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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, vs. ALEX M. AZAR II, et al., Defendants.	No. C 19-02405 WHA No. C 19-02769 WHA No. C 19-02916 WHA **DECLARATION OF BRANDON NUNES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Date: October 30, 2019 Time: 8:00 AM courtroom: 12 Judge: Hon. William H. Alsup Action Filed: 5/2/2019
STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, vs. ALEX M. AZAR, et al., Defendants.	
COUNTY OF SANTA CLARA et al, Plaintiffs, vs. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	

I, Brandon Nunes, declare:

1. I am a resident of the State of California. I am over the age of 18 and have personal knowledge of all the facts stated herein. If called as a witness, I could and would testify competently to all the matters set forth below.

2. I am the Chief Deputy Director of Operations for the California Department of Public Health (CDPH). CDPH has nearly 3,800 employees working in over 200 program areas to serve the people of California.

3. I was appointed Chief Deputy Director of Operations in May 2015. In this capacity, and as a member of the CDPH directorate, I have responsibility in overseeing and supporting our department's programs to ensure they have the resources they need to successfully implement their mission and the mission of CDPH.

4. Prior to my appointment as Chief Deputy Director of Operations, I worked for over 16 years at the California Department of Finance (DOF) in various roles. The first eight years of my time with DOF was spent in the Office of State Audits and Evaluations (OSAE). OSAE is responsible for all Executive Branch audit functions, including financial audits, performance audits, and compliance audits. During my time at OSAE, I led and supervised a number of audit teams responsible for evaluating and advising on the programmatic, administrative, and fiscal policies of a wide variety of state and local entities. The second half of my career with DOF was spent in the Health and Human Services Budget Unit. During this time, I was responsible for developing, overseeing, and defending the budgets of a number of departments under the California Health and Human Services Agency, including the Department of Public Health and the Department of Social Services.

5. CDPH works to optimize and protect the health and wellbeing of the people in California. Our fundamental responsibilities include infectious disease control and prevention, food safety, environmental health, laboratory services, patient safety, emergency preparedness, chronic disease prevention and health promotion, family health, health equity, and vital records and statistics. Our key activities include protecting people in California from the threat of preventable infectious diseases like Zika virus, HIV/AIDS, tuberculosis, and viral hepatitis, and

providing reliable and accurate public health laboratory services and information about health threats. CDPH also protects patient safety in hospitals and skilled nursing facilities, maintains birth and death certificates, and prepares for and responds to public health emergencies. CDPH works continuously to reduce health and mental health disparities affecting vulnerable and underserved communities to achieve health equity throughout California. Indeed, CDPH programs and services touch the lives of every Californian and visitor to the state 24 hours a day, seven days a week.

6. I am familiar with the rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, RIN 0945-AA10, issued by the U.S. Department of Health and Human Services (HHS) on May 2, 2019 (Rule), and published in the Federal Register on May 21, 2019.

7. The Rule has already imposed costs on California. CDPH has spent more than 30 hours of program staff and attorney time reading and analyzing the Rule in order to determine its potential impacts on our programs, workforce, and partnerships with local health departments.

8. The Rule will impose immediate costs on CDPH. Although the final rule indicates that notice requirements are now voluntary, the Rule also states that adherence to the notice requirements will be taken into consideration when assessing whether an agency is in compliance. In accordance with section 88.5 of the Rule, CDPH will incur costs developing easy-to-understand, accessible materials for CDPH staff and others, including written policies and procedures, electronic notices, and updates to CDPH's internal and external websites. CDPH will also incur costs creating and operationalizing new training modules.

9. Currently, CDPH has nearly 670 contracts that involve federal funding. These contracts help fund public health efforts throughout the state. For fiscal year 2018-2019, CDPH's budget was approximately $3.2 billion, which included approximately $1.5 billion from the federal government.

10. The Rule jeopardizes all federal funds CDPH receives from the U.S. Department of Health and Human Services, including the Centers for Disease Control and Prevention, as well as from the U.S. Department of Education and the U.S. Department of Labor. Loss of this federal funding will have a devastating impact on California, the nation's most populous state, both by

impacting state public health programs and by having a cascading impact on local health departments dependent on federal funding that flows through the state. CDPH—and, in all likelihood, the local health departments—will be unable to absorb such a tremendous loss of funding without a reduction in staffing, programs, and services.

11. When developing its annual budgets, CDPH does so with the expectation that it will receive the federal funds to which it is entitled to under its existing agreements with the aforementioned federal agencies—these funds are now being placed at risk under the Rule. In California, state agencies begin development of their annual budgets in July of the preceding fiscal year.[1] Federal funding is a critical consideration in our budget deliberation process because these dollars make up nearly 50 percent of CDPH's budget. During the budget development period, both programmatic resource and personnel decisions are made with the expectation that the federal funds on which CDPH depends for critical operations will be available. As a result, CDPH forgoes requesting resources from other funding sources in anticipation of these federal funds being available. Once the state budget is enacted, CDPH has no mechanism available to it to receive budget authority to support its programs if federal funding is revoked. A sudden disruption in anticipated federal funds would create budgetary chaos for both state and local public health programs and undermine their ability to deliver vital public health programs and services.

12. Federal funding supports numerous programs within CDPH, including through dollars that support state operations or are passed through to local health departments. With regard to CDPH's 2019-2020 budget, enacted as part of the state budget, the Rule jeopardizes the following public health programs, and corresponding federal funding dollars (among others):

- Public Health Emergency Preparedness Program, which coordinates preparedness and response activities for all public health emergencies, including natural disasters, acts of terrorism, and pandemic diseases and plans and supports surge capacity in the medical care and public health systems to meet needs during emergencies ($31.8 million for state operations and $59.1 million for local assistance in 2019-2020);

[1] The state's fiscal year begins on July 1 and ends on June 30 of the following year.

- Programs within the Center for Healthy Communities, which work to prevent and control chronic diseases, injuries, and violence, including reducing the prevalence of obesity, reducing and preventing tobacco use, promoting safe and healthy environments, and treating problem gambling ($24.3 million for state operations and $7.5 million for local assistance in 2019-2020);
- Infectious Diseases Program, which works to prevent and control infectious diseases such as: HIV/AIDS, viral hepatitis, influenza and other vaccine-preventable illnesses, sexually transmitted diseases, tuberculosis, emerging infections, and foodborne illnesses ($66.0 million for state operations and $215.6 million for local assistance in 2019-2020);
- Health Statistics and Informatics Program, which develops data systems and facilitates the collection, validation, analysis, and dissemination of health information ($913,000 for state operations in 2019-2020);
- Programs within the Center for Environmental Health, which work to protect and improve the health of all California residents by providing for the safety of food, drugs, and medical devices; conducting underage tobacco enforcement; conduct environmental management programs; and oversee the use of radiation through investigation, inspection, laboratory testing, and regulatory activities ($1.4 million for state operations in 2019-2020);
- Health Facilities Licensing Program, which regulates the quality of care in over 10,000 public and private health facilities, clinics, and agencies throughout the state; licenses nursing home administrators; certifies nurse assistants, home health aides, and hemodialysis technicians; and oversees the prevention, surveillance, and reporting of healthcare-associated infections in California's general acute care hospitals ($99.3 million for state operations in 2019-2020); and
- Laboratory Field Services Program, which regulates quality standards in approximately 22,000 clinical laboratories, public health laboratories, blood banks, and tissue banks in California; and licenses approximately 60,000 scientific

classifications that include 30 different categories of laboratory personnel including laboratory scientists, phlebotomists, genetic scientists, clinical chemists, and public health microbiologists ($1.7 million for state operations in 2019-2020).

13. The Rule makes CDPH liable for the actions of third parties in a manner that is unprecedented in CDPH's experience and unworkable in practice. This is because the Rule dictates that if a sub-recipient violates the Rule, the sub-recipient's violation jeopardizes CDPH's funding as a recipient. Specifically, the Rule includes an assurance and certification requirement that should be included with all applications, reapplications, and amendments and modifications. The provision also places an obligation on CDPH to take actions to come into compliance. But if a sub-recipient (as defined by the Rule) is found in violation, CDPH will be subject to remedial action, including the loss of some or all of the federal funding described above.

14. By making CDPH responsible for the compliance of sub-recipients, the Rule appears to impose an oversight obligation that requires CDPH to expend funds for additional staff time to monitor the compliance of sub-recipients. Even if monitoring is not required under the Rule, the Rule is so broadly and vaguely written that it is nearly impossible to ascertain how CDPH should communicate with its sub-recipients, including through the re-drafting of its contracts, in order to obligate its sub-recipients to comply with the Rule in a manner that effectively protects CDPH's own federal funding.

15. Terminating CDPH's funding based on the conduct of third parties that CDPH neither controls nor operates would hobble the state's ability to protect the public health. For example, federal funding for CDPH and for all counties could be placed at risk based on the alleged violation of a single county, a separate legal entity from the state (Cal. Gov. Code § 23000, et seq.).

16. As one example, CDPH's Immunization Branch receives substantial annual funding and support under the federal Health and Human Services appropriation, totaling almost $581 million annually. Approximately $537 million supports routine childhood vaccines, $8.7 million covers routine vaccines for uninsured and underinsured adults, and $36.8 million provides financial assistance for state and local operations each year. Of this $36.8 million in operations

funding, close to half ($16 million) is provided to 61 local health departments throughout California. Under the Rule, even if CDPH contractually obligates all local health departments to comply with the Rule, and a single violation is committed without CDPH's knowledge, this violation would put CDPH's funding and pass-through funding at risk. And, as a result of the loss of federal funding, local health departments would struggle to provide immunizations against deadly diseases such as measles, polio, and tetanus.

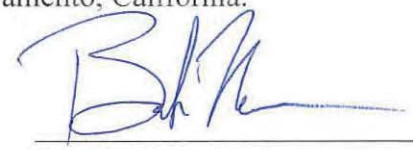
17. As another example, CDPH's Sexually Transmitted Diseases (STD) Control Branch provides support, guidance, coordination and safety-net services to local STD control programs. CDPH receives $7.4 million in federal funding, including $1.4 million that is passed through to local STD control programs throughout California. Under the Rule, even if CDPH contractually obligates all local health departments to comply with the Rule, and a single violation is committed without CDPH's knowledge, this violation would put CDPH's funding at risk. STD rates are currently on the rise in California: In 2017 compared to 2016, the rate of chlamydia increased 9%, the rate of gonorrhea increased 16%, and the rate of early syphilis increased 21%. If CDPH lost federal funding due to one local health department's non-compliance with the Rule, many local health departments could struggle to continue their work preventing, diagnosing, and treating STDs.

18. In addition to the potential decimation of public health programs in the state due to the potential loss of federal funding, CDPH is also concerned that the Rule's position on vaccinations, and its potential to encourage doctors opposed to the state's efforts to ensure that all families follow the recommended childhood vaccination schedule, will adversely affect California's public health efforts to control the spread of preventable diseases such as measles.

19. As of August 29, 2019, 67 confirmed measles cases, including 38 outbreak-associated cases, have been reported in California. The outbreak of measles has an impact beyond state lines. The last large outbreak of measles in California was associated with Disneyland and occurred from December 2014 to April 2015, when at least 131 California residents were infected with measles, and also infected residents of six other states, Mexico, and Canada.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on August 29, 2019, in Sacramento, California.



Brandon Nunes
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California Department of Public Health