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TESTIMONY OF
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Concerning Assembly Bill 1254
Committee on Health
April 28, 2015

My name is Casey Mattox. I am Senior Counsel with Alliance Defending Freedom. I've been asked to testify today concerning the legal implications of Assembly Bill 1254 and the action to which it responds, the Department of Managed Healthcare Order of August 22, 2014, requiring all insurance plans offered in the state to cover all legal abortions. I have prepared this testimony with the assistance of my co-counsel, Catherine Short of the Life Legal Defense Foundation.

In my opinion, the DMHC Order is without legal basis, violates federal law, and threatens to jeopardize a significant part of California's federal funding. Assembly Bill 1254 would simply restore the status quo, ensuring that California is in compliance with federal law.

On August 22, Michelle Rouillard, Director of the DMHC informed all California insurers, for the first time, that the 1974 Knox-Keene Act requires them to provide coverage of all legal abortions. She also cited, without explanation, the California Constitution's protection of the right to an abortion as a basis for her decision. Neither supports her judgment.

As the Order notes, the DMHC had previously approved plans that excluded coverage of elective abortions. In four decades of both the Knox-Keene Act and *Roe v. Wade*, the DMHC had not previously interpreted Knox-Keene, the California Constitution or any other law to require private insurance carriers to cover abortion. The Knox-Keene Act does not address abortion at all. DMHC simply asserted without explanation that its requirement that insurance plans cover all "basic health care services" mandates not just "medically necessary," but also elective abortion coverage. The DMHC has apparently not interpreted this provision to require other elective medical services to be covered and for good reason. Elective and "medically necessary" are not synonyms.

While the California Constitution has been interpreted since 1981 to prohibit **the state** from discriminating against women who have an abortion by withholding funding for those abortions, *CDRR v. Myers*, 29 Cal.3d 252 (1981), I'm aware of no decision interpreting the California Constitution to require private insurers, employers, and insured employees to pay for others' abortions through their private health plans. Even after we sent Ms. Rouillard the

attached letter on the day the Order was issued, the DMHC has provided no justification for this brand new and novel interpretation of California law.

Indeed, we also sought documents concerning the DMHC's decision pursuant to the California Public Records Act, §6250 et seq. The DMHC has provided only a single email and a few documents, repeatedly extending the time for its response to this request. But the one email it has provided, which I am including with this testimony, demonstrates that rather than being a neutral application of California law to a complaint, the DMHC Order here was an agency-wide effort to impose this Order in search of a justification for its actions.

This Assembly has also rejected DMHC's theory in practice. For example, the Assembly has exempted some religious employers, particularly churches, from the requirement that they provide insurance coverage of contraceptives. Because DMHC issued its Order without considering its impact on third parties, particularly religious employers and pro-life individuals, the DMHC order does not provide even this accommodation, forcing California churches and others to provide coverage for all abortions to their employees, and pro-life employees to pay for abortion coverage in violation of their conscience.

DMHC's Order has created an anomalous situation in which California churches are not required to provide insurance coverage of contraceptives, but they are required to provide insurance coverage of elective late term abortions. Under the DMHC's theory of the law, by not also forcing churches to provide contraceptive coverage to employees this Assembly is violating the California Constitution.

While the DMHC's Order was not supported by law, California is bound to comply with the federal Weldon Amendment. As a condition of receiving funding under the federal Labor, Health and Human Services, and Education Appropriations Act, California has agreed to comply with Congress's expressed conditions on those funds including the Weldon Amendment. This law states:

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

Section 507, Consolidated Appropriations Act, Pub. L. No. 113-76, 128 Stat. 5 (Jan. 17, 2014) (emphasis supplied).

This nine year old federal law prohibits states and federal governments receiving certain federal funding from discriminating against health insurance plans that do not cover abortions. California has received funding from the Federal Government for nine years, agreeing to comply with this requirement. The DMHC Order blatantly discriminates against health insurance plans in California that do not cover abortion – indeed it prohibits the licensure of any plan that does not cover all legal abortions.

We have filed two complaints, provided with this testimony, now pending with the U.S. Department of Health and Human Services Office of Civil Rights asking that the HHS enforce the Weldon Amendment. HHS OCR is committed to enforcing the Weldon Amendment "to ensure that Department funds do not support coercive or discriminatory practices, or policies in violation of federal law." 45 C.F.R. Part 88. At risk is over $40 billion in federal funds for programs under the Labor, Health & Human Services and Education Appropriations Act. See Brief of the State of California, in *California v. United States,* No. 3:05-cv-00328 (N.D. Cal. June 23, 2006) (California challenge to Weldon Amendment dismissed).

The DMHC Order also violates the First Amendment. It requires even churches to provide elective abortion insurance coverage for ministerial and other church employees, imposing a substantial burden on religious exercise without even a rational, much less compelling justification, in violation of the Free Exercise Clause of the First Amendment. Yet, for forty years the DMHC did not interpret the same laws to require this mandate and exempts some plans under the Affordable Care Act from this Order while compelling religious employers. Further, the DMHC leaves California in the indefensible position of forcing churches to pay for abortions while exempting them from paying for contraceptives. The First Amendment forbids such a substantial and needless burden on religious freedom. See *Church of the Lukumi Babalu Aye v. City of Hiealeah,* ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny…. [A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal citations omitted). *See also, Taylor v. St. Vincent's Hospital,* 523 F.2d 75, 77 (9th Cir. 1975) ("If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals with religious or moral scruples against sterilizations and abortions.") (internal quotation omitted), citing *Doe v. Bolton,* 410 U.S. 179, 197-98 (1973).

Finally, the Order interferes with the internal employment affairs of religious institutions in violation of the First Amendment. See *e.g., Hosanna-Tabor Evangelical Church and School v. EEOC,* 132 S.Ct. 694 (2012) (Unanimous Court held First Amendment's free exercise and establishment clauses forbid government from interfering in religious organizations' employment decisions regarding employees in ministerial positions). The Assembly's decision not to force churches to provide contraceptive coverage at least recognized these First Amendment protections, but the DMHC has ignored them.

Assembly Bill 1254 would simply restore the *status quo ante* and ensure California's continued compliance with its obligations under the Weldon Amendment. It would not prohibit

insurers from covering any legal health service, but religious employers would remain free, as before, to contract for insurance plans that did not require them to pay for abortions.

On behalf of my clients, churches and individuals whose insurance plans have been subjected to illegal discrimination because they do not include elective abortion coverage, I encourage the Committee to support Assembly Bill 1254.