Case No. 19-15974 & 19-15979

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA,
Plaintiff-Appellee,

v.

ALEX AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
Defendants-Appellants.

ESSENTIAL ACCESS HEALTH, INC.; and MELISSA MARSHALL, M.D.,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-01195-EMC
Hon. Edward M. Chen

PETITION FOR INITIAL HEARING EN BANC OF APPELLEES ESSENTIAL ACCESS HEALTH, INC. and MELISSA MARSHALL, M.D.

MICHELLE S. YBARRA, #260697
JUSTINA SESSIONS, #270914
SOPHIE HOOD, #295881
SARAH SALOMON, #308770
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Plaintiffs-Appellees
ESSENTIAL ACCESS HEALTH, INC.
and MELISSA MARSHALL, M.D.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff Essential Access Health, Inc. discloses that it is a nongovernmental corporate entity. It does not have a parent corporation, nor is there a publicly held corporation that owns 10% or more of its stock.

s/Michelle S. Ybarra
MICHELLE S. YBARRA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION AND RULE 35 STATEMENT

On June 20, 2019, a motions panel of this Court issued an order staying the preliminary injunctions entered by three different district courts. These courts preliminarily enjoined enforcement of a new rule[1] governing the Title X program, which funds essential family planning medical care for at-risk communities. All three district courts found that the plaintiffs were likely to succeed on their claims that the Final Rule contravenes substantive laws and the Administrative Procedure Act ("APA"), and that the balance of the equities tipped sharply in plaintiffs' favor. All three courts found that millions of patients could lose access to necessary health care if the Final Rule were enforced.

The motions panel's order staying the preliminary injunction does the very opposite of maintain the status quo: it allows into effect a new regulation that changes decades of agency practice and that will dramatically and irreversibly diminish the quality and quantity of health care under the Title X program. In addition, the motions panel decided to publish its 25-page ruling, without the benefit of oral argument or even full briefing. Plaintiffs-Appellees ("Plaintiffs")

[1] 84 Fed. Reg. at 7788 (the "Final Rule").

anticipate that the Department of Health and Human Services ("HHS" or "Defendants") will argue that the motions panel's decision binds any three-judge merits panel. This means that the three judges empaneled to decide the *merits* of HHS's appeals from the preliminary injunctions may not be able to decide those merits at all, as they may be bound by the motions panel's published views on the issues. Such a result would subvert the Court's traditional review process. To the extent the stay order is precedential or the law of the case, only the en banc court can correct the motions panel's errors. *See Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) ("[T]he appropriate mechanism for resolving an irreconcilable conflict is an en banc decision."). Plaintiffs, therefore, seek initial hearing of this appeal en banc to ensure a full and fair consideration of the merits of HHS's appeal.

En banc review is necessary "to . . . maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). The motions panel departed significantly from existing Circuit precedent in two ways. ***First***, the motions panel fashioned a new-for-this-case method of balancing the harms from a temporary injunction and stay and, by doing so in a

published opinion, created an intra-Circuit split. The settled rule in this Circuit is that the balance-of-harms inquiry must be fact-specific and grounded in the actual evidence of harm before the court. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013). But in this case, the motions panel invented a new rule in which the purported harm to the government trumps all competing concerns so long as its lawyers assert that the challenged regulation has important policy implications.

Second, the motions panel abrogated the Court's obligation to examine the government's asserted injury, and instead improperly deferred to agency "expertise" on the balance-of-harms inquiry. Circuit precedent is clear that the balance-of-harms determination falls squarely under the equitable power of the Court, and that deference to agency "expertise" regarding the requirements for an injunction is an abuse of discretion. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011).

En banc consideration is also necessary here because this case involves an issue of "exceptional importance." Fed. R. App. P. 35(a)(2). The Final Rule would have a devastating impact on the quality and

availability of reproductive care for millions of low-income patients. The Final Rule prevents Title X providers from giving patients neutral, factual information about abortion and imposes draconian physical and financial separation requirements on providers that would offer counseling, referral, and services outside a Title X program using non-Title X funds. As the district court found after reviewing an extensive record, the Final Rule would decimate California's Title X program and drastically limit patients' access to vital care—factual findings the motions panel summarily dismissed instead of properly reviewing for clear error. En banc intervention is necessary to prevent the imminent harm to Plaintiffs that will result if the Final Rule is implemented.

For all of these reasons and as explained further below, the en banc court should hear this appeal, rather than first committing it to a three-judge panel that could be bound by the motions panel's erroneous views on the merits.

II. STATEMENT OF THE FACTS AND THE CASE

A. The Title X Program

The federal government's Title X program is a critical part of the nation's public health safety net, subsidizing high-quality family

planning services for low-income individuals. C.SER 502-503.[2] Hailed by the Centers for Disease Control and Prevention as one of the greatest public health achievements of the twentieth century, Title X has successfully reduced rates of unintended pregnancy by facilitating contraceptive access and conducting pregnancy testing and counseling, including referrals. *Id.* 505-506. In addition to offering the most advanced contraceptive methods available, Title X-funded centers offer infertility services; testing and treatment for sexually-transmitted infections ("STIs"); cervical and breast cancer screening; and screening for high blood pressure, diabetes, depression, and other pre-conception issues. *Id.* 499.

Plaintiff Essential Access Health ("Essential Access") is California's primary Title X grantee, with a network that serves one million patients annually—more than 25 percent of the patients served nationwide. *Id.* 498-99. Plaintiff-Appellee Melissa Marshall, M.D. is a family medicine physician and CEO of CommuniCare, an Essential Access Title X health center. *Id.* 574.

[2] State of California's Supplemental Excerpts of Record ("C.SER") filed in Case No. 19-15974.

B. The Final Rule

For the past three decades, Title X has been governed by a largely consistent set of regulations that leave the incredibly personal and sensitive issue of abortion counseling in the hands of patients and their medical providers.[3] On March 4, 2019, however, HHS promulgated the Final Rule, with the purported goal of bringing the Title X program into compliance with Section 1008 of the Title X statute. Section 1008 provides that no funds disbursed under program may be used in "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. But Title X regulations have *never* permitted Title X funds to be used to fund abortions, and have always required financial separation between Title X programs and abortion counseling or

[3] In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court rejected a statutory and constitutional challenge to Title X regulations promulgated in 1988, applying *Chevron* deference to the Secretary's then-permissible interpretation of the statute. HHS argues that *Rust* precludes any challenge to the Final Rule today, but *Rust* allowed a different rule based on a very different administrative record and statutory landscape. The agency justifications that saved the *Rust* rule are absent here, and the laws that the Final Rule violates didn't exist at the time of *Rust*. The *Rust* regulations were never fully implemented, and from 1991 to 2019 the Title X program was governed by a consistent regulatory scheme.

services. 65 Fed. Reg. at 41275–76. The Final Rule goes much farther than prior regulations. Most significantly, the Final Rule:

(1) Substitutes the agency's political agenda for a medical provider's clinical judgment by preventing medical providers from giving patients unbiased factual information about abortion services while at the same time mandating referrals for prenatal care, even when such referral is not medically indicated. § 59.5(a)(5); § 59.14(b)(1).[4]

(2) Forces patients and providers to engage in a farcical game of hide-the-ball by banning referral to abortion providers, even in response to a patient's direct request. § 59.14(b)(1). Instead, providers may provide "a list of . . . primary health care providers (including providers of prenatal care)," but the list must not include only abortion providers, and need not include any at all. § 59.14(b)(1)(ii), (c)(2). Even if the list includes abortion providers, "[n]either the list nor project staff may identify which providers on the list perform abortion." § 59.14(c)(2).

(3) Attempts to regulate activities well outside the scope of the Title X program by mandating complete physical and financial

[4] For ease of reference, the provisions of the Final Rule are cited by their section number (e.g., "§ 59.5" or "§ 59.14").

separation between a Title X project and so-called "prohibited activities." § 59.15. Prohibited activities include any activity that "encourage[s], promote[s] or advocate[s] abortion as a method of family planning." §§ 59.14, 59.16(a)(1). As a practical matter, this requirement prohibits a Title X provider from engaging in full, factual options counseling even outside of the scope of a Title X program.

C. District Court Proceedings

Plaintiffs filed their Complaint challenging the Final Rule on March 4, 2019 and moved for a preliminary injunction shortly thereafter. On April 26, 2019, the district court preliminarily enjoined the Rule in California in a 78-page order, finding that the Rule was likely arbitrary and capricious and contrary to two laws: (1) the annual appropriations rider that Congress has passed each year since 1996, requiring that "all pregnancy counseling" in the Title X program "shall be nondirective,"[5] and (2) a provision of the Patient Protection and Affordable Care Act ("ACA") that prohibits HHS from promulgating

[5] Pub. L. No. 115-245, 132 Stat. 2981, 3070-3071 (2018) (the "Nondirective Mandate").

"any regulation" that creates unreasonable barriers to individuals seeking appropriate medical care.[6]

Based on the sworn written testimony of program administrators, experts, and healthcare providers, the district court held that the Rule "threatens to decimate the network of Title X providers in California and drastically restrict patients' access to a wide range of vital services," thereby "inflict[ing] significant public health consequences and costs on the State and frustrat[ing] Essential Access's organizational mission to promote access to quality healthcare." ER 10. By contrast, the district court noted that HHS was "unable to articulate any real harm [it] will suffer if the Final Rule is preliminarily enjoined," *id.*, and determined that "the balance of hardships and the public interest tip[ped] sharply in favor of granting injunctive relief." *Id.* 11. District courts in Oregon and Washington also issued preliminary injunctions blocking enforcement of the Rule under similar rationales. *See Washington v. Azar*, 376 F. Supp. 3d 1119 (2019); *Oregon v. Azar*, No. 6:19-CV-00317-MC, 2019 WL 1897475 (D. Or. Apr. 29, 2019).

[6] 42 U.S.C. § 18114 ("Section 1554").

On May 6, 2019, HHS asked the district court to stay the injunction pending appeal. The district court denied the stay but narrowed the scope of its injunction. ER 1-4.

D. Appellate Proceedings

On May 10, 2019, Defendants filed in this Court a motion to stay the preliminary injunction pending appeal. Motion for Stay Pending Appeal, No. 19-15979, Dkt. 8. On June 20—after Defendants had filed their opening merits brief challenging the preliminary injunction, but before Plaintiffs' July 1 response deadline—a motions panel stayed all three preliminary injunctions pending resolution of the appeals. *California v. Azar*, — F.3d —, 2019 WL 2529259 (9th Cir. 2019) (per curiam) ("Stay Ord."). The motions panel issued its published opinion without hearing any argument. The Stay Order does more than rule on HHS's request to stay the preliminary injunction; it comments extensively on the legal and factual questions at issue in the appeal.

III. ARGUMENT

A. En banc review is warranted because the motions panel supplanted the merits panel's role as decisionmaker

By issuing a published order purporting to decide the merits of this appeal, the motions panel took on the role of a merits panel. "The

whole idea [of a stay] is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits." *Nken v. Holder*, 556 U.S. 418, 432 (2009). A stay is intended to "give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly'" on "often-thorny legal issues without adequate briefing and argument." *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011). Indeed, "[s]uch pre-adjudication adjudication" of the merits of an appeal "would defeat the purpose of a stay." *Id.*

The motions panel disregarded this guidance, decisively siding with HHS on all of its merits arguments and overturning the district court's fact-findings in a scant one-and-a-half pages. HHS will certainly argue that, although the motions panel's order was issued after accelerated briefing and with no argument, it is nevertheless binding on any subsequent merits panel under *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015). Far from promoting the "orderly course of justice," *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005), then, the stay order would render the merits appeal pointless and disrupt the decision-making process in other appeals. As HHS will likely seek to elevate the

motions panel to the final arbiter of the merits, the en banc court will need to intervene to correct the stay decision's errors.

B. En banc review is warranted because the stay order saddles the merits panel with two intra-Circuit splits

1. The stay order creates a conflict in Circuit precedent regarding the balance-of-harms inquiry

In effect, the stay order creates a *per se* rule that harm to HHS from delaying implementation of a regulation always outweighs the potential harm to litigants challenging that regulation. The motions panel concluded that HHS would be irreparably harmed if the Final Rule were not implemented pending appeal because during that time it couldn't implement its preferred policy choices. But both the Supreme Court and this Court require careful balancing of the interests of the respective parties, based on actual evidence of the harm that each party will suffer. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 330 (9th Cir. 1975), *abrogated on other grounds by Cottonwood Envtl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015); *see also*, *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 26 (2008) (disapproving of the district court's "cursory," one-sentence consideration of this factor, "[d]espite the importance of assessing the balance of equities"); *Herb Reed Enters.,* 736 F.3d at 1250 (district

court's irreparable-harm analysis must be "grounded in . . . evidence," and should not be "cursory and conclusory"). The motions panel's circular logic—that the government is irreparably harmed every time it cannot immediately implement a challenged regulation—does away with that balancing altogether.

Applying its new rule, the motions panel concluded that HHS would suffer irreparable harm if the regulations which have governed Title X for decades remained in place pending this expedited appeal, because HHS will be forced to allow taxpayer dollars to be spent in a manner that "***it has concluded*** violates the law." Stay Ord. at *8 (emphasis added). But no court has ever concluded that the Title X regulations in place for the past thirty years violated any law; HHS's conclusion is simply that prior regulations didn't do enough to ensure that Title X funds did not "indirectly" facilitate abortion.

The motions panel's irreparable-harm analysis is especially remarkable given that the current administration did not itself view the harm from the prior regulatory scheme as imminent or irreparable, and waited *years* to implement these new changes to the Title X program. Despite this delay, the motions panel came to the bizarre conclusion

that a stay was necessary to ensure that the decades-long *status quo* did not suddenly cause HHS supposedly imminent and irreparable harm.

The motions panel furnishes no citation supporting this new rule.[7] Nor can it. Circuit precedent is clear that the government is not irreparably harmed merely because it is prevented from carrying out its desired policy. *See, e.g.*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.,* 908 F.3d 476, 500 (9th Cir. 2018) (affirming injunction against termination of DACA program despite agency's "belief that DACA was unlawful"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (balance-of-hardships favored plaintiffs where "[t]he government provide[d] almost no evidence that it would be harmed . . . other than its assertion that the order enjoins 'presumptively lawful' government activity").

[7] HHS' citation to *Maryland v. King*, 567 U.S. 1301 (2012), for this proposition is unavailing. Relying on *Maryland*, HHS has contended that it will suffer irreparable injury if "'enjoined . . . from effectuating statutes enacted by representatives of its people.'" ER 33 (citing HHS's Opposition to Preliminary Injunction). But the district court enjoined an agency *rule*—not a statute, as in *Maryland*. *See id*. Moreover, the *Maryland* court found that "Maryland's law enforcement and public safety interests" would suffer "concrete harm" if the statute at issue were suspended. *Maryland*, 567 U.S. at *3. HHS has not identified any similar interest here.

A rule that boils down to "the government's harm always exceeds that of any other litigants, so long as it can articulate a policy rationale" has dangerous implications. Under such a rule, the Environmental Protection Agency could stop enforcing environmental regulations it no longer deemed in line with its agenda, with no regard to the impact. The Department of Veterans Affairs could stop providing key benefits "it has concluded" are no longer legal with no real weighing of the detriment caused to veterans. Assuming the motions panel's order is binding, the en banc court must intervene to resolve the "clear conflict in [its] precedent," which will "give difficulty to other . . . courts in the future." *United States v. Washington*, 593 F.3d 790, 798 (9th Cir. 2010).

Of course, this intra-circuit split will also "give difficulty" to any three-judge panel convened for the instant case. Rather than forcing a merits panel to labor under this inconsistent precedent, the en banc court should intervene to correct it.

2. The Stay Order creates a conflict in Circuit precedent regarding the deference owed to the government's "predictive judgment" on harm

Under Circuit precedent, reviewing courts defer to "agency decision-making" "[w]here scientific and technical expertise is

necessarily involved." *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009); Stay Ord. at *7. The motions panel impermissibly extended *Trout Unlimited* deference to subsume the balance-of-harms inquiry, holding that "HHS's predictions" regarding the "minor" harm Plaintiffs would suffer "[are] entitled to more deference than Plaintiffs' contrary predictions." Stay Ord. at *8. In other words, the motions panel credited Defendants' unsupported assessment of the harm to *Plaintiffs*, rather than the district court's factual findings based on sworn evidence.

There is no precedent for such a sweeping abnegation of the Court's equitable responsibility to itself balance the harms based on evidence, not conclusions. "Where plaintiff and defendant present competing claims of injury, the traditional function of [the court at] equity has been to arrive at a . . . reconciliation between the competing claims" by "balanc[ing] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citations omitted). Indeed, "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* at 313 (citation omitted).

With those principles in mind, this Circuit has already categorically rejected the new rule of deference that the motions panel announced. In *Sierra Forest Legacy v. Rey*, 670 F. Supp. 2d 1106 (E.D. Cal. 2009), the district court deferred to the Forest Service experts' "predictive judgment" that, amongst other things, "the risk of stand-replacing wildfire is more significant to the survival of species like the California spotted owl that the risk that some habitat . . . will be lost in attempting to ameliorate the fire risk." *Id.* at 1111. The Court reversed, holding that the district court had improperly "deferred to [agency] experts in its own equitable analysis." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011). As the *Sierra* Court explained, "If the federal government's experts were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable" because "government experts will likely [always] attest that the public interest favors the federal government's preferred policy." *Id.* at 1186.

Blanket deference to "agency expertise" on the issue of relative harm makes no sense for a second reason—it improperly extends the government's "predictive judgment" into areas where the agency has no

unique proficiency. Indeed, in many instances, the plaintiff may have at least as much, if not more, "expertise" as the agency in assessing the harm it will suffer if the status quo is disturbed.

As noted by *Sierra*, "*Winter v. Natural Resources* is illustrative" on this point. *Id.*at 1185-86. In *Winter,* the Supreme Court held that "lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's . . . training exercises." *Winter*, 555 U.S. at 27. Deference to ***that*** judgment was appropriate given the government's unique expertise on issues of military functioning. However, "*Winter* applied no such deference concerning the possibility that sonar testing would irreparably harm whales," because "ecology is not a field within the unique expertise of the federal government." *Sierra*, 646 F.3d at 1185-86. Establishing, as the motions panel has, a rule of deference to the government's balance-of-harms determinations, invites pronouncements on subjects far afield of the agency's expertise. And here, the motions panel did not even bother to assess whether the harm that Plaintiffs would suffer as a result of the Final Rule was within HHS's expertise.

The motions panel's decision completely distorts the balance-of-harms inquiry, gutting the court's equitable discretion in violation of *Sierra* and *Winter*, and virtually guaranteeing that the government will always prevail. Here, again, the en banc court should hear this appeal in the first instance because of the risk that the merits panel's erroneous analysis will bind a three-judge merits panel.

C. En banc review is warranted because this Rule imperils the reproductive healthcare of millions of low-income patients who rely on Title X

En banc review is necessary here for another reason: the motions panel's order gives HHS the green light to drastically alter how the Title X program functions. Information about and access to comprehensive reproductive healthcare allows women to take control of their most "intimate and personal choices . . . central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion). The Final Rule, now blessed by the motions panel, manipulates those discussions and threatens to cut off low-income patients' access to critical care. Plaintiffs' interests in ensuring that complete, medically appropriate, and nondirective reproductive healthcare is available to all women should not be

definitively adjudicated on a stay motion, with rushed briefing and no oral argument.

And yet, that is precisely what the motions panel did, sweeping aside the district court's factual findings regarding the catastrophic impact of the Final Rule without so much as a single citation to evidence. After reviewing an extensive record, including more than a dozen sworn declarations from Title X administrators and healthcare experts, the district court found that implementation of the Rule would reduce the availability and quality of Title X services to low-income individuals in several significant ways. ***First***, compliance with the physical separation requirement would be cost-prohibitive, resulting in an exodus of providers from the program. ER 23-25. "The net effect of so many providers leaving Title X will be a significant reduction in the availability of important medical services" for California's Title X patients. *Id.* 24. ***Second***, Title X providers who remain in the program will be forced to "obstruct and delay patients with pressing medical needs" in violation of their medical obligations. *Id.* 23. This obstruction would result in "worse health outcomes for patients and the public as a whole." *Id.* 26. The cumulative effect of the Final Rule would be to

undermine the purpose of the Title X program writ large—increasing the rate of unintended pregnancies, perversely leading to more abortions, and contributing to a higher incidence of STIs and other medical conditions that would otherwise be diagnosed with Title-X funded testing. *Id.*

Under the clear error standard, as long as the district court's factual findings were "plausible in light of the record reviewed in its entirety," the motions panel could not "reverse even if it [was] convinced it would have reached a different result." *Nat'l Wildlife Fed. v. Nat'l Marine Fishers Serv.*, 422 F.3d 782, 795 (9th Cir. 2005). Indeed, even if the panel could "point[ ] to conflicting evidence in the record," that would not be sufficient to overturn these "plausible" factual findings. But the motions panel did not even point to "conflicting" evidence; it instead overturned the district court's factual findings based on entirely on HHS's unsupported assertion that the Rule will increase the number of Title X participants. Stay Ord. at *8.

If the motions panel's order remains in effect and the merits panel is powerless to reinstate the preliminary injunction, it will have disastrous consequences for California's Title X program. The en banc

court should hear this case in the first instance to prevent any further delay in rectifying the damage already done by the stay of the preliminary injunction.

IV. CONCLUSION

The motions panel's ruling may tie the merits panel's hands and disrupt decision-making in other appeals unless the en banc court first settles the intra-Circuit clash that the Stay Order has created. Given the exceptional interests that hang in the balance—access to quality reproductive healthcare for a million low-income Californians—the en banc court should hear this appeal in the first instance.

Dated: July 1, 2019

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

s/Michelle S. Ybarra
MICHELLE S. YBARRA
JUSTINA SESSIONS
SOPHIE HOOD
SARAH SALOMON
Attorneys for Plaintiffs-Appellees
ESSENTIAL ACCESS HEALTH, INC.
and MELISSA MARSHALL, M.D.

STATEMENT OF RELATED CASES

Counsel for Plaintiffs are aware of 3 related cases pending in the Ninth Circuit:

- *State of California v. Alex Azar II & Dep't v. Health & Human Serv.*, Case No. 19-15974 (consolidated with this case)
- *State of Oregon, et al. v. Alex Azar II, et al. & Am. Med. Ass'n, et al. v. Alex Azar II, et al.*, Case No. 19-35386
- *State of Washington, et al. v. Alex Azar II, et al.*, Case No. 19-35394

These cases are related to this action because they raise the same or closely related issues and involve the same unlawful events.

Dated: July 1, 2019

s/Michelle S. Ybarra
MICHELLE S. YBARRA

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 3,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Fed. R. App. P. 35(b)(2) and Cir. R. 32-3.

Dated: July 1, 2019

s/Michelle S. Ybarra
MICHELLE S. YBARRA

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Michelle S. Ybarra
MICHELLE S. YBARRA