

1 XAVIER BECERRA
 Attorney General of California
 2 KATHLEEN BOERGER, State Bar No. 213530
 Supervising Deputy Attorney General
 3 KARLI EISENBERG, State Bar No. 281923
 STEPHANIE YU, State Bar No. 294405
 4 NELI N. PALMA, State Bar No. 203374
 Deputy Attorneys General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 210-7522
 7 Fax: (916) 322-8288
 E-mail: Neli.Palma@doj.ca.gov
 8 *Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13 CITY AND COUNTY OF SAN FRANCISCO,
 14 Plaintiff,
 15 vs.
 16 ALEX M. AZAR II, et al.,
 17 Defendants.

No. C 19-02405 WHA
 No. C 19-02769 WHA
 No. C 19-02916 WHA

**DECLARATION OF KEVIN KISH
 IN SUPPORT OF PLAINTIFFS’
 MOTION FOR SUMMARY
 JUDGMENT AND IN SUPPORT
 OF THEIR OPPOSITION TO
 DEFENDANTS’ MOTION TO
 DISMISS OR, IN THE
 ALTERNATIVE, FOR SUMMARY
 JUDGMENT**

18 STATE OF CALIFORNIA, by and through
 ATTORNEY GENERAL XAVIER BECERRA,
 19 Plaintiff,
 20 vs.

21 ALEX M. AZAR, et al.,
 22 Defendants.

Date: October 30, 2019
 Time: 8:00 AM
 Courtroom: 12
 Judge: Hon. William H. Alsup
 Action Filed: 5/2/2019

23 COUNTY OF SANTA CLARA et al,
 24 Plaintiffs,
 25 vs.
 26 U.S. DEPARTMENT OF HEALTH AND
 HUMAN SERVICES, et al.,
 27 Defendants.

1 I, Kevin Kish, declare:

2 1. I am the Director of the California Department of Fair Employment and Housing
3 (DFEH). I was appointed in December 2014 to lead DFEH.

4 2. DFEH is the state agency charged by the California Legislature with enforcing
5 California's civil rights laws. The mission of DFEH is to protect the people of California from
6 unlawful discrimination in employment, housing, and public accommodations and from hate
7 violence and human trafficking. Cal. Gov't Code § 12930.

8 3. DFEH is responsible for enforcing state laws that make it illegal to discriminate
9 against an employee because of certain protected categories that include religion, sex and gender
10 (e.g. pregnancy, childbirth, breastfeeding, or related medical conditions), gender identity and
11 gender expression, and sexual orientation, among many other bases. Among other laws, DFEH
12 enforces the California Fair Employment and Housing Act (FEHA) (Cal. Gov't Code § 12900 et
13 seq.), the Unruh Civil Rights Act (Cal. Civil Code § 51), and Cal. Gov't Code § 11135.

14 4. FEHA applies to public and private employers, labor organizations, and employment
15 agencies. Under FEHA, it is illegal for employers of five or more employees to discriminate
16 against employees because of a protected category, or to retaliate against them because they have
17 asserted their rights under the law.

18 5. The Unruh Civil Rights Act prohibits discrimination by business establishments and
19 is incorporated into the FEHA. Cal. Gov't Code § 12948. Unruh is violated by denying the full
20 and equal accommodations, advantages, facilities, privileges, or services of a business
21 establishment.

22 6. Under Cal. Gov't Code § 11135, no person in the State of California shall be denied
23 full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any
24 program or activity that is conducted, operated, or administered by the state or by any state
25 agency, is funded directly by the state, or receives any financial assistance from the state.

26 7. To carry out its responsibilities, DFEH facilitates a complaint process, whereby
27 individuals who believe that they were the victim of discrimination, may file a complaint with
28 DFEH, which is called an intake form. The submission of the intake form initiates an intake

1 interview with a department representative to determine whether a formal complaint will be
2 accepted for investigation. The DFEH investigator contacts the individual complainant and the
3 investigator seeks specific facts and any records about the incident(s) and copies of any
4 documents supporting the complaint. DFEH then evaluates the facts and decides whether the case
5 alleges facts within DFEH's jurisdiction. DFEH does not have discretion to decline to investigate
6 cases within its jurisdiction. If a case is within its jurisdiction, DFEH will prepare a complaint
7 form for the individual's signature under penalty of perjury and when the individual returns the
8 complaint, it is delivered to the person or entity that the person believes discriminated against
9 him/her/them, who is the respondent.

10 8. After a complaint is signed and issued, the respondent is required to answer the
11 complaint. DFEH reviews the answer with the complainant. It conducts an investigation by
12 obtaining documents and interviewing witnesses. Cases are evaluated for complexity and merit at
13 every stage of the investigation.

14 9. DFEH offers free dispute resolution services to encourage parties to resolve the
15 complaint, when appropriate. For many less complex cases, a voluntary resolution can be
16 negotiated at any time during the complaint process. When parties cannot resolve a complaint or
17 DFEH determines that a case is not appropriate for voluntary resolution, DFEH continues an
18 investigation to determine if a violation of California law occurred. If it did not, the case is
19 closed. If DFEH finds there were probable violations of the law, there is a cause finding and the
20 case moves into DFEH's Legal Division. At that time, the parties are required to go to mediation.
21 DFEH represents the interests of the State, and the complainant is a witness to the discrimination.
22 At mediation, the parties have the opportunity to reach an agreement to resolve the dispute and
23 close the case. If mediation fails, DFEH may file a lawsuit in court.

24 10. If an individual prefers not to use the DFEH investigation process, the individual may
25 instead file their own lawsuit. In the context of employment discrimination, a complainant must
26 first obtain a Right-to-Sue notice from DFEH before filing a lawsuit in court.

27 11. DFEH conducts an independent investigation when a complaint is filed. DFEH
28 investigates the facts and encourages the parties to resolve the dispute in appropriate cases.

1 DFEH considers taking legal action if evidence supports a finding of discrimination and the
2 dispute is not resolved.

3 12. In addition to individual complaints, the Director may also initiate a Director's
4 Complaint pursuant to 2 C.C.R. § 10012 on behalf of a group or class of persons adversely
5 affected in a similar manner by an unlawful practice under FEHA.

6 13. I have reviewed and am familiar with the content of the final rule Protecting Statutory
7 Conscience Rights in Health Care; Delegations of Authority that the U.S. Health and Human
8 Services Department published on May 21, 2019 (the Rule).

9 14. Under state laws, DFEH has jurisdiction over complaints filed by employees alleging
10 that their employers have not reasonably accommodated their religious beliefs or that their
11 employers have otherwise discriminated against or harassed them on a protected basis. DFEH
12 also has jurisdiction over complaints filed by patients, consumers, and contractors alleging that
13 they have been denied full and equal accommodations, advantages, facilities, privileges, or
14 services. DFEH similarly has jurisdiction over complaints of discrimination under—and unequal
15 access to—government-funded programs and activities.

16 15. After considering the Rule, I believe that it will impact the analysis that DFEH must
17 engage in to carry out its required responsibilities under these laws, including analysis of the
18 scope and application of California's own religion-based exemptions from anti-discrimination
19 principles of general applicability. *See, e.g.*, Cal. Gov't Code § 12926.2. It will impact the
20 analysis that DFEH must engage in to enforce the Unruh Civil Rights Act and Cal. Gov't Code §
21 11135.

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

24 Executed on August 16, 2019 in Los Angeles, California.

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27 Kevin Kish
28 Director
Department of Fair Employment and Housing