

No. 19-35394

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, et al.,
Defendants-Appellants.

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

ALEX M. AZAR II, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Washington Nos. 19-cv-3040, 19-cv-3045 (Bastian, J.)

**JOINDER OF
PLAINTIFFS-APPELLEES NATIONAL FAMILY PLANNING &
REPRODUCTIVE HEALTH ASSOCIATION, THE STATE OF
WASHINGTON, ET AL. IN EMERGENCY MOTION FOR FULL COURT
OR LIMITED EN BANC RECONSIDERATION OF
THE LIMITED EN BANC COURT'S JULY 11, 2019, ORDER**

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July 25, 2019

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CIRCUIT RULE 27-3 CERTIFICATE

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

Emergency relief is necessary to give proper effect to an order of the full Ninth Circuit that granted rehearing of a motions panel stay order. That directive from this Court has now been frustrated by an interim order of the en banc panel. Plaintiffs-Appellees and plaintiffs in related cases sought—and received—rehearing of the motions panel stay order because the stay order, if permitted to stand, would trigger massive, irreparable disruption for Plaintiffs and the entire Title X network.

All parties, including Defendants-Appellants, understood this Court's grant of rehearing to lift the stay during the pendency of reconsideration. *See* Dkt. No. 81 at 2. But the limited en banc court, on July 11, 2019, summarily issued an order stating that the rehearing grant left the stay order in place. In the same July 11, 2019, order, the en banc panel also denied an earlier administrative stay request, without explanation, again allowing the erroneous motions panel stay order to remain in place as rehearing proceeds.

As a direct result of the limited en banc court's July 11 order, Defendants announced on July 15, 2019, that the new Title X regulations have taken effect. On July 20, 2019, Defendants announced immediate "good faith" compliance expectations and imminent enforcement plans. These steps are pushing providers from the program and requiring substandard health care throughout the Title X network. Emergency relief is needed now to correct the en banc panel's July 11, 2019, interim order and to preserve the status quo ante. Hanging in the balance is the nationwide Title X network, which will imminently become a frayed patchwork, and continued access to high-quality health care for millions of low-income people across the country.

As set out below, Plaintiffs-Appellees join the emergency motion for full court or limited en banc reconsideration of the July 11, 2019, order filed today by

the American Medical Association, Planned Parenthood, and the other Plaintiffs-Appellees in related case No. 19-35386 (Dkt. No. 125).

(iii) Notification of parties:

Counsel for Defendants-Appellants were notified of Plaintiffs-Appellees intent to join this emergency motion by emails on July 24 and 25, 2019, and subsequently informed counsel for Plaintiffs that Defendants oppose Plaintiffs' emergency motion.

Counsel for Plaintiffs will serve counsel for Defendants by email with copies of this motion and its addendum.

(iv) The relief sought in this motion is not available in the district court. Plaintiffs-Appellees join in the request for emergency full court or limited en banc court relief, as soon as possible, pursuant to 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.

/s/ *Fiona Kaye*
FIONA KAYE

**RULE 35 STATEMENT AND
JOINDER IN EMERGENCY MOTION FOR FULL COURT OR
LIMITED EN BANC COURT RECONSIDERATION**

Plaintiffs-Appellees join in the emergency request for reconsideration of the en banc panel’s July 11 order submitted today by the American Medical Association, Planned Parenthood, and other Plaintiffs-Appellees in related case No. 19-35386 (Dkt. No. 125) (“AMA Emergency Motion”). As that motion demonstrates, reconsideration is warranted: (1) to preserve uniformity of this Court’s decisions with respect to the effect of rehearing grants; and (2) because the request involves an exceptionally important matter—that is, irreparable harm to the Title X network that has just begun unfolding as a result of the July 11 order.

On July 3, 2019, this Court granted Plaintiffs-Appellees’ request for en banc rehearing of a motions panel’s error-rife stay order. No. 19-15974, Dkt. No. 49. That June 20 motions panel order had improperly stayed the preliminary injunction entered by the district court in this case—and preliminary injunctions entered by two other district courts in this Circuit—that preserved the status quo and temporarily prevented implementation of new Title X regulations because of the irreparable harms that implementation would trigger.

Additional emergency relief is now necessary to ensure that the Court’s rehearing grant is meaningful to Plaintiffs-Appellees, their patients, and the Title X program and to prevent the massive irreparable harms that Defendants’ new

enforcement steps are starting to trigger in the meantime. The full Court ordered that the government's stay request shall be reconsidered and that the motions panel stay order shall "not be cited as precedent by or to any court of the Ninth Circuit." No. 19-15974, Dkt. No. 49. But the en banc panel then issued a summary order on July 11, stating that "the order granting reconsideration en banc did not vacate the stay order itself." Add.1-3 (No. 19-15974, Dkt. No. 84). That order is contrary to this Court's consistent practice with respect to the effect of such reconsideration orders. *See* AMA Emergency Mot. at 14-16.

The Plaintiffs-Appellees in this action, like those in the AMA-Planned Parenthood action, now face even more pressing irreparable harms, as previously foretold. The en banc panel's July 11 order caused Defendants to declare the new Title X Rule in effect and initiate compliance and enforcement steps, despite the pendency of reconsideration. The hundreds of Title X-funded members of the National Family Planning & Reproductive Health Association, including Feminist Women's Health Center and the State of Washington Department of Health among many others, and their individual clinicians now must each make the Hobson's choice caused by the Rule among options that will each irreparably harm Plaintiffs and their patients. Dkt. No. 13 at 18-19, Dkt. No. 35 at 1-7, Dkt. No. 37 at 1-11. Indeed, all current Title X providers must now switch to providing substandard, unprofessional care, contrary to HHS's own clinical standards, or stop participating

in the program, leaving millions of patients across the country unserved by Title X. *Id.* (citing district court's factual findings and 15 supporting declarations); AMA Emergency Mot. at 11-13, 16-18.

The devastating effects of the Rule should not be allowed to unfold as the stay motion is reconsidered and before the appeal of the preliminary injunction is even considered by a panel of this Court on the merits. Accordingly, Plaintiffs-Appellees National Family Planning & Reproductive Health Association, Feminist Women's Health Center, Deborah Oyer, M.D., Teresa Gall, F.N.P., and the State of Washington join in the emergency motion and request the narrow additional relief of reconsideration by the full Court or limited en banc Court of the July 11, 2019, order, so that the full Court's earlier grant of rehearing can meaningfully occur. *See* AMA Emergency Mot.

CONCLUSION

Plaintiffs-Appellees respectfully request that the full Court or limited en banc Court grant the emergency motion for reconsideration of the limited en banc Court's July 11, 2019, order and vacate the motions panel stay order or grant Plaintiffs-Appellees a temporary administrative stay pending the limited en banc Court's reconsideration of HHS's motion to stay pending appeal.

July 25, 2019

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Respectfully submitted,

/s/ Fiona Kaye

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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 670 words, exclusive of the exempted portions of the brief. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Fiona Kaye
FIONA KAYE

July 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I have also separately served counsel for Defendants by e-mail.

/s/ Fiona Kaye
FIONA KAYE

ADDENDUM

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Order, <i>Washington v. Azar</i> , No. 19-35394 (9th Cir. July 11, 2019).....	Add.1
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FILED

JUL 11 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, by and
through Attorney General Xavier Becerra,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his Official
Capacity as Secretary of the U.S.
Department of Health & Human Services;
U.S. DEPARTMENT OF HEALTH &
HUMAN SERVICES,

Defendants-Appellants.

Nos. 19-15974

D.C. No. 3:19-cv-01184-EMC
Northern District of California,
San Francisco

ORDER

ESSENTIAL ACCESS HEALTH, INC.;
MELISSA MARSHALL, M.D.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, Secretary of U.S.
Department of Health and Human
Services; UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-Appellants.

Nos. 19-15979

D.C. No. 3:19-cv-01195-EMC
Northern District of California,
San Francisco

STATE OF OREGON; et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II; et al.,

Defendants-Appellants.

No. 19-35386

D.C. Nos. 6:19-cv-00317-MC
6:19-cv-00318-MC

District of Oregon,
Eugene

STATE OF WASHINGTON; 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; et al.,

Defendants-Appellants.

Nos. 19-35394

D.C. Nos. 1:19-cv-03040-SAB
1:19-cv-03045-SAB

Eastern District of Washington,
Yakima

Before: THOMAS, Chief Judge, and LEAVY, WARDLAW, W. FLETCHER, PAEZ, BYBEE, CALLAHAN, M. SMITH, JR., IKUTA, MILLER, AND LEE, Circuit Judges.

Pending before the en banc court are several emergency motions for an administrative stay of the three-judge panel order staying the district courts’

preliminary injunction orders. *See Oregon, et. al. v. Azar*, No. 19-35386 (Dkt. nos. 59 and 66); *Washington, et. al. v. Azar*, No. 19-35394 (Dkt. nos. 35, 37, and 40).

Pursuant to prior order of the Court upon granting reconsideration en banc, the three-judge panel Order on Motions for Stay Pending Appeal in these cases was ordered not be cited as precedent by or to any court of the Ninth Circuit. However, the order granting reconsideration en banc did not vacate the stay order itself, so it remains in effect. Thus, the motions for administrative stay remain pending and were not mooted by the grant of reconsideration en banc.

After due consideration of the emergency motions, the motions for administrative stay of the three-judge panel order are DENIED. The en banc court will proceed expeditiously to rehear and reconsider the merits of the Appellants' motions for stay of the district courts' preliminary injunction orders pending consideration of the appeals on the merits. Until further order of the Court, no further briefing is required of the parties for the en banc court's reconsideration of the three-judge panel order. The briefing schedule established for the merits appeal shall remain as originally ordered.

Chief Judge Thomas and Judges Wardlaw, W. Fletcher, and Paez would grant the motions for administrative stay and therefore respectfully dissent from this order.