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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-03040-SAB

THE PARTIES' JOINT
SUBMISSION IN RESPONSE TO
THE COURT'S FEBRUARY 24,
2020, ORDER (ECF NO. 145)

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

19 Plaintiffs,

20 v.

21 ALEX M. AZAR II, et al.,

22 Defendants.

1 On February 24, 2020, ECF No. 145, this Court ordered the parties in the
2 State of Washington action and the National Family Planning & Reproductive
3 Health Association (NFPRHA) action “to file briefing suggesting steps the Court
4 should take in light of the recent Ninth Circuit opinion” on the appeal of the
5 preliminary injunction in these matters. All parties in both actions jointly provide
6 this submission in response to that order.

7 As explained below, because Plaintiffs plan to seek further appellate review
8 of the Ninth Circuit’s recent rulings, the parties believe that the most efficient
9 course forward is for that appellate effort to occur before the Court and the parties
10 move forward with any further proceedings here. Therefore, the parties
11 respectfully request that the Court hold these matters in abeyance and order a joint
12 status report from all the parties to be filed in 90 days.

13 **A. The Ninth Circuit Decision**

14 The Department of Health and Human Services (HHS) promulgated the
15 Rule at issue in these cases on March 4, 2019. Plaintiffs filed suit immediately,
16 and in less than three weeks moved for preliminary injunctive relief. This Court
17 held a hearing on April 25, 2019, and that day issued a preliminary injunction
18 against the Rule, as did two other district courts in the Ninth Circuit shortly
19 thereafter. These preliminary injunctions prevented the Rule from taking effect on
20 its initial effective date, May 4, 2019.

21 A motions panel of the Ninth Circuit stayed the injunctions. Plaintiffs
22 moved for and were granted *en banc* review of the stay decision, yet the stay
23 remained in place. Within that context, HHS decided to start implementing the

1 Rule during the summer of 2019, and all parts of the Rule have now gone into
2 effect. The 11-member *en banc* panel of the Ninth Circuit heard argument in late
3 September 2019 on the stay and on the preliminary injunction appeals.

4 The *en banc* panel, split 7-4, issued a decision on February 24, 2020, that
5 vacated the preliminary injunctions and found the stay question moot. In that
6 decision, the *en banc* majority held that it had the power to resolve the merits of
7 claims Plaintiffs had included in their motion briefing and determined that
8 Plaintiffs would not succeed. The dissent disagreed on a number of grounds,
9 including that reaching the merits of arbitrary and capricious claims on the
10 preliminary injunction appeal was premature.

11 When the Ninth Circuit ruled, the Parties had filed and briefed cross-motions
12 for summary judgment in this Court, but those motions had not yet been argued.
13 Plaintiffs' complaints and summary judgment motions include claims upon which
14 the Ninth Circuit did not rule.

15 **B. Plaintiffs Plan to Seek Further Appellate Review**

16 Plaintiffs will seek further appellate review of the Ninth Circuit's February
17 24, 2020, decision. Plaintiffs, for example, believe that the *en banc* majority
18 overreached in deciding the merits of the arbitrary and capricious claims in the
19 course of the preliminary injunction appeal, without the administrative record and
20 without any opportunity for full argument from that record (including from what is
21 *not* in it) by Plaintiffs. Defendants disagree and believe the Ninth Circuit's
22 decision was proper in all respects. Accordingly, Defendants plan to oppose
23 Plaintiffs' request for further appellate review.

1 Plaintiffs have 45 days from February 24 to seek rehearing and full Ninth
2 Circuit review of the *en banc* panel ruling. That is Plaintiffs' likely next step.
3 Should Plaintiffs decide to petition for Supreme Court review, they would have 90
4 days to do so from the date of the Ninth Circuit's final determination.

5 **C. Joint Proposal for Proceedings in this Court**

6 The parties disagree about the extent to which the Ninth Circuit's decision
7 forecloses certain of Plaintiffs' arbitrary-and-capricious claims, but agree that the
8 decision did not address all of the claims Plaintiffs have asserted in these matters.
9 The parties also agree that it would be inefficient for this Court to proceed right
10 now to hear argument and to decide the unaddressed claims while Plaintiffs seek
11 further appellate review. Plaintiffs believe that their claims about the overall Rule
12 should be addressed *in toto* at one time. As Plaintiffs have also argued, the
13 constitutional claims (which Defendants contend are meritless in any event) should
14 not be decided unless statutory claims are unavailable to provide Plaintiffs with
15 relief. *See Iturribarria v. INS*, 321 F.3d 889, 895 (9th Cir. 2003) ("We decline to
16 decide cases on constitutional grounds when other grounds on which to base our
17 decision are available."). Moreover, if the Court were to resolve any aspect of the
18 parties' summary judgment motions now, that would almost certainly result in two
19 different appeals on different sets of claims making their way through the appellate
20 process at the same time. For all these reasons, it would conserve judicial
21 resources and the parties' resources for the first, preliminary injunction appeal to
22 reach its final resolution before the Court turns to the merits and decides the full
23 scope of the case, as it exists at that point.

1 The parties therefore request that the Court hold proceedings in abeyance
2 pending further appellate review of the Ninth Circuit’s decision. The parties
3 propose to provide the Court with a joint status report within 90 days. In the
4 unlikely event that any party or parties should need to update the Court or ask for
5 action consistent with the Court’s jurisdiction before then, they could do so, as the
6 case would be in abeyance but not formally stayed. This proposal is in keeping
7 with the Court’s inherent powers to control its cases and docket. *See, e.g., U.S. v.*
8 *W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008) (“There is a ‘well established’
9 principle that” district courts have the power to control their own dockets) (citation
10 omitted); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (“A district court
11 has inherent power to control the disposition of the causes on its docket in a
12 manner which will promote economy of time and effort for itself, for counsel, and
13 for litigants.”). In these matters, where the parties have diligently pursued moving
14 the cases forward, the parties respectfully submit that a pause now while the parties
15 pursue appellate review of the Ninth Circuit’s recent decision is an appropriate
16 course in the interest of litigation efficiency.

17 CONCLUSION

18 For these reasons, the parties respectfully request that the Court hold its
19 proceedings in abeyance, pending any further appellate review of the Ninth
20 Circuit’s February 24, 2020 decision, and direct the parties to file a joint status
21 report in 90 days.

1 DATED: March 5, 2020

Respectfully submitted,

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3 By: /s/ John Midgley

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the court’s CM/ECF system, which will serve a copy of this document upon all counsel of record.

Dated: March 5, 2020

/s/ Ruth E. Harlow

Counsel for NFPRHA Plaintiffs