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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

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

Plaintiff,

v.

ALEX M. AZAR, et al.,

Defendants.

Case No. 3:19-cv-2769-WHA

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

Date: February 13, 2020
Time: 8:00 AM
Courtroom: 12
Judge: Hon. William H. Alsup

1 Plaintiff California's motion for entry of partial final judgment under Federal Rule of Civil
2 Procedure 54(b) as to portions of its APA claim, Pl. State of California's Mot. for Entry of Partial Final
3 J. Under Rule 54(b), ECF No. 144 (Mot.), should be denied.

4 On November 19, this Court ordered that "[t]he challenged rule is set aside and shall be
5 unenforceable," on the basis of the Court's conclusion that some of the Rule's definitions conflicted
6 with statute and that the agency lacked authority for the Rule. See Order Re: Mots. to Dismiss and for
7 Summ. J. (Order) 32, *San Francisco v. Azar*, No. 19-cv-2405, ECF No. 147. This Court observed that
8 "[t]his order gives plaintiffs substantially all the relief they seek, although it has not reached all the
9 claims tendered. The undersigned judge accordingly believes this action is ready for appeal, and
10 suggests that all sides stipulate to entry of final judgment with reservation of all issues not reached in
11 this order in the event of a remand." Order 32.

12 From the first, California's request is different from a classic Rule 54(b) motion brought by a
13 party seeking to immediately appeal a court's resolution of one portion of a case. Here, California was
14 the prevailing party in this Court's November 19 ruling, and presumably does not seek to appeal it.
15 Instead, California—which was the master of its complaint, and chose to raise eight causes of action
16 challenging the Rule and a ninth FOIA cause of action in one proceeding—now seeks to control the
17 timing of *Defendants'* potential appeal.

18 The Ninth Circuit has cautioned that "[j]udgments under Rule 54(b) must be reserved for the
19 unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding
20 the appellate docket are outbalanced by pressing needs of the litigants for an early and separate
21 judgment as to some claims or parties," *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir.
22 1981). This is not such an "unusual case," and California has not identified any legitimate pressing need
23 for piecemeal review by the Ninth Circuit. It is Defendants, and not California, that may seek to appeal
24 this Court's ruling. In the interim, the Rule has been set aside and will not apply to California or any
25 other entity. If and when Defendants take an appeal in this case, California will be able to participate
26 fully. California opaquely suggests that it has an interest in having its appeal "proceed along the same
27 trajectory," Mot. 2, as any appeal by Defendants of the final judgments in *City & County of San*

1 *Francisco v. Azar*, No. 3:19-cv-2405 (N.D. Cal.) (*San Francisco*) and *County of Santa Clara v. Azar*,
 2 No. 5:19-cv-2916 (N.D. Cal.) (*Santa Clara*). But California has chosen to set its case apart from those
 3 cases, where the parties have stipulated to—and the Court has entered—final judgments that dismiss all
 4 issues not reached by this Court. In any event, if California desired to participate in the appeals in those
 5 cases, it could seek to do so through amicus briefing, even if there is not an appealable final judgment in
 6 California’s own case.

7 California’s proposed use of Rule 54(b) overlooks important differences between California’s
 8 case and *Santa Clara* and *San Francisco* which stem from California’s strategic litigation decisions. As
 9 to California’s alternative challenges to the Rule, such as its Spending Clause challenge, they are not
 10 separate “claims” for Rule 54(b) purposes because they arise from the same set of facts as the APA
 11 challenges that California already prevailed on. As to California’s FOIA claim, there are just reasons to
 12 delay an appeal of the Court’s ruling as to California’s APA claim until the FOIA claim is resolved.

13 **I. CALIFORNIA’S ALTERNATIVE CHALLENGES TO THE RULE**

14 Rule 54(b) is inapplicable when, regardless of the styling of the complaint, a plaintiff actually
 15 presents a single claim under multiple theories. As the Ninth Circuit has explained, “only one claim is
 16 presented when ‘a single set of facts gives rise to a legal right of recovery under several different
 17 remedies.’” *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 575 (9th Cir. 2018) (alterations
 18 omitted) (quoting *Ariz. State Carpenters Pension Tr. Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir.
 19 1991)); see also 10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2657 (4th
 20 ed. 2019) (noting that “when a claimant presents a number of legal theories, but will be permitted to
 21 recover only on one of them, the bases for recovery are mutually exclusive, or simply presented in the
 22 alternative, and plaintiff has only a single claim for relief for purposes of Rule 54(b)”). Here, causes of
 23 action 1 through 8 in California’s complaint are a single claim challenging the Rule. They each
 24 originate in the same single set of facts (*i.e.*, the Rule and its administrative record), and they each seek
 25 the same relief—vacatur of the Rule.

26 California expresses concern that, if it dismisses its unresolved challenges to the Rule now, it
 27 will be unable to reassert them after a potential remand by the Ninth Circuit. Mot. 7. But the similar
 28

challenges brought in *Santa Clara* and *San Francisco* present an illustrative counter-example. In both of those cases, plaintiffs raised objections to the Rule not reached by this Court. *See, e.g.*, Compl. ¶¶ 123-26, *San Francisco*, ECF No. 1 (raising an Establishment Clause challenge to the Rule); Compl. ¶¶ 253-54, *Santa Clara*, ECF No. 1 (raising a Spending Clause challenge to the Rule). After this Court set aside the Rule on APA grounds, it issued a final judgment by the agreement of the parties that treated the remaining claims as moot. *See San Francisco*, Final Judgment, ECF No. 149 (“Plaintiff’s remaining claims are dismissed as moot.”); *Santa Clara*, Final Judgment, ECF No. 89 (“Because Plaintiffs have received substantially all the relief they sought in this action, it is unnecessary for the Court to reach the claims not addressed in the Court’s Order.”). This approach achieved the “reservation of all issues not reached in this [the Court’s November 19] order in the event of a remand,” Order 32, and there is no reason that *California*’s alternative challenges to the Rule should be treated any differently.

This outcome is also in line with the Ninth Circuit’s instructions regarding Rule 54(b) judgments. According to the Ninth Circuit, a Rule 54(b) judgment is only appropriate after “a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court. A similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result, documented by further and specific findings.” *Satpathy v. Cathay Pac. Airways, Ltd.*, No. C 04-5334 CW, 2005 WL 8162029, at *1-2 (N.D. Cal. Oct. 31, 2005) (quoting *Morrison-Knudsen*, 655 F.2d at 965); *see also id.* at *1 (“The analysis of a just reason for delay examines first whether the claims under review are separable from those remaining to be adjudicated and, second, whether there is a likelihood that an appellate court would have to decide the same issues more than once.” (citing *Gregorian v. Izvestia*, 871 F.2d 1515, 1518-20 (9th Cir. 1989))).

Here, of course, to resolve California’s constitutional objections to the Rule would involve considering many of the same legal and factual issues required to resolve California’s APA arguments, including interpreting the Rule and comparing HHS’s authority under the conscience statutes and under the Rule. In other words, if California were permitted to keep its remaining challenges in this Court

1 while Defendants appealed its November 19 ruling, the ultimate result would be a duplication of effort
2 by the Ninth Circuit following the resolution of California's APA arguments.

3 California also argues that it does not want to dismiss its remaining challenges to the Rule as
4 moot because it wants the Ninth Circuit to rely on them in considering Defendants' potential appeal.
5 Mot. 7 ("[I]f California were to maintain the unresolved claims, the Ninth Circuit could decide on appeal
6 that they are a basis for affirming this Court's judgment."). But California can ask the Ninth Circuit to
7 do so in any appeal—as these other "claims" are not actually separate claims; they are merely additional
8 theories (in addition to California's APA theories) supporting the same single claim. *See, e.g.,*
9 *Pakootas*, 905 F.3d at 575; 10 Fed. Prac. & Proc. Civ. § 2657. California provides no reason why these
10 additional theories cannot be (and should not be) dismissed as moot given the vacatur of the Rule.

11 **II. CALIFORNIA'S FOIA CLAIM**

12 Second, as to California's FOIA claim, California has failed to establish that there is no just
13 reason to delay a final judgment until the resolution of that claim. Reserving any appeal for the
14 conclusion of California's district court litigation against Defendants will not imperil California's right
15 to participate in any eventual appeal in its case, and it will enable California to appropriately litigate any
16 FOIA issues—such as the agency's redactions or any applicable attorneys' fees—in the proper course.
17 To be clear, Defendants do not suggest that California could be compelled to give up its FOIA claim or
18 any attorneys' fees to which it may be entitled. Defendants simply submit that, given California's
19 choice to bring all of its claims in one lawsuit, Rule 54(b) is not an appropriate mechanism to relieve
20 California from that choice.

21 "It will be a rare case where Rule 54(b) can appropriately be applied when the contestants on
22 appeal remain, simultaneously, contestants below." *Jewel v. NSA*, 810 F.3d 622, 630 (9th Cir. 2015)
23 (quoting *Spiegel v. Trustees of Tufts Coll.*, 843 F.2d 38, 44 (1st Cir. 1988)); accord *Purdy Mobile*
24 *Homes, Inc. v. Champion Home Builders Co.*, 71 F.R.D. 341, 342 (E.D. Wash. 1976), *aff'd*, 594 F.2d
25 1313 (9th Cir. 1979) ("[A determination of no just reason for delay] requires the trial court to exercise
26 its discretion as a 'dispatcher' by 'dispatching' final decisions on claims to appellate courts when they
27 are ready for appeal. There is a firm belief in the appellate courts that this discretion should be exercised
28

cautiously and infrequently.” (citations omitted)), *aff’d*, 594 F.2d 1313 (9th Cir. 1979). Here, resolving California’s entire lawsuit at the same time, after completion of the FOIA litigation, will avoid the risk of duplicating effort between the appellate and district court. For example, to the extent that California retains an interest in pursuing its FOIA claim in this Court because it hopes to use the records it receives to support its APA claims, that further weighs against a Rule 54(b) judgment, as using any produced records in such a way would likely require *this Court* to re-open the administrative record for the case, which would be more complicated if a portion of the case were open on appeal. Further, should California’s FOIA claim be litigated through summary judgment and/or the parties litigate the issue of attorney’s fees, and should either party choose to appeal this Court’s adjudications regarding the FOIA claim, all appellate issues in this case could be considered at the same time, saving the already-burdened Ninth Circuit from considering piecemeal appeals. *See* Ninth Circuit and National Caseload Profiles, http://cdn.ca9.uscourts.gov/datastore/general/2018/08/22/National_Appellate_and_CA9_June2018.pdf (indicating that for the 12-month period ending on June 30, 2018, the Ninth Circuit received approximately 50,000 appeals).

Although California complains about the speed of progress on its FOIA request, California does not explain how that provides a just reason to enter partial final judgment on its challenges to the Rule. In any event, the agency has been diligently processing California’s extremely broad request, which comprised twenty-eight separate sub-requests. *See, e.g.*, Letter from Karli Eisenberg to Michael Marquis (Apr. 25, 2018) (FOIA Request), attached as Ex. A. The agency has provided California with the 549,940 page administrative record in this case, as well as a seven-page index aligning administrative record materials to the twenty-eight sub-requests. Letter from Brandon J. Gaylord to Karli Eisenberg (September 27, 2019), attached as Ex. B. The agency has also collected additional potentially responsive documents beyond the administrative record and has been making monthly productions. The no doubt substantial length of time it will take to complete processing of California’s request is directly traceable to California’s decision to submit an extraordinarily broad FOIA request. For example, the twenty-sixth of California’s twenty-eight sub-requests was for *every* email or other communication exchanged by *any* HHS employees about the Rule. *See, e.g.*, FOIA Request 5 (“All

1 records, including but not limited to, memorandum(s), including, but not limited to a final decision
2 memorandum presented to the Secretary, emails, meeting notices, summaries, or notes of any meeting or
3 call, related to internal communications between HHS employees, including but not limited to Secretary
4 Alex M. Azar and Sarah Bayko Albrecht, OCR employees, including but not limited to Director Roger
5 Severino, and the Centers for Medicare and Medicaid Services employees, related to the Proposed
6 Rule[.]). Moreover, identifying these records is itself a time-consuming process. And before
7 production, HHS must review the responsive materials individually in order to identify and redact,
8 among other things, deliberative information contained within them, as well as to protect any personal
9 privacy interests at stake.

10 California further argues that it should not be compelled to give up potential FOIA attorney fees
11 in order to “have its case considered with any appeals that might be filed in the two related cases and the
12 case filed by State of Washington.” Mot. 8. But, again, it is Defendants, and not California, that may
13 seek to appeal this Court’s November 19 ruling, once it is incorporated into a final judgment. And
14 Defendants have no objection to the cases proceeding along different tracks if California wants to
15 continue to press its FOIA claim and/or any claim for FOIA attorney fees. California cites no authority
16 for the idea that it has a “right” to have Defendants’ appeals in separate cases considered together when
17 California—the master of its own complaint—has included a FOIA claim that does not exist in the other
18 cases. Furthermore, California offers no explanation of *why* it prefers that any appeal by Defendants be
19 considered at the same time as other potential appeals. Given that California has been the prevailing
20 party, and that the Rule has been set aside, it is clear that California would not be prejudiced if the
21 Court’s November 19 order is not appealed while California’s FOIA claim proceeds in the ordinary
22 course. The Ninth Circuit has stated that a Rule 54(b) judgment is appropriate only when “pressing
23 needs of the litigants for an early and separate judgment as to some claims or parties” so require.
24 *Satpathy*, 2005 WL 8162029, at *1-2 (quoting *Morrison-Knudsen*, 655 F.2d at 965). Here, having
25 secured the relief it sought as to the Rule, California cannot identify such a “pressing” need for an early
26 and separate judgment.

Nor is it clear why California believes a Rule 54(b) judgment would aid “expeditious decision” of this case or “streamline further litigation.” Mot 5. To the extent that California continues to press its FOIA claim, a Rule 54(b) judgment is unlikely to alter the timeline for completing this case. And as to California’s alternative arguments against the Rule, leaving them lurking before the district court is likely to be *less* expeditious than dismissing them as moot.

CONCLUSION

California has already achieved all of the relief that it sought or could hope for as to the Rule. California’s bid to control the scope and timing of Defendants’ potential appeal through a Rule 54(b) judgment should be denied. If California wishes to continue to pursue its alternative theories against the Rule and its FOIA claim, then any appeal should wait until this Court has resolved any remaining issues before proceeding to the Ninth Circuit. This path will not prejudice California. To the extent California believes it would be inconvenienced by having Defendants’ potential appeal proceed on a different timeframe than Defendants’ potential appeal of the *Santa Clara* and *San Francisco* cases, that potential delay is entirely the result of California’s choices.

For these reasons, Plaintiff’s motion should be denied.

Dated: January 22, 2019

Respectfully Submitted,

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EXHIBIT A



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April 25, 2018

VIA ELECTRONIC DELIVERY AND CERTIFIED U.S. MAIL

FOIA Officer: Michael Marquis
U.S. Department of Health and Human Services
Freedom of Information Officer
Hubert F. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, DC 20201
Email: FOIARequest@HHS.gov

RE: Freedom of Information Act Request Regarding Proposed Rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (RIN 0945-ZA03)

Dear Mr. Marquis:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (the "Act"), I hereby request disclosure of certain 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"). This letter describes: (1) the records requested and (2) our request for a fee waiver for production of these records.

The Attorney General of California has a constitutional duty to protect all 39 million Californians, by safeguarding their health and safety, and defending the State's laws. Cal. Const., art. V, § 13. Attorney General Becerra has deep concerns about any efforts, including the Proposed Rule by the U.S. Department of Health and Human Services (HHS), to restrict or burden California residents' access to all health care services. If implemented, it will have significant negative impacts on our State; residents, including women, LGBTQ individuals, and other people; and numerous State entities that receive federal funding to provide important benefits and services for California's residents. In Attorney General Becerra's comment letter to HHS on the Proposed Rule, he made clear that the Proposed Rule "fails to account for its potential impact on States and their citizens." As such, we believe it is critical that there be transparency in the justification for and impact of such a broad, sweeping rule, to allow affected parties to understand and assess the Proposed Rule's impacts and consequences.

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Request for Records

As a result, on behalf of Attorney General Becerra, I respectfully request that HHS produce a copy of all of the records enumerated below (in electronic format, or print versions if electronic versions are not available) relating to the justification for the Proposed Rule and the economic impact of the Proposed Rule. Our request seeks all records, as described below, as that term has been defined by the Act and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)).

Please provide these records in a timely manner, on a rolling basis, and in a readily-accessible, electronic format, either in “.pdf,” or native form for excel spreadsheets. *See* 5 U.S.C. § 552(a)(3)(B). If HHS has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, then please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location), (ii) the justification for the destruction or claimed exemption(s), and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A).

This request includes any records in the custody, control, or possession of HHS, inclusive of all sub-agencies and all respective subdivisions of each agency. Nothing in these requests should be interpreted to be seeking personally identifiable information such as names or addresses. Any record responsive to a request that contains personally identifiable information should be redacted accordingly.

The Attorney General of California respectfully requests the following records relating to the Proposed Rule:

1. All records relating to the statement that “this proposed rule probably will have minimal to no impact on family well-being” (83 Fed. Reg. at 3919);
2. All records relating to HHS’s conclusions regarding impact of the Proposed Rule on patients;
3. All records relating to the alleged forty-four complaints that the Office for Civil Rights (OCR) has received since 2008, including the thirty-four complaints filed since the November 2016 election (83 Fed. Reg. at 3886);
4. All records relating to the statement that “[s]ince November 2016, there has been a significant increase in complaints filed with OCR alleging violations of these conscience and associated anti-discrimination laws” (83 Fed. Reg. at 3887);
5. All records relating to HHS’s statement that “[m]embers of Congress raised concerns following OCR’s closure of three additional complaints” (83 Fed. Reg. at 3886);

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6. All records relating to the decision that the prior “sub-regulatory guidance issued by OCR with respect to interpretation of the Weldon Amendment no longer reflects the current position of HHS, OCR, or the HHS Office of the General Counsel” (83 Fed. Reg. at 3890);
7. All records relating to HHS’s conclusion that the universe of new persons and entities subject to the Proposed Rule “is small and, possibly, non-existent” (83 Fed. Reg. at 3909);
8. All records relating to HHS’s statement that “all persons and entities subject to the proposed rule would spend approximately one hour on average familiarizing themselves with the content of the proposed rule and its requirements” (83 Fed. Reg. at 3912);
9. All records relating to HHS’s statement that it would take “3.5 hours on average to review the applicability of the additional laws that this rule proposes to enforce” (83 Fed. Reg. at 3913);
10. All records relating to HHS’s estimate that it expects “OCR’s staff costs would increase by \$904,500 annually [sic] in years one through five” (83 Fed. Reg. at 3915);
11. All records relating to HHS’s statements regarding “Estimated Benefits” of the Proposed Rule (83 Fed. Reg. at 3916);
12. All records relating to HHS’s statement that the Department “carefully considered alternatives to this proposed rule” (83 Fed. Reg. at 3917);
13. All records relating to HHS’s statement that “OCR estimates that there are 30 recipients on average per year that OCR may investigate” (83 Fed. Reg. at 3915);
14. All records relating to HHS’s decision to require both an assurance and certification (83 Fed. Reg. at 3928-3929);
15. All records relating to HHS’s decision as to what language to include in the Proposed Rule’s “Notice concerning Federal Health Care Conscience and Associated Anti-Discrimination Protections” (83 Fed. Reg. at 3931);
16. All records relating to how the Notice requirement is related to Congress’s intent in promulgating the “Federal health care conscience and associated anti-discrimination laws”;
17. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Notice requirement in the Proposed Rule;

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18. All records identifying or explaining the statutory authority that HHS relied on to include the Notice requirement in the Proposed Rule;
19. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Compliance requirements;
20. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to require recipients to validate compliance;
21. All records that HHS considered in relation to its estimate that the Proposed Rule “generates \$112 million in annualized costs at a 7% discount rate, discounted relative to year 2016, over a perpetual time horizon” (83 Fed. Reg. at 3918);
22. All records relating to the “Delegations of Authority” authorized in the Proposed Rule, including but not limited to, records relating to the necessity for the “Delegations of Authority” (83 Fed. Reg. at 3902);
23. All records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to establish a Conscience and Religious Freedom Division;
24. All records concerning internal HHS and/or Centers for Medicare and Medicaid Services (CMS) meetings related to the Proposed Rule which were held with HHS and/or CMS employees only,
 - a. Request 24 includes but is not limited to any communications, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls,
 - b. Request 24 includes but is not limited to records involving:
 - i. HHS Secretary Alex M. Azar and Sarah Bayko Albrecht;
 - ii. OCR employees, including but not limited to Director Roger Severino;
 - iii. CMS employees;
 - iv. the Food and Drug Administration;
 - v. the Health Resources and Services Administration; and,
 - vi. the Centers for Disease Control and Prevention;
25. All records concerning HHS and/or CMS meetings or calls related to the Proposed Rule which were held with HHS and/or CMS employees and individuals outside HHS and/or CMS;
 - a. Request 25 includes but is not limited to records involving any communications, meeting requests or invitations to persons or groups as well as meeting notes or lists of those attending meetings or calls;

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- b. Request 25 includes but is not limited to:
 - i. any group including outside entities and other governmental agencies;
 - ii. the Office of Management and Budget;
 - iii. any member of Congress or representative of a member of Congress;
 - iv. any employee of the White House, including but not limited to Katy Talento;
 - v. Any employee of a not-for-profit entity, advocacy group, or member thereof;
26. All records, including but not limited to, memorandum(s), including, but not limited to a final decision memorandum presented to the Secretary, emails, meeting notices, summaries, or notes of any meeting or call, related to internal communications between HHS employees, including but not limited to Secretary Alex M. Azar and Sarah Bayko Albrecht, OCR employees, including but not limited to Director Roger Severino, and the Centers for Medicare and Medicaid Services employees, related to the Proposed Rule;
27. All records related to communications between employees of HHS with any other person or group from January 20, 2017 to the date of the response to this request, relating to the reorganization of the Office of Civil Rights; and,
28. Organization chart(s) for HHS and OCR, from January 20, 2017 to the date of the response to this request, including all employees who participated in the development and/or drafting of the Proposed Rule.

The Attorney General believes that the documents sought are of great public interest and not exempt from required disclosure under FOIA. Please forward this request to all HHS agencies and any other federal agencies that may be in possession of the requested documents. In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, the Attorney General requests that you disclose these documents as a matter of agency discretion.

Request for a Fee Waiver

The California Attorney General's Office is a noncommercial organization not subject to review fees. In addition, I request a waiver of searching and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). HHS has incorporated this requirement in its regulations for responding to FOIA requests. 45 C.F.R. § 5.54. Under the criteria set forth in the HHS regulations, such a waiver is appropriate here, as explained below.

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“Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” 45 C.F.R. § 5.54(b)(1).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern the decision of HHS to include new conditions on the disbursement of federal funds to states and localities, and to require recipients of federal funding to validate compliance. These are direct and clear actions by the federal government that have a direct impact on state and local governments.

“Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities.” 45 C.F.R. § 5.54(b)(2).

This disclosure would be likely to contribute significantly to the public understanding of the federal government’s decision to issue the Proposed Rule, including these new conditions on the disbursement of federal funds appropriated by Congress. Some parts of the Proposed Rule include no explanation of the new conditions and/or the reasoning behind their imposition and/or the evidence that HHS relied on in making its decision. Thus, this information is not already in the public domain. *See* 45 C.F.R. § 5.54(b)(2)(i).

Moreover, the disclosure will contribute to the understanding of a broad audience of persons interested in the subject. *See* 45 C.F.R. § 5.54(b)(2)(iii). There is no question that the distribution of federal funds itself is a matter of significant public interest, and impacts all residents of California (and the other 49 states), whose state and local entities rely on this funding. The California Attorney General, who is the chief law officer for the State of California and its more than 39 million residents, has a role in determining whether state and local policies are in compliance with these new substantive conditions. At a minimum, we intend to share the disclosed records with other state entities and sub recipients, something that will be of “great benefit to the public at large.” In addition, our office engages regularly with the public and serves as a source of information to promote the public’s understanding through speaking engagements, press releases, and other social media. Those public outreach actions, coupled with our expertise in both administrative and civil justice law, make our office well suited to disseminate more broadly, which I also plan to do, any notable records disclosed as part of this request.

“The disclosure must not be primarily in the commercial interest of the requester.” 45 C.F.R. § 5.54(b)(3).

The California Attorney General is a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. *See* Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist me in representing the 39 million people of California. Disclosure of the documents sought “is likely

April 25, 2018

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to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.

Please send all requested materials to my attention, at the address provided above, within 20 business days as required by FOIA. Please call me at 916-210-7913 if you have any questions about this request.

Sincerely,

A handwritten signature in cursive script that reads "Karli Eisenberg".

KARLI EISENBERG
Deputy Attorney General

For XAVIER BECERRA
Attorney General

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

September 27, 2019

Karli Eisenberg
Deputy Attorney General
State of California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Dear Karli Eisenberg:

This is an interim response to your April 25, 2018, Freedom of Information Act ("FOIA") request. You requested the following: "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')."

As you are aware, a significant volume of materials was previously produced to you in *California v. Azar et al*, No. 3:19-cv-02769, via the Administrative Record and Supplement thereto (the "AR") on July 22 and August 19, 2019, respectively. As you may be aware, there is a significant overlap between the materials included in the AR and the materials you requested under FOIA.

We have prepared the enclosed index, which cross references the materials included in the AR with the materials you requested under FOIA. We have identified approximately 5,000 pages within the AR that are responsive to Request No.: 2018-00934-FOIA-OS, subparts 1–12, 14–19, 21–22. The enclosed index identifies the responsive documents according to their AR Bates numbers, and organizes them according to the subparts of your FOIA request. Note that some documents are responsive to multiple subparts. By releasing this index to you, the responsive materials identified therein are hereby also released to you pursuant to FOIA.

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", is written over a horizontal line.

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

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Subparts to CA Attorney General Request No.: 2018-00934-FOIA-OS**

#	Requested Records	AR Bates No.	Title
1	Any or all records relating to the statement that "this proposed rule probably will have minimal to no impact on family well-being" (83 Fed. Reg. at 3919).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
2	Any or all records relating to HHS' conclusions regarding impact of the Proposed Rule on patients.	000541746 to 541797	2019 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000538052 to 538075	Emmanuel Scheppers, <i>et al.</i> , Potential Barriers to the Use of Health Services Among Ethnic Minorities: A Review, Family Practice 23: 325-348 (2006)
		000538792 to 538810	Fallon Chipidza et al., Impact of the Doctor-Patient Relationship, Prim. Care Companion CNS Discord. 2015; 17(5)
		000548707 to 548710	Christian Medical & Dental Association summary of Key Findings on Conscience Rights Polling conducted April, 2009
3	Any or all records relating to the alleged forty-four complaints that the Office for Civil Rights (OCR) has received since 2008 (83 Fed. Reg. at 3886), including the thirty-four complaints filed since the November 2016 election (83 Fed. Reg. at 3886).	000541613 to 541615; 000541814 to 541891; 000541894 to 541956; 000542017 to 542222; 000542229 to 542332; 000542334 to 542377; 000545236 to 545244; 000545609 to 546163; 000549903	Various incoming complaints filed with OCR
4	Any or all records relating to the statement that "[s]ince November 2016, there has been a significant increase in complaints filed with OCR alleging violations of these conscience and associated anti-discrimination laws" (83 Fed. Reg. at 3887).		
5	Any or all records relating to HHS' statement that "[m]embers of Congress raised concerns following OCR's closure of three additional complaints..."(83 Fed. Reg. at 3886).	000537561 to 537562	Letter from Members of Congress to Sylvia M. Burwell, Secretary of Health and Human Services, and Jocelyn Samuels, Director of the Office for Civil Rights (June 28, 2016)

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#	Requested Records	AR Bates No.	Title
6	Any or all records relating to the decision that the prior "sub-regulatory guidance issued by OCR with respect to interpretation of the Weldon Amendment no longer reflects the current position of HHS, OCR, or the HHS Office of the General Counsel" (83 Fed. Reg. at 3890).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000546205 to 546342	Department of Justice Title VI Legal Manual
7	Any or all records relations to HHS' conclusion that the universe of new persons and entities subject to the Proposed Rule "is small and, possibly, non-existent" (83 Fed. Reg. at 3909).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000537753 to 537755	Census Statistics of U.S. Businesses Data
		000537756 to 537757	2010 Census Geographic Entity Tallies by State and Type
		000537758 to 537801	FY 2016 HHS Awards to Junior Colleges, Colleges, and Universities
		000537802 to 537806	FY 2017 HHS Awards from PEPFAR Implementing Agencies to Foreign Nonprofits, Foreign Governments, and International Organizations
		000538822 to 539068	HHS, FY 2018, Administration for Community Living: Justification of Estimates for Appropriations Committees
		000539070 to 539402	HHS, FY 2018, Centers for Disease Control and Prevention: Justification of Estimates for Appropriations Committees
		000539403 to 539748	HHS, FY 2018, Centers for Medicare & Medicaid Services: Justification of Estimates for Appropriations Committees
		000539749 to 540125	HHS FY 2018, Administration for Children and Families: Justification of Estimates for Appropriations Committees
		000540173 to 540321	HHS, FY 2018, National Institutes of Health: Justification of Estimates for Appropriations Committees
		000540322 to 540672	HHS, FY 2018, Health Resources and Services Administration: Justification of Estimates for Appropriations Committees
		000540673 to 540919	HHS, FY 2018, Administration for Community Living: Justification of Estimates for Appropriations Committees
		000540920 to 541227	HHS, FY 2018, Substance Abuse and Mental Health Services Administration: Justification of Estimates for Appropriations Committees
		000546345 to 546594	IHS FY 2018 Congressional Justification of Estimates to the Appropriations Committees (2017)

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#	Requested Records	AR Bates No.	Title
7	Continued - Any or all records relations to HHS' conclusion that the universe of new persons and entities subject to the Proposed Rule "is small and, possibly, non-existent" (83 Fed. Reg. at 3909).	000547174 to 547177	Administration for Community Living, National Network of University Centers for Excellence in Developmental Disabilities Education, Research & Service
		000547178 to 547184	Administration for Community Living, The Development Disabilities Assistance and Bill of Rights of 2000 (DD Act) Funding Allocations
		000547185	Administration for Community Living, AIDD Developmental Disabilities Councils (DDC) Awards for the States/Territories, FY 2017 Annual Allocation
		000547186	Administration for Community Living, AIDD Protection and Advocacy (PADD) Awards for the States/Territories FY 2017 Annual Allocation
		000547187 to 547694	2012 North American Industry Classification System Definitions
		000547695 to 547702	Statistics of U.S. Businesses Methodology
		000547708 to 547715	Esther Hing, et al., Nat'l Ctr. For Health Statistics, Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Servs., Acceptance of New Patients with Public and Private Insurance by Office-Based Physicians: United States, 2013, NCHS Data Brief No. 195 (Mar. 2015).
		000547716 to 547717	U.S. Census, 2012 NAICS Definition, 621399 Offices of All Other Miscellaneous Health Practitioners
		000548444	U.S. Census Bureau, Statistics of U.S. Businesses, 2015, NAICS code 611310 (Colleges, Universities, and Professional Schools)
		000548760 to 548762	SF-1151 Nonexpenditure Transfer Authorization of funds from the U.S. Department of State to U.S. Department of Health and Human Services, Example
		000548763 to 548780	Amendment #1 to Memorandum of Agreement Between the Department of State Office of the U.S. Global AIDS Coordinator (OGAC) and the U.S. Department of Health and Human Services (HHS) to Allocate Funds Appropriated in FY 2017
8	Any or all records relating to HHS' statement that "all persons and entities subject the proposed rule would spend approximately one hour on average familiarizing themselves with the content of the proposed rule and its requirements" (83 Fed. Reg. at 3912).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)

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#	Requested Records	AR Bates No.	Title
9	Any or all records relating to HHS' statement that it would take "3.5 hours on average to review the applicability of the additional laws that this rule proposes to enforce" (83 Fed. Reg. at 3913).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000198373 to 198403	2008 Final Rule, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Final Rule), 73 Fed. Reg. 78,072 (Dec. 19, 2008)
10	Any or all records relating to HHS' estimate that it expects "OCR's staff costs would increase by \$904,500 annually [sic] in years one through five" (83 Fed. Reg. at 3915).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
11	Any or all records relating to HHS' statements regarding "Estimated Benefits" of the Proposed Rule (83 Fed. Reg. at 3916).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000537932 to 537951	Lynn Stout, Cultivating Conscience: How Good Laws Make Good People, Chapter 1
		000537952 to 537996	Kevin H. Theriot & Ken Connelly, Free to Do No Harm: Conscience Protections for Healthcare Professionals, 49 Ariz. State L. J. 549 (Summer 2017)
		000537997 to 537999	Letter from George Washington to the Society of Quakers (Oct. 13, 1789)
		000538000 to 538014	United States v. Seeger, 380 U.S. (1965)
		000538052 to 538075	Emmanuel Scheppers, <i>et al.</i> , Potential Barriers to the Use of Health Services Among Ethnic Minorities: A Review, Family Practice 23: 325-348 (2006)
		000538553 to 538637	Letter from Lawrence J. Joseph on behalf of the American Association of Pro-Life Obstetricians and Gynecologists to the Department of Health & Human Services Office of Public Health & Science (April 9, 2009)
		000538667	James Madison, Property, The Founders' Constitution, Vol. 1, Ch. 16, Doc. 23
		000538792 to 538810	Fallon Chipidza et al., Impact of the Doctor-Patient Relationship, Prim. Care Companion CNS Discord. 2015; 17(5)
		000546631 to 546632	Abortion is Legal, but What Percentage of ObGyns Will Provide One?, Freakonomics (August 24, 2011, 1:57 p.m.)

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#	Requested Records	AR Bates No.	Title
		000546633 to 546634	U.S. Catholic Health Care: The Nation's Largest Group of Not-for-Profit Health Care Providers, Catholic Health Association of the United States (2017)
		000546637 to 546640	<i>History of Our Ministry</i> , Christian Medical & Dental Associations
		000546641 to 546643	<i>About Us</i> , American Association of Pro-Life Obstetricians and Gynecologists
12	Any or all records relating to HHS' statement that the Department "carefully considered alternatives to this proposed rule..." (83 Fed. Reg. at 3917).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
14	Any or all records relating to HHS' decision to require both an assurance and certification (83 Fed. Reg. at 3928-3929).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000198373 to 198403	2008 Final Rule, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law (Final Rule), 73 Fed. Reg. 78,072 (Dec. 19, 2008)
		000537874	Form HHS-690, Civil Rights Assurance of Compliance
		000546718 to 546719	Civil Rights Information Request for Medicare Certification, OMB No. 0945-0006 (expiration date 04/30/2017) (Medicare Part A)
		000546720 to 546721	HHS-5161-1 Form (OMB No. 0930-0367) (expiration date 06/30/2020) (HHS Grant Applications)
		000546884 to 547100	U.S. Dep't of Health & Human Serv., HHS, Office of the Assistant Secretary for Resources and Technology, Office of Grants, HHS Grants Policy Statement, I-31 (Jan. 2007)
		000548781 to 548782	48 C.F.R. 253-370-9 Non-Discrimination for Conscience
15	Any or all records relating to HHS' decision as to what language to include in the Proposed Rule's "Notice concerning Federal Health Care Conscience and Associated Anti-Discrimination Protections" (83 Fed. Reg. at 3931).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)

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#	Requested Records	AR Bates No.	Title
16	Any or all records relating to how the Notice of requirement is related to Congress' intent in promulgating the "Federal health care conscience and associated antidiscrimination laws".	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
17	Any or all records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Notice requirement in the Proposed Rule.	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
18	Any or all records identifying or explaining the statutory authority that HHS relied on to include the Notice requirement in the Proposed Rule.	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
19	Any or all records, including but not limited to, studies, data, evidence, or other materials that HHS considered in relation to the decision to include the Compliance requirements.	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
21	Any or all records that HHS considered in relation to its estimate that the Proposed Rule "generates \$112 million in annualized costs at a 7% discount rate, discounted relative to year 2016, over a perpetual time horizon" (83 Fed. Reg. at 3918).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
		000537753 to 537755	Census Statistics of U.S. Businesses Data
		000537756 to 537757	2010 Census Geographic Entity Tallies by State and Type
		000537758 to 537801	FY 2016 HHS Awards to Junior Colleges, Colleges, and Universities
		000537802 to 537806	FY 2017 HHS Awards from PEPFAR Implementing Agencies to Foreign Nonprofits, Foreign Governments, and International Organizations
		000537821 to 537828	FY 2017 HHS Awards to the State of California, Pivot Table

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#	Requested Records	AR Bates No.	Title
		000540156 to 540172	Executive Office of the President, Office of Management and Budget, M-17-21, Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions on EO 13771 (April 5, 2017)
		000546595 to 546630	Bureau of Labor Statistics, Occupational and Employment Statistics, Occupational Employment and Wages, May 2016
22	Any or all records relating to the "Delegations of Authority" authorized in the Proposed Rule, including but not limited to, records relating to the necessity for the "Delegations of Authority" (83 Fed. Reg. at 3902).	000541746 to 541797	2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)