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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**
10 **AT YAKIMA**

11 STATE OF WASHINGTON,

12 Plaintiff,

13 v.

14 ALEX M. AZAR II, et al.,

15 Defendants.

No. 1:19-cv-3040-SAB

JOINT STATUS CERTIFICATE
AND SCHEDULING PROPOSAL
OF ALL PARTIES

16 NATIONAL FAMILY PLANNING &
17 REPRODUCTIVE HEALTH
18 ASSOCIATION, et al.,

19 Plaintiffs,

20 v.

21 ALEX M. AZAR II, et al.,

22 Defendants.

23 The parties respectfully submit this Joint Status Certificate and Scheduling
Proposal of All Parties pursuant to the Court's orders dated May 24, 2019, and July

1 22, 2019. ECF Nos. 81, 95. The parties will also be prepared to address these
2 matters with the Court during the telephonic status conference on August 22, 2019.

3 Current Status of Appeal and of Final Rule Implementation

4 The parties last updated the Court on developments in this case on July 19,
5 2019, when the Court of Appeals for the Ninth Circuit had just agreed to
6 “expeditiously” reconsider en banc the Government’s request for a stay of the
7 preliminary injunctions pending appeal. ECF No. 94; *see also* ECF No. 71 (May
8 13, 2019, joint report). Since the July update, there have been additional
9 developments in the Court of Appeals. On July 29, 2019, the Court notified the
10 parties that it would hear en banc oral argument during the week of September 23,
11 2019. And on August 1, 2019, the Court directed that the “parties should be
12 prepared to discuss at [the en banc] oral argument the district courts’ preliminary
13 injunction orders on the merits.” Thus, merits consideration of the preliminary
14 injunctions has apparently been expedited and will be before the same en banc
15 panel as the stay motion reconsideration. These matters will be fully submitted for
16 the Court of Appeals’ decision by late September.

17 A stay of this Court’s preliminary injunction currently remains in effect,
18 despite the Court of Appeals’ July 3, 2019, decision to reconsider en banc the
19 motions panel’s June 20 grant of a stay. Plaintiffs on July 25, 2019, moved for
20 emergency reconsideration of the Ninth Circuit’s July 11, 2019, order that stated
21 the stay remains in place. As of now, the Ninth Circuit has not granted or denied
22 that motion.

1 In light of the stay, Defendants have issued directives that “compliance with
2 the 2019 Final Rule, except for the physical separation requirement, was required
3 as of July 15, 2019.” The HHS directives require grantees to submit a written
4 assurance and an action plan by August 19, 2019, and a written statement and
5 supporting evidence that the grantee’s project is in compliance, except for the
6 physical separation requirements, by September 18, 2019. These recent HHS
7 directives also require grantees to provide a written statement and supporting
8 evidence that their project is in compliance with the physical separation
9 requirements by March 4, 2020.

10 (1) The Need for Discovery or Supplementation of the Record

11 In the district court proceedings, Defendants made their production of the
12 administrative record on June 24, 2019. Since that time, Plaintiffs have undertaken
13 searches in that voluminous record and reviewed a significant part of its content.
14 As of this date, Plaintiffs have not identified any problems with the format or
15 accessibility of the administrative record. Likewise, as of this date, Plaintiffs
16 report that Defendants’ production appears to contain all of the administrative
17 record identified by Defendants as the basis for their rulemaking. Because that
18 record contains hundreds of thousands of documents, however, Plaintiffs reserve
19 the right to raise any production issues identified in the future, as Plaintiffs’ review
20 and use of the record continues.

21 At this time, Plaintiffs do not anticipate the need for any discovery of
22 Defendants in this matter. Should that change (e.g., if Plaintiffs become aware of
23 additional information or input used in Defendants’ rulemaking to which Plaintiffs

1 do not have access), Plaintiffs will immediately alert the Court. Likewise, at this
2 time, Defendants do not believe that discovery is necessary or appropriate because
3 this is an Administrative Procedure Act case. Thus, there are no extant discovery
4 issues that should delay further proceedings in this Court.

5 As to the scope of the record that will properly be before the Court in order
6 to resolve Plaintiffs' claims on dispositive cross-motions, Plaintiffs have conferred
7 with Defendants on certain types of supplementation of the administrative record
8 produced by Defendants.

9 First, Plaintiffs state that the governing case law allows the Court to consider
10 supplementary evidence to provide background information and to explain
11 complex subject matter, in order that the Court can assess the substantive merits of
12 an agency's action; in particular, supplementary information is often necessary as
13 context to assist the Court in determining whether the agency has considered all
14 relevant factors and adequately explained its decision. *See, e.g., Lands Council v.*
15 *Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *Asarco, Inc. v. EPA*, 616 F.2d 1153,
16 1160 (9th Cir. 1980). Plaintiffs believe that the declarations submitted on the
17 motions for a preliminary injunction may also be considered as background
18 information by the Court when it turns to the dispositive motions and assesses
19 Defendants' rulemaking, as supported (or not supported) by the administrative
20 record. Indeed, the Court has already read and is thus already familiar with much
21 of the larger context about Title X that those declarations describe. Defendants
22 observe that the case law on which Plaintiffs rely indicates that supplementation of
23 the record, where permitted, "operate[s] to identify and plug holes in the

1 administrative record,” and that exceptions permitting supplementation “are
2 narrowly construed and applied.” *Lands Council*, 395 F.3d at 1030. Defendants
3 are not convinced at this stage that consideration of the declarations submitted on
4 the motions for a preliminary injunction is appropriate under these standards.
5 Defendants, however, wish to avoid unnecessary motion practice at this time and
6 thus will raise any objections to Plaintiffs’ use of particular declaration material
7 after Plaintiffs file their dispositive motion and it becomes clear whether and how
8 Plaintiffs intend to use that material.

9 Second, Defendants have already filed a motion to dismiss in the related
10 California cases. *See* N.D. Cal. Case No. 3:19-cv-01195, ECF No. 109. In that
11 motion, Defendants briefly referenced two lawsuits that were filed after
12 promulgation of the Final Rule. *See, e.g., id.* at 28. Plaintiffs note (and Defendants
13 agree) that subsequent information is generally not properly considered in a case
14 challenging agency rulemaking, although there are exceptions. To address that
15 concern upfront and without the necessity of motion practice, the parties have
16 agreed that, to the extent that either party does reference any events or information
17 subsequent to promulgation of the Final Rule in their dispositive motion papers,
18 the opposing party may (but is not required to) object to the Court’s consideration
19 of that information and/or respond in kind with additional information that may be
20 responsive to the other party’s inclusion of subsequent information. Of course, if
21 any subsequent information is presented, the Court will make the ultimate decision
22 whether any such information is relevant to and may properly be taken into
23 account in its disposition of the parties’ motions.

1 (2) The Status of Defendants' Answer

2 Defendants have not yet responded to the Complaints. So long as the Court
3 is amenable to this proposed scheduling, the parties have agreed that—in lieu of a
4 separate answer or separate motion to dismiss—Defendants will file first in the
5 briefing of dispositive motions and will file a combined motion to dismiss / motion
6 for summary judgment, as further addressed below.

7 (3) The Status of Defendants' Motion to Stay

8 On June 14, 2019, this Court denied Defendants' motion to stay proceedings
9 in the district court pending the appeal of the preliminary injunction.

10 (4) Proposed Scheduling of Dispositive Motion Briefing and Argument

11 The parties have conferred with regard to briefing dispositive motions.
12 Because the Ninth Circuit en banc panel will hear argument on the merits of the
13 preliminary injunction on September 23 and has effectively expedited that appeals
14 process, the parties believe it is likely that the Ninth Circuit will provide guidance
15 in the fall or early winter on at least some of the legal questions at issue in the case.
16 On the other hand, the parties understand that this Court has denied Defendants'
17 motion to stay proceedings and wishes to move the case forward here. Especially
18 with no such appellate guidance yet, the parties' initial dispositive motion briefs
19 will have to be comprehensive (addressing all legal claims) and will have to
20 provide detailed assistance to the Court in its consideration of the voluminous
21 administrative record and multi-faceted rulemaking, which will require over-length
22 briefs and significant time.
23

1 Taking all of these circumstances into account, the parties propose this
2 briefing schedule, which spaces the major briefs roughly 45 days apart and the last
3 reply brief roughly 30 days later:

4 October 7, 2019: Defendants file their motion to dismiss / motion for
5 summary judgment.

6 November 20, 2019: Plaintiffs file their motions for summary judgment /
7 opposition to Defendants' motions.

8 January 3, 2020: Defendants oppose Plaintiffs' motions for summary
9 judgment / reply in support of their motions.

10 February 3, 2020: Plaintiffs reply in support of summary judgment.

11 Week of February 10, 2020, or a time thereafter that is convenient for the
12 Court: Oral argument on the dispositive motions.

13 The parties seek permission to file over-length briefs, as needed to fully present
14 their arguments, because of the large number of legal claims and the large record in
15 this case.

16 This schedule (1) will complete briefing by the beginning of February,
17 which is likely after the en banc Court of Appeals will have issued its decision and
18 provided any merits guidance; (2) will allow these dispositive motions to be argued
19 shortly thereafter; and (3) will put the Court in a position to issue a decision by the
20 very beginning of March, ahead of the Final Rule's physical separation
21 requirements taking effect on March 4, 2020. (Because events may unfold in a
22 way that is not now anticipated, however, the parties would like to reserve the right
23 to come back to the Court, either jointly or separately, for a schedule modification
should the need arise.)

1 The parties look forward to discussing this scheduling proposal with the
2 Court on August 22, 2019.

3
4 DATED: August 12, 2019

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