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11 **UNITED STATES DISTRICT COURT**
 12 **EASTERN DISTRICT OF WASHINGTON**
 13 **AT YAKIMA**

14 STATE OF WASHINGTON,

15 Plaintiff,

16 v.

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

21 Defendants.
 22

NO. 1:19-cv-3040-SAB

DECLARATION OF DAVID
 JOHNSON

1 NATIONAL FAMILY PLANNING &
2 REPRODUCTIVE HEALTH
3 ASSOCIATION, FEMINIST
4 WOMEN'S HEALTH CENTER,
5 DEBORAH OYER, M.D., and
6 TERESA GALL, F.N.P.,

7
8 Plaintiffs,

9 v.

10 ALEX M. AZAR II, in his official
11 capacity as United States Secretary of
12 Health and Human Services, UNITED
13 STATES DEPARTMENT OF
14 HEALTH AND HUMAN SERVICES,
15 DIANE FOLEY, M.D., in her official
16 capacity as Deputy Assistant Secretary
17 for Population Affairs, and OFFICE
18 OF POPULATION AFFAIRS,

19
20 Defendants.

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DECLARATION OF DAVID
JOHNSON

U.S. DEPARTMENT OF JUSTICE
1100 L Street, N.W.
Washington, DC 20005
(202) 305-0878

1 I, David Johnson, declare as follows:

2 1. I am the Operations and Management Officer for the Office of
3 Populations Affairs, Department of Health and Human Services (DHHS), and I
4 have served in that capacity since August 7, 2016. My duties in this role include
5 oversight of Office of Population Affairs' (OPA) budget and organizational
6 policies and procedures for the office. Additionally, I am responsible for the
7 administrative oversight of the Title X grant program including providing
8 guidance to grantees on program requirements.
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10 2. The injunction that is currently in place enjoining implementation
11 and enforcement of the March 4, 2019 rule at issue in this litigation (the Rule)
12 will result in uncertainty and administrative burdens on both OPA and the
13 grantees.
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15 3. On April 1, 2019, the agency awarded nearly \$256 million dollars
16 in fiscal year 2019 with the expectation that funds would be spent within that
17 budget year, which ends on March 31, 2020. These funds will be spent for
18 grants administered by 90 different grantees. It is OPA's understanding that
19 grantees have already begun spending the award money and will continue to do
20 so while the injunction is in place. Additionally, under the 2000 instead of the
21 2019 regulations, OPA will be funding programs where there are referrals for
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1 abortion and where there is not physical separation or financial separation as
2 required in the 2019 rules. And the longer the injunction remains in place, the
3 more funds will be spent in this manner.

4 4. If Defendants prevail at a later stage of the litigation or on appeal,
5 the March 4, 2020 deadline for physical separation would still apply. As a
6 result, the injunction will cause serious uncertainty between now and any future
7 date at which the injunction could be lifted, because grantees will not know
8 whether they should take the steps needed to physically separate before the
9 March 4, 2020 deadline, whether they should spend resources on separation, and
10 whether they need to seek guidance from OPA on whether their separation plans
11 are sufficient. There is no guarantee that, if the injunction is lifted, there will be
12 enough, or even any, time left for grantees to comply with the Rule before
13 Defendants would begin enforcing the physical separation requirement.

14 5. If it is not stayed, the injunction will also cause significant
15 uncertainty given the nature of the awards to grantees. Current grantees received
16 awards on April 1, 2019 for a one-year budget period with the projected
17 opportunity to renew for two additional years. Grantees must apply for
18 continuation awards to receive funding for each of those subsequent years and
19 will have to comply with any rules in place at that time, absent an injunction.
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1 See 42 C.F.R. § 59.8(b), (c). If the injunction remains in place, the typical
2 continuation award process could be significantly disrupted, because grantees
3 will not know when or if the injunction may be lifted. For example,
4 noncompeting continuation award guidance is likely to be posted on October 1,
5 2019, continuation applications are likely to be due January 1, 2020, and
6 continuation grants will be awarded on April 1, 2020. At all points during this
7 process, the uncertainty of which rules will be in effect creates significant
8 uncertainty and burdens. Agency staff will be unable to effectively write
9 continuation award guidance, not knowing which compliance regime will be in
10 effect. In addition, applicants may write continuation applications responsive to
11 one set of rules that changes after they have submitted applications, and,
12 similarly, staff may be required to review and assess applications against one set
13 of rules, even though those rules may no longer be in effect when/if grantees
14 receive a continuation award.
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17 6. If the injunction is lifted after continuation applications have been
18 submitted, OPA staff will need to follow-up with grantees to ensure they will be
19 in compliance with the Rule, which could take several weeks given that there are
20 90 different grantees. In contrast, in the absence of an injunction, OPA staff
21 would provide compliance guidance beforehand, in a more controlled rollout,
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1 including in written guidance, webinars, and at the national grantee meeting to
2 be held in July 2019.

3 7. Additionally, the injunction creates uncertainty with respect to
4 ongoing monitoring and oversight. While OPA staff and consultants are
5 currently trained on providing oversight with respect to the 2000 rules, OPA is
6 unsure of how and when to devote resources to training on the new Rule, as it is
7 unclear if or when it will go into effect.

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9 8. Part of the regulation, § 59.5(a)(13), would have allowed the
10 agency to collect information on grantees and subrecipients in order to better
11 make administrative and fiscal plans and ensure proper oversight. Without such
12 information, it will be more difficult to ensure grantee compliance with this new
13 provision. Additionally, it will be harder for the agency to ensure that Title X
14 beneficiaries are getting the proper distribution of scarce resources.

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16 9. Another section, § 59.17, would have required grantees to provide
17 the agency appropriate documentation demonstrating compliance with state
18 reporting and notification laws regarding the abuse of minors. Additionally, it
19 requires grantees to provide a plan, annual training, and protocols to ensure
20 minors are aware of ways to resist sexual coercion. While the injunction is in
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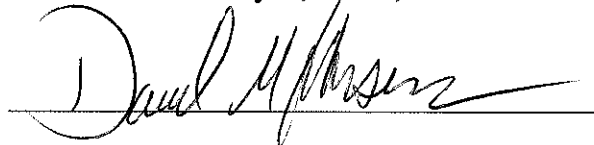
1 place, the agency will not have the ability to fully ensure compliance with this
2 new provision.

3 10. Finally, to ensure that Title X funds are not used to build
4 infrastructure for prohibited purposes, § 59.18 would have required grantees to
5 provide a detailed plan or accounting for the use of grant dollars, both in their
6 applications and in annual reporting, and to seek prior approval for any
7 significant changes in the use of grant dollars. While the injunction is in place,
8 the agency will not have the ability to fully ensure compliance with this new
9 provision.
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11 ***

12 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the
13 laws of the United States that the foregoing declaration is true and correct to the
14 best of my knowledge, information, and belief.
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16 Executed on May 3, 2019, in Rockville, Maryland

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