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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*, Nos. 19-1614 & 20-1215
(4th Cir.) Response to Appellants' FRAP 28(j) Notice of Supplemental
Authority

Dear Ms. Connor:

This letter responds to Appellants' May 11, 2020 letter regarding the Ninth Circuit's denial of Circuit-wide rehearing en banc in *California v. Azar*, 950 F.3d 1067 (9th Cir. 2020). The decision is not relevant to the merits here. But it heightens the need to clarify that the district court's order vacating the Rule nullified it everywhere.

First, denial of "true" or "super" en banc in the Ninth Circuit says nothing about the merits of the underlying decision of a limited en banc panel. "Since the [Ninth Circuit] adopted its limited en banc procedure in 1980 ... a vote for a 'true' or 'super' en banc has ... never been successful." Ilya Shapiro & Nathan Harvey, *Break Up the Ninth Circuit*, 26 Geo. Mason L. Rev. 1299, 1315 (2019). Thus, contrary to Appellants' letter, the Ninth Circuit's decision neither "underscores that Baltimore's criticisms of the Ninth Circuit en banc panel's decision lack merit" nor "confirms that the Rule is reasonable as a matter of law." Dkt.146, at 1. It is precisely these kinds of inappropriate inferences from inapposite evidence that permeate HHS's Rule and require its vacatur.

Second, the Ninth Circuit's decision shows why Congress made *vacatur* the remedy for APA violations. The "limited" *vacatur* here leaves Baltimore "in a never-never land outside HHS's ongoing operation of Title X" and "thoroughly disrupts the national functioning of this unique federal family planning program." Amicus Brief of NPHRA, Dkt.141-1, at 19-20. And it paralyzes the State of Maryland. Without a true *vacatur*, it will be unclear going forward whether the Ninth Circuit's ruling governs Maryland or this Court's ruling does. Congress made *vacatur* the presumptive remedy for rulemaking violations to prevent precisely the kind of piecemeal regulatory conflict that the Ninth Circuit's flawed decision will otherwise create. *See id.* at 12-22.

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Respectfully Submitted,

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cc: all counsel (via CM/ECF)