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Via CM/ECF

Ms. Patricia S. Connor
Office of the Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3538

Re: *Mayor and City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir.)
Response to Appellants' FRAP 28(j) Notice of Supplemental Authority

Dear Ms. Connor:

This letter responds to Appellants' February 27, 2020 letter regarding *California v. Azar*, slip op. (9th Cir. Feb. 24, 2020). The decision is unpersuasive, marred by errors, and inapposite.

1. To refer is to counsel. *Contra* Op.35-41. The Ninth Circuit's contrary, conclusion—that a doctor who provides a referral to a patient has not "counseled" that patient—is baffling. The court's *own* dictionaries—which it even quotes—define "counseling" as "advice" and "referral" as "directing … a patient … to an appropriate specialist or agency for definitive treatment." Op.36-37. And the court disregarded mountains of evidence showing that Congress and the medical community use those words the way the Dictionary defines them, *see e.g.*, Op.39-41 & nn.17-18.

2. Prohibiting abortion referrals (even if a patient asks for one), and mandating prenatal care referrals (even if a patient indicates she does not want one), is not "nondirective" counseling. *Contra* Op.41-48. The Ninth Circuit is incorrect that "nontherapeutic abortion is not a [medical] treatment option," Op.45 n.20, and that a patient denied material medical information by *their own doctor* (even secretly, as with the referral list) is not "coerced" thereby, Op.46 n.21. The Ninth Circuit overlooked entirely that a patient cannot receive an abortion referral even if the patient requests one. The Rule isn't even "nondirective" under the Ninth Circuit's interpretation. Op.48.

3. The Noninterference Mandate applies to the Rule's referral restrictions and Separation Requirement. *Contra* Op.49-57. The Ninth Circuit's conclusion that the Mandate does not apply where the HHS regulation imposes conditions on grant funding, is inconsistent with the Mandate's plain text and purpose. The Ninth Circuit ignored the

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Mandate's text and instead tried to mind-read Congress and enforce its unenacted (and nowhere evident) purpose instead. Op.55-57. The Ninth Circuit's reading eviscerates the Mandate. HHS is the largest grant-making agency in the United States. HHS does not engage in direct regulation of medical care. The Ninth Circuit's holding that the Mandate applies only to "direct regulation of certain aspects of care" is unquestionably wrong.

4. The Ninth Circuit's arbitrary and capricious analysis is unsound but also irrelevant to this appeal.

Respectfully Submitted,

By /s/ Andrew Tutt

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cc: all counsel (via CM/ECF)

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