March __, 2021

MEMORANDUM

TO: Sean McCluskie
Chief of Staff
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 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. 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 particular 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 other prior employers other than the State of California.

BACKGROUND

On January __, 2021, you resigned your position as Chief Deputy Attorney General with the State of California to accept an appointment as Chief of Staff in the Immediate Office of the Secretary at the Department of Health and Human Services (HHS or Department), which began on January 21, 2021. As the Chief of Staff, your duties potentially cover the entire range of public health and social welfare policy issues and programs of concern to the Department. Specifically, as my principal policy advisor, you are involved in top-level discussions on policy and program developments, and ensure that I am equipped with the information necessary to ensure successful management of the Department. You may also represent me in discussions with Agency heads and other members of the Department in conveying the Biden-Harris Administration's priorities and direction, and goals. At times, you also may be asked to represent HHS in meetings with key stakeholders, including state and territorial governments.

You have more than 20 years of experience in federal and state government. During the one year prior to your appointment, you served under me as the Chief Deputy Attorney General for the State of California. In this position you served as my second in command, and the Divisions of Legal Affairs, Law Enforcement, Operations, and Policy, Executive and Technology reported directly to you. Prior to that, you served as an aide in the U.S. House of Representatives,

including as my Chief of Staff for the 34th Congressional District of California and in my leadership office.

While the majority of your work as the HHS Chief of Staff is at a policy-setting level, you may become involved in particular matters involving specific parties, including your former employer, the State of California. From your previous role, you bring direct state operational experience to HHS, which makes you effective at providing advice and counsel relative to how federal policy and regulations will impact states and other stakeholders. This experience and perspective has significant value to the federal government and aids HHS in achieving its mission. To effectively carry out your function as HHS Chief of Staff, you will work with states, other federal agencies, non-governmental organizations, and industry stakeholders in administering HHS programs. These contacts may occur as a larger meeting that may not be considered a particular matter involving specific parties or as one-on-one or small group meetings or conversations that would be considered a party matter. Furthermore, you may be called on to participate litigation or enforcement actions, or other party matters to which the State of California is a party. To effectively perform your duties, it is important that you be able to work with all states and territories, including the State of California.

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 relationship[s]" 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 matter[s] involving specific parties" and not to "particular matter[s] 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 of a potential appearance of a lack of integrity in the agency's program and operations. See 5 C.F.R. § 2635.502(d).

You served as the Chief Deputy Attorney General for the State of California within the last year. As such, you have a covered relationship with the State of California. Furthermore, because you recently provided services to the State of California on issues that overlap with your current position, a reasonable person could question your impartiality in matters involving these states. Therefore, Therefore, in order for you to participate in a particular matter in which the State of California 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 two years of your approximately twenty-year career in government service. You are not on a leave of absence nor do you have a continuing a relationship with the State of California. Furthermore, other than the standard defined benefit pension offered to all employees of the state, you have retained no personal financial interests that would create a conflict of interest with the State of California. Markedly different from private, for-profit entities, state governments as prior employers 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 HHS Chief of Staff, you are likely to participate in matters that are of significance to the financial interests of all the states. As stated above, you have broad responsibilities regarding the policies and operations of HHS, 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. Your duties primarily focus on policy matters, and you will share information with state officials and gather input from them on how national policy decisions under consideration could impact the state and its residents. However, the ultimate government-wide policy decisions that you are working on would also impact other similarly situated states in the same way. Under these circumstances, including California in your national policy formulation discussions will not be 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 you will be asked to participate personally and substantially in specific party matters that affect the financial interests of the State of California. Inasmuch as your 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 you are likely to participate is not particularly significant relative to the financial effect of your policy work, which would have an equal effect across all states.

3. ***Nature and importance of your role.*** Your role, as Chief of Staff, is vitally important in assisting me to carry out the priorities and goals set by the Biden-Harris Administration for HHS, work that will profoundly affect all citizens of the United States. As my top advisor, it is imperative that you be able to effectively work on all matters as needed. Though your role primarily involves setting departmental policy, you might be called upon to attend meetings as my representative or weigh-in on decisions to which the State of California is a party. You engagement with public officials at all levels in all 50 states and all US territories is necessary as the Department tackles difficult issues such as the country's battle with the COVID-19 virus, welfare of children who have crossed the US-

Mexico border unaccompanied, disparities and obstacles in access to healthcare, and promotion of better health outcomes for all Americans.

Furthermore, you may be called upon to make departmental decisions as part of your regular work or on an *ad hoc* basis, in the event of my absence on a matter. Nevertheless, decisions made at the highest levels, including those by the Chief of Staff, are undoubtedly 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 Chief of Staff are typically the most sensitive in nature. The Immediate Office of the Secretary manages policy setting and decision-making 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 you that you are accessible to share the Department's views and rationale, as well as its decisions with interested states. You will be able to share information that is publicly available and shared with other states that have requested a personal meeting with the Secretary, yourself, or other senior Department officials to discuss issues of importance to the respective states. Allowing *all* states to participate in policy discussions with you as you formulate policy decisions mitigates 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.*** You are the only HHS Chief of Staff and my top policy advisor. You are trusted to act on my behalf when I am unavailable to engage on an issue and, in effect, manage the work of the Immediate Office of the Secretary. It would be inefficient to reassign these management duties based on a single stakeholder's participation or interest in a matter, as reassignment could create discord 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 of the Chief of Staff cannot readily be reassigned.

6. ***Adjustments to your duties.*** You were brought to HHS because of your extensive experience as a trusted advisor to me during my time in Congress and as the Attorney General of California on many issues pending before HHS. Alteration to your duties would undermine the value you bring to the Department. As stated above, such changes would be inefficient, where the Department would lose the benefit of your expertise on party matters concerning the State of California. Further, it would disadvantage the citizens of California inasmuch as other states could rely on and benefit from your involvement and input in their party matters.

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, 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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Xavier Becerra Date
Secretary
Department of Health and Human Services

cc:
OGC/Ethics Division