No. 19-1614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff-Appellee,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services, et al.,
Defendants-Appellants.

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

# REPLY IN SUPPORT OF EMERGENCY MOTION FOR REHEARING EN BANC TO VACATE STAY OF INJUNCTION

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## REPLY

The court should grant rehearing en banc. The Rule violates the Nondirective Mandate, enacted since 1996, and the Non-Interference Mandate, enacted in 2010. Defendants' continued reliance on *Rust v. Sullivan*, a case decided before Congress adopted either mandate, is mystifying and completely misplaced.

Defendants' Response clouds the issues. Defendants represent that the Rule is not in effect in Maryland. Resp.5. But HHS has told all Title X grantees, including Maryland, the opposite. *See* Reply.Add.14. Defendants state that it is unclear that Baltimore is suffering irreparable harm. Resp.7-8. But Baltimore's irreparable harms grow greater by the day. *See infra*. Baltimore is providing pre-Rule Title X care with its own money while patient lives are endangered and patient trust erodes.

The panel extinguished a carefully considered preliminary injunction without argument or an opinion and over a vigorous dissent. The Court should grant rehearing en banc and vacate the stay.

## I. THE RULE VIOLATES THE NONDIRECTIVE AND NON-INTERFERENCE MANDATES

### A. Neither the Nondirective Mandate Nor the Non-Interference Mandate Is Subject to the "Implied Repeal" Canon

*Rust v. Sullivan*, 500 U.S. 173 (1991), does not control the outcome of this case. *Rust* is a *Chevron* Step Two decision that held that § 1008 is "ambiguous." *Id.* at 184. It did not issue any holding regarding how § 1008 must or should be read, *see id.* at 184-87.

1. Neither the Nondirective Mandate nor the Non-Interference Mandate "impliedly repeals" any provision of Title X or subverts the holding in *Rust*. Resp.1,8-10,12. Later-enacted and more specific statutes "frequently" modify the meaning of ambiguous earlier statutes. *United States v. Fausto,* 484 U.S. 439, 453 (1988) (per Scalia, J.); *see* Scalia & Garner, Reading Law 330 (2012).

In fact, *Rust*'s holding that § 1008 is ambiguous supports Baltimore's case. The presumption against implied repeals is only triggered when two statutes irreconcilably conflict. *National Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007). "[W]hen two statutes are capable of co-existence," as they are here because of § 1008's ambiguity, "it is the duty of the courts, absent a clearly expressed

Congressional intention to the contrary, to regard each as effective." *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003). It is undisputed that the pre-Rule regulations, in effect since the 1970s, reasonably and lawfully interpreted § 1008 and did not violate the Non-Interference and Nondirective Mandates.

In the rulemaking HHS expressly stated that the Nondirective Mandate *does* govern its regulatory authority under Title X, *see, e.g.*, 84 Fed. Reg. 7745, 7777, and in three other rulemakings HHS has acknowledged that the Non-Interference Mandate constrains it as well. *See, e.g.*, 84 Fed. Reg. 23223-24; 83 Fed. Reg. 57551-52; 83 Fed. Reg. 57608.

2. Defendants' invocation of the "elephants in mouseholes" doctrine is similarly ridiculous. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Congress hardly "hid" two unambiguous restrictions on HHS's authority. One appears in the annual Title X appropriation; the other says that the "the Secretary of Health and Human Services shall not promulgate any regulation" that violates its provisions. These elephants are hiding in plain sight.

### B. The Rule Violates the Non-Interference Mandate Because It Conflicts With Its Unambiguous Text and the Non-Interference Mandate Argument Is Neither Waived Nor Subject to Waiver

The Rule violates the Non-Interference Mandate. The argument is neither waived nor subject to waiver. The Mandate's unambiguous text applies to grant programs and is not limited to the ACA.

1.a. The Non-Interference Mandate argument is not waived. An issue is preserved if the agency had an opportunity to address it in the rulemaking. *See 1000 Friends of Maryland v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001). Commenters need not raise an issue using precise legal formulations—raising the issue "implicitly" is enough. *See id.* at 228.

That standard is amply met here. *See California v. Azar*, No. 19-CV-01184-EMC, 2019 WL 1877392, at *19-21 (N.D. Cal. Apr. 26, 2019) (discussing waiver and collecting relevant comments). Commenters told HHS that HHS lacked statutory authority to promulgate the Rule. *See, e.g.*, HHS-OS-2018-0008-69480, http://bit.ly/2XVzLBN ("The Department has no statutory authority to dictate medical discussions between providers and patients, nor to dictate or require specific plans of care.").

Commenters also told HHS that the Rule would erect unreasonable barriers to care, impede timely access to care, interfere with doctor-patient communications, deny patients access to medically relevant information, and require doctors to violate medical ethics. *See, e.g.*, HHS-OS-2018-0008-30266, http://bit.ly/2Xl8Han (barriers); HHS-OS-2018-0008-198615, http://bit.ly/2VJantI (barriers); HHS-OS-2018-0008-179339, HHS-OS-2018-0008-179339, http://bit.ly/2ZjlEDt (denies information); HHS-OS-2018-0008-106624, http://bit.ly/2VS2Hpi (denies information); HHS-OS-2018-0008-188772, http://bit.ly/2Ul3L3p (unethical).

HHS even acknowledged that it had received many comments objecting that the Rule created barriers to patients' access to care, interfered with provider-patient communications, and violated principles of medical ethics. *See, e.g.*, 84 Fed. Reg. 7722-24, 7745.

Moreover, the Administrative Record specifically states that "HHS consulted upon" the Non-Interference Mandate, "to develop the draft and final rule," during the rulemaking process, Reply.Add.1; *see also* Reply.Add.2-13, and addressed it in three other recent rulemakings. *See* 84 Fed. Reg. 23223-24; 83 Fed. Reg. 57551-52; 83 Fed. Reg. 57608.

Thus, HHS was demonstrably aware of the Non-Interference Mandate during the rulemaking. Not only are agencies presumed to know the law that governs their conduct, in this case, HHS relied upon the Mandate in crafting a Rule that directly contradicts it.

1.b. The Non-Interference Mandate argument is not subject to waiver. "A purely legal question that this Court may answer without the benefit of the [agency's] expertise" is not subject to waiver. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 182 (4th Cir. 2018); *see also Sims v. Apfel*, 530 U.S. 103, 110 (2000) (per Thomas, J.) (waiver may be inappropriate in non-adversarial agency proceedings); *St. Marys Cement v. U.S. E.P.A.*, 782 F.3d 280, 288 (6th Cir. 2015) (per Sutton, J.) (waiver should not apply to significant rulemakings). Here, the only arguments that the Rule does not violate the Non-Interference Mandate are purely legal: (1) that the Mandate would constitute an implied repeal of *Rust*; and (2) that the Mandate does not apply to grant programs. HHS has no expertise relevant to those questions.

1.c. Under Defendants' understanding of the waiver doctrine, HHS could promulgate a Rule creating "death panels" that decide on the best course of medical treatment for patients and require doctors to withhold

medically relevant information from patients as a means of carrying out the panels' dictates, in direct contravention of the Mandate's purpose. *See* 111 Cong. Rec. 4198 (2010) (statement of Rep. Pascrell). Even if tens of thousands of commenters weighed in to argue that the panels would be illegal because they would violate medical ethics, impose unreasonable barriers to access, and interfere with doctor-patient communications, those arguments would be waived—and HHS's rule would be allowed to stand in perpetuity—if those commenters failed to explicitly reference § 1554. That cannot be right.

2. The Non-Interference Mandate applies to grant programs. The statute's unambiguous text forecloses the argument that it does not. Resp.11-12. A regulation just as readily "restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions," 42 U.S.C. § 18114(4), notwithstanding that its restriction is enforced by a threat to withhold grant funds. The same analysis applies to the Mandate's other provisions. *See id.*(1)-(5).

3. The Non-Interference Mandate's "notwithstanding" clause, as a matter of basic English grammar, does not limit the scope of the

Mandate. Defendants' argument—that a provision that actually broadens the Mandate "implicitly" narrows it—is incorrect. Resp.12. There is nothing implicitly narrowing about a clause that provides that the HHS Secretary "shall not promulgate any regulation that" violates medical ethics "notwithstanding" any other provisions of the ACA. *See* 42 U.S.C. § 18114.

4. The Rule's Separation Requirement plainly violates the Non-Interference Mandate. Baltimore made the argument, the court below ruled on it. Dkt.27-1,28; Dkt.15-1,227-28. Defendants err in suggesting that was not the basis for the injunction.

### C. The Rule Violates the Nondirective Mandate Because "Referrals" Are Part of "Nondirective Counseling"

1. The Rule violates the Nondirective Mandate. Counseling is giving advice; a referral is a type of advice. *See, e.g.*, Merriam-Webster Dictionary Online (2019); Oxford English Dictionary Online (2019); Black's Law Dictionary (10th ed. 2014). Judge Chen's exhaustive analysis in *California v. Azar*—showing that Congress, HHS, and the medical community all agree that referrals are part of counseling—is conclusive. *See* 2019 WL 1877392, at *16–19.

2. Barring abortion referrals violates the Nondirective Mandate. As HHS stated in the rulemaking, "[n]ondirective pregnancy counseling is the meaningful presentation of options." 84 Fed. Reg. 7716; *accord* JA199 (Wynia Decl.). A patient denied access to a medically relevant referral is not given a "meaningful presentation of options." Defendant's contrary arguments rely on a distorted understanding of what it means for counseling to be "directive." *See* Resp.9-10,11.

3. Referrals are part of nondirective counseling notwithstanding that Congress has protected referrals expressly in some unenacted statutes. Resp.10. "[U]nenacted legislation has no interpretative value." *United States v. Cooper*, 962 F.2d 339, 342 (4th Cir. 1992), *abrogated on other grounds by Johnson v. United States*, 529 U.S. 694 (2000). Defendants' Rule would require Congress to preserve surplusage in every bill it enacts to prevent a future court from unduly narrowing its plain meaning. The best explanation for Congress's decision to include "referrals" is this case—where an opportunistic HHS seeks to narrow the unambiguous reach of "nondirective counseling." *See, e.g.*, *M'Culloch v. Maryland*, 17 U.S. 316, 420-21 (1819) ("If no

other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts.").

## II. BALTIMORE IS SUFFERING IRREPARABLE HARM

### A. Baltimore Is Spending Its Own Money To Implement Title X Services In Accordance With The 2000 Rule

Baltimore cannot ethically comply with the Rule. Baltimore is spending its own money to implement Title X in accordance with the 2000 Rule.

### B. It Is Unclear Whether The Rule Is In Effect in Maryland

Defendants said on July 12 that "Maryland . . . is now the only place where the Rule is not in effect." Resp.5. But HHS told Maryland on July 15 that "HHS shall now require compliance with the Final Rule." Reply.Add.15. No one knows whether the Rule is in effect in Maryland.

### C. The Maryland Statute Defendants Cite Does Not Provide That Baltimore Will Be Reimbursed For the Title X Services It Is Currently Providing And It May Never Result In Reimbursement

Defendants cite a Maryland statute, Md. Code Ann., Health-Gen. § 13-3402 (2019), for the proposition that "it is not clear that the panel's stay is presently harming Baltimore." Resp.7-8. That statute provides that Maryland must reject Title X funds if Title X "does not require

family planning providers to provide a broad range of acceptable and effective medically approved family planning methods and services." *Id.*(f)(1)(ii). Defendants' admission that the Rule violates this provision is telling. Resp.7-8.

But § 13-3402 is not protecting Baltimore. No money is appropriated to fund § 13-3402 in this year's state budget (FY 2020), and that budget is already set. The Governor is not required to fund § 13-3402 until FY 2021. *See* Reply.Add.16 (mandatory approprations must be "enacted before July 1 of the fiscal year *which preceeds the fiscal [year]* to which the requirement applies" (emphasis added)); Reply.Add.18, 20,26-27 (same). FY 2021 does not begin until July 2020. Put another way, in Maryland a 12-month gap must separate a mandatory appropriation's enactment and its appearance in the budget.

Moreover, a mandate that the Governor fund a program requires only that he *propose to fund it*. The Governor can veto appropriations by line-item. *See* Md. Constitution, Art. II, § 17; art. III, § 52(2), (8). The Governor could strike funding for § 13-3402 in every future year. *See id.*; *Panitz v. Comptroller of the Treasury,* 232 A.2d 891, 893-95

(Md. 1967). Moreover, because the Governor must only propose the amount of funding that Maryland received in Title X funds during the prior year, Md. Code Ann., Health-Gen. § 13-3402(f)(1)(2) (2019), that amount will likely be zero. The statute requires Maryland to refuse Title X funds once the Rule goes into effect, *id.*(f)(1), so its Title X funding in the current fiscal year will likely be zero.

Thus, Baltimore, as Maryland's Title X subgrantee, is not assured of reimbursement for Title X services it is currently providing. The state has not budgeted funds for this purpose for this year and it might never do so.

### D. Baltimore Is Suffering Harms from The Withdrawal of Other Providers and the Implementation of the Rule

Baltimore is suffering additional irreparable harms. Even if § 13-3402 provided relief, which it does not, it does not cover all Title X providers in Maryland—only Maryland's subgrantees. Patient trust erodes every day that unprotected Title X providers engage in directive counseling. And the withdrawal and curtailment of services by other providers unprotected by § 13-3402 is devastating public health. Every missed cancer or sexually transmitted infection diagnosis, and every

unintended pregnancy resulting from the panel's stay is a tragic and irreparable harm.

## III. THE STAY CONFLICTS WITH *NKEN V. HOLDER* AND THE GOVERNMENT STILL HAS NOT COME FORWARD WITH AN IRREPARABLE HARM

The panel decision conflicts with *Nken v. Holder*, 556 U.S. 418 (2009). The Supreme Court has repeatedly and emphatically held, and this Court has recognized, that a showing of irreparable harm is *mandatory*. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21-22 (2008); *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 386 (4th Cir. 2017).

Defendants still have not stated an irreparable harm. Defendants do not dispute that the 2000 regulations are lawful and that Defendants have not "determined" that they are unlawful. Defendants do not dispute that any administrative burdens from the preliminary injunction are inconsequential. Defendants do not dispute that HHS will be able to readily implement the Rule once it goes into effect.

Instead, Defendants offer new speculation that the Rule will do more than the 2000 regulations already do to avoid the "risk" that federal funds will be used to promote or encourage abortion. *See* Resp.13. Not

only is that incorrect—as HHS found in 2000, 65 Fed. Reg. 41271, 41274—but Defendants' bare desire to change the fifty year status quo faster does not transform delay into *irreparable harm*. Against Defendants' non-harms, Baltimore's irreparable harms grow greater by the day.

## IV. THE SCOPE OF THE INJUNCTION WAS APPROPRIATE AND THE COURT BELOW WAS RIGHT TO ENJOIN THE ENTIRE RULE

Defendants' arguments regarding the Rule's severability and the injunction's scope are meritless and waived. Resp.14-16. In light of the centrality of the Gag Rule and the Separation Requirements, the rule is inseverable. *See Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393-94 (D.C. Cir. 1990) (relevant question is whether Rule would have been promulgated absent provision). And Defendants have waived the argument by refusing to identify any specific provisions that are lawful and severable with any clarity.

The injunction was appropriate and narrow. The court below determined that an injunction covering Title X providers in Maryland would be sufficient to protect Baltimore and its health system from irreparable harms arising out of the Rule. Pet.Add.36-37; Pet.Add.8.

The injunction clearly comports with Article III and equitable principles. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971); *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). If anything, the injunction was not broad enough to remedy all of Baltimore's harms.

## CONCLUSION

The Court should grant emergency rehearing en banc and vacate the stay order.

July 22, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply In Support of Emergency Motion for Rehearing En Banc to Vacate Stay of Injunction was filed electronically on July 22, 2019 and will, therefore, be served electronically upon all counsel.

s/ *Andrew Tutt*
Andrew T. Tutt

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), the undersigned counsel for appellee certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this brief contains 2,594 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Andrew Tutt*
Andrew T. Tutt

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1. README.txt

HHS-OS-2018-000 Public Comments Archive
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This DVD set contains an archive of public comments submitted in response to Notice of Proposed Rule Making, “Compliance with Statutory Program Integrity Requirements" Agency/Docket Number: HHS-OS-2018-0008

The submitted comments and their attachments are collated in PDF format, in 44 parts, named "01.pdf" through "44.pdf" in the "data" folder. A new part was started when the page count reached approximately 10,000 or the file size reached approximately 500MB, whichever limit came first.

The "master-index" files in the "data" folder contain a list of the comments. For each comment in the master index, the "Part" column tells you which PDF file contains the comment, and the "File" column contains a list of comment and any attachments for this record. To find a comment or attachment, open the correct PDF file given by the "Part" number and then navigate to the bookmark given by the "File" column.

"master-index.html" contains hyperlinks in the File column that take you directly to the correct bookmark in the correct PDF file, if your software is setup to handle these kinds of links.

A folder called "Studies" includes in a zip file the text of studies that HHS consulted upon to develop the draft and final rule.

If you received this archive on two DVDs, it is best to copy the "data" folder from both DVDs to a single workspace folder on your computer or file server, so you can keep the entire data set in one place.

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| | Source Description | Citation |
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| | **Proposed Rules, Notices, Memorandum** | |
| 1 | 1993 Title X Proposed Rule | Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 FR 7464 (Feb 5, 1993). |
| 2 | 2018 Title X Proposed Rule | Compliance With Statutory Program Integrity Requirements, 83 FR 25502 (proposed June 1, 2018) (to be codified at 42 CFR Part. 59). |
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PL 111-148, March 23, 2010, 124 Stat 119

UNITED STATES PUBLIC LAWS

111th Congress - Second Session

Convening January 05, 2010

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed
Vetoes are indicated by ~~Text~~ ;
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PL 111–148 [HR 3590]
March 23, 2010
PATIENT PROTECTION AND AFFORDABLE CARE ACT

An Act Entitled The Patient Protection and Affordable Care Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

<< 42 USCA § 18001 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Patient Protection and Affordable Care Act".

(b) TABLE OF CONTENTS.--The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I--QUALITY, AFFORDABLE HEALTH CARE FOR ALL AMERICANS

Subtitle A--Immediate Improvements in Health Care Coverage for All Americans

Sec. 1001. Amendments to the Public Health Service Act.

"PART A--Individual and Group Market Reforms

"SUBPART II--IMPROVING COVERAGE

"Sec. 2711. No lifetime or annual limits.

"Sec. 2712. Prohibition on rescissions.

"Sec. 2713. Coverage of preventive health services.

Sec. 1513. Shared responsibility for employers.

Sec. 1514. Reporting of employer health insurance coverage.

Sec. 1515. Offering of Exchange–participating qualified health plans through cafeteria plans.

Subtitle G--Miscellaneous Provisions

Sec. 1551. Definitions.

Sec. 1552. Transparency in government.

Sec. 1553. Prohibition against discrimination on assisted suicide.

Sec. 1554. Access to therapies.

Sec. 1555. Freedom not to participate in Federal health insurance programs.

Sec. 1556. Equity for certain eligible survivors.

Sec. 1557. Nondiscrimination.

Sec. 1558. Protections for employees.

Sec. 1559. Oversight.

Sec. 1560. Rules of construction.

Sec. 1561. Health information technology enrollment standards and protocols.

Sec. 1562. Conforming amendments.

Sec. 1563. Sense of the Senate promoting fiscal responsibility.

TITLE II--ROLE OF PUBLIC PROGRAMS

Subtitle A--Improved Access to Medicaid

Sec. 2001. Medicaid coverage for the lowest income populations.

Sec. 2002. Income eligibility for nonelderly determined using modified gross income.

Sec. 2003. Requirement to offer premium assistance for employer-sponsored insurance.

Sec. 2004. Medicaid coverage for former foster care children.

Sec. 2005. Payments to territories.

Sec. 2006. Special adjustment to FMAP determination for certain States recovering from a major disaster.

Sec. 2007. Medicaid Improvement Fund rescission.

Not later than 30 days after the date of enactment of this Act, the Secretary of Health and Human Services shall publish on the Internet website of the Department of Health and Human Services, a list of all of the authorities provided to the Secretary under this Act (and the amendments made by this Act).
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<< 42 USCA § 18113 >>

**SEC. 1553. PROHIBITION AGAINST DISCRIMINATION ON ASSISTED SUICIDE.**

(a) IN GENERAL.--The Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act (or under an amendment made by this Act) or any health plan created under this Act (or under an amendment made by this Act), may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.

(b) DEFINITION.--In this section, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

(c) CONSTRUCTION AND TREATMENT OF CERTAIN SERVICES.--Nothing in subsection (a) shall be construed to apply to, or to affect, any limitation relating to--

(1) the withholding or withdrawing of medical treatment or medical care;

(2) the withholding or withdrawing of nutrition or hydration;

(3) abortion; or

(4) the use of an item, good, benefit, or service furnished for the purpose of alleviating pain or discomfort, even if such use may increase the risk of death, so long as such item, good, benefit, or service is not also furnished for the purpose of causing, or the purpose of assisting in causing, death, for any reason.

(d) ADMINISTRATION.--The Office for Civil Rights of the Department of Health and Human Services is designated to receive complaints of discrimination based on this section.

<< 42 USCA § 18114 >>

**SEC. 1554. 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.
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<< 42 USCA § 18115 >>

**SEC. 1555. FREEDOM NOT TO PARTICIPATE IN FEDERAL HEALTH INSURANCE PROGRAMS.**

No individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act (or any amendments made by this Act), or in any Federal health insurance program expanded by this Act (or any such amendments), and there shall be no penalty or fine imposed upon any such issuer for choosing not to participate in such programs.

**SEC. 1556. EQUITY FOR CERTAIN ELIGIBLE SURVIVORS.**

<< 30 USCA § 921 >>

(a) REBUTTABLE PRESUMPTION.--Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.

<< 30 USCA § 932 >>

(b) CONTINUATION OF BENEFITS.--Section 422(l) of the Black Lung Benefits Act (30 U.S.C. 932(l)) is amended by striking ", except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981".

<< 30 USCA § 921 NOTE >>

(c) EFFECTIVE DATE.--The amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.

**From:** Foley, Diane (HHS/OASH) <Diane.Foley@hhs.gov>
**Sent:** Monday, July 15, 2019 4:05 PM
**To:** OS OPHS OPA (OPHS) <OPA@hhs.gov>
**Subject:** 2019 Title X Final Rule

Good afternoon,

We are looking forward to the next few days together. I am hoping to have the opportunity to meet most of you throughout the course of the meeting and hear firsthand about the excellent services you are providing to the clients in your project areas.

We are aware that many of you have been frustrated with the lack of guidance given to you regarding the 2019 Title X Final Rule that was posted earlier this year. The timing of the national grantee meeting will allow us to provide direction to you as well as hopefully answer your questions face to face rather than over the phone or on a webinar.

Attached please find the statement approved by HHS today. This will be explained in more detail during the national grantee meeting. We look forward to working with you to continue to provide quality family planning services to those clients who need it.

Sincerely,

Diane Foley MD, FAAP

Deputy Assistant Secretary

Office of Population Affairs

Office of the Assistant Secretary for Health/HHS

Phone: 240-453-2826 (office-direct)

OPA | OFFICE OF POPULATION AFFAIRS

Compliance With Statutory Program Integrity Requirements

Earlier this year, district courts in California, Maryland, Oregon, and Washington issued preliminary injunctions preventing the U.S. Department of Health and Human Services (HHS) from enforcing the March 2019 Final Rule, titled *Compliance With Statutory Program Integrity Requirements*. Among other things, the Final Rule ensures statutory compliance with Section 1008 of Title X, which states, "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning."

Motions panels in the Fourth and Ninth Circuit stayed the injunctions, but plaintiffs in the Ninth Circuit cases filed motions for an administrative stay of the Ninth Circuit's stay order. On July 11, 2019, an *en banc* panel of the Ninth Circuit denied those requests for an administrative stay and made clear that the order staying the injunctions remained in effect. By denying those motions, the *en banc* Ninth Circuit—along with the Fourth Circuit and a federal district court in Maine that recently denied another motion for a preliminary injunction—has made clear that HHS may begin enforcing the Final Rule. Consistent with those rulings, HHS shall now require compliance with the Final Rule.

As set forth in the Final Rule, compliance with the physical-separation requirements in the Final Rule is required by March 4, 2020, and the Rule's grant-application criteria will apply to the next competitive- or continuation-award applications due after July 2, 2019. The Final Rule established that compliance with the financial-separation requirements, and certain reporting, assurance, and provision-of-service requirements, was required by July 2, 2019. All other requirements were set to take effect on May 3, 2019, but the prior preliminary injunctions, including two nationwide injunctions, prevented HHS from enforcing those provisions.

Compliance with the requirements of the Final Rule, except for the physical-separation requirements, is therefore required as of Monday, July 15, 2019.

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January 13, 1994

Mr. William S. Ratchford, II, Director
Department of Fiscal Services
90 State Circle
Annapolis, Maryland 21401

Dear Mr. Ratchford:

This is in response to your request for advice of counsel concerning a mandated appropriation. In your letter, you asked if a 1992 law requires the Governor to include an appropriation for the State Reserve Fund in the Budget for Fiscal Year 1995. Although it has been suggested that the Governor could satisfy the requirement of the 1992 law by proposing a deficiency appropriation for Fiscal Year 1994, it is my view that that 1992 law clearly requires that the appropriation be included in the Budget for Fiscal Year 1995.

In 1978 the Executive Budget Amendment of the State Constitution was amended to allow the General Assembly to enact legislation requiring the Governor to include a minimum level of funding for a program in a future budget. Md. Const., Art. III, Sec. 52(11) and (12). Such a law must have been enacted before July 1 of the fiscal year which preceeds the fiscal to which the requirement applies. This office has understood that such a law must prescribe a dollar amount or an objective basis from which a level of funding can easily be computed. 64 Opinions of the Attorney General 108, 110 (1980). It has also been understood that the requirement that the Governor include an appropriation in the Budget does not preclude the General Assembly from exercising its constitutional power to strike or reduce the amount. 64 Opinions of the Attorney General 45, 50 (1980).

In the 1992 regular session the General Assembly enacted the Budget Reconciliation Act for Fiscal Year 1993. Ch. 269, Laws of Maryland, 1992. Section 12(b) of this law provided, as follows:

> "For Fiscal Year 1995 only, the Governor shall include an appropriation to the Revenue Stabilization Account of the State Reserve Fund established under §7-311 of the State Finance and Procurement Article, in an amount equivalent to the unappropriated general fund surplus as of June 30, 1993, including any revenues derived from the sales and use tax collected from out-of-state vendors for mail-order purchases made by consumers in the State (commonly referred to as National Bellas Hess sales). The amount appropriated under this section shall be in addition to any amount required to be appropriated under §7-311 of the State Finance and Procurement Article."

This provision of law took effect June 1, 1992. Sec. 38. Thus, this provision was enacted before July 1 of the Fiscal Year (1994) preceding the fiscal year to which it applies, i.e. 1995. Moreover, it specifically provides that the appropriation is to be made "for Fiscal Year 1995 only." Finally, it prescribes an objective basis from which the amount may be computed. Accordingly, there can be no doubt that it mandates the Governor to include the requisite amount in the Budget for Fiscal Year 1995. This requirement would not be satisfied if the requisite amount were included as a deficiency appropriation for Fiscal Year 1994.

Very truly yours,

Richard E. Israel

Richard E. Israel
Assistant Attorney General

REI:ss

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April 6, 2005

The Honorable John R. Leopold
213 Lowe House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Leopold:

I write to provide clarification of my letter of March 18, 2005 regarding House Bill 1015. The March 18 letter addressed, in part, the issue of when certain reimbursements from the State to the counties would be required under Tax Property Article § 9-104(a-1). The letter correctly noted that "HB 1015 would not require the Governor to include . . . funds as a deficiency appropriation in the Budget Bill now under consideration." However, the last sentence of the letter stated that "The deficiency appropriation would be in the fiscal year 2007 Budget Bill presented in January, 2006." That language may have created the impression that the deficiency appropriation would constitute a mandated appropriation for fiscal year 2006 under Article III, § 52(11) of the Constitution. Under § 52(11) the General Assembly may only mandate spending "by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date . . .". A deficiency appropriation proposed in the Fiscal Year 2007 Budget Bill would be designed to provide an appropriation in the Fiscal Year 2006 Budget, i.e., the Budget now under consideration. Under § 52(11), the General Assembly could not mandate that appropriation for Fiscal Year 2006 through a law enacted this Session. Thus, although the Governor may provide for a deficiency appropriation meeting the obligations of HB 1015 for Fiscal Year 2006 in the Fiscal Year 2007 Budget Bill, he is not be obligated to do so.

Sincerely,

Bonnie A. Kirkland
Assistant Attorney General

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# The Attorney General of Maryland

## Office of Counsel to the General Assembly

March 18, 2005

The Honorable John R. Leopold
213 Lowe House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Leopold:

You have requested advice concerning the application of Tax-Property Article(TP), § 9-104(a-1) to House Bill 1015, as amended by the Ways and Means Committee. Specifically, you have asked whether current § 9-104(a-1)(3) amounts to a funding mandate under the Maryland Constitution, Article III, § 52, and, if so, when the required reimbursement from the State to the counties would be effective.

House Bill 1015, as amended by the Ways and Means Committee, in part, alters the definition of "total real property tax" so as to modify the application of the limitation on the assessed value of a dwelling used for calculating the homestead property tax credit under TP, § 9-105. The effect of this change will be to increase, in some cases, the property tax credits granted by the counties.

Tax - Property (TP),§ 9-104(a-1) provides

(1) The homeowners' tax credit under this section is a State-funded program.

(2) It is the intent of the General Assembly that:

(i) the State shall appropriate sufficient funds to reimburse the full amount of tax credits granted under this section; and

(ii) the State, and not the local governments, shall bear the burden of any insufficiency of funds to fully reimburse the counties for property tax credits under this section.

(3) For any fiscal year, if State appropriations for reimbursement of tax credits under this section do not provide sufficient funds to fully reimburse the counties for tax credits granted under this section, the

> Governor shall include in the budget bill for the next fiscal year a deficiency appropriation to provide the additional funds to fully reimburse the counties.

Under the Executive Budget Amendment, the General Assembly may enact legislation which requires the Governor to include a level of funding for a program. Md. Const., Art. III, Sec. 52(11) and (12). However, the legislation must prescribe a dollar amount or objective basis from which the level of funding may be computed. 65 *Opinions of the Attorney General* 108, 110 (1980). Moreover, the legislation can apply to a particular fiscal year only if it was enacted before July 1 of the preceding fiscal year. *See* Sec. 52(11) and (12).

As the annual Budget Bill is considered before the property tax rate is even levied, the initial appropriation to reimburse the counties for the credit is necessarily an estimate. However, once the rate is levied, the individual tax bills are computed and the credit is applied, it can be determined whether the funds appropriated are sufficient to reimburse the counties for their loss of revenue. If there are insufficient funds, this can only be addressed in a deficiency appropriation. As the Governor's authority to include a deficiency appropriation in the Budget can be implied from his general responsibility for the States finances under the Budget Amendment, the limitations of that amendment are equally applicable, including the provision on mandated appropriations. Thus, because the level of funding needed to fully reimburse the counties can be determined with exactitude from objective criteria , it is my view that TP, § 9-104(a-1)(3) amounts to a funding mandate.

House Bill 1015 has an effective date of June 1, 2005, and applies to all taxable years beginning after June 30, 2005. Thus, it will apply during fiscal year 2006. If the appropriation for fiscal year 2006 is determined to be insufficient, under TP, § 9-104(a-1), HB 1015 would not require the Governor to include the needed funds as a deficiency appropriation in the Budget Bill now under consideration. This is so because the deficiency appropriation would be for fiscal year 2006, which begins July 1, 2005, and the bill would not have been enacted prior to July 1 of the preceding fiscal year, *i.e.* before July 1, 2004. The deficiency appropriation would be in the fiscal year 2007 Budget Bill presented in January, 2006.

Sincerely,

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April 3, 2019

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

***RE: House Bill 1407, "Budget Reconciliation and Financing Act of 2019"***

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1407, "Budget Reconciliation and Financing Act of 2019" ("BRFA"). While we approve the bill, we write to address three provisions that we believe raise concerns under the State Constitution's one subject requirement. Two of the provisions involve funding mandates, and although they do not result in any increase in State expenditures, we believe their inclusion in the BRFA is questionable. Moreover, to the extent that one of those provisions mandates a deficiency appropriation, we caution that mandating funding through a deficiency appropriation may be inconsistent with Article III, § 52. The third provision, which adds a notice requirement for certain projects to be included in the State's Consolidated Transportation Program ("CTP"), has only a tenuous connection to the State budget.

Though it is our view that these provisions are not clearly unconstitutional, we recommend that the General Assembly reenact the provisions next session to cure any potential constitutional defect.[1] If these provisions were challenged and a court were to find any of them unconstitutional, it is our view that each of the provisions would be severable from the remainder of the bill.

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

**The One Subject Requirement**

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." This constitutional provision traditionally has been given a "liberal" reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). At the same time, the liberal reading of the one subject requirement was "never intended to render the Constitutional requirement meaningless … ." *Delmarva Power v. PSC*, 371 Md. 356, 369 (2002).

Generally speaking, an act meets the one subject requirement if its provisions are "germane" to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). In this context, "germane" means "in close relationship, appropriate, relative, [or] pertinent." *Id.* Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject. For purposes of assessing how closely connected and interdependent the provisions of a bill may be, the "notions of connection and interdependence may vary with the scope of the legislation involved." *MCEA*, 346 Md. at 14 (quoting *Porten Sullivan*, 318 Md. at 407). Moreover, "a measure that begins life as a comprehensive one, and then has additional details inserted may survive a § 29 attack more readily than an originally narrow bill which becomes a very broad one." *Porten Sullivan*, 318 Md. at 407.

When analyzing the BRFA for compliance with the one subject requirement, this Office "generally has considered whether the various provisions of the bill deal with the single subject of balancing the budget and adjusting the finances of State and local government." Bill Review Letter on Senate Bill 187 of 2018; *see also* Bill Review Letter on Senate Bill 172 of 2014 (the purpose of the BRFA is "to balance the State operating budget and provide for the financing of State and local government"); Letter to William S. Ratchford, II from AAG Richard E. Israel, April 1, 1993 ("one-subject of adjusting the finances of State and local government").

As we noted in our bill review letter on last year's BRFA:

> The BRFA typically includes provisions that enhance revenues and reduce current and future year expenditures. These provisions often take the form of fund transfers, the elimination, reduction, or suspension of mandated spending, and revenue raising measures. Provisions that reduce revenues

> or increase State expenditures arguably run counter to the primary purpose of the BRFA, and the inclusion of such provisions in the BRFA raises constitutional concerns.

Given the historical purpose of the BRFA, we have consistently advised that funding mandates typically are not an appropriate subject for the BRFA. Bill Review Letter on House Bill 152 of 2017; Bill review Letter on Senate Bill 172 of 2014; Bill Review Letter on House Bill 147 of 2005. A BRFA provision that creates a new funding mandate or increases the amount of an existing mandate is the most difficult to defend, as the effect of the provision is counter to the primary purpose of the BRFA – to balance the State budget. Nonetheless, we have recognized that funding mandates are "more defensible" when they are legislative reactions to a budget action taken by the Executive, either in the Budget Bill or the BRFA. Bill Review Letter on Senate Bill 187 of 2018; Bill Review letter on House Bill 152 of 2017.

**Provisions in the 2019 BRFA**

This year's BRFA was initiated by the General Assembly in reaction to anticipated General Fund revenue write-downs following the submission of the Governor's budget. The Department of Legislative Services anticipated "a revenue write-down of about $200 million across fiscal 2019 and 2020." Fiscal Note on House Bill 1407 of 2019, First Reader. According to the Department of Legislative Services, a write-down of that magnitude would "require about $200 million of legislative actions, including $150 million of structural actions, to attain the Spending Affordability Committee goals." *Id.* The actual revenue write-down reported by the Board of Revenue Estimates amounted to a $138 million reduction for Fiscal Year 2019 and a $130.5 million reduction for Fiscal Year 2020.

As introduced, the BRFA included provisions that enhance special fund revenues and authorize certain special fund expenditures for the purpose of offsetting General Fund cuts; reduce mandated General Fund expenditures; reduce Fiscal Year 2019 General Fund appropriations; and enhance Fiscal Year 2020 General Fund revenues with certain projected and unappropriated "nonwithholding income tax revenues" that otherwise would have been deposited into a special fund.

As noted above, we have identified three provisions in the BRFA that raise concerns in light of the one subject requirement of Article III, § 29 of the Maryland Constitution, one of which also raises an issue under Article III, § 52 to the extent the provision mandates a deficiency appropriation.

*Mandated Funding for Cost-of-Living Adjustments in the Fiscal Year 2021 Budget*

Under current law, a portion of projected and unappropriated "nonwithholding income tax revenues" are to be deposited in the Fiscal Responsibility Fund ("FRF") at the end of Fiscal Year 2020, and at the end of each subsequent fiscal year, to the extent those revenues are not needed to support General Fund appropriations or to maintain a balance in the Revenue Stabilization Account ("RSA") at or above six percent of estimated General Fund revenues. State Finance and Procurement Article ("SFP") § 7-329.[2] The Governor must include in the Budget Bill for the second following fiscal year an appropriation equal to the amount in the FRF for public school capital projects, including projects at public institutions of higher education. SFP § 7-330(g) and (j). Thus, the Governor's budget submission for Fiscal Year 2022, for example, must include an appropriation for public school capital projects equal to the amount of nonwithholding income tax revenues, if any, that were deposited into the FRF at the end of Fiscal Year 2020 pursuant to SFP § 7-329.

The BRFA amends SFP § 6-104(e) so that, for Fiscal Year 2020, a greater share of projected nonwithholding income tax revenues is credited to the State's General Fund. The bill also amends SFP § 7-329 so that the nonwithholding income tax revenues not distributed to the General Fund are deposited in the FRF, rather than being allocated between the RSA and the FRF. It is our understanding that projected revenues to the FRF for Fiscal Year 2020 would decrease modestly as a result of these BRFA provisions.

The BRFA also amends SFP §§ 7-329 and 7-330 to provide that any nonwithholding income tax revenues allocated to the FRF at the end of Fiscal Year 2020 are to be used to fund a cost-of-living adjustment ("COLA") of up to 2 percent beginning July 1, 2020,[3] for permanent employees of the Executive Branch of State government who are in certain bargaining units. Pursuant to new SFP § 7-330(i)(3), the Governor must include in the Budget Bill submitted at the 2021 session an appropriation equal to the amount distributed

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[2] The RSA is one of four accounts that make up the State Reserve Fund, SFP § 7-309, and its purpose is to retain State revenues for future needs and reduce the need for future tax increases by moderating revenue growth, SFP § 7-311. Certain unappropriated nonwithholding income tax revenues not needed to support General Fund appropriations are to be deposited into the RSA until the balance of the RSA equals six percent of the estimated General Fund revenues for the fiscal year, after which any remaining nonwithholding income tax revenues are to be allocated between the RSA and the FRF. SFP § 7-329(b) though (d). "Nonwithholding income tax revenues" represent the State share of income tax quarterly estimated and final payments with returns made by individuals. SFP § 6-104(a)(1).

[3] July 1, 2020, is the start of State Fiscal Year 2021.

to FRF for the purpose of funding the COLA. The effect of these provisions is that the General Assembly has, for one year, replaced an existing funding mandate (for public school projects) with a new funding mandate of a slightly lesser amount (for State employee COLAs).

Although these provisions, collectively, result in a modest reduction of future mandated expenditures, the reallocation of funding does not serve the BRFA's primary purpose of balancing the State budget. The budget balancing is achieved by the amendment to SFP § 6-104(e), which results in additional estimated revenues accruing to the General Fund for Fiscal Year 2020. The reallocation of funding to State employee COLAs is independent of the amendment to SFP § 6-104(e), is not related to any other provision in the BRFA, and does not itself serve to balance the budget.

As we have noted before, funding mandates in the BRFA are the types of provisions that are the most difficult to defend. This position "is consistent with one of the underlying purposes of the one subject rule – to protect the Governor's veto power." Bill Review Letter on House Bill 152 of 2017. We recognize that the new funding mandate for employee COLAs, however, is more defensible given that it replaces an existing mandate and does not increase State expenditures. In light of this, it is our view that, although there is a legitimate question about inclusion of this provisions in the BRFA, the provision mandating funding for COLAs is not clearly unconstitutional under the one subject requirement of Article III, § 29.

We also write to comment on the funding mandate to the extent it requires the Governor to include funding for COLAs in the Fiscal Year 2022 Budget Bill as a deficiency appropriation for Fiscal Year 2021.

Article III, § 52 requires that the Governor, in January each year, submit to the General Assembly "a Budget for the next ensuing fiscal year." § 52(3). The budget "shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the estimated surplus or deficit of revenues at the end of the preceding fiscal year." *Id.* The Governor shall submit the budget to the presiding officers of each House, along with a Budget Bill containing all of the proposed appropriations of the budget. § 52(5). Thus, in describing the Governor's constitutional obligation to submit a budget and a Budget Bill, Article III, § 52 speaks to the budget plan for "the next ensuing fiscal year."

Subsections (11) and (12) detail how the Governor is to develop that budget plan. "For the purpose of making up the Budget, the Governor shall require from the proper State

officials … such itemized estimates … as directed by the Governor. An estimate for a program required to be funded by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date shall provide a level of funding not less than that prescribed in the law." § 52(11). The Governor has broad discretion to revise the spending estimates for State agencies, but the Governor may not reduce any estimate below the level of funding prescribed by a law "which will be in effect during the fiscal year covered by the Budget, and which was enacted before July 1 of the fiscal year prior thereto." § 52(12).

Based on these provisions, there is a legitimate argument that the Governor's constitutional obligation to "include a level of funding not less than that prescribed in … law" relates only to the spending estimates for the next fiscal year, and the General Assembly, therefore, cannot mandate that the Governor include in the budget submission a minimum level of funding as a deficiency appropriation. We note, however, that there are existing statutory provisions that require the Governor to include deficiency appropriations in the budget under certain circumstances. *See, e.g.,* Tax-Property Article § 9-104(b)(3) (requiring a deficiency appropriation to fully reimburse counties for the homeowners' tax credit if the initial appropriation is insufficient); Education Article §§ 16-305(e)(4) and 16-508(d) (requiring a deficiency appropriation under certain circumstances to support services at community colleges for students enrolled in an English for Speakers of Other Languages program). Moreover, we recognize that the long accepted practice of Governors including deficiency appropriations in the Budget Bill is not expressly authorized by Article III, § 52 but is essentially an implied power derived from the Governor's general responsibilities over State finances under that constitutional provision. As such, it can be reasonably argued that the limitations of the Executive Budget Amendment, including those involving mandated appropriations, are equally applicable to this implied authority to provide for deficiency appropriations.

Though we have reservations about the General Assembly's authority to mandate funding through a deficiency appropriation, for the above reasons we cannot say the BRFA provision, to the extent it purports to mandate a deficiency appropriation, is clearly unconstitutional.[4] However, to address any question about the provision's constitutional validity – under Article III, § 52 and the one subject requirement of Article III, § 29 – we recommend that the General Assembly reenact the provision through stand-alone

[4] We note that the BRFA provision does not contravene the timing restrictions regarding funding mandates in Article III, Sec. 52(11) and (12) because the provision does not mandate funding in the Fiscal Year 2020 budget.

legislation during the 2020 session for the purpose of funding a COLA in Fiscal Year 2022.[5]

*Town of Forest Heights Local Impact Funding*

A conference committee amendment to the BRFA alters the allocation of video lottery terminal revenues distributed as local impact grants under State Government Article ("SG") § 9-1A-31 by requiring the distribution of $120,000 to the Town of Forest Heights. While this reallocation of funding does not result in any increase in State expenditures, it does not serve the primary purpose of balancing the State budget. Moreover, it does not appear to be related to any other provision in the BRFA or to any action taken in the Budget Bill. While it is our view that the provision is not clearly unconstitutional, we believe its inclusion in the BRFA is questionable under the one subject rule. Accordingly, we recommend that the General Assembly reenact this provision through stand-alone legislation next session.

We also note that, pursuant to Article III, § 52(11) and (12) of the Maryland Constitution, the General Assembly may not mandate an appropriation for the next fiscal year - i.e., for the fiscal year that is the subject of the budget then under consideration. Accordingly, the amendments to SG § 9-1A-31 cannot establish a funding mandate for the next fiscal year, and the Governor, therefore, is not required to provide an appropriation to support the distribution to the Town of Forest Heights in Fiscal Year 2020, though it is our view that he may, in his discretion, authorize the distribution.

*Certification of Notice Requirement - Consolidated Transportation Program*

The third provision, which relates to the State's Consolidated Transportation Program ("CTP"), amends Transportation Article § 2-103.1(c)(6) to add an additional requirement for the inclusion of a major capital project in the construction program of the CTP. Specifically, it requires that an entity making a request for inclusion of a project provide a "certification that all members of the legislative delegation of the county in which the project is located have been notified."

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[5] Because the balance in the FRF will not be known until after the Fiscal Year 2021 budget is submitted, the FRF fund balance could not serve as a measure for establishing the prescribed amount of funding for the Fiscal Year 2021 budget submission. This is likely why the BRFA provision mandates the funding in the Fiscal Year 2022 budget submission as a deficiency appropriation for Fiscal Year 2021.

This provision does not serve the purpose of balancing the budget, and it is not related to any other provision in the BRFA or action taken on the Budget Bill. There is, of course, a general connection between the State budget and the BRFA provision in that the certification of notice requirement relates to projects for which an entity requests State funding. However, given that the purpose of the provision – to notify legislators of funding requests – is only indirectly related to the formulation of the budget, we believe the connection likely is too tenuous to satisfy the Constitution's one subject requirement. Accordingly, as with the other provisions highlighted in this letter, we recommend that the General Assembly reenact it in standalone legislation next session.

Sincerely,

Brian E. Frosh
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber