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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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 14 CITY AND COUNTY OF SAN FRANCISCO,
 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 BRANDON NUNES
 IN SUPPORT OF PLAINTIFF'S
 MOTION FOR SUMMARY JUDGMENT**

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 19 STATE OF CALIFORNIA, by and through
 ATTORNEY GENERAL XAVIER BECERRA,
 Plaintiff,
 20 vs.
 21 ALEX M. AZAR, et al.,
 22 Defendants.

**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

23
 24 COUNTY OF SANTA CLARA et al,
 Plaintiffs,
 25 vs.
 26 U.S. DEPARTMENT OF HEALTH AND
 HUMAN SERVICES, et al.,
 27 Defendants.
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1 I, Brandon Nunes, declare:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 • Programs within the Center for Healthy Communities, which work to prevent and
2 control chronic diseases, injuries, and violence, including reducing the prevalence of
3 obesity, reducing and preventing tobacco use, promoting safe and healthy
4 environments, and treating problem gambling (\$24.3 million for state operations and
5 \$7.5 million for local assistance in 2019-2020);
- 6 • Infectious Diseases Program, which works to prevent and control infectious diseases
7 such as: HIV/AIDS, viral hepatitis, influenza and other vaccine-preventable illnesses,
8 sexually transmitted diseases, tuberculosis, emerging infections, and foodborne
9 illnesses (\$66.0 million for state operations and \$215.6 million for local assistance in
10 2019-2020);
- 11 • Health Statistics and Informatics Program, which develops data systems and facilitates
12 the collection, validation, analysis, and dissemination of health information (\$913,000
13 for state operations in 2019-2020);
- 14 • Programs within the Center for Environmental Health, which work to protect and
15 improve the health of all California residents by providing for the safety of food,
16 drugs, and medical devices; conducting underage tobacco enforcement; conduct
17 environmental management programs; and oversee the use of radiation through
18 investigation, inspection, laboratory testing, and regulatory activities (\$1.4 million for
19 state operations in 2019-2020);
- 20 • Health Facilities Licensing Program, which regulates the quality of care in over
21 10,000 public and private health facilities, clinics, and agencies throughout the state;
22 licenses nursing home administrators; certifies nurse assistants, home health aides, and
23 hemodialysis technicians; and oversees the prevention, surveillance, and reporting of
24 healthcare-associated infections in California's general acute care hospitals (\$99.3
25 million for state operations in 2019-2020); and
- 26 • Laboratory Field Services Program, which regulates quality standards in
27 approximately 22,000 clinical laboratories, public health laboratories, blood banks,
28 and tissue banks in California; and licenses approximately 60,000 scientific

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

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

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

19 15. Terminating CDPH's funding based on the conduct of third parties that CDPH
20 neither controls nor operates would hobble the state's ability to protect the public health. For
21 example, federal funding for CDPH and for all counties could be placed at risk based on the
22 alleged violation of a single county, a separate legal entity from the state (Cal. Gov. Code
23 § 23000, et seq.).

24 16. As one example, CDPH's Immunization Branch receives substantial annual
25 funding and support under the federal Health and Human Services appropriation, totaling almost
26 \$581 million annually. Approximately \$537 million supports routine childhood vaccines, \$8.7
27 million covers routine vaccines for uninsured and underinsured adults, and \$36.8 million provides
28 financial assistance for state and local operations each year. Of this \$36.8 million in operations

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

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

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

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

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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
Chief Deputy Director of Operations
California Department of Public Health