

Arnold & Porter

Andrew Tutt
+1 202.942.5242 Direct
Andrew.Tutt@arnoldporter.com

February 10, 2020

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.)
FRAP 28(j) Notice of Supplemental Authority

Dear Ms. Connor:

On January 27, 2020, the court below held a hearing on the parties' cross motions for summary judgment. In that hearing, counsel for the United States conceded that "no professional organization of any kind" takes the position that the Rule's referral restrictions are consistent with medical ethics. The exchange, in relevant part, is reproduced below:

THE COURT: Well, it depends in terms of my analysis in terms of whether it's arbitrary or capricious or not, I just want to make sure the record is clear here for the purposes of appellate review. There is literally nothing in the record from any professional organization of any kind that counters the argument, all those organizations I've just mentioned on medical ethics. Now if I'm not correct, Mr. Merritt, tell me. But you've not cited any. We looked through the record. I can find no record of any professional organization of any kind that has disputed the position taken by those organizations I've just mentioned with respect to the matter of the medical ethics. But if I'm wrong, tell me.

MR. MERRITT: No, you're right about that point, Your Honor.¹

The medical ethics issue in this case is not one where there exists a "majority" position and a "minority" position in the medical field. There is only one view: the Rule's referral restrictions violate medical ethics.

¹ The hearing transcript is also attached to this letter.

Arnold & Porter

Andre M. Davis
City Solicitor

Suzanne Sangree
*Senior Counsel for Public Safety &
Director of Affirmative Litigation*

CITY OF BALTIMORE
DEPARTMENT OF LAW
City Hall, Room 109
100 N. Holliday Street
Baltimore, MD 21202
443-388-2190
andre.davis@baltimorecity.gov
suzanne.sangree2@baltimorecity.gov

Stephanie Toti
LAWYERING PROJECT
25 Broadway, Fl. 9
New York, NY 10004
646-490-1083
stoti@lawyeringproject.org

Respectfully Submitted,

By /s/ Andrew Tutt
Andrew T. Tutt
Drew A. Harker
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 942-5000
andrew.tutt@arnoldporter.com

Priscilla J. Smith
REPRODUCTIVE RIGHTS &
JUSTICE PROJECT
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
priscilla.smith@ylsclinics.org

Faren M. Tang
REPRODUCTIVE RIGHTS &
JUSTICE PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT
faren.tang@ylsclinics.org

Counsel for Appellee Mayor and City Council of Baltimore

cc: all counsel (via CM/ECF)

enclosures

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Mayor and City Council)
Of Baltimore,)
)
vs.) CIVIL CASE NO. RDB-19-cv-1103
Alex Azar, et al.,)
)
)
Defendant.)
_____)

Monday, January 27, 2020
Courtroom 5D
Baltimore, Maryland

Motions Hearing

BEFORE: THE HONORABLE RICHARD D. BENNETT, Judge

For the Plaintiff:

Andrew Tutt, Esquire
Drew Harker, Esquire
Arnold & Porter

Suzanne Sangree, Esquire
City of Baltimore Law Department

Faren Tang, Esquire
Priscilla Joyce Smith, Esquire
Reproductive Rights and Justice Project, Yale Law School

For the Defendant,

Robert Charles Merritt, Esquire
Bradley Humphreys, Esquire
United States Department of Justice

Reported by:

Nadine M. Gazic, RMR, CRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201
410-962-4753

P R O C E E D I N G S

1
2 **THE COURT:** I want to thank you for agreeing to
3 start earlier on this matter in light of the fact I'm in trial
4 on another case.

5 This is calling the matter of Mayor and City Council
6 of Baltimore versus Alex Azar, Secretary of Health and Human
7 Services, et al. Civil number RDB-19-1103. And we are here
8 for a hearing on cross motions for summary judgment. If
9 Counsel will identify themselves for the record, please.

10 **MR. TUTT:** Andrew Tutt for the City of Baltimore.

11 **THE COURT:** Yes, Mr. Tutt, nice to see you. You
12 came over from Washington this morning, thank you.

13 **MS. SANGREE:** Suzanne Sangree, Mayor and City
14 Council.

15 **THE COURT:** Yes, Ms. Sangree, always nice to see
16 you. Good morning.

17 **MR. HARKER:** Drew Harker, with Arnold and Porter for
18 the city of Baltimore.

19 **THE COURT:** Yes, Mr. Harker, nice to see you as
20 well. And you came over from Washington as well, I believe,
21 so thank you. And there in the second row. Usually the
22 farthest away from the center has done the most work.

23 **MS. SMITH:** It's not true in this case, but
24 Priscilla Smith from Yale Law School, Your Honor.

25 **THE COURT:** Yes, Ms. Smith, I see that you came down

1 from New York, I believe?

2 **MS. SMITH:** That's correct.

3 **THE COURT:** Nice to see you here.

4 **MS. TANG:** Faren Tang, also from Yale for the City
5 of Baltimore.

6 **THE COURT:** Thank you. You came down from New
7 Haven; is that right?

8 **MS. TANG:** I did.

9 **THE COURT:** Nice to see you here. And on behalf of
10 the defendants?

11 **MR. MERRITT:** Yes, Your Honor. Robert Charles
12 Merritt from the Department of Justice.

13 **THE COURT:** Yes, Mr. Merritt, nice to see you. And
14 you came up from Washington or from Richmond actually? From
15 Richmond?

16 **MR. MERRITT:** Yes, Your Honor. I'm located in
17 Richmond, Virginia.

18 **THE COURT:** Nice to have you here.

19 **MR. HUMPHREYS:** Bradley Humphreys, Your Honor.

20 **THE COURT:** So main Justice in Washington, nice to
21 have all of you here.

22 Let me just go over a little bit of housekeeping.
23 And again, thank you for coming here and moving this up a
24 little earlier today as I'm in trial two, two-and-a-half --
25 civil trial. This is on cross motions for summary judgment

1 here. And as to Counts One and Two, it's all been very
2 thoroughly briefed, but quite frankly, it would appear that as
3 to Count One of the complaint, the complaint filed in this
4 case back in last April, Count One alleging a violation of the
5 Affordable Care Act's noninterference provision and Count Two,
6 alleging violation of the Consolidated Appropriations Act of
7 2018, it's a nondirective mandate, both of those were subject
8 to my granting of injunctive relief which has now been stayed
9 by the Fourth Circuit. And they're appending review here and
10 you all can just quickly update me on that, but it would seem
11 that as to those two matters, we sort of have an interweaving
12 of likelihood of success on the merits with a standard of no
13 generation of material fact. But I tend to think it's been
14 thoroughly briefed. And as to that, not much more can be
15 said. And I think, quite frankly, I have to sort of wait on
16 my ruling on that until there's a resolution of that appeal of
17 the stay.

18 So, is that correct from your point of view as well,
19 Mr. Tutt? I don't really see any reason to go plowing through
20 those fields at all.

21 **MR. TUTT:** Yes, Your Honor. We actually -- we
22 agree, although if the Court is prepared to enter Summary
23 Judgment on any of the claims, it might actually be useful to
24 the Court --

25 **THE COURT:** No, I'm going to rule forthwith pretty

1 quickly. It's just that --

2 **MR. TUTT:** But yes, you don't have to --

3 **THE COURT:** We have the benefit of -- meaning no
4 disrespect in any way, but we have the benefit of --
5 essentially the benefit of Judge Thacker's views and we really
6 don't have the benefit of Judge Richardson or Judge Rushing's
7 views, it just was a four-line order essentially granting the
8 motion for stay. And so that's what's before the Fourth
9 Circuit and I don't know how else we can address it.

10 Mr. Merritt, from your point of view, we just let
11 that lie, it is what it is and I really can't rule until
12 there's been a resolution of that from your point of view.
13 Isn't that correct?

14 **MR. MERRITT:** Yes, Your Honor. I agree that we
15 shouldn't get into the specifics of that. We agree that we
16 should await the Fourth Circuit's guidance.

17 **THE COURT:** It would seem to me that once the Fourth
18 Circuit rules on the issue of the appeal of the stay, that
19 depending upon how the Fourth Circuit rules or with what depth
20 it rules, I may or may not then be able to rule on the papers
21 with respect to Summary Judgment. Correct from your point of
22 view, Mr. Tutt?

23 **MR. TUTT:** That's correct.

24 **THE COURT:** Correct from your point of view, Mr.
25 Merritt?

1 **MR. MERRITT:** Yes.

2 **THE COURT:** And either one of you can advise how you
3 think it should be handled, but I'll be prepared to rule on
4 it. But where we are I think for this morning's purposes,
5 with respect to -- and Counts Four and Ten have previously
6 been dismissed, so we basically have eight counts left in
7 which to address, which taking out Counts One and Two for the
8 reasons we just indicated, we're down to six counts.

9 And specifically, the goal here this morning I think
10 is -- and if we have time, we'll get into the other counts,
11 the remaining counts, but I would like to if I can,
12 specifically address the claims in Count Seven and Eight of
13 the complaint with respect to the allegations of violations of
14 the Administrative Procedures Act with respect to the pending
15 motion specifically as to the issue of -- if you recall, as
16 I'm sure you all do, that as to those counts, I did not join
17 in a review of those in the context of injunctive relief as
18 some other Courts have, finding that that really was subject
19 to further discovery and review by me. So I was not prepared
20 to enter an injunctive relief with respect to Section 706 of
21 the Administrative Procedures Act. And my own view was that
22 the case law particularly out of this district and the Fourth
23 Circuit authority in Casa de Maryland versus United States
24 Department of Homeland Security 924 F.3d 684, a Fourth Circuit
25 opinion issued in 2019 has noted that the Court should engage

1 in a search and careful inquiry of the administrative record
2 before you can get there. So I just didn't see any basis to
3 provide -- no disrespect to others around the country -- I
4 didn't see any basis to provide or order injunctive relief
5 until we had an opportunity to review the record. But now
6 we're here after briefing and I've had an opportunity with my
7 staff to review the administrative record and we will address
8 that.

9 So what I'd like to do if we can, unless there's any
10 disagreement, is let's address the matters in Counts Seven and
11 Eight with respect to the arbitrary and capricious claims.
12 And with that, Mr. Tutt, I'll be happy to hear from you. You
13 can stand at the table, use the podium, or whatever is your
14 pleasure.

15 **MR. TUTT:** I'll stand at the podium.

16 **THE COURT:** That's fine. Whatever you want to do.

17 **MR. TUTT:** So we think the Court should enter
18 Summary Judgment in favor of the City of Baltimore because the
19 rule is arbitrary and capricious. We make five basic points
20 about why it is clearly arbitrary and capricious and I'd just
21 like to go through them.

22 **THE COURT:** That's fine.

23 **MR. TUTT:** So first, we think that the agency failed
24 to be shown an awareness of or explain its change in its
25 interpretation of the actual text of the nondirected mandate.

1 So the nondirected mandate claimed, the Court has already
2 held, violate the regulations contrary to that law. But in
3 2000, the agency had actually already expressed a view that
4 agreed with our position that the nondirective mandates,
5 nondirective counseling provision also included nondirective
6 referrals. And that is on page 65 of Federal Register 41273.
7 That's the 2000 rule's preamble. And there's a passage on
8 that page, in fact multiple passages, that show that the
9 agency is explaining that when it reads the nondirective
10 mandate and it says that mandate's nondirective counseling, it
11 always uses referral and says that it also requires
12 nondirective referrals. It says, Congress has repeatedly
13 indicated that it considers this requirement to be an
14 important one. And "this requirement" is referring back to
15 nondirective counseling and referral, earlier in the same
16 paragraph.

17 **THE COURT:** Well, the Health and Human Services in
18 the preamble does acknowledge that the 2000 regulations view
19 is contrary to the position they're taking here in 2019,
20 correct?

21 **MR. TUTT:** So there is no acknowledgement in the new
22 rule that they are changing their interpretation of the
23 nondirective mandate to not include referrals. So in 2000 --

24 **THE COURT:** Then as I understand it, Mr. Tutt,
25 didn't the preamble, didn't the department say, the department

1 no longer believes that the requirement is appropriate or
2 permissible because the referral requirement is in conflict
3 with federal conscience protections such as the church,
4 Coats-Snowe and Weldon amendments for individual and
5 institutional identities which object, meaning that they seem
6 to have acknowledged that they're changing their position.

7 **MR. TUTT:** Yes, but what they don't acknowledge or
8 they don't show an awareness of is that they once believed
9 that the nondirective mandate actually covered referrals. And
10 this is important because they read throughout the preamble,
11 they read the nondirective counseling provision to make -- to
12 impose the following requirement: If pregnancy counseling is
13 offered, it must be nondirective, because of the nondirective
14 mandate. So in other words, they do say that there's now this
15 conflict that referrals are in conflict, but they don't seem
16 to see that same conflict with counseling. They think that
17 the nondirective mandate permits them to -- that's a conflict
18 between the conscience statutes and the nondirective mandate
19 and they say that the nondirective mandate controls. So the
20 only issue is that they changed their view of what is
21 counseling. They went from saying that counseling --

22 **THE COURT:** And this was the point as I recall of
23 the Northern District of California, the California versus
24 Azar, this was exactly an issue that they directed injunctive
25 relief not only as I did on two points, but they picked up on

1 this as well, correct?

2 **MR. TUTT:** That's my understanding.

3 **THE COURT:** Yes.

4 **MR. TUTT:** So that is the crux of that argument, is
5 that they once understood counseling to be what we think it
6 must be based on just dictionary definitions, which is giving
7 advice about where to go for further treatment. That is a
8 form of counseling. The agency believed that and thought that
9 the nondirective mandate therefore covered that. And now
10 they've gone from believing that, to saying it never covered
11 that, but they didn't show any awareness that that
12 contradicted their earlier understanding of the word
13 "counseling" in a nondirective --

14 **THE COURT:** I guess the key language as to awareness
15 of a position is with respect to the Supreme Court's opinion
16 in 2016 in Encino Motor Cars essentially, that's the standard.

17 **MR. TUTT:** Yes, Your Honor, yes.

18 **THE COURT:** And your view is that there's not been
19 sufficient awareness on the part of the Department of Health
20 and Human Services. I may use the Department or the
21 Government interchangeably here as we're talking about this.
22 Is that agreeable with you, Mr. Merritt, if I say the
23 Government or Department, I'm referring to the defendants,
24 correct?

25 **MR. MERRITT:** Yes, Your Honor.

1 **THE COURT:** And that the rights don't show a
2 sufficient awareness of this change in the position to the
3 extent that you think would be necessary.

4 **MR. TUTT:** And the reason it's important, because
5 awareness is actually the predicate to what they are supposed
6 to do. So because what they then would say is even though the
7 dictionary says that counseling means advice about where to
8 get treatment or advice about your treatment, we believe that
9 there's a permissible -- they would go through an explanation,
10 a very process of thinking about why their former position was
11 incorrect and why their new position of a more constrained
12 version of the word "counseling" is a better interpretation.

13 So awareness is actually -- a failure to show
14 awareness means that there's no explanation. And that's
15 really what's lacking is that there's no explanation for why
16 counseling doesn't include referrals in the rule. They didn't
17 think they needed to explain that because they didn't -- they
18 weren't aware that they had taken the opposite position
19 20 years earlier.

20 **THE COURT:** And I get on this then in terms of
21 displaying an awareness that there's a changing position and
22 that there are good reasons for it, the preamble does say,
23 does it not, that the Department no longer believes that the
24 requirement is appropriate or permissible because the referral
25 requirement is in conflict with federal conscience protections

1 such as the church, Coats-Snowe and Weldon amendments for
2 individuals and institutional entities which object, which
3 would certainly seem to reflect an awareness of the change in
4 the landscape over the last 19 years, would it not?

5 **MR. TUTT:** Yes, Your Honor. We would say that they
6 knew that they showed that awareness, but the broader context,
7 they don't make the same point about nondirective counseling
8 itself. So it's this narrower point. In other words, later
9 on and throughout the rule they say if pregnancy counseling is
10 offered, it must be nondirective. And they say that's
11 required by the nondirective mandate. But those conscience
12 protections would be in equal conflict with the counseling
13 requirement. And so that's the crux of that claim and I don't
14 want to belabor it.

15 **THE COURT:** That's okay.

16 **MR. TUTT:** So let me move on. Because I think one
17 of the most audacious reasons that this is arbitrary and
18 capricious is that the agency concluded that the rule is
19 consistent with and does not violate medical ethics. And its
20 entire discussion of that is on two pages of the preamble,
21 7724 and 7748.

22 **THE COURT:** And essentially as I understand the
23 Government's position or the Department's position is that
24 essentially the basis of its position on the Rust opinion in
25 1988.

1 **MR. TUTT:** Yes, Your Honor. That's basically the
2 opening -- -

3 **THE COURT:** The Rust opinion, just for the record,
4 Rust versus Sullivan, 111 Supreme Court Reporter 1759 --
5 actually it's better cited, 500 U.S. 173, a 1991 opinion of
6 the Supreme Court.

7 **MR. TUTT:** Yes, Your Honor. And they infer from the
8 fact that the Rust Court did not vacate the rule or hold that
9 it was arbitrary and capricious, that the Supreme Court must
10 necessarily or implicitly have deemed the rule consistent with
11 medical ethics. But the Rust Court never discussed medical
12 ethics once. And we don't actually know whether that argument
13 about whether the agency had deemed it consistent with medical
14 ethics and inadequately explained its position was before the
15 Court. People can raise a variety of arbitrary and capricious
16 claims and if it wasn't raised, it wouldn't be decided. The
17 bigger point --

18 **THE COURT:** Well, there was a discussion, was there
19 not, in Rust versus Sullivan in dicta, the end of the majority
20 opinion where -- wait a second here. Oh, I should remember
21 who the author is. Yes, to Chief Justice Rehnquist
22 specifically noted there at the very conclusion of this
23 majority opinion that petitioners also argue that by
24 impermissibly infringing on the doctor/patient relationship
25 and depriving a Title 10 client of information concerning

1 abortion as a method of family planning, that those
2 regulations violate a woman's Fifth Amendment right to medical
3 self-determination and to make informed medical decisions free
4 of Government-imposed harm. So it did address it in the
5 context of self-determination, but not in the matter of
6 ethics, correct?

7 **MR. TUTT:** Yes, Your Honor.

8 **THE COURT:** And I'm just looking to look through
9 there because I know essentially the position of the
10 Government has been that the ethics issue was addressed in
11 *Rust* and the only other thing I can find is that the Chief
12 Justice Rehnquist referred to *Akron versus Akron Center for*
13 *Reproductive Health*, the Supreme Court opinion in 1983, 46
14 *U.S. 416* and then also *Thornburgh versus American College of*
15 *Obstetricians and Gynecologists*, 476 U.S. 747, 1986 opinion.
16 And Chief Justice Rehnquist noted there that critical to the
17 Court's decisions in *Akron* and *Thornburgh*, to invalidate a
18 Government intrusion into patient/doctor dialogue is the fact
19 that the laws in both cases require all doctors within their
20 respective jurisdictions to provide all pregnant patients
21 contemplating an abortion, a litany of information, regardless
22 of whether the patient sought the information or whether the
23 doctor thought the information necessary. But Chief Justice
24 Rehnquist did note in the *Rust* opinion that under the
25 secretary's regulations, however, a doctor's ability to

1 provide a woman's right to receive information concerning
2 abortion and abortion-related services outside the context of
3 Title 10 project remains unfettered. But he continued by
4 saying, that the Constitution does not require that the
5 Government distort the scope of its mandated program in order
6 to provide that information.

7 So that's the thrust of their argument, is that
8 certainly in dicta, it would appear that Chief Justice
9 Rehnquist felt that in the context of a mandated program, that
10 one could not be required to divulge that.

11 And I'll hear from Mr. Merritt or Mr. Humphreys in a
12 moment, but I gather that's the gist of it, that's the total
13 response of the Government?

14 **MR. TUTT:** Yes, Your Honor. And to make very clear
15 our position just to sum up, the agency may not have been
16 required to say that this was medically ethical, that this was
17 consistent with medical ethics. That may not have been
18 something that they were, but they said it was and it clearly
19 formed and because it was, it formed an aspect of why they
20 said that this rule was one that they would adopt. So when an
21 agency says something and they take it to be true and it's
22 false, that is arbitrary and capricious, you have to send it
23 back so the agency can know what the truth is and make the
24 right decision based on what the actual facts are.

25 Moving onto the third claim, they reached a clearly

1 erroneous conclusion about the likely consequences of the
2 rule. And this appears throughout the rule. And, in fact,
3 7719 has a great point about this, although you can almost
4 pick any part of the rule where they completely disregarded
5 any costs whatsoever arising from the rule in terms of impact
6 on providers, on patients, or on the program. So they say on
7 7719 the Department estimates no --

8 **THE COURT:** This is what would be called the
9 reliance interest?

10 **MR. TUTT:** The reliance interest. No cost
11 associated with removing the requirement for abortion
12 referral. The addition of a prohibition against abortion
13 referral will involve no additional monitoring costs as
14 current mechanisms are expected to be sufficient. So they say
15 we don't even have to consider the costs of prohibiting
16 abortion referral that we don't have -- they say that no
17 providers -- they don't believe any providers -- there's no
18 good evidence that any providers will leave the program. They
19 say that they don't believe that there will be any impact on
20 access to reproductive health care or contraception. And they
21 say things like "no evidence." They say things like "no
22 compelling evidence." Those are very absolute statements
23 about what they believe the record shows.

24 And so under Casa de Maryland and this Court's
25 advice, we went through the record and we found quite a lot of

1 evidence that was presented to the agency. Evidence in the
2 form of studies, evidence in the form of representations about
3 providers saying that because of the rule, they would leave
4 the program, that showed that there definitely was some
5 evidence, and we think actually compelling and overwhelming
6 evidence. And so the agency reached a conclusion that in fact
7 not only would there be no impact on the program, but it would
8 actually make the program better. Gaps in services would be
9 closed. More patients would be served. And they did this on
10 the basis of a mistaken belief that there was no evidence to
11 the contrary.

12 **THE COURT:** Well, they did refer in the face of the
13 comments you're talking about including I think the New
14 England Journal of Medicine review, the Government does cite
15 one comment from the Christian Medical Association which
16 suggested that new providers may enter the program to fill the
17 gaps in the services. So there was some response, correct?

18 **MR. TUTT:** There is a single letter cited in the
19 rule for the opposite view, but that would just be evidence on
20 the other side. Their declaration is that there is no
21 evidence that this sort of -- there's no weights on this side
22 of the scale, has nothing to do with the fact that there might
23 be one scintilla of evidence supporting their conclusion. So
24 it's the fact that they mistakenly believed there was nothing
25 to weigh it against that makes it clearly erroneous. And it's

1 their own statements made many times that there won't be any
2 impact on the program, there won't be any impact on women's
3 access or men's access to health care for that matter.

4 **THE COURT:** Do I understand correctly that as a
5 result of the limiting access to Title 10 care that among the
6 large number of providers who may be out of the Title 10
7 program, that Planned Parenthood of Maryland has now pulled
8 out of the Title 10 program; is that correct?

9 **MR. TUTT:** Yes, Your Honor. Planned Parenthood
10 National has pulled out of any Planned Parenthood provider
11 that received funds directly under the program.

12 **THE COURT:** So is it correct that in terms of
13 funding under Title 10, that as to Planned Parenthood in
14 Maryland, who we are going to have an issue here, we're going
15 to try to address this this morning before we finish with
16 respect to the matter of severability. And apparently this
17 has had a statewide impact here in Maryland; is that correct
18 or not?

19 **MR. TUTT:** Oh, yes, absolutely, Your Honor. The
20 impact has been statewide and nationwide.

21 **THE COURT:** And it's in effect now. They're not
22 taking funding right now as we speak; is that correct?

23 **MR. TUTT:** That's correct. In fact, they did exit
24 the program. Planned Parenthood exited the program, as did
25 many providers in multiple states. Basically what they said

1 in the rules, what they said in their comments would happen,
2 did happen and because all the preliminary injunctions were
3 stayed, the consequences that were represented to the agency
4 came to pass.

5 I want to just briefly touch on the other two points
6 which is that just in terms of the actual financial cost
7 analysis, they were all -- also it's demonstrable, arbitrary
8 and capricious.

9 **THE COURT:** In terms of physical separation.

10 **MR. TUTT:** Yes, physical separation. And this is
11 the \$30,000 one-time cost for 15 percent of providers in the
12 program.

13 As an initial matter, they say that their reasons
14 for imposing these draconian separation requirements are to
15 combat a perception of misuse of funds. But the statute says
16 that the only question of their statutory authority is to
17 limit it to preventing program providers from actually
18 providing abortion services as a method of family planning or
19 providing abortion as a method of family planning. So
20 combating perceptions in and of itself is sort of outside of
21 the interest. So the only other remaining interest is to
22 actually combat commingling would be their only other
23 interest. Except in the 20 years since the 2000 rule, they
24 point to not one provider that has ever commingled funds.
25 There has never been a demonstrated problem of commingling.

1 So on the one side of the ledger there wasn't even a reason to
2 adopt it. So we wanted to emphasize that. But what's
3 absolutely clear is that they didn't look -- they pulled a
4 financial cost number out of thin air.

5 And again, I think this goes to a broader problem
6 with the Government's briefs in this case which is an agency
7 can put a number in a preamble and say, we think this is the
8 right number. And then when, if they are sued --

9 **THE COURT:** The proposed rule had an estimate of
10 \$20,000.

11 **MR. TUTT:** \$20,000.

12 **THE COURT:** And now the Department of Health and
13 Human Services estimates it as \$30,000.

14 **MR. TUTT:** \$30,000. And after comments were
15 submitted, so they did the right thing. They had a proposal,
16 they had a number, they put it out there. They say, I think
17 it's about this and you get comments from the public. And
18 they say, you know, it's actually closer to \$625,000, just to
19 change the site.

20 **THE COURT:** Well, that's Planned Parenthood's
21 estimate.

22 **MR. TUTT:** Planned Parenthood's estimate. And there
23 were other providers that said, well, you know, just a record
24 keeping system alone, just changing the record keeping system
25 would easily be multiples of \$30,000. And these costs would

1 be ongoing because the separation requirement is not just a
2 one-time physical change to the provider, but it's actually we
3 need two different medical record keeping systems. We need
4 two different servers for our e-mail providers. We need two
5 different telephone numbers for the physician so that it
6 complies with this requirement.

7 **THE COURT:** I think that was the Family Planning
8 Council of Iowa made those submissions?

9 **MR. TUTT:** Yes, Your Honor, exactly. And so but the
10 agency -- we were curious to see what the agency's evidence
11 was which was presumably we thought in the administrative
12 record because, you know, they could just say, we think it's
13 30 thousand and then they could actually point to places in
14 the administrative record where there's evidence showing that
15 it should be, that that's a good estimate. But they didn't do
16 that. As far as we know, there is no basis at all for the
17 number of \$30,000. No basis at all. No evidence anywhere.
18 No comments are anywhere where it says that it should be
19 \$30,000. No study. They could have had a study to show this
20 is what it is. They just pulled it out of thin air. Truly
21 out of thin air.

22 And then they said it will only affect 15 percent of
23 providers because 15 percent of providers provide abortion
24 services on-site, in addition to Title 10 services. Except,
25 they secured dismissal of our vagueness challenge by telling

1 the Court that the referral requirement is the same as
2 providing abortion. In other words, if you make abortion
3 referrals, you need to separate that from your Title 10
4 services. But every provider under the 2000 rule was required
5 to make abortion referrals. Which means that it actually
6 applies to 100 percent of providers. Anyone who is in the
7 Title 10 program who previously made referrals for abortions
8 needs to comply with the separation requirement. That's just
9 because of their own interpretation, their own representations
10 about who provides abortions.

11 So they multiplied the \$30,000 one-time cost and
12 said it only would affect 15 percent of providers when, in
13 fact, it affects 100 percent of providers. That means their
14 estimate was six times too low. It was \$210 million too low,
15 based on their own numbers.

16 So this is just representative of the slipshod
17 analysis that undergirded this rulemaking. This is not a
18 final rule that can withstand even a soft look review, let
19 alone the hard look that this Court is obligated to give it.
20 It's inadequately reasoned. And frankly, it's unreasonable,
21 just objectively unreasonable which is why we have the two
22 claims. And so that's why we think it's arbitrary and
23 capricious.

24 **THE COURT:** And you want to be heard, there was a
25 fifth point?

1 **MR. TUTT:** Yes, Your Honor.

2 **THE COURT:** --about advanced practice providers?

3 **MR. TUTT:** The fifth point, yes. Thank you, Your
4 Honor. Which is they adopted -- and this is in Judge Chen's
5 opinion on the preliminary injunction and he explains it quite
6 well.

7 **THE COURT:** In California.

8 **MR. TUTT:** Yes, Your Honor, out of California. And
9 they adopted this restriction on who can actually engage in
10 pregnancy counseling and made it so that only physicians and
11 advanced practice providers which is a concept that they
12 created in the final rule, which are people who have advanced
13 degrees can engage in counseling, in nondirective pregnancy
14 counseling. So they sharply, sharply limited --

15 **THE COURT:** Well, they increased the level of
16 professional achievement educationally, but you really --
17 there's nothing in the administrative record that you've
18 presented as to that that makes that unreasonable. I
19 understand what your argument is, but it's probably the
20 weakest of your five arguments, would you not agree?

21 **MR. TUTT:** You know, Your Honor, there isn't -- it's
22 hard to -- yes. I would just say that it is not our strongest
23 of our five arguments, but I would say that it sort of -- the
24 Court is permitted to use common sense in analyzing whether
25 something is reasonable or unreasonable. And here they make

1 an argument or they make this restriction, they don't even say
2 why in the rule you need to have an advanced degree to engage
3 in counseling. And it's very difficult to understand why you
4 would.

5 **THE COURT:** Thank you very much, Mr. Tutt. And with
6 that, Mr. Merritt or Mr. Humphreys, I'll be glad to hear from
7 you. I think in the interest of time here as to the first
8 argument by the plaintiff with respect of the five arguments,
9 the matter of your prior interpretations and reversing
10 position and as to the fifth of the five, the advanced
11 practice providers, I don't think you need to spend a lot of
12 time on that. I understand what your argument is and I've
13 read your responses. I really would like to focus pretty
14 quickly on the second, third, and fourth arguments of the
15 plaintiff's here. And specifically with respect to if we can
16 in the interest of time, the matter of the medical ethics
17 point. So I'll be glad to hear from you on that. So as I
18 read the response of the Government, Mr. Merritt, I've looked
19 at -- we've taken time to look at the record here in terms of
20 the administrative records submitted by major medical
21 organizations and from the American Medical Association, the
22 American College of Obstetrics and Gynecologists, the American
23 College of Physicians, the American Academy of Family
24 Physicians, the American Academy of Nursing, the American
25 Academy of Pediatrics, all of them, all of them posed the

1 final rule as contrary to standards of medical ethics. And
2 the response essentially of the Government is that I know of
3 no professional organization that you cited that addresses
4 that. And your response is basically that this was dealt with
5 by Chief Justice Rehnquist in the Rust opinion and that's
6 basically your response, correct?

7 **MR. MERRITT:** I don't believe that's the full
8 response, Your Honor.

9 **THE COURT:** Let me go step by step. Have you cited
10 any professional organization of any import, anyone who has
11 taken a reverse opinion that notes as I summarized with
12 respect to the issue as to medical ethics and patient client
13 -- doctor/patient relationship?

14 **MR. MERRITT:** The Department did not cite any
15 professional organizations, but that is not required.

16 **THE COURT:** Well, it depends in terms of my analysis
17 in terms of whether it's arbitrary or capricious or not, I
18 just want to make sure the record is clear here for the
19 purposes of appellate review. There is literally nothing in
20 the record from any professional organization of any kind that
21 counters the argument, all those organizations I've just
22 mentioned on medical ethics. Now if I'm not correct, Mr.
23 Merritt, tell me. But you've not cited any. We looked
24 through the record. I can find no record of any professional
25 organization of any kind that has disputed the position taken

1 by those organizations I've just mentioned with respect to the
2 matter of the medical ethics. But if I'm wrong, tell me.

3 **MR. MERRITT:** No, you're right about that point,
4 Your Honor.

5 **THE COURT:** Basically your position if I'm not
6 mistaken, is that this was addressed in Rust versus Sullivan
7 and your review of Rust versus Sullivan supports the secretary
8 on this matter because you believe it was addressed in the
9 Rust opinion, right?

10 **MR. MERRITT:** Again, that wasn't the fullness of the
11 argument. The Department as opposing counsel noted,
12 addressed, commoners raised these concerns that the rule
13 violated medical ethics. The Department considered those
14 comments and responding to them. Federal register pages are,
15 you know, several columns long and it devoted attention to
16 those on a couple different pages. It did not cite only Rust,
17 although Rust is good evidence that the Supreme Court
18 considered similar arguments and rejected them, specifically
19 as noted in our briefs, but the dissenting opinion in Rust
20 pointed out very similar concerns that the 1988 regulations
21 would violate medical ethics. So it was an issue that was
22 considered and it was not deemed to make the rule, again,
23 under the appropriate APA standard, arbitrary and capricious.

24 The agency also pointed to the fact that there are
25 federal conscience statutes that recognize that certain

1 providers can refuse to provide certain abortion-related
2 services, counseling and referrals and be protected in that
3 action. And that therefore, the conclusion to draw from that
4 is that such activities would not be inconsistent with medical
5 ethics.

6 The Department also explained that properly
7 construed, the rule does not violate medical ethics because it
8 does not require doctors or Title 10 providers to provide
9 misinformation or to represent views that they do not hold.
10 They can provide nondirective pregnancy counseling, subject to
11 the limitations that are imposed by the statute here.

12 It's important to remember Section 1008 of the
13 Public Health Service Act prevents the big expenditure of
14 Title 10 funds on programs where abortion is a method of
15 family planning. And to the extent doctors' activities are
16 limited in that program, doctors are certainly free to say
17 that as the basis. So I do think that it's useful and I'm
18 certainly respectful for the time we have before Your Honor
19 and Your Honor's interest that I do think it's appropriate to
20 take the step back and look at the appropriate standards under
21 APA. And the Court's review is differential and is to
22 determine whether the agency is given a reasonable basis for
23 taking the action that is taken. It's not to dispute its
24 views in substantive conclusions for those the agency reached.

25 And so as a starting point, the Department was very

1 clear about the reason for the rule. And it was that it had
2 changed its interpretation of Section 1008 of the Public
3 Health Service Act.

4 **THE COURT:** In other words, it changed its
5 interpretation that it was clear in the 2000 regulations,
6 correct?

7 **MR. MERRITT:** Yes, exactly.

8 **THE COURT:** Because in the 2000 regulations they
9 clearly did recognize that medical ethics required
10 nondirective pregnancy counseling and referral, correct?

11 **MR. MERRITT:** I believe the 2000 rule acknowledged
12 certain medical organizations who made those representations
13 as to medical ethics. But again, the 1988 rule had the same
14 and even more restrictive restrictions on pregnancy counseling
15 or abortion counseling and referrals as this rule. And it was
16 upheld by the Supreme Court. And the Department did not in
17 2000 say that --

18 **THE COURT:** I want to give you an opportunity. This
19 is very important, Mr. Merritt, very important. We spent time
20 going through all this. I was very careful with respect to
21 injunctive relief. Again, no disrespect to other federal
22 judges around the country with respect to the issues as to --
23 essentially with respect to the earlier ruling here. I
24 specifically noted that with respect to the matter of
25 Count One, Violation of the Affordable Care Acts and Violation

1 of the Consolidated Appropriations Acts non-directive
2 mandating Counts One and Two and my awarding injunctive
3 relief. And I know the appeal to stay is still pending. And
4 again, we have a thorough response by Judge Thacker. I don't
5 just say it's thorough because she agreed with me, but I have
6 no idea what the basis of Judge Richardson and Judge Rushing's
7 opinion was. None. But that's on appeal, so we really can't
8 touch that. But I was very careful not to deal with the
9 issues in violation of the Administrative Procedures Act
10 because I thought it was rather quick-triggered, quite
11 frankly, before I had a chance to review the record. But now
12 we have. And I note that not only is the secretary taking a
13 position contrary to the interpretation of the 2000
14 regulations, but it did, it did catch my eye. Just so you
15 realize, we really read through this in the record here. And
16 I'm glad you confirmed, because we took great time to see if
17 there was any professional organization that in any way
18 rebutted the overwhelming authority on the medical ethics
19 issue. And there's none in the record, none.

20 I noted that the American Academy of Nursing had two
21 key phrases here and it's not the role of the Court to weigh
22 in on the political fray here, but the American Academy of
23 Nursing analysis, I was caught by two comments there, that the
24 following rule prioritizes ideology over evidence-based
25 professional recommendations. And then secondarily the

1 phrase, we urge health and human services to remain
2 religiously and morally neutral. And I thought they might
3 have been two of the most telling comments there in terms of
4 the emotion on both sides on this. And the notion of very
5 strong views one way or the other. And the reasons why the
6 analysis under the Administrative Procedures Act has to be
7 fairly undertaken. And we have. And I would, indeed, note
8 that the professional responses, the notion -- quite frankly,
9 the notion that essentially the issue with respect to the
10 matter of certain change in the landscape with respect to
11 certain interpretations with respect to certain ethical
12 considerations by religious groups, I was caught by the fact
13 that the American College of Obstetricians and Gynecologists,
14 the record reflects that 90 percent, 90 percent of all board
15 certified OBGYNs belonged to this organization. I don't think
16 there are 90 percent of the lawyers in America that belong to
17 the American Bar Association, but there are really 90 percent
18 of all board certified OBGYN professionals belong to the
19 American College of Obstetricians. And it's the leading
20 organization for services unique just to women, for medical
21 services. And that's among the group that have raised issues
22 as to ethics.

23 So I need to give you time on this because your
24 entire argument here, the entire argument of the Government on
25 this, putting aside any kind of change in landscape reviews

1 and the political winds that blow through this issue which I
2 think were very cogently noted by the American Academy of
3 Nursing, essentially it comes down to about six sentences in
4 Chief Justice Rehnquist's opinion in Rust versus Sullivan.
5 And as I read this, it is difficult for me to believe that
6 there was an in-depth analysis with respect to the medical
7 ethics issue here. It's Justice Rehnquist in dicta that says
8 the constitution does not require that the Government distort
9 the scope of its mandated program in order to provide that
10 information. But there was not a thorough analysis in Rust
11 versus Sullivan with respect to medical ethics. And I just
12 want to make sure the record is abundantly clear on that and
13 the dearth of arguments.

14 So why don't you just wind up on that because your
15 position is what it is. And I understand what your position
16 is. You don't need to restate it. I'm just telling you the
17 concerns that I have. So unless you want to address this any
18 further with me, I want to make sure we cover all the bases
19 here. You don't need to address two of the five arguments
20 raised by the plaintiffs, but there were two others I think
21 you should address as well, and they are the reliance interest
22 in terms of the abrupt change in agency policy and the matter
23 of accessibility of Title 10 services.

24 And with that, I would note that we not only have
25 evidence that Planned Parenthood has totally pulled out of the

1 program here in Maryland, but we have looking here at the --
2 I'm not sure if this was the American Academy of Nursing or
3 not, but there is at document 81-2 of the submissions here
4 which we've reviewed, projects the estimated impact on
5 contraceptive client case load among other types of Title 10
6 funded centers, if there were no Title 10 funded Planned
7 Parenthood centers. So that's just a 2015 estimate. But
8 apparently according to the chart here as to Maryland and I'm
9 just addressing Maryland, and it's document 81-2 filed on
10 November the 1st, it projects that there could be as much as a
11 64 percent increase in contraceptive client case load among
12 non-Planned Parenthood Title 10 funding centers. So it
13 certainly -- I want to make sure we also address this matter
14 of the reliance cost that may be attenuated here. And I'd be
15 glad to hear from on you that.

16 **MR. MERRITT:** Well, Your Honor, just one more point
17 on medical ethics.

18 **THE COURT:** Sure.

19 **MR. MERRITT:** I just want to make clear, whether or
20 not the rule is consistent with medical ethics is not
21 dispositive as to the question of whether the rule is
22 arbitrary and capricious under the APA standard of review.
23 The agency is required to provide a reasonable basis for
24 making the decision as it did here relying on the change of
25 statutory interpretation and that change as we know was

1 blessed by the Supreme Court. And it has an obligation to
2 respond to the significant comments that are raised through
3 the rule. And here the agency unquestionably addressed
4 concerns about medical ethics, it considered them and it came
5 to a different conclusion as to whether medical ethics would
6 be violated. And it also weighed the cost associated with
7 whether some providers would believe the medical ethics were
8 violated and it would leave the program against the benefit
9 that the agency identified in requiring compliance with the
10 statute as it had deemed -- its renewed interpretation of that
11 statute. So that, you know, through those actions the agency
12 satisfied its obligations under the APA. And the question is
13 not narrowly whether or not who has more evidence that the
14 rule is or is not consistent with medical ethics.

15 And I think that same type of analysis applies to
16 the arguments about the extent to which the agency considered
17 reliance interests and measured costs. The agency did do
18 those things. It took into account the concerns Congress
19 addressed, it weighed them and it responded to them. But
20 again, its primary basis for acting was its change in
21 statutory interpretation which the Supreme Court recognized in
22 Rust and other cases is an appropriate basis on which to
23 change course. And especially when you're dealing with a
24 statute like we have at issue here, Section 1008, that just is
25 a limitation on the extent to which federal funds could be

1 used in programs where abortion is a method of family
2 planning. It's not a statute that requires the agency to make
3 complex, technical, or scientific findings and so you would
4 not expect there to be a large factual record in order for the
5 agency to promulgate this rule. Indeed, that was the issue in
6 1988.

7 The question before the Supreme Court's analysis in
8 Rust on the arbitrary and capricious claim was fairly cursory.
9 It was only about a paragraph that concluded that it might
10 have the ambiguity of the legislative history and the language
11 that the Court was required to defer to the secretary's
12 permissible construction of the statute. And indeed, the
13 First Circuit case underlying Rust found that the report that
14 the Supreme Court cited -- and I don't want to get too
15 sidetracked here -- but the Supreme Court cited a couple of
16 reports: One by the Government accountability office and one
17 by the Office of Inspector General, but didn't place much
18 weight on them. And the First Circuit had called those a slim
19 read on which to uphold the rule, while still upholding the
20 rule. Supporting the contention that this is a rule that is
21 based on so long as the agency explained what it's doing, that
22 it's changing course and coming up with a new interpretation
23 of Section 1008, that would be a sufficient basis to change
24 course. And then so long as it addresses the comments that
25 were raised.

1 So on the comments about reliance and the cost of
2 compliance, the agency did weigh those costs and determined
3 that what was more important was consistent, you know,
4 consistency with Section 1008 as interpreted by the agency.
5 And that some activities that have been happening prior to the
6 new rule, such as referrals for abortion or colocation of
7 facilities would no longer be required, that that was an
8 adequate factual basis on which to take the action.

9 It's also important to note that the area of what
10 would happen under the new rule and what effect it would have
11 on providers leaving or impacts on patient health and what
12 would happen afterwards is an area of uncertainty which the
13 agency recognized in promulgating this rule. It was doing its
14 best to make an educated and in this case, expert guess as to
15 what certain effects and consequences would be. And those
16 were the kind of predictive judgments that a Court is required
17 to refer to the agency on under the APA standard of review.

18 Especially in a competitive grant process like
19 Title 10 where every year there's turnover, so it can be
20 difficult to predict, some grantees will leave, some others
21 will enter. And so the agency in this case was in the
22 position of exercising its expert judgment to make a
23 prediction about the likely effects and consequences. And
24 it's to those judgments that the Court is to defer to, not the
25 predictions that some commenters make.

1 Regarding Your Honor's point about the effects of
2 the rule such as certain providers actually leaving after the
3 rule went into effect, we would submit that's beyond the scope
4 of review under the Administrative Procedure Act which focuses
5 on the basis for the agency acting at the time the agency took
6 the action, whether that was reasonable. And it's not to then
7 second guess that judgment based on the actual effects that
8 postdate the rule.

9 So we would submit that Your Honor's review should
10 be limited to the administrative record which you've said
11 you've obviously taken a close look at and that would be the
12 basis for upholding the rule.

13 So unless Your Honor has further questions on the
14 arbitrary and capricious claims specifically --

15 **THE COURT:** No, I would just note that in terms of
16 as we sort of await the Fourth Circuit regarding more guidance
17 in terms of its position as to the Counts One and Two, if
18 Summary Judgment is entered with respect to Counts Seven and
19 Eight, these are cross-motions for Summary Judgment by the
20 way. Obviously we should remind ourselves. You moved for
21 Summary Judgment as well on all of these counts, correct?

22 **MR. MERRITT:** Yes, Your Honor.

23 **THE COURT:** If the Court were to rule in favor of
24 the plaintiff on Counts Seven and Eight, that in and of itself
25 joins the issue, does it not in terms of a final judgment

1 being entered and the vacatur of the secretary's position in
2 terms of its own appellate review track, does it not?
3 Regardless of the matters of the Affordable Care Act and
4 regardless with respect to the Congressional appropriations,
5 that in and of itself would trigger a judgment for the
6 plaintiff and trigger appellate review by the Fourth Circuit,
7 would it not?

8 **MR. MERRITT:** That sounds right, Your Honor. I
9 don't want to speak definitively.

10 **THE COURT:** That's a sense of where we are
11 procedurally. So thank you very much, Mr. Merritt, and I
12 apologize, Counsel, we could go another hour or two on this,
13 but I've got a jury trial I've got to get back to. But I'd be
14 glad to --

15 **MR. MERRITT:** Your Honor, one more as a final point.
16 I did just want to note that while we think it makes most
17 sense for Your Honor to rely on the Fourth Circuit's guidance,
18 if you do proceed to enter Summary Judgment as you mentioned
19 for the plaintiff --

20 **THE COURT:** I haven't said I'm going to do that.
21 The Fourth Circuit has had no review --

22 **MR. MERRITT:** I understand.

23 **THE COURT:** --from this Court as to the
24 Administrative Procedures Act because I haven't ruled. And
25 regardless of how anxious people might be for me to jump into

1 the fray, the Fourth Circuit has absolutely no jurisdiction as
2 we speak on the matter of the Administrative Procedures Act
3 until I rule, correct?

4 **MR. MERRITT:** Yes, Your Honor. I was just pointing
5 out if you were to rule on those claims and enter a judgment
6 as you were just discussing, we would just request that you
7 stay the effect of any such order pending appeal so that we
8 could avoid the need to consider seeking emergency appellate
9 relief.

10 **THE COURT:** I understand that. Thank you very much.
11 Thank you very much. And with that, Mr. Tutt, given
12 particularly I'm addressing the plaintiff's Motion for Summary
13 Judgment as to Counts Seven and Eight with some degree of
14 intensity, so obviously I'll be glad to hear from you if you
15 have any further comments you want to make.

16 **MR. TUTT:** Thank you, Your Honor and I know the
17 Court is short on time. I want to emphasize our first point
18 would be that if the Court is inclined to enter Summary
19 Judgment in favor of the plaintiff, that it do so
20 expeditiously. The compliance date for the separation
21 requirement is March 4th and the Courts in the Ninth Circuit
22 have actually reopened Summary Judgment briefing at the
23 request of the plaintiffs there.

24 **THE COURT:** On the APA matters?

25 **MR. TUTT:** Yes, Your Honor because --

1 **THE COURT:** Well, that's of some solace to me. It
2 means at least some of them out there took the approach that I
3 took initially.

4 **MR. TUTT:** Yes, Your Honor. Duly noted. And on the
5 merits, I just don't need to tell the Court this, but APA
6 review, hard look review, I mean, the central case is State
7 Farm and it says that an agency is not allowed to essentially
8 be factually wrong about the world, say that its reason for
9 action is something that is absolutely implausible and cannot
10 be ascribed to agency expertise and then reach its conclusion.
11 Here the agency could have said and we would be in a very
12 different place, the rule violates medical ethics. We agree,
13 but the program demands that it do so. But they didn't do
14 that. They said it doesn't violate medical ethics and then
15 said that's just another reason that we can adopt this rule
16 and there's no reason to wait. And we think that that is --
17 that is reason enough to deem the rule arbitrary and
18 capricious and send it back to the agency so that it can
19 actually make that judgment in the context of what is actually
20 true.

21 And then I just want to -- I just want to point out
22 that a remand to an agency, remands to agencies, vacancy
23 remand happens all the time. And agencies go back and they
24 open a new common period and they re-decide the question. And
25 the agency has acted as if it's cataclysmic, if the Court were

1 to vacate this rule, but it's far from cataclysmic. It's
2 actually very ordinary for a rule to be vacated and remanded
3 so the agency can make the right decision. Some rules have
4 been through the DC Circuit three and four times because the
5 agency continues to make some kind of mistake in how it
6 considers the issues. This is a rulemaking replete with
7 errors and, in fact, we would encourage the Court to really
8 give the agency guidance about how to go about re-crafting the
9 rule and so also reach our second and third and even first and
10 fifth arguments on arbitrary and capriciousness, so that the
11 agency knows sort of not blindsided. Our interest is to give
12 the agency an opportunity to come to the correct result based
13 on a correct view of the facts.

14 **THE COURT:** I just have two other questions here.

15 **MR. TUTT:** Yes, Your Honor.

16 **THE COURT:** Counsel, if anybody is waiting for the
17 next jury trial, we're going to get there as quickly as we
18 can, but this is important, obviously. This is why I adjusted
19 my calendar.

20 Mr. Merritt, let me ask you a question on this in
21 terms of the medical ethics issue and I'm really asking
22 because I'm not really sure, but I think I know what the
23 answer is. The gag rule that prohibits health professionals
24 from providing their patients with abortion referral
25 information even if patients directly request it, and the

1 issue of medical ethics and the doctor/patient relationship,
2 let me ask you this: Correct me if I'm wrong, but this
3 Title 10 program is the only federal program which is
4 dedicated for low income patients in family planning; is that
5 correct? I believe that's --

6 **MR. MERRITT:** Family planning, I don't believe it's
7 the only federal program for--

8 **THE COURT:** Well, in terms of Title 10 it is the
9 only federal program dedicated for low income patients,
10 correct? I believe that's the purpose of the statute and if
11 I'm wrong, tell me. Isn't it the only federal program
12 dedicated for low income patients, Title 10?

13 **MR. MERRITT:** I don't think that's accurate, Your
14 Honor. I think there are other --

15 **THE COURT:** Okay.

16 **MR. MERRITT:** I don't know for sure.

17 **THE COURT:** That's fine, that's a fair response.

18 **MR. MERRITT:** I believe there are other programs
19 that serve the general needs of low income families. I
20 believe, Your Honor when you stated that family planning
21 services for low income --

22 **THE COURT:** I mean in terms of low income patients,
23 but I have a question as to this. Let us say that under a
24 Title 10 program, it's receiving funds, a doctor determines
25 that there's a life-threatening situation with respect to that

1 pregnancy. And there may or may not be an immediate need for
2 consideration of abortion. There's a life-threatening issue
3 not only with the life of the fetus, to the life of the
4 mother. As I understand the gag rule, that physician is
5 barred from entering that kind of conversation, correct? And
6 I know Title 10 doesn't cover abortion. I know that. And
7 that's not the issue. But is that not the case that a doctor
8 would be precluded from addressing that issue or that topic
9 under the gag rule?

10 **MR. MERRITT:** There's an emergency exception, Your
11 Honor.

12 **THE COURT:** Could he or she then address the matter
13 of abortion under the emergency exception?

14 **MR. MERRITT:** I believe the exception is for --

15 **THE COURT:** Mr. Tutt?

16 **MR. TUTT:** The rule does have an exception for
17 emergency situations, but it's very unclear how emergency the
18 situation has to be. And that's been one of the big --

19 **THE COURT:** Well then both of you sort of answered
20 my question on that.

21 And then the last thing to address here is the
22 severability question because the Administrative Procedures
23 Act requires the Court set aside agency action that are not in
24 accordance with law, but the matter of whether or not the
25 order regulation is severable depends on the issuing agency's

1 intent as the cases have said. And I guess my question is the
2 plaintiff has argued that if this Court deems either the
3 rule's counseling restrictions or separation requirements or
4 both to be unlawful, then it should set aside the final rule.
5 And the defendant has suggested that if I were inclined to
6 grant Summary Judgment as to the plaintiff as to any of its
7 claim, the scope should be limited essentially. So just
8 quickly from your point of view, Mr. Tutt, what is your
9 position on this?

10 **MR. TUTT:** Your Honor, the rule is inseverable both
11 based on agency intent and it's just a question of would the
12 agency have undertaken this rulemaking and made this rule if a
13 critical piece was taken out of it. And we think that the
14 rule was really meant to operate as a single coherent hole and
15 given the low stakes of making sure a remand, let the agency
16 craft the new rule the way that it wants. And I would point
17 out that if, at least if the judgment goes down, the
18 separation requirement can't work without it. They cross
19 reference each other. So those two provisions have to go down
20 together and we think they take the rest down with them.

21 **THE COURT:** Mr. Merritt, do you wish to be heard
22 further on that?

23 **MR. MERRITT:** Your Honor, the agency made clear in
24 the preamble to the rule that it would prefer or that if Your
25 Honor were to find any provision of the rule in violation of

1 any provision of law that it allow Rust to go into effect.

2 **THE COURT:** I understand what your position is on
3 that. Thank you all very much. And again, I regret that I
4 had to weigh my very busy trial calendar in the last six or
5 seven weeks with my need to get into this. And that's why I
6 was determined to get you all before me. I want to thank all
7 of you for your very intense work on this. Mr. Tutt, nice to
8 have you here. Ms. Sangree and Mr. Harker and Ms. Smith and
9 Ms. Tang, it's nice to have you all here. Those that speak
10 less doesn't mean that they necessarily work less. And Mr.
11 Merritt, thank you very much for your arguments. Mr.
12 Humphreys, thank you for your work on this matter as well. I
13 always recall -- and my clerks hear me say -- I still recall
14 Chief Justice Winter one time in the Fourth Circuit when I was
15 down there arguing an appeal and I was ahead of the game and
16 didn't utter a word and he told me I had never been more
17 eloquent. So I don't want you to think we haven't read
18 everything you've written.

19 And with that, Madam Clerk, we're ready to proceed
20 with the jury trial in Younger versus Green and come get me as
21 soon as you're ready, Katina.

22 **(Proceeding concluded at 10:38 a.m.)**

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CERTIFICATE OF OFFICIAL REPORTER

I, Nadine M. Gazic, Registered Merit Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 1st day of February, 2020.

Nadine M. Gazic

NADINE M. GAZIC, RMR, CRR

FEDERAL OFFICIAL COURT REPORTER

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