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 through Attorney General Xavier Becerra*

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

13  
 14 **STATE OF CALIFORNIA, by and through**  
 15 **ATTORNEY GENERAL XAVIER**  
**BECERRA,**

16 Plaintiff,

17 v.

18 **ALEX M. AZAR, in his official capacity as**  
 19 **Secretary of the U.S. DEPARTMENT OF**  
 20 **HEALTH & HUMAN SERVICES; U.S.**  
 21 **DEPARTMENT OF HEALTH AND**  
 22 **HUMAN SERVICES; DOES 1-100,**

23 Defendants.  
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Case No. 3:19-cv-02769-WHA

**PLAINTIFF STATE OF CALIFORNIA'S  
 MOTION FOR ENTRY OF PARTIAL  
 FINAL JUDGMENT UNDER RULE 54(b)**

Date: February 13, 2020  
 Time: 8:00 a.m.  
 Courtroom: 12  
 Judge: The Honorable William Alsup

Action Filed: May 21, 2019

1                   **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

3           PLEASE TAKE NOTICE that on February 13, 2020, at 8:00 a.m. in Courtroom 12 at the  
4 United States Courthouse at 450 Golden Gate Avenue, San Francisco, CA, 94102, Plaintiff State  
5 of California will and hereby does move this Court for entry of a partial final judgment under  
6 Federal Rule of Civil Procedure 54(b) in accordance with the terms of the Court’s November 19,  
7 2019 Order Re Motions to Dismiss and for Summary Judgment and Requests for Judicial Notice  
8 (Dkt. No. 143).

9           Plaintiff seeks entry of a partial judgment as to California’s “not in accordance with law”  
10 and “exceeds statutory authority” Administrative Procedure Act claim regarding the statutory  
11 definitions in the final rule, “Protecting Statutory Conscience Rights in Health Care; Delegations  
12 of Authority,” 84 Fed. Reg. 23,170 (May 21, 2019), to allow appeals from the Court’s November  
13 19, 2019 Order, which decided three related cases, to proceed along the same trajectory. Rule  
14 54(b) certification is appropriate because the Court’s Order satisfies the requirements of Rule  
15 54(b) and there is no just reason to delay appeal of the legal issues decided by the Court.

16           This request is made pursuant to the Federal Rule of Civil Procedure 54(b) and is based  
17 upon the attached memorandum of points and authorities and declaration of Deputy Attorney  
18 General Neli N. Palma. A proposed order is also attached.

19                   **MEMORANDUM OF POINTS AND AUTHORITIES**

20                                   **INTRODUCTION**

21           Plaintiff State of California respectfully requests that this Court issue an order directing the  
22 entry of a partial final judgment under Federal Rule of Civil Procedure 54(b), in accordance with  
23 the terms of the Court’s November 19, 2019 Order Re Motions to Dismiss and For Summary  
24 Judgment and Requests for Judicial Notice. In that order, which set aside the challenged final  
25 rule as violative of the Administrative Procedure Act (APA), the Court determined that “this  
26 action is ready for appeal,” and suggested “that all sides stipulate to entry of final judgment with  
27 reservation of all issues not reached in this order in the event of remand.” In order to enter into a  
28 stipulation, Defendants are insisting that California dismiss all remaining claims, including

1 California's cause of action under the Freedom of Information Act even though production is  
2 ongoing. Because a dismissal of claims as suggested by Defendants is neither appropriate nor  
3 legally sound, California requests that the Court issue a Rule 54(b) certification order as to  
4 California's APA "not in accordance with law" and "exceeds statutory authority" claim regarding  
5 the statutory definitions (First Cause of Action).

### 6 **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

7 On May 21, 2019, the U.S. Department of Health and Human Services (HHS) issued a final  
8 rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed.  
9 Reg. 23,170 (May 21, 2019), which endeavored to create a broad exemption permitting any  
10 individual, entity, or provider to deny patients basic healthcare, including reproductive and  
11 emergency care, not just on the basis of federally protected conscience protections, but also on the  
12 basis of "ethical or other reasons." 84 Fed. Reg. at 23,264.

13 California filed a Complaint for Declaratory and Injunctive Relief on May 21, 2019. Dkt.  
14 No. 1. The Complaint asserts nine causes of action and alleges that the final rule violates several  
15 statutory and constitutional provisions, including the APA and the Spending and Establishment  
16 Clauses of the United States Constitution. *Id.* In the complaint, California also seeks injunctive,  
17 declaratory, and other appropriate relief against HHS to remedy HHS's violations of the Freedom of  
18 Information Act (FOIA), 5 U.S.C. § 552. Dkt No. 1 at 40-43, 52-54. California's case was later  
19 related to cases filed by the City and County of San Francisco and the County of Santa Clara, et  
20 al., *City and County of San Francisco v. Azar, et al.*, Case No. 3:19-cv-2405 (N.D. Cal. May 2,  
21 2019) and *County of Santa Clara et al. v. U.S Dep't of Health and Human Svcs., et al.*, Case No.  
22 5:19-cv-2916 (N.D. Cal. May 28, 2019). Dkt. No. 26.

23 On July 1, 2019, the Court granted the parties' stipulated request to postpone the effective  
24 date of the final rule until November 22, 2019, to hold the Plaintiffs' preliminary injunction  
25 motions in abeyance, and to set a summary judgment schedule. Dkt. No. 42. Defendants moved  
26 to dismiss or, in the alternative, for summary judgment. Dkt. No. 54. Plaintiffs also moved for  
27 summary judgment. Dkt. Nos. 57-113.

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1 On November 19, 2019, the Court denied Defendants’ motion to dismiss and granted  
2 Plaintiffs’ motion for summary judgment. The Court found that the challenged federal rule  
3 “conflicts with” the underlying statutes “in a number of ways and upsets the balance drawn by  
4 Congress between protecting conscientious objections versus protecting the uninterrupted  
5 effective flow of health care to Americans.” Dkt. No. 143 at 2; *see also id.* at 30 (“[T]his order  
6 holds the rule is ‘not in accordance with law’ by reason of conflict with the underlying statutes  
7 and is in conflict with the balance struck by Congress in harmonizing protection of conscience  
8 objections vis-à-vis the uninterrupted flow of health care to Americans.”). The Court also held  
9 that HHS did not have express or implicit authority to issue legislative rules, adding to or  
10 subtracting from the underlying statutes as the final rule does by expanding “definitions in  
11 conflict with the statutes and imposing draconian financial penalties.” *Id.* at 29-30. The Court  
12 further held that because the “rule is so saturated with error, as here, there is no point in trying to  
13 sever the problematic provisions. The whole rule must go.” *Id.* at 30.

14 The Court acknowledged, however, that “it has not reached all the claims tendered.” Dkt.  
15 No. 143 at 32. Nevertheless, given that the “rule is set aside and shall be unenforceable,” the  
16 Court “believe[d] this action is ready for appeal, and suggests that all sides stipulate to entry of  
17 final judgment with reservation of all issues not reached in this order in the event of remand.” *Id.*

18 California has endeavored in good faith to enter into a stipulation for entry of a final  
19 judgment, but has been unable to reach agreement with Defendants. *See* Exh. A of Palma Decl.  
20 Defendants have requested that California dismiss all remaining claims without prejudice,  
21 suggesting that if Defendants were to prevail on appeal and the case were remanded, California  
22 could simply reassert the dismissed claims. *Id.*

### 23 ARGUMENT

24 “Rule 54(b) permits district courts to authorize immediate appeal of dispositive rulings on  
25 separate claims in a civil action raising multiple claims.” *Gelboim v. Bank of Am. Corp.*, 135 S.  
26 Ct. 897, 902 (2015). The Court must first determine whether the order is a final judgment “in the  
27 sense that it is a decision upon a cognizable claim for relief, and it must be ‘final’ in the sense that  
28 it is ‘an ultimate disposition of an individual claim entered in the court of a multiple claims

1 action.” *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980) (citing *Sears, Roebuck*  
2 *& Co. v. Mackey*, 351 U.S. 427, 436 (1956)). The court must then determine whether there is any  
3 just reason for delay. *Curtiss-Wright*, 446 U.S. at 8. The Court applies a two-step test to  
4 determine whether there is a just reason for delay. *AmerisourceBergen Corp. v. Dialysist West,*  
5 *Inc.*, 465 F.3d 946, 954 (9th Cir. 2006). First, the court evaluates “such factors as the  
6 interrelationship of the claims so as to prevent piecemeal appeals.” *Curtiss-Wright*, 446 U.S. at  
7 10. The second step “requires an assessment of the equities.” *AmerisourceBergen Corp.*, 465  
8 F.3d at 954. This case meets the requisite standard.

9 **A. The Court Entered a Final Judgment on a Distinct APA Claim**

10 Here the Court has entered final judgment as to California’s “not in accordance with law”  
11 and “exceeds statutory authority” APA claim regarding the statutory definitions. The November  
12 19, 2019 order vacates the final rule and orders that it shall not be enforceable. Dkt. No. 143 at  
13 32. Therefore, the decision on this claim is an “ultimate disposition of an individual claim  
14 entered in the court of a multiple claims action.” *Sears*, 351 U.S. at 436.

15 **B. Judicial Administrative Interests Support Immediate Appeal**

16 Rule 54(b) certification is proper if it will aid “expeditious decision” of the case. *See*  
17 *Texaco v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991); *see also Continental Airlines, Inc. v.*  
18 *Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987) (“[G]iven the size and  
19 complexity of this case, we cannot condemn the district court’s effort to carve out threshold  
20 claims and thus streamline further litigation.”). And toward that end, “Rule 54(b) claims do not  
21 have to be separate from and independent of the remaining claims.” *Sheehan v. Atlanta Int’l Ins.*  
22 *Co.*, 812 F.2d 465, 468 (9th Cir. 1987); *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991)  
23 (concluding that although certified claims require proof of same facts as unadjudicated claims,  
24 resolution of legal issues on appeal will streamline ensuing litigation); *Continental Airlines, Inc.*,  
25 819 F.2d at 1524-25 (observing that Rule 54(b) demands a “pragmatic approach focusing on  
26 severability and efficient judicial administration”). Indeed, “[i]t is left to the sound judicial  
27 discretion of the district court to determine the ‘appropriate time’ when each final decision in a  
28 multiple claims action is ready for appeal.” *Curtiss-Wright*, 446 U.S. at 8 (citing *Sears*, 351 U.S.

1 at 435). Here, there is no just reason for delaying judgment because the claims already decided  
2 are sufficiently separate and distinct from California’s remaining claims; and thus will not result  
3 in piecemeal appeals.

4 California’s FOIA claim (Ninth Cause of Action) is premised on Defendants’ failure to  
5 conduct an adequate search, timely respond to, and disclose non-exempt records and reasonably  
6 segregable records in response to California’s April 25, 2018 FOIA request. *See* Dkt. No. 1 at 52-  
7 53. Defendants submitted a sixth interim production to California on December 9, 2019, but as of  
8 the filing of this motion, have not provided a date certain for completion of the rolling production.  
9 *See* Exhs. A & B to Palma Decl. Even with the Court’s decision, California retains an interest in  
10 the documents underlying the Defendants’ actions and Defendants have committed to producing  
11 documents on a rolling basis. Moreover, California may be entitled to recover attorneys’ fees  
12 pursuant to 5 U.S.C. § 552(a)(4)(E) because of Defendants’ violation of FOIA.

13 Additionally, the Court has not yet resolved other APA claims raised by California,  
14 including whether the final rule is (1) contrary to several other federal statutes, including Title VII  
15 of the Civil Rights Act of the 1964, Title X of the Public Health Services Act and the nondirective  
16 counseling requirement, the Emergency Medical Treatment & Labor Act, and Sections 1554 and  
17 1557 of the Affordable Care Act; and (2) arbitrary and capricious because, *inter alia*, the  
18 justifications offered by Defendants, including the purported increase in conscience complaints,  
19 are not supported by the administrative record. *See* Dkt. No. 1 at 43-47. These APA claims are  
20 separate and distinct from California’s “not in accordance with law” and “exceeds statutory  
21 authority” APA claim regarding the statutory definitions, which was fully adjudicated by the  
22 Court’s November 19, 2019 order.

23 Furthermore, California has raised other separate claims, including claims under the  
24 Spending Clause (Fourth through Seventh Causes of Action) and a claim under the Establishment  
25 Clause (Eighth Cause of Action). California wishes to reserve these separate claims, including all  
26 evidence offered in support of them. In *National Federation of Independent Business v. Sebelius*,  
27 567 U.S. 519, 581-82 (2012), the Supreme Court explained that because Medicaid spending  
28 accounts for about 20 percent of the average State’s total budget, and because States “have

1 developed intricate statutory and administrative regimes” in reliance on receiving that funding,  
2 the threatened loss of the funding violated the Spending Clause. Here, California’s declarations  
3 include evidence about the amount of federal funding to California at stake under the final rule  
4 and the reliance interests created by those funds that are relevant to its Spending Clause claim.  
5 This evidence was not considered by the Court in deciding that the final rule’s definitions violated  
6 the APA. Dkt. No. 143 at 32 (dismissing as moot Defendants’ opposition to Plaintiff’s  
7 declarations because the “declarations were not relevant in the determination of the  
8 Administrative Procedures Act claims.”).

### 9 **C. The Equities Weigh in Favor of an Immediate Appeal**

10 Finally, the equities weigh in favor of entry of a partial final judgment. *See Ahmadi v.*  
11 *Chertoff, et al.*, No. C 07-03455 WHA, 2008 WL 1886001, at \*10 (N.D. Cal. April 25, 2018)  
12 (Aslup, J.) (concluding that the equities weighed in favor of granting Rule 54(b)). Defendants  
13 ask California to dismiss its unresolved claims, but fail to explain how, if the Ninth Circuit  
14 remands the case, the State could reassert its dismissed claims. As such, the State may be  
15 required to refile this action to reassert the dismissed claims, including the Spending Clause  
16 claim, even though the Court has recognized in its November 19, 2019 Order that the final rule  
17 raises potential Spending Clause issues as to California. Dkt. No. 143 at 28 (noting that for  
18 California, “a single instance of noncompliance could jeopardize [ ] the \$63 billion in federal  
19 funding it receives for healthcare programs for one-third of Californians,” an unauthorized  
20 “draconian mechanism[]” under the rule).

21 On the other hand, if California were to maintain the unresolved claims, the Ninth Circuit  
22 could decide on appeal that they are a basis for affirming this Court’s judgment. *See Asante v.*  
23 *Cal. Dep’t of Health Care Servs.*, 330 F.Supp.3d 1198, 1207 (N.D. Cal. 2018) (an appeals court  
24 may affirm summary judgment on any ground supported by the record, even if not relied upon by  
25 the district court; which includes affirming based on a legal theory that was not reached by the  
26 district court).

27 Moreover, Defendants’ position does not account for California’s FOIA claim. This claim  
28 should not be dismissed when California is continuing to seek certain documents, Defendants

1 continue to produce them (albeit slowly), and because California is entitled to attorneys' fees.  
 2 California should not be required to forego the potential recovery of attorneys' fees in order to  
 3 have its case considered with any appeals that might be filed in the two related cases and the case  
 4 filed by State of Washington (*State of Washington v. Azar II*, Case No. 2:19-CV-00183-SAB).<sup>1</sup>

5 **D. A Rule 54(b) Order Avoids Potential Jurisdictional Issues on Appeal**

6 Finally, unlike a Rule 54(b) partial final judgment, Defendants' approach does not create a  
 7 final, appealable judgment. Defendants assert that California should dismiss its FOIA, Spending  
 8 Clause, Establishing Clause, and remaining APA claims without prejudice, but California can  
 9 simultaneously reserve its right to "re-urge" these claims in the event the Court's ruling is not  
 10 affirmed. *See* Dec. 9, 2019 Kopplin Email, Exh. A to Palma Decl. The Ninth Circuit has  
 11 squarely addressed this issue and declined to exercise jurisdiction in such circumstances. In  
 12 *Dannenberg v. Software Toolworks Inc.*, the Court held that voluntary dismissal with prejudice of  
 13 unresolved claims with the right to reinstate upon reversal did not make an appealable order and  
 14 was contrary to the judicial policy against piecemeal appeals. 16 F.3d 1073 (9th Cir. 1994).  
 15 Similarly, this Court noted that the "Ninth Circuit has dismissed appeals for lack of jurisdiction  
 16 under [28 U.S.C.] § 1291 where the parties acted to evade the finality requirement by, e.g., . . .  
 17 stipulating that dismissed claims could be revived if an appeal was successful." *Asante v. Cal.*  
 18 *Dep't of Health Care Servs.*, 330 F.Supp.3d 1198, 1207 (N.D. Cal. 2018). Therefore,  
 19 Defendants' position does not create an appealable order.

20 **CONCLUSION**

21 This Court should enter a Rule 54(b) partial final judgment in accordance with the terms of  
 22 the Court's November 19, 2019 Order Re Motions to Dismiss and For Summary Judgment and  
 23 Requests for Judicial Notice.

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27 <sup>1</sup> A judgment in the Washington case was issued on November 21, 2019 (Dkt. No. 75).  
 28 Defendants have thus far filed a notice of appeal in *State of New York, et al. v. U.S. Dep't of Health & Human Servs.*, Case No. 19-Civ. 4676 (PEA) (lead) (Dkt No. 255).

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Dated: January 8, 2020

Respectfully submitted,

XAVIER BECERRA  
Attorney General of California  
KATHLEEN BOERGERS  
Supervising Deputy Attorney General

*/s/ Neli N. Palma*

NELI N. PALMA  
KARLI EISENBERG  
STEPHANIE YU  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California, by  
and through Attorney General Xavier  
Becerra*

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**CERTIFICATE OF SERVICE**

Case Name: *State of California v. Alex M. Azar, et al.* No. **3:19-cv-02769-WHA**

I hereby certify that on January 8, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PLAINTIFF STATE OF CALIFORNIA’S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b)**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 8, 2020, at Sacramento, California.

Ashley Harrison  
Declarant

*/s/ Ashley Harrison*  
Signature

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1 XAVIER BECERRA  
 Attorney General of California  
 2 KATHLEEN BOERGER, State Bar No. 213530  
 KARLI EISENBERG, State Bar No. 281923  
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 E-mail: Neli.Palma@doj.ca.gov  
 6 *Attorneys for Plaintiff State of California, by  
 and through Attorney General Xavier Becerra*

7  
 8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

<p>11 <b>STATE OF CALIFORNIA, by and through</b>  <b>ATTORNEY GENERAL XAVIER</b>  <b>BECCERRA,</b></p> <p>13 Plaintiff,</p> <p>14 v.</p> <p>15 <b>ALEX M. AZAR, in his official capacity as</b>  <b>Secretary of the U.S. DEPARTMENT OF</b>  <b>HEALTH &amp; HUMAN SERVICES; U.S.</b>  <b>DEPARTMENT OF HEALTH AND</b>  <b>HUMAN SERVICES; DOES 1-100,</b></p> <p>18 Defendants.</p>	<p>3:19-cv-02769-WHA</p> <p><b>DECLARATION OF NELI N. PALMA IN  SUPPORT OF PLAINTIFF STATE OF  CALIFORNIA’S MOTION FOR ENTRY  OF PARTIAL FINAL JUDGMENT UNDER  RULE 54(b)</b></p> <p>Date: February 13, 2020  Time: 8:00 a.m.  Courtroom: 12  Judge: The Honorable William Alsup</p> <p>Action Filed: May 21, 2019</p>
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19  
20 I, Neli N. Palma, declare:

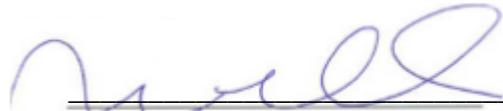
21 1. I am a member of the California State Bar, admitted to practice before this Court,  
22 employed by the Office of the California Attorney General as a Deputy Attorney General, and  
23 counsel to Plaintiff in this action. I have personal knowledge of the facts set forth herein, and if  
24 called upon as a witness, I could testify to them competently under oath.

25 2. Attached hereto as **Exhibit A** is a true and correct copy of my email  
26 correspondence with counsel for Defendants between December 6, 2019 to January 6, 2020,  
27 including the attachments referenced and sent by California in that email chain on December 12,  
28 2019 and January 6, 2020.

1           3.       Attached hereto as **Exhibit B** is a true and correct copy of the December 9, 2019  
2 cover letter from the U.S. Department of Health & Human Services included with its “sixth  
3 interim response to [California’s] April 25, 2018, Freedom of Information Act (FOIA) request.”  
4

5           I declare under penalty of perjury under the laws of the United States and the State of  
6 California that the foregoing is true and correct.

7           Executed on January 8, 2020 in Sacramento, California.

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10           Neli N. Palma  
11           Deputy Attorney General  
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# **EXHIBIT A**

**Neli Palma**

---

**From:** Neli Palma  
**Sent:** Monday, January 6, 2020 1:52 PM  
**To:** 'Takemoto, Benjamin (CIV)'; Kopplin, Rebecca M. (CIV)  
**Cc:** Karli Eisenberg  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Thanks, Ben.

Maybe a call would be helpful. What works for you? In the meantime, so that we can prepare for a constructive call, could you please let us know what defendants have in mind as to a "potential resolution without further litigation" on the FOIA claim?

Can you also explain how, under Defendants' proposal, the State can "reassert" dismissed claims after the case has been remanded. Would we file a new complaint? And, if we are "reserving" claims, how does not that not violate the final judgment rule. Your answers could potentially get us beyond this impasse.

Thank you.

Neli

---

**From:** Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>  
**Sent:** Monday, January 6, 2020 1:29 PM  
**To:** Neli Palma <Neli.Palma@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>  
**Cc:** Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Hi Neli,

Defendants do not agree with your proposed filing. If California wishes to request a final judgment under Rule 54(b), then the proper course of action is to file a motion seeking such relief from the court, to which Defendants would respond. As we previously indicated, Defendants would oppose your request since Rule 54(b) does not define "claim" as narrowly as California proposes in its draft filing and since California has not shown that there is no just reason for delay.

As we previously indicated, we believe that to obtain a final judgment in this case, any unresolved claims should be dismissed without prejudice. If California instead prefers to litigate the FOIA claim in district court, HHS will continue to produce responsive records diligently, as it has been doing. Of course, California's decision to request an extraordinarily large number of records means that production will take significant time. HHS is open to discussing alternative means of resolving the FOIA claim; if you would like to discuss a potential resolution without further litigation, please let us know.

Thanks,  
Ben

--

Benjamin T. Takemoto  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
P.O. Box 883, Ben Franklin Station, Washington, DC 20044  
Tel: (202) 532-4252 / Fax: (202) 616-8460

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---

**From:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>  
**Sent:** Monday, January 06, 2020 12:38 PM  
**To:** Takemoto, Benjamin (CIV) <[btakemot@CIV.USDOJ.GOV](mailto:btakemot@CIV.USDOJ.GOV)>; Kopplin, Rebecca M. (CIV) <[rkopplin@CIV.USDOJ.GOV](mailto:rkopplin@CIV.USDOJ.GOV)>  
**Cc:** Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>  
**Subject:** FW: 19-cv-02769-WHA State of California v. Azar and other cases  
**Importance:** High

Hi Ben,

While you consider the below, and just to keep things moving forward promptly, we suggest submitting a joint response to the court for its consideration. If you agree with this approach, please feel free to edit the portion laying out Defendants' position and let me know I have Defendants' consent to file this pleading.

Thank you.

Neli

---

**From:** Neli Palma  
**Sent:** Friday, January 3, 2020 12:59 PM  
**To:** 'Takemoto, Benjamin (CIV)' <[Benjamin.Takemoto@usdoj.gov](mailto:Benjamin.Takemoto@usdoj.gov)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>  
**Cc:** Kopplin, Rebecca M. (CIV) <[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov)>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Dear Ben,

Dismissal of claims does not appear to be the approach suggested by the court as it is directing the parties to stipulate to entry of final judgment "with reservation of all issues not reached in this order in the event of a remand." ECF No. 143 at p. 32. Moreover, defendants' suggested approach does not address the FOIA claim wherein they continue to provide interim productions, have refused to provide a date certain for completion of the production, and the State would be entitled to attorney's fees. Resolution of this claim would seem more appropriate than dismissal. What do defendants propose with respect to this claim?

Thanks.

Neli

---

**From:** Takemoto, Benjamin (CIV) <[Benjamin.Takemoto@usdoj.gov](mailto:Benjamin.Takemoto@usdoj.gov)>  
**Sent:** Friday, January 3, 2020 9:17 AM  
**To:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>

**Cc:** Kopplin, Rebecca M. (CIV) <[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov)>

**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Dear Neli,

Thank you for circulating the draft stipulation and proposed order. Defendants do not agree to your proposed stipulation. As we've previously suggested, we think that the claims that Judge Alsup did not resolve should be dismissed without prejudice.

Thanks,  
Ben

--

Benjamin T. Takemoto  
Trial Attorney  
U.S. Department of Justice, Civil Division, Federal Programs Branch  
P.O. Box 883, Ben Franklin Station, Washington, DC 20044  
Tel: (202) 532-4252 / Fax: (202) 616-8460

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---

**From:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>  
**Sent:** Thursday, December 12, 2019 3:41 PM  
**To:** Eisenberg, Sara (CAT) <[Sara.Eisenberg@sfcityatty.org](mailto:Sara.Eisenberg@sfcityatty.org)>; Kopplin, Rebecca M. (CIV) <[rkopplin@CIV.USDOJ.GOV](mailto:rkopplin@CIV.USDOJ.GOV)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Nemetz, Miriam R. <[MNemetz@mayerbrown.com](mailto:MNemetz@mayerbrown.com)>  
**Cc:** Takemoto, Benjamin (CIV) <[btakemot@CIV.USDOJ.GOV](mailto:btakemot@CIV.USDOJ.GOV)>; Mere, Yvonne (CAT) <[Yvonne.Mere@sfcityatty.org](mailto:Yvonne.Mere@sfcityatty.org)>; Huling Delaye, Jaime (CAT) <[Jaime.HulingDelaye@sfcityatty.org](mailto:Jaime.HulingDelaye@sfcityatty.org)>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Thanks, Sara.

Rebecca and Ben, Attached are the proposed documents for California's case.

Neli

---

**From:** Eisenberg, Sara (CAT) <[Sara.Eisenberg@sfcityatty.org](mailto:Sara.Eisenberg@sfcityatty.org)>  
**Sent:** Thursday, December 12, 2019 12:31 PM  
**To:** 'Kopplin, Rebecca M. (CIV)' <[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov)>; Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Nemetz, Miriam R. <[MNemetz@mayerbrown.com](mailto:MNemetz@mayerbrown.com)>  
**Cc:** Takemoto, Benjamin (CIV) <[Benjamin.Takemoto@usdoj.gov](mailto:Benjamin.Takemoto@usdoj.gov)>; Mere, Yvonne (CAT) <[Yvonne.Mere@sfcityatty.org](mailto:Yvonne.Mere@sfcityatty.org)>; Huling Delaye, Jaime (CAT) <[Jaime.HulingDelaye@sfcityatty.org](mailto:Jaime.HulingDelaye@sfcityatty.org)>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Rebecca,

Although Judge Alsup heard the three N.D. Cal. cases together, the cases have not been consolidated and there are some significant differences between the cases with respect to the claims asserted. Accordingly, we do not believe there is a one-size-fits-all approach to getting appealable final judgments along the lines of Judge Alsup Orders. I am therefore responding only on behalf of San Francisco. San Francisco is amenable to an order that dismisses the unaddressed claims as moot. A draft proposed final judgment and cover letter are attached for your review. Please let us know if you are amenable to this approach and, if so, whether you have any edits to the attached documents.

Regards,  
Sara



**Sara J. Eisenberg**  
Chief of Strategic Advocacy  
Office of City Attorney Dennis Herrera  
(415) 554-4633 Direct  
[www.sfcityattorney.org](http://www.sfcityattorney.org)  
Find us on: [Facebook](#) [Twitter](#) [Instagram](#)

Please note my new phone number.

This message is subject to attorney-client privilege and/or attorney work product privilege and must not be disclosed.

---

**From:** Kopplin, Rebecca M. (CIV) <[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov)>  
**Sent:** Monday, December 9, 2019 12:12 PM  
**To:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Eisenberg, Sara (CAT) <[Sara.Eisenberg@sfcityatty.org](mailto:Sara.Eisenberg@sfcityatty.org)>; Nemetz, Miriam R. <[MNemetz@mayerbrown.com](mailto:MNemetz@mayerbrown.com)>  
**Cc:** Takemoto, Benjamin (CIV) <[Benjamin.Takemoto@usdoj.gov](mailto:Benjamin.Takemoto@usdoj.gov)>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Neli,

Thanks for a very quick reply. I'm attaching an order from another case that dismissed unaddressed claims as moot without prejudice and "reserv[ed] to Plaintiff the right to re-urge such claims in the event the Court's ruling is not otherwise affirmed." Stipulating to a similar order here seems like a reasonable way to proceed, and we think would not require you to refile the complaint if the court's order were reversed on appeal in order to assert the remaining claims. We also think this would be consistent with Judge Alsup's order.

We're happy to further discuss your concerns if that would be helpful. It's our goal to get a final appealable order along the lines of Judge Alsup's order.

Regards,

Rebecca

**Rebecca M. Kopplin**  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
1100 L Street NW | Washington, D.C. 20005  
[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov) | (202) 514-3953

---

**From:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>  
**Sent:** Friday, December 06, 2019 8:00 PM  
**To:** Kopplin, Rebecca M. (CIV) <[rkopplin@CIV.USDOJ.GOV](mailto:rkopplin@CIV.USDOJ.GOV)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Eisenberg, Sara (CAT) <[Sara.Eisenberg@sfcityatty.org](mailto:Sara.Eisenberg@sfcityatty.org)>; Nemetz, Miriam R. <[MNemetz@mayerbrown.com](mailto:MNemetz@mayerbrown.com)>  
**Cc:** Takemoto, Benjamin (CIV) <[btakemot@CIV.USDOJ.GOV](mailto:btakemot@CIV.USDOJ.GOV)>  
**Subject:** RE: 19-cv-02769-WHA State of California v. Azar and other cases

Dear Rebecca,

Thank you for reaching out. Whereas the court recommended that the parties stipulate to entry of final judgment “with reservation of all issues not reached in this order in the event of a remand,” you are instead proposing that plaintiffs dismiss the issues not reached in the court’s order, adding that “[i]f defendants were to prevail on appeal and the case were remanded, plaintiffs could reassert the dismissed claims, of course.” Please provide authority for the proposition that dismissed claims can spring back as you propose. Also, are you proposing any particular statutory means for entry of a final judgment?

Thanks again and have a great weekend.

Neli

---

**From:** Kopplin, Rebecca M. (CIV) <[Rebecca.M.Kopplin@usdoj.gov](mailto:Rebecca.M.Kopplin@usdoj.gov)>  
**Sent:** Friday, December 6, 2019 2:19 PM  
**To:** Neli Palma <[Neli.Palma@doj.ca.gov](mailto:Neli.Palma@doj.ca.gov)>; Karli Eisenberg <[Karli.Eisenberg@doj.ca.gov](mailto:Karli.Eisenberg@doj.ca.gov)>; Eisenberg, Sara (CAT) <[Sara.Eisenberg@sfcityatty.org](mailto:Sara.Eisenberg@sfcityatty.org)>; Nemetz, Miriam R. <[MNemetz@mayerbrown.com](mailto:MNemetz@mayerbrown.com)>  
**Cc:** Takemoto, Benjamin (CIV) <[Benjamin.Takemoto@usdoj.gov](mailto:Benjamin.Takemoto@usdoj.gov)>  
**Subject:** 19-cv-02769-WHA State of California v. Azar and other cases

Counsel,

I’m writing regarding Judge Alsup’s November 19 order granting plaintiffs’ motions for summary judgment to the extent described in the order. As I’m sure you saw, Judge Alsup suggested that, because the order gave plaintiffs substantially all the relief they seek, the parties should stipulate to entry of final judgment “with reservation of all issues not reached in this order in the event of a remand.” Order at 32. We agree that approach makes sense in order to obtain an appealable order. We’d propose a stipulation that enters final judgment in plaintiffs’ favor as to their claims that the rule exceeds HHS’s statutory authority (*i.e.*, California’s Second Cause of Action, Count One of San Francisco’s Complaint, and the Second Count of Santa Clara’s Complaint) and dismisses all remaining claims without prejudice. If defendants were to prevail on appeal and the case were remanded, plaintiffs could reassert the dismissed claims, of course.

Please let us know your position on our proposal.

Regards,

Rebecca

**Rebecca M. Kopplin**  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
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 6 *Attorneys for Plaintiff State of California, by  
 and through Attorney General Xavier Becerra*

7 **[FEDS SIG BLOCK]**

8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 **STATE OF CALIFORNIA, by and through**  
 12 **ATTORNEY GENERAL XAVIER**  
 13 **BECERRA,**

3:19-cv-02769-WHA

14 Plaintiff,

15 v.

16 **ALEX M. AZAR, in his official capacity as**  
 17 **Secretary of the U.S. DEPARTMENT OF**  
 18 **HEALTH & HUMAN SERVICES; U.S.**  
 19 **DEPARTMENT OF HEALTH AND**  
 20 **HUMAN SERVICES; DOES 1-100,**

21 Defendants.

22 Pursuant to Northern District of California Civil Local Rules 7-11, the parties, Plaintiff the  
 23 State of California, by and through Attorney General Xavier Becerra, and Defendants Secretary  
 24 Alex Azar, et al. (collectively “the parties”), respectfully request that the Court issue a Federal  
 25 Rule of Civil Procedure 54(b) (Rule 54(b)) certification order as to Plaintiffs’ Administrative  
 26 Procedures Act (APA) “not in accordance with law” claim.

27 In support of their request, the parties state as follows:

28 1. On November 19, 2019, the Court denied Defendants’ motion to dismiss and  
 granted Plaintiffs’ motion for summary judgment. As relevant to this stipulation, the Court

1 concluded that the challenged federal rule “conflicts with” the underlying statutes “in a number of  
2 ways and upsets the balance drawn by Congress between protecting conscientious objections  
3 versus protecting the uninterrupted effective flow of health care to Americans.” ECF No. 147 at  
4 2; *see also id.* at 30 (“this order holds the rule is ‘not in accordance with law’ by reason of  
5 conflict with the underlying statutes and is in conflict with the balance struck by Congress in  
6 harmonizing protection of conscience objections vis-à-vis the uninterrupted flow of health care to  
7 Americans.”). The Court further held that because the “rule is so saturated with error, as here,  
8 there is no point in trying to sever the problematic provisions. The whole rule must go.” *Id.* at  
9 30. The Court acknowledged, “it has not reached all the claims tendered.” *Id.* at 32.  
10 Nevertheless, given that the “rule is set aside and shall be unenforceable,” the Court “believe[d]  
11 this action is ready for appeal, and suggests that all sides stipulate to entry of final judgment with  
12 reservation of all issues not reached in this order in the event of remand.” *Id.* at 32.

13 2. “Rule 54(b) permits district courts to authorize immediate appeal of dispositive  
14 rulings on separate claims in a civil action raising multiple claims.” *Gelboim v. Bank of Am.*  
15 *Corp.*, 135 S. Ct. 897, 902 (2015).

16 3. In determining whether to certify an order under Rule 54(b), the court must first  
17 determine whether the order is a final judgment “in the sense that it is a decision upon a  
18 cognizable claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of  
19 an individual claim entered in the court of a multiple claims action.” *Curtiss-Wright Corp. v.*  
20 *General Elec. Co.*, 446 U.S. 1, 7 (1980). The court must then determine whether there is any just  
21 reason for delay. *Id.* at 8. This case meets both prongs.

22 4. Here, the Court has entered final judgment as to Plaintiffs’ “not in accordance with  
23 law” APA argument as to the statutory definitions. However, the Court has not reached the State  
24 of California’s other claims, including but not limited to, its Freedom of Information Act claim.

25 5. There is no just reason for delaying judgment on the distinct APA argument claim  
26 pending adjudication of the entire case. As the Court acknowledged, the order “gives Plaintiffs  
27 substantially all the relief they seek.” ECF No. 147 at 32. The Court has set aside the challenged  
28 rule and ordered that it shall not be enforceable. *Id.* Therefore, there is no reason to delay

1 judgment. *See Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-  
2 25 (9th Cir. 1987) (“[G]iven the size and complexity of this case, we cannot condemn the district  
3 court’s effort to carve out threshold claims and thus streamline further litigation.”); *Sheehan v.*  
4 *Atlanta Int’l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987) (stating that certified claims need not be  
5 separate and independent); *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (concluding  
6 that although certified claims require proof of same facts as unadjudicated claims, resolution of  
7 legal issues on appeal will streamline ensuing litigation); *Continental Airlines, Inc. v. Goodyear*  
8 *Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th Cir. 1987) (observing that Rule 54(b) demands  
9 “pragmatic approach focusing on severability and efficient judicial administration”).

10 WHEREFORE, the parties respectfully request that the Court grant this stipulated request  
11 for a Rule 54(b) certification.

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1 Respectfully Submitted,

2 Dated: December XX, 2019

[ADD FEDERAL SIG BLOCK]

3 XAVIER BECERRA  
4 Attorney General of California  
5 KATHLEEN BOERGERS  
6 Supervising Deputy Attorney General

7 /s/ Neli Palma

8 NELI N. PALMA  
9 KARLI EISENBERG  
10 STEPHANIE YU  
11 Deputy Attorneys General  
12 *Attorneys for Plaintiff State of California, by*  
13 *and through Attorney General Xavier Becerra*

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically transmitted the foregoing document and all attachments thereto to the Clerk’s Office using the CM/ECF system for filing, that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

By: /s/ Ashley Harrison

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7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10  
11 **STATE OF CALIFORNIA, by and through**  
**ATTORNEY GENERAL XAVIER**  
12 **BECERRA,**

3:19-cv-02769-WHA

13 Plaintiff,

14 v.

15  
16 **ALEX M. AZAR, in his official capacity as**  
**Secretary of the U.S. DEPARTMENT OF**  
17 **HEALTH & HUMAN SERVICES; U.S.**  
**DEPARTMENT OF HEALTH AND**  
18 **HUMAN SERVICES; DOES 1-100,**  
19 Defendants.

20 The parties have filed a Stipulated Request for a Rule 54(b) Certification. For the reasons  
21 set forth in the parties' stipulation,

22 IT IS HEREBY ORDERED that the parties' Stipulated Request is GRANTED. The  
23 Court hereby enters partial final judgment against Defendants and in favor of Plaintiffs as to their  
24 APA "not in accordance with law" claim. This presents a final adjudication as to at least one of  
25 the multiple claims in this lawsuit, making it ready for entry of partial final judgment pursuant to  
26 Rule 54(b). Nor is there any just reason for delay.

27 As explained in the parties' stipulation, the Court concludes that the requirements of Rule  
28 54(b) have been met. To be precise, the Court has entered final judgment as to Plaintiffs' "not in

1 accordance with law” APA argument and there is no just reason for delay. In the event of  
2 remand, all of the issues not reached in the Court’s November 19, 2019 order are reserved. As  
3 such, the Court hereby issues a Rule 54(b) certification.  
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5 IT IS SO ORDERED.

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7 Dated: \_\_\_\_\_

\_\_\_\_\_ The Honorable William Alsup

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1 XAVIER BECERRA, State Bar No. 118517  
 Attorney General of California  
 2 KATHLEEN BOERGERS, State Bar No. 213530  
 Supervising Deputy Attorney General  
 NELI N. PALMA, State Bar No. 203374  
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 Attorneys for Plaintiff State of California, by and  
 8 through Attorney General Xavier Becerra

9  
 10 U.S. DISTRICT COURT FOR THE  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12  
 13

14 **STATE OF CALIFORNIA, by and through**  
**ATTORNEY GENERAL XAVIER**  
 15 **BECERRA,**

16 Plaintiff,

17 v.

18 **ALEX M. AZAR, in his official capacity as**  
**Secretary of the U.S. DEPARTMENT OF**  
 19 **HEALTH & HUMAN SERVICES; U.S.**  
 20 **DEPARTMENT OF HEALTH AND**  
 21 **HUMAN SERVICES; DOES 1-100,**

22 Defendants.

Case No. 3:19-cv-02769-WHA

**JOINT RESPONSE TO THE COURT'S**  
**RECOMMENDATION IN ITS**  
**NOVEMBER 19, 2019 ORDER THAT**  
**"ALL SIDES STIPULATE TO ENTRY**  
**OF FINAL JUDGMENT WITH**  
**RESERVATION OF ALL ISSUES NOT**  
**REACHED [ ] IN THE EVENT OF A**  
**REMAND"**

Action Filed: May 21, 2019

23  
 24 Plaintiff the State of California, by and through Attorney General Xavier Becerra, and  
 25 Defendants Secretary Alex Azar, et al. (collectively "the parties") hereby submit the following  
 26 joint response to the Court's November 19, 2019 order.

27 On November 19, 2019, the Court denied Defendants' motion to dismiss and granted  
 28 Plaintiffs' motion for summary judgment. The Court concluded that the challenged federal rule

1 “conflicts with” the underlying statutes “in a number of ways and upsets the balance drawn by  
2 Congress between protecting conscientious objections versus protecting the uninterrupted  
3 effective flow of health care to Americans.” ECF No. 147 at 2; *see also id.* at 30 (“[T]his order  
4 holds the rule is ‘not in accordance with law’ by reason of conflict with the underlying statutes  
5 and is in conflict with the balance struck by Congress in harmonizing protection of conscience  
6 objections vis-à-vis the uninterrupted flow of health care to Americans.”). The Court further held  
7 that because the “rule is so saturated with error, as here, there is no point in trying to sever the  
8 problematic provisions. The whole rule must go.” *Id.* at 30. The Court acknowledged, “it has  
9 not reached all the claims tendered.” *Id.* at 32. Nevertheless, given that the “rule is set aside and  
10 shall be unenforceable,” the Court “believe[d] this action is ready for appeal, and suggests that all  
11 sides stipulate to entry of final judgment with reservation of all issues not reached in this order in  
12 the event of remand.” *Id.* at 32.

13 The parties have endeavored in good faith to enter into a stipulation for entry of a final  
14 judgment, but have been unable to do so, and hereby submit the following joint response for the  
15 Court’s consideration:

16 **Defendants’ Position:**

17 Defendants agree that because the November 19, 2019 order gave California substantially  
18 all the relief they seek, the parties should stipulate to entry of final judgment “with reservation of  
19 all issues not reached in this order in the event of a remand.” ECF No. 143 at 32. Defendants  
20 agree that this approach makes sense in order to obtain an appealable order. Defendants propose  
21 a stipulation that enters final judgment in California’s favor as to their claims that the rule  
22 exceeds HHS’s statutory authority (i.e., California’s Second Cause of Action) and dismisses all  
23 remaining claims without prejudice. If Defendants were to prevail on appeal and the case were  
24 remanded, Plaintiffs could reassert the dismissed claims.

25 **California’s Position:**

26 California’s position is that a dismissal of claims, even with a “reservation of issues,” is  
27 neither wise nor warranted and hereby requests that the Court issue a Federal Rule of Civil  
28

1 Procedure 54(b) (Rule 54(b)) certification order as to California’s Administrative Procedures Act  
2 (APA) “not in accordance with law” claim.

3 “Rule 54(b) permits district courts to authorize immediate appeal of dispositive rulings on  
4 separate claims in a civil action raising multiple claims.” *Gelboim v. Bank of Am. Corp.*, 135 S.  
5 Ct. 897, 902 (2015). In determining whether to certify an order under Rule 54(b), the court must  
6 first determine whether the order is a final judgment “in the sense that it is a decision upon a  
7 cognizable claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of  
8 an individual claim entered in the court of a multiple claims action.” *Curtiss-Wright Corp. v.*  
9 *General Elec. Co.*, 446 U.S. 1, 7 (1980). The court must then determine whether there is any just  
10 reason for delay. *Id.* at 8. This case meets both prongs.

11 Here, the Court has entered final judgment as to California’s “not in accordance with law”  
12 APA argument regarding the statutory definitions. However, the Court has not reached  
13 California’s other claims, including but not limited to, its Freedom of Information Act claim.  
14 Even with the Court’s decision, California retains an interest in the documents underlying the  
15 Defendants’ actions and Defendants have committed to producing documents on a rolling basis.  
16 Defendants submitted a Sixth Interim production to California on December 9, 2019 and, as of  
17 the filing of this joint statement, have not provided a date certain for completion of the rolling  
18 production.

19 There is also no just reason for delaying judgment on the distinct APA argument claim  
20 pending adjudication of the entire case. As the Court acknowledged, the order “gives Plaintiffs  
21 substantially all the relief they seek.” ECF No. 147 at 32. The Court has vacated the challenged  
22 rule and ordered that it shall not be enforceable. *Id.* Therefore, there is no reason to delay  
23 judgment on this claim. *See Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d  
24 1519, 1524-25 (9th Cir. 1987) (“[G]iven the size and complexity of this case, we cannot condemn  
25 the district court’s effort to carve out threshold claims and thus streamline further litigation.”);  
26 *Sheehan v. Atlanta Int’l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987) (stating that certified claims  
27 need not be separate and independent); *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991)  
28 (concluding that although certified claims require proof of same facts as adjudicated claims,

1 resolution of legal issues on appeal will streamline ensuing litigation); *Continental Airlines, Inc.*,  
2 819 F.2d at 1524-25(observing that Rule 54(b) demands “pragmatic approach focusing on  
3 severability and efficient judicial administration”).

4 California disagrees with Defendants’ approach for three overall reasons. First, Defendants  
5 fail to explain how, if the case were remanded, the State of California would “reassert” the  
6 dismissed claims. Moreover, maintaining those claims could result in them being decided on  
7 appeal as a basis for affirming this Court’s judgment. *See Asante v. Cal. Dep’t of Health Care*  
8 *Servs.*, 330 F.Supp.3d 1198, 1207 (N.D. Cal. 2018) (noting that an appeals court may affirm a  
9 grant of summary judgment on any ground supported by the record, even if not relied upon by the  
10 district court, and that includes affirmance based on a legal theory that was not reached by the  
11 district court). Second, Defendants’ approach does not create a final, appealable judgment. *Id.* at  
12 1205 (explaining that the “Ninth Circuit has dismissed appeals for lack of jurisdiction under §  
13 1291 where the parties acted to evade the finality requirement by, *e.g.*, . . . stipulating that  
14 dismissed claims could be revived if an appeal was successful”). Finally, Defendants’ position  
15 does not account for California’s FOIA claim. This claim should not be dismissed when  
16 California is continuing to seek certain documents, Defendants continue to produce them, albeit  
17 slowly, and California is entitled to attorneys’ fees.

18 Therefore, California respectfully requests that the Court enter a Rule 54(b) certification. A  
19 proposed order is attached hereto as **Exhibit A**.

20 Respectfully submitted,

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Dated: January [redacted], 2020

JOSEPH H. HUNT  
Assistant Attorney General

MICHELLE R. BENNETT  
Assistant Branch Director  
Civil Division

*/s/ Benjamin T. Takemoto*

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33926841.docx

Dated: January [redacted], 2020

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Supervising Deputy Attorney General

*/s/ Neli N. Palma*

NELI PALMA  
KARLI EISENBERG  
STEPHANIE YU  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California, by  
and through Attorney General Xavier Becerra*

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**ATTESTATION OF SIGNATURES**

I, Neli N. Palma, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

          /s/ Neli N. Palma            
Neli N. Palma  
Deputy Attorneys General  
*Attorneys for Plaintiff State of California, by  
and through Attorney General Xavier  
Becerra*

**CERTIFICATE OF SERVICE**

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Case Name: *State of California v. Alex M. Azar, et al.* No. **3:19-cv-02769-WHA**

I hereby certify that on January [redacted], 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**JOINT RESPONSE TO THE COURT’S RECOMMENDATION, IN NOVEMBER 19, 2019 ORDER, THAT “ALL SIDES STIPULATE TO ENTRY OF FINAL JUDGMENT WITH RESERVATION OF ALL ISSUES NOT REACHED [ ] IN THE EVENT OF A REMAND”**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January [redacted], 2020, at Sacramento, California.

Ashley Harrison  
Declarant

*/s/ Ashley Harrison*  
Signature

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# **EXHIBIT B**



**DEPARTMENT OF HEALTH & HUMAN SERVICES**

Office of the Secretary

Assistant Secretary for Public Affairs  
Washington, D.C. 20201

**Request No.: 2018-00934-FOIA-OS**  
***California v. Azar et al, No. 3:19-cv-02769***

**December 9, 2019**

Karli Eisenberg  
Deputy Attorney General  
State of California Department of Justice  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550

Dear Karli Eisenberg:

This is the sixth interim response to your April 25, 2018, Freedom of Information Act (FOIA) request. You requested the following: “[C]ertain records regarding the Proposed Rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (RIN 0945-ZA03), HHS docket no. HHS-OCR-2018-0002 (hereinafter "Proposed Rule").”

The Department has processed 224 pages of potentially responsive records captured in the agency’s search for FOIA request 2018-00934-FOIA-OS. After a careful review of these pages, I have determined to release 18 pages to you in their entirety, and I am further releasing 73 pages in part, with portions redacted, pursuant to Exemptions (b)(5), (b)(6), (b)(7)(A) and (b)(7)(C). I have also determined that 133 pages should be withheld in their entirety under Exemption (b)(5), (b)(6), (b)(7)(A) and (b)(7)(C).

FOIA exemption (b)(5) protects inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. This exemption protects documents that would be covered by any privilege an agency could assert in a civil proceeding. These privileges include, among others, the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.

FOIA exemption (b)(6) permits a Federal agency to withhold information and records about individuals in “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

FOIA exemption (b)(7)(A) authorizes Federal agencies to withhold “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings.”

FOIA exemption (b)(7)(C) is the law enforcement counterpart to Exemption 6. It provides protection for law enforcement information, the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Including, but not limited to, identifying information of individuals associated with a law enforcement proceeding; i.e. law enforcement officers’ names, witness/interviewee identifying information.

We will continue to review the remaining records as efficiently and expeditiously as possible, consistent with our available resources. Should you have questions or concerns regarding the Department's response and/or the processing of your request, any such issues should be communicated to your legal counsel and the Department of Justice Attorney representing the Department in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brandon J. Gaylord". The signature is fluid and cursive, with the first name "Brandon" being the most prominent part.

Brandon J. Gaylord  
Supervisory Government Information Specialist  
and HHS FOIA/PA Public Liaison

Enclosure(s)

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and through Attorney General Xavier Becerra*

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11 **STATE OF CALIFORNIA, by and through**  
**ATTORNEY GENERAL XAVIER**  
12 **BECCERRA,**

13 Plaintiff,

14 v.

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16 **ALEX M. AZAR, in his official capacity as**  
**Secretary of the U.S. DEPARTMENT OF**  
17 **HEALTH & HUMAN SERVICES; U.S.**  
**DEPARTMENT OF HEALTH AND**  
18 **HUMAN SERVICES; DOES 1-100,**

19 Defendants.

3:19-cv-02769-WHA

**[PROPOSED] ORDER GRANTING  
PLAINTIFF STATE OF CALIFORNIA’S  
MOTION FOR ENTRY OF PARTIAL  
FINAL JUDGMENT UNDER RULE 54(b);  
RULE 54(B) JUDGMENT**

20 Plaintiff State of California has filed a Motion for Entry of Partial Final Judgment under  
21 Rule 54(b). Having considered Plaintiff’s motion and all materials submitted in relation thereto,  
22 IT IS HEREBY ORDERED that Plaintiff’s motion is GRANTED. The Court hereby enters  
23 partial final judgment against Defendants and in favor of Plaintiff State of California as to  
24 California’s Administrative Procedure Act “not in accordance with law” and “exceeds statutory  
25 authority” claim regarding statutory definitions (First Cause of Action). The Court concludes that  
26 the requirements of Rule 54(b) have been met. This presents a final adjudication as to at least one  
27 of the multiple claims in this lawsuit, making it ready for entry of partial final judgment pursuant  
28 to Rule 54(b). This order finds that there is no just reason for delaying an appeal of the issues

1 fully adjudicated by the Court's November 19, 2019 Order Re Motions to Dismiss and for  
2 Summary Judgment and Requests for Judicial Notice (Dkt. No. 143). This order finds that an  
3 immediate appeal of those claims would not result in piecemeal appeal of issues in this litigation,  
4 as Plaintiff's remaining claims are sufficiently distinct. This order also finds that the balance of  
5 equities favors an immediate appeal of the Court's November 19, 2019 order. As such, the Court  
6 hereby issues a Rule 54(b) certification.

7  
8 IT IS SO ORDERED.

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10 Dated: \_\_\_\_\_

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The Honorable William Alsup

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