No. 19-35386

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF OREGON, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

AMERICAN MEDICAL ASSOCIATION, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**EMERGENCY MOTION OF PLAINTIFF STATES FOR FULL COURT OR LIMITED EN BANC RECONSIDERATION OF THE LIMITED EN BANC COURT'S JULY 11, 2019 ORDER**

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## CIRCUIT RULE 27-3 CERTIFICATE

(i) The contact information for the attorneys for the parties is as follows:

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(ii) The nature of the emergency is as follows:

The full Court granted rehearing en banc of a motions panel order staying three preliminary injunctions against enforcement of a new Rule issued by the United States Department of Health and Human Services that would alter the status quo that has governed the Title X program for nearly fifty years. Nonetheless, a July 11 order issued by the limited en banc Court has kept that stay in place pending rehearing en banc. Reconsideration of the limited en banc Court's July 11 order by the full Court or limited en banc Court is necessary to prevent immediate enforcement of the Rule, which will cause massive disruptions of the Title X program and irreparable harm to the State plaintiffs, their residents, and public health.

Shortly after the Rule went into effect, three district courts preliminarily enjoined its enforcement. HHS appealed and filed a motion to stay the preliminary injunctions. On June 20, a three-judge motions panel (Leavy, Callahan, Bea, JJ.) stayed the preliminary injunctions in a published order. On July 3, the full Court granted Plaintiffs' emergency motions for reconsideration en banc of the motions panel's stay order. Pursuant to the Court's usual practice, the en banc order stated that the motions panel's stay order "shall not be cited as precedent by or to any court of the Ninth Circuit." That grant of rehearing en banc had the effect of vacating the stay order pending en banc review. But on July 11, a divided eleven

judge en banc panel issued an order (1) stating that the motion panel's stay remained in effect pending en banc reconsideration, and (2) denying plaintiffs' request for a temporary administrative stay pending en banc reconsideration.

Following the July 11 order, HHS announced that it will begin enforcing the Rule and that compliance with much of the Rule is required as of Monday, July 15, 2019. Plaintiff States—like the private plaintiffs in a lawsuit consolidated with this one—are now in a precarious position. They must comply with a Rule that requires them to violate established standards of medical care and ethics, or else at the very least forego the use of Title X funds. Either approach will significantly harm public health. Indeed, the July 11 order is already irreparably injuring the States' Title X programs by causing significant disruption and confusion.

Emergency reconsideration of the July 11 order is thus warranted to (1) clarify that the full Court's July 3 order granting rehearing en banc had the effect of vacating the motions panel's stay order pending en banc reconsideration, and/or (2) grant an administrative stay of the motions panel's order pending en banc reconsideration. Such reconsideration is needed to maintain the longstanding status quo that has governed the Title X program for nearly fifty years, and protect plaintiffs and the public during the en banc proceeding and defendants' expedited appeal from the preliminary injunction. Absent such reconsideration, the Rule will bring about the harms that the preliminary injunctions were designed to prevent

even if this Court were to ultimately deny defendants' request for a stay (which is currently being reheard by the en banc panel) or affirm the preliminary injunctions.

(iii) Notification of parties:

Counsel for Defendants-Appellants were notified of this emergency motion on July 25, 2019, by telephone call, and they subsequently informed counsel for Plaintiffs-Appellees that they oppose it. Counsel will serve counsel for Defendants-Appellants by email with copies of this motion and supporting documents attached.

(iv) Plaintiff States, along with the other plaintiffs in this appeal, seek emergency en banc relief under Federal Rules of Appellate Procedure 35 and 40, Ninth Circuit Rules 27-3, 27-10, and 35-3, and Ninth Circuit General Orders 5.8 and 6.11. The relief sought is not available in the district court.

/s/ Benjamin Gutman
Benjamin Gutman

## RULE 35 STATEMENT

This case concerns an issue of exceptional importance—the implementation of a Final Rule that will devastate the Title X program and cause irreparable harm to the plaintiff States, their residents, and public health.

For nearly fifty years, Title X has been a highly effective program aimed at helping low-income and other vulnerable individuals to access vital family-planning and reproductive health-care services. The HHS Final Rule will force numerous providers, including many state grantees and the only Title X providers in many areas, to leave the Title X program. As a result, the Title X program will no longer be able to serve many of the low-income and vulnerable patients who depend on the program.

## ARGUMENT

To avoid repetitive briefing, Plaintiff States join in the factual background and arguments made by Planned Parenthood Federation of America, the American Medical Association, and the other private plaintiffs in their emergency motion for full court or limited en banc reconsideration of the July 11 order.

Plaintiff States also emphasize that by allowing the motions panel's stay order to remain in effect, the July 11 order severely undermines the fundamental purpose of both a stay pending appeal and the full Court's decision to grant rehearing en banc, i.e., to preserve the status quo and prevent irreparable injury

pending appeal. A stay pending appeal should preserve the status quo. *Nken v. Holder*, 556 U.S. 418, 429 (2009). But the motions panel's stay order drastically departed from this fundamental principle by enabling an upending of the status quo that has governed the Title X program for nearly fifty years and allowing defendants the ultimate relief they seek in their underlying appeal from the preliminary injunction—the ability to enforce the Final Rule immediately rather than after judicial review of the Rule's legality. The full Court's decision to rehear defendants' stay application en banc would typically prevent that result by having the effect of vacating the stay order pending en banc reconsideration. *See, e.g.*, *Marinelarena v. Barr*, 2019 WL 3227458, at *4 n.3 (July 18, 2019) (en banc). Here, however, the limited en banc panel's statement that the stay order remains in force has permitted HHS to bring the Rule into effect despite the pending en banc proceeding. As a result, the States, their residents, and public health are already being irreparably harmed by the Final Rule

In addition to the harms described by the private medical providers, the district court found that the Rule "will have a detrimental economic impact on the states" through harms to public health, such as "an increase in sexually transmitted disease and unexpected pregnancies" (ER33). This Court has previously recognized that such harm, stemming from likely cuts to birth control, sufficiently

demonstrates irreparable harm to a state's economic interests. *California v. Azar*, 911 F.3d 558, 571–73 (9th Cir. 2018). Those harms are now imminent.

> To restore the status quo pending the en banc proceeding, the full Court or limited en banc Court should thus reconsider the July 11 order and (1) clarify that the full Court's July 3 order had the effect of vacating the motions panel's stay order pending en banc reconsideration, and/or (2) grant an administrative stay of the motions panel's order pending en banc reconsideration.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Ninth Circuit Rules 35-4 and 40-1 because it contains 541 words, excluding the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Benjamin Gutman

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## NOTICE OF FILING AND PROOF OF SERVICE

I hereby certify that on July 25, 2019, I directed the Emergency Motion of State Plaintiffs for Full Court or Limited En Banc Reconsideration of the Limited En Banc Court's July 11, 2019 Order to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Benjamin Gutman

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