

Arnold & Porter

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

June 15, 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*, 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' June 11, 2020 letter regarding the district court decision in *The Family Planning Association of Maine v. U.S. Dep't of Health and Human Services*, No. 19-100 (D. Me.). The opinion does not contain a single citation to the Administrative Record and incorrectly claims that how one views some of the arguments in this case "depends on ... what one's political leanings are." Op.13. The flaws in the decision are self-evident and indeed highlighted in Appellants' 28(j) letter.

First, the Supreme Court has *not* "already deemed [HHS's] rationale" for the Rule "acceptable and reasonable." No.19-1614, Dkt.149, at 1 (quoting Op. 11). The Supreme Court has never considered (and could not have considered) the three main challenges to the Rule's reasonableness. The Supreme Court has never considered whether HHS underestimated the cost of the Separation Requirement in this Rule by millions of dollars. The Supreme Court has never considered whether HHS overlooked evidence that this Rule would have negative impacts on patients and providers. The Supreme Court has never considered whether HHS acted unreasonably or explained itself inadequately when it concluded that this Rule is consistent with medical ethics even though literally every major professional medical organization disagrees and HHS's conclusion is not derived from any generally accepted source of medical ethics.

Second, the court's statement that HHS's decisions are "not arbitrary and capricious just because they are not preferred by industry experts," No.19-1614, Dkt.149, at 1 (quoting Op. 13), misstates the challengers' argument. Agencies violate the APA when they fail to draw reasonable conclusions from relevant evidence. HHS violated the APA because it inexplicably and unreasonably disregarded the views of every major

Arnold & Porter

professional medical organization. HHS's rejection of the consensus view of medical ethics in the United States was unreasonable (and, at minimum, inadequately explained) in light of *all* the evidence HHS had before it, not "just because" it was "not preferred by industry experts."

The district court's analysis of the statutory and constitutional claims in the case was similarly superficial and flawed.

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

Dana Petersen Moore
Acting City Solicitor

Suzanne Sangree
Director of Affirmative Litigation

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

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

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)