

**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.*

No. 19-15974

D.C. No.  
3:19-cv-01184-EMC

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.*

No. 19-15979

D.C. No.

3:19-cv-01195-EMC

STATE OF OREGON; STATE OF  
NEW YORK; STATE OF  
COLORADO; STATE OF  
CONNECTICUT; STATE OF  
DELAWARE; DISTRICT OF  
COLUMBIA; STATE OF  
HAWAII; STATE OF ILLINOIS;  
STATE OF MARYLAND;  
COMMONWEALTH OF  
MASSACHUSETTS; STATE OF  
MICHIGAN; STATE OF  
MINNESOTA; STATE OF  
NEVADA; STATE OF NEW  
JERSEY; STATE OF NEW  
MEXICO; STATE OF NORTH  
CAROLINA; COMMONWEALTH  
OF PENNSYLVANIA; STATE OF  
RHODE ISLAND; STATE OF

No. 19-35386

D.C. Nos.

6:19-cv-00317-MC

6:19-cv-00318-MC

VERMONT; COMMONWEALTH  
OF VIRGINIA; STATE OF  
WISCONSIN; AMERICAN  
MEDICAL ASSOCIATION;  
OREGON MEDICAL  
ASSOCIATION; PLANNED  
PARENTHOOD FEDERATION OF  
AMERICA, INC.; PLANNED  
PARENTHOOD OF  
SOUTHWESTERN OREGON;  
PLANNED PARENTHOOD  
COLUMBIA WILLAMETTE;  
THOMAS N. EWING, M.D.;  
MICHELE P. MEGREGIAN,  
C.N.M.,

*Plaintiffs-Appellees,*

v.

ALEX M. AZAR II; UNITED  
STATES DEPARTMENT OF  
HEALTH AND HUMAN  
SERVICES; DIANE FOLEY;  
OFFICE OF POPULATION  
AFFAIRS,

*Defendants-Appellants.*

STATE OF WASHINGTON;  
NATIONAL FAMILY PLANNING  
AND REPRODUCTIVE HEALTH  
ASSOCIATION; FEMINIST  
WOMEN'S HEALTH CENTER;  
DEBORAH OYER, M.D.;  
TERESA GALL,

*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; DIANE FOLEY,  
MD, in her official capacity  
as Deputy Assistant  
Secretary for Population  
Affairs; OFFICE OF  
POPULATION AFFAIRS,

*Defendants-Appellants.*

No. 19-35394

D.C. Nos.

1:19-cv-03040-SAB

1:19-cv-03045-SAB

ORDER

Filed July 11, 2019

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Before: Sidney R. Thomas, Chief Judge, and Edward Leavy, Kim McLane Wardlaw, William A. Fletcher, Richard A. Paez, Jay S. Bybee, Consuelo M. Callahan, Milan D. Smith, Jr., Sandra S. Ikuta, Eric David Miller, and Kenneth K. Lee, Circuit Judges.

Order

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## **SUMMARY\***

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### **Title X of the Public Health Service Act**

The en banc court denied the motions for administrative stay of the three-judge panel Order on Motions for Stay Pending Appeal. The en banc court will expeditiously rehear and reconsider the merits of Appellants' motions for stay of the district court's preliminary injunction orders pending consideration of the appeals on the merits.

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

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

**COUNSEL**

Jaynie Lilley, Katherine Allen, and Michael S. Raab, Appellate Staff; Brinton Lucas, Senior Counsel; Hashim M. Mooppan, Deputy Assistant Attorney General; Joseph H. Hunt, Assistant Attorney General; for Defendants-Appellants.

Anna Rich, Ketakee Kane, and Brenda Ayon Verduzco, Deputy Attorneys General; Kristin A. Liska, Associate Deputy Solicitor General; Joshua Patashnik, Deputy Solicitor General; Kathleen Boergers, Supervising Deputy Attorney General; Michael L. Newman, Senior Assistant Attorney General; Edward C. DuMont, Solicitor General; Xavier Becerra, Attorney General; Office of the Attorney General, San Francisco, California; for Plaintiff-Appellee State of California.

Alan E. Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Joshua M. Koppel, Albinas J. Prizgintas, Kimberly A. Parker, and Paul R.Q. Wolfson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; Kennon Scott, Per A. Ramfjord, and Jeremy D. Sacks, Stoel Rives LLP, Portland, Oregon; Erin G. Sutton, Leonard A. Nelson, and Brian D. Vandenberg, Office of General Counsel, American Medical Association, Chicago, Illinois; Mark Bonnano, General Counsel, Oregon Medical Association, Portland, Oregon; Carrie Y. Flaxman and Helene T. Krasnoff, Planned Parenthood Federation of America Inc., Washington, D.C.; for Plaintiffs-Appellees American Medical Association; Oregon Medical Association; Planned Parenthood Federation of America, Inc.; Planned Parenthood of Southwestern Oregon; Planned Parenthood Columbia Willamette; Thomas N. Ewing, M.D.; Michele P. Megregian, C.N.M.

Judith N. Vale, Senior Assistant Solicitor General; Anisha S. Dasgupta, Deputy Solicitor General; Barbara D. Underwood, Solicitor General; Letitia James, Attorney General; Office of the Attorney General, Albany, New York; Benjamin Gutman, Solicitor General; Jona J. Maukonen, Senior Assistant Attorney General; Ellen F. Rosenblum, Attorney General; Office of the Attorney General, Salem, Oregon; Phil Weiser, Attorney General, State of Colorado; William Tong, Attorney General, State of Connecticut; Kathy Jennings, Attorney General, State of Delaware; Karl A. Racine, Attorney General, District of Columbia; Clare E. Connors, Attorney General, State of Hawaii; Kwame Raoul, Attorney General, State of Illinois; Brian E. Frosh, Attorney General, State of Maryland; Maura Healey, Attorney General, Commonwealth of Massachusetts; Dana Nessel, Attorney General, State of Michigan; Keith Ellison, Attorney General, State of Minnesota; Aaron Ford, Attorney General, State of Nevada; Gurbir Singh Grewal, Attorney General, State of New Jersey; Hector Balderas, Attorney General, State of New Mexico; Josh Stein, Attorney General, State of North Carolina; Josh Shapiro, Attorney General, Commonwealth of Pennsylvania; Peter F. Neronha, Attorney General, State of Rhode Island; T.J. Donovan, Attorney General, State of Vermont; Mark R. Herring, Attorney General, Commonwealth of Virginia; Josh Kaul, Attorney General, State of Wisconsin; for Plaintiffs-Appellees State of Oregon, State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, and State of Wisconsin.

Douglas Hallward-Driemeier, Andrew J. Sutton, and Thomas N. Bulleit, Ropes & Gray LLP, Washington, D.C.; Haley Eagon, Ropes & Gray LLP, Boston, Massachusetts; Taylor Washburn, Lane Powell PC, Seattle, Washington; Amy W. Malone, Ropes & Gray LLP, New York, New York; Daniel W. Richards, Ropes & Gray LLP, East Palo Alto, California; Nadia Dahab, Stoll Berne, Portland, Oregon; for Amici Curiae American College of Obstetricians and Gynecologists, American Academy of Pediatrics, American Academy of Family Physicians, California Medical Association, Society for Adolescent Health and Medicine, and Society for Maternal-Fetal Medicine.

Fiona Kaye, Brigitte Amiri, Elizabeth Deutsch, Anjali Dalal, and Ruth E. Harlow, American Civil Liberties Union Foundation; Emily Chiang, American Civil Liberties Union Foundation of Washington; Joe Shaeffer, MacDonald Hoague & Bayless, Seattle, Washington; for Plaintiffs-Appellees National Family Planning and Reproductive Health Association, Feminist Women's Health Center, Deborah Oyer M.D., and Teresa Gall.



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**ORDER**

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.