



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights

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VIA CERTIFIED U.S. MAIL AND ELECTRONIC MAIL [Xavier.Becerra@doj.ca.gov]

The Honorable Xavier Becerra
Attorney General
State of California
Department of Justice
1300 I Street
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January 24, 2020

Notice of Violation -- OCR Transaction Numbers 17-274771 and 17-283890

Dear Governor Newsom, Attorney General Becerra, Secretary Ghaly, and Director Rouillard:

The U.S. Department of Health & Human Services's ("HHS" or the "Department") Office for Civil Rights ("OCR") has completed its investigation of the complaints filed by Missionary Guadalupanas of the Holy Spirit, Inc. (OCR Transaction Number 17-274771)¹ and Skyline Wesleyan Church (OCR Transaction Number 17-283890)² (collectively, the "Complainants"). OCR finds that the State of California ("California") has discriminated, in violation of the Weldon Amendment,³ against health care plans and issuers⁴ that did, or would, limit or exclude abortion

¹ Letter from Stephen J. Greene, Jr., Attorney, Greene & Roberts, L.L.P., to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep't of Health & Human Servs. (June. 26, 2017) (on file with HHS OCR) [hereinafter "Guadalupanas Sisters Complaint"].

² Letter from Elissa Graves, Attorney, Alliance Defending Freedom, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Sept. 22, 2017) (on file with HHS OCR) [hereinafter "2017 Skyline Complaint"].

³ See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018) [hereinafter "2018 Weldon Amendment"]; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018), as extended by the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, Div. A., sec. 101(8), 133 Stat. 1093, 1094 (Sept. 27, 2019) [hereinafter "2019 Weldon Amendment"]; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018), as extended by the Further Continuing Appropriations Act, 2020, and Further Health Extenders Act of 2019, Pub. L. No. 116-69, Div. A., sec. 101(1), 133 Stat. 1134 (Nov. 21, 2019) [hereinafter "2020 CR Weldon Amendment"]; Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. A., § 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019) [hereinafter "2020 Weldon Amendment"].

⁴ Under California law, a health care service plan is "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost of those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." CAL. HEALTH & SAFETY CODE § 1345(f)(1). The "plan" "refers to the entity that offers health coverage, as distinct from one of more 'products' covering a specific package of benefits and services that a plan may offer to purchasers." Letter from Gabriel Ravel, Gen. Counsel & Deputy Dir., Dep't of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep't of Health & Human Servs., at 2 n.3 (Nov. 1, 2017) (on file with HHS OCR) [hereinafter "2017 DMHC Data Response"]. For purposes of this Notice of Violation, the term

coverage, by mandating abortion coverage in plans subject to regulation by the California Department of Managed Health Care (“DMHC”).

BACKGROUND

The Knox-Keene Health Care Service Plan Act of 1975 (“Knox-Keene Act”)⁵ requires health plan issuers operating in California to provide seven categories of “basic health care services” in their plan products. California’s DMHC licenses health plan issuers in the state⁶ and has authority to determine the scope of basic health care services under the Knox-Keene Act.⁷ In 2013, Loyola Marymount University and Santa Clara University, two religiously affiliated universities in California, implemented changes to their employee health care plans to no longer provide elective abortion coverage—changes that DMHC had previously approved.⁸

Abortion providers and advocacy groups, including Planned Parenthood, learned of this development and pressured DMHC to not only reverse its decision to allow the coverage changes, but also to make elective abortion coverage mandatory for all health care plans falling under DMHC’s jurisdiction.⁹

On August 22, 2014, DMHC responded to the pressure campaign by sending letters to seven California health care service plan issuers (the “Health Plan Issuers”) mandating they cover

“issuer(s)” or “health plan issuer(s)” refers to a “health care service plan” as defined under California law, and the terms “plan(s)”, “health plans”, “health care plans”, or “plan products” refers to the products covering a specific package of benefits and services that an issuer may offer to purchasers.

⁵ CAL. HEALTH & SAFETY CODE § 1340 *et seq.*

⁶ See CAL. HEALTH & SAFETY CODE § 1349 (requiring licensure unless exempted by § 1343 of California’s Health and Safety Code).

⁷ “The director shall by rule define the scope of each basic health care service that health care service plans are required to provide as a minimum for licensure under this chapter.” *Id.* at §§ 1367(i), 1345(b); CAL. CODE REGS. tit. 28, § 1300.67.

⁸ See OCR Interview with Robert McElroy, Vice Pres., California Catholic Conference, *et al.* (March 12, 2015) (on file with HHS OCR).

⁹ See E-mail from Kimberly Lewis, Managing Attorney, Nat’l Health Law Prog., (“NHLP”) to Shelley Rouillard, Dir. DMHC (Nov. 8, 2013) (on file with HHS OCR) (requesting to arrange a meeting between DMHC, NHLP, and other “allies” to address the “sensitive topic” of LMU’s and SCU’s decision to not cover elective abortions in their employee health plans). From November 2013 through Spring 2014, Planned Parenthood (lead by its Chief Legal Counsel, Beth Parker) and, to a lesser extent, other advocacy groups, lobbied DMHC, CHHSA, and the California Governor’s Office for a legislative or administrative “fix” for “the ongoing issue of DMHC approval of employee plans that exclude abortion coverage.” E-mail from Brianna Pittman, Legislative Advocate, Planned Parenthood, to Donna Campbell, Dep. Sec., CHHSA (March 17, 2014) (CHHS000052) (on file with HHS OCR). The weight of the details regarding the lobbying effort, including California’s requesting legal guidance from Planned Parenthood, are found in the trial court record in *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (S.D. Cal. 2016). See, e.g., Pl.’s Separate Statement Undisputed Material Facts Supp. Mot. Summ. J., *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (Dkt. # 92-5) (S.D. Cal. March 9, 2018), and the declarations, depositions, and exhibits referenced therein. See also OCR Telephone Interview with Terry German, Assoc. Gen. Counsel, Blue Cross of California, dba Anthem Blue Cross (Feb. 26, 2015) (on file with HHS OCR) [hereinafter “Anthem Blue Cross Interview”] (recounting Planned Parenthood’s advocating to DMHC that it implement the change in policy quickly).

abortion without exclusion or limitation in every plan product they offered (collectively, the “Mandate Letters”). The Health Plan Issuers were:

1. Aetna Health of California, Inc. (“Aetna”);¹⁰
2. Blue Cross of California, dba Anthem Blue Cross (“Anthem Blue Cross”);¹¹
3. California Physicians’ Service, dba Blue Shield of California (“Blue Shield”);¹²
4. Health Net of California, Inc. (“Health Net”);¹³
5. Kaiser Foundation Health Plan, Inc. dba Kaiser Foundation, Permanente Medicare Care Program (“Kaiser”);¹⁴
6. GEMCare Health Plan, Inc., dba ERD Inc., Physicians Choice by GEMCare Health Plan (“GEMCare”);¹⁵ and
7. UnitedHealthcare of California (“UnitedHealthcare”).¹⁶

Prior to sending the Mandate Letters, DMHC did not have any written rules, policies, or procedures related to abortion coverage for the health care plans under its jurisdiction.¹⁷ The Mandate Letters, and the change in position they announced, were issued without prior public notice, public comment, or hearing.¹⁸

¹⁰ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to John Ternan, Pres. Aetna, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/aetna082214.pdf> [hereinafter “Aetna Letter”].

¹¹ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to Mark Morgan, Cal. Pres. of Anthem Blue Cross, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf>.

¹² See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to Paul Markovich, Pres. & Chief Exec. Officer, Blue Shield of Cal., (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/bsoc082214.pdf>.

¹³ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to Steven Sell, Pres., W. Region Health Plan & Pres., Health Net, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/hn082214.pdf>.

¹⁴ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to Wade J. Overgaard, Senior Vice-Pres., Cal. Health Plan Operations, Kaiser, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/k082214.pdf>.

¹⁵ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care, to Michael Myers, Chief Exec. Officer, GEMCare, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/gc082214.pdf>.

¹⁶ See Letter from Michelle Rouillard, Dir. Cal. Dep’t of Managed Health Care to Brandon Cuevas, UnitedHealthcare, Pres. & Chief Exec. Officer, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/uh082214.pdf>.

¹⁷ Sept. 27, 2017 Deposition of Nancy Wong, former Dep. Dir. Office of Plan Licensing, DMHC (on file with HHS OCR) 41:18-21; Sept. 19, 2017 Deposition of Sherrie Lowenstein, Dep. Dir. Leg. Affairs, DMHC (on file with HHS OCR) 15:18-16:13, 17:20-24; Sept. 20, 2017 Deposition of Gary Baldwin, former Dep. Dir. Plan & Prov. Relations, DMHC (on file with HHS OCR) 29:13-17 (“... DMHC didn’t seem to have a policy on this issue and hadn’t done—it seemed to me that they hadn’t done the—the research in regards to whether or not that—what its policy should be in regards to those exclusions ...”).

¹⁸ Consolidated Opening Br. Pet., Opp’n Demurrer, & Supp. Writ Mandamus & Declaratory Relief at 4, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. Aug. 12, 2016).

As a result of its edict, California forced over 28,000 people out of plans that up until that time had chosen to not cover elective abortions.¹⁹

As described further below, OCR's current investigation was prompted by complaints alleging that California's actions directly caused Complainants to lose health care plans that were consistent with their sincere moral or religious beliefs regarding their objection to helping pay for or facilitate elective abortion.²⁰

BACKGROUND OF THE COMPLAINTS

1. Missionary Guadalupanas of the Holy Spirit, Inc. ("Guadalupanas Sisters")

The Guadalupanas Sisters are a Catholic order of religious women organized as a Florida nonprofit corporation and headquartered in Los Angeles, California.²¹ The Guadalupanas Sisters "endeavor to creatively live the attitudes modeled by Our Lady of Guadalupe: presence, accompaniment, solidarity and compassion towards the poorer people, especially the indigenous, migrants, and the marginalized."²² The Guadalupanas Sisters are "faithful to the moral and theological teachings of the Roman Catholic Church"²³ and "believe that direct abortion, abortion willed either as an end or a means, is gravely contrary to the moral law."²⁴ On June 26, 2017, the Guadalupanas Sisters filed a complaint with OCR alleging that the Mandate Letters "burden[] their conscience rights by compelling them to fund, through their premiums payments [to Kaiser], the practice of abortion on demand for other plan participants."²⁵

¹⁹ Letter from Gabriel Ravel, Gen. Counsel & Deputy Dir., Dep't of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep't of Health & Human Servs., at 5 (Jan. 20, 2015) (on file with HHS OCR) [hereinafter "2015 DMHC Data Response"].

²⁰ Pursuant to 45 C.F.R. sections 88.1 and 88.2 (effective March 25, 2011), OCR receives and handles complaints concerning alleged violations of the Weldon Amendment in coordination with HHS funding components as appropriate. *See also* Statement of Organization, Functions, and Delegations of Authority, 83 Fed. Reg. 2,802, 2,803 (Jan. 19, 2018). This notice of violation does not rely on the final rule published on May 21, 2019, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23,170, which has been vacated by courts in ongoing litigation. *See New York v. U.S. Dep't of Health & Human Servs.*, 2019 WL 5781789, at *70 n.76 (S.D.N.Y. Nov. 6, 2019) ("The 2011 Rule, which has governed HHS's administration of the Conscience Provisions for eight years and is unaffected by this decision, will remain in place, and continue to provide a basis for HHS to enforce these laws, pending any future rule that HHS may promulgate."); *Id.* at *72 ("The Conscience Provisions recognize and protect undeniably important rights."); *City and County of San Francisco v. Azar*, 2019 WL 6139750 (N.D. Cal. Nov. 19, 2019); *State of Washington v. Azar*, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019).

²¹ V. Pet. Writ Mandamus & Compl. Injunctive & Declaratory Relief & Attorneys' Fees at ¶¶ 12-13, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. Oct. 26, 2015).

²² Misionares Guadalupanas del Espíritu Santo, About Us, Charism, <http://mgsp.org/carisma-charism/> (last visited Jan. 23, 2020).

²³ V. Pet. at ¶ 14, *MGHS v. Rouillard* (2015).

²⁴ *Id.* at ¶ 16.

²⁵ Guadalupanas Sisters Compl. at 2. The Guadalupanas Sisters had previously "procured their insurance through a federally qualified Employee Retirement Income Security Act ("ERISA") trust available to certain, qualified Catholic religious entities...this ERISA trust [is] not subject to California state regulations [and] excludes coverage of direct abortion of any kind." In January 2015, the Guadalupanas Sisters no longer qualified for the ERISA trust and were

2. Skyline Wesleyan Church (“Skyline Church”)

Skyline Church is a non-profit Christian church located in La Mesa, California.²⁶ As a member of the Wesleyan denomination, Skyline Church “adheres to the Wesleyan Doctrinal Statement, including the belief that the Holy Bible is the inspired Word of God, infallible and without error.”²⁷ Skyline Church believes abortion “is a grave moral evil,”²⁸ that “violates the Bible’s command against the intentional destruction of innocent human life,” and “is inconsistent with the dignity conferred by God on creatures made in His image.”²⁹ “Skyline Church believes and teaches that participation in, facilitation of, or payment for an elective or voluntary abortion is a grave sin.”³⁰ Skyline Church expects its employees in their work and personal lives to abide by Skyline Church’s religious beliefs and teachings on abortion.³¹ “Because of its religious beliefs . . . Skyline Church seeks to offer health insurance coverage to its employees in a way that does not also cause it to pay for abortions.”³²

On September 22, 2017, Skyline Church filed a complaint with OCR alleging that the Mandate Letters violate the Weldon Amendment because California’s discrimination against health care plans forced Skyline Church to provide insurance coverage for elective abortions, “despite [its] sincerely held religious beliefs against abortion.”³³ Prior to the Mandate Letters, Skyline Church had been insured by Aetna under a plan that excluded elective abortion services.³⁴ Skyline alleges that California’s actions deprived it of insurance coverage that was consistent with its beliefs.

Although OCR’s investigation relates to the 2017 Guadalupanas and Skyline Complaints, OCR also received complaints from other parties raising similar allegations.³⁵

thus “compelled to seek recourse to commercial health plan markets to obtain health insurance for their sisters located in California,” opting to obtain coverage through Kaiser. *Id.*

²⁶ Compl. Declaratory & Injunctive Relief & Nominal Damages, ¶ 14, *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 37-2016-000036 (Cal. Sup. Ct. Feb. 4, 2016), *removed*, No. 16-cv-00501 (S.D. Cal. 2018), *appeal filed*, No. 18-55451 (9th Cir. Apr. 9, 2018).

²⁷ *Id.* ¶ 15.

²⁸ 2017 Skyline Compl. at 1.

²⁹ Compl. ¶ 22, *Skyline Wesleyan Church* (2018).

³⁰ *Id.* ¶ 23.

³¹ *Id.* ¶ 26.

³² *Id.* ¶ 29.

³³ 2017 Skyline Compl. at 2.

³⁴ Decl. Gayle Amann Supp. Pl.’s Mot. Summ. J., *Skyline Wesleyan Church v. DMHC*, No. 16-cv-00501, at ¶¶ 3-5 (S.D. Cal. Nov. 20, 2017).

³⁵ See, e.g., Complaint filed by Benjamin Trahan, received through HHS OCR Complaint Portal (October 9, 2017) (OCR Transaction No. 18-284511) (on file with HHS OCR); complaint filed by Jane Doe, received through HHS OCR Complaint Portal (Jan. 9, 2018) (OCR Transaction No. 18-338383) (on file with HHS OCR); and Letter from L. Martin Nussbaum, Att’y for Catholic Benefits Association, to Roger Severino, Dir., Office for Civil Rights (Aug. 24, 2018) (OCR Transaction No. 18-316979) (on file with HHS OCR). See also Letter from Rep. Kevin McCarthy, House Majority Leader, et al., to Hon. Sylvia Burwell, Sec., U.S. Dep’t Health & Human Servs., and Jocelyn Samuels, Dir.

JURISDICTION

Congress has included the Weldon Amendment in the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act every year since 2004. 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.³⁶

The Weldon Amendment protects “institutional or individual health care entit[ies].”³⁷ Under 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.*”³⁸

The Weldon Amendment prohibits HHS from providing applicable funds to an entity that discriminates in violation of the Amendment’s terms. As a recipient, through grants or cooperative agreements, of the Federal funds from HHS that are subject to the Weldon Amendment, California is, and has been, subject to 45 C.F.R. § 75.300(a), which requires HHS funds to be awarded and implemented consistent with all U.S. statutory and public policy requirements, including nondiscrimination requirements. Therefore, HHS has the authority to ensure that both it, and covered entities, are spending Federal funds and operating programs consistent with the Federal laws applicable to those funds and programs.

OCR’S INVESTIGATION

As part of OCR’s investigation, it sent a detailed data request³⁹ to the California Health and Human Services Agency (“CHHSA”) and the DMHC, requesting information about California’s actions including “whether, and if so, how, the [CHHSA] and [DMHC], respectively, implement, provide guidance on, enforce, or plan to enforce the Knox-Keene Health Care Service Plan Act of 1975, (Cal. Health & Safety Code§ 1340 *et seq.*), the California Reproductive Privacy Act (Cal. Health & Safety Code§§ 123460-123468), or Article 1, Section I, of the California Constitution, with regard to California health plans that do not cover abortions in their evidence

Office for Civil Rights (June 28, 2016) (on file with HHS OCR); H. Rept. 115-862, at 122 (July 23, 2018) (<https://www.congress.gov/115/crpt/hrpt862/CRPT-115hrpt862.pdf>).

³⁶ *E.g.*, 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

³⁷ *Id.* § 507(d)(2).

³⁸ *Id.* (emphasis added).

³⁹ Letter from Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to Diana S. Dooley, Sec., Cal. Health & Human Servs. Agency, and Michelle (Shelley) Rouillard, Dir., Cal. Dep’t Managed Health Care (Oct. 2, 2017) [hereinafter “2017 Data Request”] (on file with HHS OCR).

of coverage filings, subscriber documents, other plan documents, or otherwise, or plans that seek approval without covering abortions.”⁴⁰ OCR likewise inquired about enforcement of the Mandate Letters and provided California copies of the Guadalupanas Sisters and 2017 Skyline Complaints, along with notice of OCR’s investigation.⁴¹

OCR reviewed and analyzed California’s responses to the 2017 Data Request, as well as data request responses, interview notes, and other related documents obtained during OCR’s investigation of three complaints filed with OCR in 2014 concerning the Mandate Letters that had been closed in 2016.⁴²

OCR also reviewed and analyzed applicable pleadings, motions, briefs, discovery, deposition transcripts, declarations, affidavits, hearing transcripts and videos, and court decisions in the following matters:

- *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales*, No. 04-cv-02148 (D. D.C. 2005).
- *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales*, No. 05-5406 (D.C. Cir. 2006).
- *California ex rel. Lockyer v. United States*, No. 05-cv-00328 (N.D. Cal. 2005).
- *California ex rel. Lockyer v. United States*, Nos. 05–17292, 05–17312, 450 F.3d 436 (9th Cir. 2006).
- *Connecticut, et al. v. United States*, No. 09-cv-00054 (D. Conn. 2009).
- *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. 2015).
- *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, No. C083232 (Cal. Ct. App. 2019).
- *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (S.D. Cal. 2016).
- *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 18-55451 (9th Cir. 2018).
- *Foothill Church, et al. v. Rouillard*, No. 15-cv-02165 (E.D. Cal. 2015).
- *Foothill Church, et al. v. Rouillard*, No. 19-15658 (9th Cir. 2019).

FINDINGS AND ANALYSIS

1. The DMHC Enforced California’s Abortion Mandate against Health Care Entities that Limited or Excluded Abortion Coverage.

⁴⁰ 2017 Data Request at 3.

⁴¹ *Id.*; Letter from Luis E. Perez, Deputy Director, Conscience and Religious Freedom Div., to Diana S. Dooley, Sec., Cal. Health & Human Servs. Agency, and Michelle (Shelley) Rouillard, Dir., Cal. Dep’t Managed Health Care, et al. (Aug 30, 2018) (on file with HHS OCR).

⁴² On June 21, 2016, OCR closed the complaints and declined to make any finding of violation. *See* Letter from Jocelyn Samuels, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to Catherine W. Short, Vice Pres. Of Legal Affairs, Life Legal Defense Found., et al. (June 21, 2016) (“Samuels Letter”) (on file with HHS OCR). However, on January 26, 2018, the Department announced that the Samuels Letter, and the analysis contained therein, no longer reflects the views of HHS, OCR, or the HHS Office of the General Counsel. 83 Fed. Reg. 3880, 3890-91.

As the gatekeeper to the California health plan issuer market, which provides health care coverage to over 26 million Californians, the DMHC Director wields significant leverage through its regulation of over ninety-six percent of “commercial and public health plan enrollment” within the State of California.⁴³ This translates to approximately 171 different health care service plans and about 10,000 different products.⁴⁴ With limited exceptions, a health plan issuer must obtain a license from the DMHC Director to do business in California.⁴⁵ The DMHC Director issues a license when the Director determines that the health plan issuer’s application, which must contain, among other materials, copies of the evidence of coverage form, satisfies the requirements of the Knox-Keene Act.⁴⁶ A health plan issuer’s failure to provide “basic health care services” is grounds for disciplinary action.⁴⁷ A health plan issuer that commits an act or omission constituting grounds for disciplinary action may, after appropriate due process procedures, have its license suspended or revoked, or face administrative penalties.⁴⁸ Health plan issuers that do not comply with DMHC directives are subject to penalties.⁴⁹

The DMHC states that it “aggressively monitor[s]” health plan issuer compliance with the Knox-Keene Act.⁵⁰ Through post-license reviews and routine tri-annual surveys, DMHC states that it monitors “all aspects of the health plan[issuer]’s operations,” including “changes they make to their operations . . . changes in service areas, contracts, benefits or systems.”⁵¹ If DMHC identifies deficiencies, the DMHC “takes timely action against health plan[issuer]s that violate the law.”⁵² In 2017 alone, the DMHC closed 2,203 cases with penalties under the Knox-Keene Act, with assessed penalties totaling \$8.9 million.⁵³

The DMHC Director informed each Health Plan Issuer that its “contracts contain language that . . . limit[s] or exclud[es] coverage for termination of pregnancies.”⁵⁴ The DMHC Director also mandated each of the Health Plan Issuers to “amend current health plan [issuer] documents to

⁴³ DEP’T OF MANAGED HEALTH CARE, CAL. HEALTH & HUMAN SERVS. AGENCY 2017 ANNUAL REPORT 10 at 3 (May 2018). Available at: <http://dmhc.ca.gov/Portals/0/Docs/DO/2017-Annual-Report-web.pdf>. [hereinafter “2017 Annual Report”].

⁴⁴ Wong Dep. 14:13-15:9.

⁴⁵ See CAL. HEALTH & SAFETY CODE § 1349 (requiring licensure unless exempted by § 1343 of California’s Health and Safety Code).

⁴⁶ *Id.* §§ 1351, 1353.

⁴⁷ *Id.* § 1386(b)(3)-(4).

⁴⁸ *Id.* § 1386(a).

⁴⁹ 2017 Annual Report at 12 and 16. See also Wong Dep. 122:5-21 (testifying that failure of a healthcare plan to provide coverage for all legal abortions is considered a violation of the Knox-Keene Act subject to administrative penalties handled by the enforcement office).

⁵⁰ 2015 DMHC Data Resp. at 3.

⁵¹ 2017 Annual Report at 10.

⁵² *Id.* at 2, 16.

⁵³ *Id.* at 16.

⁵⁴ *E.g.*, Aetna Letter at 1.

remove . . . coverage exclusions and limitations” for abortion.⁵⁵ “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 only ‘therapeutic’ or ‘medically necessary’ abortions.”⁵⁶ DMHC further instructed each Health Plan Issuer, within 90 days, to file an amendment to the Health Plan Issuer’s license by submitting revised documents, such as evidence of coverage forms.⁵⁷

The Mandate Letters declared that the limitation or exclusion of abortion in health coverage by health care entities is “inconsistent with the Knox-Keene Act and the California Constitution,”⁵⁸ and effectively presented an ultimatum: Either amend and refile license documents in violation of health care entities’ rights under the Weldon Amendment, or operate without approved plans and face possible enforcement action for being in violation of California law as set forth in the Mandate Letters.⁵⁹ This action discriminated against plans on the basis that they did not cover all abortions, notwithstanding the fact that DMHC had, for many years, consistently approved plan language limiting abortion coverage.⁶⁰

In response to the Mandate Letters, each of the issuers identified above removed coverage exclusions and limitations regarding abortion coverage because they viewed these alterations in

⁵⁵ *E.g.*, Aetna Letter at 2.

⁵⁶ *Id.* (emphasis in original).

⁵⁷ *Id.*

⁵⁸ *E.g.*, Aetna Letter at 2. In a lawsuit filed by Missionary Guadalupanas challenging the DMHC’s issuance of its Mandate Letters under the California Administrative Procedure Act, the California Court of Appeals determined that, “[b]ecause California law guarantees every woman the right to choose whether to bear a child or obtain an abortion, the only legally tenable interpretation of the law is that abortions are basic health care services, which health care service plans are required to cover.” *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 427-28 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019).

⁵⁹ See CAL. HEALTH & SAFETY CODE § 1386(b)(3)-(4) (identifying a health plan issuer’s failure to provide a basic health care service as grounds for disciplinary action), and § 1386(a) (identifying that a health plan issuer that commits an act or omission constituting grounds for disciplinary action may, after appropriate due process procedures, have its license suspended or revoked or have to face administrative penalties).

⁶⁰ See, e.g., Email Communications from Nancy Pheng, Department of Managed Health Care, to Lyle Swallow, Associate General Counsel, Blue Shield CA, approving sample plan language that explicitly excluded coverage for “services which are...for or incident to elective abortion.” (Sept. 12, 2008, 11:40am) (on file with HHS OCR); “[P]rior to August 22, 2014, CDMHC’s position had been that voluntary abortions were not medically necessary under the Knox-Keene Act such that managed health care plans were not required to provide coverage.” Anthem Blue Cross Interview; “[T]here had been managed care products on the market for years with the option not to cover voluntary abortions.” Telephone Interview with Mary Anderson, Western Region General Counsel, Aetna Health of CA (Feb. 26, 2015) (on file with HHS OCR) [hereinafter “Aetna Interview”]; “For religious groups, United Healthcare has historically covered medically necessary termination of pregnancy” as opposed to covering “voluntary termination of pregnancy... United Healthcare has refiled for certain religious employers since 1997 using the same preapproved language regarding medically necessary termination of pregnancy.” Telephone Interview with Elizabeth Hays, Dir. of Regulatory Affairs, United Healthcare et al. (Mar. 12, 2015) (on file with HHS OCR) [hereinafter “United Healthcare Interview”]; See also Aetna Letter at 1. (“The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings.”).

their plan language as imperative for compliance.⁶¹ The mandated changes impacted at least 35 employer groups associated with at least 28,647 “lives enrolled” in health care plans that excluded or limited abortion coverage,⁶² including thirteen that met the definition of “religious employer” under California law.⁶³

This estimate likely significantly underrepresents the number of lives impacted for two reasons. First, this estimate is based on data from only five of the seven Health Plan Issuers.⁶⁴ Second, relevant data from Kaiser used for this estimate represents the number of employer IDs rather than lives enrolled.⁶⁵ Because more than one “life enrolled” may be associated with an employer ID,⁶⁶ Kaiser’s data likely underrepresents the number of lives enrolled in its products that limited or excluded abortion coverage.

2. California Does Not Exempt Health Care Entities that Otherwise Would Provide—and Did Provide—Coverage Limiting or Excluding Abortion.

Subsequent to the release of the Mandate Letters, the California Court of Appeals ruled that California law unequivocally requires health care service plans to cover abortion as a basic health care service, but also upheld provisions of the Knox-Keene Act that allow “the [DMHC] director [], for good cause, by rule or order” to exempt any plan or class of plan contracts from the

⁶¹ “Kaiser orally notified groups whose plans included abortion coverage restrictions that Kaiser was required to comply with CDMHC’s August 22 letter...[Life Legal Defense Fund] encouraged Kaiser to challenge the August 22 letter but Kaiser advised [Life Legal Defense Fund] that it had no choice but to comply with the letter.” Telephone Interview with Deborah Espinal, Kaiser Executive Director of Policy, and Peter Moren, Kaiser National Legal Department Senior Counsel (Mar. 3, 2015) (on file with HHS OCR) [hereinafter “Kaiser Interview”]; “Aetna viewed the amendment as necessary for regulatory compliance.” Aetna Interview; “United Healthcare was required to make a filing pursuant to the [DMHC] letter.” United Healthcare Interview.

⁶² 2015 DMHC Data Resp.at 5; Cal. Dep’t of Managed Health Care, Cal. Health & Human Servs. Agency, Health Plan Responses to DMHC Abortion Data Call 000728-31 (Sept. 30, 2014) (on file with HHS OCR) [hereinafter “DMHC Health Plan Issuer Responses”]. Of the 28,647 estimated, 22,747 represented “lives enrolled” in plan products that limited or excluded abortion coverage for Anthem Blue Cross, Blue Shield, Health Net, Aetna, and UnitedHealthcare, collectively. *Id.* The remainder of the estimate, 5,900, represented the number of employer IDs associated with Kaiser plan products that limited or excluded abortion coverage. *Id.* at 000729. DMHC had this information prior to issuing the Mandate Letters. *See* Wong Dep. 90:17-94:13, 103:2-6, 104:23-105:1, 107:2-7, 117:22-118:8; Aetna, DMHC Data Call – Abortion Coverage, Ex. E-1 (July 2, 2014) (AGO000467) (on file with HHS OCR) (responding to “data call issued . . . June 10, 2014, in which the Department seeks . . . the number of employer groups that have purchased coverage that limits or excludes abortion services . . . the number of those employers that would qualify as a ‘religious employer’ . . . [and] the total number of lives covered by [such] plans . . .”).

⁶³ DMHC Health Plan Issuer Responses at 000728; *See* CAL. HEALTH & SAFETY CODE § 1367.25(c)(1) (defining “religious employer”).

⁶⁴ DMHC requested information from six of the seven Health Plan Issuers affected and received estimates from Kaiser, United Healthcare, Blue Shield, Aetna, and Health Net. 2015 DMHC Data Resp.at 4. Anthem did not respond. *Id.* at 5 n.5. DMHC did not request data from GEMCare due to its small enrollment figures and status of its commercial business. *Id.*

⁶⁵ DMHC Health Plan Issuer Responses at 000730 n.5.

⁶⁶ *Id.*

requirement to provide all basic health care services, including abortion.⁶⁷ While exemptions are at the discretion of the director, there are no written rules, policies, or procedures governing how to handle an exemption request.⁶⁸

The Mandate Letters did not reference any available exemption process,⁶⁹ but did state (in a footnote) that no “religiously sponsored health carrier” may be required by law “to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion.”⁷⁰ This reference is a nearly verbatim copy of a Washington State insurance statute,⁷¹ except it excludes, without explanation, the text of a key subsection which states, “[n]o individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion.”⁷² This indicates that, while DMHC may have contemplated the possibility of exempting “religiously sponsored health carriers” (without explaining how an entity qualifies as a “carrier”), it would not, at the same time, exempt religious individuals⁷³—who object to paying for abortion coverage for themselves, their children, or others in the insurance pool—and would not exempt religious organizations, such as Complainants, that object to purchasing abortion coverage for their employees.

OCR notes that the DMHC discussed granting an exemption with some of the health care entities, and granted Anthem Blue Cross an exemption “to offer products that restrict abortion coverage to employers that meet the definition of a religious employer” under California law.⁷⁴ However, this lone exemption does not cure the impact of the Mandate Letters.

⁶⁷ CAL. HEALTH & SAFETY CODE § 1367(i); *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 439 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019) (“the director clearly has the authority to exempt plan contracts from the requirements of the Knox-Keene Act.”).

⁶⁸ Sept. 19, 2017 Deposition of Jenny Phillips, Dep. Dir. Legal Affairs, DMHC (on file with OCR) 32:18; 35:17.

⁶⁹ Sept. 28, 2017 Deposition of Michelle Rouillard, Dir., DMHC (on file with HHS OCR) 45:14-19; Wong Dep. 130:9-12.

⁷⁰ Aetna Letter at 1, n.3.

⁷¹ *Compare, e.g.,* Aetna Letter at 1, n.3 with WASH. REV. CODE ANN. § 70.47.160(2)(a) (“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 so doing for reason of conscience or religion.”).

⁷² WASH. REV. CODE ANN. § 70.47.160(3)(a). Ms. Rouillard was instructed by counsel not to answer why the Mandate Letters excluded this subsection. *See* Rouillard Dep. 48:19-49:7.

⁷³ Complainants’ religious beliefs regarding abortion are shared by their employees. *See* Consolidated Opening Br. Pet’ Opp’n Demurrer, & Supp. Writ Mandamus & Declaratory Relief at 4, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226, at 8 (Cal. Super. Ct. Aug. 12, 2016) (“Petitioner’s members have therefore been coerced into financially supporting procedures that they believe involve the killing of other human lives, in violation of their deeply-held religious and moral convictions.”); Pl.’s Mem. Points & Authorities Supp. Mot. Summ. J., *Skyline Wesleyan Church v. DMHC*, No. 16-cv-00501, at 16 (S.D. Cal. Nov. 20, 2017) (“Enforcing the abortion mandate against the church’s internal healthcare decisions simply is not in the public interest. The only people affected are those who work at the church, and they necessarily share the church’s beliefs about abortion.”).

⁷⁴ 2017 DMHC Data Resp. at 5, citing CAL. HEALTH & SAFETY CODE § 1367.25(c); *see also* Order Granting Def.’s Cross Mot. Summ. J. at 4, *Skyline Wesleyan Church*, No. 3:16-cv-0501 (S.D. Cal. March 9, 2018).

First, California was put on notice of the burdens imposed by the Mandate Letters by complaints filed with OCR and through long-running lawsuits over these issues filed by private entities (including the Complainants in this matter). Lawsuits are strong and explicit requests for relief, yet the State has refused to provide any relief at all in response to the litigation.⁷⁵

Second, the only exemption California offered (to a health plan issuer) was limited to plans covering a narrow set of “religious employers” under California law.⁷⁶ However, the Weldon Amendment protects from discrimination *all* plans that decline to cover abortion, without requiring any plan issuers, sponsors, or beneficiaries to have a religious character or have a religious reason for not providing or paying for such coverage. Based on the information available to OCR about those affected by the DMHC policy, even a categorical exemption of “religious employers,” as defined by California law, would have only been available to approximately 37% of those employer groups who, prior to the Mandate Letters, had health care coverage that limited or excluded abortion.⁷⁷

Third, for California’s regime to be compliant with the Weldon Amendment, exemptions from the abortion mandate cannot be discretionary, but rather, must be available to all health care entities that desire to limit or exclude coverage of abortion.

Fourth, the DMHC Director has never exempted abortion-free plans as a class,⁷⁸ nor the plans purchased by the Complainants at issue here, despite the fact that compliance with federal

⁷⁵ To OCR’s knowledge, DMHC has not taken any action to ensure Skyline Church has access to an exempted plan, despite having knowledge, since 2014, of the fact that Skyline Church meets the definition of a “religious employer” under California law, and possessing the statutory authority to exempt any person or plan contract from the abortion requirement. See Letter from Jeremiah Galus, Legal Counsel for Skyline Wesleyan Church, Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hill Church, to Michelle Rouillard, Dir., DMHC (July 12, 2018) (attached as Ex. 1 to Appellant’s Mot. Supplement Record, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Sept. 14, 2018); Appellants’ Opening Br., *Foothill Church v. Rouillard*, No. 19-15658, at 43 (9th Cir. Aug. 14, 2019) (“Five years later, the DMHC still refuses to make a similar accommodation for churches whose religious beliefs allow for abortion only when necessary to save the life of the mother.”). See also Oral Arg., 23:58-24:06, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Nov. 4, 2019) (https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016448). (Statement by Friedland, J. to counsel for DMHC: “I don’t understand why we should think that they really have a chance of getting an exemption when you’ve been fighting this tooth and nail.”).

⁷⁶ California defines “religious employer” narrowly to include only those employers for which:

- (A) The inculcation of religious values is the purpose of the entity.
- (B) The entity primarily employs persons who share the religious tenets of the entity.
- (C) The entity serves primarily persons who share the religious tenets of the entity.
- (D) The entity is a nonprofit organization as described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Cal. Health & Safety Code § 1367.25(c)(1).

⁷⁷ See *supra*, discussing the policy’s known impact on at least 35 employer groups, 13 of which met the definition of “religious employer” under California law, and 28,647 lives enrolled.

⁷⁸ See Wong Dep. 57:3-9. The DMHC Director claims that she cannot commit as to whether DMHC would approve a product sold to religious employers that excluded abortion in all cases, including rape and incest, except to save the life of the mother. Rouillard Dep. 51:8-54:17. California claims it has not had a chance to evaluate such a request. See Ans. Br. at 14, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Dec. 14, 2018) (“Yet, no health plan has sought an exemption for a product that excludes all abortion coverage (including in cases of rape and incest, where the only exception is to protect the life of the woman. SER 83.”) (citing Decl. Sarah Ream Supp. Defs’ Mot. Summ. J. or in the Alt. Summ. Adjudication Claims at ¶ 2, *Skyline v. DMHC*, No. 16-cv-00501 (S.D. Cal. Nov. 20, 2017)

law, namely, the Weldon Amendment, is *per se* good cause for doing precisely that, and DMHC has long been aware of the conflict.

Finally, before concluding this investigation, OCR wrote California, asking it to confirm or deny whether it would utilize the exemption process under state law “to align DMHC practices to be consistent with the Weldon Amendment” and to clearly provide relief to all plans as a class so that they may decline to provide abortion coverage without discrimination by the State.⁷⁹ In response, California ignored OCR’s specific request and instead reasserted its purported authority to issue the Mandate Letters and stated that it would consider exemption requests from regulated health plan issuers without any reference to how such requests will be solicited, treated, or resolved, if at all.⁸⁰ California’s response further confirms its non-compliance.

3. California’s Arguments Regarding the Weldon Amendment Fail.

California has argued that, because the “[Health Plan Issuers] that received the letter already covered the legally required abortion services for the vast majority of their enrollees . . . the requirements outlined in the letter do not discriminate against the [Health Plan Issuers] for failure to cover abortion.”⁸¹ California misconstrues the plain language of the Weldon Amendment.

Pursuant to the Weldon Amendment, a covered state or local government has an absolute duty to refrain from subjecting “any . . . health care entity to discrimination on the basis that the health care entity does not . . . provide coverage of . . . abortions.”⁸² It is irrelevant that some or even most of the Health Plan Issuers’ plans covered abortion without exclusion or limitation, because the Weldon Amendment plainly defines a protected “health care entity” as a “health insurance plan . . . or any other kind of health care . . . plan.”⁸³ An issuer protected by Weldon does not lose protection because they do not object to abortion coverage in 99% of their plans, just as a covered health care professional does not lose the right to be free from state discrimination for refusing to participate in partial-birth abortions because they are willing to participate in early-term medication abortions.

(“To date, no plan has requested an exemption that would mandate that women who become pregnant as a result of rape or incest be forced to carry to term.”)). However, there is evidence in the record indicating DMHC approved such a plan in 2002. *See* Letter from Robert Issai, Pres. and CEO, Daughters of Charity Health System, to Lyle Swallow, Esq., Associate Gen. Counsel, Blue Shield of Cal. (Aug. 20, 2008) at 2 (DMHC000026) (on file with HHS OCR) (explaining DMHC had approved plan language since January 2002 that limited abortion coverage to “only if the member’s life or member’s spouse’s life would be in jeopardy as a direct result of pregnancy due to an existing medical condition.”).

⁷⁹ *See* Letter from Roger Severino, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to Michelle Rouillard, Dir., DMHC, et al. (Jan. 10, 2020) (on file with OCR).

⁸⁰ Letter from Karli Eisenberg, Dept. Att’y Gen., Cal., to Roger Severino, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs. (Jan. 21, 2010), at 2 (on file with OCR).

⁸¹ 2015 DMHC Data Resp. at 1, incorporated by reference in 2017 DMHC Data Resp. at 1-2.

⁸² *E.g.*, 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

⁸³ *Id.* § 507(d)(2).

By broadly conditioning licensure on abortion coverage, California discriminated, and continues to discriminate, against health care entities that did or would limit or exclude abortion coverage precisely because they would not provide coverage for abortion.

CONCLUSION AND REMEDY

Based on the evidence gathered in its investigation, and having considered California's responses to the allegations in the complaints, OCR finds California in violation of the Weldon Amendment⁸⁴ for having discriminated, and continuing to discriminate, against health care plans and issuers that did, or would otherwise, limit or exclude abortion coverage in their plan products. Because California refuses, despite ample notice and opportunity, to provide exceptions or take remedial action sufficient to comply with the Weldon Amendment, California's violation is ongoing, and implicates funding that HHS made available to it from the 2018, 2019, and 2020 Appropriations Acts applicable to the Department of Health and Human Services.

OCR is charged with helping ensure entities come into compliance with Federal laws protecting conscience and prohibiting coercion in health care, including the Weldon Amendment. Accordingly, OCR requests that the State of California notify OCR **within thirty (30) days from the date of this letter** whether the State of California intends to continue to enforce the Mandate Letters' requirement that all health care plans cover abortions, or will instead agree to take corrective action to come into compliance with the law and remedy the effects of its discriminatory conduct. OCR stands ready to assist California in coming into compliance with the Weldon Amendment.

If OCR does not receive sufficient assurance that California will cease requiring all health care plans, as a class, to cover abortion, or that it is willing to negotiate in good faith towards that end, OCR will forward this Notice of Violation and the evidence supporting OCR's findings in this matter to the appropriate HHS funding components for further action under applicable grants and contracts regulations. Such referral may ultimately result in limitations on continued receipt of certain HHS funds in accordance with the Constitution and applicable Supreme Court case law. *See, e.g.*, 45 C.F.R. § 75.371.

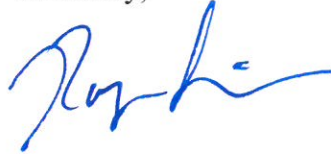
⁸⁴ 2018 Weldon Amendment, § 507(d), 132 Stat. at 764; 2019 Weldon Amendment, § 507(d), 132 Stat. at 3118; 2020 CR Weldon Amendment, § 507(d), 132 Stat. at 3118; 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

ADVISEMENTS

Nothing in this letter precludes OCR from making referrals to any other HHS component or other federal agencies, including the Department of Justice, for appropriate action.⁸⁵

OCR will share this Notice of Violation with the Health Plan Issuers and with the Complainants and their counsel. This Notice of Violation will be made available to the public and may include redactions.

Sincerely,



Roger T. Severino, Director



Luis E. Perez, Deputy Director
Conscience and Religious Freedom Division

⁸⁵ OCR will inform the State of California of any such referral.

Cc:

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