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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13
14 **ERICA JIMENEZ, individually and**
15 **on behalf of a class of similarly**
16 **situated individuals,**

17
18 Plaintiff,

19 v.

20 **DR. ERICA PAN, in her official**
21 **capacity as Director of the California**
22 **Department of Public Health; DR.**
23 **BARBARA FERRER, in her official**
24 **capacity as Director of the Los**
25 **Angeles County Department of Public**
26 **Health; MANUEL CARMONA, in his**
27 **official capacity as the Director of**
28 **Public Health for the Pasadena Public**
Health Department; LOS ANGELES
COUNTY DEPARTMENT OF
PUBLIC HEALTH; and PASADENA
PUBLIC HEALTH DEPARTMENT,

Defendants.

2:26-cv-03500-SPG-SP

DEFENDANT DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
NOTICE OF MOTION AND
MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(1)

[Filed Concurrently with Memorandum
of Points and Authorities in Support of
Defendant Director of the California
Department of Public Health's Motion
to Dismiss Pursuant to F.R.C.P.
12(b)(1); Declaration of Rita Nguyen;
Declaration of Jennifer Bunshoft;
[Proposed] Order]

Date: September 30, 2026
Time: 1:30 p.m.
Courtroom: 5C
Judge: The Honorable Sherilyn
Peace Garnett

Action Filed: 4/02/2026

1 TO PLAINTIFF ERICA JIMENEZ AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 30, 2026, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard in the United States District Court, Central
4 District of California, First Street Courthouse, 350 W. 1st Street, Los Angeles, CA
5 90012, in Courtroom 5C, 5th floor, Defendant Dr. Erica Pan, in her official capacity
6 as Director of the California Department of Public Health, will move this Court to
7 dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(1) because the
8 Court lacks subject matter jurisdiction due to Plaintiff's lack of standing.

9 This motion is made following the meet-and-confer conference of counsel
10 pursuant to L.R. 7-3 on July 1, 2026, regarding Defendant's anticipated motion to
11 dismiss, and subsequent correspondence between counsel on August 17 and 18,
12 2026. The parties thoroughly discussed the substance and potential resolution of
13 the filed motion by videoconference. After discussing their respective positions
14 regarding Plaintiff's standing to sue, the parties did not agree to any resolution of
15 the claims.

16 The motion to dismiss will be based on this Notice of Motion and Motion, the
17 Memorandum of Points and Authorities in support, the declarations of Rita
18 Nguyen, M.D., Jennifer Bunshoft and Amanda Cusick, and the pleadings and
19 papers filed in this matter, as well as any argument the Court may hear.

20 Dated: August 24, 2026

Respectfully submitted,

21 ROB BONTA
22 Attorney General of California
23 JENNIFER G. PERKELL
Supervising Deputy Attorney General

24 

25 JENNIFER A. BUNSHOFT
26 Deputy Attorney General
27 *Attorneys for Defendant Dr. Erica*
28 *Pan in her official capacity as*
Director of the California
Department of Public Health

CERTIFICATE OF SERVICE

Case Name: **Erica Jimenez v Dr. Erica Pan,
et al.** No. **2:26-cv-03500-SPG-SP**

I hereby certify that on August 24, 2026, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **DECLARATION OF RITA NGUYEN, M.D. IN SUPPORT OF DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **EXHIBIT A TO DECLARATION OF RITA NGUYEN, M.D. IN SUPPORT OF DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **DECLARATION OF JENNIFER BUNSHOFT IN SUPPORT OF DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **EXHIBIT A TO DECLARATION OF JENNIFER BUNSHOFT IN SUPPORT OF DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(1)**
- **[PROPOSED] ORDER GRANTING THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S MOTION TO DISMISS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 24, 2026, at San Francisco, California.

G. Guardado
Declarant

/s / G. Guardado
Signature

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21 **Angeles County Department of Public**
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23 **Health Department; LOS ANGELES**
COUNTY DEPARTMENT OF
24 **PUBLIC HEALTH; and PASADENA**
PUBLIC HEALTH DEPARTMENT,

25 Defendants.
26
27
28

2:26-cv-03500-SPG-SP

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(1)**

*[Filed Concurrently with Defendant
Director of the California Department
of Public Health's Notice of Motion
and Motion to Dismiss Pursuant to
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INTRODUCTION

Plaintiff Erica Jimenez lacks standing to bring her constitutional challenge to the State's Black Infant Health (BIH) Program. The BIH Program, administered by the California Department of Public Health (CDPH), is designed to address the public health crisis of significantly higher mortality rates among Black and African American mothers and their infants as compared to other demographics. Declaration of Rita Nguyen, M.D. in Support of Motion to Dismiss (Nguyen Decl.), ¶ 11.

Plaintiff cannot establish standing because the record does not demonstrate that she actually applied for and was rejected from the BIH Program, or that she would necessarily be denied participation in the program if she were to take the required steps to apply. In fact, Defendants confirmed in sworn declarations filed in support of their May 6, 2026 oppositions to Plaintiff's preliminary injunction motion that the BIH Program does not categorically exclude participants based on race. Thus, at the May 28, 2026 hearing, the Court inquired why Plaintiff had not subsequently reached out to the City of Pasadena (City) to pursue enrollment. Following the hearing, Plaintiff continued to decline to pursue enrollment in the program, even after counsel for the City sent a letter to Plaintiff's counsel on July 8, 2026, inviting Plaintiff to schedule an intake interview. Plaintiff's ongoing refusal to seek enrollment into the program calls into serious question Plaintiff's purported desire to participate in the BIH Program.

In addition, because Plaintiff cannot show that it is certain that she would be rejected from the program if she were to apply, she is also unable to rely on the futility exception to the standing requirement.

For these reasons, the Court should grant CDPH Director Dr. Erica Pan's motion to dismiss Plaintiff's complaint for lack of standing under Federal Rule of Civil Procedure 12(b)(1), without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

I. RELEVANT ALLEGATIONS IN PLAINTIFF’S COMPLAINT

By this action, Plaintiff alleges a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act based on her allegations that the BIH Program excludes women from participation based on race alone, and that she was denied participation in the BIH Program based on her race. Dkt. 1 (Complaint), ¶¶ 1, 2-3, 10, 26-33, 44-66. She also brings this action individually and as a class representative for a putative class action on behalf of “all persons who are eligible for the challenged Program but excluded on account of their race.” *Id.*, ¶ 36.

Plaintiff alleges that she is a new mother who resides in Pasadena, California. Complaint, Dkt. 1, ¶ 26. In mid-March 2026, she gave birth to her first child. *Id.*, ¶ 27. Plaintiff does not identify as Black, nor does she identify her infant as Black. *Id.*, ¶ 28. Plaintiff alleges that, before giving birth, she completed the City of Pasadena’s online interest form for the BIH Program. *Id.*, ¶ 29. She further alleges that, on February 27, 2026, she spoke by telephone with a City of Pasadena BIH coordinator who explained to her that the BIH Program is only for mothers or infants who meet the racial eligibility criterion. *Id.*, ¶ 31. Plaintiff further alleges that, purportedly upon learning her race, the program coordinator indicated that she was excluded from the BIH Program and referred her to other resources. *Id.*, ¶ 32; Jimenez Decl., Dkt. 13-5, ¶ 4.

Plaintiff does not allege that she actually applied for the BIH Program or informed the representative that she wanted to enroll in the program. *See generally* Dkt. 1, ¶¶ 26-32; Dkt. 13-5. She does not state that she wants to participate in the BIH Program, alleging only that she is “ready and able to apply.” Dkt. 13-6, ¶ 6.

II. DEFENDANTS’ DECLARATIONS CONTRADICTING PLAINTIFF’S ALLEGATIONS RELEVANT TO STANDING

Plaintiff’s vague allegations that she was told she is ineligible for the BIH

1 Program based on her race are directly contradicted by the testimony of the BIH
2 representative for the City of Pasadena (City) who received the call from Ms.
3 Jimenez.

4 After the Pasadena Public Health Department (PPHD) receive the BIH interest
5 form from the State that Plaintiff had submitted, PPHD representative McKenzie
6 Scott conducted a preliminary informational telephone call with Plaintiff on
7 February 27, 2026. Declaration of McKenzie Scott, Dkt. 26-3 (Scott Decl.), ¶ 4-6.
8 During the call, Ms. Scott described the purpose of the BIH Program and the
9 program's contents. *Id.*, ¶¶ 6-7. She further informed Plaintiff about numerous
10 other programmatic options that Plaintiff could avail herself of in addition to BIH,
11 consistent with the City's practice of providing such information to anyone seeking
12 pregnancy/parenting support. *Id.*, ¶¶ 6-8.

13 During the informational call, Plaintiff did not request admission to the
14 Program. *Id.*, ¶ 9. Furthermore, Ms. Scott did not tell Plaintiff that she was being
15 denied admission to or not eligible for the BIH Program, nor did she ask Plaintiff to
16 identify her race during her call. *Id.*, ¶¶ 6, 9-10. Moreover, Ms. Scott would not
17 have told Plaintiff that she was ineligible during that initial call because that is not
18 her training or her practice. *Id.*, ¶ 10. Only after a prospective applicant has
19 completed the assessment and enrollment process would they be confirmed as
20 admitted to the Program. *Id.*

21 **III. PLAINTIFF'S ONGOING REFUSAL TO SEEK ENROLLMENT INTO THE** 22 **PROGRAM**

23 Since the hearing on Plaintiff's motion for preliminary injunction, Plaintiff has
24 only persisted in her failure to take the steps required to enroll in the BIH Program.

25 At the May 28, 2026 hearing, the Court questioned Plaintiff's counsel about
26 whether Plaintiff had applied for enrollment in the BIH Program in light of the
27 testimony offered in support of Defendants' oppositions to the preliminary
28 injunction motion that Plaintiff was not categorically ineligible due to her race.

1 Declaration of Jennifer Bunshoft (Bunshoft Decl.), ¶ 3, Exh. A at 37:12-38:1;
2 Declaration of Amanda Cusick (Cusick Decl.), ¶ 3 (to be filed by the Pasadena
3 Public Health Department Defendants in connection with their joinder in
4 Defendants’ motions.) Plaintiff’s counsel conceded that Plaintiff had not
5 subsequently reached out to Defendants regarding enrollment in the program,
6 arguing that submitting an inquiry form was enough, but expressing an openness to
7 outreach from Defendants about Plaintiff’s enrollment. Bunshoft Decl., Exh. A at
8 37:12-39:7.

9 Following the hearing, and despite the Court’s intimation that Plaintiff should
10 proceed with the enrollment process as described by Defendants, Plaintiff still did
11 not reach out to the City regarding her enrollment in the BIH Program. Cusick
12 Decl., ¶ 4. Consequently, on July 8, 2026, counsel for the City Defendants sent a
13 letter to Plaintiff’s counsel inviting Plaintiff to proceed with completing the
14 additional steps for enrollment in the program. *Id.*, ¶ 6, Exh. A. Specifically, the
15 letter reminded counsel that, “as the City and its co-Defendants have explained in
16 the course of this litigation, including by their oppositions to the preliminary
17 injunction motion and at hearing, if Plaintiff wishes to enroll in the BIH Program,
18 she may simply express her intent to apply for the program and proceed with
19 completing the additional requirements for enrollment.” *Id.*, Exh. A. The City
20 reiterated that this process would require scheduling an appointment for her to
21 complete an assessment with a mental health professional from the PPHD, and to
22 discuss with the Program representative the services available to her under the BIH
23 Program and the logistics of participation. *Id.* The City further offered specific
24 date and time options from which Plaintiff could choose to schedule the
25 appointment for her assessment (July 13, 15, 21, and 23), or, if none of those
26 options were available, invited Plaintiff to respond with alternative dates and times
27 that did work for her. *Id.*

28 As of the date of this filing, neither the City’s counsel nor PPHD staff have

1 received any correspondence or communications from Plaintiff or her counsel in
2 response to the City's letter offering to facilitate Plaintiff's enrollment into the BIH
3 Program. *Id.*, ¶ 7. Nor have Plaintiff or her counsel otherwise reached out to
4 PPHD staff or the City's counsel regarding her enrollment in the BIH Program. *Id.*,
5 ¶ 8. Defendant Dr. Pan and CDPH, and their counsel in this matter, also have not
6 received any correspondence or communications from Plaintiff or her counsel since
7 the May 28, 2026 preliminary injunction hearing and the City's letter regarding
8 Plaintiff's enrollment in the BIH program. Nguyen Decl., ¶ 23; Bunshoft Decl. ¶¶
9 5-6. Similarly, Plaintiff and her counsel have not reached out to the County or its
10 counsel regarding Plaintiff's pursuit of enrollment in the BIH Program. Declaration
11 of Amnon Siegel, Dkt. 39-2, ¶¶ 7-8. Furthermore, Plaintiff also has not enrolled, or
12 attempted to enroll, in any other programs offered by the City for infants and
13 mothers. Cusick Decl., ¶ 9.

14 Finally, the evidence in the record also establishes that CDPH does not have a
15 policy to deny admission to the BIH Program on the basis of race to potential,
16 otherwise eligible applicants. Nguyen Decl., ¶¶ 15-22. Similarly, the evidence
17 establishes that neither the County nor City has a policy or practice of rejecting BIH
18 Program applicants or excluding them from participation in the program on the
19 basis of race. Declaration of Dr. Melissa Franklin, Dkt. 24-1 (Franklin Decl.), ¶ 65;
20 Scott Decl., Dkt. 26-3, ¶ 11.

21 **IV. PROCEDURAL BACKGROUND**

22 Plaintiff filed a motion for preliminary injunction on April 13, 2026. Dkt. 13.
23 Defendants opposed the motion, arguing, among other things, that Plaintiff lacked
24 standing to bring this litigation. Dkt. Nos. 24-28. Plaintiff replied on May 13,
25 2026. Dkt. 31. The Court heard the motion for preliminary injunction on May 27,
26 2026. Bunshoft Decl., ¶ 3, Exh. A.

27 **APPLICABLE LEGAL STANDARD**

28 A Rule 12(b)(1) motion to dismiss may be brought for lack of subject matter

1 jurisdiction. Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction must exist when
2 the action is commenced. *Morongo Band of Mission Indians v. California State Bd.*
3 *of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Further, subject matter
4 jurisdiction may be challenged “at any stage in the litigation.” *Arbaugh v. Y&H*
5 *Corp.*, 546 U.S. 500, 506 (2006). The party seeking to invoke the jurisdiction of
6 the federal court bears the burden of establishing that all jurisdictional prerequisites
7 have been met, including the required elements of standing. *Kokkonen v. Guardian*
8 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Am. Encore v. Fontes*, 152 F.4th
9 1097, 1110 (9th Cir. 2025) (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561
10 (1992)).

11 On a Rule 12(b)(1) motion, the court is not limited in its review to the
12 complaint’s allegations, but may properly consider extrinsic evidence on a “factual”
13 motion to determine whether the plaintiff has met her burden to establish
14 jurisdiction. *See, e.g., White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (“Rule
15 12(b)(1) jurisdictional attacks can be either facial or factual”); *Warren v. Fox Fam.*
16 *Worldwide, Inc.*, 171 F. Supp. 2d 1057, 1060–61 (C.D. Cal. 2001), *aff’d*, 328 F.3d
17 1136 (9th Cir. 2003) (The party mounting a Rule 12(b)(1) challenge to the court’s
18 jurisdiction may do so either on the face of the pleadings or by presenting extrinsic
19 evidence for the court’s consideration); *Farr v. U. S.*, 990 F.2d 451, 454 (9th Cir.
20 1993).

21 The usual presumptions favoring the sufficiency of the complaint’s allegations
22 on a Rule 12(b) motion, such as assuming the plaintiff’s factual allegations are true,
23 do not apply when the motion involves a factual dispute based on extrinsic
24 evidence. *White*, 227 F.3d at 1242; *Valdez v. U. S.*, 837 F. Supp. 1065, 1067 (E.D.
25 Cal. 1993), *aff’d*, 56 F.3d 1177 (9th Cir.1995). In deciding a 12(b)(1) motion based
26 on extrinsic evidence, courts may weigh the evidence presented and resolve factual
27 disputes where necessary in order to evaluate whether they have the power to hear
28 the case, unless the jurisdictional issue is inextricable from the merits of the case.

1 *Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir. 2009); *Thornhill Publ'g Co. v. Gen.*
2 *Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

3 **ARGUMENT**

4 **I. PLAINTIFF LACKS STANDING TO SEEK THE RELIEF REQUESTED**

5 Plaintiff fails to show that she has met the standing requirements to bring this
6 lawsuit. Accordingly, the Complaint must be dismissed for lack of jurisdiction.

7 To establish standing, a plaintiff must demonstrate: (1) a concrete and
8 particularized injury in fact; (2) a causal connection between the injury and
9 defendant's conduct; and (3) a likelihood that the injury will be redressed by a
10 favorable decision. *Lujan*, 504 U.S. at 560-61. To meet the injury-in-fact
11 requirement, a plaintiff must demonstrate an invasion of a legally protected interest
12 that is both (1) "concrete and particularized" to them and (2) "actual or imminent,"
13 not hypothetical or conjectural. *Id.* at 560. Where prospective injunctive relief is
14 sought, an alleged threatened injury must be "certainly impending." *Clapper v.*
15 *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). A plaintiff fails to show concrete
16 injury if their claims rest solely on an "abstract injury" stemming from "only a
17 general legal, moral, ideological, or policy objection to a particular government
18 action." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381
19 (2024). In this case, this same standard applies to Plaintiff's challenges to the BIH
20 Program, whether as-applied or facial. This means that, if Plaintiff cannot establish
21 standing to bring her as-applied claim, she also necessarily cannot establish
22 standing for any facial claim. *See, e.g., Miller v. City of Wickliffe, Ohio*, 852 F.3d
23 497, 506 (6th Cir. 2017) ("There may be very little difference to the standing
24 requirements for as-applied and facial challenges, other than the former being the
25 easier of the two.").

26 Here, Plaintiff, on multiple grounds, fails to and cannot establish the required
27 injury in fact. Firstly, she lacks standing to challenge the BIH Program because the
28 now-extensive evidence does not substantiate that she actually applied for and was

1 informed she would be denied admission to the BIH Program. It is a “long-
2 established rule ‘that a plaintiff lacks standing to challenge a rule or policy to which
3 he has not submitted himself by actually applying for the desired benefit.’” *Friery*
4 *v. L.A. Unified Sch. Dist.*, 448 F.3d 1146, 1149 (9th Cir. 2006) (quoting *Madsen v.*
5 *Boise State Univ.*, 976 F.2d 1219, 1220–21 (9th Cir. 1992) (per curiam)); *Moose*
6 *Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–71 (1972) (a plaintiff who did not apply
7 for membership in organization lacked standing to challenge its allegedly
8 discriminatory membership policies). In fact, “[r]equiring a party to have actually
9 confronted the policy he now challenges in court has several prudential and
10 practical advantages,” including “establish[ing] the existence of a well-defined
11 controversy between the parties.” *Madsen*, 976 F.2d at 1221 (“This case illustrates
12 how the failure to make a concrete request can leave the dispute between the parties
13 too nebulous for judicial resolution, because the precise nature of Madsen’s
14 asserted injury—and the appropriate relief—are unclear to us.”) Thus, where a
15 plaintiff alleges that she would be denied benefits or services, she lacks standing if
16 she fails to demonstrate that she has applied for and was denied the requested
17 benefits, unless she can show it would be futile to apply, as discussed in Section II,
18 below. *See, e.g., Alexandre v. Amazon.com, Inc.*, No. 22-cv-1459-MMA (VET),
19 2024 WL 2445705, at *4–5 (S.D. Cal. May 23, 2024), *appeal dismissed*, No. 24-
20 3566, 2025 WL 1607660 (9th Cir. May 20, 2025) (“Because Plaintiffs have
21 willingly refused to apply to the DSP program, they have not satisfied the general
22 standing requirement that a plaintiff submit to a policy before bringing an action to
23 challenge it.”)

24 There is a factual dispute here regarding whether Plaintiff applied to and was
25 informed she was excluded from the BIH Program based on the differing accounts
26 of Plaintiff and Ms. Scott of what was said during their single phone call, a dispute
27 that the Court may resolve based on extrinsic evidence submitted by the parties.
28 *See, e.g., White*, 227 F.3d at 1242; *Robinson*, 586 F.3d at 685. That issue is directly

1 relevant to the standing question, and weighs in favor of dismissal, since it is
2 Plaintiff's burden to establish each element of standing. *Lujan*, 504 U.S. at 560-61.

3 Specifically, the parties dispute whether Plaintiff was told that she was or
4 would be denied admission into the Program. *Compare* Dkt. 1 ¶¶ 31-32 *with* Scott
5 Decl., ¶¶ 6, 9. Yet, Plaintiff did not actually request to be enrolled in the Pasadena
6 BIH Program, but rather stopped at merely submitting an interest form and having
7 an informational call with Ms. Scott. Scott Decl., ¶¶ 3-6. Submission of an interest
8 form is simply a preliminary step to moving forward with completion of the
9 enrollment process. *Id.*, ¶ 10. Furthermore, Plaintiff was not told that she was
10 being denied admission to or is not eligible for the BIH Program, nor was she asked
11 to identify her race during her call with the program representative. *Id.*, ¶¶ 6, 9-10.
12 Indeed, it is not Ms. Scott's practice to make eligibility determinations during an
13 initial informational call. *Id.*, ¶ 10. Plaintiff's conclusory argument that "the
14 program is not for [her]," and her vague statement that she is "ready and able to
15 apply" to the BIH Program, are entitled to far less weight than the far more detailed
16 description and explanation in the Scott Declaration. *Compare* Jimenez Decl., ¶¶
17 4, 6 *with* Scott Decl., ¶¶ 6-11.

18 Moreover, even if Plaintiff had the mistaken assumption from the phone call
19 with Ms. Scott that she was ineligible for the BIH Program based on her race, there
20 is no question that as of May 6, 2026, Defendants' sworn testimony in opposition to
21 her preliminary injunction motion confirmed that the BIH Program does not have a
22 policy of excluding participants based on race. *See, e.g.*, Declaration of Rita
23 Nguyen, M.D. in Support of Opposition to Preliminary Injunction Motion., Dkt.
24 26-2, ¶¶ 45-52; Franklin Decl., ¶ 65; Scott Decl., ¶ 11; Despite being prompted by
25 this Court at the May 28th hearing, and by the City's July 8th letter inviting
26 Plaintiff to take the required steps towards enrollment, Plaintiff still has not sought
27 to enroll in the BIH Program. Bunshoft Decl., ¶¶ 3, 5-6, Exh. A at 37:12-38:20;
28 Cusick Decl., ¶¶ 7-8. This fact further undermines Plaintiff's testimony that she

1 sought admission to the BIH Program during the initial informational call, and
2 confirms that Plaintiff has not been disqualified from the BIH Program based on
3 her race, or any other factor for that matter. Scott Decl., ¶ 11; Nguyen Decl., ¶ 21-
4 22; Franklin Decl., ¶ 65. Nor has Plaintiff presented any contrary evidence that
5 conclusively demonstrates that she would be rejected from the program on the basis
6 of race if she ever actually sought to enroll. *See* Nguyen Decl., ¶¶ 15-22; Scott
7 Decl., ¶¶ 9-11; Franklin Decl., ¶ 65. In fact, this evidence strongly calls into
8 question any assertion by Plaintiff that she actually wants to participate in the BIH
9 Program. Under these facts, Plaintiff cannot allege a concrete, actual, or certainly
10 impending injury in fact caused by the Pasadena BIH Program based on exclusion
11 from the program.

12 Plaintiff lacks standing for the additional reason that she cannot show a causal
13 connection between her supposed injury and Defendants' conduct, which is a
14 distinct required element of standing. *Lujan*, 504 U.S. at 560-61. Plaintiff fails to
15 meet her burden of showing that Defendants caused her alleged injury of exclusion
16 from BIH services because the evidence demonstrates that she only inquired about
17 the program, but never, to date, has taken any further steps to actually enroll, again,
18 despite the City's express invitation to her to do precisely that. Scott Decl., ¶¶ 4-
19 12; Cusick Decl., ¶ 4-8, Exh. A. Thus, her alleged injury of non-receipt of BIH
20 Program services is the result of her own (mistaken) assumptions and decision to
21 not apply, rather than any action by Defendants. In other words, her claimed lack
22 of allegedly desired programmatic supports is a harm entirely of her own making.
23 *See, e.g., Clapper*, 568 U.S. at 416 ("respondents cannot manufacture standing
24 merely by inflicting harm on themselves").

25 Moreover, even assuming the truth of Plaintiff's testimony—that she applied
26 for and was told she was ineligible for the BIH Program because she does not
27 identify as Black—Plaintiff has still failed to establish that CDPH caused her any
28 injury due to lack of services. Plaintiff makes no mention of what services she

1 wanted to receive that could only be accessed through the BIH Program, so it is not
2 clear what services exactly Plaintiff believes she is being deprived of by CDPH or
3 pursuant to CDPH policy. Nor does she allege whether she took any steps to
4 pursue any of the alternative programs she was informed about in an effort to obtain
5 those services, and the affirmative evidence supports the conclusion that, in fact,
6 she has not taken any such steps. Scott Decl., ¶ 12; Cusick Decl., ¶ 9. Plaintiff
7 admits that she was advised of and directed to other available maternity programs
8 and resources for pregnant mothers and infants, and it is undisputed that other such
9 programs and resources exist. Dkt. 1 (Complaint), ¶ 32, Nguyen Decl., ¶¶ 24-26;
10 Franklin Decl., ¶¶ 49-64; Scott Decl., ¶¶ 6-8. Thus, because Plaintiff did not seek
11 out any of the alternative prenatal and postpartum services available to her, she can
12 show neither an injury in fact premised on her alleged exclusion from those
13 services, nor that CDPH caused any such injury.

14 For at least these reasons, Plaintiff has failed to meet her burden to establish
15 standing to pursue this lawsuit against Defendant Dr. Pan.

16 **II. THE FUTILITY EXCEPTION DOES NOT EXCUSE PLAINTIFF’S FAILURE TO**
17 **APPLY TO THE BIH PROGRAM BECAUSE THE EVIDENCE DOES NOT**
18 **DEMONSTRATE CERTAINTY THAT SHE WOULD BE EXCLUDED BASED**
ON HER RACE

19 CDPH anticipates that Plaintiff will argue that she is excused from applying to
20 the BIH Program because any such application would be futile since she allegedly
21 would be excluded on the basis that she does not identify as Black or African
22 American. However, “it is unclear whether futility can, by itself, establish standing
23 where it does not otherwise exist,” and it “may well be that futility excuses some
24 aspects of proving injury-in-fact while standing, a constitutional requirement, may
25 not be so easily finessed.” *Madsen*, 976 F.2d at 1222. But even assuming that
26 “futility” can substitute for satisfaction of the standing requirement, that exception
27 does not apply here because it is not at all certain that Plaintiff would be denied
28 participation in the BIH Program on the basis of race if she applies.

1 As discussed above, a plaintiff generally lacks standing to challenge a policy
2 or program that she has not submitted herself to by actually applying for and being
3 denied the desired benefits or services. *See, e.g., Friery*, 448 F.3d at 1149; *Madsen*,
4 976 F.2d at 1220–21; *Alexandre*, 2024 WL 2445705, at *4. Courts carefully
5 inquire into the standing requirement, and only in cases where exclusionary policies
6 are clear and express, such as an ordinance “flatly prohibit[ing]” signs in particular
7 locations, will they conclude that a plaintiff has standing to pursue her lawsuit
8 without first actually applying for the desired benefit or service on the basis that it
9 would be futile to do so. *See, e.g., Desert Outdoor Advert., Inc. v. City of Moreno*
10 *Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *Alexandre*, 2024 WL 2445705, at *6
11 (“under certain circumstances a plaintiff can establish standing by alleging that
12 applying would be a futile gesture.”)

13 Where, on the other hand, it is ambiguous whether the plaintiff would receive
14 the allegedly desired benefit, the dispute between the parties becomes “too
15 nebulous for judicial resolution, because the precise nature of the asserted injury—
16 and [the] appropriate relief—are unclear.” *Madsen*, 976 F.2d at 1221-22; *see also*
17 *Friery*, 448 F.3d at 1149 (court lacked information to apply futility exception to
18 excuse the plaintiff’s failure to apply for a transfer, where it was “uncertain”
19 whether the transfer policy would have affected the plaintiff). If the court is left to
20 speculate whether the defendant would actually prevent or reject the plaintiff’s
21 application or requested action, the Article III requirement of a “well-defined
22 controversy” does not exist. *Herson v. City of Reno*, 806 F. Supp. 2d 1141, 1146-
23 47 (D. Nev. 2011) (*citing Madsen*, 976 F.2d at 1221).

24 Here, Defendants’ evidence demonstrates that Plaintiff never actually applied
25 for enrollment in the BIH Program, and no evidence establishes that Plaintiff would
26 necessarily have been rejected from the BIH Program on the basis of her self-
27 identified race if she had actually sought to enroll. Scott Decl., ¶¶ 9-11; Nguyen
28 Decl., ¶¶ 22-23; Franklin Decl., ¶ 64-65. The evidence in fact establishes quite the

1 opposite. *See, e.g.*, Cusick Decl., ¶¶ 6-9. Further, CDPH is not generally aware of
2 any person being turned away, rejected, or disenrolled from the BIH Program on
3 the basis of race, including Plaintiff. Nguyen Decl., ¶¶ 21-22.

4 Because the futility exception applies only where it is indisputably clear that
5 the plaintiff would be denied entry to or is ineligible for a program, and the record
6 here does not establish with any certainty that the BIH Program excludes on the
7 basis on race, Plaintiff cannot circumvent the standing requirement on grounds of
8 so-called “futility.”

9 **CONCLUSION**

10 Because Plaintiff lacks standing to bring this lawsuit, this motion should be
11 granted and the complaint dismissed for lack of jurisdiction, without leave to
12 amend.

13 Dated: August 24, 2026

Respectfully submitted,

14 ROB BONTA
15 Attorney General of California
16 JENNIFER G. PERKELL
Supervising Deputy Attorney General

17 

18 JENNIFER A. BUNSHOFT
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20 *Attorneys for Defendant Dr. Erica Pan*
21 *in her official capacity as Director of*
22 *the California Department of Public*
23 *Health*

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Dr. Erica Pan, in her official capacity as Director of the California Department of Public Health, certifies that this brief is 13 pages, which:

___ complies with the word limit of L.R. 11-6.1.

X complies with the page limit set by the Court's Standing Order for Newly Assigned Civil Cases, consistent with L.R. 11-6.1.

Dated: August 24, 2026

Respectfully submitted,

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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 **ERICA JIMENEZ, individually and**
15 **on behalf of a class of similarly**
16 **situated individuals,**

17
18 Plaintiff,

19 v.

20 **DR. ERICA PAN, in her official**
21 **capacity as Director of the California**
22 **Department of Public Health; DR.**
23 **BARBARA FERRER, in her official**
24 **capacity as Director of the Los**
25 **Angeles County Department of Public**
26 **Health; MANUEL CARMONA, in his**
27 **official capacity as the Director of**
28 **Public Health for the Pasadena Public**
Health Department; LOS ANGELES
COUNTY DEPARTMENT OF
PUBLIC HEALTH; and PASADENA
PUBLIC HEALTH DEPARTMENT,

Defendants.

2:26-cv-03500-SPG-SP

DECLARATION OF RITA
NGUYEN, M.D. IN SUPPORT OF
DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(1)

*[Filed Concurrently with Defendant
Director of the California Department
of Public Health's Notice of Motion
and Motion to Dismiss Pursuant to
F.R.C.P. 12(b)(1); Memorandum of
Points and Authorities in Support of
Motion to Dismiss; Declaration of
Jennifer Bunshoft; [Proposed] Order]*

Date: September 30, 2026
Time: 1:30 p.m.
Courtroom: 5C
Judge: The Honorable Sherilyn
Peace Garnett

Trial Date:
Action Filed: 4/02/2026

1
2 I, Rita Nguyen, declare:

3 1. I am over the age of 18 years, a resident of the State of California, a U.S.
4 citizen, and the Assistant State Public Health Officer with the California
5 Department of Public Health (CDPH). I know the following facts based on my
6 own personal knowledge, and, if called as a witness, I could and would testify
7 competently to the truth of the matters set forth herein.

8 **Background and Experience**

9 2. I received my M.D. at Johns Hopkins University School of Medicine and
10 B.A. from Stanford University. I completed my Internal Medicine Residency
11 Training at Brigham and Women's Hospital.

12 3. Since 2022, I have worked for CDPH as the Assistant Public Health
13 Officer for the State of California. Prior to this position, from 2017-2022, I was the
14 Assistant Health Officer at the San Francisco Department of Public Health, where I
15 supported chronic disease and cancer prevention efforts for the City and County of
16 San Francisco. Prior to that, I was an Assistant Clinical Professor at UCSF with a
17 focus on nutrition security, public health, and providing clinical care to hospitalized
18 patients.

19 **My Role with CDPH**

20 4. I am currently employed by the California Department of Public Health
21 as the Assistant Public Health Officer for the State of California. I oversee CDPH's
22 Population Health Pillar, which entails providing policy, program, and
23 administrative oversight of the Centers for Healthy Communities, Family Health,
24 and Environmental Health; the Vital Records and Statistics Division; and the Office
25 of Data Strategy. The Maternal Child and Adolescent Health Program, which
26 houses the Black Infant Health Program, is located under the Center for Family
27 Health, which I oversee. As the Assistant Public Health Officer, I also assist and
28

1 support the Director and State Public Health Officer with pressing and/or emerging
2 public health issues.

3 5. Under CDPH, the Maternal, Child and Adolescent Health (MCAH)
4 Division administers public funds to local partners to promote the health of women
5 of reproductive age, pregnant people, mothers, infants, children, and adolescents in
6 California. MCAH administers funds to Local Health Jurisdictions and Community
7 Based Organizations through contracts and/or allocation agreements. MCAH
8 provides health information, data dashboards, and programs to help promote the
9 physical, emotional, mental, and social health of California mothers, birthing
10 people, babies, children, and youth. MCAH's intent is to ensure that all pregnant
11 people and their children can obtain quality maternal and child health services in
12 the State of California.

13 6. I previously submitted a declaration in support of the opposition by
14 Defendant Dr. Erica Pan, in her official capacity as Director of CDPH, to Plaintiff's
15 motion for preliminary injunction on May 6, 2026. *See* Dkt. 26-1. I will not repeat
16 all of the contents of the prior declaration here, but instead will focus on the
17 information that is directly relevant to Defendant Pan's Motion to Dismiss.

18 **The Black Infant Health (BIH) Program**

19 **The History of and Need for the BIH Program**

20 7. CDPH MCAH Division places a high priority on addressing poor birth
21 outcomes that disproportionately impact the Black community. As extensively
22 discussed in paragraphs 17 through 30 of my May 6, 2026 declaration, Dkt. 26-1,
23 Black infants, mothers and birthing people in California die at disproportionately
24 high rates. Although the Black infant mortality rate declined 25% since 2000, in
25 2023 it remained 3 times higher than the White and Asian rates (8.75 vs. 2.90 and
26 2.60 deaths per 1,000 live births, respectively), and 2 times higher than the
27
28

1 Hispanic rate (4.21).¹ The overall pregnancy-related mortality rate in California
2 declined to 12.0 deaths per 100,000 live births in 2023, down from 21.6 in 2021
3 and 18.6 in 2020 during the COVID-19 peak. Nonetheless, the Black birthing
4 population bears a disproportionate burden: averaged over 2021–2023, the
5 pregnancy-related mortality rate among Black mothers and birthing people was
6 57.8 per 100,000 live births—3.6 times the White rate (15.9), 4.0 times the
7 Hispanic rate (14.3), and 4.3 times the Asian rate (13.3). Preventable death of
8 mothers, birthing people, and infants have long-reaching impacts on the health of
9 affected families and communities.

10 8. In 1989, with the passage of Senate Bill 165, Budget Act of 1989,
11 California began to more aggressively address the challenge of improving the
12 health of Black mothers and birthing people, infants, and children by promoting
13 health and health care during the prenatal and post-partum periods and providing
14 services in a supportive and culturally supportive manner. Originally a pilot project
15 at four sites, the BIH Program currently reaches 14 local health jurisdictions where
16 over 90 percent of all Black births occur in California.

17 9. The BIH Program focuses on improving a set of health and health-related
18 outcomes hypothesized to be in the pathway to birth outcomes, reflecting current
19 scientific knowledge about the individual and community-level factors that
20 influence health and health disparities.² Building on successful components of

21 ¹ California Department of Public Health. Center for Family Health,
22 Maternal, Child and Adolescent Health Division, [Infant Mortality Dashboard](#), Last
Modified April 2026.

23 ² P. Braveman, T. P. Dominguez, W. Burke, S.M. Dolan, D.K. Stevenson,
24 F.M. Jackson, J.W. Collins, Jr., D.A. Driscoll, T. Haley, J. Acker, G.M. Shaw,
25 E.R.B. McCabe, W.W. Hay, Jr, K. Thornburg, D. Acevedo-Garcia, J.F. Cordero,
26 P.H. Wise, G. Legaz, K. Rashied-Henry, J. Frost, L. Waddell, *Explaining the
27 Black-White Disparity in Preterm Birth: A Consensus Statement From a Multi-
28 Disciplinary Scientific Work Group Convened by the March of Dimes*, 3 *Frontiers
in Repr. Health* 684207 (2021); 2015-2018 Black Infant Health Program
Evaluation: Intermediate Outcomes Among Prenatal Group Model Participants.
[https://www.cdph.ca.gov/Programs/CFH/DMCAH/BIH/Pages/Data-Brief-
Intermediate-Outcomes-2015-2018.aspx](https://www.cdph.ca.gov/Programs/CFH/DMCAH/BIH/Pages/Data-Brief-Intermediate-Outcomes-2015-2018.aspx); I.Z. Smith, K.L. Bentley-Edwards, S. El-
Amin, W. Darity, Jr., *Fighting at Birth: Eradicating the Black-White Infant*

(continued...)

1 existing BIH Program models and incorporating other promising practices, the
2 resulting model includes client-centered social services that integrate prenatal,
3 postpartum, parenting and infant-health education and promotion with program
4 pillars of social support, stress reduction, and empowerment.

5 10. To better meet the health-related needs of pregnant and postpartum Black
6 mothers and birthing people who are the target population for the BIH Program, in
7 2011, CDPH/MCAH began implementing a standardized BIH Program that
8 features both: (1) a group intervention designed to encourage empowerment and
9 social support while promoting healthy behaviors, and (2) one-to-one support to
10 link participants with needed community and health-related services. This program
11 thus provides services in a culturally relevant manner that respects participants'
12 beliefs and cultural values while promoting overall health and wellness, recognizing
13 that women's health and health-related behaviors are shaped by non-medical factors
14 (e.g., the effects of stress related to limited social and economic resources as well as
15 racism and discrimination).³ The BIH Program has been developed to address
16 these social determinants of health in ways that are relevant, culturally affirming,
17 and empowering to participants. The Program also offers one-to-one support for
18 pregnant and postpartum participants who are unable to attend group sessions.

19 11. In other words, the BIH Program is designed to address a public-health
20 crisis: the significantly disproportionate risk of adverse maternal and infant-health
21 outcomes for Black mothers and birthing people. As detailed above and in my May
22 6, 2026 declaration at paragraphs 17 through 21, Black mothers, birthing people
23 and infants in California experience severe, persistent, and well-documented
24 disparities in maternal and infant health. Black babies, historically, have had higher
25 rates of infant mortality, low birth weight, and prematurity than any other ethnic

26 *Mortality Gap*, Duke University's Samuel DuBois Cook Center on Social Equity
27 and Insight Center for Community Economic Development, (2018).

28 ³ Alhusen, K.M. Bower, E. Epstein, P. Sharps, *Racial Discrimination and Adverse Birth Outcomes: An Integrative Review* 61 (6) *J. Midwifery Women's Health* 707–720 (Nov. 2016); See also Smith, et al., *supra* note 2.

group.⁴ Additionally, studies show that Black mothers and birthing people at all income and education levels experience worse birth outcomes, including pregnancy and birth-related complications and death, than White birthing people.⁵ These disparities, and the scientific literature explaining their root causes (discussed in my May 6, 2026 declaration at paragraphs 16 and 20 through 29, and incorporated herein by reference), provide the factual and scientific foundation for programs specifically designed to serve and support Black mothers and birthing people and their infants, including the BIH Program.

BIH Program Sites

12. The BIH Program is run through city and county Local Health Jurisdictions (LHJs) as part of their Maternal, Child and Adolescent Health divisions. Several LHJs have elected to subcontract with community-based organizations to provide services. Each service area has a requisite minimum number of qualified personnel, including a coordinator, family health advocates, group facilitators, outreach liaison, a mental health professional and a public health nurse. All sites follow the CDPH and MCAH policies and procedures to ensure standardization across all sites, which includes ten 150-minute in-person prenatal and postpartum group sessions, individualized life planning, referrals to pertinent services, and outreach efforts to educate the community at large about these persisting disparities.

Enrollment in the BIH Program

13. Although the Program is geared towards addressing the needs of the self-identifying Black and African-American population, who otherwise fall within

⁴ California Department of Public Health. Center for Family Health, Maternal, Child and Adolescent Health Division, [Infant Mortality Dashboard](#), Last Modified April 2026.

⁵ K. Kennedy-Moulton, S. Miller, P. Persson, M. Rossin-Slater, L. Wherry, G. Aldana, *Maternal and Infant Health Inequality: New Evidence from Linked Administrative Data*, NBER Working Paper No. 30693, JEL No. I1, I14, I30 (Nov. 2022, Rev. Oct. 2025); see also Smith, et al., *supra* note 2.

1 gestational and postpartum timing parameters, if a prospective participant who local
2 BIH Program staff believe would benefit from participation in the program does not
3 identify as Black, local BIH staff can facilitate the person's admission.

4 14. CDPH elected to focus on culturally specific interventions to provide
5 critical supports that participants can utilize to remain physically and mentally well
6 during pregnancy, postpartum, and beyond, and ultimately contribute to improving
7 adverse outcomes. The BIH Program model and approach is supported
8 by numerous studies showing the effectiveness of culturally-appropriate maternity
9 care services and group perinatal services with peer support in terms of improving
10 birth outcomes.⁶ Enrolling participants that identify as Black or African-American
11 aligns participants' racial backgrounds for shared lived experience and encourages
12 inter-personal trust within the groups. The BIH Program would not be as successful
13 at targeting the disparity in infant mortality and health outcomes in the Black
14 community were it, as compared to other available programs, not to encourage the
15 enrollment of participants that self-identify as Black or African-American.

16 **Non-Black/African American Participants in the BIH Program**

17 15. I have reviewed the BIH Policies and Procedures Manual referenced in
18 our agreements with local BIH implementing agencies and have verified our
19 program administrative processes with our BIH Program Lead, and I am not aware
20

21
22 ⁶ C. Klima, K. Norr, S. Vonderheid, A. Handler, *Introduction of Centering*
23 *Pregnancy in a Public Health Clinic*, 54 (1) J. Midwifery Womens Health 27–34,
24 (Jan.-Feb. 2009); J.R. Ickovics, V. Earnshaw, J.B. Lewis, et al., *Cluster*
25 *Randomized Controlled Trial of Group Prenatal Care: Perinatal Outcomes Among*
26 *Adolescents in New York City Health Centers*, 106 (2) Am. J. Public Health 359–
27 365, (2016); *Centering Pregnancy and Centering Parenting*, Annotated
28 Bibliography, Centering Healthcare Institute, (2025); M. Alsan, O. Garrick, G.
Graziani, *Does Diversity Matter for Health? Experimental Evidence*
From Oakland, 109 (12) C. Am. Econ. Rev. 4071–4111 (2019); C. Klima, K. Norr,
S. Vonderheid, A. Handler, *Introduction of Centering Pregnancy in a Public Health*
Clinic, 54 (1) J. Midwifery Womens Health 27–34, (2009); E. Jones, S.R. Lattot, E.
Coast, *Interventions to Provide Culturally-Appropriate Maternity Care Services:*
Factors Affecting Implementation, 17 BMC Pregnancy Childbirth 267 (2017).

1 of any specific individuals who have been excluded from the program or BIH
2 services on the basis of race.

3 16. CDPH does not take any actions to enforce any policies that might be
4 interpreted to suggest that local BIH sites should disallow individuals from entering
5 the program, or require individuals to be disenrolled from the program, based on
6 racial criteria.

7 17. CDPH also does not have any quality control measures or reporting or
8 review processes that would require, or even encourage, local BIH sites to not
9 admit or to disenroll individuals from the program based on racial criteria.

10 18. CDPH provides a recruitment form to local BIH sites—the BIH
11 Recruitment Form—to be used when recruiting possible program participants. The
12 Form is intended for the intake of prospective BIH participants, whether they are
13 referred by another provider or another agency, or whether they have been
14 identified through direct BIH staff outreach, media outreach, or self-referral to the
15 program. This form does not include any language requesting or contain any boxes
16 to record the prospective participant's race. Attached hereto as **Exhibit A** is a true
17 and correct copy of the BIH Recruitment Form.

18 19. Local BIH sites often consult with CDPH program administrators
19 regarding individuals who do not meet requirements to participate in the program.
20 Local sites have reached out to CDPH regarding applicants who were not of the age
21 or gestational condition described in the enrollment procedures, but to whom the
22 local BIH site intended to provide BIH services because the applicant's maternal
23 health and wellness would benefit from the services in a manner that furthered the
24 goals of the BIH program. For example, there have been cases where participants
25 have suffered miscarriages, exceeded 30-weeks gestation, or were more than six
26 months post-partum and were able to continue receiving BIH services. To my
27 knowledge, there have not been instances where any of our local sites have reached
28 out regarding or otherwise reported to CDPH an instance of an applicant who was

1 going to be disallowed based on the applicant's race, and CDPH staff were unaware
2 of any instances where a local BIH site inquired about denying an applicant based
3 on their race.

4 20. Using linked data with the California Birth Statistical Master File, CDPH
5 identified that some past participants reported racial classifications on their
6 California birth records that did not include any reference to Black, but instead
7 identified as: White, American Indian, or another racial category. Beginning in
8 late 2024, the BIH Program began collecting self-identified race ethnicity data from
9 participants after they had already been admitted to the program. These data also
10 show that some participants did not identify as Black, but rather as Hispanic, Asian,
11 White, American Indian or Alaska Native, and Middle Eastern or North African.

12 21. I am not aware of anyone being turned away, rejected, or disenrolled
13 from the program on the basis of race, including the plaintiff in this case, Erica
14 Jimenez.

15 22. It is my understanding that if Ms. Jimenez, or any other person who does
16 not self-identify as Black or African American, sought to participate in the
17 program, and local BIH staff believe that the individual would benefit from
18 participation, local BIH staff can facilitate the person's admission regardless of
19 their self-identified race.

20 23. I understand that there was a hearing on the preliminary injunction
21 motion on May 28, 2026, and that counsel for the City of Pasadena subsequently
22 sent Ms. Jimenez's counsel a letter on July 8, 2026, inviting Ms. Jimenez to
23 proceed with completing the additional steps for enrollment in the BIH Program. I
24 am informed and believe that neither Director Pan nor CDPH MCAH has received
25 any correspondence or communications from Ms. Jimenez regarding enrollment in
26 the BIH Program in the time that has passed since those events.

27 **Other Programs and Resources Through MCAH**
28

1 24. MCAH's overriding mission to provide health information, data, and
2 programs means that other programmatic options, including culturally sensitive
3 programs, are available to women and birthing people and their infants who do not
4 qualify for or are not interested in participation in the BIH. Each MCAH program
5 is also expected to ensure the availability of a toll-free or "no cost to the calling
6 party" telephone system that provides a current list of culturally and linguistically
7 appropriate information and referrals to community-health and human resources for
8 the public regarding access to prenatal care.

9 25. These other programs include:

- 10 • Local Maternal, Child and Adolescent Health Program: Local county
11 and city Maternal, Child and Adolescent Health (MCAH) departments
12 are responsible for improving the health and well-being of mothers
13 and birthing people and families in their region. This is done through
14 an array of programs and initiatives that serve California's diverse
15 populations, providing best practice interventions, resources,
16 information and data about health and social topics such as
17 reproductive health, family planning, pregnancy, intimate partner
18 violence and more. The initiatives provided vary by Local Health
19 Department.
- 20 • California Home Visiting Program (CHVP) Programs:
 - 21 ○ Family Connects: Supports health for all families with
 - 22 newborns at a moment of life-changing transition. Trained
 - 23 Family Connects nurses offer home visits to assess the needs of
 - 24 newborns and postpartum parents, provide health information
 - 25 and refer to community and medical services when needed.
 - 26 ○ Healthy Families America: Serves low-income families who
 - 27 must be enrolled within the first three months after an infant's
 - 28

1 birth. A trained paraprofessional provides home visits to
2 parents and their children through three years of age.

- 3 ○ Home Instruction for Parents of Preschool Youngsters: Serves
4 families with children between the ages of two and five. Offers
5 parents support, training and material to engage in effective,
6 developmental and fun activities with their children in the
7 comfort of their own homes. Program is a developmentally
8 appropriate, early literacy curriculum designed to promote
9 children's cognitive, social, emotional and physical
10 development. Parents engage with the curriculum by
11 roleplaying the parent-child activities with a home visitor who
12 is from the same community.
- 13 ○ Nurse-Family Partnership: Serves low-income, first-time moms
14 who must be enrolled by the 28th week of pregnancy. A Public
15 Health Nurse provides one-on-one home visits to parents and
16 their babies through two years postpartum.
- 17 ○ Parents as Teachers: Serves families with children (between
18 pregnancy and Kindergarten entry) experiencing one or more
19 stressors in their lives. A Parent Educator conducts personal
20 visits with parents and their children, as well as monthly group
21 events.

22 26. These programs offer similar services and supports to improve maternal,
23 infant, and/or child-health outcomes and are available to people who meet the
24 eligibility requirements for them. Specific services include referrals to resources,
25 nurse home visiting, and provision of necessary resources to participants.

26 27. As part of the governing rules and requirements for implementation of
27 the BIH Policies and Procedures, there are policies and procedures that guide staff
28 actions at the local level of a MCAH program if a prospective program participant,

1 like Ms. Jimenez, either is deemed to not qualify for or does not wish to participate
2 in a particular program. In such a case, the prospective participant would be
3 directed to other programs and resources available to her through MCAH or in the
4 surrounding community that would provide similar or overlapping types of
5 resources and supports.

6 28. For example, in this case, Ms. Jimenez could qualify to participate in, as
7 alternatives to the BIH, the California Home Visitation programs or other Local
8 MCAH programs, assuming she meets their respective eligibility criteria and that
9 she takes the required steps to apply to them.

10 I declare under penalty of perjury under the laws of the United States that the
11 foregoing is true and correct. Executed in Sacramento, CA on August 21, 2026.

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14 By: 
15 Rita Nguyen, M.D.
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Exhibit A

Recruitment

Maternal, Child and Adolescent Health Division
Black Infant Health Program**PARTICIPANT INFORMATION** (Add new participant)

*Recruitment Date (Program Start Date): ____ / ____ / ____

Case Number: _____

*First Name: _____ Middle Name: _____ *Last Name: _____

Preferred Name: _____ *Participant's DOB: ____ / ____ / ____

Home Address (Address 1): _____ Apt/Ste/Bldg # (Address 2): _____

City: _____ State: _____ *ZIP Code: _____

Mailing Address: _____

City: _____ State: _____ ZIP Code: _____

Home Phone: () _____ - _____ Work Phone: () _____ - _____

Email: _____

What is the best way to contact you? _____

REFERRAL INFORMATION (Recruitment TouchPoint)			
Date Referral Made (Provider): ____ / ____ / ____		*BIH Staff Name: _____	
*Pregnancy Status:	☐ Prenatal	☐ Postpartum	*Due Date/Delivery Date: ____ / ____ / ____
*First time parent?	☐ Yes	☐ No	☐ Unknown
*Referral Source Type (Check primary source):	☐ Social Service Provider	☐ WIC	☐ BIH App/Commercial/PSA/News article/Press Release
	☐ Medical Provider	☐ Word of Mouth	☐ TV/Radio/Newspaper/Billboard
	☐ County Health Department	☐ Other BIH participant	☐ Website – blackinfanthealth.org
	☐ BIH Staff Outreach- Health fair	☐ Returning BIH Participant (previous pregnancy)	☐ Internet- other website
	☐ BIH Staff Outreach- Street	☐ Other: _____	☐ Internet- social media, digital ads
For provider-based referrals, was the participant information received initially via automated list/report?		☐ Yes	☐ No
Name of Referral Organization (if provider-based referral): _____		PEI provider? ☐ Yes ☐ No	
Contact Person: _____		Phone Number: () _____ - _____	
Name of Referring BIH Staff (if health fair or street outreach): _____			

Dismiss Participant from Recruitment Program (to be completed by BIH Staff)	
*Program End Date: ____ / ____ / ____	
*Dismissal Reason (CHECK ONE)	
Enrolled:	☐ Enrolled in BIH Group Model with 1:1 Support ☐ Enrolled in 1:1 Support Only
Ineligible/ Not Contacted:	☐ Staff unable to contact ☐ Not eligible for BIH
Participant Declined:	☐ No time available to participate ☐ Cannot participate due to transportation, childcare, or other barriers
	☐ Not interested ☐ Needs could not be met by BIH
	☐ Other

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Attorney General of California
2 JENNIFER G. PERKELL
Supervising Deputy Attorney General
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8 *Attorneys for Defendant Dr. Erica Pan, in her*
official capacity as Director of the California
Department of Public Health
9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 **ERICA JIMENEZ, individually and**
15 **on behalf of a class of similarly**
16 **situated individuals,**

17 Plaintiff,

18 v.

19 **DR. ERICA PAN, in her official**
20 **capacity as Director of the California**
21 **Department of Public Health; DR.**
22 **BARBARA FERRER, in her official**
23 **capacity as Director of the Los**
24 **Angeles County Department of Public**
25 **Health; MANUEL CARMONA, in his**
26 **official capacity as the Director of**
27 **Public Health for the Pasadena Public**
28 **Health Department; LOS ANGELES**
COUNTY DEPARTMENT OF
PUBLIC HEALTH; and PASADENA
PUBLIC HEALTH DEPARTMENT,

Defendants.

2:26-cv-03500-SPG-SP

**DECLARATION OF JENNIFER
BUNSHOFT IN SUPPORT OF
DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(1)**

*[Filed Concurrently with Defendant
Director of the California Department
of Public Health Erica Pan's Notice of
Motion and Motion to Dismiss
Pursuant to F.R.C.P. 12(b)(1);
Memorandum of Points and Authorities
in Support of Motion to Dismiss;
Declaration of Rita Nguyen;
[Proposed] Order]*

Date: September 30, 2026
Time: 1:30 p.m.
Courtroom: 5C
Judge: The Honorable Sherilyn
Peace Garnett

Trial Date:
Action Filed: 4/02/2026

1 I, Jennifer A. Bunshoft, declare:

2 1. I am an attorney licensed to practice before all the state and federal courts
3 in the State of California and am a Deputy Attorney General employed by the
4 Office of the Attorney General, counsel of record for Defendant Erica Pan, in her
5 official capacity as Director of the California Department of Public Health in this
6 matter.

7 2. This declaration supports Defendant Pan's motion to dismiss pursuant to
8 Federal Rule of Civil Procedure 12(b)(1).

9 3. On May 27, 2026, I attended the hearing on Plaintiff's Motion for
10 Preliminary Injunction before this Court. During the hearing the Court asked
11 Plaintiff's counsel whether she had reached out to the City of Pasadena (City) again
12 to apply for enrollment in the City's Black Infant Health ("BIH") Program in light
13 of Defendants' statements that Plaintiff was not categorically ineligible due to her
14 race. Plaintiff's counsel conceded Plaintiff had not subsequently reached out to
15 Defendants regarding enrollment in the program, arguing that submitting an inquiry
16 form was enough, but expressed an openness to Defendants reaching out about
17 Plaintiff's enrollment. A true and correct copy of the hearing transcript is attached
18 hereto as Exhibit A.

19 4. I was among the recipients of a letter dated July 8, 2026, from Amanda
20 Cusick, counsel for the City Defendants, on behalf of her clients, to Andrew R.
21 Quinio and Samantha Romero-Drew, attorneys of record for Plaintiff Erica
22 Jimenez. The letter invited Ms. Jimenez to proceed with completing the additional
23 steps for her enrollment in the BIH program. In the letter, the City reiterated that
24 this process would require scheduling an appointment for her to complete an
25 assessment, and to discuss with the program representative the services available to
26 her and the logistics of participation in the BIH Program. The City further offered
27 four specific date and time options from which Ms. Jimenez could choose to
28 schedule the appointment for her assessment, or, if none of those options were

1 available, invited Ms. Jimenez to respond with alternative dates and times that did
2 work for her. A copy of the letter is attached as exhibit A to the Declaration of
3 Amanda Cusick, filed separately.

4 5. To date, I have not received or been made aware of any correspondence or
5 communications from Plaintiff or her counsel regarding facilitating Plaintiff's
6 enrollment in the BIH Program in response to the Court's inquiry at the May 27,
7 2026, as described above.

8 6. To date, I also have not received or been made aware of any
9 correspondence or communications from Plaintiff or her counsel in response to the
10 City's subsequent July 8, 2026 letter regarding Plaintiff's enrollment in the BIH
11 program.

12 7. On June 30, 2026, on behalf of Defendant Pan, I sent Plaintiff's counsel a
13 meet and confer letter outlining Defendant's arguments regarding Plaintiff's lack of
14 standing to bring this action.

15 8. On July 1, 2026, the parties met and conferred regarding Defendants'
16 anticipated motions to dismiss under Federal Rule of Civil Procedure 12(b)(1). The
17 parties thoroughly discussed the substance and potential resolution of the motion by
18 videoconference. After discussing their respective positions regarding Plaintiff's
19 standing to sue, the parties did not agree to any resolution of the claims.

20 9. On August 17, 2026, I sent Plaintiff's counsel an email advising them that
21 all Defendants were planning to move forward with filing their 12(b)(1) motions on
22 August 24, 2026, on the ground that Plaintiff lacks standing, and that the reasons
23 supporting our motions to dismiss remain the same as previously discussed. I asked
24 counsel to confirm whether Plaintiff's position regarding standing had changed.

25 10. On August 18, 2026, Plaintiff's counsel confirmed that Plaintiff's
26 position that she has standing remained the same, and that she should would not be
27 dismissing or amending the complaint at this time.
28

1 I declare under penalty of perjury under the laws of the United States that the
2 forgoing is true and correct.

3 Executed in San Francisco, California, on August 24, 2026.
4

5
6 By: Jennifer Bunshoft
7 Jennifer A. Bunshoft

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Exhibit A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
ERICA JIMENEZ, et al.,) Case No. LA CV 26-03500-SPG
) (SPx)
Plaintiffs,) Los Angeles, California
)
vs.) Wednesday, May 27, 2026
)
DR. ERICA PAN, et al.,) (2:11 p.m. to 3:11 p.m.)
)
Defendants.)
_____)

TRANSCRIPT OF PLAINTIFF MOTION FOR PRELIMINARY INJUNCTION
[13]
BEFORE THE HONORABLE SHERILYN PEACE GARNETT
UNITED STATES DISTRICT JUDGE

Appearances: See next page.
Court Reporter: Recorded; CourtSmart
Courtroom Deputy: Patricia Gomez
Transcribed by: C. Okonta
Echo Reporting, Inc.
9711 Cactus Street
Suite B
Lakeside, CA 92040
(858) 453-7590

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 APPEARANCES:

2 For the Plaintiffs:

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Los Angeles, California; Wednesday, May 27, 2026 2:11 PM

--o0o--

(Call to Order)

THE CLERK: Calling item number four, civil case
26-3500, Erica Jimenez, et al. versus Doctor Erica Pan, et
al.

Counsel, please make your appearances, beginning
with the Plaintiff.

MR. QUINIO: Good afternoon, your Honor. Andrew
Quinio for Plaintiff Erica Jimenez.

THE COURT: Good afternoon.

MS. CUSICK: Good afternoon, your Honor. Amanda
Cusick for the City of Pasadena.

THE COURT: Good afternoon.

MS. BUNSHOFT: Good afternoon, your Honor.
Jennifer Bunshoft on behalf of Defendant, Director Pan from
the California Department of Public Health.

THE COURT: Good afternoon.

MR. SIEGEL: Good afternoon, your Honor. Amnon
Siegel on behalf of Defendant, Doctor Barbara Ferrer, the
County of Los Angeles Public Health Officer, and the County
of Los Angeles.

THE COURT: Good afternoon.

MR. WILLIAMSON: Good afternoon, your Honor.
Steven Williamson, also with the County Defendants.

1 THE COURT: Good afternoon.

2 THE CLERK: Please be seated.

3 THE COURT: This is here for Plaintiff's motion
4 for preliminary injunction. Basically, my understanding of
5 the case is that Plaintiff applied -- no, Plaintiff filled
6 out an online interest form for a program entitled, one
7 moment, the Black Infant Health Program, designed, according
8 to the submissions to the Court, to address issues
9 surrounding Black infant mortality. And according to the
10 Plaintiff, after filling out the online interest form, she
11 had a conversation with somebody from the program, last name
12 McKenzie. And according to the Plaintiff, Ms. McKenzie
13 asked for the Plaintiff's race. And when she was informed
14 that Plaintiff is not African American or Black and the
15 father of the child is not African American or Black and the
16 child is not African American or Black, that she was told
17 the program was not for her.

18 So Plaintiff is seeking a mandatory injunction to
19 be -- well, I'm going to ask for clarity on that. And the
20 Defendants are arguing that there's a lack of standing and
21 that the likelihood of success has not been shown. That's
22 my assessment. Have I missed anything? Okay.

23 Well, it's Plaintiff's motion. Would you like to
24 be heard briefly?

25 MR. QUINIO: Yes, your Honor.

1 THE COURT: Quick question, do you agree that it's
2 a mandatory injunction that you're seeking?

3 MR. QUINIO: Your Honor, I believe it's
4 prohibitory.

5 THE COURT: How so?

6 MR. QUINIO: Because we're only asking the
7 Defendants to implement the program without regard to race.
8 We're not asking them to do anything extra beyond complying
9 with the Equal Protection Clause.

10 THE COURT: Well, you're not asking for them to
11 maintain the status quo, which would be to implement the
12 program as is, as opposed to doing something affirmative,
13 which is to not implement the program as is and to ignore
14 the name of the program and the purpose of the program and
15 the legislative intent of the program and do something
16 different. I'll say different because the Defense
17 disagrees. We'll get to that. But to do something that is
18 not status quo, to affirmatively allow the Plaintiff in,
19 notwithstanding that, facially, she doesn't fit the name of
20 the program. So it's a mandatory injunction, wouldn't you
21 say?

22 MR. QUINIO: I think when framed like that, your
23 Honor, it would be mandatory. It was our -- it was our
24 assertion that because we're seeking the status quo of
25 constitutionality that it would be prohibitory.

1 THE COURT: That's an interesting theory.

2 MR. QUINIO: Well -- but, nonetheless, your Honor
3 is right that we are asking them to admit her to the program
4 and allow her to participate in the program without regard
5 to her race.

6 THE COURT: Okay. So given that, then you would
7 agree that the standard is higher than what you've
8 articulated in your papers in that your client has to show
9 that the facts are clearly in her favor.

10 MR. QUINIO: And I think we have shown that those
11 facts are clearly in her favor, your Honor. I think we
12 would still have some issue about the mandatory versus
13 prohibitory, but, nonetheless, whether it is either -- under
14 either standard, I think we clearly show the facts are in
15 her favor.

16 THE COURT: Let me ask you this, has your client
17 actually applied for the program?

18 MR. QUINIO: She has, your Honor. She has.

19 THE COURT: So what is the application process?
20 You just fill out this online interest form, and you're in
21 or not?

22 MR. QUINIO: The form is an interest and
23 eligibility form. From what she understands from the
24 program, you submit that, and then you receive a call or
25 have a phone call or a communication with the program

1 coordinator. From there, according to the Defendants,
2 that's when you begin the process of getting admitted into
3 the program after some other steps.

4 THE COURT: So there's no online application or
5 anything of the equivalent?

6 MR. QUINIO: The online application was the
7 eligibility form. That was the preliminary step.

8 THE COURT: Okay.

9 MR. QUINIO: Beyond that, the -- beyond that, it's
10 out of Ms. Jimenez' control essentially how she gets into
11 the program.

12 THE COURT: Okay. So she filled out this online
13 interest form, and then she received a call, and she says
14 that during that call she was asked her race, and she was
15 told that the program was not for her. The Defense says, or
16 Ms. McKenzie says, "I didn't ask her about her race, and I
17 never told her that the program was not for her." Does the
18 Court have to make a factual determination or credibility
19 determination for this preliminary injunction?

20 MR. QUINIO: I don't believe so, your Honor.

21 THE COURT: Why not?

22 MR. QUINIO: In a preliminary injunction, the
23 standards of evidence are actually relaxed because of the
24 expeditious requirement or the expeditious nature of the
25 preliminary relief. That's under Herb Reed Enterprises vs.

1 Florida Entertainment Management, excuse --

2 THE COURT: So is it your position, Plaintiff,
3 that the Court doesn't consider other declarations or the
4 Court just sticks to the allegations of the complaint and
5 the factual statements in the preliminary injunction motion?

6 MR. QUINIO: The Court can certainly consider
7 other declarations and other evidence.

8 THE COURT: Well, then if I consider Ms.
9 McKenzie's declaration, doesn't the Court have to make a
10 credibility determination? Because your client says she was
11 asked about her race and told program is not for her, and
12 Ms. McKenzie says, "I didn't ask her about her race, and I
13 didn't tell her the program wasn't for her."

14 MR. QUINIO: Yes, your Honor. You can make the
15 credibility determination. I think what I'm getting at,
16 your Honor, is that it doesn't weigh in favor or against my
17 client, given the other competing evidence. There's no
18 burden on my client because of the --

19 THE COURT: What if I disagree with you? What if
20 I weigh Ms. McKenzie's recitation of the facts more -- as
21 more credible than your client's recitation of the facts?
22 And Ms. McKenzie says, "Well, I never asked her about her
23 race, and I never asked her that -- or I never told her that
24 the program was not for her." Then has your client, for
25 standing purposes, applied, or was she just kind of

1 interested and filled out an online form?

2 MR. QUINIO: Yes, your Honor. And we would of
3 course disagree if it was weighed against Mrs. Jimenez,
4 because the other facts and the other public information
5 about this program is consistent with what Ms. Jimenez
6 experienced. Notwithstanding the name of the program,
7 notwithstanding the very extensive opposition that the
8 Defendants have mounted against our preliminary injunction
9 motion, if the program was not conditioned on the race of
10 the applicant, then there's nothing for the Defendants to
11 oppose.

12 THE COURT: But the Defendants are saying it's not
13 conditioned, that what they actually do is that they make
14 determinations after somebody has applied on whether the
15 program will benefit that person. And some of those
16 determinations have not been race based. Other people who
17 are not Black or African American, who do not have Black or
18 African American kids have gotten into the program,
19 according to them, also based on facts that they have
20 submitted.

21 MR. QUINIO: Right. And two things, your Honor.
22 Number one, what -- that assertion, again, conflicts with
23 all of the information about this program. Number two, what
24 the Defendants are specifically saying --

25 THE COURT: What information exactly does it

1 conflict with?

2 MR. QUINIO: The California Department of Public
3 Health website specifically says that this program serves
4 Black mothers and Black infants. The form that Ms. Jimenez
5 submitted, the interest and eligibility form, asks
6 specifically if her race is African American or the race of
7 her infant is African American. The goals asserted by the
8 Defendants are to make sure the mortality rates for Black
9 mothers and Black infants are specifically addressed.

10 THE COURT: That kind of makes sense, what you're
11 saying, based on your complaint, which apparently asserts a
12 facial challenge to the program itself. But we're here on
13 the preliminary hearing, and it seems that what you have or
14 how you've worded it is that you're asserting or your client
15 is asserting an as-applied-to-her challenge, as applied. So
16 there's an issue there, number one.

17 And, number two, as applied to her, the Court
18 would necessarily look to other applications and/or consider
19 other evidence in terms of whether she's some outlier or
20 whether she's not.

21 MR. QUINIO: Yes, your Honor. And with respect to
22 those who were supposedly admitted, notwithstanding the race
23 not conforming with what the program says, I again want to
24 specifically look at what Defendants are saying here.
25 They're saying that they have admitted individuals who have

1 not self-identified as Black or African American. That
2 doesn't mean that the Defendants have not admitted people
3 who they have perceived to be of the right race. And where
4 -- the facts agree here, and I think this is very important
5 to look at, both Mrs. Jimenez and both Mrs. Scott state that
6 alternatives were discussed to this program. And that seems
7 to suggest that if there was an ability to admit Mrs.
8 Jimenez notwithstanding her race, she wouldn't have been
9 offered these options, these alternative options.

10 THE COURT: That's not what the Defendants are
11 saying. And I'm not trying to make their arguments for
12 them. It's in the papers. According to the Defendants,
13 they always or -- I won't say always, but they do offer
14 alternatives as well. So, again, Ms. Jimenez has not
15 necessarily demonstrated that she is an outlier for this as-
16 applied challenge.

17 MR. QUINIO: And I emphasize that difference
18 again, your Honor. It doesn't seem like a big difference,
19 but it actually is, because being able to tell a -- an
20 applicant there are alternatives permits the Defendants to
21 say that we don't actually explicitly turn people away from
22 the program based on their race. That they're encouraging
23 or offering alternatives is enough of a rejection or is
24 enough to indicate that this is a program that's not for an
25 applicant based on race.

1 What I'm -- the point I'm making is that they're
2 able to say that they don't explicitly reject individuals,
3 but there seems to be a practice and a policy of providing
4 these alternatives in a way that discourages applicants who
5 might not be the right race, like Mrs. Jimenez. That's
6 consistent with what her experiences was. That's consistent
7 with what Mrs. Scott was saying.

8 THE COURT: Okay. Is your client ready and able
9 to apply?

10 MR. QUINIO: She is, your Honor, which is why she
11 submitted the eligibility form. And that's sufficient for
12 her to have standing in this case, your Honor. It is -- the
13 injury to her is her inability to compete for a spot in this
14 program on an equal footing. She was denied that on the
15 basis of her not having the right race.

16 THE COURT: If I believe her declaration over Ms.
17 McKenzie.

18 MR. QUINIO: Yes, your Honor. And, again, that
19 declaration is in the context of all the public information
20 about this program that indicates that this is a race-
21 conscious program and what the Defendants have said about
22 why this program needs to be race conscious for all of the
23 interests and all of the goals that they have stated.

24 THE COURT: I guess I'm struggling with you kind
25 of flip-flopping back and forth between facial versus as-

1 applied. And that's kind of where I'm struggling. So,
2 again, my concern is that your client has to make a clear or
3 show that the facts are clearly, clearly in her favor,
4 assuming this is a mandatory injunction. If it's not, then
5 she has to show a likelihood of success. And here, number
6 one, the Court has to make a factual determination out the
7 gate as to whether to believe her versus Ms. McKenzie. That
8 doesn't -- is not necessarily conducive to a preliminary
9 injunction at this stage of the proceedings, as opposed to
10 summary judgment or trial. And, number two, your client's
11 declaration just says that she's ready and able to apply. I
12 would love to hear from Defendants what it all entails to
13 apply. Is it enough to just submit an interest and then
14 have a conversation and then that's -- then you can bring
15 suit because you don't like what you heard, or something
16 more required. Number three, in looking at the arguments
17 that were made in the briefing, you liken this to a
18 affirmative-action-type case with discrimination as opposed
19 to what this is, and it's something different. On the
20 Plaintiff's side, your briefing points out that the only
21 basis for the government officials to be doing what they're
22 doing, to include the legislature, is to remedy past
23 discrimination, and it -- the briefing seems to ignore,
24 quite frankly, the very basis for this program and whether
25 or not strict scrutiny -- whether or not it would survive

1 strict scrutiny. Those are my issues as far as the
2 Plaintiffs are concerned.

3 If you want a few moments to address those issues?

4 MR. QUINIO: Yes, your Honor.

5 First of all -- I will address her applying and
6 the extent of this being an affirmative action, a race-
7 conscious program.

8 First of all, with respect to her applying to this
9 program, the farthest that she could go, given the race-
10 conscious criteria of this and the fact that there was a --
11 essentially a gatekeeper in the form of Mrs. Scott, was to
12 submit that eligibility form. And as she has -- as she has
13 declared, discovering that this -- or being told that this
14 program was not for her because of her race, that's as far
15 as she could go. It would be inflating the standing
16 requirement if there was an additional demand of her, for
17 instance, to continue on and persist and perhaps even show
18 up in -- to the office and demand that she be admitted to
19 the program. She's -- she did everything she had to do and
20 she could do within her power to show that she was ready,
21 willing, and able to apply.

22 With respect to the extent of this program and its
23 use of race and it being an affirmative action program, the
24 -- ultimately, the Defendants here have not disavowed the
25 use of race or the presence of race or race consciousness in

1 this program. The Supreme Court has been very clear that
2 there are only two compelling interests that would satisfy
3 strict scrutiny, and the Defendants here admit that the
4 interests here are not either of those, which is to remedy
5 specific instances of past discrimination and to prevent
6 violence in prisons, which is not applicable here. The
7 Defendants say that this is -- the interest here is a
8 forward-facing health program. Despite the salutary impact
9 of that reason, it is not a sufficient compelling interest
10 under Students for Fair Admission vs. Harvard. The Defense
11 --

12 THE COURT: That's a affirmative action case?

13 MR. QUINIO: Yes, it is, your Honor.

14 THE COURT: And the Supreme Court said this
15 applies to everybody in every context where race is used as
16 a factor?

17 MR. QUINIO: Yes, your Honor. So this is -- in
18 Students for Fair Admission vs. Harvard, there was no --
19 there was no indication or no argument by the court that the
20 Equal Protection Clause varies in application depending on
21 the industry or depending on the subject. The strict
22 scrutiny analysis that the court put forward in Students for
23 Fair Admission borrowed for -- borrowed from Reno vs. Shaw,
24 which is a redistricting voting rights case. It also
25 borrowed from City of Richmond vs. Croson, which was a

1 minority contracting case. Just recently, the Supreme Court
2 decided Louisiana vs. Callais, which cited to Students for
3 Fair Admission. Louisiana vs. Callais was a voting rights
4 redistricting case. So the strict scrutiny analysis here
5 and the compelling interests that were asserted in Students
6 for Fair Admission is absolutely applicable here, and the
7 Defendants don't satisfy that.

8 THE COURT: Okay. Thank you.

9 MR. QUINIO: Your Honor.

10 THE COURT: Defense. Any one of you.

11 MR. SIEGEL: It might be two of us, your Honor,
12 but I'm going --

13 THE COURT: All right.

14 MR. SIEGEL: -- to let the State start, if that's
15 okay.

16 MS. BUNSHOFT: Good afternoon, your Honor.
17 Jennifer Bunshoft on behalf of Director Pan.

18 And so because the County and the State have
19 similar arguments, we are going to divide it up to avoid
20 redundancy. So I'll address standing and the lack of
21 imminent harm and the -- sort of the general argument that
22 the program does not even discriminate on the basis of race.
23 And then Counsel will address the strict scrutiny argument.

24 THE COURT: Okay.

25 MS. BUNSHOFT: So, as your Honor noted, the issue

1 with standing here is that the -- their allegation is
2 completely contradicted by Ms. Scott. And, you know, even
3 now, after she has been made aware, if she was unaware
4 before, that the program does not discriminate on the basis
5 of race and that it -- she could be admitted if she actually
6 went through the process, she still has not even sought to
7 apply, which really calls into question whether she wants to
8 be part of this program.

9 THE COURT: Can I ask you, is the application
10 process just filling out the online interest form?

11 MS. BUNSHOFT: No, your Honor, it is not. And
12 that is --

13 THE COURT: What else does it entail?

14 MS. BUNSHOFT: So that's just for the original
15 informational call. But after that, there would need to be
16 an expression from the potential applicant that they want to
17 be considered for this program. And if so, then that person
18 would be connected with a mental health specialist who would
19 do some evaluations and so forth. And then they would meet
20 to discuss the program. But there's a lot more that goes
21 into it. It's not just filling out an interest form and
22 saying, "Oh, well, I don't think I could be admitted because
23 it's called the Black Infant Health Program, and I'm not" --

24 THE COURT: When you say that there needs to be an
25 expression that they want to be considered, isn't the online

1 interest form that expression?

2 MS. BUNSHOFT: Well, that's an interest form. And
3 then, as Ms. Scott said, you know, there would have to be
4 some indication after providing information to say, "Yes,
5 that sounds good."

6 And to the point about talking about different
7 programs, I mean that's just the general practice to let an
8 applicant or potential applicant know, you know, not only
9 about the Black Infant Health Program, but about these other
10 programs, because there's a lot of programs that are offered
11 by, you know, the County and the City that may have other
12 benefits. And, you know, the Black Infant Health Program is
13 a very specific program with, you know, 10 group meetings
14 before birth of the infant, and then 10 after, and that may
15 not be what everyone chooses to go. So -- I mean --

16 THE COURT: Let me ask you this.

17 MS. BUNSHOFT: Yes.

18 THE COURT: If I were to accept the declaration of
19 the Plaintiff over Ms. -- is it McKenzie Scott?

20 MS. BUNSHOFT: It is, yes.

21 THE COURT: I keep calling her Ms. McKenzie, and I
22 apologize to Ms. Scott.

23 If I were to accept the Plaintiff's declaration
24 and find it more credible than Ms. Scott, because the really
25 do conflict in terms of their account of this telephone

1 conversation, then the record would be that Ms. -- or the
2 Plaintiff filled out this online interest form, received a
3 phone call from the program or a person from the program and
4 was told that because she did not fit the racial criteria,
5 the program was not for her. Click. Is that enough for
6 standing?

7 MS. BUNSHOFT: I mean, that's not enough, given
8 the fact that she has to -- you know, the burden is on her
9 to demonstrate the facts, and so to find her statement more
10 credible than a conflicting statement would not comply with
11 the requirements for -- you know, for her burden on a
12 preliminary injunction and also her burden on standing. But
13 if the Court nonetheless were to say, "Well, I'll ignore the
14 sworn testimony of Doctor -- I mean, of Ms. Scott," then --
15 it just says she's, you know, ready and able to. But she
16 doesn't say she actually requested during that conversation
17 to be, you know, part of the program.

18 THE COURT: And to be clear, "Ready and able" is
19 kind of a legal conclusion. There are no facts necessarily
20 supporting it, so I tend to agree with you. But what I'm
21 grappling with is, in the standing argument, there are cases
22 that say that a plaintiff should not have to go through the
23 futility of applying for something and being denied before
24 they have standing. And then there are cases that say that
25 the plaintiff has to be ready and able, and the Court has to

1 figure out where this case falls in between those standards.
2 Maybe they're on top of each other as opposed to there's a
3 gap, but it kind of feels like a gap. And, factually, I'm
4 trying to figure out where it falls within the gap.

5 MS. BUNSHOFT: Right. Well, here, the case law
6 about when the futility exception applies says that it has
7 to be clear that the person would not be admitted to the
8 program. There has to be a clear exclusionary policy. And
9 that's simply not the case here. I mean, at best, she could
10 say, well, it was maybe unclear to her.

11 THE COURT: Doesn't the say Black?

12 MS. BUNSHOFT: Well, the title reflects that the
13 focus is on Black women and infants to address a critical
14 health issue, but that doesn't mean that it only admits
15 women who identify as Black.

16 THE COURT: So the average plaintiff has to kind
17 of probe beyond the title to know that they can apply, even
18 though -- you know, I would think the average person might
19 be dissuaded by the title itself.

20 MS. BUNSHOFT: I mean, if someone is dissuaded,
21 that's not -- that does not mean that the program excludes.
22 And that's really what this is about. Case law doesn't say
23 that if someone looks at a website and makes an assumption
24 that is incorrect that it doesn't apply to them and doesn't
25 apply on that basis, that that is stating a constitutional

1 violation.

2 THE COURT: Which brings me to my next question,
3 because, as I pointed out with Plaintiff, he was like -- the
4 complaint is -- seems to be asserting a facial challenge to
5 the program and its title, yet the preliminary injunction
6 motion seems to be asserting an as-applied challenge.
7 Anything to say about that?

8 MS. BUNSHOFT: Yes. I mean, it does -- the relief
9 that's sought through the injunction is for her to be
10 admitted into the program. And the fact is that based on
11 all of the record evidence that's been submitted by
12 Defendants, there's no reason she cannot be admitted into
13 the program. There's no policy saying that she's excluded
14 because of her race. She simply has not applied. She has
15 not said, "I want to be part of this program" for -- to even
16 test that. So it seems, you know, highly premature for her
17 to be here seeking such relief when -- without having
18 actually applied. If somehow she were denied based on her
19 race, that would be a different story. But that's not the
20 case. And based on all of the evidence, that seems highly
21 unlikely. So there's simply no -- nothing warranting an
22 injunction here to force the State to do something.

23 THE COURT: Out of curiosity, and not to trample
24 on any sort of negotiations or discussions, at the point
25 that the Defendants got this here complaint and preliminary

1 injunction, did the Defendants ever go, "You know what?
2 Just come on into the program"? Or -- I mean, this could
3 have all gone away or be moot.

4 MS. BUNSHOFT: I think the surprising thing,
5 having, you know, put forth that in the opposition, that
6 Plaintiffs didn't just say, "Okay. I'm going to call back
7 McKenzie Scott and say, 'I understand that I can be in the
8 program. Let's move forward.'" And she didn't do that.
9 And the burden is on here --

10 THE COURT: And McKenzie Scott didn't call her,
11 right --

12 MS. BUNSHOFT: No, but the --

13 THE COURT: -- and say, "Hey, you can be in the
14 program. Why are we doing all of this?"

15 MS. BUNSHOFT: That is true. But, you know,
16 again, this is a preliminary injunction motion with a really
17 heavy burden on Plaintiff. It's an extraordinary remedy,
18 and they need to make a clear showing. So that is something
19 that she should have done should -- if she truly had wanted
20 to be part of this program, and she still could do. There's
21 nothing prohibiting her from calling her up and saying, "I
22 would like to be part of this program."

23 THE COURT: Okay.

24 MS. BUNSHOFT: And then in terms of the question
25 about, you know, whether there's a barrier or that there's

1 an inability to compete on equal footing, those cases deal
2 with, you know, competition in a bidding or application
3 process. And that's simply not what we have here. In those
4 cases, in like the Northeastern Florida cases, there's some
5 sort of limited resource or benefit, a contract, but there's
6 only few contracts that may be awarded, but not everyone
7 gets one, or an admission to law school or medical school.
8 There's a finite number of spots that they're competing for.
9 But there's been no evidence to suggest that this -- you
10 know, this is a competitive process to become a part of the
11 program. There's no allegation whatsoever that people have
12 been told, "Oh, you can't be a part of this program because
13 there's not enough spots" and that there's some competition
14 between Black and non-Black participants for limited spots.
15 So that really distinguishes that line of cases where there
16 is no competition involved in this program.

17 And so, you know, given the clear evidence from
18 Ms. Scott that not only did she not say "this program is not
19 for you," but that it would not be something that she would
20 ever do on this preliminary calls -- and she didn't know
21 Plaintiff's race either, didn't ask for Plaintiff's race,
22 and that there's, you know, much more of the process that
23 needs to take place before someone is enrolled in the
24 program, coupled with the record evidence from Doctor Nguyen
25 from CDPH and Doctor Franklin from the County, which both

1 confirm that the program is not intended and does not have a
2 policy to exclude on the basis of race, and the testimony
3 from Doctor Nguyen and Ms. Scott that, in fact, people who
4 are not Black have, in fact, been admitted into the program
5 in the past, all of those suggest that the recitation from
6 Plaintiff that she was told it wasn't -- she couldn't apply
7 for the program is simply not credible. And in any event,
8 given that this is a preliminary injunction and she has the
9 burden of making a clear showing of standing, it does not
10 support standing in this case. And, you know, without
11 standing, the Court need go no further because she has no
12 entitlement to a preliminary injunction if she doesn't have
13 standing.

14 But even assuming she did for the sake of
15 argument, there is another serious issue here, which is the
16 lack of imminent irreparable harm. In their moving papers,
17 Plaintiff argued that she needed this preliminary injunction
18 immediately because she needed the services and would time
19 out of the program when her infant reaches six months. But
20 after getting the opposition, in the reply, Plaintiff back
21 away from and, in fact, even disavow this argument that they
22 have actual imminent harm. And so -- I mean, that argument
23 is abandoned. There is -- she can show no harm to her from
24 not being part of the program because she simply has not
25 applied, and the evidence shows that there's no policy of

1 excluding people based on race, should they seek to be part
2 of the program.

3 And so, again, this gets back to, you know, a
4 self-created harm, in the Ninth Circuit, the court found
5 that if you create the harm, that doesn't constitute
6 irreparable imminent harm. And that's -- here, if she's
7 still not applying to the program and going through the
8 process, perhaps to avoid, you know, not -- being a part of
9 it and then not being able to pursue this litigation
10 further, then that -- that's certainly not harm for purposes
11 of preliminary injunction motion.

12 THE COURT: So your argument is it's self-created
13 harm because she's on notice that there's a possibility she
14 could apply to and be admitted into the program, but she
15 chooses not to, instead going forward with this litigation.

16 MS. BUNSHOFT: And also in terms of not only BIH
17 program services, but she's not even -- there's no evidence
18 she's availed herself of any of the other programs that
19 would provide benefits to her and her infant currently --

20 THE COURT: Okay.

21 MS. BUNSHOFT: -- as we speak. And Plaintiffs,
22 instead, they state that there's a presumption that there's
23 imminent harm because there's a constitutional violation
24 here and there's a likelihood of success on that claim.
25 And, you know, Counsel for the County will address that

1 point more fully, but there is no likelihood of success on
2 the merits. She hasn't shown an entitlement or that there's
3 been discrimination. And in any event, it is a rebuttable
4 presumption, doesn't apply in all instances. And most of
5 the cases, you know, that they cited, for instance, are
6 dealing with cases where there's clearly harm, like
7 immigrants locked up and, you know, needing to get out of
8 detention. There's nothing like that here. So this simply
9 is not a presumption that should apply here where she hasn't
10 shown that she has actually tried to avail herself of the
11 program or to -- and to participate in it in the face of
12 records -- evidence showing that there is not an exclusion.

13 THE COURT: Okay.

14 MS. BUNSHOFT: So another point is that -- and it
15 would not -- it's not an appropriate use of an injunction
16 to require something that there's no need for. I mean,
17 that's essentially what they're asking for here, especially
18 since any injunction would be limited to Plaintiff herself
19 under the Ninth Circuit Vasquez Perdomo case and Trump v.
20 CASA and not on behalf of class members who -- you know, she
21 has not made any effort to bring that class into or show
22 entitlement at this stage of the litigation.

23 The -- in turning to the -- like, a lack of
24 success on the merits, I'll simply say that the department
25 has made the argument that there's no need to even address

1 strict scrutiny because the program does not exclude on the
2 basis of race. And, you know, that is set forth in
3 declarations of Doctor Nguyen in paragraphs 45 to 52, Doctor
4 Franklin in paragraph 65, and Ms. Scott in paragraph 11. So
5 the fact that, you know, the program is -- has a certain
6 title or a certain focus does not mean that it discriminates
7 and does not admit people who do not fall within that focus.
8 And there's nothing inappropriate about a public health
9 program with a specific focus on a particular race. And the
10 Parents Involved in Community Schools case confirmed that,
11 you know, outreach and program design focused on particular
12 race does not implicate an Equal Protection Claim.

13 So for that reason, we would argue there's no need
14 to subject this to strict scrutiny. However, I'll turn it
15 over to Counsel for LA County to explain why even if strict
16 scrutiny applied, this -- the BIH program would meet it,
17 unless you have any further questions for me.

18 THE COURT: I do not. Thank you.

19 MS. BUNSHOFT: Thank you, your Honor.

20 MR. SIEGEL: Good afternoon, your Honor.

21 THE COURT: Good afternoon.

22 MR. SIEGEL: At the risk of giving the Court an
23 opportunity to question another government attorney, we
24 decided to split the argument this way. I think it makes
25 sense.

1 The County, the State, and the City of Pasadena
2 are quite proud to stand behind this program. We're proud
3 because we believe it represents the best of what government
4 can and should do, identify a crisis -- this is a
5 significant health policy issue as set forth in the briefs,
6 identified at every level of government as a significant
7 health policy issue that can't just be waved away as
8 Plaintiff attempts to do in its brief by claiming, "Those
9 are just numbers." They aren't. These are not mere
10 abstractions as set forth in the declaration, supported by
11 significant evidence, scholarly research, scientific
12 literature, all of which heavily backs the program. The
13 State marshaled the evidence, the legislature did, in 1989,
14 came after the Heckler Report from the U.S. Department of
15 Health and Human Services. And it made specific findings
16 and specific declarations that have nothing to do with
17 remedying past instances of discrimination or racial
18 balancing. Nothing at all. It had everything to do with a
19 forward-looking public health intervention to address this
20 very serious public health crisis. And the program
21 continues to exist today -- we hope one day it will no
22 longer be needed -- for one simple reason, in Los Angeles
23 County, Black mothers and infants are dying at three to four
24 times the rate of other groups.

25 The question before the Court, thus, on strict

1 scrutiny, assuming it applies, assuming you get past all the
2 hurdles my colleague discussed, is, may the government act
3 to save the lives of mothers and infants who are dying at
4 alarming, disproportionate rates? And the County submits --
5 the Defendant submit the answer is an emphatic yes, your
6 Honor. The stakes could not be higher. We submitted a
7 number of cases talking about the solemn duty of government,
8 probably the most solemn duty of government, to protect and
9 preserve life. Without life, you don't have liberty and you
10 don't have the pursuit of happiness. You don't even have
11 the opportunity for it. So the stakes here, we submit,
12 could not be higher. And any attempt by the Plaintiff to
13 say there is not a compelling State interest here, we simply
14 -- we believe falls flat and does not deserve credence.

15 THE COURT: Understood. And let's say I agree
16 with you. Plaintiff has argued that the standard is that
17 any such program has to be put in place to remedy past
18 discrimination. What do you say? What is the standard?

19 MR. SIEGEL: I believe that the Plaintiff is
20 extrapolating and extending Supreme Court precedent beyond
21 what the Supreme Court has actually said. Okay. The
22 Supreme Court has not foreclosed a forward-looking public
23 health intervention to protect and preserve life of women
24 and newborns. They have not said that. They have
25 identified two instances where such programs can satisfy,

1 but they haven't said, "And all other instances are forever
2 precluded, and we announce that, for now, any program that
3 comes in front of us will be invalidated unless it's
4 protecting safety of prison institutions or the affirmative
5 action, remedying past discrimination, racial quotas type
6 issues."

7 THE COURT: Given the direction that the Supreme
8 Court seems to be going, is it the case that -- I find it
9 hard to accept that such forward-looking programs have not
10 been in place for -- I mean, this one has been in place
11 since the '80s. So what standard does the Court apply to
12 this particular program? Because I guess I'm not satisfied
13 with "the Supreme Court has not foreclosed this."

14 MR. SIEGEL: Well, the standard is strict
15 scrutiny, but that doesn't mean -- context still matters in
16 strict scrutiny. Strict scrutiny does not mean absolute
17 death and you don't get past the front gate. And context
18 very much matters. The Supreme Court has said that time and
19 again. They said it in Grutter vs. Bollinger that "not
20 every decision influenced by race is equally objectionable."
21 This is a different context. States, of course, have a
22 compelling interest to protect life. The Ninth Circuit in
23 Mitchell vs. Washington, which was not addressed whatsoever
24 by the Plaintiff in its reply, talked about scientific
25 literature and scholarly research based on empirical data,

1 epidemiological empirical data, just as this program is, can
2 establish a compelling interest for a government program
3 targeting specific health interventions at different races.
4 Okay. And they've said that. There's a lot -- we cited a
5 lot of cases, albeit concurrences and not the controlling
6 basis for the decision, where the court has said, "We could
7 see situations where health issues, significant health
8 policy issues being addressed by government, can constitute
9 or can satisfy the strict scrutiny standard. So Plaintiff
10 has certainly not pointed us to any case that says, "This
11 program must be defeated because it is not addressing only
12 two instances in which the Supreme Court said you can
13 satisfy strict scrutiny." They have not cited any such
14 case, and there isn't any such case that we've been able to
15 find either.

16 The State did not create this program on a whim,
17 and it doesn't administer it on a whim. In fact, as
18 recently as 2006, a very comprehensive analysis was done by
19 UCSF about this program. This is set forth in our briefing.
20 And I think it's important when you talk about the strict
21 scrutiny standard, to look at not only the initiation of the
22 program, which is set forth in detail in our briefs, but
23 also the continuous evolution of the program to make sure
24 that we are targeting the most effective and most promising
25 health intervention to the most vulnerable in our

1 population, which is what the Black Infant Health Program is
2 designed to do. We have seen improvements. There are
3 continuous evaluations done. California DPH did one
4 recently, and they found improvements in a number of areas.
5 The work is not quite done yet, but that doesn't mean that
6 the program isn't narrowly tailored. It is very much
7 narrowly tailored. In fact, in the County, it's limited in
8 scope to three service areas where we have the highest
9 discrepancies, where we have found the biggest gap in
10 mortality rates and the highest mortality rates among Black
11 women and infants in the County compared to other groups.
12 It only applies to approximately 450 people annually, albeit
13 that's not a cap, so this is not a university admission
14 zero-sum game. That's just approximately how many people
15 are served. And it is a narrow time period. It's during
16 pregnancy and six months postpartum. That is narrow
17 tailoring. The -- other attempts have been made, and this
18 is not even required by strict scrutiny that you
19 specifically try and fail, but as part of the narrow
20 tailoring analysis, the Court can take into account that
21 over the decades, other what I would call broad-based or
22 generic prenatal interventions have been attempted. And
23 both Doctor Nguyen and Doctor Franklin have submitted
24 declarations saying the research -- the scholarly research,
25 the scientific literature all find that those broad-based

1 generic prenatal programs are not effective in addressing
2 this very significant mortality gap issue that we're trying
3 to address. And, in fact, they go further and say the most
4 promising program is something like this current Black
5 Infant -- iteration of the Black Infant Health Program to
6 make a change. And it's currently the only approach that
7 has shown documented progress.

8 THE COURT: Are you saying basically it's in the
9 name that attracts more individuals who need this sort of
10 programming?

11 MR. SIEGEL: Absolutely. I mean, it is targeted
12 to a specific health policy issue affecting our society that
13 is strikingly and disproportionately impacting a certain
14 community within the population. That does not on its face
15 make the program a violation of strict scrutiny or contrary
16 to the constitutional standards of Equal Protection.

17 THE COURT: What about as applied to Plaintiff?

18 MR. SIEGEL: I think you start getting into some
19 of the issues that was addressed by my colleague from the
20 State of California, because I think, as applied, we have
21 some serious issues with the Plaintiff's submission here.
22 It's a conclusory six-paragraph declaration, which says, "I
23 had one conversation -- I filled out an interest form," not
24 in the record, we don't have the form, "I had one telephone
25 call. By the way, I -- the woman called me first. It took

1 a few days. I had one phone call. The phone call was less
2 than 10 minutes long." And, of course, there's a dispute
3 about the evidence, which your Honor has correctly
4 identified. And then after that, she does nothing. She
5 doesn't do anything in reply or otherwise to say, "I want to
6 participate in the program." She says, "I'm ready and
7 able." That's different than "I want to." She doesn't say
8 that she thinks she would benefit from the program. She
9 doesn't really explain anything about why she wants to be in
10 the program, and we submit she doesn't really want to be in
11 the program.

12 So I think that's -- it's a complicated question,
13 as applied. I think it starts getting into a lot of these
14 other issues about this particular Plaintiff, who we do not
15 believe has established a sufficient injury in fact for
16 standing nor the necessary irreparable harm that's required
17 to obtain an extraordinary preliminary injunction.

18 The last thing I would say, dovetailing off your
19 Honor's question to Plaintiff's counsel, was that I agree
20 with the Court, to the extent the Court was making that
21 suggestion -- I'm not going to put words in your mouth --
22 that this is very different than the affirmative action line
23 of cases. And the Plaintiff can continue sort of setting up
24 that strawman and saying, "Well, in the affirmative action
25 cases, this is what the court requires," and Plaintiff

1 claims that really the only instance in which you can
2 suffice or satisfy the strict scrutiny standard is when
3 you're trying to remedy past instances of discrimination and
4 you prove all these other things that apply to racial quotas
5 and contracting or other zero-sum games like affirmative
6 action programs. I submit that's not the governing law,
7 and, more importantly, that is not the purpose of this
8 program. And we said it over and over again. And on the
9 reply brief, Plaintiff just goes back to its same statement,
10 "This is -- you know, it doesn't satisfy strict scrutiny
11 because it's not remedying past instances of
12 discrimination." We agree. I'm sorry, we strongly disagree
13 with the Plaintiff. I think I've already addressed this
14 point, your Honor, so unless you have any further questions,
15 I would submit.

16 THE COURT: Okay.

17 MR. SIEGEL: Thank you.

18 MR. QUINIO: Thank you, your Honor. Just to
19 address some of the points made by the Defendants.

20 The Defendants have not presented any case that
21 says that a forward-looking health program satisfies strict
22 scrutiny. The Supreme Court was very clear that the Equal
23 Protection Clause means that eliminating discrimination
24 means eliminating all of it and that distinctions on the
25 basis of ancestry among a people whose institutions were

1 founded on equality is odious. And so to carve out these
2 exceptions beyond the two rare exceptions that the Supreme
3 Court set forth in Students for Fair Admission vs. Harvard
4 goes against that principle. Again, despite the salutary
5 impact of the reasons for this health program, that still
6 doesn't satisfy strict scrutiny. It's a different question
7 whether the goals are worthy and whether it is
8 constitutional under the 14th Amendment. These may be
9 worthy goals, but it's not sufficient under Equal Protection
10 Clause analysis and strict scrutiny analysis.

11 THE COURT: Let's say I don't even get there.
12 Let's say that I look at the declaration, and it says that
13 your client is ready and able to participate in this
14 program. You would agree that that's conclusory.

15 MR. QUINIO: It's not, your Honor, because the
16 facts that were submitted by Ms. Jimenez in her declaration
17 and, again, the facts surrounding her application indicate
18 that that's as far as she could go, submitting that interest
19 form. And I want to emphasize, that interest form is not
20 just the -- it's the interest form. So if you're interested
21 in the program, you submit the interest form. It's also an
22 eligibility form because it asks you questions that indicate
23 your eligibility, including whether you identify as Black or
24 your baby identifies as Black. The assertion that
25 submitting this form is not enough contravenes the form

1 itself. This is the only form for the Black Infant Health
2 Program. Submitting this form doesn't avail you of the
3 other programs. It is specifically for the Black Infant
4 Health Program. So submitting the form for the Black Infant
5 Health Program means you are interested in the Black Infant
6 Health Program. This is before the Court in our moving
7 papers. I would direct the Court to page 10 of our points
8 and authorities. It's -- the form is linked there. And,
9 again, it is titled Interest Eligibility Form. And it asks,
10 among the other questions, do you or your baby identify as
11 Black or African American? Yes, your Honor.

12 THE COURT: I'm not even sure what this has to do
13 with anything, but your client got the opposition. The
14 Defendant said, "We let other people in." Your client has
15 or has not reached out?

16 MR. QUINIO: She hasn't reached out, because to
17 the Plaintiff, to Ms. Jimenez, this is still a program that
18 excludes her on the basis of race. And Defendants --

19 THE COURT: But apparently the Opposition says
20 it's not.

21 MR. QUINIO: The Opposition --

22 THE COURT: The title may exclude her, according
23 to Ms. Jimenez, but the Opposition says that other
24 individuals who are not falling within the category of the
25 title have been allowed in the program. So with that

1 additional knowledge, has your client reached out?

2 MR. QUINIO: It's not on Ms. Jimenez to reach out,
3 especially given that the Defendants still have not
4 disavowed the presence of race or race consciousness in the
5 program. Their opposition makes very clear, without its
6 focus -- without the program's focus on Black and African
7 American women and infants, that this program would not be
8 successful.

9 THE COURT: I go back to the facial versus as-
10 applied. This preliminary injunction is as applied to her.
11 What is the Court to do with the fact that she has not
12 applied, given the additional knowledge that she has?
13 Anything?

14 MR. QUINIO: And -- well -- and we welcome the
15 Defendants to work out a stipulation to admit her to the
16 program. But the overwhelming facts that are consistent
17 with her experience still show -- and, again, absence a
18 disavowal by the Defendants of there being race in this
19 program -- would suggest that she still -- it would still be
20 futile for her to apply.

21 THE COURT: Well, one of the things the Court has
22 to consider is irreparable injury. And it sounds like or at
23 least the argument is, from what I gather from the
24 Plaintiffs, that the injury becomes irreparable around
25 September of 2026.

1 MR. QUINIO: That's correct, your Honor.

2 THE COURT: Yet, here we are, and Ms. Jimenez has
3 not applied with the new knowledge that other individuals
4 who are not falling within the title of the program have
5 been allowed in. Is it really irreparable for purposes of a
6 preliminary injunction, as opposed to seeking damages, you
7 know, on her complaint?

8 MR. QUINIO: Yes, your Honor.

9 And, again, the Defendant -- or the Plaintiff is
10 allowed to rely on the representations of the Defendants, to
11 the extent that the eligibility here is dependent on her
12 race and that she would apparently do harm to the program if
13 they admit her. That's what they've said in their
14 opposition. So to put the -- again, that --

15 THE COURT: Have they said that? And to the --
16 when you say "to the extent," a lot is hinging on that "to
17 the extent" part. The Court has to make a decision as to
18 whether or not she's met -- satisfied all of the Winter's
19 factors. And I'm struggling with irreparable harm. I'm
20 struggling with likelihood of success and/or a clear showing
21 that the facts are in her favor, given all that has been
22 presented to the Court.

23 MR. QUINIO: What's been presented to the Court,
24 your Honor, is a dispute between what the Defendants are
25 saying and what their own program shows as far as

1 eligibility and the presence of race. Whereas Mrs. Jimenez'
2 experience is consistent with what she has seen in the
3 public-facing information, which is that this serves
4 individuals who don't share her race, and thus she's
5 excluded, it would be futile for her to be admitted. She is
6 competing on unequal footing. That is an irreparable harm
7 in and of itself. That constitutional injury constitutes an
8 irreparable harm.

9 I do want to point out, your Honor, and I
10 apologize for going back to this question of whether this is
11 prohibitory or mandatory, and I just want to direct the
12 Court's attention to this particular case -- let me just
13 pull it up -- Arizona Dream Act Coalition vs. Brewer at 757
14 F.3d 1053, an injunction -- it held that an injunction
15 against enforcement of a likely unconstitutional policy was
16 prohibitory rather than mandatory. Likewise, Bay Area
17 Addiction Research and Treatment Incorporated vs. City of
18 Antioch, 179 F.3d 725, which held that an injunction against
19 enforcement of an ordinance that likely violated federal law
20 was prohibitory rather than mandatory. We are asserting
21 that the Black Infant Health Program and its eligibility
22 criteria likely violates federal law, likely violates the
23 Constitution.

24 I want to also address the Mitchell case, Mitchell
25 vs. Washington. That case never held that a program that

1 addresses health satisfies strict scrutiny as a compelling
2 interest. What it said was it could imagine that that could
3 be a compelling interest, but, ultimately, the court decided
4 that the defendant there didn't satisfy the compelling
5 interest -- didn't put forward a compelling interest. And,
6 again, that case predates Students for Fair Admission vs.
7 Harvard, which again only provides those two instances of
8 compelling -- of a compelling interest.

9 And just going back again, your Honor, I'll wrap
10 up with this, regarding Mrs. Jimenez' ability to avail
11 herself of this program and whether what she did was
12 sufficient. I would direct the Court's attention to
13 Monterey Mechanical Company vs. Wilson which found that
14 there the plaintiffs in submitting a bid for a contract that
15 was subject to minority subcontractor requirements was
16 enough to give themselves standing, was enough to show that
17 they were ready, willing, and able to apply for this program
18 -- for that contract. Again, Mrs. Jimenez went as far as
19 she could in applying by submitting that interest and
20 eligibility form. She's done more than the plaintiffs in
21 Amazon vs. Alexandre, where the plaintiffs there didn't even
22 submit a contract. At issue there was a contract for
23 delivery services -- providing delivery services on behalf
24 of Amazon. The plaintiffs were found not to have standing
25 because they never even submitted anything to indicate that

1 they wanted to be part of this program -- or part of that
2 contract. Mrs. Jimenez has done more in this case, to the
3 extent she could, because she was prohibited based on her
4 race.

5 Unless there are any other questions, your Honor,
6 we ask that the preliminary injunction be granted.

7 THE COURT: Okay. Thank you.

8 I'm going to take this matter under submission. I
9 will consider the arguments that have been made, as well as
10 the briefing, and I hope to issue a ruling soon.

11 Anything further?

12 MR. SIEGEL: Thank you, your Honor.

13 MS. BUNSHOFT: Thank you, your Honor.

14 MR. QUINIO: Thank you, your Honor. No.

15 THE COURT: All right. Thank you.

16 THE CLERK: This court is adjourned.

17 (Proceedings concluded.)
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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Chinago Okonta 6/12/2026
Transcriber Date

FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

/s/L.L. Francisco
L.L. Francisco, President
Echo Reporting, Inc.

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**
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12 **ERICA JIMENEZ, individually and**
13 **on behalf of a class of similarly**
14 **situated individuals,**

15 **Plaintiff,**

16 **v.**

17 **DR. ERICA PAN, in her official**
18 **capacity as Director of the California**
19 **Department of Public Health; DR.**
20 **BARBARA FERRER, in her official**
21 **capacity as Director of the Los Angeles**
22 **County Department of Public Health;**
23 **MANUEL CARMONA, in his official**
24 **capacity as the Director of Public**
25 **Health for the Pasadena Public Health**
26 **Department; LOS ANGELES**
27 **COUNTY DEPARTMENT OF**
28 **PUBLIC HEALTH; and PASADENA**
PUBLIC HEALTH DEPARTMENT,
Defendants.

Case No. 2:26-cv-03500

**[PROPOSED] ORDER GRANTING
THE DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
MOTION TO DISMISS [ECF NO. 40]**

1 On August 24, 2026, Defendant Erica Pan, sued in her official capacity as Director
2 of the California Department of Public Health (Defendant Pan), filed a motion to dismiss
3 under Federal Rule of Civil Procedure 12(b)(1). By the motion, Defendant Pan argues
4 that that Plaintiff lacks standing to bring this action and requests that the Court dismiss
5 Plaintiff's Complaint for lack of subject matter jurisdiction.

6 The Court, having considered Defendant Pan's Motion, and finding good cause
7 therefor, hereby GRANTS the motion and ORDERS as follows:

8 1. Plaintiff's Complaint is DISMISSED WITH PREJUDICE for lack of
9 subject-matter jurisdiction.

10
11 IT IS SO ORDERED.

12
13 Dated:

14 _____
15 HON. SHERILYN PEACE GARNETT
16 UNITED STATES DISTRICT JUDGE
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