City Health Department Leaders, the Center for Reproductive Rights, the Family Planning Council of Iowa,

[7] The estimate in the Proposed Rule was $20,000. *See* 83 Fed. Reg. 25502, 25525 (June 1, 2018.)

Planned Parenthood, and the Guttmacher Institute, among others, all estimated costs well beyond $30,000 to comply with the separation requirement. (*See* AR 245623; AR 315959; AR 279351; AR 316400; AR 264415.)

A comment by City Health Department Leaders from Baltimore, Kansas City, Boston, San Antonio, Chicago, Los Angeles, and Cleveland, estimated that the Rule would impose ongoing compliance costs, such as the administrative cost of maintaining separate accounts for funding streams and associated staffing needs. (AR 245623-245624.) Planned Parenthood estimated average capital costs of nearly $625,000 per affected service site. (AR 316430-316431.) The Center for Reproductive Rights noted that hiring one additional full-time staff member would cost well more than the proposed rule's $20,000 estimate. (AR 315994.) The Family Planning Council of Iowa explained, "it typically costs hundreds of thousands, or even millions, of dollars to locate and open any health care facilities (and would also cost much more than $10,000-30,000 to establish even an extremely simple and limited office), staff it, purchase workstations, set up record-keeping systems, etc." (AR 279362.)

After reviewing the administrative record, this Court concurs with its sister court in the Northern District of California that "HHS's conclusory response to commenters' evidence-backed concerns about the serious problems the physical separation requirement will cause flies in the face of established APA principles." *California v. Azar*, 385 F. Supp. 3d at 1010. Under the arbitrary and capricious standard, the Court may not "substitute its judgment for that of the agency." *State* Farm, 463 U.S. at 43. The Court must, however, set aside agency

action that it finds to be arbitrary and capricious when the agency "entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* In this case, for all of the reasons explained above, the Court is compelled to set aside the Final Rule as arbitrary and capricious. Thus, summary judgment is entered in favor of Plaintiff on Counts VII and VIII.

D. Injunctive Relief.

Plaintiff seeks declaratory and permanent injunctive relief restraining the enforcement, operation, and execution of the Final Rule by enjoining Defendants, their agents, employees, appointees, or successors, from enforcing, threatening to enforce, or otherwise applying the provisions of the Final Rule against Baltimore City and its subgrantees. (Compl. at 67, ECF No. 1.) For the reasons explained *supra* as to Counts VII and VIII, Baltimore City shall be granted declaratory relief and a permanent injunction of the Final Rule in the State of Maryland. As the Court acknowledged previously in granting the preliminary injunction (ECF No. 43), Baltimore City is close in proximity to multiple other States and municipalities whose people make use of its health system. Loss of funding in neighboring states will put pressure on Baltimore's health system, as mobile patients come from neighboring communities to make use of Baltimore's resources. In this case, a permanent injunction that is limited to Maryland is narrowly tailored

to avoid irreparable harm to the sole Plaintiff, Baltimore City.[8]

II. HHS complied with the APA's rule-making procedures (Count IX).

Plaintiff's challenge to HHS's compliance with the APA's rule-making procedures fails. Administrative agencies are required, under the APA, to comply with certain procedures before issuing a rule. 5 U.S.C. § 553; *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012). "Generally stated, the APA's rulemaking provisions require that the agency publish a notice of proposed rule-making in the Federal Register; permit interested parties the opportunity to comment on the proposed rule; and, after considering the submitted comments, issue a concise general statement of the rule's purpose along with the final rule." *Mayor and City Council of Baltimore v.*

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[8] As noted in its Memorandum Opinion granting Plaintiff's preliminary injunction, this Court is cognizant of the skepticism regarding the increased issuance of nationwide injunctions by United States District Judges. (*See* ECF No. 43 at 27 n.12 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-25 (2018); *California v. Azar*, 385 F. Supp. 3d 960, 1021 (N.D. Cal. 2019)). In his recent concurrence granting a stay of a nationwide injunction, Justice Gorsuch addressed "the increasingly common practice of trial courts ordering relief that transcends the cases before them." *Dep't of Homeland Security, et al. v. New York, et al.*, No. 19A785, 589 U.S. __ (Jan. 27, 2020) (Gorsuch, J., concurring). He explained, "these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case," but "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *Id.* Here, the Court has provided only the necessary relief for the particular Plaintiff in this case, Baltimore City.

Trump, Civil Action No. ELH-18-3636, 2019 WL 4598011, at *22 (D. Md. Sept. 20, 2019) (citing 5 U.S.C. § 553; *N.C. Growers' Ass'n, Inc.*, 702 F.3d at 763)). The Fourth Circuit has instructed that courts "must be strict in reviewing an agency's compliance with procedural rules." *Id.* (quoting *N.C. Growers Ass'n, Inc.*, 702 F.3d at 764).

When a party challenges the adequacy of notice of a change in a proposed rule occurring after the comment period, the Fourth Circuit applies the "logical outgrowth test." *See Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985). "Notice is 'adequate' if the changes in the original plan 'are in character with the original scheme,' and the final rule is a 'logical outgrowth' of the notice and comments already given." *Id.* If the final rule "substantially departs from the terms or substance of the proposed rule," then the notice is inadequate. *Id.* (quoting *Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980)).

Plaintiff argues that HHS's 60-day comment period deprived the public of a meaningful opportunity to comment on the Rule and that the advanced practice provider ("APP") requirement was not a logical outgrowth of the proposed rule. As Plaintriff concedes, however, 60 days is generally accepted as the "reasonable minimum time for comment" on a typical rule. (ECF No. 81-1 at 24 (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)). Despite Plaintiff's belief that this Rule warranted an extension of the comment period because the proposal was "complex or based on scientific or technical data," Plaintiff cites no authority finding a 60-day comment period unreasonable. Plaintiff's reliance on *Hollingsworth v. Perry*, 558 U.S. 183 (2010) is

misplaced, as *Hollingsworth* did not involve a comment period under the APA, but instead addressed the propriety of a thirty-day comment period for amendments to a federal court's local rules, pursuant to 28 U.S.C. § 2071(b) and Federal Rule of Civil Procedure 83(a). *See* 558 U.S. at 191-93. Moreover, this Court does not have authority to "impose upon the agency its own notion of which procedures are best." *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). Simply put, HHS did not violate APA's rulemaking procedures by implementing a 60-day comment period.

With respect to the APP requirement, HHS has contended that this requirement was a logical outgrowth of the proposed rule because HHS clearly indicated in the proposed rule that it was considering limiting which professionals would be qualified to perform counseling. In fact, the proposed rule contained an even stricter limitation that only physicians could perform counseling. *See* 83 Fed. Reg. 25502, 25507, 25518, 25531 (June 1, 2018). Thus, the change from allowing only physicians to allowing advanced practice providers to perform counseling was not a substantial departure from the terms of the proposed rule. *See California v. Azar*, 385 F. Supp. 3d 960, 1019-21 (N.D. Cal. 2019) (holding that HHS did not violate the APA's notice and comment procedures because the APP requirement was a logical outgrowth of the proposed rule). Accordingly, summary judgment is entered in favor of Defendants on Count IX.

III. The Final Rule does not violate Title X (Count III).

Plaintiff asserts that the gag rule violates Title X's voluntariness requirement and that *Rust* never addressed this particular argument. Title X provides in relevant part that:

> The acceptance by any individual of [Title X] family planning services or . . . information (including educational materials) . . . shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information.

42 U.S.C. § 300a-5. Plaintiff relies on HHS's January 2001 "Program Guidelines for Project Grants for Family Planning Services," which explained that "[u]se by any individual of project services must be solely on a voluntary basis. Individuals must not be subjected to coercion to receive services or to use or not to use any particular method of family planning." (*See* Pl.'s Exhibit 41 at PEP904, ECF No. 81-2.) The Final Rule reaffirms this principle: "This final rule continues the historical Title X emphasis that family planning must be voluntary—the definition of 'family planning' adopted by the final rule, and thus, applicable to the Title X program explicitly states that 'family planning methods and services are never to be coercive and must always be strictly voluntary.'" 84 Fed. Reg. at 7724.

Plaintiff's argument must fail because the voluntariness requirement predates the Supreme Court's decision in *Rust*, which, contrary to Plaintiff's assertion, had before it the argument that the 1988 regulations violated Title X. *See* Reply Br. For State Petitioners at 6-7,

Rust v. Sullivan (No. 89-1392), 1990 WL 505761 (Oct. 15, 1990). The petitioners in *Rust* argued that "Title X itself provides that '[t]he acceptance by any individual of family planning services . . . shall be voluntary.' By withholding relevant information from Title X beneficiaries, the Secretary prevents them from making the informed, voluntary family planning decisions that Congress intended to facilitate." *Id.* Despite this argument, the Supreme Court found that "[t]he broad language of Title X plainly allows the Secretary's construction of the statute." 500 U.S. at 184. While Plaintiff urges this Court to find the gag rule violates Title X in the same way that this Court found the rule likely violates the ACA and the 2018 appropriations act, the Court made clear that its preliminary injunction finding was based on the "Final Rule's violations of laws passed by Congress and enacted *after Rust* was decided." (ECF No. 43 at 16 (emphasis added).) In contrast, Title X's voluntariness requirement predates *Rust*, and the Supreme Court found the same rule at issue to be consistent with Title X. Accordingly, summary judgment is entered in favor of Defendants on Count III.

IV. *Rust v. Sullivan* forecloses Plaintiff's constitutional claims (Counts V and VI).

Plaintiff argues that the Final Rule violates both the First Amendment to the United States Constitution and the equal protection component of the Due Process Clause of the Fifth Amendment. The Supreme Court's decision in *Rust* forecloses both arguments. This Court notes that its earlier ruling that *Rust* does not foreclose Plaintiff's claims as to the Affordable Care Act (Count I) and the Appropriations Act (Count II) should not be

taken to mean that the Final Rule is unconstitutional, as asserted by the Plaintiff.

A. First Amendment claim (Count V).

The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. It is undisputed that the 1988 regulations, considered in *Rust*, established a broader prohibition on abortion counseling than the 2019 regulations. *Compare* 53 Fed. Reg. 2922, 2945 (Feb. 2, 1988) ("a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning"), *with* 84 Fed. Reg. 7714, 7788-89 (Mar. 4, 2019) ("A title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take nay other affirmative action to assist a patient to secure such an abortion.").

In *Rust*, the Supreme Court upheld the 1988 regulations and found that they did not violate the First Amendment. 500 U.S. at 192-200. Specifically, the Supreme Court explained that the 1988 regulations "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. The Court noted that the Government is "simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196.

Despite Plaintiff's efforts to distinguish the constitutional arguments made here with those presented to the *Rust* Court, this Court is bound by the Supreme Court's

finding that an even stricter abortion counseling provision is consistent with the First Amendment. First, the Supreme Court in *Rust* clearly stated that the "Title X program regulations do not significantly impinge upon the doctor-patient relationship." 500 U.S. at 200. Plaintiff asserts, without support, that Title X patients have become more reliant on their doctors since *Rust*. Consequently, Plaintiff insists that the Supreme Court's decision in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), finding that the government cannot interfere with traditional relationships like the attorney-client relationship, should govern here to find that the 2019 regulations interfere with the doctor-patient relationship. Plaintiff relies on Justice Scalia's dissent in *Velazquez* suggesting that *Rust*'s finding as to the doctor-patient relationship was in serious doubt. *See* 531 U.S. at 553-54 (Scalia, J., dissenting). However, the majority in *Velazquez* distinguished *Rust* and the doctor-patient relationship, explaining, "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*." 531 U.S. at 543.

Second, Plaintiff's argument that the Supreme Court's decision in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), rather than *Rust*, controls here, because Title X is not a "government-messaging program" anymore. In *Rosenberger*, Supreme Court applied strict scrutiny to a government program that was intended to fund the private speech of students, not to fund a government message. 515 U.S. at 830-37. Again, the Court distinguished *Rust*, explaining, "[t]here [in

Rust], the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program." *Id.* at 833. Plaintiff cites no authority that Congress intended to change the nature of the Title X program, nor has the Supreme Court so indicated.

Finally, Plaintiff argues that *Rust* did not address the withholding of information from patients and patients' rights to receive truthful information. Whether the *Rust* Court addressed this specific argument is of no significance, as the Court ultimately upheld as consistent with the First Amendment an even stricter form of the gag rule that required providers to withhold *all* information regarding abortion. *See* 500 U.S. at 193-94 ("[A] doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."). Defendants are granted summary judgment on Count V.

B. Fifth Amendment claim (Count VI).[9]

Plaintiff's Fifth Amendment arguments are equally unsuccessful. The equal protection component of the

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[9] Defendants briefly argue that Plaintiff lacks standing to bring its equal protection claim. At the dismissal stage, the Court determined that Plaintiff's allegations sufficed to establish standing. (ECF No. 74 at 11-12.) There is no reason for the Court to find otherwise at the summary judgment stage, as Plaintiff has provided ample citation to the record to support its allegations of injury to Baltimore City as a result of the Rule, including comments from the City's Health Commissioner and, more specifically, the fact of Planned Parenthood's departure from the Title X program.

Due Process Clause of the Fifth Amendment "prohibits the government from intentionally treating one group differently than other similarly situated groups where no rational basis exists for doing so." *Mayor and City Council of Baltimore v. Trump*, Civil Action No. ELH-18-3636, 2019 WL 6970631, at *9 (D. Md. Dec. 19, 2019) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)); *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Classifications based on sex must survive heightened scrutiny and the burden of justification for the classification lies with the government defendant. *See Goulart v. Meadows*, 345 F.3d 239, 260 (4th Cir. 2003); *United States v. Virginia*, 518 U.S. 515 (1996). The government must show that the challenged classification "serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533.

When reviewing a restriction on abortion funding, the Supreme Court has 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." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993) (citing *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980)).

Plaintiff asserts that the Final Rule is subject to heightened scrutiny because it is based on stereotypes rather than physical differences between women and men. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003). Plaintiff argues that the Rule reflects

"different sex-role expectations of male and female patients," because the Rule requires referral for prenatal care of a pregnant woman visiting a Title X clinic, but it does not place the same requirement on a man visiting a Title X clinic who discloses that his wife is pregnant. (ECF No. 81-1 at 33.)

Try as it may, Plaintiff cannot escape the fact that the restrictions at issue here are promulgated under a program that prohibits federal funds to be used to refer for abortion, and as the Fourth Circuit has explained, "[t]he rationality of distinguishing between abortion services and other medical services when regulating physicians or women's healthcare has long been acknowledged by Supreme Court precedent." *Greenville Women's Clinic v Bryant*, 222 F.3d 157, 173 (4th Cir. 2000). The distinction the regulations make based on sex is the result of the simple fact that only women can get pregnant. Under *Bray*, Defendants need only provide a rational basis for the Rule, which is satisfied by HHS's determination that prenatal care is medically necessary for a pregnant woman and unborn child, a consideration that does not apply to non-pregnant Title X patients, whether they are non-pregnant women or men. Accordingly, summary judgment is granted in favor of Defendants on Count VI.

V. Severability

Defendants urge the Court not to vacate the Final Rule in its entirety. The APA requires that courts "set aside agency action" "not in accordance with law." 5 U.S.C. § 706(2)(A). "Whether an administrative agency's order or regulation is severable . . . depends on the issuing agency's intent." *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984) (citing *FPC v.*

Idaho Power Co., 344 U.S. 17, 20-21 (1952)). "[T]he ultimate determination of severability will rarely turn on the presence or absence" of a severability clause. *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (quoting *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)).

The test for severability of a subsection of an agency's regulations turns on "whether severance of the subsection would 'impair the function of the statute as a whole,' so that 'the regulation would not have been passed but for its inclusion.'" *West Virginia Ass'n of Community Health Ctrs., Inc. v. Sullivan*, 737 F. Supp. 929, 942 (S.D. W. Va. 1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988)). This "two-part inquiry involv[es] (1) an examination of the functional independence of the section to determine whether it is an 'integral' part of the whole, and (2) an examination of the agency's intent in enacting the regulations." *Id.* (citations omitted). If there is "substantial doubt" that the issuing agency would have promulgated the rule in the absence of the challenged portion, then "partial affirmance is improper." *North Carolina v. FERC*, 730 F.2d at 795-96.

The Final Rule contains a severability clause providing, "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of the provisions should remain in effect." 84 Fed. Reg. 7714, 7725 (Mar. 4, 2019). There is authority in this circuit finding that similar provisions in the 1988 Title X regulations, specifically the prohibition on abortion counseling and referral and the physical separation requirement, could be severed from the regulations as a

whole, because the remaining provisions were "functionally independent of the other[s] in that [they are] directed at specific conduct as varied as pro-abortion lobbying and the use of Title X project funds for payment of dues to groups advocating abortion as a method of family planning." *See West Virginia Ass'n of Community Health Ctrs., Inc.*, 737 F. Supp. at 943 (S.D. W. Va. 1990). That holding is distinguishable because that court set aside the agency action on the basis that certain provisions were constitutionally impermissible, not because the agency acted arbitrarily and capriciously in promulgating the rule. *See id.* at 941 n.10 ("the court concludes that HHS provided a reasoned basis for promulgating the new regulations").

Here, the Final Rule labels the gag rule and the physical separation requirement as "[m]ajor [p]rovisions," 84 Fed. Reg. at 7715, while the 1988 regulations made no such representation. *See* 53 Fed. Reg. 2922 (Feb. 2, 1988). Moreover, the remaining provisions either incorporate by reference the gag rule and/or the physical separation requirement provisions or include language similar to that used in those provisions such that the Court is unable to delineate which remaining provisions could or should survive. For example, subsection 59.5 entitled "What requirements must be met by a family planning project?", uses the same language from the gag rule: "provide, promote, refer for, or support abortion as a method of family planning." 42. U.S.C. § 59.5.

Apart from relying on the severability provision, Defendants have not explained how the provisions should be severed. Indeed, in the summary judgment motions hearing, Defendants relied only on the severability provision in arguing that Defendants would "prefer" that

the entire Rule not be vacated if the Court granted summary judgment in favor of Plaintiff. (*See* Jan. 27, 2020 Hr'g Tr. at 43:23-44:1, ECF No. 92.) The Court finds that the gag rule and the physical separation requirement are not functionally independent provisions, and indeed, has substantial doubts that HHS would have promulgated the rule in the absence of the challenged portions. Accordingly, the Court will permanently enjoin the entirety of the Final Rule in the State of Maryland.

CONCLUSION

For the foregoing reasons:

1. Plaintiff's Motion for Summary Judgment (ECF No. 81) is GRANTED IN PART AND DENIED IN PART;
2. Defendants' Motion for Summary Judgment (ECF No. 82) is GRANTED IN PART AND DENIED IN PART;
3. JUDGMENT IS ENTERED in favor of Plaintiff with respect to Counts VII and VIII;
4. JUDGMENT IS ENTERED in favor of Defendants with respect to Counts III, V, VI, and IX;
5. The Defendants, and all other officers, agents, employees and attorneys of the Department of Health and Human Services, are PERMANENTLY ENJOINED in the State of Maryland from implementing or enforcing the Health and Human Services Final Rule, entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019), *codified at* 42 C.F.R. Part 59.

A separate Order follows.

Dated: Feb. 14, 2020.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: RDB-19-1103

MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: May 30, 2019

ORDER

For the reasons stated in the Memorandum Opinion issued this date, IT IS this 30th day of May 2019, HEREBY ORDERED:

1. Plaintiff's Motion for Preliminary Injunction (ECF No. 11) is GRANTED.
2. The Health and Human Services Final Rule, entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019), *to be codified at* 42 C.F.R. Part 59, is ENJOINED as to enforcement in the State of Maryland.
3. This preliminary injunction shall take effect immediately and shall remain in effect pending further order of the Court.

4. Plaintiff is not required to post a bond. This Court finds that security is not required under the circumstances of this case.

5. That the Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel for both parties.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: RDB-19-1103

MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF

v.

ALEX M. AZAR, II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: May 30, 2019

MEMORANDUM OPINION

This case involves the challenge by the Mayor and City Council of Baltimore ("Baltimore City") to a rule promulgated by the United States Department of Health and Human Services that would amend federal regulations with respect to the funding of family planning services. It has been preceded by similar lawsuits in United States District Courts in the states of Washington, California, Oregon, and Maine. Now pending before this Court is Baltimore City's Motion for a Preliminary Injunction seeking to prevent the federal government from putting these amended regulations into effect. The City has wisely *not* sought a nationwide injunction. Wisely so, as this Court most respectfully is not inclined to join the cascade of nationwide injunctions

issued by United States District Judges across the country with respect to many administrative policies of the federal government. It is not the role of this Court to become involved in these policy questions. Quite simply, the executive branch of government is entitled to deference with respect to its administrative orders.

However, the executive branch of government is not entitled to circumvent by administrative order existing laws passed by the United States Congress. When the executive branch seeks to do so, it must be constrained by the federal judiciary.[1] Accordingly, for the reasons that follow, a Preliminary Injunction shall be entered in this case enjoining the United States Department of Health and Human Services from implementing these new federal regulations in the State of Maryland until this matter is resolved on the merits.

Specifically, Baltimore City brings a ten-Count Complaint pursuant to the Administrative Procedures Act ("APA") against Alex M. Azar II, in his official capacity as the Secretary of Health and Human Services; United States Department of Health and Human Services ("HHS"); Diane Foley, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Af-

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[1] *See* The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other. . . . "); *see also Sierra Club v. Trump*, — F. Supp. 3d —, 2019 WL 2247689, at *1 (N. D. Cal. May 24, 2019) ("The underlying policy debate is not our concern. . . . Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress." (quoting *In re Aiken Cty.*, 725 F.3d 255, 257 (D.C. Cir. 2013))).

fairs; and Office of Population Affairs (collectively, "Defendants" or "the Government"). (Compl., ECF No. 1.) Baltimore City challenges the final rule ("Final Rule") promulgated on March 4, 2019 by HHS amending the regulations developed to administer Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, which provides federal funding for family-planning services. (*Id.* at ¶¶ 1, 3.) Baltimore City's motion seeks a preliminary injunction to prevent the Government from putting into effect certain provisions of the Final Rule that had been scheduled to go into effect on May 3, 2019.[2] (Pl.'s Mot., ECF No. 11.) This Court held a hearing on April 30, 2019, has heard the arguments of counsel, and has reviewed the submissions of the parties.

For the reasons that follow, this Court holds that the Final Rule likely violates provisions of the Affordable Care Act, 42 U.S.C. § 18114, enacted in 2010, and Congress' nondirective mandate in the Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018), which has been consistently included by Congress with respect to Title X appropriations funding

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[2] Two United States District Courts issued nationwide injunctions prior to the May 3, 2019 implementation date. *See State of Oregon v. Azar*, 6:19-cv-00317-MC (Lead Case), 6:19-cv-00318-MC (Trailing Case), 2019 WL 1897475 (D. Or. April 29, 2019); *State of Washington v. Azar*, No. 1:19-cv-03040-SAB, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019). The District of Oregon and the Eastern District of Washington decisions have been appealed, and the Government also moved for stays of both injunctions pending appeal. *See* Mot. to Stay, ECF No. 58, *State of Washington v. Azar*, Nos. 1:19-cv-3040-SAB; 1:19-cv-3045-SAB (E.D. Wash. May 3, 2019); Defs.' Mot. for a Stay, ECF No. 150, *State of Oregon v. Azar*, Consolidated Civil Action Nos. 6:19-cv-00317-MC (Lead Case), 6:19-cv-00318-MC (D. Or. May 3, 2019).

every year since 1996. Accordingly, this Court shall GRANT Plaintiff's Motion for Preliminary Injunction (ECF No. 11) against enforcement of the Final Rule in Maryland. The Government shall be enjoined from implementing or enforcing any portion of the Final Rule in the State of Maryland during the pendency of this litigation and until this matter is resolved on the merits.[3]

BACKGROUND

I. Title X History

A. Inception of Title X

Almost fifty years ago, in 1970, Congress enacted Title X, the only federal program specifically dedicated to funding family planning services. Public Health Service Act, 84 Stat. 1506, *as amended* 42 U.S.C. §§ 300 to 300a-6. Title X addresses low-income individuals' lack of equal access to family planning services by authorizing the Secretary of Health and Human Services ("the Secretary") to "make grants to and enter into contracts with public or nonprofit private 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." *Id.* § 300(a). Title X grant money is provided in a lump

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[3] Regardless of the effect of the nationwide injunctions issued by the Oregon and Washington Courts, Baltimore City requests that this Court issue an injunction against enforcement of the Final Rule in Maryland. (Pl.'s Mot. Mem. 35, ECF No. 11-1; Reply 29, ECF No. 34.) As Judge Chen stated in *California v. Azar*, a nationwide injunction "does not obviate this Court's duty to resolve the dispute before it." Case No. 19-cv-01184-EMC, Case No. 19-cv-01195-EMC, 2019 WL 1877392, at *2 (N.D. Cal. Apr. 26, 2019) (citations omitted).

sum and may be used both to cover the costs of family planning care for those with incomes below or near the federal poverty level and to pay for non-service costs like purchasing contraceptives or training staff. *Id.* § 300. Through this mechanism, low-income families have free or low-cost access to clinical professional contraceptive methods and devices, and testing and counseling services related to reproductive health, including pregnancy testing and counseling.

All grants and contracts must "be made in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4. Section 1008 of the Act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Consistent with this restriction, HHS has never permitted Title X grantees to use Title X funds to perform or subsidize abortions. *See* 42 C.F.R. §§ 59.5(a)(5), 59.9 (1986). The initial regulations, issued in 1971, stated that Section 1008 simply required that a Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (1971) (codified at 42 C.F.R. § 59.5(9) (1972)). "During the mid-1970s, HHS General Counsel memoranda made a further distinction between directive ('encouraging or promoting' abortion) and nondirective ('neutral') counseling on abortion, prohibiting the former and permitting the latter." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 229 (D.C. Cir. 1992). In 1981, HHS issued "Program Guidelines" that mandated nondirective abortion counseling by Title X projects upon a patient's request. *Id.*

B. The 1988 Regulations

In 1988, HHS promulgated new regulations "designed to provide 'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Rust v. Sullivan*, 500 U.S. 173, 179 (1991) (quoting 53 Fed. Reg. 2923-2924 (1988)). The 1988 regulations established a much broader prohibition on abortion counseling and referrals. They included a "gag rule"[4] that prohibited Title X projects from counseling or referring clients for abortion as a method of family planning; a "separation requirement" that required grantees to separate their Title X project physically and financially from prohibited abortion-related activities; established compliance standards; and prohibited certain activities that promote, encourage, or advocate abortion, such as using funds for performance of pro-abortion lobbying, materials, or legal action. *See* 42 C.F.R. § 59 (1991).

Title X grantees and doctors who supervised Title X funds promptly challenged the facial validity of the reg-

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[4] Generally, referring to "a rule saying that people are not allowed to speak freely or express their opinions about a particular subject." "gag rule." *Merriam-Webster.com*, 2019. https://www.meriam-webster.com (20 May 2019). The term has been used by courts to describe the 1988 regulation prohibiting abortion counseling. *See, e.g.*, *Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 229 (D.C. Cir. 1992) ("In 1988, HHS promulgated by notice and comment rulemaking new regulations that established a much broader prohibition on abortion counseling or referrals including a "gag rule" applicable to all Title X project personnel against informing or discussing with clients the availability of abortion as an option for individual planning or treatment needs.").

ulations and sought injunctive relief to prevent implementation. *Rust*, 500 U.S. at 181. The regulations were challenged on the grounds that they were not authorized by Title X and that they violated the First and Fifth Amendment rights of the Title X clients and the First Amendment rights of the health providers. *Id.* A preliminary injunction was initially granted. *Id.* Ultimately, the challenge came before the United States Supreme Court, which held in *Rust v. Sullivan*, 500 U.S. at 185, that the legislative history was ambiguous with respect to Congress' intent in enacting Title X and the prohibition of Section 1008. Applying *Chevron*[5] deference to the agency's interpretation, *id.* at 186-87, the Supreme Court therefore held that the 1988 regulations were a permissible construction of Title X and did not violate either the First or Fifth Amendments to the Constitution. *Id.* at 185, 203.

These 1988 regulations, however, were never fully implemented. In 1991, President George H. W. Bush issued a memorandum to the HHS Secretary, directing adherence to four principles "compatible with free speech and the highest standards of medical care." *Nat'l Family Planning*, 979 F.2d at 230. "In a press conference, President George H.W. Bush asserted: '[U]nder my directive, they can go ahead—patients and doctors can talk about absolutely anything they want, and they should be able to do that.'" *Id.* The 1988 regulations were suspended by the Secretary in 1993,

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[5] In *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, the United States Supreme Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 843 (1984).

resulting in Title X grantees returning to operating under the 1981 guidelines. *See* 58 Fed. Reg. 7462, 7462 (1993). These 1981 guidelines mandated nondirective abortion counseling upon a patient's request. *See California v. Azar*, Case No. 19-cv-01184-EMC, Case No. 19-cv-01195-EMC, 2019 WL 1877392, at *3 (N.D. Cal. Apr. 26, 2019) (quoting 53 Fed. Reg. 2922, 2923 (1988)).

For over 20 years, beginning in 1996, and every year since, Congress has always added a clarifying statement regarding Section 1008 in its Title X appropriations bill. Alongside the statement that "amounts provided to [Title X] projects . . . shall not be expended for abortions," Congress has included language that emphasizes that "all pregnancy counseling shall be nondirective" ("Nondirective Mandate"). *See, e.g.*, Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018); *see also* 65 Fed. Reg. 41,272-73.

C. The 2000 Regulations

New regulations were finalized in 2000, 65 Fed. Reg. 41270 (Jul. 3, 2000), *codified at* 42 C.F.R. Pt. 59, revoking the 1988 regulations, and these regulations remain in effect today. The Final Rule, promulgated on March 4, 2019, and at issue in this case, would replace the 2000 regulations. Under the 2000 regulations, Title X grantees are required to "provide neutral, factual information and nondirective counseling on each of the options, and referral" upon request. 42 C.F.R. § 59.5(a)(5) (July 3, 2000). The options include: "(A) Prenatal care and delivery; (B) Infant care, foster care, or adoption; and (C) Pregnancy termination." 65 Fed. Reg. at 41,279. Grantees' non-Title X abortion activities must be "separate and distinct" from Title X activities, but "[c]ertain kinds of shared facilities are permissible, so long as it is

possible to distinguish between the Title X supported activities and non-Title X abortion-related activities." 65 Fed. Reg. at 41281.

D. The Affordable Care Act

In 2010, Congress passed the Affordable Care Act ("ACA") and included language in section 1554 that limited the rulemaking authority of HHS as follows:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services 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.

E. The Final Rule

On June 1, 2018, HHS published the Final Rule in the Federal Register.[6] During the 60-day public comment period, HHS received more than 500,000 comments, including comments from most major medical associations. Certain revisions were made to the proposed rule, and HHS published the Final Rule in the Federal Register on March 4, 2019. The Rule had an implementation date of May 3, 2019.[7] The Final Rule contains two key provisions that are essentially a reversion back to the 1988 Regulations. These two provisions are central to Baltimore City's claims in this case:

1. The Gag Rule

The Final Rule imposes broad restrictions on what health care providers under the Title X program may inform pregnant patients. It provides that a "Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89 (to be codified at 42 C.F.R. § 59.14(a)). Even if a client specifically requests a referral to an abortion provider, the Title X

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[6] Administrative agencies are required, under the Administrative Procedures Act, to provide notice of proposals to create, amend, or repeal a rule and afford an opportunity for interested persons to comment on the proposal. *See* 5 U.S.C. §§ 551(4)-(5), 553(a)-(c). Generally, notice of proposed rule making must be published in the Federal Register, as well as the final version of the rule, together with a statement of its basis and purposes. *See* 5 U.S.C. § 553.

[7] *See* n.1 *infra*, noting that two United States District Courts issued nationwide injunctions prior to the May 3, 2019 implementation date.

grantee can at most offer a a list of "comprehensive primary health care providers," "some, but not the majority" of which may "also provide abortion." *Id.* at 7789. The list cannot identify which providers provide the abortion services she is requesting. The project staff are prohibited from answering a direct inquiry about which providers provide abortion. *Id.* Moreover, because the list is limited to "comprehensive primary health care providers," specialized reproductive health care providers are excluded.

At the same time, Title X providers must provide all pregnant patients with a referral for prenatal care, regardless of the patients' wishes, on the basis that prenatal referrals are "medically necessary." 84 Fed. Reg. 7,789 (to be codified at 42 C.F.R. § 59.14(b)(1)). Furthermore, the provider must counsel a patient seeking an abortion on options she may not wish to pursue, while providing information about the "risks and side effects [of abortion] to both mother and unborn child." *Id.* at 7,747; *see id.* ("abortion must not be the only option presented").

2. The Separation Requirement

The Final Rule also contains a Separation Requirement, i.e., that Title X activities be "physically and financially separate" (defined as having an "objective integrity and independence") from prohibited activities, such as the provision of abortion services and any referrals for abortion services that do not meet the Gag Rule requirements. 84 Fed. Reg. at 7789. "Mere bookkeeping separation of Title X funds from other monies is not sufficient." *Id.* The Secretary will determine whether such objective integrity and independence exist by looking to relevant factors that include: "The existence of

separate, accurate accounting records"; "[t]he degree of separation [of] facilities (e.g., treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites)"; "[t]he existence of separate personnel, electronic or paper-based health care records, and workstations"; and the "extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent." *Id.* The deadline for physical separation is March 4, 2020.

II. Baltimore City Health Services

Baltimore City has participated in the Title X program since its inception in 1970, receiving its funding as subgrants through the Maryland Department of Health. (Compl. ¶ 57, ECF No. 1.) The Baltimore City Health Department, formed in 1793, is the oldest continuously operating health department in the United States. (*Id.* at ¶ 33.) It has wide-ranging responsibilities for providing health services to the residents of Baltimore, including prevention of chronic disease, sexually-transmitted disease prevention, maternal-child health, including pregnancy prevention, and school health services. (*Id.*) In collaboration with other city agencies, health care providers, community organizations and funders, the Baltimore City Health Department's mission is to ensure the well-being of every Baltimorean through education, advocacy, and direct service delivery. (*Id.* at ¶¶ 34-35.)

The Baltimore City Health Department currently receives $1,430,000 annually from the Government in funding subject to Title X rules. (*Id.* at 7.) It directly operates three community clinics and four school-based

health centers that provide Title X services and provides funding to ten additional subgrantees in the city. (*Id.*) Planned Parenthood operates additional Title X sites with Baltimore. (*Id.* at 8.) Baltimore City's Title X program serves as the final safety net for healthcare for one third of women living in Baltimore. (*Id.*)

The Baltimore City health clinics served 7,670 Title X clients in 2017, of which nearly one in five were under the age of 18, and almost 84% were female. (*Id.* at ¶ 36.) Eighty-six percent of the women served in Title X centers in Baltimore had incomes below the poverty line. (*Id.*) Baltimore City directly operates three community clinics and four school-based health centers that provide Title X services, and it oversees the Title X grant for ten other subgrantee health clinics in the community, including clinics at John Hopkins University, Baltimore Medical System, Family Health Centers of Baltimore, and the University of Maryland, as well as clinics that offer comprehensive care in middle and high schools. (*Id.* at ¶ 59.)

Baltimore City contends that the Final Rule is at odds with its mission and its "patient centered" strategy as a best practice for health care delivery in Baltimore. (*Id.* at ¶ 37.) Baltimore City asserts that if the Final Rule goes into effect, it will effectively be forced to withdraw from Title X, or abandon its long-standing mission, either of which choice will place the most vulnerable Baltimore City residents at risk. (*Id.* at ¶¶ 37, 63.) For example, Baltimore City has used Title X funding in its public health efforts and has achieved a 55% reduction

in teen pregnancy over the last ten years.[8] (Pl.'s Mot. Mem. 8, ECF No. 11-1.) Baltimore City filed this lawsuit on April 12, 2019 asserting ten causes of action:

- I – Violation of Administrative Procedures Act ("APA"), 5 U.S.C. § 706—Contrary to Law—Contrary to Affordable Care Act ("ACA")'s Non-Interference Provision, 42 U.S.C. § 18114.
- II – Violation of APA § 706—Contrary to Law—Contrary to Nondirective Mandate of the Consolidated Appropriations Act of 2018
- III – Violation of APA § 706—Contrary to Law —Contrary to Tile X, 42 U.S.C. §§ 300(a), 300a(a)

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[8] Charlotte Hager, the Health Program Administrator at the Baltimore City Health Department provided statistics regarding the number of patients served, the ages, sex, and socio-economic status of the patients, cases of sexually transmitted diseases, and savings from preventing unintended pregnancies through access to birth control. (Hager Decl., ECF No. 11-7.) In her declaration, she states that "over the last ten years, through our efforts we have seen a 55% reduction in teen pregnancy." (*Id.* at ¶ 11.) These results are consistent with a 2017 study, which "estimated that in 2015 the contraceptive care delivered by Title X-funded providers in the U.S. helped women avoid 822,300 unintended pregnancies, which would have resulted in 387,200 unplanned births and 277,800 abortions." (Bailey Decl. 18, ECF No. 11-2 (citing Jennifer J. Frost et al., Guttmacher Inst., *Publicly Funded Contraceptive Services at U.S. Clinics, 2015* (Apr. 2017), https://www.guttmacher.org/report/publicly-funded-contraceptiveservices-us-clinics-2015.) The study concluded that the unintended pregnancy rate among teens would have been 44% higher in the absence of this reduction. (*Id.* at 19.)

- IV – Violation of APA § 706—Contrary to Law—Contrary to Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1(a).
- V – Violation of APA § 706—Contrary to Constitutional Right—First Amendment
- VI – Violation of APA—Contrary to Constitutional Right—Equal Protection Under Fifth Amendment
- VII – Violation of APA—Arbitrary and Capricious—Inadequately Justified
- VIII – Violation of APA—Arbitrary and Capricious—Objectively Unreasonable
- IX – Violation of APA—Without Observance of Procedure Required by Law
- X – Violation of APA—Contrary to Constitutional Right—Unconstitutionally Vague

Baltimore City requests that this Court enjoin the enforcement of the Final Rule in Maryland during the pendency of this lawsuit. It does not seek a nationwide injunction.

III. Procedural Setting

This case is one of multiple cases that have been filed across the nation seeking to maintain the Title X status quo while the courts consider the legal challenges to the Government's new regulations. *See California v. Azar*, 3:19-cv-01184-EMC (N.D. Cal.), and related case *Essential Access v. Azar*, 3:19-cv-01195-EMC (N.D. Cal.); *Oregon v. Azar*, 6:19-cv-00317-MC (D. Ore.), and related case *Am. Med. Ass'n v. Azar*, 6:19-cv-00318-MC (D. Ore.); *Washington v. Azar*, 1:19-cv-03040-SAB (E.D. Wash.)

(consolidated); *Family Planning Ass'n v. U.S. HHS*, 1:19-cv-00100-LEW (D. Me.). Hearings were held in all cases, and decisions have been issued in all but the Maine case.

On April 25, 2019, Judge Stanley A. Bastian, of the United States District Court, Eastern District of Washington, issued an injunction, which enjoins the Government from implementing or enforcing the Final Rule on a nationwide basis. *State of Washington v. Azar*, No. 1:19-cv-03040-SAB, 2019 WL 1868362 (E.D. Wash. Apr. 25, 2019). On April 26, 2019, Judge Edward M. Chen, United States District Court, Northern District of California, enjoined enforcement of the Final Rule in the state of California, stating: "The recent injunction issued against Defendants' implementation of the Final Rule by Judge Bastian in *State of Washington v. Azar* . . . does not obviate this Court's duty to resolve the dispute before it." *California v. Azar*, Case No. 19-cv-01184-EMC, Case No. 19-cv-01195-EMC, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019). At the end of the hearing on April 23, 2019, Judge Michael J. McShane, of the United States District Court, District of Oregon, stated that an injunction would issue, with an order to follow that would reveal the scope of the injunction. On April 29, 2019, Judge McShane also issued a nationwide injunction. *State of Oregon v. Azar*, 6:19-cv-00317-MC (Lead Case), 6:19-cv-00318-MC (Trailing Case), 2019 WL 1897475 (D. Or. April 29, 2019). Finally, on the basis that a nationwide injunction had been issued by Judge Bastian, the Maine Plaintiffs chose to withdraw their motion as moot (without prejudice to their right to renew the motion if circumstances warranted). *See* Not. of Withdrawal, ECF No. 65, *Family Planning*

Ass'n of Maine v. Azar, Case No. 1:19-cv-00100-LEW (D. Me. Apr. 26, 2019).

Most recently, the Government has advised this Court that it is appealing the District of Oregon and the Eastern District of Washington decisions, and it moved for stays of both injunctions pending appeal. *See* Mot. to Stay, ECF No. 58, *State of Washington v. Azar*, Nos. 1:19-cv-3040-SAB; 1:19-cv-3045-SAB (E.D. Wash. May 3, 2019); Defs.' Mot. for a Stay, ECF No. 150, Consolidated Civil Action Nos. 6:19-cv-00317-MC (Lead Case), 6:19-cv-00318-MC (D. Or. May 3, 2019).

In the instant case, Baltimore City filed a Motion for Preliminary Injunction (ECF No. 11) on April 16, 2019, seeking to enjoin the Government from "putting into effect certain provisions" of the HHS Final Rule. More specifically, Baltimore City requests that this Court issue an injunction against enforcement of the Final Rule in Maryland. (Pl.'s Mot. Mem. 35, ECF No. 11-1; Reply 29, ECF No. 34.) An accelerated briefing schedule completed with Plaintiff's Reply on Monday, April 29, 2019, and a hearing was held on Tuesday, April 30, 2019. This Court has considered the parties' arguments, reviewed the decisions issued by its sister courts, and finds the reasoning in those decisions persuasive. For the reasons that follow, this Court shall grant Plaintiff's Motion for Preliminary Injunction (ECF No. 11) and shall enjoin the Government from enforcing the Final Rule in the State of Maryland.

STANDARD OF REVIEW

As the United States Court of Appeals for the Fourth Circuit stated in *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013), "[t]he purpose of a preliminary

injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." 720 F.3d at 524 (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). In determining whether to issue a preliminary injunction, a court must follow the test set forth by the United States Supreme Court in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), which requires that the plaintiff show that: (1) the movant is likely to succeed on the merits; (2) the movant is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities favors the movant; and (4) that an injunction is in the public interest. 555 U.S. at 20. While a plaintiff need not establish a "certainty of success," he or she must make a "clear showing that he is likely to succeed at trial." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017); *Int'l Brotherhood of Teamsters v. Airgas, Inc.*, 239 F. Supp. 3d 906, 912 (D. Md. 2017) ("Because a preliminary injunction is 'an extraordinary remedy,' it 'may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" (quoting *Winter*, 555 U.S. at 22).

ANALYSIS

I. Likelihood of Success on the Merits

To satisfy the showing for a preliminary injunction, Baltimore City does not need to demonstrate that it is likely to succeed on the merits of all ten causes of action. The City focuses its arguments on the Final Rule violating three separate statutory provisions: (1) The Affordable Care Act Non-Interference Mandate, 42 U.S.C. § 18114, (2) the Nondirective Mandate in the Appropriations Act, 132 Stat. at 3070-3071, and (3) Title X itself, 42 U.S.C. § 300a-5, 84 Stat. 1504 § 2. (Pl.'s Mot. Mem.

15, ECF No. 11-1.) Baltimore City asserts that because the Final Rule is not in accordance with law, it must be set aside pursuant to 5 U.S.C. § 706(2)(A). (*Id.*) Baltimore City also argues that the Rule is arbitrary and capricious and unconstitutionally vague. (*Id.* at 21, 29.)

The Government argues that the Supreme Court's 1991 decision in *Rust v. Sullivan* controls. (Defs.' Resp. 8, ECF No. 25 (citing *Rust*, 500 U.S. 173).) The Government contends that the 1988 regulations that were upheld in *Rust* were materially identical to the conditions contained in the Final Rule. It further contends that Section 1008 has not changed since *Rust*, and that the Supreme Court rejected the same arguments that Baltimore City is now advancing. (*Id.*) However, Baltimore City is not relying on its constitutional claims to demonstrate likelihood of success on the merits, but rather, it relies on the Final Rule's violations of laws passed by Congress and enacted after *Rust* was decided. Therefore, this Court must determine whether the Final Rule likely violates these later-enacted laws.

A. The Affordable Care Act Non-Interference Mandate

Baltimore City contends that the Gag Rule violates at least three parts of the ACA Non-Interference Mandate, specifically:

> (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;

42 U.S.C. § 18114. The Gag Rule prohibits physicians in Title X facilities from counseling patients about abortion. *See* 84 Fed. Reg. 7717. It requires physicians to withhold relevant medical information from patients, which the City contends violates principles of informed consent. Importantly, the Final Rule's restrictions permit a Title X project to give a patient who specifically requests a referral for abortion a referral list that contains no abortion providers, requires that the compiled list contain a majority of providers that are not responsive to the patient's request, and does not allow the Title X project to identify which providers are responsive to the patient's request. *See* § 59.14(c)(2). This reflects a government policy to circumvent and ignore the ACA Non-Interference Mandate, which is still existing law.[9]

Medical groups and numerous individual physicians have denounced the rule as a violation of basic medical ethics. *See, e.g.*, American Medical Association ("AMA") Comment 1-3 (expressing opposition to the Proposed Rule, the AMA stated, "We are very concerned that the proposed changes, if implemented, would undermine patients' access to high-quality medical care and information, dangerously interfere with the patient-physician relationship and conflict with physicians' eth-

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[9] *See Nat'l Fed. of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (upholding the constitutionality of the ACA). While still being challenged, *see Texas v. United States*, 352 F. Supp. 3d 665 (N.D. Tex. 2018) (currently under appeal), it is valid law, and until such time as Congress enacts new law, or the United States Supreme Court declares it unconstitutional, HHS may not ignore it.

ical obligations, exclude qualified providers, and jeopardize public health." (available at http://bit.ly/2Zexyyi)). The AMA strongly opposed the proposed rule as interfering with and undermining the patient-physician/provider relationship. *Id.*

The Government contends that the prefatory language in ACA Section 1554, "[n]otwithstanding any other provision of this Act," limits the scope of Section 1554 to the ACA. (Defs.' Resp. 16, ECF No. 25 (quoting 42 U.S.C. § 18114).) However, this Court agrees with Judge Chen's reasoning that the plain text does not limit its application to the ACA. *See California v. Azar*, 2019 WL 1877392, at *21-22. Rather, its express language prohibits the HHS Secretary from promulgating "any regulation" violative of the stated principles. 42 U.S.C. § 18114.

Accordingly, Baltimore City has shown that the Final Rule likely violates the ACA § 1554 by creating unreasonable barriers for patients to obtain appropriate medical care, interfering with communications between the patient and health care provider, and restricting full disclosure, which violates the principles of informed consent. Baltimore City adds that the Separation Requirement also violates the ACA Non-Interference Mandate by creating unreasonable barriers and by impeding timely access to health care services.

B. Appropriations Nondirective Mandate

Every year since 1996, including the current year, Congress has added a directive to Title X appropriations funding, specifying that pregnancy counseling must be "nondirective." *See, e.g.*, Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018). Baltimore City argues that the

Final Rule would force Title X projects to steer women away from one particular option, abortion, while directing them toward another option, carrying the pregnancy to term, regardless of the patient's stated desires. (Pl.'s Mot. Mem. 20, ECF No. 11-1.) Baltimore City contends that requiring a referral for prenatal care, even when the client has rejected that option, is coercive and directive, and thus, in direct violation of Congress' mandate. (*Id.*) Baltimore City further asserts that Title X itself is violated for the same reasons, i.e., the Title X statute requires that services be "strictly voluntary" and "never . . . coercive." 84 Fed. Reg. 7731. Requiring physicians to disregard a patient's wishes and provide information that the patient does not want or need eliminates the ability of patients to make fully informed "voluntary" choices about their medical care.

The Government argues that there is a distinction between consulting and referrals, and Congress did not silently supplant *Rust* and repeal part of Title X with its appropriations language. (Defs.' Resp. 18-20, ECF No. 25.) There is, however, no "silent repeal" at issue because the nondirective counseling provision is not inconsistent with *Rust*. The *Rust* Court did not purport to interpret Section 1008 as requiring directive counseling, but rather, it held that the 1988 rule was one permissible interpretation of Section 1008. *See* 500 U.S. at 184 ("The language of § 1008—that '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning'—does not speak directly to the issues of counseling, referral, advocacy, or program integrity."). The Government does not dispute that HHS has an obligation to comply with Congress' Nondirective Mandate.

This Court finds persuasive the reasoning in *California v. Azar*, in which Judge Chen found that "nondirective counseling" encompasses referrals, "as indicated by statute, regulations, and industry practice." 2019 WL 1877392, at *16. "Congress' use of the identical term 'nondirective counseling' should be read consistently across the [Public Health Service Act] and the HHS Appropriations Acts to include referrals as part of counseling." *Id.* Also, HHS itself characterizes referrals as part of counseling throughout the Final Rule as well in its earlier Title X Guidelines. *Id.* Finally, accepted usage of the term within the medical field supports the interpretation that the term is used to include referrals. *Id.*

The Final Rule is likely to violate the Nondirective Mandate, because to be nondirective, "the medical professional must 'present[ ] the options in a factual, objective, and unbiased manner . . . rather than present[ ] the options in a subjective or coercive manner." 84 Fed. Reg. at 7747. Requiring providers to refer a patient to prenatal health care even when the patient has expressly stated that she does not want prenatal care is coercive, not "nondirective." Requiring providers to provide a referral list that is limited to those that do not provide abortion, even if the client specifically requests an abortion referral, is coercive, not "nondirective." Requiring providers to exclude abortion as one of multiple options available to a client facing an unwanted pregnancy, especially if she has asked about that option, is coercive, not "nondirective." Therefore, Baltimore City is likely to succeed on the merits of its claim that the Final Rule violates the Nondirective Mandate.

C. Administrative Procedures Act Review

Baltimore City also argues that the promulgation of the Final Rule was arbitrary and capricious. (Pl.'s Mot. Mem. 21, ECF No. 11-1.) Under the Administrative Procedures Act, when a court reviews an agency decision, the court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Of course, the standard of review is narrow, and "a court is not to substitute its judgment for that of the agency." *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 513 (2009). As the United States Court of Appeals for the Fourth Circuit has recently noted in *Casa De Maryland v. U.S. Department of Homeland Security*, "we must engage in a searching and careful inquiry of the [administrative] record, so that we may consider whether the agency considered the relevant factors and whether a clear error of judgment was made." — F.3d —, 2019 WL 2147204, at *12 (4th Cir. 2019) (quoting *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012)).

An agency rulemaking is arbitrary and capricious if, in coming to its decision, the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. E.P.A.*, — U.S. —, 135 S. Ct. 2699, 2706

(2015) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* An agency must also consider and respond to significant comments received during the period for public comment. *Perez v. Mortgage Bankers Ass'n*, — U.S —, 135 S. Ct. 1199, 1203 (2015).

Further, where, as here, an agency adopts a rule that directly contradicts prior agency conclusions of fact and law, it must acknowledge that it is doing so and give a reasonable justification for the change. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Fox*, 556 U.S at 515. Baltimore City asserts that the Final Rule failed to consider the "serious reliance interests" engendered by the prior policy that HHS now seeks to abruptly and radically change with little notice. *See, e.g.*, *Encino Motorcars*, 136 S. Ct. at 2126 ("In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'").

The Government argues that the Final Rule easily satisfies the deferential standard that courts must apply. (Defs.' Resp. 25-26, ECF No. 25 (citing *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009).) According to the Government, HHS simply read Title X as it did in 1988, determined that the intervening 2000 regulations were inconsistent, and decided that the Final Rule was necessary to properly implement Section 1008. (*Id.* at 26.) The Government further contends that the Supreme Court's rejection of

the arbitrary-and-capricious challenges in *Rust* controls this Court now, and in response to the many comments received, HHS simply explained that the Supreme Court had already upheld a materially indistinguishable Gag Rule and Separation Requirement, which it regards as sufficient justification. (*Id.* at 26-27.)

However, simply because the Supreme Court in *Rust* found that the then-Secretary had amply justified the change in interpretation with a reasoned analysis, does not mean that the current Secretary has also done so. The ensuing changes in the societal landscape and in the law over the past 30 years means that HHS cannot rely on the same justifications as it did in 1988. *See California v. Azar*, 2019 WL 1877392, at *27. The Government adds that regardless whether this Court accepts that *Rust* controls, HHS's promulgation of the Final Rule satisfies the arbitrary and capricious standard and that it adequately explained why the policy change was appropriate.

This Court notes that the California, Oregon, and Washington courts determined that the Final Rule's promulgation was likely arbitrary and capricious. *See California v. Azar*, 2019 WL 1877392, at *28-41; *Oregon v. Azar*, 2019 WL 1897475, at *15; *Washington v. Azar*, 2019 WL 1868362, at *8. However, in the context of a preliminary injunction based on the limited record before it, this Court is uncomfortable with making such a finding. The "searching and careful inquiry of the [administrative] record" that is required to determine if it is likely that HHS's rule-making in this instance was arbitrary and capricious would be more prudently handled on a fully-developed record. *Casa de Maryland*, 2019 WL 2147204, at *12. This Court need not undertake

that analysis at this time in the context of a preliminary injunction. Having found that the Final Rule likely violates provisions of the Affordable Care Act and the Continuing Appropriations Act, the threshold inquiry on the merits has been established. Therefore, it is unnecessary to continue with analysis of the remaining claims. Indeed, Baltimore City does not rely on its constitutional claims to support its request for a preliminary injunction. Therefore, this Court declines to reach a conclusion at this time on whether Baltimore City is likely to succeed in demonstrating that the Final Rule's promulgation was arbitrary and capricious.

II. Irreparable Harm

"[A] party seeking a preliminary injunction must prove that he or she is 'likely to suffer irreparable harm in the absence of preliminary relief.'" *Pashby v. Delia*, 709 F.3d 307, 328 (4th Cir. 2013) (quoting *Winter*, 555 U.S. at 20). The Fourth Circuit recognizes irreparable injury when a movant makes a "clear showing" of "actual and imminent" harm that "cannot be fully rectified by the final judgment after trial," including economic harms if damages are not recoverable or could not undo a permanent harm resulting from a temporary loss of funds. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216-18 (4th Cir. 2019). Baltimore City asserts that if the Final Rule goes into effect, it will be forced to choose between complying and forcing its doctors to engage in the unethical practice of medicine, thus endangering the lives of patients and residents, or to withdraw from Title X and forego its financial support. (Pl.'s Mot. Mem. 30, ECF No. 11-1.) Either choice results in irreparable harm.

Should Baltimore City lose Title X funding, which represented $1,430,000 in 2017, the lost funds could not be recovered should it ultimately succeed with this litigation, because HHS enjoys sovereign immunity that precludes monetary recovery. *See Mountain Valley Pipeline*, 915 F.3d at 217-18; *Senior Executives Ass'n v. United States*, 891 F. Supp. 2d 745, 755 (D. Md. 2012). Baltimore City's clinics rely on Title X funding to provide services, and the loss of that funding threatens their continued existence. Clinic closures will result in a loss of medical services available to Baltimore City residents. The Fourth Circuit has held that irreparable injury occurs when the public loses medical services. *See Pashby*, 709 F.3d at 329 ("[B]eneficiaries of public assistance may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule may deny them needed medical care.").

Should Baltimore City choose to comply with the Final Rule in order to retain Title X funding, its medical providers would be forced to contravene their ethical obligations to provide patient-centered, nondirective care. *See Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 809 (E.D. Va. 1998) (finding irreparable injury where physicians would be "constrained to alter their medical advice to, and their medical care of, their patients contrary to their best judgments"). Further, if the Final Rule goes into effect, Baltimore City will be impacted by the inevitable withdrawal of other current Title X recipients,[10] which will drive patients to

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[10] For example, Planned Parenthood has stated that it will withdraw if the Final Rule goes into effect. (Pl.'s Mot. Mem. 34, ECF No. 11-1.)

Baltimore City health systems, placing greater demands on their capacity and ability to provide service.

This Court finds that Baltimore City has established a likelihood of irreparable harm unless the Final Rule is enjoined. The Government argues that there is no imminent threat of irreparable harm because a nationwide injunction has already been issued. However, the Government has also advised this Court that it is appealing the nationwide injunctions and has requested stays of the injunctions pending appeal. Should the stays be granted or the appeals successful, Baltimore City remains at risk and is not a party to the other cases. The earlier granting of a nationwide injunction does not prevent this Court from entering an overlapping injunction if all of the preliminary injunction factors are met in this case. *See Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 435 (E.D.N.Y. 2018); *California v. Azar*, 2019 WL 1877392, at *2 n.1.

III. Balance of Equities and Public Interest

When a preliminary injunction is sought against the government, and "the government's interest is the public interest," the last two factors merge. *Kravitz v. United States Dep't of Commerce*, — F. Supp. 3d —, Case No.: GJH-18-1041, Case No.: GJH-18-1570, 2019 WL 1510449, at *54 (D. Md. 2019) (quoting *Pursuing Am. Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009)). In this case, the public interest and balance of equities favors the Plaintiff.

Baltimore City seeks to avoid potentially costly and harmful public health problems as well as protect the health and welfare of its citizens, especially women. It

is in the public interest to continue the existing structure and network of healthcare that Baltimore City currently provides while this Court addresses legal challenges to the Final Rule. On the other hand, should the Government ultimately succeed in this litigation, it will suffer only a delay in implementation of the Final Rule. It is in the public's interest to ensure that government agencies abide by federal laws such as the ACA Non-Interference Mandate and the Appropriations Non-directive Mandate passed by Congress and still binding law.

Therefore, the balance of equities and public interest weighs in favor of Baltimore City and the issuance of a preliminary injunction.

IV. Scope of Injunction

Having found that Baltimore City is likely to succeed on the merits of at least some of its claims, it is likely to be irreparably harmed absent an injunction, and the balance of equities and public interest weigh in favor of an injunction, this Court shall issue a preliminary injunction.[11] Baltimore City requests that the injunction be broad enough to protect its interests and asks this Court to issue the injunction against enforcement of the Final Rule in Maryland. Baltimore City notes that it is close in proximity to multiple other States and municipalities whose people make use of its health system. Loss of

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[11] Noting that "preliminary injunctions are by [their] very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by [their] for-the-time-beingness." *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573-74 (7th Cir. 1999) (citation omitted).

funding in neighboring states will put pressure on Baltimore's health system, as mobile patients come from neighboring communities to make use of Baltimore's resources.

As noted above, two other United States District Courts have issued injunctions on a nationwide basis. In those cases, the courts had to consider nationwide plaintiffs, such as the National Family Planning and Reproductive Health Association, Planned Parenthood Federation, and the American Medical Association, who are not present in this case.[12] In this case, a preliminary injunction that is limited to Maryland is narrowly

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[12] This Court notes that there also exists some skepticism regarding the increased issuance of nationwide injunctions by United States District Judges. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-25 (2018) ("'[U]niversal' or 'nationwide' injunctions . . . have become increasingly common. District courts . . . have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.") (Thomas, J., concurring); *California v. Azar*, 2019 WL 1877392, at *43 noting the Ninth Circuit's instruction regarding broad relief: "[d]istrict judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts." (quoting *California v. Azar*, 911 F.3d 558 (9th Cir. 2018)). This Court further cautions against the danger of nationwide injunctions leading to forum shopping. It is clear that most of the nationwide injunctions issued against the federal government in the past two years have come from United States District Courts in states less favorably inclined politically to the current administration. It is also clear that most of the nationwide injunctions against the federal government in the years before also came from United States District Courts in states less favorably inclined politically to the previous administration. It is important

tailored to avoid irreparable harm to the sole Plaintiff, Baltimore City.

CONCLUSION

For the foregoing reasons:

1. Plaintiff's Motion for Preliminary Injunction (ECF No. 11) is GRANTED;
2. The Health and Human Services Final Rule, entitled *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019), *to be codified at* 42 C.F.R. Part 59, is ENJOINED as to enforcement in the State of Maryland.

A separate order follows.

Dated: May 30, 2019.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

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that the federal judiciary not allow itself to become part of "underlying policy debate." *Sierra Club v. Trump*, 2019 WL 2247689, at *1 (quoting *In re Aiken Cty.*, 725 F.3d at 257).

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: RDB-19-1103

MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Apr. 15, 2020

ORDER

For the reasons stated in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED this 15TH day of April, 2020 that:

1. Plaintiff's Motion to Alter or Amend the Judgment (ECF No. 103) is DENIED; and
2. The Clerk of this Court shall transmit copies of this Order and accompanying Memorandum Opinion to Counsel of record.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF

v.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Apr. 15, 2020

MEMORANDUM OPINION

This case involves the challenge by the Mayor and City Council of Baltimore ("Plaintiff" or "Baltimore City") to a rule promulgated by the United States Department of Health and Human Services ("HHS" or "the Government") that would amend federal regulations with respect to the funding of family planning services. On May 30, 2019, this Court granted a preliminary injunction with respect to Counts I and II of the Complaint, finding that this rule violated provisions of the Affordable Care Act, 42 U.S.C. § 18114, as well as the Consolidated Appropriations Act of 2018. While this Court's opinion was appealed by the Government, the remaining eight counts of the ten-Count Complaint remained pending. Finally, on February 14, 2020, this Court granted summary judgment in favor of Baltimore

City on Counts VII and VIII, finding that the HHS Final Rule violates the Administrative Procedure Act ("APA") "in that it is arbitrary and capricious, being inadequately justified and objectively unreasonable." (ECF No. 93.) The Court's Order also granted a permanent injunction of the Final Rule in the State of Maryland. (ECF No. 94.) On February 26, 2020, in response to a motion filed by Baltimore City, the Court clarified that the effect of its February 14, 2020 order was to vacate and set aside the Final Rule in the State of Maryland. (ECF No. 99.)

Presently pending is Plaintiff's Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e). (ECF No. 103.) The parties' submissions have been reviewed, and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2018).[1] For the reasons that follow, Plaintiff's Motion to Alter or Amend the Judgment (ECF No. 103) shall be DENIED. While ruling in favor of Baltimore City on two prior occasions, this Court has consistently declined to enter nationwide relief. Indeed, Baltimore City has previously not requested a nationwide injunction.

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[1] Pursuant to Standing Order 2020-07, the United States District Court for the District of Maryland has suspended all non-emergency proceedings through June 5, 2020 due to the exigent circumstances created by the COVID-19 Pandemic. In light of consolidated pending appeals to the United States Court of Appeals for the Fourth Circuit, the parties sought an immediate ruling from this Court on Plaintiff's Motion to Alter or Amend the Judgment (ECF No. 103), as an appeal could not become effective until this Court's ruling on said Motion. Accordingly, this Court this Court conducted a telephone conference off the record by agreement of counsel on April 14, 2020.

BACKGROUND

The background of this case was discussed at length in three prior opinions issued by this Court: (1) the Memorandum Opinion of May 30, 2019 granting Plaintiff's Motion for Preliminary Injunction (ECF No. 43); (2) the Memorandum Order of September 12, 2019, granting in part and denying in part Defendants'[2] Motion to Dismiss (ECF No. 74); and (3) the February 14, 2020 Memorandum Opinion granting summary judgment in favor of Plaintiff on Counts VII and VIII, granting summary judgment in favor of Defendants on Counts III, V, VI, and IX, and granting a permanent injunction of the HHS Final Rule in the State of Maryland (ECF No. 93).

In brief, Congress enacted Title X almost fifty years ago, in 1970, to address low-income individuals' lack of equal access to family planning services. (Compl. ¶ 2, ECF No. 1.) The federal grant program has been providing $1,430,000 each year to the City of Baltimore and serves over 16,000 patients per year at 23 sites in the City. (*Id.* at ¶ 1.) On March 4, 2019, HHS published the Final Rule in the Federal Register amending the regulations developed to administer Title X. (*Id.* at ¶ 3.)

On April 12, 2019, Baltimore City brought a ten-Count Complaint against the Defendants based on its promulgation of the Final Rule, alleging statutory and constitutional violations. (ECF No. 1.) On April 14,

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[2] The Defendants in this case are the Department of Health and Human Services; the Honorable Alex M. Azar, II, in his official capacity as the Secretary of Health and Human Services; the Office of Population Affairs; and Diane Foley, M.D., in her official capacity as the Deputy Assistant Secretary of the Office of Population Affairs.

2019, the City also sought a preliminary injunction "against enforcement of the Rule in Maryland." (Pl.'s Preliminary Injunction Mot. at 35, ECF No. 11-1.) On May 30, 2019, this Court granted Plaintiff's requested relief, implementing a preliminary injunction in the State of Maryland only. (ECF Nos. 43, 44.) The Court's decision addressed the likelihood of success on the merits of only Count I (Violation of APA, 5 U.S.C. § 706—Contrary to Law—Contrary to Affordable Care Act's Non-Interference Provision, 42 U.S.C. § 18114) and Count II (Violation of APA § 706—Contrary to Law —Contrary to Nondirective Mandate of the Consolidated Appropriations Act of 2018) of Plaintiff's Complaint, finding that the HHS Final Rule likely violated provisions of the Affordable Care Act and the Consolidated Appropriations Act. (*Id.*)

The Government appealed the preliminary injunction decision to the United States Court of Appeals for the Fourth Circuit and moved to stay the injunction pending appeal in both the Fourth Circuit and this Court. (ECF Nos. 48, 49; USCA No. 19-1614.) This Court denied the Government's stay motion, but a divided panel of the Fourth Circuit granted the Government's Motion to Stay the Injunction Pending Appeal on July 2, 2019. (ECF Nos. 56, 58.)

On September 12, 2019, this Court dismissed Count IV (Violation of APA § 706—Contrary to Law—Contrary to Religious Freedom Restoration Act of 1993) and Count X (Violation of APA—Contrary to Constitutional Right—Unconstitutionally Vague) without prejudice. (ECF No. 74.) On February 14, 2020, having heard arguments of counsel and having conducted a thorough

review of the Administrative Record, this Court addressed the remaining Counts in the Complaint that were not on appeal in conjunction with the preliminary injunction. (*See* ECF Nos. 93, 94.) Specifically, the Court granted summary judgment in favor of Baltimore City on Count VII (Violation of APA-Arbitrary and Capricious-Inadequately Justified) and Count VIII (Violation of APA-Arbitrary and Capricious-Objectively Unreasonable). (*Id.*) The Court granted summary judgment in favor of the Government on Count III (Violation of APA § 706—Contrary to Law—Contrary to Title X, 42 U.S.C. §§ 300(a), 300a(a)), Count V (Violation of APA § 706—Contrary to Constitutional Right—First Amendment), Count VI (Violation of APA—Contrary to Constitutional Right—Equal Protection Under Fifth Amendment), and Count IX (Violation of APA—Without Observance of Procedure Required by Law). (*Id.*) The Court also entered a permanent injunction of the HHS Final Rule in the State of Maryland. (*Id.*) On February 26, 2020, in response to a motion filed by Baltimore City, the Court clarified that the effect of its February 14, 2020 Order was to vacate and set aside the Final Rule in the State of Maryland, as vacatur in the State of Maryland was the precise effect of the Court's permanent injunction of the Final Rule in Maryland. (ECF No. 99.)

The Government appealed this Court's summary judgment ruling to the Fourth Circuit on February 24, 2020, and filed a Motion to Stay the Court's ruling pending appeal in both this Court and in the Fourth Circuit. (ECF Nos. 95, 100; USCA No. 20-1215.) This Court denied the Government's Motion to Stay on March 4, 2020. (ECF No. 102.) On March 13, 2020, Baltimore

City filed the presently pending Motion to Alter or Amend the Judgment, seeking a nationwide injunction of the HHS Final Rule instead of the state-wide injunction the Court had ordered. (ECF No. 103.)

On March 30, 2020, the Fourth Circuit denied Defendants' Motion to Stay this Court's February 14, 2020 Order with respect to the entry of summary judgment in favor of Baltimore City, and granted an initial hearing en banc. (ECF Nos. 106, 107.) The Fourth Circuit also consolidated the Government's two appeals in this case, USCA number 19-1614 and USCA number 20-1215. (*Id.*) On April 10, 2020, the Government sought a ruling from this Court on Plaintiff's Motion to Alter or Amend the Judgment because Federal Rule of Appellate Procedure 4(B)(i) provides that an appeal does not become effective until the District Court disposes of certain motions, including a motion to amend under Rule 59(e). (ECF No. 114.)

STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) authorizes a district court to alter, amend, or vacate a prior judgment. The Fourth Circuit has repeatedly recognized that a judgment may be amended under Rule 59(e) in only three circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent manifest injustice." *See Gagliano v. Reliance Standard Life Ins. Co.*, 547 F.3d 230, 241 n.8 (4th Cir. 2008). A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." *Pac. Ins. Co. v. Am. Nat'l*

Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Moreover, "[t]he district court has considerable discretion in deciding whether to modify or amend a judgment." *Fleming v. Maryland-National Capital Park & Planning Commission*, DKC-11-2769, 2012 WL 12877387, at *1 (D. Md. Mar. 8, 2012). "In general, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co.*, 148 F.3d at 403.

Under Federal Rule of Appellate Procedure 4(B)(i), "if a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A) [including a motion under Rule 59(e)]—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered."

ANALYSIS

Baltimore City moves to amend this Court's judgment, which vacated the HHS Final Rule and granted a permanent injunction in the State of Maryland. (ECF Nos. 93, 94, 99.) The City asserts that this Court must correct "a clear error of law" in its judgment because the "APA requires" that the Final Rule be vacated and set aside on a nationwide basis, without geographic limitation. To be sure, the Administrative Procedure Act ("APA") requires a reviewing court to:

> hold unlawful and set aside agency action . . . found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power,

> privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law. . . .

5 U.S.C. §§ 706(2)(A)-(D). Contrary to the City's assertion, however, the APA does not require a reviewing court vacating a rule to do so on a nationwide basis. There is no authority in either Fourth Circuit or Supreme Court jurisprudence that mandates such a finding. As a result, the City fails to meet its burden under Rule 59(e) to establish this Court's need to correct a "clear error of law." Not only has the City failed to meet its burden, its arguments for a nationwide injunction fail on their merits.

As a preliminary matter, Baltimore City has never previously sought vacatur of the Final Rule on a nationwide basis. Instead, the City's Complaint asks the Court to "set aside and vacate the Final Rule" and "issue preliminary and permanent injunctive relief . . . enjoining Defendants . . . from enforcing, threatening to enforce, or otherwise applying the provisions of the Final Rule against *Plaintiff and its subgrantees*." (Compl. at 67, ECF No. 1 (emphasis added).) The City's Motion for Preliminary Injunction sought relief specifically "against enforcement of the Rule in Maryland." (Pl.'s Preliminary Injunction Mot. at 35, ECF No. 11-1.) When this Court granted such preliminary injunctive relief, the City did not take any exception to the state-wide injunction. Finally, in its summary judgment motion, the City requested that "the Court grant summary judgment in Baltimore City's favor, vacate the challenged Rule . . . and enter an order awarding appropriate equitable relief." (ECF No. 81

at 1.) In each of these instances, and particularly on summary judgment, the City had the opportunity to clarify the nature of relief it sought, and it did not seek vacatur on a nationwide basis.

Furthermore, in addressing the City's arguments on their merits, this Court is not persuaded that vacatur must be nationwide. The City relies principally on a District of Columbia case, *O.A. v. Trump*, which determined that a permanent injunction of the Secretary of Homeland Security's interim final rule, barring "eligibility for asylum for certain aliens," was unnecessary because the court decided instead to order a nationwide vacatur of the agency rule at issue. 404 F. Supp. 3d 109, 152-54 (D.D.C. 2019), *appeal filed* No. 19-5272 (D.C. Cir. Oct. 11, 2019). In *O.A.*, the District Court explained that "[t]he D.C. Circuit has 'made clear that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—*not that their application to the individual petitioners is proscribed.*"'" *Id.* at 153 (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). The Court further relied on Justice Blackmun's dissenting opinion in *Lujan v. National Wildlife Federation*, which noted,

> In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of the parties not before the court.

Id. (quoting *Lujan*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)). As a result, the Court found that the rule barring eligibility for asylum for certain aliens had to be vacated on a nationwide basis, questioning as a practical matter "[w]hat would it mean to 'vacate' a rule as to some but not other members of the public." *Id.*

The decision in *O.A.* is distinguishable in several ways. First, it interprets Justice Blackmun's dissenting opinion to mean that whenever a rule of "broad applicability" is invalidated as to a particular plaintiff, then any relief *must* be "programmatic." However, Justice Blackmun uses permissive, not mandatory, language, when discussing the effect of such rule invalidation, noting that a plaintiff "may" obtain broader relief. In addition, the practical concern of vacating the asylum rule only as to the plaintiffs in *O.A.*, a case brought as a class action, is not present in this case. The plaintiffs in *O.A.*, comprising nineteen individuals from various countries who had entered the United States and were allegedly subject to the new rule, as well as two nonprofit organizations that provided legal services to refugees, specifically sought nationwide relief, asking the court to "issu[e] an injunction that provides Plaintiffs complete relief and also prevents the [g]overnment from harming other similarly situated individuals." 404 F. Supp. 3d at 152 (quoting Plaintiffs' Br., Dkt No. 73 at 29-31). As a result, the Court's decision to vacate the asylum rule on a nationwide basis afforded the complete relief sought by plaintiffs.

Such factors are not present in this case, where a permanent injunction in the State of Maryland, effectively resulting in vacatur of the HHS Final Rule in the State of Maryland, is precisely what Baltimore City has sought

from the inception of this litigation. The Fourth Circuit has established that "an injunction should be carefully addressed to the circumstances of the case." *Va. Soc'y for Human Life Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).[3] While the City urges this Court to find meaning in the difference between the remedy of vacatur as opposed to the remedy of permanent injunctive relief, this Court finds it to be a distinction without a difference in this case. Nor, as the City concedes, is it a distinction that the Fourth Circuit or the Supreme Court have recognized to require nationwide vacatur when a rule is vacated in one state.

The City proffers only a case from the United States District Court for the Southern District of New York, now on appeal to the United States Court of Appeals for the Second Circuit, which rejected an argument by HHS that any relief from the rule at issue, whether a vacatur or injunction, should be limited only to New York. *See New York v. United States Dep't of Health and Human*

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[3] As this Court has previously noted in both its Memorandum Opinion granting a preliminary injunction and its Memorandum Opinion granting a permanent injunction, this Court is cognizant of the skepticism regarding the increased issuance of nationwide injunctions by United States District Court Judges. (*See* ECF No. 43 at 27 n.12; ECF No. 93 at 26 n.8 (citing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *California v. Azar*, 385 F. Supp. 3d 960, 1021 (N.D. Cal. 2019)).) This Court has cautioned against the danger of nationwide injunctions leading to forum shopping. (*Id.*) As a result, this Court has emphasized the importance of the federal judiciary not allowing itself to become part of "underlying policy debate." (ECF No. 43 at 27 n.12 (quoting *Sierra Club v. Trump*, 2019 WL 2247689, at *1).)

Servs., 414 F. Supp. 3d 475, 578-79 (S.D.N.Y. 2019), *appeal filed* No. 20-0032 (2d Cir. Jan. 3, 2020). The rule at issue in that case was a "federal conscience" rule promulgated by HHS that aimed to accommodate religious and moral objections to health care services provided by recipients of federal funds. *Id.* at 497. The New York court found HHS's argument for limited relief unpersuasive as the "plaintiffs in these cases span 19 States, the District of Columbia, several units of local government, and include a number of associations of health care providers," such that "the violations of the APA and the Constitution that were found [there] would equally imperil the Rule in the face of a similar challenge brought in any District and by any plaintiff with standing." *Id.*

This Court, in *Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 581 (D. Md. 2019), has also previously noted that nationwide injunctive relief may be appropriate when it could not be practically limited to one geographic area. In granting a nationwide permanent injunction on the use of a citizenship question on the 2020 census questionnaire, the Court explained that "the injunctive relief requested . . . could not be practically limited to only one geographic area or certain litigants." 366 F. Supp. 3d at 755 (D. Md. 2019). The nature of relief was appropriately nationwide because "the citizenship question [would] either be included or barred from 2020 Census on a nationwide basis." *Id.* That is clearly distinguishable here, where Baltimore City has addressed family planning services in Maryland and the effect of the Final Rule upon that funding. To be sure, different issues with respect to such funding

under the Final Rule in question in this case may arise in different states.

In this case, Baltimore City has never previously sought nationwide relief. Furthermore, this Court has been explicit that the scope of any relief afforded to the City would be state-wide only to remedy the City's specific alleged harms in the State of Maryland. As a result, a permanent injunction limited to the State of Maryland, resulting in vacatur of the Rule only in Maryland, is both practical and reasonable to afford the City complete relief. More importantly, such a decision is well in line with the Fourth Circuit's precedent on the issue of nationwide relief. *See Va. Soc'y for Human Life Inc.*, 263 F.3d 379 at 394 ("Nothing in the language of the APA, however, requires us to exercise such far-reaching power."). While vacatur and injunctive relief may be distinct remedies, in this case, their result is the same: the proscription of enforcement of the HHS Final Rule in the State of Maryland. As a result, the City's Motion to Alter or Amend the Judgment to expand the relief from state-wide to nationwide is DENIED.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Alter or Amend the Judgment (ECF No. 103) is DENIED.

A separate Order follows.

Dated: Apr. 15, 2020.

/s/ RICHARD D. BENNETT
RICHARD D. BENNETT
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1614
(1:19-cv-01103-RDB)

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; DIANE FOLEY, M.D., IN HER OFFICIAL CAPACITY AS THE DEPUTY ASSISTANT SECRETARY, OFFICE OF POPULATION AFFAIRS; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; OFFICE OF POPULATION AFFAIRS, DEFENDANTS-APPELLANTS

Filed: July 2, 2019

ORDER

Upon consideration of submissions relative to appellants' motion to stay the district court's preliminary injunction pending appeal, the court grants the motion for stay.

Judge Richardson and Judge Rushing voted to grant the motion for stay. Judge Thacker voted to deny the

motion for stay and filed a separate dissenting statement.

For the Court

/s/ PATRICIA S. CONNOR, Clerk
PATRICIA S. CONNOR

THACKER, J., dissenting:

I do not believe the Government has met its high burden for a stay in this matter.

First, the Government is not likely to prevail on the merits. The 2019 Final Rule at issue ("Final Rule") promulgated by Health and Human Services ("HHS") likely contravenes provisions of the Affordable Care Act ("ACA"), 42 U.S.C. § 18114, and Congress' nondirective mandate in the Continuing Appropriations Act for 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018) (the "Nondirective Mandate").

Title X grants and contracts must be made in accordance with HHS regulations, and no funds appropriated shall be used "in programs where abortion is a method of family planning." 42 U.S.C. §§ 300a-4, 300a-6. And as the district court stated, HHS has never allowed Title X recipients to use such funds to perform or subsidize abortions. In any event, that is not the issue here. We are dealing with a "gag rule" that prohibits Title X recipients from counseling clients about abortion and referring them for abortions—not providing, performing, or paying for them.

The Final Rule likely violates the ACA and the Nondirective Mandate, both of which were enacted after Rust v. Sullivan, 500 U.S. 173 (1991), which was a decision bearing on the permissibility of HHS's regulations in a different legal landscape. Since Rust, Congress has explicitly recognized in the ACA the importance of removing barriers to full disclosure in a health care setting, and preserving a private and plenary consultation between a patient and her health care provider. Indeed, the ACA clearly provides that, notwithstanding

other ACA provisions, HHS "shall not promulgate" any regulation that, inter alia, "interferes with communications regarding a full range of treatment options between the patient and the provider"; "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; and "violates the principles of informed consent." 42 U.S.C. § 18114(3), (4), (5). I cannot fathom a more direct violation of this provision than a regulation prohibiting Title X health care providers from referring a woman for an abortion when she requests it. What is worse, the Final Rule actually requires health care providers to hide the ball from their patients by giving them a list of providers without telling them which ones actually perform abortions. How can this possibly be "full disclosure of all relevant information"? *Id.* § 18114(4). As the district court noted, the American Medical Association has even strongly opposed this rule for its interference in the patient-physician relationship. And President George H.W. Bush—addressing concerns about the 1988 regulations the Government is attempting to revive here—urged that under Title X, the "confidentiality of the doctor-patient relationship be preserved," and declared that operation of the Title X program must be "compatible with free speech and the highest standards of medical care." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 230 (D.C. Cir. 1992).

Further, the Final Rule also likely violates the Nondirective Mandate. Since 1996—again, after Rust—Congress has mandated that under Title X, pregnancy counseling must be "nondirective." I find the district court's reasoning persuasive. That is, nondirective

"counseling" encompasses referrals. HHS has even characterized referrals as part of *nondirective counseling* in the Final Rule itself. See 84 Fed. Reg. at 7733 ("Congress has expressed its intent that postconception adoption information and referrals be included as part of any nondirective counseling in Title X projects when it passed [§ 254c-6(a)(1)]." (emphases supplied)). Thus, because the Final Rule requires pregnant women seeking abortions to be referred for prenatal care, and because Title X projects cannot adequately refer women to physicians who perform abortions *when the patient requests as much*, it likely violates the Nondirective Mandate.

I find disingenuous the Government's statement that "a doctor's *failure to refer* a patient for an abortion does not *direct* the patient to do anything." Mot. at 9. To start, it is not a "failure" to refer when you are directed not to do so. Moreover, Congress' use of "nondirective" means that patients are entitled to *neutral* counseling. In my view, refusing (not failing) to refer a patient to someone who actually performs abortions (when she has requested as much) is far from neutral.

Finally, this is not an implied repeal case, and I find the Government's arguments to the contrary misguided. Baltimore is not asking for a repeal of HHS's authority to promulgate regulations regarding Title X. Rather, it is asking us, via the Administrative Procedures Act, to address the executive's promulgation of a rule that is allegedly contrary to law. *See* 5 U.S.C. § 706.

For these reasons, I believe the Government is not likely to succeed on the merits.

Second, as to the remaining requirements for a stay —irreparable harm, balance of the equities, and public interest—the Government's filings lead me to believe that its alleged harm is grounded in its purported inconvenience and nuisance of not knowing when and if the Final Rule will become effective. But this alleged harm pales in comparison to Baltimore's submission that its longstanding and renowned health care system is in jeopardy. Baltimore City health clinics served 7,670 Title X clients in 2017, of which nearly one in five were under the age of 18, and almost 84% were female, and it has seen a reduction in teen pregnancy by 55% in the last ten years. The Government's declaration that "the Rule simply limits what the government chooses to fund through the Title X grant program" ignores reality. Mot. at 14. The public has a strong interest in maintaining a check on executive agency overreach. Just ask the Founding Fathers.

Therefore, having concluded the Government has failed to meet its burden, I vote to deny the motion for stay.

APPENDIX I

1. 42 U.S.C. 300 provides:

Project grants and contracts for family planning services

(a) Authority of Secretary

The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private 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). To the extent practical, entities which receive grants or contracts under this subsection shall encourage familiy[1] participation in projects assisted under this subsection.

(b) Factors determining awards; establishment and preservation of rights of local and regional entities

In making grants and contracts under this section the Secretary shall take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance. Local and regional entities shall be assured the right to apply for direct grants and contracts under this section, and the Secretary shall by regulation fully provide for and protect such right.

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[1] So in original. Probably should be "family".

(c) Reduction of grant amount

The Secretary, at the request of a recipient of a grant under subsection (a), may reduce the amount of such grant by the fair market value of any supplies or equipment furnished the grant recipient by the Secretary. The amount by which any such grant is so reduced shall be available for payment by the Secretary of the costs incurred in furnishing the supplies or equipment on which the reduction of such grant is based. Such amount shall be deemed as part of the grant and shall be deemed to have been paid to the grant recipient.

(d) Authorization of appropriations

For the purpose of making grants and contracts under this section, there are authorized to be appropriated $30,000,000 for the fiscal year ending June 30, 1971; $60,000,000 for the fiscal year ending June 30, 1972; $111,500,000 for the fiscal year ending June 30, 1973, $111,500,000 each for the fiscal years ending June 30, 1974, and June 30, 1975; $115,000,000 for fiscal year 1976; $115,000,000 for the fiscal year ending September 30, 1977; $136,400,000 for the fiscal year ending September 30, 1978; $200,000,000 for the fiscal year ending September 30, 1979; $230,000,000 for the fiscal year ending September 30, 1980; $264,500,000 for the fiscal year ending September 30, 1981; $126,510,000 for the fiscal year ending September 30, 1982; $139,200,000 for the fiscal year ending September 30, 1983; $150,830,000 for the fiscal year ending September 30, 1984; and $158,400,000 for the fiscal year ending September 30, 1985.

2. 42 U.S.C. 300a provides:

Formula grants to States for family planning services

(a) Authority of Secretary; prerequisites

The Secretary is authorized to make grants, from allotments made under subsection (b), to State health authorities to assist in planning, establishing, maintaining, coordinating, and evaluating family planning services. No grant may be made to a State health authority under this section unless such authority has submitted, and had approved by the Secretary, a State plan for a coordinated and comprehensive program of family planning services.

(b) Factors determining amount of State allotments

The sums appropriated to carry out the provisions of this section shall be allotted to the States by the Secretary on the basis of the population and the financial need of the respective States.

(c) "State" defined

For the purposes of this section, the term "State" includes the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, the Virgin Islands, the District of Columbia, and the Trust Territory of the Pacific Islands.

(d) Authorization of appropriations

For the purpose of making grants under this section, there are authorized to be appropriated $10,000,000 for the fiscal year ending June 30, 1971; $15,000,000 for the fiscal year ending June 30, 1972; and $20,000,000 for the fiscal year ending June 30, 1973.

3. 42 U.S.C. 300a-1 provides:

Training grants and contracts; authorization of appropriations

(a) The Secretary is authorized to make grants to public or nonprofit private entities and to enter into contracts with public or private entities and individuals to provide the training for personnel to carry out family planning service programs described in section 300 or 300a of this title.

(b) For the purpose of making payments pursuant to grants and contracts under this section, there are authorized to be appropriated $2,000,000 for the fiscal year ending June 30, 1971; $3,000,000 for the fiscal year ending June 30, 1972; $4,000,000 for the fiscal year ending June 30, 1973; $3,000,000 each for the fiscal years ending June 30, 1974 and June 30, 1975; $4,000,000 for fiscal year ending 1976; $5,000,000 for the fiscal year ending September 30, 1977; $3,000,000 for the fiscal year ending September 30, 1978; $3,100,000 for the fiscal year ending September 30, 1979; $3,600,000 for the fiscal year ending September 30, 1980; $4,100,000 for the fiscal year ending September 30, 1981; $2,920,000 for the fiscal year ending September 30, 1982; $3,200,000 for the fiscal year ending September 30, 1983; $3,500,000 for the fiscal year ending September 30, 1984; and $3,500,000 for the fiscal year ending September 30, 1985.

4. 42 U.S.C. 300a-4 provides:

Grants and contracts

(a) Promulgation of regulations governing execution; amount of grants

Grants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate. The amount of any grant under any section of this subchapter shall be determined by the Secretary; except that no grant under any such section for any program or project for a fiscal year beginning after June 30, 1975, may be made for less than 90 per centum of its costs (as determined under regulations of the Secretary) unless the grant is to be made for a program or project for which a grant was made (under the same section) for the fiscal year ending June 30, 1975, for less than 90 per centum of its costs (as so determined), in which case a grant under such section for that program or project for a fiscal year beginning after that date may be made for a percentage which shall not be less than the percentage of its costs for which the fiscal year 1975 grant was made.

(b) Payment of grants

Grants under this subchapter shall be payable in such installments and subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made.

(c) Prerequisites; "low-income family" defined

A grant may be made or contract entered into under section 300 or 300a of this title for a family planning service project or program only upon assurances satisfactory to the Secretary that—

(1) priority will be given in such project or program to the furnishing of such services to persons from low-income families; and

(2) no charge will be made in such project or program for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized or is under legal obligation to pay such charge.

For purposes of this subsection, the term "low-income family" shall be defined by the Secretary in accordance with such criteria as he may prescribe so as to insure that economic status shall not be a deterrent to participation in the programs assisted under this subchapter.

(d) Suitability of informational or educational materials

(1) A grant may be made or a contract entered into under section 300 or 300a-3 of this title only upon assurances satisfactory to the Secretary that informational or educational materials developed or made available under the grant or contract will be suitable for the purposes of this subchapter and for the population or community to which they are to be made available, taking into account the educational and cultural background of the individuals to whom such materials are addressed and the standards of such population or community with respect to such materials.

(2) In the case of any grant or contract under section 300 of this title, such assurances shall provide for the review and approval of the suitability of such materials, prior to their distribution, by an advisory committee established by the grantee or contractor in accordance with the Secretary's regulations. Such a committee shall include individuals broadly representative of the population or community to which the materials are to be made available.

5. 42 U.S.C. 300a-6 provides:

Prohibition against funding programs using abortion as family planning method

None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

6. Department of Health and Human Services Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat 2558 (2019) provides in pertinent part:

* * * * *

FAMILY PLANNING

For carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, $286,479,000: *Provided*, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote

public support or opposition to any legislative proposal or candidate for public office.

* * * * *

7. 42 U.S.C. 18114 provides:

Access to therapies

Notwithstanding any other provision of this Act, the Secretary of Health and Human Services 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.

8. 42 C.F.R. 59.14 provides:

Requirements and limitations with respect to post-conception activities.

(a) *Prohibition on referral for abortion.* A Title X project may not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion.

(b) *Information about prenatal care.* (1) Because Title X funds are intended only for family planning, once a client served by a Title X project is medically verified as pregnant, she shall be referred to a health care provider for medically necessary prenatal health care. The Title X provider may also choose to provide the following counseling and/or information to her:

(i) Nondirective pregnancy counseling, when provided by physicians or advanced practice providers;

(ii) A list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care);

(iii) Referral to social services or adoption agencies; and/or

(iv) Information about maintaining the health of the mother and unborn child during pregnancy.

(2) In cases in which emergency care is required, the Title X project shall only be required to refer the client immediately to an appropriate provider of medical services needed to address the emergency.

(c) *Use of permitted lists or referrals to encourage abortion.* (1) A Title X project may not use the provision of any prenatal, social service, emergency medical, or other referral, of any counseling, or of any provider lists, as an indirect means of encouraging or promoting abortion as a method of family planning.

(2) The list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care) in paragraph (b)(1)(ii) of this section may be limited to those that do not provide abortion, or may include licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), some, but not the majority, of which also provide abortion as part of their comprehensive health care services. Neither the list nor project staff may identify which providers on the list perform abortion.

(d) *Provision of medically necessary information.* Nothing in this subpart shall be construed as prohibiting the provision of information to a project client that is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method, provided that the provision of such information does not promote abortion as a method of family planning.

(e) *Examples.* (1) A pregnant client of a Title X project requests prenatal health care services. Because the provision of such services is outside the scope of family planning supported by Title X, the client is referred for prenatal care and may be provided a list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care). Provision of a referral for prenatal health care is consistent

with this part because prenatal care is a medically necessary service.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action complies with the requirements of paragraph (b) of this section.

(3) After receiving nondirective counseling at a Title X provider, a pregnant woman decides to have an abortion, is concerned about her safety during the procedure, and asks the Title X project to provide her with a referral to an abortion provider. The Title X project tells her that it does not refer for abortion, but provides the following: A list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), which is not presented as a referral for abortion, but as a list of comprehensive primary care and prenatal care providers that does not identify which providers perform abortion, and the project staff member does not identify such providers on the list; and information about maintaining her health and the health of her unborn child during pregnancy. Such actions comply with paragraphs (a) through (c) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion, and provides her a list that consists of hospitals and clinics and other providers, all of which provide comprehensive primary health care (including prenatal care), as well as abortion as a method of family planning. Although there are several licensed, qualified, comprehensive primary health care providers (including providers of prenatal care) in the area that do not provide

abortion as a method of family planning, none of these providers is included on the list. Provision of the list is inconsistent with paragraphs (a) and (c) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her for an abortion. The counselor tells her that the project does not consider abortion a method of family planning and, therefore, does not refer for abortion. The counselor offers her nondirective pregnancy counseling, which may discuss abortion, but the counselor neither refers for, nor encourages, abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services and offers her the list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care), assistance, and information for pregnant women described in paragraph (b) of this section. None of the providers on the list provide abortions. Such actions are consistent with paragraphs (a) through (c) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information is consistent with paragraph (d) of this section and this section generally and does not constitute an abortion referral.

9. 42 C.F.R. 59.15 provides:

Maintenance of physical and financial separation.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Public Health Service Act and §§ 59.13, 59.14, and 59.16 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include:

(a) The existence of separate, accurate accounting records;

(b) The degree of separation from facilities *(e.g.,* treatment, consultation, examination and waiting rooms, office entrances and exits, shared phone numbers, email addresses, educational services, and websites) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel, electronic or paper-based health care records, and workstations; and

(d) The extent to which signs and other forms of identification of the Title X project are present, and signs and material referencing or promoting abortion are absent.

10. 42 C.F.R. 59.5(a)(5) (2001) provides:

What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(5) Not provide abortion as a method of family planning. A project must:

(i) Offer pregnant women the opportunity to be provided information and counseling regarding each of the following options:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

(ii) If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling.

11. 42 C.F.R. 59.8 (1989) provides:

Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is

diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provi-

sion of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate

method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

12. 42 C.F.R. 59.9 (1989) provides:

Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The

Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.