March __, 2021

MEMORANDUM

TO: Sarah Lovenheim
Advisor to the Secretary and Assistant Secretary for Public Affairs designate

FROM: Sean McCluskie
Chief of Staff
Department of Health and Human Services

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

The purpose of this memorandum is to authorize you, under 5 C.F.R. § 2635.502(d), to participate in specific-party matters involving, as a party or party representative, the State of California, for whom you served as an employee, and to participate in specific-party matters involving, as a party or party representative, the Washington Post, for whom your spouse serves as an employee. After weighing the factors articulated in section 502(d), and consulting with the Department's OGC Ethics Division, I have determined that the governmental interest in your participation in these specific party matters outweighs any countervailing appearance concerns and authorize your participation in these specific party matters as described in more detail, and subject to the limitations, below. 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 of your prior employers other than the State of California and does not affect the application of the spousal-employer recusal requirement of 5 C.F.R. 2635.502 to any entity other than the Washington Post, and only applies to the Washington Post as long as your spouse is an employee in the Business Department. Furthermore, this authorization does not allow you to participate in matters in which the Washington Post is a party or represents a party if the matter involves the participation of your spouse or any other employee of the Washington Post Business Department in the matter.

BACKGROUND

On March 1, 2021, you resigned your position as Special Assistant for Strategic Communications to the Attorney General of the State of California to accept an appointment as the Assistant Secretary for Public Affairs (ASPA) of the Department of Health and Human Services (HHS or Department). Your tenure at HHS began on March 14, 2021.[1] As the ASPA, your duties potentially cover the entire range of public health and social welfare policy issues and programs of concern to the Department. Specifically, as the Secretary's principal counsel on public affairs, you provide centralized leadership and guidance for public affairs activities throughout the Department, oversee public affairs programs and digital communications, manage the Department's administration of the Freedom of Information and Privacy Acts, and lead

[1] You began a temporary transitional appointment as Advisor to the Secretary on March 14, 2021. This temporary appointment is expected to last for approximately one week when you will be converted to a permanent appointment as the ASPA.

planning, development, and implementation of emergency incident communications strategies and activities.

You have a decade-and-a-half of experience in communications and public affairs. For one year prior to your appointment, you served as the Special Assistant for Strategic Communications to the Attorney General of the State of California. In that position you lead the communications and outreach programs to advance the policy and legal initiatives of the California Attorney General. Prior to that, you worked as an aide to Xavier Becerra, nominated to be the Secretary of HHS, in the U.S. House of Representatives, as an aide in the U.S. Senate, and as a producer for several media outlets. After resigning your position with the State of California, you are retaining a defined contribution retirement plan sponsored by the state, but California will not make any additional contributions. You do not have any other financial interests in the State of California. Your skills and experience makes you especially qualified to manage the public affairs of the Department.

Your spouse is the deputy business editor of the Washington Post. The Washington Post is a major American newspaper, one of the ten largest by circulation, and the most-widely circulated newspaper within the Washington metropolitan area. It regularly features HHS in its news coverage. As deputy business editor, your spouse helps oversee the department responsible for business, economics, technology and policy coverage (the Business Department). He is paid a fixed salary plus a bonus, neither of which are tied to the profitability of the Washington Post. He also participates in a defined contribution retirement plan sponsored by the Washington Post, but does not have any other financial interests in the organization.

As the head of public affairs for HHS, your duties will necessarily touch on nearly all programs and policies of the Department. You will oversee the Department's efforts to communicate with the general public about all major HHS programs, policies, and initiatives. As a senior member of HHS leadership, you will provide advice and counsel to the Secretary on public affairs matters. Many official matters that will require communications to the public about the Department's work will feature the State of California as a party. Some matters are likely to have the same subject matter as issues you dealt with as an employee of the State of California. Major portions of the Department's public affairs work will constitute matters where the Washington Post is a party. Therefore, as discussed further below, it is important that you be able to participate in official matters where either the State of California or the Washington Post is a party.

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. A "covered relationship" includes persons or entities for which the employee has, within the last year, served as an employee. 5 C.F.R. § 2635.502(b)(1)(iv). A "covered relationship" also includes the employer of a federal employee's spouse. 5 C.F.R. § 2635.502(b)(1)(iii). The disqualification requirement only applies to "particular matters

involving specific parties" (party matters) and not to "particular matters of general applicability" or broad policy matters. For example, it applies 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.

Participation in a party matter is not limited to direct contact between a Federal employee and the non-Federal party. Participation often includes, for example, when an employee performs work related to a matter through rendering a decision, approval, or disapproval, making a recommendation, or providing advice to another employee about a particular matter. It includes the direct and active supervision of the participation of a subordinate in the matter. An employee engaging in public affairs work relating to a party matter is often actually participating in that party matter. For example, were you to provide advice to the Secretary regarding a joint press conference with officials from the California state government, you would be participating in a matter in which the State of California was a party, even if you did not have any direct contact with state officials or otherwise participate in the press conference. Likewise, were you to direct a subordinate how to respond to a request for information from a Washington Post reporter, you would be participating in a matter in which the Washington Post was a party.

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 of a potential appearance of a lack of integrity in the agency's program and operations. 5 C.F.R. § 2635.502(d). You served as the Special Assistant for Strategic Communications to the Attorney General of the State of California within the last year. As such, you have a covered relationship with the State of California. Because you recently provided services to the State of California on issues that overlap with your duties as the ASPA, a reasonable person could question your impartiality regarding matters involving the state. Similarly, because your spouse is an employee of the Washington Post, you have a covered relationship with the Washington Post. Because the interests of the Government and the news media concerning public affairs work may, at times, diverge, a reasonable person could question your impartiality regarding matters involving the Washington Post.

Therefore, in order for you to participate in a particular matter in which the State of California is a party or represents a party, or in a particular matter in which the Washington Post is a party or represents a party, I must first authorize your participation after determining, in light of all the circumstances, that the interest of the Government in your participation outweighs the concern that a reasonable person may question the integrity of the programs and operations of HHS.

The ethics regulations provide that I may consider the following factors in determining whether to authorize your participation:

1. ***Nature of the relationship.*** You were employed by the State of California for less than four years of your approximately fifteen year career in communications and public affairs. You are not on a leave of absence from, nor do you have a continuing a relationship with, the State of California. You are retaining a defined contribution retirement plan sponsored by the state, but California will not make any additional

contributions and you have no other personal financial interests that would create a conflict of interest with the state. 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.

Your spouse is the deputy business editor of the Washington Post. Under the Standards of Conduct, your spouse's financial interests are imputed to you. 5 C.F.R. § 2635.402(b)(2). He is paid a fixed salary and a bonus, neither of which are tied to the profitability of the organization, and he participates in a defined contribution retirement plan sponsored by the organization. Neither you nor he have a personal financial interest in the Washington Post, other than its willingness to employ him and pay his salary, bonus, and relevant employee benefits. Lastly, this authorization has an important limitation: it does not authorize you to participate in any matter where the Washington Post is a party or party representative if the matter involves the participation of your spouse or any other employee of the organization's Business Department. The nature of that relationship and the limitation lessen the concerns that a reasonable person would question your impartiality in party matters involving the Washington Post.

2. ***Effect of the matter on the finances of the State of California and on the finance of the Washington Post.*** As the ASPA, you are likely to participate in matters that are of significance to the financial interests of all the states, including California. As stated above, your responsibilities will touch on a broad array of the policies and operations of the Department, some of which are sure to affect state policies and programs subject to HHS administration, state budget and resource allocation, and legal posturing between the states and the Department. However, most underlying matters you will be participating in will impact other similarly-situated states in a comparable manner to how California is impacted. Under these circumstances, performing public affairs duties concerning party matters involving the State of California is not likely to have a special or unique impact on the state and would not require California's exclusion from such public affairs work to avoid special access or appearance concerns.

   It is possible that you will be asked to participate personally and substantially in specific party matters that affect the financial interests of the State of California. Typically, however, public affairs duties are a step removed from the heart of any specific party matter involving the states. That is to say, your primary concern will be how to inform the public about the array of HHS work, which will include public affairs work covering specific matters in which the State of California is a party, but you are unlikely to be involved in shaping the underlying details of those specific matters, which somewhat attenuates the impact your participation will have on the financial interests of the State of California. Inasmuch as your participation in a specific party matter is concerned with informing the public about Departmental or Administration policy, it would be unlikely that such public affairs work 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 you are likely to participate is not particularly significant relative to the financial effect of

your overall work, which is likely to have a similar impact across all states. Such diffuse impact reduces reasonable impartiality concerns.

As the ASPA, it is obvious that you will participate in matters that are of significance to the financial interests of news organizations, including the Washington Post. The programs and polices of HHS are extremely important to the country, especially during a global pandemic, and the news media, including the Washington Post, has a clear interest in covering the Department. However, your participation in any particular party matter involving the Washington Post is likely to have the same impact on that organization's financial interests as the impact your participation in party matters involving other news organizations will have on those organization's financial interests. Your duties are largely to manage HHS's end of the relationship between the Department and the news media and to ensure that the Department's interests are being maintained during the process of communicating information to news organizations (and ultimately to the general public). How you respond to matters involving the Washington Post is likely to be similar to how you respond to matters involving other similarly situated news organizations. Furthermore, the largest impact on the Washington Post's financial interests is the overall level of access it will have to the Department. This authorization will actually keep that level of access comparable to other news organizations and nearly the same as the access it would have did it not employ your spouse, which should assuage concerns a reasonable person would have about impartiality in such matters.

3. ***Nature and importance of your role.*** As the ASPA, your role is vitally important. It is critical for HHS to communicate information to the public about the Department's programs and policies as it tackles difficult issues such as the country's battle with the COVID-19 virus, welfare of unaccompanied children who have crossed the US-Mexico border, disparities and obstacles in access to healthcare, and promotion of better health outcomes for all Americans. Your role is one of a limited number of positions in the official HHS line of succession, pursuant to Executive Order 13461.

   Your role will involve participation in matters where various states, including California, are parties, and will involve numerous matters where the Washington Post is a party. Some of those matters may arise out of your role as the Secretary's principal counsel on public affairs or direct queries to your office, especially as you lead planning, development, and implementation of emergency incident communications strategies and activities. Many other matters will arise from the various components of HHS and will require your input as you provide centralized leadership and guidance for public affairs activities throughout the Department and oversee public affairs programs and digital communications. Lastly, matters may arise out of your management of how the Department's administers the Freedom of Information Act and the Privacy Act. Given the importance of your role, the government has a strong interest in your participation in these official matters.

4. ***Sensitivity of the matter.*** As your duties touch on all major areas of the Department's work, many of the matters you work on are some of the most sensitive issues that HHS faces. It is important that you be accessible to share information on HHS's views,

decisions, and rationale to the news media, so the information can be disseminated to the public. Many portions of the Department's work are controversial, and public opinion will be shaped, in part, but how you manage the relevant public affairs work. California is especially likely to be party to HHS matters that are sensitive due to the size of its population and particular situations such as, for example, the state's handling of COVID-19 cases and vaccine hesitancy among minority populations. Considering the Washington Post's status as a major news organization, it will almost assuredly be party to matters that concern some of the most sensitive topics the Department handles. The Department has a strong interest in allowing you to participate in these sensitive matters.

5. ***Difficulty of reassigning the matter.*** You are the Department's chief public affairs official and are tasked with managing public affairs work across all of HHS. Regarding matters involving the State of California, it would be inefficient to reassign those management duties based on one single stakeholder's participation or interest in a matter. That reassignment could create discord in HHS's ability to communicate with the public. As it pertains to the Washington Post, given that news organizations frequently communicate with the Department individually or in a group setting, such as a press conference, reassigning matters where a particular media company is a party would also be inefficient. Furthermore, it would disadvantage the Washington Post by causing the department to provide unequal access to different media companies. Since public affairs work often requires addressing groups of reporters, it could actually reduce the access multiple news organizations have to HHS, likely causing strife with the news media and limiting the Department's ability to communicate to the general public. While public affairs matters require the work of many individuals, the duties of the ASPA cannot readily be reassigned.

6. ***Adjustments to your duties.*** You were brought to HHS because of your extensive experience in communications and public affairs, as well as your role as a trusted advisor to Xavier Becerra, the [PHRASE-TK] nominee for HHS Secretary. Alteration to your duties would undermine the value you bring to the Department. As stated above, such changes would cause the Department to lose the benefit of your expertise in party matters involving the State of California or the Washington Post, which is inefficient and could harm HHS's public affairs capabilities. The provisions of 5 C.F.R. § 2635.502 were written in recognition of the reality that we cannot have unreasonably restrictive requirements of disqualification that prevent the use of the most qualified employees in matters such as these.

LIMITATIONS

This authorization is limited. It does not affect the application of the prior-employer recusal requirement of 5 C.F.R. 2635.502 and the Ethics Pledge to matters involving any other of your prior employers other than the State of California. It does not affect the application of the spousal-employer recusal requirement of 5 C.F.R. 2635.502 to any entity other than the Washington Post. As it pertains to the Washington Post, this authorization will only apply as long as your spouse works for the Washington Post as part of its Business Department. In addition, this authorization does not allow you to participate in any specific party matters with

the Washington Post if the matter involves the participation of your spouse or any other employee of the organization's Business Department in the matter. It does not allow you to participate in any party matter or particular matter of general applicability that will impact the Washington Post's ability or willingness to continue to employ your spouse and pay his salary, bonus, and employee benefits, or that would otherwise violate 18 U.S.C. § 208.

DECISION

Based upon my determination, made in accordance with 5 C.F.R. § 2635.502(d), that, in light of all the circumstances, the interest of the government in your participation in specific party matters involving the State of California, your former employer, or in specific party matters involving the Washington Post, your spouse's employer, as a party or party representative outweighs any concern about a potential appearance of lack of integrity, therefore the limited authorization as described above is granted.

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Sean McCluskie Date

cc: OGC/Ethics Division