Exhibit 392

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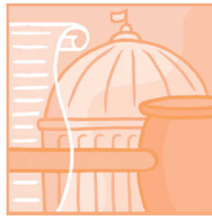

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When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals

Lori R. Freedman, PhD, Uta Landy, PhD, and Jody Steinauer, MD, MAS

As Catholic-owned hospitals merge with or take over other facilities, they impose restrictions on reproductive health services, including abortion and contraceptive services. Our interviews with US obstetrician–gynecologists working in Catholic-owned hospitals revealed that they are also restricted in managing miscarriages.

Catholic-owned hospital ethics committees denied approval of uterine evacuation while fetal heart tones were still present, forcing physicians to delay care or transport miscarrying patients to non–Catholic-owned facilities. Some physicians intentionally violated protocol because they felt patient safety was compromised.

Although Catholic doctrine officially deems abortion permissible to preserve the life of the woman, Catholic-owned hospital ethics committees differ in their interpretation of how much health risk constitutes a threat to a woman's life and therefore how much risk must be present before they approve the intervention. (*Am J Public Health.* 2008;98: 1774–1778. doi:10.2105/AJPH. 2007.126730)

OVER THE PAST DECADE, AS Catholic hospitals have merged with and purchased nonsectarian hospitals around the United States, the lay press and legal journals have featured discussion about the impact of these mergers on patient care, particularly with regard to reproductive health.[1–5] The literature has focused on policies prohibiting tubal ligation, contraceptive services, emergency contraception, and abortion. Although other religiously owned and nonsectarian hospitals may also prohibit or limit some of these services, Catholic-owned hospitals are the largest group of religiously owned nonprofit hospitals, operating 15.2% of the nation's hospital beds,[6] and increasingly they are the only hospitals in certain regions within the United States.[7] The result is that Catholic and non-Catholic patients alike come to depend on these facilities for emergencies, childbirth, and routine procedures without knowing how some of their options are potentially curtailed.

The findings reported here were not the original focus of our research. In the process of conducting a qualitative study about abortion provision in the clinical practice of obstetrician–gynecologists, we interviewed 30 obstetrician–gynecologists around the United States. During the interviews, which were conducted in 2006, 6 physicians working with or within Catholic-owned hospitals revealed that they were constrained by hospital policies in their ability to undertake urgent uterine evacuation. They reported that Catholic doctrine, as interpreted by their hospital administrations, interfered with their medical judgment. For example, some of them were denied permission to perform an abortion when uterine evacuation was medically indicated and fetal heart tones were still present.

Catholic-owned institutions and their employees must adhere

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to medical practice guidelines contained in the "Ethical and Religious Directives for Catholic Health Care Services" (hereafter called "the directives") written by the Committee on Doctrine of the National Conference of Catholic Bishops.[8] The directives state that abortion is never permitted. However, regarding emergency care during miscarriage management, the manual used by Catholic-owned hospital ethics committees to interpret the directives states that abortion is acceptable if the purpose is to treat "a life-threatening pathology" in the pregnant woman when the treatment cannot be postponed until the fetus is viable.[9] The experiences of physicians in our study indicate that uterine evacuation may not be approved during miscarriage by the hospital ethics committee if fetal heart tones are present and the pregnant woman is not yet ill, in effect delaying care until fetal heart tones cease, the pregnant woman becomes ill, or the patient is transported to a non–Catholic-owned facility for the procedure.

Although medical journals have featured articles about a physician's right to refuse patients treatment, referral, or information regarding services to which the physician has religious objections,[10–12] few articles in the medical literature published to date have addressed the effect of Catholic-owned hospital policies on patient care and the professional conduct of physicians.[13,14] One recent opinion piece in the *Journal of the American Medical Association* described how a patient was transferred from a religiously owned to a nonsectarian hospital for labor induction to facilitate spontaneous abortion because the religious hospital would not allow the procedure until after she became septic.[15] The following interview excerpts demonstrate how 5 different Catholic-owned hospital ethics committees responded to 6 physician requests to evacuate the uterus during miscarriage and the resulting effects on miscarriage management.

MISCARRIAGE MANAGEMENT

According to the generally accepted standards of care in miscarriage management, abortion is medically indicated under certain circumstances in the presence of fetal heart tones. Such cases include first-trimester septic or inevitable miscarriage, previable premature rupture of membranes and chorioamnionitis, and situations in which continuation of the pregnancy significantly threatens the life or health of the woman. In each instance, the physician must weigh the health impact to the woman of continuing the pregnancy against the potential viability of the fetus. Ideally, the physician then engages in a sensitive decisionmaking process with the patient. The physician reviews with the patient the risks of continuing the pregnancy and the likelihood of fetal survival, as well as management options that include "expectant management" (i.e., no intervention) and termination of pregnancy, with the physician often recommending a form of management. The patient then chooses how to proceed; when fetal survival is no longer possible or when continuing the pregnancy involves significant risk, she may decide to terminate the pregnancy. For spiritual or psychological reasons, a patient may prefer to delay induction of labor or surgical uterine evacuation until there is no fetal heartbeat, even in cases in which the risk of expectant management to her health is great.

In general, this process of assisted decisionmaking is guided by informed consent or informed choice,[16] which requires that the patient understand all appropriate medical options, as well as the relevant risks and benefits of each, before choosing and consenting to a course of management. Informed choice and consent may be compromised when hospital policies restrict physicians from offering treatment options routinely available in other hospitals.

OVERVIEW OF CATHOLIC POLICY

The standards of medical care put forth in the directives are at variance with those generally recognized in other medical settings, particularly regarding care at the beginning and ending of life. They were codified over 50 years ago to ensure strict obedience to Catholic principles by all employees of Catholic-owned hospitals, without local variation.[17] The directives sanction prenatal care and natural family planning but prohibit nearly all other reproductive services, including all other birth control methods, emergency contraception, infertility treatment, sterilization, and abortion.[8] In Catholic-owned hospitals, physicians must request approval to terminate a pregnancy for any indication from the ethics committee, which interprets and enforces the directives. Such consultations can be done quickly over the phone with an on-call representative of the committee, typically a priest or nun, if the medical situation is urgent. In theory, therefore, consultation with the ethics committee presents only a minor delay to urgent care. If the situation is not urgent, the committee convenes to discuss the matter and then offers its ruling.

An important qualification of the prohibition of abortion is made in Directive 47. Termination of pregnancy is permissible if the health of the mother is at risk:

> Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.[8]

The death of the fetus is therefore acceptable as a secondary consequence of actions intended to preserve the health of the pregnant woman. However, the manual of Catholic hospital ethics committees, used to help them interpret and apply the directives, warns, "The mere rupture of membranes, without infection, is not serious enough to sanction interventions that will lead to the death of the child."[6] By contrast, writing in a leading Catholic health journal, other Catholic health ethicists offer a more liberal

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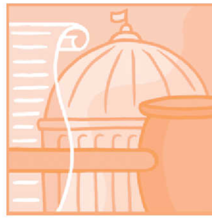

interpretation of Directive 47: uterine evacuation is indicated if abortion is inevitable and delay will harm the pregnant woman.[18] Therefore, the former—and arguably more authoritative—source approves of uterine evacuation only after a woman becomes sick, and the latter approves of it as a measure to prevent sickness. Our data indicate that despite Catholic leaders' desire for strict standardization of Catholic-owned health services, varying interpretations and executions of Directive 47 exist both at the individual (practitioner) and institutional (hospital ethics committee) levels.

STUDY AND METHODS

Our findings arose from a study that was not originally focused on care in Catholic-owned hospitals. In-depth interviews were conducted in person and over the telephone with 30 obstetrician–gynecologists to determine the impact of residency abortion training on their future medical practice. Study participants graduated between 1996 and 2001 from residency programs in the western, midwestern, northeastern, and southern United States that offered routine abortion training, as opposed to elective or "opt-in" training. Most physicians in the study reported that they had participated in such training.

Requests for study participation, contact information, and consent forms were sent to all residents (about 150 in total) of 4 residency programs, one in each of the regions. In this way, we obtained interviews with 30 physicians—at least 5 from each region. Questions were designed to assess the effects of abortion training during residency and obstacles to the subsequent practice of abortion in their various professional environments. Transcripts of the interviews were analyzed with Atlas.ti 5.0 (ATLAS.ti Scientific Software Development GmbH, Berlin, Germany) for thematic content.

Thirteen of the physicians interviewed had worked in Catholic-owned hospitals regularly or occasionally since their residency. The following reports concerning miscarriage management come from 6 physicians working with and within Catholic-owned health institutions, each of whom reported at least one such event. Five of the 6 physicians participated in abortion training. Two of the 6 physicians currently work in academic medical centers and have continued to perform abortions after residency, and the remaining 4 are prohibited from doing so by their Catholic-owned institutional employers.

In the interview excerpts, the initials of physicians' names are based on pseudonyms. Physicians offered their accounts in the context of questions about their work history and whether they had experienced conflict with colleagues or superiors over the issue of abortion. Although the effect of religious ownership of health care was not initially a focus of our study, we believe it is important to examine and document these cases to highlight miscarriage management in Catholic-owned hospitals and find ways to improve care for pregnant women.

For purposes of confidentiality, no identifiers beyond the type of physician and the region and size of the city in which he or she practices are given.

RESULTS

Nontreatment, Delays, and Transport of Patients

Obstetrician–gynecologists working in Catholic-owned hospitals described cases in which abortion was medically indicated according to their medical judgment but, because of the ethics committee's ruling, it was delayed until either fetal heartbeats ceased or the patient could be transported to another facility. Dr P, from a midwestern, mid-sized city, said that at her Catholic-owned hospital, approval for termination of pregnancy was rare if a fetal heartbeat was present (even in "people who are bleeding, they're all the way dilated, and they're only 17 weeks") unless "it looks like she's going to die if we don't do it."

In another case, Dr H, from the same Catholic-owned hospital in the Midwest, sent her patient by ambulance 90 miles to the nearest institution where the patient could have an abortion because the ethics committee refused to approve her case.

> She was very early, 14 weeks. She came in . . . and there was a hand sticking out of the cervix. Clearly the membranes had ruptured and she was trying to deliver. . . . There was a heart rate, and [we called] the ethics committee, and they [said], "Nope, can't do anything." So we had to send her to [the university hospital]. . . . You know, these things don't happen that often, but from what I understand it, it's pretty clear. Even if mom is very sick, you know, potentially life threatening, can't do anything.

In residency, Dr P and Dr H had been taught to perform uterine evacuation or labor induction on patients during inevitable miscarriage whether fetal heart tones were present or not. In their new Catholic-owned hospital environment, such treatment was considered a prohibited abortion by the governing ethics committee because the fetus is still alive and the patient is not yet experiencing "a life-threatening pathology" such as sepsis. Physicians such as Dr H found that in some cases, transporting the patient to another hospital for dilation and curettage (D&C) was quicker and safer than waiting for the fetal heartbeat to stop while trying to stave off infection and excessive blood loss.

Dr B, an obstetrician–gynecologist working in an academic medical center, described how a Catholic-owned hospital in her western urban area asked her to accept a patient who was already septic. When she received the request, she recommended that the physician from the Catholic-owned hospital perform a uterine aspiration there and not further risk the health of the woman by delaying her care with the transport.

> Because the fetus was still alive, they wouldn't intervene. And she was hemorrhaging, and they called me and wanted to transport her, and I said, "It sounds like she's unstable, and it sounds like you need to take care of her there." And I was on a recorded line, I reported them as an EMTALA [Emergency Medical Treatment and Active Labor Act]

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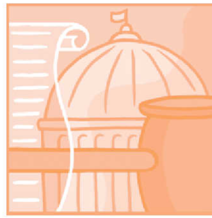

violation. And the physician [said], "This isn't something that we can take care of." And I [said], "Well, if I don't accept her, what are you going to do with her?" [He answered], "We'll put her on a floor [i.e., admit her to a bed in the hospital instead of keeping her in the emergency room]; we'll transfuse her as much as we can, and we'll just wait till the fetus dies."

Ultimately, Dr B chose to accept the patient to spare her unnecessary suffering and harm, but she saw this case as a form of "patient dumping," because the patient was denied treatment and transported while unstable.

Circumventing the Ethics Committee

Some doctors have decided to take matters into their own hands. In the following case, the refusal of the hospital ethics committee to approve uterine evacuation not only caused significant harm to the patient but compelled a perinatologist, Dr S, now practicing in a nonsectarian academic medical center, to violate protocol and resign from his position in an urban northeastern Catholic-owned hospital.

> I'll never forget this; it was awful—I had one of my partners accept this patient at 19 weeks. The pregnancy was in the vagina. It was over. . . . And so he takes this patient and transferred her to [our] tertiary medical center, which I was just livid about, and, you know, "we're going to save the pregnancy." So of course, I'm on call when she gets septic, and she's septic to the point that I'm pushing pressors on labor and delivery trying to keep her blood pressure up, and I have her on a cooling blanket because she's 106 degrees. And I needed to get everything out. And so I put the ultrasound machine on and there was still a heartbeat, and [the ethics committee] wouldn't let me because there was still a heartbeat. This woman is dying before our eyes. I went in to examine her, and I was able to find the umbilical cord through the membranes and just snapped the umbilical cord and so that I could put the ultrasound—"Oh look. No heartbeat. Let's go." She was so sick she was in the [intensive care unit] for about 10 days and very nearly died. . . . She was in DIC [disseminated intravascular coagulopathy]. . . . Her bleeding was so bad that the sclera, the white of her eyes, were red, filled with blood. . . . And I said, "I just can't do this. I can't put myself behind this. This is not worth it to me." That's why I left.

From Dr S's perspective, the chances for fetal life were nonexistent given the septic maternal environment. For the ethics committee, however, the present yet waning fetal heart tones were evidence of fetal life that precluded intervention. Rather than struggle longer to convince his committee to make an exception and grant approval for termination of pregnancy, Dr S chose to covertly sever the patient's umbilical cord so that the fetal heartbeat would cease and evacuation of the uterus could "legitimately" proceed.

Dr G also circumvented the ethics committee in her southern Catholic-owned hospital. She opted not to check fetal heart tones or seek ethics committee approval when caring for a miscarrying woman for fear that documentation of fetal heart tones would have caused unnecessary delays. This led to conflict with the nurse assisting her.

> She was 14 weeks and the membranes were literally out of the cervix and hanging in the vagina. And so with her I could just take care of it in the [emergency room] but her cervix wasn't open enough . . . so we went to the operating room and the nurse kept asking me, "Was there heart tones, was there heart tones?" I said "I don't know. I don't know." Which I kind of knew there would be. But she said, "Well, did you check?" . . . I said, "I don't need an ultrasound to tell me that it's inevitable . . . you can just put, 'The heart tones weren't documented,' and then they can interpret that however they want to interpret that." . . . I said, "Throw it back at me . . . I'm not going to order an ultrasound. It's silly." Because then that's the thing; it would have muddied the water in this case.

Dr G's main concern was sparing the patient extended suffering during loss of pregnancy. She disregarded the authority and protocol of the hospital ethics committee by not checking for fetal heart tones, which, she believed, would have led to significant delay in the inevitable treatment.

Strategic Communication With Ethics Committees

Dr J, an obstetrician–gynecologist working in a small town in the West, had success navigating his ethics committee by presenting patients to them in the language of the directives themselves. A nun advised him that terminology such as "inevitable abortion" and "maternal complications" should be highlighted.

> I [received] a good bit of advice actually . . . from the sister that sits on the ethics committee the first time I tried to have one of these conversations with her. She said, "Well, what are you concerned about with the mom?" . . . [T]hat's just the way that the conversation gets started. . . . I don't know if she was trying to give me a hint or whether she was . . . just interested in doing what she really considers to be the right thing, the moral thing . . . but it certainly helped me out.

Dr J described how he applied this advice in another case. The patient, at 20 weeks, was dilated with a placental abruption and fetal heart tones present, and she preferred to expedite uterine evacuation. He presented her case to the ethics committee in this fashion: "If we continue to watch this placental abruption, it could end up being dangerous, [leading to] transfusions or potentially even maternal death, if left untreated." This was the only case of approval by a Catholic-owned institution's ethics committee for urgent uterine evacuation with fetal heart tones present that was mentioned in the interviews.

DISCUSSION

Physicians working in Catholic-owned hospitals in all 4 US regions of our study disclosed experiences of being barred from completing emergency uterine evacuation while fetal heart tones were present, even when medically indicated. As a result, they had to delay care or transfer patients to non–Catholic-owned facilities. Some physicians violated the authority and protocol of the ethics committee to deliver what they considered safe medical care that reflected the standard of care learned in residency. The extent to which this might occur needs to be researched further but may be difficult to assess, because most physicians are not likely to discuss

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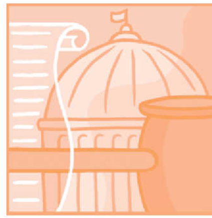

such behavior even in a confidential interview.

Contradictory interpretations of Directive 47 in the Catholic health literature and in practice indicate that ethics committees are either uncertain or in disagreement about how to manage miscarriage when fetal heart tones are present and what exact circumstances allow for termination of pregnancy in Catholic-owned hospitals. In cases in which physicians judge their patients' health or comfort to be compromised by delay, they may, like Dr J, obtain safer and more-expeditious patient care by emphasizing to the ethics committee the inevitability of fetal death and the risk of maternal complications. When physicians are unable to persuade the committee to approve pregnancy termination in emergency cases, however, it appears that patients may receive treatment that is riskier and less comfortable than the care provided in non-Catholic medical settings.

Given the prevalence of Catholic-owned health care today, these issues bring to light important policy questions about standards of medical practice and a patient's right to information. Patients entering a Catholic-owned hospital may be aware that abortion services are not available there, but few prenatal patients conceive of themselves as potential abortion patients and therefore they are not aware of the risks involved in being treated there; these include delays in care and in being transported to another hospital during miscarriage, which may adversely affect the patient's physical and psychological well-being.

For women to make informed decisions about care, physicians must be able to communicate clearly with them about the chances of fetal survival, all management options, and their recommendations. After such counseling, which also includes a discussion of the patient's personal beliefs, she will give informed consent to a specific management option of her choice. As with other examples of medical decisionmaking, the physician's recommendation is not always the chosen course. When a physician has recommended termination because waiting until the fetus is dead carries a high risk, a woman might decline intervention because of her personal beliefs. When possible, the course of treatment must be the patient's decision, but it is important that the physician is able to offer patients pregnancy termination when he or she considers it a necessary treatment without having to defy hospital policy or risk job loss.

Our findings bring into question the ethics of an institution's right to refuse care as granted by "conscience clauses."[12,19] Should a religiously owned institution have a right to a legally protected "conscience" in the same way an individual physician does? These are questions that members of the medical profession, ethicists, and lawmakers must continue to grapple with. The case histories we described indicate that, in some Catholic-owned hospitals, the private patient–physician relationship, patient safety, and patient comfort are compromised by religious mandates that require physicians to act contrary to the current standard of care in miscarriage management. ■

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Contributors

L.R. Freedman conducted the research, did preliminary analysis, and led the writing. U. Landy and J. Steinauer conceptualized and supervised the study, contributed to analysis, and assisted in the writing.

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Human Participant Protection

This study was approved by the institutional review board of the University of California, San Francisco.

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Exhibit 393

Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine

Julie D. Cantor, M.D., J.D.

A new rule from the Department of Health and Human Services (DHHS) has emerged as the latest battleground in the health care conscience wars. Promulgated during the waning months of the Bush administration, the rule became effective in January. Heralded as a "provider conscience regulation" by its supporters and derided as a "midnight regulation" by its detractors, the rule could alter the landscape of federal conscience law.

The regulation, as explained in its text (see the Supplementary Appendix, available with the full text of this article at NEJM.org), aims to raise awareness of and ensure compliance with federal health care conscience protection statutes. Existing laws, which are tied to the receipt of federal funds, address moral or religious objections to sterilization and abortion. They protect physicians, other health care personnel, hospitals, and insurance plans from discrimination for failing to provide, offer training for, fund, participate in, or refer patients for abortions. Among other things, the laws ensure that these persons cannot be required to participate in sterilizations or abortions and that entities cannot be required to make facilities or personnel available for them. And they note that decisions on admissions and accreditation must be divorced from beliefs and behaviors related to abortion. On their face, these laws are quite broad.

But the Bush administration's rule is broader still. It restates existing laws and exploits ambiguities in them. For example, one statute says, "No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded" by DHHS if it "would be contrary to his religious beliefs or moral convictions."[1] Here the rule sidesteps courts, which interpret statutory ambiguities and discern congressional intent, and offers sweeping definitions. It defines "individual" as physicians, other health care providers, hospitals, laboratories, and insurance companies, as well as "employees, volunteers, trainees, contractors, and other persons" who work for an entity that receives DHHS funds. It defines "assist in the performance" as "any activity with a reasonable connection" to a procedure or health service, including counseling and making "other arrangements" for the activity. Although the rule states that patients' ability to obtain health care services is unchanged, its expansive definitions suggest otherwise. Now everyone connected to health care may opt out of a wide range of activities, from discussions about birth control to referrals for vaccinations. As the rule explains, "an employee whose task it is to clean the instruments used in a particular procedure would also be considered to assist in the performance of the particular procedure" and would therefore be protected. Taken to its logical extreme, the rule could cause health care to grind to a halt.

It also raises other concerns. In terms of employment law, Title VII of the Civil Rights Act, which applies to organizations with 15 or more employees, requires balancing reasonable accommodations for employees who have religious, ethical, or moral objections to certain aspects of their jobs with undue hardship for employers. But the new rule suggests that if an employee objects, for example, to being a scrub nurse during operative treatment for an ectopic pregnancy, subsequently reassigning that employee to a different department may constitute unlawful discrimination — a characterization that may be at odds with Title VII jurisprudence.[2] As officials of the Equal Employment Opportunity Commission remarked when it was proposed, the rule could "throw this entire body of law into question."[3]

Furthermore, although the rule purports to address intolerance toward "individual objections to abortion or other individual religious beliefs or moral convictions," it cites no evidence of such intolerance — nor would it directly address such intolerance if it existed. Constitutional concerns about the rule, including violations of state autonomy and rights to contraception, also lurk. And the stated goals of the rule — to foster a "more inclusive, tolerant environment" and promote DHHS's "mission of expanding patient access to necessary health services" — conflict with the reality of extensive objection rights. Protection for the silence of providers who object to care is at odds with the rule's call for "open communication" between patients and physicians. Moreover, there is no emergency exception for patient care. In states that require health care workers to provide rape victims with information about emergency contraception, the rule may allow them to refuse to do so.

Recently, the DHHS, now answering to President Barack Obama, took steps to rescind the rule (see the Supplementary Ap-

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pendix). March 10 marked the beginning of a 30-day period for public comment on the need for the rule and its potential effects. Analysis of the comments (www.regulations.gov) and subsequent action could take some months. If remnants of the rule remain, litigation will follow. Lawsuits have already been filed in federal court, and Connecticut Attorney General Richard Blumenthal, who led one of the cases, has vowed to continue the fight until the regulation is "finally and safely stopped."[4]

This state of flux presents an opportunity to reconsider the scope of conscience in health care. When broadly defined, conscience is a poor touchstone; it can result in a rule that knows no bounds. Indeed, it seems that our problem is not insufficient tolerance, but too much. We have created a state of "conscience creep" in which all behavior becomes acceptable — like that of judges who, despite having promised to uphold all laws, recuse themselves from cases in which minors seek a judicial bypass for an abortion in states requiring parental consent.[5]

The debate is not really about moral or religious freedom writ large. If it were, then the medical profession would allow a broad range of beliefs to hinder patient care. Would we tolerate a surgeon who holds moral objections to transfusions and refuses to order them? An internist who refuses to discuss treatment for diabetes in overweight patients because of moral opposition to gluttony? If the overriding consideration were individual conscience, then these objections should be valid. They are not (although they might well be permitted under the new rule). We allow the current conscience-based exceptions because abortion remains controversial in the United States. As is often the case with laws touching on reproductive freedom, the debate is polarized and shrill. But there comes a point at which tolerance breaches the standard of care.

Medicine needs to embrace a brand of professionalism that demands less self-interest, not more. Conscientious objection makes sense with conscription, but it is worrisome when professionals who freely chose their field parse care and withhold information that patients need. As the gatekeepers to medicine, physicians and other health care providers have an obligation to choose specialties that are not moral minefields for them. Qualms about abortion, sterilization, and birth control? Do not practice women's health. Believe that the human body should be buried intact? Do not become a transplant surgeon. Morally opposed to pain medication because your religious beliefs demand suffering at the end of life? Do not train to be an intensivist. Conscience is a burden that belongs to the individual professional; patients should not have to shoulder it.

Patients need information, referrals, and treatment. They need all legal choices presented to them in a way that is true to the evidence, not the randomness of individual morality. They need predictability. Conscientious objections may vary from person to person, place to place, and procedure to procedure. Patients need assurance that the standard of care is unwavering. They need to know that the decision to consent to care is theirs and that they will not be presented with half-truths and shades of gray when life and health are in the balance.

Patients rely on health care professionals for their expertise; they should be able expect those professionals to be neutral arbiters of medical care. Although some scholars advocate discussing conflicting values before problems arise, realistically, the power dynamics between patients and providers are so skewed, and the time pressure often so great, that there is little opportunity to negotiate. And there is little recourse when care is obstructed — patients have no notice, no process, and no advocate to whom they can turn.

Health care providers already enjoy broad rights — perhaps too broad — to follow their guiding moral or religious tenets when it comes to sterilization and abortion. An expansion of those rights is unwarranted. Instead, patients deserve a law that limits objections and puts their interests first. Physicians should support an ethic that allows for all legal options, even those they would not choose. Federal laws may make room for the rights of conscience, but health care providers — and all those whose jobs affect patient care — should cast off the cloak of conscience when patients' needs demand it. Because the Bush administration's rule moves us in the opposite direction, it should be rescinded.

Dr. Cantor reports representing an affiliate of Planned Parenthood in a legal matter unrelated to conscientious objection. No other potential conflict of interest relevant to this article was reported.

This article (10.1056/NEJMp0902019) was published at NEJM.org on March 25, 2009.

Dr. Cantor is an adjunct professor at the UCLA School of Law, Los Angeles.

1. 42 U.S.C.A. § 300a-7(d).
2. Shelton v. Univ. of Medicine & Dentistry of New Jersey, 223 F.3d 220 (3d Cir. 2000).
3. Pear R. Protests over a rule to protect health providers. New York Times. November 17, 2008:A14.
4. Press release of the State of Connecticut Attorney General's Office, Hartford, February 27, 2009. (Accessed March 20, 2009, at http://www.ct.gov/ag/cwp/view.asp?A=3673&Q=434882.)
5. Liptak A. On moral grounds, some judges are opting out of abortion cases. New York Times. September 4, 2005.

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HHS Conscience Rule-000548435

Exhibit 394

PREDECISIONAL AND DELIBERATIONAL - INTERNAL WORK PRODUCT

TO: Sarah B. Albrecht
FROM: Will Estrada
DATE: April 10, 2019
SUBJECT: EO 12866 OMB Listening Session for Conscience Rule with Alliance Defending Freedom (ADF)

Attendees:

OMB: Josh Brammer, Brenda Aguilar (OMB)

Alliance Defending Freedom (ADF): Kevin Theriot

OCR: Roger Severino, March Bell, Justin Butterfield, Luis Perez, Sarah Albrecht, Dan Balserak, Mandi Ancalle, Will Estrada

Discussion:

Kevin: ADF has an interest in the Rule as was demonstrated by ADF's March 2018 comment to the NPRM. ADF clearly supports the proposed regulations. The regulation protects the many statutory rights that medical professionals have. Valid purposes of the Rule are to raise awareness and give teeth to federal protections that ADF clients use all the time. Moral and conscience rights of medical professionals are under siege across the world, not just in the US. Bioethicists are saying doctors are more like a public utility. A classic example that Kevin uses to respond to that claim is that many people say that when you go to the doctor, you should be in control, and decide what you want, but if a person had a disorder where they felt like a quadriplegic and wanted to have their limbs amputated, a doctor could not ethically amputate the person's limbs just because the person wanted the doctor to, because the doctor is under a higher ethical standard.

Kevin: Church, Coats-Snowe, Weldon are all ways federal government ensures that HHS-funded entities do not force medical professionals to participate in or refer for abortions or sterilizations. ADF thinks the proposed changes are a good thing because it allows OCR to enforce these federal laws.

Kevin: If you look at the NPRM, many of the cases cited as reasons for the rule are cases that ADF has litigated. Case of Cathy DeCarlo. Catholic, nurse from the Philippines, saw earthquake victims as a child, wanted to become a nurse. Became a nurse, everyone was aware of her faith and opposition to abortion, but one day, she was forced to participate in a non-emergency abortion. Even though she finally got a good resolution, the emotional and psychological trauma exists to this day, and that is why this new rule is so important. It will help with outreach and education, and if these rules had already been in place, Kevin believes Cathy DeCarlo would not have had to participate in the abortion. Kevin believes the rule will prevent future similar instances.

Kevin: Rule has compliance reviews. Very good.

CONFIDENTIAL

Kevin: Rule puts civil rights regimen into place. Rule includes certification and assurance of compliance, and notice to employees, which in Cathy DeCarlo's case would have been her supervisor.

Kevin: Two cases: Foothill Church and Skyline Wesleyan Church in California. These cases are also referenced as justifications in the NPRM. CA DMHC changed rules, and all health insurance plans are required to have health insurance that covers surgical abortions.

Kevin: When this first happened, ADF filed an OCR complaint, and HHS reinterpreted the Weldon Amendment to not apply to this situation because the insurance companies themselves were not religious and did not oppose abortion. This was an interpretation that had never been adopted by HHS before that. So these two churches were forced to include surgical abortions in their health insurance plans, despite the fact that they oppose abortion, and despite the fact that their employees in these churches must sign a code of conduct that they would not participate in a surgical abortion. Two separate cases, both courts have dismissed the cases on technicalities, and both cases are on appeal. Neither court has addressed the merits, but it could be that if the churches lose on appeal, the Weldon Amendment may be their only recourse, and that's why ADF thinks the rule is so important.

Roger Severino question: In litigation, did you raise the Weldon Amendment? Did the court say there was no private right of action for their clients?

Kevin: ADF did not raise the Weldon Amendment in the lawsuit because they do not believe that there is a private right of action.

Roger: So if you didn't raise it because of other precedents, then do you believe that demonstrates that OCR would be the only potential avenue for relief?

Kevin: That is absolutely right. And we're at the mercy of how OCR interprets the Weldon Amendment. This isn't an isolated problem. Similar situation in Washington State. Requires everyone with limited exceptions to cover surgical abortions. Just filed a lawsuit on behalf of Cedar Park church in the Seattle area. This demonstrates this is a major problem.

Josh Brammer question: Have other entities dropped their coverage as a result of this? How is it playing out? Injunctions allowing them to keep their plans without abortion?

Kevin: Those who have third party coverage like Blue Cross Blue Shield have to cover abortion. ADF has been unable to get an injunction. Going to file for an injunction in WA, but in CA, no injunctions. What churches are being forced to do is become self-insured, because then ERISA applies, instead of these statutes. But for Cedar Park which has 125 employees, self-insurance is not an option. Very expensive, some very personal issues where employees are going through cancer treatments, and they can't change right now. But some have been able to self-insure and avoid the law.

CONFIDENTIAL

Kevin: Conclude with Illinois situation. ADF has several cases, one in state court, *NIFLA v. Schneider* in federal court. Illinois law requires pro-life pregnancy centers to refer for abortion. If anyone asks about abortion, they are required to give contact info for someone who can provide it, even if they don't believe it is medically indicated. This Rule would fix that problem, and keep these Illinois entities from having to undergo compelled speech. This Rule fixes that, and ensures that Coats-Snowe and Weldon Amendment are interpreted to protect entities that oppose abortion from having to do so. Both these cases are enjoined – ADF did get an injunction, but Illinois has proposed some new regulations that are even more stringent.

Kevin: I want to close that the outreach and education in this rule will go a long way to require that covered entities are actually complying with the law, much like other civil rights laws. Those receiving federal funds are giving written assurances that they are complying with these laws, and then notify their employees, including supervisors. Voluntary compliance will be good, and will be bitter sweet because it will work me out of a job, but that will be good.

Roger: Do you have a sense of how much it cost to do the Cathy DeCarlo litigation?

Kevin: Yes, close to $100,000.

Josh: Thank you for sharing about the state laws.

CONFIDENTIAL

Exhibit 395

EO 12866 Alliance Defending Freedom

- Clearly support the NPRM – they protect the many statutory rights that medical professionals have
- We encourage the valid protections to give teeth to rights our clients want to take advantage of
- Doctors and bioethicists are says that doctors are being treated as a public utility rather than a medical professional bound by the Hippocratic oath
- A doctor is bound by a higher authority than the patient's demand a person who believes they are quadriplegic, but have operable limbs should not get amputations because the patient demands it
- The NPRM is good and a good thing because they give HHS OCR an ability to enforce the Church, Weldon, and Coats-Snowe Amendments
- Many of the cases that justify or necessitate the NPRM are ADF's litigated cases.
    - Cathy DeCarlo case – Mt. Sinai Hospital receives federal funds. Cathy is devout Catholic. She notified Mt. Sinai that she would not participate or facilitate abortion. She was asked years later to participate in an abortion that was not emergent, she reminded them of her accommodation, she was told she would lose her license if she did not participate. She brought a lawsuit under the Church Amendment, but it was dismissed. The HHS investigated and Mt. Sinai changed its position and they no longer require her to participate in abortion. The problem is the emotional and psychological trauma she experienced by being forced to participate in abortion. The new regulation could've prevented this scenario due to the outreach and education, the compliance review capability, investigations are important, written assurance and certification reminders for covered entities, and notice would be required to employees, which would include supervisors of Cathy.
    - Foothill and Skyline Church cases – CA case mentioned in the NPRM, where CA officials at Department of Managed Care changed the rules regarding what is required in healthcare plans for employees so that now all plans, including churches, have to cover surgical abortion.
        - Policy change was made at the behest of those requesting more access to abortion
        - Our clients filed a complaint in 2014, and HHS interpreted the Weldon Amendment as not applying to Skyline's complaint because the insurance companies themselves were not religious. That is an interpretation that had not been adopted by HHS up until that time. HHS expressed some separation of powers issues
        - The churches were forced to include surgical abortion in their employee insurance plans
        - NPRM would fix this problem. There are not constitutional concerns and the Weldon Amendment protections include the plans themselves and the sponsors of those plans, like the churches themselves.
        - Both Federal courts have dismissed the cases and they are on appeal, but if they lose on appeal, the Weldon Amendment would be their only recourse.

        - Roger question: you raised the Weldon Amendment in the litigation, and what did the court say?
            - Kevin – We did not raise the Weldon Amendment as a claim because we do not understand there to be a private right of action. We are at the mercy of how the Weldon Amendment is interpreted by OCR.
        - Roger question: how many plans were changed by the requirement of CA?
            - Kevin – Will get back to you
        - Brammer question: has anyone dropped the plan because of this?
            - Kevin – they have to have it in the plan; we have not been able to get an injunction; we were thrown out of court. Some churches have been forced to become self-insured so that ERISA applies rather than state statutes.
    - Similar statute in WA that requires coverage of surgical abortion, with limited exemptions. Cedar Park Assembly of God litigation pending. Cedar Park is a very large church, but it would be too expensive to become self-insured.
    - IL Cases – Pregnancy Care Center of Rockford v. Schneider (state court) NIFLA case is in federal court. IL requires medical professionals including pregnancy centers to refer for abortion. This rule would address the IL situation as it protects against forced referral and ensures the Coats-Snowe and Weldon Amendments are interpreted so that my clients who are conscientiously opposed to referring for abortion from having to do so.
        - Injunction was issued in the IL cases, but IL has proposed new regulations that go further than the changes to the Health Care Right of Conscience Act.
- The outreach and education that are encouraged by the NPRM would go a long way to ensure people are voluntarily complying, much like people do in the civil rights context. It would ensure those who receive federal funds provide assurance and certifications that they are complying with Weldon, Coats-Snowe, and the Church Amendments.
- If employers know that folks are watching and ensuring entities are doing the right thing, we won't have to resort to litigation, as entities will voluntarily change their behavior.
- Roger question: how much did it cost for Cathy DeCarlo litigation
    - Kevin – close to $100,000 for attorney fees and costs

Exhibit 396

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of the Secretary

Director
Office for Civil Rights
Washington, D.C. 20201

June 21, 2016

<u>SENT VIA U.S. MAIL AND ELECTRONIC MAIL</u>

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Michelle (Shelley) Rouillard, Director
California Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

Re: <u>OCR Transaction Numbers: 14-193604, 15-193782, & 15-195665</u>

Dear Ms. Short, Mr. Bowman, Mr. Mattox, Mr. Sweeney, and Ms. Rouillard:

The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) has concluded its investigation of allegations that the California Department of Managed Health Care (CDMHC) engaged in discrimination under the Weldon Amendment[1] by issuing letters to several health insurers directing them to amend their plan documents to remove coverage exclusions and limitations regarding elective abortions. OCR received three complaints challenging the CDMHC letter, filed on behalf of a religious organization, churches and a

[1] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).

HHS Conscience Rule-000546807

church-run school, and employees of a religiously-affiliated university. The following sets forth the results of our investigation of these complaints.

Background

On August 22, 2014, the Director of CDMHC notified seven California health insurance plans[2] that it had come to CDMHC's attention that each of them had issued insurance contracts that limited or excluded coverage for termination of pregnancies. CDMHC regulates health care service plans under the Knox-Keene Health Care Service Plan Act of 1975 (Act), Cal. Health & Safety Code Sections 1340-1399.864, and its letter directed each health insurer to ensure that its health plans complied with the Act's requirement to cover legal abortions. CDMHC required the insurers to amend plan documents to remove coverage exclusions and limitations for "voluntary" or "elective" abortions and any limitations on coverage to only "therapeutic" or "medically necessary" abortions and to file revised documents within 90 days. A footnote in the letter stated that "no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion."

Implementing regulations of the Federal Health Care Provider Conscience Laws designate OCR as the office to receive complaints alleging discrimination under the Weldon Amendment. 45 C.F.R. § 88.2. OCR investigated each of the three complaints it received about the CDMHC letter, including requesting, receiving, and analyzing a written response to the complaints from CDMHC; collecting additional information from the complainants; interviewing each of the seven health insurers contacted by CDMHC, some on several occasions; and engaging in follow-up conversations with CDMHC.

OCR's investigation found that each of the insurers that received the CDMHC letter had, at the time it received the letter, included coverage for voluntary abortions in plans that it offered; upon receipt of the letter, each amended its plan documents by CDMHC's deadline to eliminate the subject exclusions from any plans that contained them. None of the insurers asserted any objection to offering coverage for voluntary abortion services and none identified any religious or moral objection that it had to such coverage.

OCR's investigation also found that Blue Cross of California (dba Anthem Blue Cross) subsequently sought and received from CDMHC an exemption to allow it to offer a plan excluding elective abortion services for religious employers as defined under California law. Cal. Health & Safety Code Section 1367.25(c)(1). As a result, CDMHC has demonstrated its willingness to authorize insurers to offer products that exclude coverage for elective abortion to such religious employers.

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[2] The seven health insurance plans were Aetna Health of California, Inc.; Blue Cross of California, dba Anthem Blue Cross; California Physicians' Service, dba Blue Shield of California; GEMCare Health Plan, Inc., dba ERD, Inc., Physicians Choice by GEMCare Health Plan; Health Net of California, Inc.; Kaiser Foundation Health Plan, Inc., dba Kaiser Foundation, Permanente Medical Care Program; and United Healthcare of California. OCR understands that GEMCare is no longer participating in the commercial insurance marketplace.

The Weldon Amendment

The Weldon Amendment provides:

> (d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.
>
> (2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.[3]

The amendment was passed to protect health care entities covered by the amendment from discrimination where those entities object to abortion on religious or moral grounds. *See State of California v. Lockyer*, 450 F.3d 436, 441 (9th Cir. 2006) ("Congress passed the Weldon Amendment precisely to keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs or risking imprisonment or loss of professional livelihood").

The amendment applies only to health care entities as defined therein. As the primary sponsor of the amendment, Representative Weldon himself made clear in discussing its scope:

> This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions. . . . It explicitly clarifies existing law to state that a health care entity includes a hospital, a health professional, a provider-sponsored organization, a health maintenance organization, a health insurance plan or any other kind of health care facility. It goes on further to state that existing law protects health care entities from discrimination based on three kinds of participation in abortion: performing, training and referring.[4]

Representative Weldon further stated that the health care entities that are protected are those that "choose not to provide abortion services."[5] In making clear that the amendment protects those who object to the provision of abortions, he stated, "[t]he Hyde-Weldon amendment . . . simply states you cannot force the unwilling" to participate in elective abortions. "The amendment does not apply to willing abortion providers."[6]

[3] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).
[4] 150 Cong. Rec. H10090 (Statement of Rep. Weldon) (Nov. 20, 2004).
[5] *Id.*
[6] 151 Cong. Rec. H177 (Statement of Rep. Weldon) (Jan. 25, 2005).

Representative Weldon also made clear that the health care entities protected under the amendment are those that have objections based on religious or moral grounds:

> [The Weldon Amendment] is a continuation of the Hyde policy of conscience protection. . . . The right of conscience is fundamental to our American freedoms. We should guarantee this freedom by protecting all health care providers from being forced to perform, refer, or pay for elective abortions.[7]

Findings

CDMHC is an agency and instrumentality of the State, and thus an entity to which the terms of the Weldon Amendment apply. The State of California receives federal funding under the Appropriations Act that includes the Weldon Amendment.[8] The seven health insurers to which CDMHC sent the August 22, 2014 letter meet the definition of "health care entity" in the Weldon Amendment, as each is a "health insurance plan." Based on the facts provided to OCR, none of the complainants meets the definition of a "health care entity" under the Weldon Amendment.

By its plain terms, the Weldon Amendment's protections extend only to health care entities and not to individuals who are patients of, or institutions or individuals that are insured by, such entities. In addition, its author, Representative Weldon, made clear both that the amendment protects only those covered health care entities that object to the provision of abortions and that its basic purpose is to protect those entities whose objections are made on religious or moral grounds.

Here, none of the seven insurers that received the CDMHC letter – the entities that are covered under the Weldon Amendment – objected to providing coverage for abortions. All modified their plan documents to cover voluntary abortion in response to the CDMHC letter, and none has indicated to OCR that it has a religious or moral objection to abortion or to providing coverage for abortion in the products it offers. Indeed, as noted above, at the time CDMHC sent the letter, all of the insurers offered plans that covered abortion, demonstrating that they have no religious or moral objection to that procedure. As a result, there is no health care entity protected under the statute that has asserted religious or moral objections to abortion and therefore there is no covered entity that has been subject to discrimination within the meaning of the Weldon Amendment.[9]

We further note that the approach described above avoids a potentially unconstitutional application of the amendment. A finding that CDMHC has violated the Weldon Amendment might require the government to rescind all funds appropriated under the Appropriations Act to

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[7] 150 Cong. Rec. H10090 (Statement of Rep. Weldon) (Nov. 20, 2004).

[8] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).

[9] We reiterate that to the extent that entities whose religious beliefs are not protected under the Weldon Amendment nonetheless object to CDMHC's letter, CDMHC has demonstrated its willingness to authorize insurers to offer products that exclude coverage for elective abortion to entities that qualify as religious employers under California law. *See* discussion of Anthem Blue Cross *supra*. Some employers may also, of course, decide to self-insure; self-insured plans are not subject to the CDMHC policy.

the State of California – including funds provided to the State not only by HHS but also by the Departments of Education and Labor, as well as other agencies. HHS' Office of General Counsel, after consulting with the Department of Justice, has advised that such a rescission would raise substantial questions about the constitutionality of the Weldon Amendment. Specifically, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court ruled that Congress could not condition a State's preexisting Medicaid funding on the State's compliance with an Affordable Care Act requirement to expand the program to include all low-income adults. The Court reasoned that this threat to terminate significant independent grants was so coercive as to deprive States of any meaningful choice whether to accept the condition attached to receipt of federal funds. Following accepted canons of statutory construction, OCR's approach, which is consistent with the views of the primary sponsor of the amendment, avoids this potentially unconstitutional application of the statute. *See Gomez v. United States*, 490 U.S. 858, 864 (1989).

Accordingly, OCR is closing its investigation of these complaints without further action.

Advisements

The determinations in this letter are not intended, nor should they be construed, to cover any issues regarding CDMHC's compliance with the Weldon Amendment that are not specifically addressed in this letter. It neither covers issues or authorities not specifically addressed herein nor precludes future determinations about compliance that are based on subsequent investigations.

The complainant has the right not to be intimidated, threatened, or coerced by a covered entity or other person because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. Please take all necessary steps to ensure that no adverse action is taken against the complainants or any other individual for the filing of this complaint, providing information to OCR, or otherwise participating in this investigation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

Sincerely,

Jocelyn Samuels
Director, Office for Civil Rights

cc: Gabriel Ravel
Deputy Director, General Counsel
California Department of Managed Health Care

Exhibit 397

DEPARTMENT OF HEALTH & HUMAN SERVICES | OFFICE OF THE SECRETARY

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VIA U.S. MAIL AND ELECTRONIC MAIL (Xavier.Becerra@doj.ca.gov)

January 18, 2019

Xavier Becerra, Esq.
California Attorney General
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244

Notice of Violation – OCR Transaction Numbers 16-224756 and 18-292848

Dear Attorney General Becerra:

This letter notifies you that the U.S. Department of Health & Human Services ("HHS") Office for Civil Rights ("OCR") has completed investigations of the complaints filed by Sacramento Life Center (OCR Transaction Number 16-224756),[1] and LivingWell Medical Clinic, Inc., Pregnancy Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc. (OCR Transaction Number 18-292848)[2] (collectively, the "Complainants"). The Complainants allege that the State of California ("California") engaged in impermissible discrimination when it enacted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the "FACT Act"),[3] subjecting Complainants to potential fines if they refused to provide certain notices or refer for or make arrangements for abortion.

Under part 88 of 45 C.F.R., OCR is authorized to receive and handle complaints based on potential violations of the Weldon Amendment, the Church Amendments,[4] and the Coats-Snowe Amendment. OCR investigated the Complainants' allegations under the Weldon and Coats-Snowe Amendments by conducting clarifying interviews, reviewing documents, and propounding data requests to California. OCR also reviewed relevant pleadings, briefs, and court decisions from Complainants' Federal court litigation, as well as other relevant Federal court litigation. Based on its investigations, OCR has determined that California violated the Weldon Amendment[5] and the Coats-Snowe Amendment.[6]

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[1] Letter from James F. Sweeney, Attorney, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Nov. 4, 2015) (on file with HHS OCR).
[2] Letter from Francis J. Manion & Geoffrey R. Surtees, Attorneys, Am. Ctr. for Law & Justice, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Jan. 10, 2018) (on file with HHS OCR).
[3] Cal. Health & Safety Code Ann. §§ 123470 *et seq.*
[4] 42 U.S.C. § 300a-7. OCR closes these complaints without making any findings under these complaints as to whether the FACT Act violates the Church Amendments.
[5] *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).
[6] 42 U.S.C. § 238n.

BACKGROUND OF THE COMPLAINTS

1. Sacramento Life Center[7]

On November 4, 2015, Sacramento Life Center filed a complaint with OCR asserting that California discriminated against Sacramento Life Center in violation of the Weldon Amendment because it subjected Sacramento Life Center to potential fines for refusing to post the FACT Act's required notice in direct conflict with its convictions about abortion. This complaint with OCR was designated OCR Transaction Number 16-224756.

Sacramento Life Center is a non-profit, pro-life pregnancy resource center that is under the supervision of a medical director. It provides medical and other services, consistent with its convictions, that support pregnant mothers and the lives of their unborn children.[8] According to Sacramento Life Center's Complaint:

> The mission of the Sacramento Life Center is to offer compassion, support, resources, and free medical care to women and couples facing unplanned or unsupported pregnancies, by providing them with realistic, high quality options other than abortion. In addition to being a social service agency, it is also a state-licensed medical clinic committed to ensuring all women and teen girls have access to free, or low cost, medical care. The Sacramento Life Center is a private, non-denominational, non-profit charitable organization that serves everyone regardless of financial standing, ethnic background, or religion. It is opposed to abortion and has, for the past forty years, worked tirelessly to offer women in crisis pregnancies abortion alternatives and compassionate care.[9]

Sacramento Life Center provides abortion alternatives through staff and volunteers that include nurses, a sonogram technician, and a licensed physician.[10]

Sacramento Life Center meets the definition of a "licensed covered facility" under the FACT Act. It is "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services;"[11] it "offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;"[12] it "offers pregnancy testing or

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[7] According to the plain text of the statutes, the Weldon and Coats-Snowe Amendments do not necessarily require the assertion of a religious or moral objection to abortion or abortion referrals. However, this Notice of Violation describes the Complainants, their beliefs, and their allegations, as well as the procedural background of their lawsuits where germane to OCR's completed investigations.
[8] OCR telephonic interview with Marie Leatherby, Exec. Dir., Sacramento Life Ctr. (Apr. 24, 2018) (on file with HHS OCR).
[9] Letter from James F. Sweeney, Attorney, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Nov. 4, 2015) (on file with HHS OCR).
[10] OCR telephonic interview with Marie Leatherby, Exec. Dir., Sacramento Life Ctr. (Apr. 24, 2018) (on file with HHS OCR).
[11] Cal. Health & Safety Code Ann. § 123471(a).
[12] *Id.* at § 123471(a)(1).

pregnancy diagnosis;"[13] it "advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;"[14] and it "has staff or volunteers who collect health information from clients."[15] Sacramento Life Center does not meet any of the FACT Act's exceptions.[16]

Because Sacramento Life Center meets the definition of a "licensed covered facility" under the FACT Act, it would be required to post notices stating that the state of California provides free or low-cost family planning services and abortion, and providing contact information on how to obtain such family planning services and abortion for qualifying members of the public.[17]

2. <u>LivingWell Medical Clinic, Inc., Pregnancy Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc.</u>

On January 10, 2018, LivingWell Medical Clinic, Inc. ("LivingWell"); Pregnancy Center of the North Coast, Inc. ("North Coast"); and Confidence Pregnancy Center, Inc. ("Confidence") filed a complaint with OCR asserting that California discriminated against them in violation of both the Weldon and Coats-Snowe Amendments, because California subjected them to potential fines for refusing to post the FACT Act's required notice in direct conflict with their convictions about abortion. This complaint with OCR was designated OCR Transaction Number 18-292848.

LivingWell, North Coast, and Confidence are three non-profit, faith-based pregnancy resource centers that offer pregnancy-related care and counseling to pregnant mothers free of charge and consistent with their religious beliefs.[18] Because of those religious beliefs, LivingWell, North Coast, and Confidence will not perform, counsel for, refer for, or provide education about procedures that end human life through abortion or abortion-inducing drugs.[19]

According to the Complaint from LivingWell, North Coast, and Confidence, all three pregnancy resource centers "operate licensed clinics that provide services to women seeking help with unplanned pregnancies. Each of the Complainants, for religious reasons, objects to posting or distributing the State's dictated message, because they view it as requiring them to approve of

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[13] *Id.* at § 123471(a)(3).
[14] *Id.* at § 123471(a)(4).
[15] *Id.* at § 123471(a)(6).
[16] *Id.* at § 123471(c).
[17] Cal. Health & Safety Code Ann. § 123472(a)(1); *see also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (under the FACT Act, "licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them").
[18] OCR telephonic interview with Christine Morris, Exec. Dir., Confidence Pregnancy Ctr., Inc. (May 22, 2018) (on file with HHS OCR); OCR telephonic interview with Cindy Broese Van Groenou, Exec. Dir., Pregnancy Ctr. of the North Coast, Inc. (June 7, 2018) (on file with HHS OCR); OCR telephonic interview with Cathy Seapy, Chief Exec. Officer, LivingWell Med. Clinic, Inc. (June 12, 2018) (on file with HHS OCR).
[19] *Supra* note 18.

and refer for abortions."[20] LivingWell, North Coast, and Confidence provide abortion alternatives through staff and volunteers that include nurses, sonogram technicians, and licensed physicians.[21]

For the same reasons that Sacramento Life Center qualifies as a "licensed covered facility," LivingWell, North Coast, and Confidence also meet the definition of a "licensed covered facility" under the FACT Act. Nor do LivingWell, North Coast, or Confidence meet any of the FACT Act's exceptions.[22]

Accordingly, all three pregnancy resource centers would be required to post notices stating that the State of California provides free or low-cost family planning services and abortion and providing contact information to members of the public. [23]

PROCEDURAL BACKGROUND

On September 9, 2015, the California legislature passed the FACT Act, which was signed into law by Governor Jerry Brown on October 9, 2015, and went into effect on January 1, 2016.

On October 27, 2015, LivingWell, North Coast, and Confidence filed for injunctive relief against California in U.S. District Court for the Northern District of California, alleging that the FACT Act required them to post a government-dictated message they did not wish to communicate in violation of the First Amendment to the U.S. Constitution, among other grounds.[24]

On December 18, 2015, the District Court denied LivingWell, North Coast, and Confidence's motion for a preliminary injunction, as well as a stay of the FACT Act pending appeal.[25] LivingWell, North Coast, and Confidence appealed to the Ninth Circuit Court of Appeals, which affirmed the District Court on October 14, 2016.[26] LivingWell, North Coast, and Confidence appealed to the U.S. Supreme Court.

OCR conducted an investigation following receipt of the complaints from Sacramento Life Center, LivingWell, North Coast, and Confidence. As part of OCR's investigations, OCR conducted interviews with representatives from each Complainant and submitted detailed data requests to California requesting information on the FACT Act, California's interpretation of the FACT Act, and California's enforcement of the FACT Act.[27]

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[20] Letter from Francis J. Manion & Geoffrey R. Surtees, Attorneys, Am. Ctr. for Law & Justice, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Jan. 10, 2018) (on file with HHS OCR).
[21] OCR telephonic interview with Christine Morris, Exec. Dir., Confidence Pregnancy Ctr., Inc. (May 22, 2018) (on file with HHS OCR); OCR telephonic interview with Cindy Broese Van Groenou, Exec. Dir., Pregnancy Ctr. of the North Coast, Inc. (June 7, 2018) (on file with HHS OCR); OCR telephonic interview with Cathy Seapy, Chief Exec. Officer, LivingWell Med. Clinic, Inc. (June 12, 2018) (on file with HHS OCR).
[22] Cal. Health & Safety Code Ann. § 123471(c).
[23] *Id.* at § 123472(a)(1).
[24] *LivingWell Med. Clinic, Inc. v. Harris,* No. 15-CV-04939, 2015 WL 13187682 (N.D. Cal. 2015).
[25] *Id.*
[26] *LivingWell Med. Clinic, Inc. v. Harris,* 669 Fed. Appx. 493 (9th Cir. 2016).
[27] Letter from Molly Wlodarczyk, Senior Investigator, Pacific Region, Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Cal. Gov. Edmund G. Brown, Jr., Cal. Attorney Gen. Xavier Becerra, and Cal. Sec'y of Health

On June 26, 2018, the Supreme Court issued its opinion in *National Institute of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018) (*"NIFLA"*), in which it held that the plaintiffs in that case were likely to prevail on the merits of their claim that the FACT Act violated their First Amendment right of free speech.[28] The Supreme Court found that the FACT Act requires pregnancy resource centers like Complainants to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that [Complainants] are devoted to opposing."[29]

The Supreme Court further stated in *NIFLA* that, with respect to "licensed covered facilities," the FACT Act is a content based regulation that compels speech, is "wildly underinclusive," and in no way relates to the services provided by entities covered by the law.[30]

With respect to "unlicensed covered facilities," the Supreme Court stated that the FACT Act targets pro-life pregnancy resource centers and imposes an unduly burdensome notice requirement that will chill their protected speech.[31]

On June 28, 2018, the Supreme Court granted LivingWell, North Coast, and Confidence's petition for writ of certiorari, vacated the Ninth Circuit Court of Appeals' judgement, and remanded the case for further consideration in light of *NIFLA*.[32] The Ninth Circuit subsequently reversed in part, vacated in part, and remanded the case back to the District Court for further consideration in light of *NIFLA* on August 28, 2018.[33]

Following the Supreme Court's *NIFLA* decision protecting pro-life pregnancy resource centers from coerced speech, OCR requested additional information from California regarding its intentions to enforce the FACT Act.[34] The California Attorney General's office responded on August 14, 2018, by stating, "[G]iven the status of pending litigation regarding the Act, this office has no plans to enforce the Act against any facility."[35]

& Human Servs. Agency Diane S. Dooley Sept. 29, 2017) (on file with HHS OCR); Letter from Luis E. Perez, Deputy Dir., Conscience & Religious Freedom Div., Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Cal. Attorney Gen. Xavier Becerra (July 17, 2018) (on file with HHS OCR); and Letter from Luis E. Perez, Deputy Dir., Conscience & Religious Freedom Div., Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Cal. Gov. Edmund G. Brown, Jr., Cal. Attorney Gen. Xavier Becerra, and Cal. Sec'y of Health & Human Servs. Agency Diane S. Dooley (July 26, 2018) (on file with HHS OCR).

[28] 138 S. Ct. 2361, 2378 (2018).

[29] *Id.* at 2371.

[30] *Id.* at 2367.

[31] *Id.* at 2377.

[32] *LivingWell Med. Clinic, Inc. v. Becerra,* 138 S. Ct. 2701 (Mem) (2018).

[33] *LivingWell Med. Clinic, Inc. v. Becerra,* 901 F.3d 1168 (9th Cir. 2018).

[34] Letter from Luis E. Perez, Deputy Dir., Conscience & Religious Freedom Div., Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Cal. Attorney Gen. Xavier Becerra (July 17, 2018) (on file with HHS OCR); and Letter from Luis E. Perez, Deputy Dir., Conscience & Religious Freedom Div., Office for Civil Rights, U.S. Dep't of Health & Human Servs., to Cal. Gov. Edmund G. Brown, Jr., Cal. Attorney Gen. Xavier Becerra, and Cal. Sec'y of Health & Human Servs. Agency Diane S. Dooley (July 26, 2018) (on file with HHS OCR).

[35] Letters from Jose A. Zelidon-Zepeda, Deputy Attorney Gen., to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Aug. 14, 2018 & Aug. 24, 2018) (on file with HHS OCR).

On October 26, 2018, pursuant to the parties' stipulated judgment, the U.S. District Court for the Southern District of California entered a permanent injunction in favor of the plaintiffs and against California concerning the FACT Act.[36] The court order permanently enjoins California from enforcing the FACT Act and does not limit is application to the named plaintiffs. Thus, the injunction also protects Sacramento Life Center, LivingWell, North Coast, Confidence, and all similarly-situated pregnancy resource centers in California, both licensed and unlicensed.

JURISDICTION AND OCR'S INVESTIGATION

As a recipient of Federal funds from HHS that are subject to the Weldon and Coats-Snowe Amendments, California is subject to the terms of the Weldon and Coats-Snowe Amendments. The Weldon Amendment states, in relevant part:

> None of the funds made available in this Act may be made available to a . . . State or local government, if such . . . government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[37]

> The Coats-Snowe Amendment states, in relevant part:

> The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—(1) the entity refuses to … perform [induced] abortions, or to provide referrals for … such abortions, [or] (2) the entity refuses to make arrangements for any of the activities specified in paragraph (1).[38]

Throughout the FACT Act's introduction, passage, and enactment into law, California has received, and continues to receive, Federal financial assistance made available in the annual Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act. Based on the plain language of the Weldon and Coats-Snowe Amendments, California is prohibited from discriminating against a health care entity on the basis that the entity does not "refer for abortions" or make arrangements for abortion.[39]

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[36] Order RE: Permanent Injunction at 2, *Nat'l Inst. of Family & Life Advocates v. Becerra,* No. 3:15-cv-02277 (S.D. Cal., Oct. 26, 2018).
[37] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018). The Weldon Amendment defines "health care entity" as including (and, thus, not limited to) "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* at § 507(d)(2).
[38] 42 U.S.C. § 238n. The Coats-Snowe Amendment defines "health care entity" as including (and, thus, not limited to) "an individual physician, a postgraduate training program, and a participant in a program of training in the health professions." *Id.* at § 238n(c)(2).
[39] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018); 42 U.S.C. § 238n(a)(1) & (2).

FINDINGS AND ANALYSIS[40]

1. California's FACT Act Requires Pro-Life Pregnancy Resource Centers that Meet the Definition of a "Licensed Covered Facility" to Post State-Mandated Notices Referring Their Clients for Abortion

The FACT Act requires all pregnancy resource centers that meet the definition of a "licensed covered facility" to publicly post the following notice:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].[41]

The FACT Act dictates, among other things, the notice's location, timing of presentation, medium, and the number of languages it must be stated in.[42] As set forth above, each Complainant satisfies the FACT Act's definition of a "licensed covered facility," and is therefore subject to the notice requirement.

In *NIFLA*, the Supreme Court said the following about the FACT Act's notice requirements for pregnancy resource centers that meet the definition of a "licensed covered facility":

> This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. §123472(a)(2). The notice must be in English and any additional languages identified by state law. §123472(a). In some counties, that means the notice must be spelled out in 13 different languages. See State of Cal., Dept. of Health Care Services, Frequency of Threshold Language Speakers in the MediCal Population by County for Jan. 2015, pp. 4–5 (Sept. 2016) (identifying the required languages for Los Angeles County as English, Spanish, Armenian, Mandarin, Cantonese, Korean, Vietnamese, Farsi, Tagalog, Russian, Cambodian, Other Chinese, and Arabic).[43]

2. California's FACT Act Requires Pro-Life Pregnancy Resource Centers that Meet the Definition of an "Unlicensed Covered Facility" to Post State-Mandated Notices

The FACT Act also requires all pregnancy resource centers that meet the definition of an "unlicensed covered facility" to publicly post the following notice:

> This facility is not licensed as a medical facility by the State of California and has

[40] The findings in this letter are not intended, nor should they be construed, to cover any matters not specifically addressed.
[41] Cal. Health & Safety Code Ann. § 123472(a)(1).
[42] *Id.* at § 123472. *See also Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2369.
[43] *Nat'l Inst. of Family & Life Advocates,* 138 S. Ct. at 2369.

no licensed medical provider who provides or directly supervises the provision of services.[44]

Like the notice requirement for a "licensed covered facility," the FACT Act dictates the placement, dimensions, and language(s) of the notice requirement for an "unlicensed covered facility." In its *NIFLA* decision, the Supreme Court summarized the mandate's requirements accordingly:

> This notice must be provided on site and in all advertising materials. §§123472(b)(2), (3). Onsite, the notice must be posted 'conspicuously' at the entrance of the facility and in at least one waiting area. §123472(b)(2). It must be 'at least 8.5 inches by 11 inches and written in no less than 48-point type.' Ibid. In advertisements, the notice must be in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it. §123472(b)(3).
>
> Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. §123471(b). Its stated purpose is to ensure 'that pregnant women in California know when they are getting medical care from licensed professionals.' Cal. Legis. Serv., §1(e).
>
> As California conceded at oral argument, a billboard for an unlicensed facility that says 'Choose Life' would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages.[45]

3. Failure to Post the State-Mandated Notice Subjects a Pro-Life Pregnancy Resource Center to the Threat of Financial Penalties, Litigation by California's State and Local Governmental Authorities, and Associated Costs and Attorney Fees

A violation of the FACT Act called for a civil fine of $500 for a first offense and $1,000 for each subsequent offense. Either the California Attorney General, a city attorney, or a county counsel were authorized to bring an action to enforce the FACT Act.[46]

4. The FACT Act Provides Broad Exemptions from its Mandates and Penalties – But not for Pro-Life Pregnancy Resource Centers

The U.S. Supreme Court deemed the underinclusive nature of the FACT Act to be tantamount to targeting pro-life pregnancy resource centers based upon their views regarding abortion:

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[44] Cal. Health & Safety Code Ann. § 123472(b)(1).
[45] *Nat'l Inst. of Family & Life Advocates,* 138 S. Ct. at 2370, 2378.
[46] Cal. Health & Safety Code Ann. § 123473(a). *Cf. Hobby Lobby v. Burwell,* 134 S. Ct. 2751, 2779 (2014) (holding that a threatened imposition of a penalty unlawfully burdened plaintiffs' religious freedom).

> The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers—according to a report commissioned by the California State Assembly ...—are 'pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.'
>
> '[U]nfortunately,' the author of the FACT Act stated, 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California. These centers 'aim to discourage and prevent women from seeking abortions. The author of the FACT Act observed that crisis pregnancy centers 'are commonly affiliated with, or run by organizations whose stated goal' is to oppose abortion.... [47]

According to the Supreme Court in *NIFLA*, the FACT Act's suspicious triggering thresholds and exceptions belie the State's purported goal of increasing public awareness of the unlicensed status of pregnancy related facilities:

> The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. . . . And it covers a curiously narrow subset of speakers. . . . a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed.[48]

Justice Kennedy's concurring opinion also described how California targeted pro-life pregnancy resource centers for disfavor:

> It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.[49]

5. The FACT Act Violated the Weldon and Coats-Snowe Amendments

California's enactment of the FACT Act violates the Weldon and Coats-Snowe Amendments by discriminating against health care entities that object to referring for, or making arrangements for, abortion.

The Supreme Court held in *NIFLA* that the FACT Act deprives pro-life pregnancy resource

[47] *Nat'l Inst. of Family & Life Advocates,* 138 S.Ct. at 2368-2370.
[48] *Id.* at 2378.
[49] *Id.* at 2379 (Kennedy, J., concurring) (explaining why California's FACT Act likely violates the First Amendment).

centers of their First Amendment rights because the FACT Act impermissibly compels speech. The FACT Act forces pro-life pregnancy resource centers "to promote the State's own preferred message advertising abortions."[50] By targeting those who will not promote its message, California engaged in discrimination prohibited by the Supreme Court and forbidden by the Weldon and Coats-Snowe Amendments.

Under the Weldon Amendment, a covered state or local government has a duty to refrain from subjecting "any . . . health care entity to discrimination on the basis that the health care entity does not . . . refer for abortions."[51] The same is true under the Coats-Snowe Amendment: a covered state or local government has a duty to refrain from subjecting "any health care entity to discrimination on the basis that … the entity refuses to … provide referrals … for abortion … [or] make arrangements for [abortion]."[52]

The Weldon and Coats-Snowe Amendments both define "health care entity" in an illustrative, non-exhaustive fashion. Pursuant to the Weldon Amendment, "the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[53] Pursuant to the Coats-Snowe Amendment, "The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions."[54] Accordingly, the "licensed covered facilities," as defined by the FACT Act, qualify as "health care entities" under Weldon and Coats-Snowe, and are therefore subject to the Amendments' protections. While OCR does not, at this time, make a determination as to whether every entity that is designated as an "unlicensed covered facility" under the FACT Act would constitute a "health care entity" under either the Weldon or Coats-Snowe Amendments, OCR finds that at least those "unlicensed covered facilities" that provide obstetric ultrasounds/sonograms and prenatal care qualify as "health care entities" under the Weldon Amendment and are subject to that Amendment's protections.

California subjected pro-life pregnancy resource centers that meet the definition of a "licensed covered facility" and at least some that meet the definition of an "unlicensed covered facility" to an untenable choice that violates the Weldon and/or Coats-Snowe Amendments: violate the FACT Act and face financial penalties, lawsuits, attorney fees, costs, and fines, or violate their protected right to be free from discrimination on the basis that they will not refer for or make arrangements for abortions.

This ultimatum facially violates the Weldon Amendment and Coats-Snowe Amendment as to entities designated as "licensed covered facilities" by requiring that they refer for abortions against their will. The ultimatum also violates the Weldon Amendment as applied to those

[50] *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2379 (Kennedy, J., concurring).
[51] *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).
[52] 42 U.S.C. § 238n.
[53] *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. at 764; 42 U.S.C. § 238n.
[54] 42 U.S.C. § 238n(c)(2).

"unlicensed covered facilities" that qualify as health care entities under the Weldon Amendment, because the FACT Act subjects such facilities to discrimination by targeting them for burdensome and unnecessary notice requirements because they do not refer for abortion.[55]

CONCLUSION AND REMEDY

For all the above reasons, OCR finds that California's FACT Act violates the Weldon and Coats-Snowe Amendments. OCR has determined that the FACT Act's provisions facially violate the Weldon and Coats-Snowe Amendments with respect to entities designated as "licensed covered facilities" under the FACT Act and, as applied, violate the Weldon Amendment with respect to certain entities designated as "unlicensed covered facilities." Therefore, the FACT Act cannot be enforced under the Weldon and Coats-Snowe Amendments.

OCR took into account California's representation that the State of California will not enforce the challenged provisions of the FACT Act against any facility, including Complainants.[56] Ordinarily, OCR would require California's assurances be made binding as to complainants and all similarly situated parties through a voluntary resolution agreement; however, in light of the District Court's entering of a permanent injunction against any enforcement of the FACT Act against any covered entities (both licensed and unlicensed),[57] a voluntary resolution agreement is not necessary as California's adherence to the court's permanent injunction is a sufficient remedy to the violations found by OCR in this Notice.

OCR is therefore closing these complaints as satisfactorily resolved. However, if California were to violate the terms of the injunction it would be subject to a reopening of the complaints and further enforcement action by OCR.

OCR reminds the State of California to take all necessary steps to ensure that no adverse action is taken against the Complainants or any other health care entities discriminated against, or any other individual, for the filing of these complaints, providing information to OCR, or otherwise participating in this investigation. OCR's closing of these complaints does not preclude future investigations based on new complaints or changed circumstances.

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[55] *Nat'l Inst. of Family & Life Advocates,* 138 S. Ct. at 2378 ("The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. . . . And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide 'family planning' services and 'contraception or contraceptive methods,' § 123471(a), the California Legislature dropped these triggering conditions for the unlicensed notice.").

[56] Letters from Jose A. Zelidon-Zepeda, Deputy Attorney Gen., to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Aug. 14, 2018 & Aug. 24, 2018) (on file with HHS OCR).

[57] Order RE: Permanent Injunction at 2, *Nat'l Inst. of Family & Life Advocates v. Becerra,* No. 3:15-cv-02277 (S.D. Cal., Oct. 26, 2018).

Sincerely,

/s/

Roger T. Severino
Director
Office for Civil Rights