

1 XAVIER BECERRA, State Bar No. 118517
 Attorney General of California
 2 KATHLEEN BOERGERS, State Bar No. 213530
 Supervising Deputy Attorney General
 3 KARLI EISENBERG, State Bar No. 281923
 ANNA RICH, State Bar No. 230195
 4 KETAKEE KANE, State Bar No. 291828
 Deputy Attorneys General
 5 1515 Clay Street, 20th Floor
 P.O. Box 70550
 6 Oakland, CA 94612-0550
 Telephone: (510) 879-1519
 7 Fax: (510) 622-2270
 E-mail: Ketakee.Kane@doj.ca.gov
 8 *Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra*

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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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14 **STATE OF CALIFORNIA, by and through**
ATTORNEY GENERAL XAVIER
15 BECERRA,

Case No. 3:19-cv-01184-EMC

16 Plaintiff,

**CALIFORNIA’S RESPONSE TO
 DEFENDANTS’ NOTICE OF
 SUPPLEMENTAL AUTHORITY AND
 RENEWED MOTION TO DISMISS OR
 FOR SUMMARY JUDGMENT**

17 v.

18 **ALEX AZAR, in his OFFICIAL**
19 CAPACITY as SECRETARY of the U.S.
DEPARTMENT of HEALTH & HUMAN
20 SERVICES; U.S. DEPARTMENT of
HEALTH & HUMAN SERVICES,

Date: March 12, 2020
 Dept: Courtroom 5, 17th floor
 Judge: Hon. Edward M. Chen
 Trial Date: TBD
 Action Filed: March, 2019

21 Defendants.
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INTRODUCTION AND BACKGROUND

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2 Plaintiff the State of California, by and through Attorney General Xavier Becerra, submit
3 this response to Defendants' Notice of Supplemental Authority, ECF 181, under the Court's
4 Order Permitting Response. ECF 182. California respectfully requests that the Court hold this
5 matter in abeyance, in light of Essential Access Health's and Dr. Melissa Marshall's anticipated
6 decision to seek further appellate review of the Ninth Circuit's recent ruling in their related case,
7 and to allow California to consider its own options for further appellate review. The interests of
8 judicial economy would be preserved by permitting any such appellate effort to occur before the
9 Court proceeds further. Defendants do not oppose this request. Kane Decl., ¶ 3.

10 On March 4, 2019, HHS promulgated the Rule that is the subject of this suit. *See* 84 Fed.
11 Reg. 7714 (Mar. 4, 2019), codified at 42 C.F.R. pt. 59. California filed this lawsuit alleging,
12 among other things, that the new Rule violates the Administrative Procedure Act, 5 U.S.C. §701
13 et seq (APA). ECF 1 (Cal. Complaint). Prior to production of the administrative record, this Court
14 issued an order preliminarily enjoining implementation of the Rule. *See* ECF 103. Defendants
15 appealed the order, and on June 20, 2019, a Ninth Circuit motions panel granted Defendants'
16 motion for a stay of the preliminary injunction pending appeal (as well as related motions
17 concerning similar preliminary injunctions issued by district courts in Oregon and Washington).
18 *California v. Azar*, 927 F.3d 1068 (9th Cir. 2019). On July 3, 2019, the Ninth Circuit depublished
19 the stay order and granted rehearing en banc. *California v. Azar*, 927 F.3d 1045, 1046 (9th Cir.
20 2019). The Ninth Circuit heard en banc oral argument on September 23, 2019.

21 On February 24, 2020, the en banc panel, in a 7-4 split, issued a decision that vacated the
22 preliminary injunction. *California v. Azar*, -- F.3d --, 2020 WL 878528, at *2 (9th Cir. Feb. 24,
23 2020). The en banc majority held that it could resolve the merits of California's claims and found
24 that California would not succeed on its APA claims. *Id.* at 10. The dissent disagreed, criticizing
25 the majority for prematurely reaching the merits of the plaintiffs' arbitrary and capricious claims
26 in a preliminary injunction posture. *Id.* at 33.

27 At the time the Ninth Circuit ruled, this Court had taken under submission the parties'
28 cross-motions for summary judgment. On February 25, 2020, Defendants filed a Notice of

1 Supplemental Authority and Renewed Motion to Dismiss or for Summary Judgment. ECF 181.
2 Essential Access Health and Dr. Melissa Marshall anticipate filing their request for full
3 court en banc review by April 9, 2020, *i.e.* within 45 days from issuance of the Ninth Circuit’s
4 Order. *See* Fed. R. App. P. 35(c), 40(a)(1). California must also file by April 9, 2020 if it decides
5 to seek any review before the Ninth Circuit.

6 **ARGUMENT**

7 This Court should hold this matter in abeyance in light of Essential Access Health’s and Dr.
8 Melissa Marshall’s decision to seek further appellate review of the Ninth Circuit’s February 24,
9 2020 decision.

10 The Court had the inherent authority to hold this case in abeyance. *See, e.g., U.S. v. W.R.*
11 *Grace*, 526 F.3d 499, 509 (9th Cir. 2008) (“There is a ‘well established’ principle that” district
12 courts have the power to control their own dockets) (citation omitted); *CMAX, Inc. v. Hall*, 300
13 F.2d 265, 268 (9th Cir. 1962) (“A district court has inherent power to control the disposition of
14 the causes on its docket in a manner which will promote economy of time and effort for itself, for
15 counsel, and for litigants.”). Doing so would promote judicial efficiency. Holding the matter in
16 abeyance ensures that the preliminary injunction phase of this action has fully concluded before
17 the Court evaluates the cross-motions for summary judgement. It would also allow California to
18 exhaust opportunities for relief under its APA claims. *See Iturribarria v. INS*, 321 F.3d 889, 895
19 (9th Cir. 2003) (“We decline to decide cases on constitutional grounds when other grounds on
20 which to base our decision are available.”).

21 California proposes to provide the Court with a status report within 90 days to present to the
22 Court any updates.

23 **CONCLUSION**

24 For the foregoing reasons, California respectfully requests that the Court hold these
25 proceedings in abeyance pending any further appellate review of the Ninth Circuit February 24,
26 2020 decision and direct the parties to file a status report within 90 days.

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Dated: March 12, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General
ANNA RICH
KARLI EISENBERG

/s/ Ketakee Kane
KETAKEE KANE
Deputy Attorneys General
Attorneys for Plaintiff the State of California

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 Attorney General of California
 2 KATHLEEN BOERGERS, State Bar No. 213530
 Supervising Deputy Attorney General
 3 ANNA RICH, State Bar No. 230195
 KARLI EISENBERG, State Bar No. 281923
 4 BRENDA AYON VERDUZCO, State Bar No. 315117
 KETAKEE KANE, State Bar No. 291828
 5 Deputy Attorneys General
 1515 Clay Street, 20th Floor
 6 P.O. Box 70550
 Oakland, CA 94612-0550
 7 Telephone: (510) 879-1519
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14 **STATE OF CALIFORNIA, by and through**
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 16 **BECERRA,**
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 18 **v.**
 19 **ALEX AZAR, in his OFFICIAL**
 20 **CAPACITY as SECRETARY of the U.S.**
 21 **DEPARTMENT of HEALTH & HUMAN**
 22 **SERVICES; U.S. DEPARTMENT of**
 23 **HEALTH & HUMAN SERVICES,**
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3:19-cv-01184-EMC

Plaintiff,

**DECLARATION OF KETAKEE R.
 KANE IN SUPPORT OF CALIFORNIA'S
 RESPONSE TO DEFENDANTS' NOTICE
 OF SUPPLEMENTAL AUTHORITY
 AND RENEWED MOTION TO DISMISS
 OR FOR SUMMARY JUDGMENT**

Defendants.

Date: March 12, 2020
 Dept: Courtroom 5, 17th floor
 Judge: Hon. Edward M. Chen
 Date Filed: March 4, 2019
 Trial Date: None Set

1 I, Ketakee R. Kane, declare as follows:

2 1. I am an attorney licensed to practice before the courts of the State of California. I am
3 employed by the Office of the California Attorney General as a Deputy Attorney General, counsel
4 to Plaintiff California, by and through Attorney General Xavier Becerra (California), in this case.
5 I have personal knowledge of the facts set forth in this declaration. If called as a witness in this
6 action, I could and would testify competently to these facts.

7 2. On March 10, 2020, I sent an email to counsel for Defendants stating that California
8 intends to request that the Court hold the entire case, including the pending motion for summary
9 judgment, in abeyance while plaintiffs consider whether to seek reconsideration of the Ninth
10 Circuit's order.

11 3. On March 11, 2020, Defendants' counsel, Bradley Humphries, responded and stated
12 that Defendants did not oppose the proposed approach.

13 I declare under the penalty of perjury under the laws of the United States that the contents
14 of this declaration are true and correct. Executed on March 12, 2020 in San Francisco, California.

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/s/ Ketakee Kane
KETAKEE KANE
Deputy Attorney General
Attorneys for Plaintiff State of California, by
and through Attorney General Xavier
Becerra

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