JOSEPH H. HUNT
Assistant Attorney General
JOSEPH H. HARRINGTON
United States Attorney
MICHELLE R. BENNETT
Assistant Branch Director
BRADLEY P. HUMPHREYS
ANDREW M. BERNIE
Trial Attorneys
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878
Bradley.Humphreys@usdoj.gov
Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON, Plaintiff, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	NO. 1:19-cv-3040-SAB DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT February 13, 2019 1:15 p.m. Courtroom 755

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, FEMINIST WOMEN'S HEALTH CENTER, DEBORAH OYER, M.D., and TERESA GALL, F.N.P.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

TABLE OF CONTENTS

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

TABLE OF AUTHORITIES

Cases

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Statutes

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Regulations

Legislative Materials

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Other Authorities

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

INTRODUCTION

Plaintiffs' challenge to the federal regulation at issue is a transparent attempt to evade the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). When *Rust* was decided, as now, Title X of the Public Health Service Act (PHSA) authorized the Department of Health and Human Services (HHS) to make grants for family-planning services and issue regulations to implement the statute. Title X is a limited program: It does not fund medical care for pregnant women but instead narrowly addresses preconception family planning. In addition, Congress directed in § 1008 of the PHSA that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In accordance with the limited nature of the program and § 1008, HHS issued regulations in 1988 that, among other things, prohibited Title X projects from referring patients for abortion as a method of family planning and required Title X programs to be physically separate from abortion-related activities. 53 Fed. Reg. 2922 (Feb. 2, 1988). In *Rust*, the Supreme Court held that those regulations were authorized by Title X, were not arbitrary and capricious, and were constitutional.

Relying on the Supreme Court's holding in *Rust*, HHS issued a final rule in 2019 that, in the respects challenged here, readopted provisions contained in the 1988 regulations (which had been rescinded in the interim). 84 Fed. Reg. 7714 (Mar. 4, 2019) (Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and Congress has not amended the statute *Rust* interpreted. Plaintiffs contend, rather, that Congress implicitly and indirectly amended Title X through a clause in an appropriations rider and an obscure provision of the Affordable Care Act (ACA). A unanimous motions

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

panel of the Ninth Circuit correctly rejected Plaintiffs' remarkable position.[1] As the panel explained, Congress did not amend Title X—much less abrogate *sub silentio* a high-profile Supreme Court decision. Plaintiffs, moreover, have waived any challenge based on § 1554 of the ACA because neither they nor anyone else raised this provision during the notice-and-comment process. In light of *Rust*, and for the reasons explained more fully below, Plaintiffs' statutory claims are meritless and should be dismissed.

Plaintiffs likewise cannot show that the Rule is arbitrary and capricious. As the merits panel of the Ninth Circuit recognized, HHS did not act irrationally in adopting regulations implementing its permissible interpretation of § 1008 or in making reasonable predictions using its expertise. The agency thoroughly explained its reasoning and articulated a rational justification for the choices it made—choices the Supreme Court has already upheld in substantial part. Moreover, there is no merit to NFPRHA's claim that the Rule violates the Administrative Procedure Act's (APA) notice-and-comment requirements.

There is also no merit to Plaintiffs' constitutional claims. *Rust* squarely forecloses Plaintiffs' contention that the Rule violates the First Amendment. And Plaintiffs' claim that the Rule is impermissibly vague fails under any

---

[1] Although the Ninth Circuit ordered Defendants' appeal to be reheard *en banc* and instructed that the motions panel's order not be cited as precedential, *California v. Azar*, No. 19-15974, Order (9th Cir. July 3, 2019), the motions panel's order constitutes persuasive authority. The Ninth Circuit also expressly indicated that the motions panel's order has not been vacated. *California v. Azar*, No. 19-15974, Order (9th Cir. July 11, 2019).

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

standard, as the Rule is just as specific as the materially identical provisions sustained in *Rust*. In any event, the Due Process Clause tolerates greater imprecision when government subsidies—rather than criminal or civil penalties—are involved. And NFPRHA cannot show that the Rule unconstitutionally restricts abortion access.

For these reasons and for the reasons explained below, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, the Court should enter judgment in Defendants' favor under Rule 56.

LEGAL AND FACTUAL BACKGROUND

A. Statutory and Regulatory Background

In 1970, Congress enacted Title X of the PHSA to create a limited grant program for certain types of preconception family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504. The statute authorizes HHS to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). It also provides that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a).

Section 1008, however, directs that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. "That restriction was intended to ensure that Title X funds would 'be used only to support *preventive* family planning

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

services, population research, infertility services, and other related medical, informational, and educational activities.'" *Rust v. Sullivan*, 500 U.S. 173, 178-79 (1991) (emphasis added) (quoting H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.)). As a sponsor of § 1008 explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (statement of Rep. Dingell).

The Secretary's initial regulations, which remained largely unchanged until the late 1980s, did not provide additional guidance on the scope of § 1008. Instead, they simply required that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15, 1971). During this period, HHS construed § 1008 and its regulations "as prohibiting Title X projects from in any way promoting or encouraging abortion as a method of family planning" and "as requiring that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. at 2923 (describing previous HHS guidelines and internal memoranda). The Department nevertheless permitted, and then in guidelines issued in 1981, required, Title X projects to offer nondirective options counseling. This included 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." *Id.* HHS also permitted funding recipients to maintain Title X services and abortion-related services at "a single site." 52 Fed. Reg. 33,210, 33,210 (Sept. 1, 1987) (discussing prior policy).

In the late 1980s, the Department changed course. HHS issued a notice of proposed rulemaking explaining that its past policy had "not provided clear

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

standards for grantees and HHS personnel." 52 Fed. Reg. at 33,210-11. The NPRM also stated that abortion "'referral' and counseling are clearly covered by the prohibition in section 1008." *Id.* And HHS concluded that its prior assumption that "referrals for abortion do not indeed 'encourage or promote' abortion" was "unreasonable," because "providing a referral for abortion facilitates the obtaining of [an] abortion." *Id.*

In 1988, the Secretary issued a final rule that prohibited Title X projects from promoting, encouraging, advocating, or providing counseling on, or referrals for, abortion as a method of family planning. 53 Fed. Reg. at 2945 (§§ 59.8, 59.10). To prevent programs from evading these restrictions by steering patients toward abortion providers, the regulations placed limitations on the list of providers that a program must offer pregnant patients as part of a required referral for prenatal care. *See id.* (§ 59.8(a)(3)). And to maintain program integrity, the regulations required that grantees keep their Title X-funded projects "physically and financially separate" from all prohibited abortion-related activities. *Id.* (§ 59.9). The Supreme Court upheld these regulations in *Rust*, concluding that they were authorized by Title X, were not arbitrary and capricious, and were consistent with the Constitution. 500 U.S. at 183-203.

In the aftermath of *Rust*, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991." H.R. Rep. No. 102-204, at 1 (1991). Both Houses passed a bill titled the "Family Planning Amendments Act of 1992" that would have codified HHS's 1981 guidelines by conditioning Title X funding on a grantee's promise to provide, "upon request," "nondirective counseling and referrals" concerning specific options, including

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

"termination of pregnancy." S. 323, 102d Cong. § 2 (1991). President Bush vetoed the legislation. S. Doc. No. 102-28 (1992).

In 1993, President Clinton and HHS suspended the 1988 regulations so that the 1981 guidance went back into effect. 58 Fed. Reg. 7455 (Jan. 22, 1993); 58 Fed. Reg. 7462 (Feb. 5, 1993) (interim rule). Three years later, Congress added a rider to its annual HHS appropriations act requiring that any funds provided to Title X projects "shall not be expended for abortions" and that "all pregnancy counseling shall be nondirective." Pub. L. 104-134, tit. II, 110 Stat. 1321, 1321-221 (1996). That rider has appeared in every annual HHS appropriations act since 1996. *E.g.*, Pub. L. No. 115-245, div. B, tit. II, 132 Stat. 2981, 3070-71 (2018).

In 2000, HHS finalized a new rule, which, like the 1981 guidelines and the vetoed Family Planning Amendments Act, required Title X projects to offer and provide upon request "information and counseling regarding" specific options, including "[p]regnancy termination," followed by "referral upon request." 65 Fed. Reg. 41,270, 41,279 (July 3, 2000). The 2000 rule also eliminated the physical-separation requirement in the 1988 regulations. *See id.* at 41,275-76. In adopting these new regulations, HHS acknowledged that the 1988 regulations were "a permissible interpretation of the statute," 65 Fed. Reg. at 41,277, but justified the shift in approaches on the basis of "experience," *id.* at 41,271.

In 2010, Congress enacted the ACA. Included within the Act's "Miscellaneous Provisions" subchapter and titled "Access to therapies," § 1554 provides that "[n]otwithstanding any other provision of [the ACA]," the Secretary "shall not promulgate any regulation that" (1) "creates any

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

unreasonable barriers to the ability of individuals to obtain appropriate medical care"; (2) "impedes timely access to health care services"; (3) "interferes with communications regarding a full range of treatment options between the patient and the provider"; (4) "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; (5) "violates the principles of informed consent and the ethical standards of health care professionals"; or (6) "limits the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 18114. Nothing in § 1554 specifically addresses Title X or abortion.

On June 1, 2018, the Secretary published a notice of proposed rulemaking (NPRM) designed to "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children." 83 Fed. Reg. 25,502, 25,505. After receiving more than 500,000 comments, the Secretary published a final rule in March 2019, 84 Fed. Reg. 7714, the challenged provisions of which are materially indistinguishable from the 1988 regulations upheld in *Rust*.

In implementing Title X and especially § 1008, the Rule, like the 1988 regulations, prohibits Title X projects from providing referrals for, or engaging in activities that otherwise encourage or promote, abortion as a method of family planning. 42 C.F.R. §§ 59.5(a)(5), 59.14(a), 59.16(a). As the Secretary explained, "[i]f a Title X project refers for, encourages, promotes, advocates, supports, or assists with, abortion as a method of family planning, it is a program 'where abortion is a method of family planning' and the Title X statute prohibits Title X funding for that project." 84 Fed. Reg. at 7759. In the Secretary's view,

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

this is "the best reading" of § 1008, "which was intended to ensure that Title X funds are also not used to encourage or promote abortion." *Id.* at 7777. To prevent evasion of these requirements, the Rule, like the 1988 regulations, imposes restrictions on the list of providers that may be given at the same time as the required referral for prenatal care for pregnant women. *See* 42 C.F.R. § 59.14(c)(2). Because § 1008 only addresses abortion "as a method of family planning," the Rule permits referrals for abortion in cases of an "emergency," such as "an ectopic pregnancy." *Id.* § 59.14(b)(2), (e)(2); *see also* 84 Fed. Reg. at 7747 n.76 ("Similarly, in cases involving rape and/or incest, it would not be considered a violation of the prohibition on referral for abortion as a method of family planning if a patient is provided a referral to a licensed, qualified, comprehensive health service provider who also provides abortion . . . .").

The Rule is less restrictive than the 1988 regulations, however, in that it allows, but does not require, "[n]ondirective pregnancy counseling," 42 C.F.R. § 59.14(b)(1)(i), which may include the neutral presentation of information about abortion, provided it does "not encourage, promote or advocate abortion as a method of family planning." *Id.* § 59.16(a); *see also* 84 Fed. Reg. at 7745-46 (preamble). In the Rule's preamble, HHS explained that in nondirective counseling, "abortion must not be the only option presented" and providers "should discuss the possible risks and side effects to both mother and unborn child of any pregnancy option presented, consistent with the obligation of health care providers to provide patients with accurate information to inform their health care decisions." 84 Fed. Reg. at 7747. In the Department's view, such limited, nondirective counseling—"[u]nlike abortion referral"—"would not be

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

considered encouragement, promotion, support, or advocacy of abortion as a method of family planning" in violation of § 1008. *Id.* at 7745.

Like the 1988 regulations, the Rule also requires that Title X projects remain physically separate from any abortion-related activities conducted outside the grant program. 42 C.F.R. § 59.15. As the Secretary explained, "[i]f the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, the Title X project (and, thus, Title X funds) would be supporting abortion as a method of family planning." 84 Fed. Reg. at 7766. And because without physical separation "it is often difficult for patients, or the public, to know when or where Title X services end and non-Title X services involving abortion begin," the Secretary concluded that reinstating this requirement was necessary to avoid "the appearance and perception that Title X funds being used in a given program may also be supporting that program's abortion activities." *Id.* at 7764. Indeed, the Secretary's determination that "the 2000 regulations fostered an environment of ambiguity surrounding appropriate Title X activities" was only reinforced by "the many … public comments that argued Title X should support statutorily prohibited activities, such as abortion." *Id.* at 7721-22; *see id.* at 7728-30.

The Rule also contains a number of provisions that have little to do with § 1008, such as a requirement that Title X projects comply with state and local laws that mandate notification or reporting of sexual abuse, 42 C.F.R. § 59.17. Given the Rule's breadth, its preamble contains an express severability statement directing that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

B. Procedural History

On March 5, 2019, Washington filed its complaint asserting claims under the APA and the Constitution. *See* Compl., ECF No. 1. The National Family Planning and Reproduction Health Association, the Feminist Women's Health Center, and two individual practitioners (collectively NFPRHA) filed suit two days later asserting substantially similar claims. *See National Family Planning & Reproductive Health Ass'n v. Azar*, No. 1:19-cv-03045-SAB, Compl., ECF No. 1. Washington moved to consolidate the two cases, and the Court granted its motion. *See* Order, ECF No. 8. On March 22, 2019, Plaintiffs in both cases moved for a preliminary injunction to block implementation of the Rule. *See* ECF No. 9 (Wash. PI Mem.); ECF No. 18 (NFPRHA PI Mem.). The Court granted Plaintiffs' preliminary injunction motions on April 25, 2019. *See* Order Granting Plaintiffs' Mots. For Prelim. Inj., ECF No. 54 (PI Order).

The government appealed and sought a stay of the preliminary injunction from this Court and the Ninth Circuit. This Court denied the motion to stay the preliminary injunction on June 3, 2019. ECF No. 82.

A motions panel of the Ninth Circuit issued a unanimous per curiam order on June 20, 2019, staying the preliminary injunction—along with two other injunctions issued by district courts in Oregon and California—pending appeal. *See California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). It concluded that HHS is likely to prevail on the merits and that the equitable factors cut in the Department's favor. *Id*. at 1075-80. The panel emphasized that the Rule is "reasonable and in accord with § 1008," as confirmed by *Rust. Id.* at 1075. It rejected Plaintiffs' arguments that *Rust* no longer applies because of the appropriations rider and § 1554 of the ACA, explaining that "neither statute

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

impliedly amended or repealed § 1008" or is incompatible with the Rule. *Id.* 1075-79. It also concluded that Plaintiffs are unlikely to succeed on their claim that the Rule is arbitrary and capricious. *Id.* at 1079-80.[2]

Plaintiffs moved for *en banc* reconsideration of the panel's stay order, which was granted. *See Washington v. Azar*, No. 19-35394, Order (July 3, 2019). The *en banc* panel of the Ninth Circuit initially ordered that the motions panel decision not be cited as precedent, *id*., but later clarified that the panel's stay order had not been vacated and denied the Plaintiffs' motions for an administrative stay of the stay order, *Washington v. Azar*, No. 19-35394, Order (July 11, 2019). The *en banc* panel then scheduled oral argument and instructed the parties to "be prepared to discuss . . . the district courts' preliminary injunction orders on the merits." *Washington v. Azar*, No. 19-35394, Order (Aug. 1, 2019). The panel heard argument on September 23, 2019, which addressed the merits of the preliminary injunction orders. The stay of the preliminary injunctions remains in effect.

Meanwhile, the Oregon district court granted a stay of proceedings in that parallel litigation on September 17, 2019, observing that "it is hard to imagine that the [Ninth Circuit's] decision on appeal would not guide this court

---

[2] Shortly thereafter, the Fourth Circuit stayed a similar injunction issued by a district court in Maryland, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614, 2019 WL 3072302 (4th Cir. July 2, 2019), and a district court in Maine denied a request for a fifth preliminary injunction against the Rule, *Family Planning Ass'n of Maine v. HHS (Maine Family Planning)*, No. 19-100, 2019 WL 2866832 (D. Me. July 3, 2019), *appeal filed*, No. 19-1836 (1st Cir. Sept. 3, 2019).

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

robustly." *Oregon v. Azar*, No. 6:19-cv-00317-MC, Opinion and Order at 5, ECF No. 191 (D. Or. Sept. 17, 2019). On October 2, 2019, the California district court similarly stayed Defendants' motion to dismiss "given the pendency of the appeal before the Ninth Circuit." *California v. Azar*, No. 3:19-cv-01184-EMC, Clerk's Notice, ECF No. 151 (N.D. Cal. Oct. 1, 2019).

Pursuant to the schedule entered by this Court in its September 28, 2019 Order, ECF No. 108, Defendants file the instant motion to dismiss Plaintiffs' suits or, in the alternative, for summary judgment.

ARGUMENT

Defendants move to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Courts should grant a motion to dismiss under Rule 12(b)(6) if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570).

In the alternative, Defendants move for summary judgment under Rule 56. Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For APA claims, "the district judge sits as an appellate tribunal" to resolve issues at summary judgment." *Am. Bioscience v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

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

In *Rust v. Sullivan*, the Supreme Court upheld regulations that implemented § 1008's prohibition on the use of Title X funds "in programs where abortion is a method of family planning," 42 U.S.C. § 300a-6, by "limit[ing] the ability of Title X fund recipients to engage in abortion-related activities" in multiple respects. 500 U.S. 173, 177-78 (1991). Those regulations "broadly prohibit[ed]" Title X projects from "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'" and specifically proscribed them from providing either a "referral for," or "counseling concerning," abortion as a method of family planning, "even upon specific request." *Id.* at 179-80. Instead, because "Title X is limited to preconceptional services" and "does not furnish services related to childbirth," the regulations required the projects to "refer every pregnant client 'for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.'" *Id.* This list could "not be used indirectly to encourage or promote abortion," such as by (i) "weighing the list of referrals in favor of health care providers which perform abortions," (ii) "including on the list of referral providers health care providers whose principal business is the provision of abortions," (iii) "excluding available providers who do not provide abortions," or (iv) "steering clients to providers who offer abortion as a method of family planning." *Id.* at 180 (quotation marks omitted). Finally, all Title X projects were required to "be organized so that they are 'physically and financially separate' from prohibited abortion activities." *Id.*

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

The Supreme Court rejected the arguments that these regulations exceeded the Secretary's authority under Title X, were arbitrary and capricious, and violated the First and Fifth Amendments. *Rust*, 500 U.S. at 183-203. The Court first held that the regulations were "plainly allow[ed]" under the "broad directives provided by Congress in Title X in general and § 1008 in particular." 500 U.S. at 184; *see id.* at 184-90. As it observed, "to ensure that Title X funds would 'be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities,'" Congress mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 178-79 (emphasis added). That "broad language" justified both the "ban on [abortion] counseling, referral, and advocacy within the Title X project," *id.* at 184, as well as the requirement "mandating separate facilities, personnel, and records," *id.* at 187.

The Secretary had concluded that if a program promotes, encourages, advocates, provides counseling concerning, or refers for abortion as a method of family planning, then the program is one "where abortion is a method of family planning." *See, e.g.*, 53 Fed. Reg. at 2923, 2933. The Supreme Court agreed that this is, at the very least, a "permissible construction" of § 1008, and rejected the argument that the restrictions were arbitrary and capricious. *See Rust*, 500 U.S. at 183, 186-87. The Court found that the Secretary provided a reasoned analysis for the restrictions, crediting the Secretary's explanation that this interpretation is "more in keeping with the original intent of the statute," even if it constituted a "sharp break from the Secretary's prior construction." *Id.* at 186-87; *see also id.* at 195 n.4 (recognizing "Congress' intent in Title X that federal funds not be

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

used to 'promote or advocate' abortion as a method of family planning"). The Court also credited the Secretary's determination that "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." *Id.* at 187 (quotation marks omitted).

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

More generally, the Supreme Court drew a clear distinction between impeding abortion and choosing not to subsidize it. *See Rust*, 500 U.S. at 192-203 (rejecting constitutional challenges). The Court first dismissed the objection that the 1988 regulations engaged in viewpoint discrimination by prohibiting "all discussion about abortion as a lawful option … while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192. As the Court explained, the government may "selectively fund

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 192-93. Here, the Secretary had permissibly chosen "to subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars, in a congressionally created program that excluded "abortion as a method of family planning." *Id.* at 193.

Nor, in the Court's judgment, did the regulations "significantly impinge upon the doctor-patient relationship." *Rust*, 500 U.S. at 200. Although the principal dissent insisted that "the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand" that Title X providers furnish their patients "with the full range of information and options regarding their health and reproductive freedom[,] … includ[ing] the abortion option," *id.* at 213-14 (Blackmun, J., dissenting), the majority took a different view. As it explained, the doctor-patient relationship in a Title X project is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice," and hence "a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* at 200 (majority opinion). Nor did the regulations "require[] a doctor to represent as his own any opinion that he does not in fact hold," as he "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* "In these circumstances," the Court concluded, "the general rule that the Government may choose not to subsidize speech applies with full force." *Id.*

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Finally, the Supreme Court held that the "mere decision to exclude abortion-related services from a federally funded *preconceptional* family planning program" could not "impermissibly burden" a woman's right to obtain an abortion. *Rust*, 500 U.S. at 201-02. As the Court explained, "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected," and thus instead "may validly choose to fund childbirth over abortion." *Id.* at 201. Although "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive" abortion-related services "from a Title X project," there is no constitutional requirement that "the Government distort the scope of its mandated program" to provide them. *Id.* at 203. "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral," for instance, "leaves her in no different position than she would have been if the Government had not enacted Title X." *Id.* at 202. And that was true notwithstanding the claim that "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services," as "even these Title X clients are in no worse position than if Congress had never enacted Title X." *Id.* at 203.

The 1988 regulations upheld by the Supreme Court are materially indistinguishable from—or even more restrictive than—the regulations challenged here. Both prohibit Title X projects from referring pregnant women for—or otherwise encouraging, promoting, or advocating—abortions as a method of family planning, even upon specific request. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. §§ 59.14(a), 59.16(a). Both require Title X projects to refer a pregnant woman out of the Title X program for prenatal care. *Compare*

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Rust, 500 U.S. at 179-80, *with* 42 C.F.R. § 59.14(b)(1). Both place restrictions on the list of providers given at the same time as such referral to prevent Title X projects from steering women toward abortion. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.14(c). And both mandate that Title X projects remain physically separate from prohibited abortion activities. *Compare Rust*, 500 U.S. at 180, *with* 42 C.F.R. § 59.15. In fact, the Rule is less restrictive than the 1988 regulations—which prohibited any counseling on abortion as a method of family planning—in that it permits, but does not require, nondirective pregnancy counseling that may include the neutral presentation of information about abortion, so long as the counseling does not encourage or promote that procedure. *Compare Rust*, 500 U.S. at 179, *with* 42 C.F.R. § 59.14(b)(1)(i).

None of this is disputed. The relevant statutory text has not changed. And rather than overrule *Rust* (or even call it into question), the Supreme Court has repeatedly reaffirmed it. *See, e.g.*, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 216-17 (2013). The Secretary, therefore, acted lawfully in effectively readopting regulatory provisions already upheld by the Supreme Court, and Plaintiffs' suits should be dismissed.

II. Plaintiffs' Statutory Authority Claims Lack Merit.

A. The Nondirective Provision

Since its enactment, the Title X statute has broadly mandated in § 1008 that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. As the Secretary explained, if a program refers patients for—or otherwise promotes, encourages, or advocates—abortion as a method of family planning,

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

then the program, by definition, is one "where abortion is a method of family planning." 84 Fed. Reg. at 7759. The Supreme Court agreed that this is, at the very least, a "permissible construction"; indeed, it is by far the better interpretation of the plain text of § 1008, and the Court itself credited HHS's explanation that this reading is "more in keeping with the original intent of the statute." *Rust*, 500 U.S. at 187.

Plaintiffs do not provide an alternative interpretation of § 1008, under which a program that makes referrals for or otherwise promotes or encourages abortion is not a program "where abortion is a method of family planning." 42 U.S.C. § 300a-6. Instead, Plaintiffs attempt to sidestep the text of § 1008 and the Supreme Court's decision in *Rust* by concluding that the Secretary's restrictions on abortion referrals and counseling are no longer permissible in light of a clause in an appropriations rider.

That provision—which does not mention § 1008, referrals, advocacy, or *Rust*—did not silently eliminate Title X's authorization for these funding conditions. Plaintiffs' contrary conclusion cannot be squared with either the text of the rider or the presumption against implied repeals, which requires a "clear and manifest" intent to repeal a statute, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007), and "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). There is no indication that Congress had any intent—much less a "clear and manifest" one—to eliminate HHS's statutory authorization for these regulations through an appropriations rider that provides that Title X funds "shall not be expended for abortions" and

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

that "all pregnancy counseling shall be nondirective." Pub. L. No. 115-245, div. B., tit. II, 132 Stat. at 3070-71.

Start with the prohibition on abortion referrals. By definition, a doctor's *failure* to refer a patient for an abortion does not *direct* the patient to do anything. Plaintiffs cannot refute that fundamental point, and, in its prior analysis, this Court addressed only the Rule's requirement that patients be referred for prenatal health care, PI Order at 15. However, the existence of that separate requirement does not somehow render "directive" the mere prohibition of abortion referrals. This is especially true given that the prenatal-referral requirement is severable from the abortion-referral prohibition. *See* 84 Fed. Reg. at 7725; *cf. Massachusetts v. HHS*, 873 F.2d 1528, 1552-55 (1st Cir. 1989) (Torruella, J., concurring in part and dissenting in part) (concluding that prenatal referral requirement in 1988 regulations could be severed from the restrictions on abortion counseling and referral), *on reh'g en banc*, 899 F.2d 53 (1st Cir. 1990), *cert. granted, judgment vacated sub nom. Sullivan v. Massachusetts*, 500 U.S. 949 (1991). But there is no need to sever anything, because a prenatal-care referral likewise does not "direct" a patient to forgo obtaining an abortion—such care is necessary for the health of the mother *while* she is pregnant, as she by definition is at the time of the referral, regardless of whether she *later* chooses to obtain an abortion outside the auspices of Title X. *See, e.g.*, 84 Fed. Reg. at 7748, 7761-62; *see also id.* at 7750 (explaining that, because "pregnancy may stress and affect extant health conditions," "comprehensive primary health care may be critical to ensure that pregnancy does not negatively impact such conditions"). By contrast, when HHS wants a prenatal-care referral to lead to delivery, it knows how to say so, as the 2000 regulations illustrate. *See* 65 Fed.

Reg. at 41,279 (§ 59.5(a)(5) (requiring counseling and referral for "[p]renatal care *and delivery*" upon request) (emphasis added); *see also* Family Planning Amendments Act of 1992, S. 323, 102d Cong. § 2 (same).

Similarly, the restrictions on the list of providers are consistent with—and further—the nondirective provision by ensuring that the list is not used to "steer clients to abortion or to specific providers because those providers offer abortion as a method of family planning." *Id.* at 7747. The Secretary's authority to prohibit Title X projects from directly referring clients for an abortion as a method of family planning necessarily also includes the authority to take steps to prevent them from doing so indirectly.

In any event, the nondirective provision is limited to "pregnancy counseling," a term that does not apply to referrals, let alone with sufficient clarity to repeal § 1008 by implication. In the Title X program and in general, counseling and referrals are distinct. "[P]regnancy counseling" involves providing information about medical options, which is different from referring a patient to a specific doctor for a specific form of medical care. *See, e.g.*, 84 Fed. Reg. at 7716.

That much is clear from Congress's own words on the subject. When Congress wishes to regulate both "counseling" and "referrals" in this area, it knows how to do so. *See, e.g.*, 42 U.S.C. § 300z-10 ("Grants or payments may be made only to programs or projects which do not provide abortions or *abortion counseling or referral*.") (emphasis added); 18 U.S.C. § 248(e)(5) ("The term 'reproductive health services' . . . includes . . . *counselling or referral* services relating to the human reproductive system, including services

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

relating to *pregnancy or the termination of a pregnancy*.") (emphases added).[3] Most notably, when Congress tried (and failed) to overturn *Rust* through the Family Planning Amendments Act, it used language expressly requiring Title X projects to include "termination of pregnancy" within their "nondirective counseling and referrals." *See* S. 323, 102d Cong. § 2 (1991). The appropriations rider later passed in 1996, by contrast, requires only that "pregnancy counseling" be nondirective and says nothing about "referrals," much less referrals for "termination of pregnancy" (or "abortion") specifically.

For its part, HHS has similarly used "counseling" and "referral" as distinct terms in guidance and regulations concerning the limits of Title X funds on abortion-related activities. For example, both its 1981 guidelines and the 2000 regulations treated counseling and referral as separate activities: Title X projects were required to provide "nondirective counseling"—including on "[p]regnancy termination"—"and referral upon request." 65 Fed. Reg. at 41,279 (§ 59.5(a)(5)); *accord* 1981 Guidelines § 8.6; *see also* 53 Fed. Reg. at 2923 (explaining that the 1981 guidelines required providers to furnish "nondirective 'options couns[e]ling'"—including "on pregnancy termination (abortion)"—"followed by referral for these services if [the woman] so requests"). Similarly, the 2000 regulations discussed its "referral requirement" separately from its

---

[3] *See also, e.g.*, 42 U.S.C. § 300z-1(a)(4)(B) (defining "necessary services" to include "adoption counseling and referral services") *id.* § 1395w–22(j)(3)(B) (conscience exemption for coverage of "counseling or referral" services through Medicare Advantage managed care plans); *id.* § 1396u–2(b)(3) (same with respect to Medicaid managed care plans).

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

"counseling" ones, and even discussed counseling and referrals in two separate subsections. 65 Fed. Reg. at 41,275; *see id.* at 41,272-75. And when HHS eliminated the prohibition on abortion referrals in the 2000 regulations, it viewed the appropriations rider as directly applying only to counseling, not to referrals. *Compare* 65 Fed. Reg. 41,273, *with id.* at 41,275. If it were actually "clear and manifest" that Congress had repealed Title X's authorization to prohibit abortion referrals through the appropriations rider, *Home Builders*, 551 U.S. at 663, then presumably the Department would have said as much in 2000. Instead, HHS responded to the argument that suspension of the 1988 regulations was unlawful only by explaining that those regulations were "a permissible interpretation of the statute," but in the agency's view, "not the only permissible interpretation of the statute." 65 Fed. Reg. at 41,277. Instead, "the crucial difference between" the 1988 regulations and the 2000 regulations was "one of experience." *Id.* at 41,271. Despite discussing the directive in the appropriations rider that any "pregnancy counseling in the Title X program be 'nondirective,'" *id.* at 41,273, HHS never concluded that this language required suspension of the 1988 regulations.

Turning to the Rule's provision addressing counseling, this provision *allowing* Title X projects to provide "*nondirective* pregnancy counseling," 42 C.F.R. § 59.14(b)(1)(i) (emphasis added), is entirely consistent with the appropriation rider's requirement that "all pregnancy counseling shall be nondirective."

Although this Court did not issue a finding on this claim, Plaintiffs took issue with guidance in the preamble concerning the scope of authorized nondirective abortion counseling. *See* NFPRHA PI Mem. at 14, but their

objections fail multiple times over. For example, although HHS stated that, in light of § 1008, "abortion must not be the only option presented," 84 Fed. Reg. at 7747, the neutral presentation of other options in addition to abortion is not *directing* the woman to choose one of those options. Indeed, even under the 1981 guidelines, which required nondirective counseling, HHS believed it was "'professionally incumbent' upon the counselors to discuss other options with women who say they are only interested in abortions." Comptroller General, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* 16-17 (1982) (GAO Report). Nor does "discuss[ing] the possible risks and side effects to both mother and unborn child of any pregnancy option presented," 84 Fed. Reg. at 7747, direct a woman to forego an abortion, any more than discussing the potential risks of pregnancy to her own health directs her to obtain one. *Cf. Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 883 (1992) (joint opinion) (upholding similar informed-consent requirement and analogizing it to "require[ment] that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself"). And besides, even if these limitations were somehow "directive" when a woman seeks information solely on abortion, that would not justify dismissing the Rule's counseling restrictions as facially invalid, let alone doing so based merely on guidance that does not appear in the regulatory text.

At bottom, Plaintiffs appear to assume that, in requiring that pregnancy counseling be "nondirective," Congress also mandated that counseling on abortion be treated *equally* as counseling on carrying the child to term or adoption. But when Congress wants pregnancy options to be treated on an

"equal basis," it knows how to say so. *See* 42 U.S.C. § 254c-6(a)(1) (requiring grants for programs for "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"). The same is true when Congress wishes nondirective counseling to address specific options, as confirmed by the vetoed Family Planning Amendments Act. *See* S. 323, 102nd Cong. § 2 (requiring "nondirective counseling and referral on request" regarding (A) "prenatal care and delivery"; (B) "infant care, foster care, or adoption services"; and (C) "pregnancy termination"). Here, Congress simply required that "all pregnancy counseling shall be nondirective," and that narrow directive does not require "equal" treatment between childbirth and abortions—particularly where Congress previously excluded "programs where abortion is a method of family planning" from receiving funding, thus making clear that the Secretary has authority "to subsidize family planning services which will lead to conception and childbirth," while "declining to 'promote or encourage abortion'" through taxpayer dollars. *Rust*, 500 U.S. at 193. Again, even under the 1981 guidelines, which required nondirective counseling, HHS concluded counselors should "discuss other options with women who say they are only interested in abortions," but "[w]hen a woman is interested in continuing her pregnancy, . . . abortion should not be discussed." GAO Report 16-17.

Finally, if there were any doubt as to whether the appropriations rider implicitly and indirectly eliminated the Secretary's authority under Title X to issue the counseling and referral restrictions here, ordinary interpretive principles would make clear that it did not. Plaintiffs' claim reduces to the

remarkable conclusion that, in passing the appropriations rider, the 1996 Congress—the same Congress that passed the Coats-Snowe Amendment, barring governments from discriminating against providers that refuse, among other things, to refer for abortion, 42 U.S.C. § 238n—resurrected the vetoed Family Planning Amendments Act in different form, while simultaneously ordering that Title X funds "shall not be expended for abortions." Put differently, Congress would have needed to abrogate a high-profile Supreme Court decision; after it had tried and failed to do so expressly; in a clause that does not mention abortion, pregnancy, referrals, advocacy, § 1008, or *Rust*; and in a manner that was so subtle in effecting this transformational change that not even HHS recognized what had happened when it issued its 2000 regulations, concluding that it was permitted (but not required) to provide for abortion counseling and referrals.

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

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

(noting that under the 1981 guidelines, "the practice o[f] nondirective counseling has been the subject of widespread abuse, with many providers foregoing any balanced discussion of options in favor of pressuring women, particularly teenagers, into obtaining abortions").

Indeed, far from an attempt to abrogate *Rust*, the appropriations rider was a compromise measure offered in response to an effort to defund the Title X program—an effort driven in part by concerns that Title X clinics were pressuring teenagers to obtain abortions. *See* 141 Cong. Rec. H8248-62 (Aug. 2, 1995); *see also id.* at H8260 (Rep. Waldholtz) (relaying recent anecdote of a 16-year-old at a Planned Parenthood clinic). Accordingly, a sponsor of the rider promised that, under this legislation, "not a penny of [Title X] funds can be used to provide abortion services" and "[c]ounselors in these programs may not suggest that a client choose abortion." *Id.* at H8250 (Rep. Greenwood). At a minimum, this history undercuts the notion that the appropriations rider was simply a variant of the Family Planning Amendments Act.

Plaintiffs erroneously contend that the presumption against implied repeals does not apply because the Supreme Court had concluded in *Rust* that § 1008 is ambiguous. *See* Reply in Supp. of Wash. Mot. for Prelim. Inj. at 2, ECF No. 52; Reply in Supp. of NFPRHA Mot. for Prelim. Inj. at 2, ECF No. 51 (NFPRHA Reply). Before 1996, Title X had at a minimum delegated authority to the Secretary to issue the regulations at issue, and yet this Court concluded that the appropriations rider had stripped that authority away. *See* PI Order at 15. The congressional elimination of a statutory delegation of authority, however, is by definition a repeal, whether that delegation was an explicit or implicit one. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (statutory

ambiguity constitutes an "implicit" "legislative delegation to an agency"); *see also Home Builders*, 551 U.S. at 664 n.8 ("It does not matter whether [an] alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." (collecting cases)).

B. Section 1554 of the ACA

Plaintiffs' claims based on § 1554 of the ACA fare no better, and Defendants respectfully submit that this Court erred in concluding that Congress implicitly eliminated the Secretary's authority to enact the rule by enacting that provision. Captioned "Access to therapies" and located in the ACA's "Miscellaneous Provisions" subchapter, § 1554 provides that, "[n]otwithstanding any other provision of [the ACA]," the Secretary "shall not promulgate any regulation that" (1) "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care"; (2) "impedes timely access to health care services"; (3) "interferes with communications regarding a full range of treatment options between the patient and the provider"; (4) "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions"; (5) "violates the principles of informed consent and the ethical standards of health care professionals"; or (6) "limits the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 18114. Again, there is nothing in this language suggesting that Congress had any intent—let alone a "clear and manifest" one—to erase the Secretary's pre-existing authority to

adopt regulations that are materially indistinguishable from (if not less restrictive than) the ones upheld in *Rust.*

At the outset, Plaintiffs have waived any challenge to the Rule under § 1554. It is settled that "a party's failure to make an argument before the administrative agency in comments on a proposed rule bar[s] it from raising that argument on judicial review." *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). And it is undisputed that none of the 500,000-plus comments HHS received even invoked this statutory provision, much less argued that it eliminated the Department's authority to adopt requirements materially indistinguishable from ones upheld by the Supreme Court.

That should be the end of the matter. However, in its prior decision on Plaintiffs' preliminary injunction motions, this Court did not address this waiver. Contrary to Plaintiffs' contention, *see* NFPRHA Reply at 9-10, they cannot excuse their waiver by pointing to comments raising various substantive objections to the Rule, without expressly invoking § 1554. Preservation requires that the "specific argument" advanced must "be raised before the agency, not merely the same general legal issue." *Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam). Nor does it matter that Plaintiffs' arguments with respect to § 1554 go to the scope of HHS's authority to issue the Rule. Although "agencies are required to ensure that they have authority to issue a particular regulation," they "have no obligation to anticipate every conceivable argument about why they might lack such statutory authority." *Id.* A plaintiff can raise such "statutory arguments if and when the Secretary applies the rule" to them, *id.* at 399, but "the price for a ticket to facial review is to raise objections in the

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

rulemaking," *id.* at 401 (Williams, J., concurring), and it is uncontested that neither Plaintiffs nor anyone else did so with respect to § 1554.

The omission of any mention of § 1554 in the comments is unsurprising, as nothing in § 1554 abrogates Title X's authorization for the Rule. None of the Rule's provisions violates § 1554 because the Rule does not create, impede, interfere with, restrict, or violate anything. Instead, it simply limits what the government chooses to *fund* through the Title X grant program. As the Supreme Court explained in *Rust*, the Secretary's decision "to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy,'" but simply "leaves her in no different position than she would have been if the Government had not enacted Title X." *Rust*, 500 U.S. at 201-02. And that is true even if "most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services" outside of the Title X program. *Id.* at 203. Although repackaged as a statutory argument, Plaintiffs' argument that the restrictions on referrals and counseling violate § 1554 is substantively the same as the constitutional arguments rejected in *Rust*.

Indeed, accepting Plaintiffs' expansive construction of terms such as "creates," "impedes," or "interferes" to include a refusal to provide government subsidies would have dramatic consequences for Title X and the government's authority more generally. For example, under Plaintiffs' theory, HHS could not even adopt a regulation declining to provide Medicare coverage for a particular procedure, *see, e.g., Heckler v. Ringer*, 466 U.S. 602, 607 (1984), as such an action purportedly could "impede[] timely access to health care services" (and perhaps erect an "unreasonable barrier[] to the ability of individuals to obtain

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

appropriate medical care" as well). 42 U.S.C. § 18114(1)-(2). Plaintiffs' reading would effectively halt HHS from making even minor changes to the Title X program—or to many other programs—any time a provider or patient arguably was adversely affected. If Congress had in fact imposed such significant limitations on HHS's authority, it presumably would not have done so through generalities in one of the ACA's "Miscellaneous Provisions."

Even if this were a closer question, settled rules of statutory construction would dispose of Plaintiffs' theory. If Title X's specific delegation of authority to the Secretary to adopt the Rule somehow conflicted with the general directives in § 1554, "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). And more fundamentally, it is implausible that Congress tucked away an implied repeal of Title X's authorization for the Rule (and a silent abrogation of a high-profile Supreme Court precedent) in the mousehole of § 1554. That is particularly true given that § 1554 applies "[n]otwithstanding any other provision of *this Act*," 42 U.S.C. § 18114 (emphasis added), signaling that this provision may implicitly displace otherwise-applicable provisions *in the ACA*. That language does not, however, indicate that Congress meant to implicitly repeal *other, pre-existing statutes* such as § 1008 or § 1006 (allowing for promulgation of the rules) of the PHSA, especially since the ACA is littered with "notwithstanding" clauses that use the common phrase "notwithstanding any other provision of law." *E.g.*, 42 U.S.C. § 18032(d)(3)(D)(i); *see Maine Family Planning*, 2019 WL 2866832, at *17 (D. Me. July 3, 2019); *see also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When Congress includes particular language in one section of a statute but omits it in another,

this Court presumes that Congress intended a difference in meaning." (cleaned up)). And had Congress taken the dramatic step of implicitly repealing a controversial aspect of Title X in § 1554, one would expect that at least one of the more than 500,000 comments on the proposed Rule would have mentioned it.

C. Title X

Plaintiffs contend that, by promulgating the Rule, HHS acted in excess of its statutory authority under Title X. *See* Wash. Compl. ¶ 200; NFPRHA Compl. ¶ 188. NFPRHA adds that the Rule is "fundamentally inconsistent with Title X's purpose," NFPRHA Compl. ¶ 188, and the Court appears to have agreed in its ruling on Plaintiffs' preliminary injunction motions, *see* PI Order at 15.[4] These arguments, and the Court's conclusion, do not take into account § 1008's express limits on the Title X program.

---

[4] In its Order granting Plaintiffs' preliminary injunction motions, this Court also commented that the Rule potentially "violates Title X regulations." PI Order at 15. To the extent the Court was referring to Plaintiffs' argument regarding Quality Family Planning (QFP) guidelines, a guidance document issued by HHS, *see* Wash. PI Mem. at 32-34, that conclusion is incorrect. HHS continues to expect Title X providers to follow QFP guidelines to the extent they are consistent with the Rule. To the extent those guidelines conflict with the Rule, HHS acknowledged it was departing from its prior approach under the 2000 regulations, and the QFP guidelines in place at the time of the Rule did not (and indeed could not) substantively go beyond the 2000 regulations. *See, e.g.*, 84 Fed. Reg. at 7715.

Neither the central purpose of Title X nor HHS's authority under that statute has changed since Title X was enacted or since the Supreme Court in *Rust* upheld materially indistinguishable regulations and rejected a similar argument. *See* 500 U.S. at 188-89 (rejecting similar argument that the physical-separation requirement was inconsistent with Congress's "intent" to create "a comprehensive, integrated system of family planning services"). Nor does the Rule contravene Title X's requirement that services be "voluntary" in the sense that accepting family-planning services under the program "shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information." 42 U.S.C. § 300a-5; *see* NFPRHA Opp'n to Mot. to Stay at 6, ECF No. 73 (raising this argument in opposition to the government's stay motion). The Rule abides by this Title X requirement through 42 C.F.R. § 59.5(a)(2), which is unchanged from the 2000 regulations.

III. The Final Rule Is Not Arbitrary and Capricious.

Agency action must be upheld in the face of an APA claim if the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard of review, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) ("arbitrary and capricious" standard establishes a "high

threshold" for setting aside agency action, which is "presumed valid and is upheld if a reasonable basis exists for the decision"). The Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this deferential review—for the reasons Defendants previously explained in response to Plaintiffs' preliminary injunction motions, *see* PI Opp'n at 35-53, and for the additional reasons discussed below. This Court should, therefore, dismiss Plaintiffs' APA claims or grant summary judgment for Defendants on those claims.

Defendants respectfully submit that, in granting Plaintiffs' motions for a preliminary injunction, this Court incorrectly concluded that Plaintiffs had "presented facts and argument" that the Rule is arbitrary and capricious. PI Order at 15. This Court appears to have considered the prohibition on abortion referrals arbitrary and capricious when it indicated that Plaintiffs had presented evidence that the prohibition "would be inconsistent with ethical, comprehensive and evidence-based health care," and later indicated that the Rule was arbitrary and capricious because the agency allegedly did not consider "sound medical opinions," among other things. *Id.* Defendants respectfully disagree. Indeed, Plaintiffs fail to raise even a serious question about the reasonableness of the Secretary's decisionmaking.

To start, HHS expressly considered and responded to comments arguing that the Rule would force providers to violate medical ethics. *See* 84 Fed. Reg. at 7724, 7748. As HHS explained, Congress presumes that not referring for or promoting abortion is consistent with medical ethics, as evidenced by the many federal conscience statutes giving medical providers that option (medical providers who likewise believe they are not violating medical ethics). *See id.* at

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

7748; *see also id.* at 7716 (discussing statutes), 7746-47 (same), 7780-81 (discussing medical providers with conscience objections to counseling on or referring for abortion). If a doctor's failure to refer for abortion is actually a violation of medical ethics, it is unclear why "[f]ederal and State conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or administered programs (or, under State law, more generally)." *Id.* at 7748. It also unclear why Congress and many States have excluded abortion referrals in various publicly funded programs if medical ethics mandate such referrals. *See, e.g.*, 42 U.S.C. § 300z-10; Ark. Code § 20-16-1602; Cal. Health & Safety Code § 124180(b); Minn. Stat. § 145.925 subd. 1a; 72 Pa. Stat. §§ 1702-D, 1703-D; 42 R.I. Gen. Laws § 42-12.3-3(b); Va. Code § 32.1-325.A.7; Wis. Stat. § 253.07. HHS's view is entirely reasonable. Indeed, a Title X grantee that provides family planning services challenged the abortion-referral requirement in the 2000 regulations on the basis of statutory and constitutional protections for religious beliefs. *See Obria Grp., Inc. v. HHS*, No. 19-905 (C.D. Cal.) (voluntarily dismissed June 13, 2019).

Furthermore, as HHS explained, *Rust* upheld a nearly identical, but stricter, version of the counseling and referral restrictions, and the Secretary reasonably concluded that the Supreme Court would not have done so had the rule "required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards." 84 Fed. Reg. at 7748. Indeed, in the face of a dissent arguing that the restrictions violated doctors' ethical responsibilities, *Rust*, 500 U.S. at 213-14 (Blackmun, J., dissenting), the Court explained that "[n]othing in [the regulations] requires a doctor to represent as his

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

own any opinion that he does not in fact hold," *id.* at 200 (majority opinion). Given the limited nature of the program, the Court noted that the doctor-patient relationship in a Title X program is not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.* And because Title X "does not provide post conception medical care, … a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her." *Id.* Regardless, a doctor "is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Id.* The present Rule expressly gives providers that same option. *See* 42 C.F.R. § 59.14(e)(5) (provider may tell pregnant woman that "the project does not consider abortion a method of family planning and, therefore, does not refer for abortion"). Moreover, as HHS explained, and as the Supreme Court made clear in *Rust*, "section 1008 and its implementing regulations are simply 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. And the current regulations allow providers to provide nondirective counseling on all options, including abortion, so long as the counseling does not promote or encourage abortion. 42 C.F.R. § 59.14(b)(1)(i).

The Court also appeared to conclude that the Rule's physical and financial-separation requirements are arbitrary and capricious. The Court stated that Plaintiffs had "presented initial facts and argument" that the separation requirements "will more likely than not increase [Title X projects'] expenses unnecessarily and unreasonably" and that the agency did not adequately consider

"the economic and non-economic consequences" of the Rule. PI Order at 15. Here again, Defendants respectfully disagree.

At the outset, Plaintiffs do not challenge the financial-separation requirement, and acknowledge that § 1008 and the 2000 regulations already mandate financial separation. *See, e.g.*, Wash. PI Mem. at 11 (recognizing "the statute's financial separation requirement"); NFPRHA PI Mem. at 5 (acknowledging "the financial separation that already governs Title X"). The physical-separation requirement likewise is not arbitrary and capricious, and any suggestion to the contrary is in significant tension with *Rust*. 500 U.S. at 187. In its prior order, this Court implicitly dismissed HHS's determination that physical separation was necessary to address the risk and perception that taxpayer funds will be used to fund abortion—the same rationale approved in *Rust*. The Supreme Court, however, held that HHS's judgment about how best to comply with § 1008 was a reasonable basis for the same requirement. 500 U.S. at 187. As in *Rust*, HHS justified its policy with the explanation that the prior regulations "failed to implement properly the statute." *Id.* And HHS amply discussed and considered the reliance interests, comments received, and the previous approaches, ultimately "reaffirm[ing the] reasoned determination" it made in 1988. 84 Fed. Reg. at 7724. The court did not address or dispute HHS's conclusion that subsidizing abortion through collocation of Title X clinics and abortion clinics would violate § 1008.

Defendants also disagree with the Court's suggestion that HHS underestimated the compliance costs for incumbent Title X grantees. The Court appears to have credited Plaintiffs' own predictions of the effect on the Title X network instead. PI Order at 15-16. But HHS, which administers the Title X

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

program, is best situated to consider the potential effects on that program, and it expressly did so, considering the compliance costs on providers and the possibility that some incumbent providers might withdraw from the program. HHS simply made a different judgment than Plaintiffs, which it of course was permitted to do. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

In particular, HHS considered the assertion of commenters that some providers may withdraw from Title X in response to the Rule, but concluded that the agency could "continue to fulfill the purpose of Title X by funding projects sponsored by entities that will comply," noting that there "are already competing applicants to serve the same region" in a number of areas. 84 Fed. Reg. at 7776. That prediction has borne out, as HHS recently reallocated $33.6 million of funds relinquished from departing providers to 50 current Title X grantees throughout the country and expects this action "will enable grantees to come close to—if not exceed—prior Title X patient coverage." HHS Issues Supplemental Grant Awards to Title X Recipients (Sept. 30, 2019), https://www.hhs.gov/about/news/2019/09/30/hhs-issues-supplemental-grant-awards-to-title-x-recipients.html.

In addition, HHS predicted that the Rule may encourage new providers, previously deterred from participating in the program by the requirement in the 2000 regulations to provide abortion referrals, to enter the program. *See* 84 Fed. Reg. at 7780. As HHS explained, it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," *id.*, and it pointed to data showing that a substantial number of medical

professionals—and especially those "who work full-time serving poor and medically-underserved populations"—would limit the scope of their practice if conscience protections were not put in place, *id.* at 7781 n.139. Again, soon after the Court enjoined the Rule, a new network of providers filed suit to enjoin the 2000 regulations to permit it to participate in the Title X program. *See Obria*, No. 19-905 (C.D. Cal.). Accordingly, HHS reasonably did not "anticipate that there will be a decrease in the overall number of facilities offering services." 84 Fed. Reg. at 7782.

Nothing in the APA requires an agency to defer to the views of any particular commenter over the agency's own views. Rather, the agency must consider significant comments and provide a reasoned response. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Having considered the Rule's effects on incumbent Title X providers, HHS concluded that the Rule was necessary to comply with Title X notwithstanding those predicted costs. *See* 84 Fed. Reg. at 7783. That decision was not arbitrary and capricious simply because Plaintiffs disagree with HHS's predictive judgments or ultimate conclusion that the benefits outweighed the costs. To the contrary, an agency's predictive judgments "are entitled to particularly deferential review." *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009); *see also BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (Kavanaugh, J.) ("We owe substantial deference to an agency's predictive judgments") (cleaned up). And in any event, there is no authority for the extraordinary proposition that an agency administering a competitive grant program must either accede to the wishes of a subset of current grantees or identify in advance those entities who will take their place.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

For all the reasons above, and for the reasons Defendants explained in their opposition to Plaintiffs' motions for preliminary injunctions, Plaintiffs cannot prevail on their claim that HHS acted arbitrarily or capriciously.

IV. NFPRHA's Notice-And-Comment Claim Is Meritless.

NFPRHA claims that certain of the Rule's provisions are not the logical outgrowths of HHS's proposals in the NPRM. *See* NFPRHA Compl. ¶¶ 209-14. The Court should dismiss, or enter judgment for Defendants on, this claim.

A "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (citation omitted). To determine whether notice was adequate, courts ask whether a complaining party should have anticipated that a particular requirement might be imposed, and whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Envt'l Def. Ctr. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003). Here, all of the provisions NFPRHA cites were logical outgrowths of the proposals in the NPRM.

NFPRHA first claims that commenters lacked sufficient notice of the requirement in Section 59.14(b)(1) that nondirective pregnancy counseling come from physicians or Advanced Practice Providers (APPs). *See* Compl. ¶¶ 105-07. But any claim of inadequate notice with respect to this requirement cannot be sustained, as a district court in the Northern District of California recognized when considering this precise argument in a similar challenge to the Rule. *See California v. Azar*, 385 F. Supp. 3d 960, 1020-21 (N.D. Cal. 2019). HHS initially proposed to allow *only physicians* to provide either a list of providers to

patients or nondirective counseling. *See* 83 Fed. Reg. at 25,531 ("If asked, a medical doctor may provide a list of licensed, qualified, comprehensive health service providers (some, but not all, of which also provide abortion, in addition to comprehensive prenatal care)"); *id.* at 25,507 ("Recognizing [ ] the duty of a physician to promote patient safety, a doctor would be permitted to provide nondirective counseling on abortion."); *id.* at 25,518 ("[A] doctor, though not required to do so, would be permitted to provide nondirective counseling on abortion."). In response to comments, HHS decided to allow *both physicians and APPs* to provide nondirective counseling. 84 Fed. Reg. at 7761. HHS considered which types of health care professionals to include, and reasonably drew the line at APPs, who have "advanced medical degrees, licensing, and certification requirements." *Id.* at 7728 n.41. The APA requires nothing more. *See also California*, 385 F. Supp. at 1020-21.

NFPRHA next argues that HHS violated the APA by replacing the phrase "medically indicated" in Section 59.5(b)(1) with the phrase "medically necessary." Compl. ¶ 108. NFPHRA, however, fails to explain how this change makes any difference, except to point to alleged "additional uncertainty." *Id.* Indeed, under the applicable definition, to "indicate" means to "demonstrate or suggest the necessity or advisability of." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/indicate. Notice and comment was not required for HHS to implement this change in word choice.

Finally, NFPRHA takes issue with the types of providers who may be included on the list described in Section 59.14(b). *See* NFPRHA Compl. ¶ 111. HHS could not have been clearer in the proposed rule that *only* "comprehensive health service providers" could be on the list, *see* 83 Fed. Reg. at 25,531.

NFPRHA appears to object that the language in the proposed rule did not specify that "comprehensive health care service providers" must also provide primary care services. NFPRHA Compl. ¶ 111. But "comprehensive" means just that—"comprehensive" care, which necessarily includes primary care services. The Court should reject NFPRHA's notice-and-comment claim.

V. Plaintiffs Cannot Prevail on Their Constitutional Claims.

The Supreme Court in *Rust* held that the counseling, referral, advocacy, and program integrity provisions of the 1988 regulations (1) did not violate the First Amendment rights of program participants; (2) did not improperly condition funding on the relinquishment of a constitutional right; and (3) did not violate a woman's Fifth Amendment right to choose abortion. *See* 500 U.S. at 192-203. Plaintiffs nevertheless claims that the Rule both violates medical professionals' First Amendment rights and is unconstitutionally vague, and NFPRHA claims that the Rule violates the Due Process Clause of the Fifth Amendment. These constitutional arguments fail.

A. Plaintiffs' Speech and Association Claims Lacks Merit.

Plaintiffs contend that the Rule unconstitutionally "conditions eligibility for federal funding on the relinquishment of rights to speak and associate freely." Wash. Compl. ¶ 198; *see also* NFPRHA Compl. ¶¶ 218 ("The New Rule imposes restriction on expression and association . . . ."). This claim is foreclosed by *Rust*.

In *Rust*, the Supreme Court expressly considered the contention that the 1988 "regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and

accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." 500 U.S. at 192 (citation omitted); *see also id*. at 192-200. And the Court rejected it. *Id.* at 192-200. As the Court explained, the 1988 regulations simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded[,]" and the Constitution generally permits "the Government [to] choose not to subsidize speech[.]" *Id.* at 194-95, 200. In other words, medical providers within Title X projects remain free to refer for abortion outside the Title X project, but they cannot require the government to pay them for doing so. That is, a physician "employed by [a Title X] project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." *Id.* at 193-94. The same logic, not to mention *Rust*'s explicit holding, applies equally here and forecloses Plaintiffs' First Amendment claims.

B. Plaintiffs' Vagueness Claims Lack Merit.

Plaintiffs also cannot prevail on their claim that the Rule is unconstitutionally vague. *See* Wash. Compl. ¶¶ 200-03; NFPRHA Compl. ¶¶ 224-29. The Rule does not impose any penalties but instead sets conditions on government funding. And "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). Accordingly, the Supreme Court has upheld even "opaque" funding provisions that "could raise substantial vagueness concerns" had "they appeared in a criminal statute or regulatory scheme[.]" *Id.* at 588; *see also Planned Parenthood of Cent. & N. Ariz. v. Ariz.*, 718 F.2d 938, 948 (9th Cir. 1983) ("Our tolerance should be even

greater in a case, such as the one before us, where the consequence of noncompliance with the enactment is not a civil penalty, but merely reduction of a government subsidy.").

The Rule easily clears this lenient vagueness standard. Plaintiffs' vagueness argument boils down to a claimed confusion about when and how to apply the Rule in certain hypothetical situations. *See* Wash. Compl. ¶¶ 200-03; NFPRHA Compl. ¶¶ 224-29. But this argument does not get out of the starting gate: Because Plaintiffs mount a facial challenge, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a [regulation] when it is surely valid in the vast majority of its intended applications[.]" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted); *cf. Rust*, 500 U.S. at 195 (rejecting argument about hypothetical application of rule because the cases under review "involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation"). Indeed, even for criminal statutes, "a core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the [regulatory] margin." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019). And as in *NFPRHA v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006), Plaintiffs have "within [their] grasp an easy means for alleviating the alleged uncertainty[,]" namely, to "inquire of HHS exactly how the agency proposes to resolve any of the" purported ambiguities. *Id.* at 831.[5] Thus, even if the Rule, in hypothetical applications,

---

[5] HHS specifies in the preamble that contacting it about how to implement the program in compliance with the Rule is encouraged. *See* 84 Fed. Reg. at 7766.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

could possibly give rise to borderline situations, that does not render it impermissibly vague as a facial matter.

Plaintiffs therefore cannot prevail on their vagueness challenge. Indeed, the plaintiffs in *Rust* raised similar vagueness arguments, and the Supreme Court did not even bother to address them. *See* Brief for Petitioners, *New York v. Sullivan*, No. 89-1392, Brief for Petitioners at 45 n.48, 1990 WL 505760, at *45 n.48 (July 27, 1990) ("[T]he separation requirement, as well as the counseling, referral and advocacy ban are unconstitutionally vague. . . . A Title X project cannot know what is required or prohibited by the physical separation requirement or, for that matter, by the prohibitions against 'encouraging', 'counseling' or 'promoting' 'abortion as a method of family planning.'"). There is no reason why the vagueness arguments here should be taken more seriously.

C. NFPRHA's Claim that the Rule Unconstitutionally Interferes with Access to Abortion Fails.

NFPRHA also appears to argue that the Rule somehow violates the Constitution because it allegedly could "delay and impede [Title X funding recipients'] patients' access to abortion services by denying them referrals." NFPRHA Compl. ¶¶ 220-23.

Even where this process does not resolve a grantee's concern, there are procedures available to obtain clarity. *See* 42 C.F.R. § 59.10 (referencing 45 C.F.R. Part 75, which addresses remedies for noncompliance, and referencing the appeal procedures found in 45 C.F.R. Part 16). Thus, a grantee can work with the program to resolve concerns, and if there is an impasse leading to remedial action, a grantee may take appeals that can eventually proceed to federal district court.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

This claim is squarely foreclosed by *Rust*. There, the Supreme Court reaffirmed that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." 500 U.S. at 201. Under settled precedent, the government has no "affirmative duty to 'commit any resources to facilitating abortion,'" it "may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical decisions relating to childbirth but not to those relating to abortion,'" and such funding decisions "'place[] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" *Id*. (quoting *Webster v. Reprod. Health Servs*., 492 U.S. 490, 510 (1989), and *Harris v. McRae*, 448 U.S. 297, 315 (1980), and mentioning *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding state regulation denying Medicaid funding for nontherapeutic abortions)). In light of the "more extreme restrictions" it had previously upheld, the Supreme Court ruled that it would "strain logic" to hold that the 1988 regulations' "exclu[sion of] abortion-related services from a federally funded *preconceptional* family planning program is unconstitutional." *Id*. at 202. Because the limitations on Title X funding "leave[] a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all," the 1988 regulations did not "impermissibly burden a woman's Fifth Amendment rights." *Id*. at 201. The same is true as to the Rule, and therefore NFPRHA's claim fails.

CONCLUSION

For the foregoing reasons, the Court should dismiss these suits or, in the alternative, enter judgment in Defendants' favor.

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

Dated: October 7, 2019

JOSEPH H. HUNT
Assistant Attorney General

JOSEPH H. HARRINGTON
United States Attorney

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS
(DC Bar No. 988057)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-0878
Fax: (202) 616-8460
Email: Bradley.Humphreys@usdoj.gov

Counsel for Defendants