State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL

February 21, 2020

VIA FEDERAL EXPRESS OVERNIGHT MAIL AND ELECTRONIC MAIL
[Roger.Severino@HHS.GOV]

Roger T. Severino
Director, Office for Civil Rights
Department of Health and Human Services
Office of the Secretary
200 Independence Ave., SW
Washington, DC 20201

RE: OCR Transaction Numbers 17-274771 and 17-283890

Dear Director Severino:

On behalf of the State of California, this letter responds to your January 24, 2020 "Notice of Violation."[1] Contrary to the Notice's assertion, no "corrective action" is necessary: California is already in compliance with the Weldon Amendment. In concluding otherwise, the Notice of Violation determination contradicts the U.S. Department of Health and Human Services (Department) Office for Civil Rights' (OCR's) prior adjudication of the relevant facts, ignores the legal limits of the Weldon Amendment, exacerbates the Trump Administration's prior defiance of those same limits, is not in accordance with law, and raises new constitutional concerns, including impeding California's sovereignty and its ability to support women's right to reproductive freedom.

As the Office for Civil Rights has previously determined, California has not violated the Weldon Amendment.[2] In 2016, OCR found in favor of California as to three complaints based on the same relevant facts—and, in fact, brought by some of the same entities—as the complaints on which OCR now bases its Notice of Violation. As OCR recognized at that time, "[b]y its plain terms, the Weldon Amendment's protections extend only to health care entities."

[1] By offering this response letter, California waives no rights and make no concessions about the lawful scope of federal funding restrictions, the proper scope of OCR's jurisdiction, or any arguments or defenses as they pertain to the Notice.

[2] *See* Letter from OCR Director to Complainants (June 21, 2016), https://perma.cc/G4WP-V69V.

And, as OCR also recognized, no health care entity had been subject to discrimination within the meaning of the Weldon Amendment: "none of the seven insurers that received the DMHC letters—the entities that are covered under the Weldon Amendment—objected to providing coverage for abortions." If health care entities were to object to providing coverage for abortions, California law would allow them to present that objection to California's Department of Managed Health Care (DMHC), the State's regulator, and seek an exemption from the coverage requirement. But in the years since DMHC issued its 2014 letters explaining the abortion-coverage requirement, only one health care entity has sought an exemption from that coverage requirement. That exemption was granted in October 2015. Given this fact, as OCR itself has recognized, California has not subjected any health care entity to conduct restricted under the Weldon Amendment.

The facts concerning OCR's 2020 Notice of Violation have not changed since the last time it adjudicated those facts, in 2016. Nevertheless, OCR represents that it has extensively investigated those facts since 2017. Because due process requires that California be presented with the evidence underlying OCR's Notice of Violation, California requests that OCR make available all such evidence—including, but not limited to, all communications with third parties and all documents referenced, cited, or relied upon in the Notice.[3]

In contradicting OCR's own prior adjudication, the Notice of Violation departs in other ways from the text of the Weldon Amendment. For example, the Notice suggests that the Weldon Amendment requires California to categorically exempt "abortion-free plans as a class"—including plans that exclude "abortion in all cases, including rape and incest, except to save the life of the mother." OCR even appears to suggest the Weldon Amendment requires DMHC to locate a private, licensed health plan that will provide healthcare coverage to the complainants—which are neither health care entities covered by the Weldon Amendment nor health plans regulated by DMHC—that are consistent with the complainants' religious beliefs. OCR does not explain how the Weldon Amendment requires these things—which is unsurprising, because the Weldon Amendment does not, in fact, impose these requirements. In short, OCR suggests that it has authority to interpret Weldon in a manner inconsistent with the statute and Congressional intent.

This is not the first time the Department has cited the Weldon Amendment to impose requirements that are not in accordance with the actual legal text of the Weldon Amendment. Just last year, the Department promulgated a rule purporting to interpret the Weldon Amendment. *See* 84 Fed. Reg. 23,170 (May 21, 2019). The rule was immediately challenged on its legality and three courts have held the rule to be unlawful. *See Washington v. Azar*, -- F. Supp. 3d --, 2019 WL 6219541 (E.D. Wa. Nov. 21, 2019); *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *City and Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019) ("*CCSF*"). Among other things, that rule sought to expand the definition of a "health care entity" covered by the Weldon Amendment. That effort

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[3] To the extent OCR would not otherwise comply with this request, California submits this request pursuant to the Freedom of Information Act. *See* attached addendum.

has since been enjoined. *CCSF*, 411 F. Supp. 3d at 1016–18. The Notice of Violation reflects a similar disregard for the limits of the Weldon Amendment, and it suffers from the same kinds of legal flaws as the Department's past efforts to expand the Weldon Amendment beyond its limits.

The Notice of Violation also raises new legal problems that OCR's 2016 determination avoided. When OCR resolved the prior Weldon complaints in California's favor, it recognized that doing otherwise "would raise substantial questions about the constitutionality of the Weldon Amendment." Now, OCR threatens billions of dollars in federal funding "as a means of pressuring [California] to accept policy changes"—a threat that the Constitution forbids. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (opinion of Roberts, C.J.). This threat strikes at the heart of California's sovereignty as a State, including its sovereign interests in protecting its residents' access to healthcare (including comprehensive reproductive healthcare) and regulating California-licensed health plans. *See New York v. United States*, 505 U.S. 144, 155-56 (1992); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."). It encompasses programs that are critical for California and its residents, including emergency preparedness; chronic and infectious disease prevention; and many others. And the coercive nature of this threat is only heightened by OCR's refusal to identify the particular funds it seeks to withhold (if indeed OCR intends to target particular funds), or to identify the process through which OCR will seek to withhold them.

California has, for years, protected women's right to reproductive care, including access to safe and legal abortion, fully consistent with the Weldon Amendment since its enactment. In 1981, the California Supreme Court unambiguously recognized that the personal right of a pregnant woman to choose to seek an abortion or to proceed with the pregnancy—the right of reproductive choice—is a privacy right protected under Article I, Section 1 of the California Constitution. *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal.3d. 252, 262 (1981) ("all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or not to bear a child."). The California Legislature also passed the Reproductive Privacy Act, which codified "the public policy of the State of California that . . . [e]very woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion." Cal. Health & Saf. Code § 123462(b). As a State, we have consistently defended women's right to reproductive healthcare and on May 31, 2019, Governor Gavin Newsom issued a proclamation on reproductive freedom.[4] The Notice of Violation threatens California's ability to enforce its own constitutional and state law supporting women's right to choose.

For these reasons, and because California is already in compliance with the Weldon Amendment, California will take no "corrective action" in response to the Notice. Instead,

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[4] *See California v. Azar*, 911 F.3d 558 (9th Cir. 2018); *California v. Azar*, 941 F.3d 410 (9th Cir. 2019); *California v. Azar*, 385 F.Supp.3d 960 (N.D. Cal. 2019); *see also* California Proclamation on Reproductive Freedom (May 31, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf.

California requests that OCR immediately advise California of its administrative remedies (to the extent OCR believes relevant administrative mechanisms exist), that California be timely apprised of any and all referrals made in connection with the Notice, and that California be provided with a full and fair opportunity (including access to all evidence underlying the Notice) to dispute the Notice's findings and conclusions, which are without merit.

Sincerely,

XAVIER BECERRA
Attorney General