March ___, 2021

MEMORANDUM

TO: Randall J. Hall
Acting Designated Agency Ethics Official
Department of Health and Human Services

FROM: Xavier Becerra
Secretary
Department of Health and Human Services

SUBJECT: Limited Authorization to Participate in Matters Involving the State of California

The purpose of this memorandum is to memorialize my consultation with you concerning my decision to authorize, under 5 C.F.R. § 2635.502(d), my participation in specific-party matters involving, as a party or party representative, the State of California, for whom I served as Attorney General. You have advised me that I may be authorized to participate in these specific party matters, subject to the limitations detailed below, after considering the factors articulated in section 502(d) and a determination is made that the governmental interest in my participation in these specific party matters outweighs any countervailing appearance concerns. Note, this authorization does not affect the application of the prior-employer recusal requirement of 5 C.F.R. 2635.502 and the Ethics Pledge (Executive Order 13989) to matters involving any other prior employers other than the State of California. Nor, consistent with the Ethics Agreement I signed on January 17, 2021, does it authorize me to participate in any litigation involving the State of California that was pending during my tenure as Attorney General; however, I am not prohibited from participating in particular matters of general applicability, *e.g.* policy-setting matters, regardless of their impact on such litigation.

BACKGROUND

On March __, 2021, I resigned my position as Attorney General of the State of California to accept the appointment as the Secretary of the Department of Health and Human Services (HHS or Department), which began on March __, 2021. As Secretary, my duties cover the entire range of public health and social welfare policy issues and programs of concern to the Department. Specifically, as the highest-ranking political official at the Department, I am involved in top-level discussions on policy and program developments and receive all information necessary to ensure successful management of the Department. Additionally, I meet with Agency heads and other members of the Department to convey the Biden-Harris Administration's priorities, direction, and goals. At times, I also represent HHS in meetings with key stakeholders, including state and territorial governments. As Secretary, all activities of HHS fall within my official responsibilities.

I have nearly 35 years of experience in federal and state government. During the four years prior to my appointment, I served as the Attorney General for the State of California. In this position I

was California's chief law enforcement officer and headed its Department of Justice, overseeing more than 4,500 lawyers, investigators, sworn peace officers, and other employees who provide state legal services and support for local law enforcement. Additionally, the Attorney General acts as the state's chief counsel in litigation. Prior to that, I served one term in the California General Assembly, before serving 12 terms as a Member of the U.S. House of Representatives, most recently representing the 34th Congressional District of California. During my time in Congress I also held leadership positions within the House Democratic Caucus, including that of Chair.

While the majority of my work as the Secretary is at a policy-setting level that does not constitute participation in particular matters involving specific parties, I infrequently may become involved in such matters, including those to which the State of California is a party. From my previous role, I bring direct state operational experience to HHS, which makes me an effective manager of federal policy and regulations with regard to the impact on states and other stakeholders. My experience and perspective have significant value to the federal government and aids the Administration and HHS in achieving its mission and objectives. To effectively carry out my function as Secretary of HHS, I must work with states, other federal agencies, non-governmental organizations, and industry stakeholders in administering HHS programs. These contacts may occur at a large meeting that may not be a particular matter involving specific parties or at a one-on-one or small group meeting or conversation that would be a party matter. Furthermore, I may be called on to participate in litigation or enforcement actions, or other party matters to which the State of California is a party. Therefore, it is important that I be able to effectively work with all states and territories, including the State of California. Nevertheless, I will not participate in any litigation involving the State of California that was pending during my tenure as Attorney General; however, I am not prohibited from participating in particular matters of general applicability, *e.g.* policy-setting matters, regardless of their impact on such litigation.

DISCUSSION

Under the Standards of Ethical Conduct for Employees of the Executive Branch, a federal employee may not participate in a particular matter involving specific parties if one of the parties is, or is represented by, an entity with which the employee has a "covered relationship" and where the circumstances would cause a reasonable person to question the employee's impartiality in the matter. "Covered relationships" include persons or entities for which the employee has within the last year served as an employee or consultant. See 5 C.F.R. § 2635.502(b)(1)(iv). This requirement of disqualification only applies to "particular matters involving specific parties" and not to "particular matters of general applicability" or broad policy matters. It applies, for example, to litigation, grant awards, contracts, and other matters involving a specific request, determination, or ruling, but not to legislation or regulations that might affect an entity as part of a group. When an employee's participation in a particular matter involving specific parties gives rise to a concern about the employee's impartiality in the matter, the employee may be authorized to participate in the matter if the federal government's interest in the employee's participation outweighs the concern about a potential appearance of a lack of integrity in the agency's program and operations. See 5 C.F.R. § 2635.502(d).

I served as the Attorney General for the State of California within the last year. As such, I have a covered relationship with the State of California. Furthermore, because I recently provided services to the State of California on issues that overlap with my current position, a reasonable person could question my impartiality in matters involving the state. Therefore, in order for me to participate in a particular matter in which the State of California is a party or represents a party, it must be determined - in light of all relevant circumstances - that the interest of the Government in my participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of HHS. Consultation with you, the Designated Agency Ethics Official, on the relevant factors to consider is also required. See 5 C.F.R. § 2635.102(b).

The ethics regulations provide that the following factors may be considered in determining whether to authorize my participation:

1. ***Nature of the relationship.*** I was employed by the State of California for four years of my approximately thirty-five-year career in government service. I am not on a leave of absence nor do I have a continuing relationship with the State of California. Furthermore, other than the standard defined benefit pension offered to all employees of the state, I have retained no personal financial interests that would create a financial conflict of interest with the State of California. Markedly different from private, for-profit entities, state governments as prior employers are generally less likely to create the type of bias or appearance of special treatment that 5 C.F.R. § 2635.502 was meant to prevent.

2. ***Effect of the matter on the finances of the State of California.*** As Secretary of HHS, I will participate in matters that are of significance to the financial interests of all the states. As stated above, I have broad responsibilities regarding the policies and operations of HHS, some of which will affect state policies and programs subject to HHS administration, state budget and resource allocation, and the legal posture between the states and the Department. My duties primarily focus on policy matters, and I will be sharing publicly available information with state officials and gathering input from them on how national policy decisions under consideration could impact the state and its residents. However, the ultimate nation-wide policy decisions that I will be working on would also impact other similarly situated states in the same way. Under these circumstances, including California in my national policy formulation discussions is not likely to have a special or unique impact on California and would not require California's exclusion from these discussions to avoid special access or appearance concerns.

   It is possible that I will be expected to participate personally and substantially in specific party matters that affect the financial interests of the State of California. Inasmuch as my participation in a specific party matter is an application of or is concerned with Departmental or Administration policy, it would be unlikely that such application of policy would favorably advantage any particular state. Rather, it would be presumed to have equal application to all similarly situated states. Furthermore, the financial effect of any specific party matters involving states in which I am likely to participate is not

particularly significant relative to the financial effect of my policy work, which would have an equal effect across all states. Of course, participation in litigation involving the State of California pending during my tenure as Attorney General presents a unique financial interest to California, one to which I committed the state as its Attorney General. Therefore, I will not participate in discussions or decisions concerning those litigation matters other than as part of a particular matter of general applicability, *i.e.* a larger policy-setting matter.

3. ***Nature and importance of my role.*** My role, as Secretary, is vitally important in carrying out the priorities and goals set for HHS by the Biden-Harris Administration, work that will profoundly affect all citizens of the United States. As Secretary, it is imperative that I be able to effectively work on all matters as needed. Though my role primarily involves setting departmental policy, I might be expected to attend meetings or weigh-in on decisions to which the State of California is a party. My engagement with public officials at all levels in all 50 states and every U.S. territory is necessary as the Department tackles difficult issues such as the country's battle with COVID-19, the welfare of children who have crossed the US-Mexico border unaccompanied, the disparities and obstacles in access to healthcare, and the promotion of better health outcomes for all Americans.

   Furthermore, I will be making departmental decisions as part of my regular work. All decision-making will, undoubtedly, be based on input from substantive experts and made in consultation with other senior leaders within the Department.

4. ***Sensitivity of the matter.*** Matters that come before the Secretary of HHS are typically the most sensitive in nature. The Immediate Office of the Secretary manages policy setting and decisions that typically have nation-wide impact and are expected to receive significant attention by the media and the Congress. Some issues are controversial in nature, and decisions on such issues may result in litigation against the Department. It is important that I be accessible to share the Department's views and rationale, as well as its decisions, with interested states. I will be able to share information that is publicly available and shared with other states that have requested a personal meeting with me or other senior Department officials to discuss issues of importance to the respective states. Allowing *all* states to participate in policy discussions as policy decisions are formulated helps to mitigate concerns that a reasonable person may question the integrity of the programs and operations of HHS due to preferential treatment.

5. ***Difficulty of reassigning the matter.*** As the highest Presidentially-appointed Senate confirmed official at HHS, the President, Administration, and Congress have entrusted me to act on behalf of the American people to manage the work of the Department. All matters are pending under my authority. It would be inefficient to reassign these management duties, as reassignment based on a single stakeholder's participation or interest in a matter could create inconsistency in function and policy. Furthermore, reassignment to a subordinate advisor would unduly disadvantage the citizens of California were the Department to engage with that state in a different manner than the

other states and territories. While other policy advisors will often also be present, the duties and authority of the Secretary cannot readily be reassigned.

The reassignment of decisions regarding specific litigation, on the other hand, can be reassigned to other members of Departmental leadership and the capable career attorneys already participating in the cases.

6. ***Adjustments to my duties.*** I was brought to HHS because of my extensive experience as a Member of Congress and as the Attorney General of California on many issues pending before HHS. Alteration to my duties would undermine the value I bring to the Department and the respective authorities of the President and the Senate to appoint and confirm me to serve the country in this role. As stated above, such changes would be inefficient, and the Department would lose the benefit of my expertise on party matters involving the State of California. Further, it would disadvantage the citizens of California inasmuch as other states could rely on and benefit from my involvement and input in their party matters.

DECISION

After consultation with the Designated Agency Ethics Official regarding all of the relevant factors to consider, I have determined that, other than certain litigation matters described above, the interest of the government in my participation in specific party matters involving the State of California as a party or party representative outweighs any concern about a potential appearance of lack of integrity. Therefore, in accordance with 5 C.F.R. § 2635.502(d), the limited authorization as described above is granted.

cc:
OGC/Ethics DivisionHHS Chief of Staff