**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,<br><br>*Defendants*. | No. 1:20-cv-00361-CCB |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants respectfully respond to Plaintiffs' June 30, 2020 letter advising the Court of the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, No. 18-587, 2020 WL 3271746 (June 18, 2020). Although Plaintiffs argue otherwise, the Supreme Court's recent action does not suggest that the Department of Health & Human Services' ("HHS") current enforcement posture, stated in the preamble to the challenged Rule, is reviewable. Indeed, if anything, the *Regents* decision only underscores why the so-called "Opt-Out Policy" is unreviewable, unlike the rescission of the Deferred Action for Childhood Arrivals ("DACA") program at issue in that case.[1]

[1] Plaintiffs also claim that the Supreme Court's denial of certiorari in *Department of Homeland Security v. Casa de Maryland*, No. 18-1469, 2020 WL 3492650 (June 29, 2020), supports their position. *See* Pls.' Notice of Supplemental Authority at 2, ECF No. 55. However, as that Court has explained, the "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . ." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995).

In *Regents*, the Supreme Court stressed that "DACA is not simply a non-enforcement policy." 2020 WL 3271746, at *8. The Court explained that "the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief." *Id.* Under DACA, undocumented immigrants were designated "lawfully present," *id*. at *4; *see also id.* at *12 n.5, could obtain "work authorization," and were "eligible for Social Security and Medicare" benefits, *id.* at *8.

By contrast, the so-called "Opt-Out Policy" is exactly the sort of "passive non-enforcement policy" that the Supreme Court suggested would be unreviewable in *Regents*. HHS's enforcement posture does not create any sort of "program" for relief. As Defendants have explained, issuers remain obliged to comply with all relevant provisions of the ACA and the implementing regulations. *See, e.g.*, Defs.' Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. at 12-15, ECF No. 35-1. And States, of course, retain their primary enforcement authority to compel compliance. *See id*. at 12. Thus, unlike DACA, HHS's statement regarding its enforcement posture does not amount to a program conferring affirmative relief.

Dated: July 10, 2020

Respectfully submitted,

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