



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

Office for Civil Rights  
200 Independence Ave., SW  
Washington, DC 20201

VIA U.S. MAIL AND ELECTRONIC MAIL [REDACTED]

January 18, 2019

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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),<sup>1</sup> and LivingWell Medical Clinic, Inc., Pregnancy Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc. (OCR Transaction Number 18-292848)<sup>2</sup> (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”),<sup>3</sup> 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,<sup>4</sup> 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<sup>5</sup> and the Coats-Snowe Amendment.<sup>6</sup>

<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> Cal. Health & Safety Code Ann. §§ 123470 *et seq.*

<sup>4</sup> 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.

<sup>5</sup> *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).

<sup>6</sup> 42 U.S.C. § 238n.

## BACKGROUND OF THE COMPLAINTS

### 1. Sacramento Life Center<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

Sacramento Life Center provides abortion alternatives through staff and volunteers that include nurses, a sonogram technician, and a licensed physician.<sup>10</sup>

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;"<sup>11</sup> it "offers obstetric ultrasounds,

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<sup>7</sup> 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.

<sup>8</sup> OCR telephonic interview with Marie Leatherby, Exec. Dir., Sacramento Life Ctr. (Apr. 24, 2018) (on file with HHS OCR).

<sup>9</sup> 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).

<sup>10</sup> OCR telephonic interview with Marie Leatherby, Exec. Dir., Sacramento Life Ctr. (Apr. 24, 2018) (on file with HHS OCR).

<sup>11</sup> Cal. Health & Safety Code Ann. § 123471(a).

obstetric sonograms, or prenatal care to pregnant women;<sup>12</sup> it “offers pregnancy testing or pregnancy diagnosis;”<sup>13</sup> it “advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;”<sup>14</sup> and it “has staff or volunteers who collect health information from clients.”<sup>15</sup> Sacramento Life Center does not meet any of the FACT Act’s exceptions.<sup>16</sup>

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.<sup>17</sup>

2. LivingWell Medical Clinic, Inc., Pregnancy Center of the North Coast, Inc., and Confidence Pregnancy Center, Inc.

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.<sup>18</sup> 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.<sup>19</sup>

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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<sup>12</sup> *Id.* at § 123471(a)(1).

<sup>13</sup> *Id.* at § 123471(a)(3).

<sup>14</sup> *Id.* at § 123471(a)(4).

<sup>15</sup> *Id.* at § 123471(a)(6).

<sup>16</sup> *Id.* at § 123471(c).

<sup>17</sup> 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”).

<sup>18</sup> 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).

<sup>19</sup> *Supra* note 18.

and refer for abortions.”<sup>20</sup> LivingWell, North Coast, and Confidence provide abortion alternatives through staff and volunteers that include nurses, sonogram technicians, and licensed physicians.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

## 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.<sup>24</sup>

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.<sup>25</sup> LivingWell, North Coast, and Confidence appealed to the Ninth Circuit Court of Appeals, which affirmed the District Court on October 14, 2016.<sup>26</sup> 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.<sup>27</sup>

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<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> Cal. Health & Safety Code Ann. § 123471(c).

<sup>23</sup> *Id.* at § 123472(a)(1).

<sup>24</sup> *LivingWell Med. Clinic, Inc. v. Harris*, No. 15-CV-04939, 2015 WL 13187682 (N.D. Cal. 2015).

<sup>25</sup> *Id.*

<sup>26</sup> *LivingWell Med. Clinic, Inc. v. Harris*, 669 Fed. Appx. 493 (9th Cir. 2016).

<sup>27</sup> Letter from Molly Włodarczyk, 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.<sup>28</sup> 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.”<sup>29</sup>

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.<sup>30</sup>

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.<sup>31</sup>

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*.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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.”<sup>35</sup>

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& 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).

<sup>28</sup> 138 S. Ct. 2361, 2378 (2018).

<sup>29</sup> *Id.* at 2371.

<sup>30</sup> *Id.* at 2367.

<sup>31</sup> *Id.* at 2377.

<sup>32</sup> *LivingWell Med. Clinic, Inc. v. Becerra*, 138 S. Ct. 2701 (Mem) (2018).

<sup>33</sup> *LivingWell Med. Clinic, Inc. v. Becerra*, 901 F.3d 1168 (9th Cir. 2018).

<sup>34</sup> 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).

<sup>35</sup> 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.<sup>36</sup> The court order permanently enjoins California from enforcing the FACT Act and does not limit its 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.<sup>37</sup>

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).<sup>38</sup>

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.<sup>39</sup>

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<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> 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).

<sup>39</sup> 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<sup>40</sup>

### 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].<sup>41</sup>

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.<sup>42</sup> 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).<sup>43</sup>

### 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

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<sup>40</sup> The findings in this letter are not intended, nor should they be construed, to cover any matters not specifically addressed.

<sup>41</sup> Cal. Health & Safety Code Ann. § 123472(a)(1).

<sup>42</sup> *Id.* at § 123472. See also *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2369.

<sup>43</sup> *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.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

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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<sup>44</sup> Cal. Health & Safety Code Ann. § 123472(b)(1).

<sup>45</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2370, 2378.

<sup>46</sup> 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....’<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

##### 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

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<sup>47</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S.Ct. at 2368-2370.

<sup>48</sup> *Id.* at 2378.

<sup>49</sup> *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.”<sup>50</sup> 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.”<sup>51</sup> 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].”<sup>52</sup>

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.”<sup>53</sup> 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.”<sup>54</sup> 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

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<sup>50</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

<sup>51</sup> *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018).

<sup>52</sup> 42 U.S.C. § 238n.

<sup>53</sup> *E.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. at 764; 42 U.S.C. § 238n.

<sup>54</sup> 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.<sup>55</sup>

## 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.<sup>56</sup> 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),<sup>57</sup> 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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<sup>55</sup> *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.”).

<sup>56</sup> 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).

<sup>57</sup> 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,

A handwritten signature in blue ink, appearing to read 'R. Severino', with a long horizontal flourish extending to the right.

Roger T. Severino  
Director  
Office for Civil Rights