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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. 20-1215 (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 has no application here.

The Administrative Record is essential in this case. The Ninth Circuit incorrectly resolved the arbitrary and capricious claims without the entire Administrative Record. Op.30-32 & n.11. The Administrative Record establishes that (1) the Rule requires medical providers to violate established codes of medical ethics; (2) there is no code of medical ethics under which the Rule's counseling restrictions would be considered ethical; (3) no professional medical organization of any kind takes the view that the Rule is consistent with medical ethics; (4) HHS had overwhelming evidence before it that numerous providers would withdraw from the Title X program and that their withdrawal would have severe negative repercussions for access to Title X services; (5) no evidence supported HHS's $30,000 cost estimate for the Separation Requirement; (6) no evidence supported HHS's conclusion that only 15% of providers (rather than 100% of providers), would be forced to comply with the Separation Requirement.

The Ninth Circuit also ignored—did not even mention—HHS's most egregious errors. HHS erroneously concluded that the Rule is consistent with medical ethics in the face of overwhelming contrary evidence, then failed to cite any evidence supporting its incorrect conclusion. The Ninth Circuit's discussion of medical ethics does not mention this clear error and instead substitutes the Court's own (erroneous) view of medical ethics. Op.75-77 & n.34. HHS also repeatedly incorrectly concluded that there was "no evidence"—*at all*—that the Rule would have adverse impacts on Title X services or Title X providers, 84 Fed. Reg. at 7749, 7775, 7780, 7785, when in fact it had overwhelming evidence of such impacts. The Ninth Circuit does not discuss this egregious error.

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Op.71-73. Finally, HHS underestimated the cost of the Separation Requirement for existing providers by at least $200 million by incorrectly concluding that the Separation Requirement would only apply to Title X grantees who provide abortions (rather than grantees that merely provide referrals). The Ninth Circuit did not address that error. Op.72 n.32.

Respectfully Submitted,

By /s/ Andrew Tutt

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cc: all counsel (via CM/ECF)

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