UNITED STATES COMMISSION ON CIVIL RIGHTS

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Shelley Rouillard
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

November 17, 2014

Dear Ms. Rouillard:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.[1] I am writing in regard to a recent decision by your agency that all health care plans in California must cover elective abortions and such decision's effect on religious liberty.

The American political system has reached a widely-acknowledged compromise on elective abortion. This compromise is that women are free to procure elective abortions, but their fellow citizens will not be required to pay for their abortions. This compromise is an acknowledgement that the Supreme Court has ruled that women have a right to abortion, but that many Americans have a deeply-held religious belief that abortion is a grave sin.[2] The Weldon Amendment is one aspect of this compromise. If a state wishes to force those within its borders to violate their fundamental religious beliefs by facilitating or paying for abortions, it arguably may do so. But through the Weldon Amendment, the people of the other states have said that in that case, they will not allow their tax dollars to subsidize a state that displays such disregard for religious liberty.

California is displaying just such contempt for religious liberty through the enforcement of the Knox-Keene Act in defiance of the Weldon Amendment. California may be free to do so. What California may not do is take billions of dollars in federal

[1] The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).

[2] An example of this consensus can be seen in the oral argument at the Supreme Court for the Hobby Lobby case, in which Justice Kennedy inquired of Solicitor General Verrilli whether his interpretation of RFRA would allow a for-profit corporation to be forced to fund abortions. The implication, of course, was that forcing a for-profit corporation to fund abortions would be a dramatic encroachment on religious liberty.
Burwell v. Hobby Lobby, oral argument transcript at 75,
http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf.
Justice Kennedy: Under your view, a profit corporation could be forced – in principle, there are some statutes on the books now which would prevent it, but – could be forced in principle to pay for abortions.
Solicitor General Verrilli: No. I think, as you said, the law now – the law is to the contrary.
Justice Kennedy: But your reasoning would permit that.

money while flouting a federal statute that forbids it from discriminating against individuals and organizations that do not wish to pay for or facilitate abortions.

In your letter dated September 8, 2014 you wrote:

> The DMHC carefully considered all relevant aspects of state and federal law in reaching its position. The Knox-Keene Health Care Service Plan of 1975 requires health plans to cover abortion as a basic health care service. Additionally, the California Constitution provides that health plans must treat maternity services and legal abortion neutrally. The DMHC is required to enforce the law, which compels the position it has taken.[3]

It is difficult to see how you considered "all relevant aspects of state and federal law" when the only references are to California laws, and you provide no analysis, just a cursory citation. The issue here is less what California law requires, but what federal law requires. However, it is also questionable whether the Knox-Keene Health Care Service Plan of 1975 actually requires health plans to cover abortion as a basic health care service, or whether that is a recent interpretative gloss on the statute. "Basic health care services" are defined in § 1345 of the California Health and Safety Code:

> (b) "Basic health care services" means all of the following:
> (1) Physician services, including consultation and referral.
> (2) Hospital inpatient services and ambulatory care services.
> (3) Diagnostic laboratory and diagnostic and therapeutic radiologic services.
> (4) Home health services.
> (5) Preventive health services.

Abortion services are not specifically listed as "basic health services." In fact, it appears that the word "abortion" only appears twice in the text of the entire Knox-Keene Act, and it is not in regard to requiring plans to cover abortions.[4] Perhaps there is a

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[3] Letter from Shelley Rouillard, Director, Department of Managed Health Care, to Catherine Short, Legal Director, Life Legal Defense Foundation, September 8, 2014, *available at* http://lldf.org/wp-content/uploads/HHSWeldonDMHCcomplaint.pdf.

[4] California Health and Safety Code § 1363.02.

> (a) The Legislature finds and declares that the right of every patient to receive basic information necessary to give full and informed consent is a fundamental tenet of good public health policy and has long been the established law of this state. Some hospitals and other providers do not provide a full range of reproductive health services and may prohibit or otherwise not provide sterilization, infertility treatments, abortion, or contraceptive services, including emergency contraception. It is the intent of the Legislature that every patient be given full and complete information about the health care services available to allow patients to make well-informed health care decisions.

California regulation that requires health care plans to cover abortions, but if so, one would have expected such regulation to have been cited in one of your two letters. Assuming such regulation exists, it is also unlikely to trump a federal statute.

The omission of anything more than a passing mention of federal law and the complete lack of legal analysis is particularly curious given that California previously claimed in federal court that the Weldon Amendment prevented it from enforcing § 1317 of the California Health and Safety Code.[5]

Plaintiffs allege that California has a statutory scheme which requires health care facilities which provide emergency services to provide medically necessary emergency abortions. … Plaintiffs allege that because the Weldon Amendment does not contain an explicit exception for situations in which an emergency abortion is needed to protect the life or health of a woman, there is a conflict between federal and state law, and that this conflict negatively impacts California's sovereign interests. Plaintiffs further allege that they risk losing more than 49 billion dollars in federal funds if they fail to comply with the Weldon Amendment . . . . [citations omitted][6]

To reiterate, in 2005 the state of California believed that the Weldon Amendment forbade it , on pain of losing federal funds, from penalizing health care facilities and health care providers for refusing to perform abortions deemed "medically necessary." California adhered to this position until at least 2008, when its case was dismissed on summary judgment.[7] If California believed from 2005-2008 that the Weldon Amendment prohibited it from discriminating against people and institutions that conscientiously objected to facilitating or performing *medically necessary* abortions, why does it today claim that the Weldon Amendment does not prohibit it from requiring conscientious objectors to fund *elective* abortions? Neither your initial letter to insurers informing them that they must cover elective abortions, nor your September 8 letter stating, "DMHC carefully considered all relevant aspects of state and federal law" addresses this issue.

(b) On or before July 1, 2001, a health care service plan that covers hospital, medical and surgical benefits shall do both of the following:
(1) Include the following statement, in at least 12-point boldface type, at the beginning of each provider directory:
"Some hospitals and other providers do not provide one or more of the following services that may be covered under your plan contract and that you or your family member might need: family planning; contraceptive services, including emergency contraception; sterilization, including tubal ligation at the time of labor and delivery; infertility treatments; or abortion. You should obtain more information before you enroll. Call your prospective doctor, medical group, independent practice association, or clinic, or call the health plan at (insert health plan's membership services number or other appropriate number that individuals can call for assistance) to ensure that you can obtain the health care services that you need."

[5] State of Cal. v. U.S., 2005 WL 1513156, at *1 (N.D. Cal. 2005).
[6] *Id.*
[7] California v. U.S., 2008 WL 744840 (N.D. Cal. 2008).

In your August 22 letter, you note at footnote 3:

> Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion.[8]

A bit later you write:

> Blue Cross must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for "voluntary" or "elective" abortions and/or any limitation of coverage to "therapeutic" or "medically necessary" abortions. Blue Cross may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.[9]

Your statement that "health plans are required to cover legal abortions" is directly at odds with the Weldon Amendment, which prohibits federal funds from being made available to any state that discriminates against a health care entity "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[10] The Weldon Amendment includes "health insurance plan" within its definition of "health care entity."[11] There is no evidence from either your August 22 or September 8 letters that the text of the Weldon Amendment can be convincingly interpreted to allow the state to require health care plans to cover abortions, especially elective abortions, without forfeiting federal funding.

Furthermore, your comment that insurers need not mention abortion coverage in their health plan documents betrays a fundamental misunderstanding of true religious belief. Those whose religion makes determinations that certain behaviors are sinful will find little comfort in the knowledge that they are paying for their employees' abortions, but that the fact is not stated in the employee handbook.

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[8] Letter from Michelle Rouillard, Director, Department of Managed Health Care, to Mark Morgan, California President of Anthem Blue Cross, August 22, 2014, at note 3, *available at* http://lldf.org/wp-content/uploads/HHSWeldonDMHCcomplaint.pdf.
[9] *Id.* at 2.
[10] Consolidated Appropriations Act, Pub. L. 113-76, 128 Stat. 5, Sec. 507 (Jan. 27, 2014).
[11] *Id.*

The difficulty in analogizing the infringement on religious liberty posed by mandates such as this one lies in abortion's unique position in our political life. It is simultaneously morally abhorrent to many religious people and a purported fundamental right to which many other people are fiercely devoted. The Hasidic Jew is not required, under pain of government sanction, to offer bacon and ham in the company cafeteria for his employees' benefit. The devout Muslim is not required to provide alcoholic beverages for his employees. But because of the Affordable Care Act, employers must provide health insurance for their employees or face sanctions from the federal government. And yet when an employer complies with the law and provides health insurance for their employees, California requires that all health plans cover elective abortions, thereby requiring employers to financially contribute to their employees' abortions. It is disingenuous to claim that the employer is not paying for the abortion when every health plan in the state of California must include elective abortion coverage. The employer *is* paying for the abortion. This is what the Weldon Amendment is intended to prevent. People may procure abortions, but they may not dragoon other people into engaging in what they consider morally objectionable behavior. As Judge Kozinski wrote in 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. And the Amendment appears to have had its intended effect: The state, in its complaint, contends that the Weldon Amendment "is so broad and severe as to leave the Plaintiffs with no choice but to accede to Congress's dictates." That Congress chose to use its spending power as a lever, rather than passing legislation granting affirmative rights to those represented by the proposed intervenors, is of no consequence. The Weldon Amendment effectively shields the proposed intervenors and their members from the difficult moral choice to which enforcement of section 1317 could otherwise subject them. The fact that California brought this lawsuit seeking to invalidate the Amendment, or restrict its sweep, is proof in itself of the efficacy of this congressional enactment and its significance to the proposed intervenors.[12]

Employers with health care plans that do not cover elective abortions are also within the class of persons covered by the Weldon Amendment. Therefore, they, like the doctors discussed above, are shielded from the enforcement of a state law that conflicts with the Weldon Amendment for as long as California opts to continue receiving federal funds. The likelihood that the state finds the Amendment distasteful and wrongheaded is of no consequence at all. California is free to choose between two options: respect religious liberty, or forego federal funds.

[12] California ex rel. Lockyer v. U.S., 450 F.3d 436, 441-42 (9th Cir. 2006).

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Lastly, I am curious as to what prompted this assault on religious liberty. The Weldon Amendment has been on the books for over a decade. Its effect on the Knox-Keene Act was not even raised during the 2005-2008 litigation. Yet out of the blue, your agency decides that a few health care plans that cover "a very small fraction of California health plan enrollees" must now be forced to cover elective abortions. So in closing, I respectfully ask for responses to the following questions:

(1) What specific statutory or regulatory provision(s) explicitly requires health plans to cover elective abortions?
(2) If there is no specific statutory or regulatory provision that explicitly requires health plans to cover elective abortions, what is the basis for requiring health plans to cover elective abortions?
(3) Why do you believe the Weldon Amendment does not trump your interpretation of California state law?
(4) Why does your discrimination against health plans that do not cover elective abortions not trigger the Weldon Amendment's requirement that California lose federal funds?
(5) How does your enforcement of the Knox-Keene Act against health care plans differ from the state's contemplated enforcement of Section 1317 in 2005-2008?

Thank you for your prompt response, which you may send to my special assistant, Carissa Mulder, at cmulder@usccr.gov. If you have any questions, feel free to contact me at pkirsanow@beneschlaw.com.

Sincerely,

Peter Kirsanow
Commissioner

cc: Senator Lamar Alexander, Ranking Member, Committee on Health, Education, Labor, and Pensions
Representative Hal Rogers, Chairman, Committee on Appropriations
Representative Jack Kingston, Chairman, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies