GOVERNING FOR IMPACT

Challenging the Weldon Amendment

Options for States

April 2025
Issue Brief

I. INTRODUCTION

In the final days of its first term, the Trump administration sought to strip hundreds of millions in Medicaid dollars from the State of California over an alleged violation of the Weldon Amendment — an anti-abortion appropriations rider that purports to bar federal funding from recipients that "discriminat[e]" against healthcare entities refusing to provide, pay for, provide coverage of, or refer for abortion services.[1] While the incoming Biden administration reversed course, the Weldon Amendment may figure prominently in the Trump administration's second term. Indeed, Project 2025 recommends using the Weldon Amendment to strip Medicaid funding from states that require insurers to cover abortion.[2]

States committed to protecting reproductive freedom need not be cowed by such threats.[3] The Supreme Court's reasoning in *National Federation of Independent Business v. Sebelius* (*NFIB*), a 2012 case that addressed the constitutionality of the Affordable Care Act (ACA), supports an argument that the Weldon Amendment poses an unconstitutionally coercive spending condition.[4] As states consider options to expand access to reproductive healthcare — for example, enacting new state-level protections, including requiring health insurers to offer abortion coverage free of cost-sharing if they do not already do so,[5] and continuing to enforce state laws and regulations that protect access to abortion — they should consider the possibility of bringing a constitutional challenge to the Weldon Amendment in an effort to protect such measures.

II. BACKGROUND

The Weldon Amendment. Originally adopted in fiscal year 2005, the Weldon Amendment states that no funding provided by the Departments of Health and Human Services (HHS), Labor (DOL), and Education (ED) may be provided to state and local governments if they subject healthcare entities to "discrimination" for not providing abortion care:

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[1] *See, e.g.*, Further Consolidated Appropriations Act, 2024, Pub. Law No. 118-47, § 507(d)(1), 138 Stat. 460, 703 (2024), https://www.congress.gov/118/plaws/publ47/PLAW-118publ47.pdf (hereinafter "2024 Weldon Amendment").

[2] Mandate for Leadership: The Conservative Promise 472, Project 2025, The Heritage Foundation, (2025), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf. (hereinafter "Project 2025"). As of this writing, those states appear to be California, Colorado (effective July 2025), Delaware (effective January 2026), Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington. *See* Kaiser Family Foundation, Interactive: How State Policies Shape Access to Abortion Coverage, (Accessed: Feb. 25, 2025), https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/.

[3] While this document focuses primarily on states, it is worth noting that any recipient of HHS, DOL, or ED funds is subject to the Weldon Amendment's requirements, including municipalities.

[4] 567 U.S. 519 (2012).

[5] States with pro-choice governing trifectas but without abortion insurance mandates include: Connecticut, Hawaii, Rhode Island, New Mexico, Minnesota (cost sharing allowed if there is cost sharing for similar services in the plan), New Jersey (cost sharing allowed if there is cost sharing for similar services in the plan). *See* Kaiser Family Foundation, Interactive: How State Policies Shape Access to Abortion Coverage, (Accessed: Feb. 25, 2025), https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/.

> None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or 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.[6]

The Amendment is one of several conscience provisions that are routinely included in appropriations legislation for federal agencies.[7]

Federal court challenges to Weldon's constitutionality. Early pre-enforcement challenges to the Weldon Amendment's constitutionality ultimately faltered on procedural grounds. In 2005, prior to the *NFIB* decision, a district court found that the Weldon Amendment was not unconstitutionally ambiguous and rejected the claim that the Amendment was unconstitutionally coercive, concluding that there was "simply insufficient information on the record…to conclude that the Weldon Amendment coerces" the nonprofit plaintiff's "members to comply with its provisions."[8] But on appeal the D.C. Circuit dismissed the nonprofit's challenge for lack of standing.[9]

In 2008, a district court dismissed a lawsuit brought by California to invalidate the Weldon Amendment without reaching the merits.[10] California alleged that the Weldon Amendment conflicted with a state law that required hospitals to provide lifesaving care, including emergency abortions. The Weldon Amendment, the state asserted, unconstitutionally conditioned federal funding to force California into implementing federal policy at the expense of state prerogatives.[11] The district court did not reach the merits of the state's argument, and instead dismissed the suit on standing and ripeness grounds.[12] The court noted that the federal government had not explicitly stated that a conflict existed between the Weldon Amendment and California's law; nor had the state identified an instance in which a healthcare entity had been punished for refusing to administer or pay for an emergency abortion against its moral or religious objection.[13] In the absence of these events, the court concluded, the alleged conflict between the laws was speculative and California had not yet suffered an injury.[14]

Administrative proceedings. Over the course of several years, California and HHS's Office of Civil Rights (OCR) under two administrations exchanged letters about California's requirements on insurance companies. In 2014, California notified seven insurance plans that their insurance contracts

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[6] 2024 Weldon Amendment. Per the statute, 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." *Id.*
[7] *See generally* Department of Health and Human Services, *Safeguarding the Rights of Conscience as Protected by Federal Statutes*, 89 Fed. Reg. 2078 (2024).
[8] *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc. v. Gonzales*, 391 F. Supp. 2d 200, 207 (D.D.C. 2005), *vacated and remanded*, 468 F.3d 826 (D.C. Cir. 2006) (noting that the plaintiff did not elaborate on its comment that Weldon might be coercive "or provide evidence of how the denial of Title X funding would affect its members (for example, by indicating what portion of various members' operating costs are covered by federal funds, as opposed to funding from other sources).").
[9] *Nat'l Fam. Plan. & Reprod. Health Ass'n, Inc.*, 468 F.3d 826.
[10] *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840 (N.D. Cal. Mar. 18, 2008).
[11] *Id.* at *1 (explaining that the state alleged a violation of the Spending Clause). In its briefs, California argued that the Weldon Amendment failed the Supreme Court's requirement that a condition on federal funding be related to the purpose of the federal funding and that the size of financial penalty for not accepting the conditioned federal funding was enormous and constituted coercion. Plaintiffs' Motion for Summary Judgement at 16, *California*, No. C 05-00328 JSW, 2008 WL 744840.
[12] *California*, No. C 05-00328 JSW, 2008 WL 744840 at *4-5.
[13] *Id.*
[14] *Id.*

unlawfully limited or excluded abortion coverage.[15] OCR investigated three complaints that it received asserting that California's action violated the Weldon Amendment, and closed its investigation in 2016.[16] OCR's 2016 investigation closure letter found that California's action did not violate the Weldon Amendment because the insurers modified their policies without objecting.[17] OCR also noted that closing its investigation "avoid[ed] a potentially unconstitutional application of the Weldon Amendment":

> A finding that [California] has violated the Weldon Amendment might require the government to rescind all funds appropriated under the Appropriations Act to the State of California - including funds provided to the State not only by HHS but also by the Departments of Education and Labor, as well as other agencies. HHS' Office of General Counsel, after consulting with the Department of Justice, has advised that such a rescission would raise substantial questions about the constitutionality of the Weldon Amendment. Specifically, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court ruled that Congress could not condition a State's preexisting Medicaid funding on the State's compliance with an Affordable Care Act requirement to expand the program to include all low-income adults. The Court reasoned that this threat to terminate significant independent grants was so coercive as to deprive States of any meaningful choice whether to accept the condition attached to receipt of federal funds. Following accepted canons of statutory construction, OCR's approach . . . avoids this potentially unconstitutional application of the statute. *See Gomez v. United States*, 490 U.S. 858, 864 (1989).[18]

After closing its investigation in 2016, OCR received several new complaints regarding the same 2014 California letter.[19] In 2020, OCR issued a Notice of Violation finding that California had violated the Weldon Amendment.[20] Based on the 2020 Notice of Violation, in January 2021 OCR ordered the withdrawal of at least $200 million of California's federal Medicaid funding.[21] A few months later, the Biden administration withdrew the 2020 Notice of Violation based on new legal analysis and restored California's funding.[22] The new legal analysis did not reach the constitutional issue; instead, it concluded that two of the entities purportedly subject to discrimination were not healthcare entities at all, and that the other healthcare entities did not object to complying with the California law and therefore were never subjected to discrimination.[23] As of this writing, there has been no further OCR action regarding California's law that requires insurers to cover abortions.

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[15] Letter from Jocelyn Samuels, Director, Office for Civil Rights, U.S. Department of Health and Human Services, to Catherine W. Short, Vice President of Legal Affairs, Life Legal Defense Foundation, et al., Re: Re: OCR Transaction Numbers: 14-193604. 15-193782. & 15-195665 (June 21, 2016), https://www.hhs.gov/conscience/conscience-protections/cdmhc-investigation-closure-letter/index.html.
[16] *Id.*
[17] *Id.*
[18] *Id.*; *see also* Letter from Xavier Becerra, Attorney General of California, to Roger Severino, Director, Office for Civil Rights, U.S. Department of Health and Human Services (Feb. 21, 2020), https://oag.ca.gov/system/files/attachments/press-docs/Letter%20to%20Director%20Severino.pdf (explaining that "when OCR resolved the prior Weldon complaints in California's favor [in the 2016 closure letter], it recognized that doing otherwise "would raise substantial questions about the constitutionality of the Weldon Amendment.").
[19] U.S. Department of Health and Human Services, State of California Letter Re: OCR Transaction Numbers 17-274771 and 17-283890, (Aug. 13, 2021), https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

State litigation. The Weldon Amendment arose briefly in the California Attorney General's recent effort to enforce the state's emergency care statute.[24] California sued a hospital in state court for failing to offer emergency care to a pregnant person who was in crisis.[25] The hospital asserted in its defense that the Weldon Amendment prohibited the state from requiring such care.[26] The Attorney General countered that the Amendment could not be used as a defense to an enforcement of state law because it "only functions to cut off funding" from entities that discriminate based on refusal to deliver abortion care.[27] Even if the Weldon Amendment did apply, the Attorney General cited federal case law that indicated that the Amendment's "discrimination" prohibition may not even cover state laws that are facially neutral on abortion and hold a hospital "to the same standard as every other California hospital."[28] A state court held a hearing on the hospital's motion to dismiss on February 14, 2025.[29] The court is expected to issue a decision by May 2025.[30]

Federal regulatory initiatives. Under Presidents George W. Bush and Donald Trump, HHS attempted to expand the Weldon Amendment's scope by implementing new regulatory definitions of key terms.[31] For example, in 2019 HHS finalized a rule that would have, among other things, expanded the definition of "healthcare entity" to cover "any . . . kind of health care organization [or] facility," including, potentially, "limited service pregnancy centers" like crisis pregnancy centers.[32] Lawsuits ensued, and several district courts vacated the 2019 rule.[33] One agreed with the plaintiffs' claim that the rule was unconstitutionally coercive under *NFIB*, concluding that "HHS's spending threat here is coercive given the scale of funding it jeopardizes and the new standards of conduct the [r]ule impose[d]."[34] In 2024, HHS rescinded what was left of the 2019 rule, but maintained a 2011 framework that gives OCR the authority to handle complaints filed under the Weldon Amendment.[35]

In its second term, the Trump administration is likely to reinvigorate enforcement of the Weldon Amendment. The Heritage Foundation's Project 2025 recommended that the administration withdraw up to 10 percent of Medicaid funds from at least seven states that the Project 2025 authors claim are

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[24] Complaint, *People v. St. Joseph Health Northern California*, Case No. CV2401832, (Sept. 8, 2024), https://oag.ca.gov/system/files/attachments/press-docs/Providence%20Complaint%20.pdf.
[25] *Id.*
[26] Defendant Notice Of Demurrers Memorandum Of Points And Authorities 11, *People v. St. Joseph Health Northern California*, Case No. CV2401832, (Dec. 23, 2024), https://www.scribd.com/document/808755702/2024-12-23-SJH-Demurrer-to-AG-Complaint-12-23-2024-1.
[27] Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendant's Demurrer 16, (Jan 28, 2025), https://oag.ca.gov/system/files/attachments/press-docs/1-27-2025%20Opp%20to%20Demurrer%20%28Conformed%29.pdf.
[28] *Id.* at note 6.
[29] Ryan Burns, *St. Joe's Abortion Care Lawsuit: In a Packed Courtroom, Hospital's Attorneys Ask Judge to Dismiss the Case*, (Feb. 14, 2025), https://lostcoastoutpost.com/2025/feb/14/st-joes-abortion-care-lawsuit-packed-courtroom-hos/.
[30] *Id.*
[31] Department of Health and Human Services, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, (May 21, 2019) (hereinafter "2019 Rule"); Department of Health and Human Services, Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008).
[32] 2019 Rule at 23177 (describing OCR complaints that had been "satisfactorily resolved" when the Hawaii Attorney General confirmed that they would not enforce statute requiring provision of information about abortion against "limited service pregnancy centers.").
[33] *City and Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1018 (N.D. Cal. 2019); *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 574 (S.D.N.Y. 2019); *Washington v. Azar*, 426 F.Supp. 3d 704, 721-22 (E.D. Wash. 2019).
[34] *New York*, 414 F. Supp. 3d at 572.
[35] 2019 Rule.

violating the Weldon Amendment by requiring insurance plans to cover abortion.[36] Project 2025 also recommended that the Trump administration should rescind the August 2021 legal analysis that reinstated California's Medicaid funding and that Congress enact permanent legislation that applies Weldon Amendment principles to all federal funding.[37]

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In sum, during the Obama administration HHS concluded that an application of the Weldon Amendment to withdraw all ED, DOL, and HHS funding from California might violate *NFIB*, and we are not aware of any federal court decision post-dating NFIB that addresses whether the Weldon Amendment is unconstitutionally coercive. The one decision rejecting a coercion claim pre-dated NFIB and contains little analysis.[38] Below, we explain why *NFIB* supports an argument that the Amendment is unconstitutional.

III. THE WELDON AMENDMENT IS UNCONSTITUTIONALLY COERCIVE

States might argue that the Weldon Amendment poses an unconstitutionally coercive spending condition.

a. The spending power

The Constitution imposes several restrictions on Congress's use of the spending power. First, the exercise of the spending power and any conditions placed on federal funds "must be in pursuit of the general welfare."[39] Second, conditions on states' receipt of federal funds must be "unambiguous[]."[40] Third, "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs."[41] Fourth, "the grant and any conditions attached to it cannot violate an independent constitutional provision."[42]

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[36] Project 2025 at 472.
[37] *Id.* at 493, 474.
[38] *Nat'l Fam. Plan. & Reprod. Health Ass'n*, 391 F. Supp. 2d at 207 (explaining that there was "simply insufficient information on the record for the court to" make a decision on the plaintiff's coercion claim because the plaintiff did "not elaborate on this comment or provide evidence of how the denial of Title X funding would affect its members.").
[39] *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).
[40] *Id.*
[41] *Id.* (internal quotation omitted).
[42] *Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 182 (5th Cir. 2020).

The fifth restriction applies to conditions that reach beyond restrictions on a state's use of the specific funding at issue. When they "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the State to accept policy changes."[43] As states are "independent sovereigns" and spending clause legislation is "much in the nature of a contract," a state must be able to "voluntarily and knowingly accept[] the terms of the contract" or be free to reject the funding altogether.[44] So conditions that threaten independent grants must not "be so coercive as to pass the point at which pressure turns into compulsion."[45]

The most recent Supreme Court case on the subject, *NFIB*, is particularly instructive. There, the Supreme Court invalidated a key ACA provision that would have required states to expand their Medicaid programs or risk losing all of their federal Medicaid funding. A plurality[46] identified two core characteristics of the provision that together posed a problem: (1) the fact that the penalty for not expanding Medicaid threatened "significant independent grants" (under the theory that traditional and expanded Medicaid constituted two distinct programs, rather than an evolution of one program) and (2) the magnitude of the funding at risk (the entirety of a state's federal Medicaid contribution, which made up more than 10 percent of most states' budgets).[47]

Because the Weldon Amendment threatens grants that are independent from the policy regime that the Amendment urges states to adopt (indeed, most of the grants at risk have nothing to do with reproductive care or abortion) and imposes an even more severe financial penalty than the one at issue in *NFIB* (not just the entirety of a state's federal Medicaid contribution, but also funding for a panoply of other programs), *NFIB* supports an argument that the Weldon Amendment is unconstitutionally coercive.[48]

The Weldon Amendment threatens "significant independent grants" to pressure states on policy.

Congress may "condition the receipt of funds on the States' complying with restrictions on the use of those funds."[49] Doing so is the way in which Congress can ensure that "funds are spent according to its view of the general Welfare."[50] But when conditions "take the form of threats to terminate other

[43] *NFIB*, 567 U.S. at 580.
[44] *Id.* at 577 (cleaned up).
[45] *Id.* at 580 (internal citations omitted).
[46] In total, "[s]even Justices concluded that the penalty of taking away existing Medicaid funding from states which declined to sign up for the new expanded Medicaid program was unconstitutional," but the plurality and dissenting opinions differed slightly in their reasoning. *Mayhew v. Burwell*, 772 F.3d 80, 88 (1st Cir. 2014). The plurality's holding was arguably narrower and therefore its reasoning likely governs here. *See id.*
[47] *NFIB*, 567 U.S. at 580-81. *See also New York v. Yellen*, 15 F.4th 569, 582 (2d Cir. 2021) (explaining that the "two factors especially drove the result" in *NFIB* were that "Congress had required that the States comply with the conditions to receive not only new Medicaid funding but also Medicaid funding (upon which the States had come to rely) that would have been available even under the preexisting regulatory scheme" and that "Congress had threatened to withhold funds constituting over ten percent of state budgets.").
[48] Though beyond the scope of this document, there may be an argument that the Weldon Amendment violates another restriction that the spending power imposes on Congress' ability to condition funds. "[C]onditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207 (internal quotation omitted). The statute at issue in *Dole* complied with this restriction because "the condition imposed by Congress [of requiring states to increase their drinking age was] directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208. The Weldon Amendment, on the other hand, threatens many grants, especially those from DOL and ED, that have no connection to healthcare — much less reproductive care — at all, such as grants to states under the Workforce Innovation and Opportunity Act (which provides for dislocated worker employment and training). Further Consolidated Appropriations Act, Public Law No. 118-47 Div. D Title I, 138 Stat. 629 (2024), https://www.congress.gov/bill/118th-congress/house-bill/2882.
[49] *NFIB*, 567 U.S. at 580.
[50] *Id.* (internal quotation omitted).

significant independent grants," they become "a means of pressuring the States to accept policy changes."[51]

In two key Supreme Court cases, *South Dakota v. Dole* and *NFIB*, the statutory conditions at issue were not a direct restriction on how the authorized funds themselves could be used. Instead, the conditions threatened "independent grants" to encourage states to adopt particular policies. In *Dole*, Congress conditioned highway funds, which were "set aside for specific highway improvement and maintenance efforts," not on how those funds ought to be spent, but on whether states acceded to a separate policy project: raising their drinking age.[52] Similarly, the *NFIB* Court found that Congress attempted to condition traditional Medicaid funding (historically confined to "the disabled, the blind, the elderly, and needy families with dependent children"), not on how that program should be operated, but on whether states agreed to administer an entirely new scheme (health insurance for nonelderly people below 133 percent of the poverty line).[53] The government and the dissenting justices argued that post-expansion Medicaid was simply a modification of traditional Medicaid and therefore the ACA's condition did not threaten "independent grants."[54] But the plurality rejected this view, explaining that "[w]e cannot agree that existing Medicaid and the expansion dictated by the [ACA] are all one program simply because Congress styled them as such."[55] Instead, because the Medicaid expansion "accomplishe[d] a shift in kind, not merely degree" from traditional Medicaid, it was effectively "a new health care program."[56]

Circuit courts applying *NFIB* and *Dole* have similarly first examined whether a challenged condition simply imposes restrictions on the use of particular funds or whether it threatens "independent grants" to pressure "States to accept policy changes."[57] In *Mayhew v. Burwell*, the First Circuit rejected Maine's *NFIB*-based challenge to a Medicaid amendment that required the state to maintain coverage for certain populations.[58] The First Circuit explained that the challenged Medicaid provision was "an unexceptional alteration of the boundaries of" the traditional Medicaid program, "not a new program," like the one created by the ACA.[59] Therefore the provision was better understood as governing the use of the funds to which it applied (traditional Medicaid), rather than as a threat against independent grants. In contrast, the D.C. Circuit in *Mississippi Com'n on Environmental Quality v. E.P.A.* analogized to *NFIB* and *Dole* to explain that when "Congress . . . conditioned some federal highway funding on Texas's adoption of an adequate [Clean Air Act] implementation plan," it was "at least arguably . . . not a restriction on how the highway funds are to be used, but rather an incentive to encourage States to take action in a related policy area."[60]

Applying these precedents, the Weldon Amendment threatens to terminate "independent grants" if states decline to adopt Congress's preferred policies against discrimination based on a healthcare entity's refusal to provide, pay for, provide coverage of, or refer for abortion services. The Weldon Amendment does not impose conditions on how particular grant funding ought to be used, as in *Mayhew*. Those types of conditions *do* exist about abortion, but they are not found in the Weldon Amendment; for example, Congress conditions Title X family planning grants on states' agreement not to use the funds to promote abortion.[61] Instead, the Weldon Amendment threatens a range of

[51] *Id.*
[52] *Id.*
[53] *Id.* at 583.
[54] *Id.* at 580.
[55] *Id.* at 582 (internal quotation omitted).
[56] *Id.* at 582, 584.
[57] *Id.* at 580.
[58] 772 F.3d 80 (1st Cir. 2014).
[59] *Id.* at 89. (cleaned up).
[60] 790 F.3d 138, 177 (D.C. Cir. 2015).
[61] 42 U.S.C. § 300a-6 ("None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.")

programs, most of which bear no connection to reproductive care at all, such as grants to states under the Workforce Innovation and Opportunity Act (which provides for dislocated worker employment and training) if states do not implement the Amendment's preferred policy.[62] The threats, then, are "properly viewed as a means of pressuring the States to accept policy changes," as they were in *Dole* and *NFIB*.[63] Whether that pressure tips into unconstitutional coercion depends on the size of the financial threat, explained next.

The financial penalty for violating the Weldon Amendment is too large, turning pressure into coercion.

The next question is whether the threat of a funding termination under the Weldon Amendment is "so coercive as to pass the point at which pressure turns into compulsion."[64] While *NFIB* set no magic threshold for the size of a financial inducement that causes "persuasion [to] give[] way to coercion," *Dole* and *NFIB* help illustrate the line between permissible and nonpermissible funding conditions.[65] In *Dole*, the Supreme Court upheld a law that stripped five percent of a state's federal highway funding if it declined to increase its drinking age to 21.[66] The Court noted that threatening five percent of highway funding was a "relatively mild encouragement," because this sum represented less than 0.5 percent of South Dakota's state budget at the time.[67] In *NFIB*, on the other hand, the Supreme Court invalidated the ACA provision at issue because Congress threatened to withhold the entirety of a state's federal contribution for traditional Medicaid if the state declined to implement a new expanded Medicaid program. The enormity of the financial threat – which at the time made up over 10 percent of most state budgets – led the Court to invalidate the provision, calling it a form of "economic dragooning."[68]

Lower courts applying *Dole* and *NFIB* have used the size of the threats in each case as guideposts for measuring when pressure becomes compulsion. For example, in *Mississippi Comm'n on Env't Quality*, the D.C. Circuit explained that "the threatened loss of federal highway funding" in that case did "not even approach the over 10 percent of a State's overall budget at issue in *NFIB*."[69] On the other hand, a district court found *NFIB* to be "a more apt analogy" than *Dole* when it struck down the 2019 Rule that would have expanded the scope of various conscience provisions, including the Weldon Amendment.[70] That court explained that the rule was coercive because it "threaten[ed] not a small percentage of the States' federal health care funding, but literally all of it."[71]

The Weldon Amendment purports to withhold even larger amounts of federal funding than the ACA provision invalidated in *NFIB* and the 2019 Rule. As in *NFIB*, the Weldon Amendment threatens the entirety of a state's federal Medicaid contribution; but because Medicaid has since grown dramatically as a proportion of state budgets, that sanction is today even more coercive.[72] Further, a violation of the Weldon Amendment would, by its text, result in the rescission of not only all of a state's HHS funding but also its DOL and ED funding, including the lion's share of Children's Health

[62] "Further Consolidated Appropriations Act," Public Law No. 118-47 Div. D Title I, 138 Stat. 629 (2024), https://www.congress.gov/bill/118th-congress/house-bill/2882.
[63] *NFIB*, 567 U.S.C. at 580.
[64] *Id.* (internal quotation omitted).
[65] *Id.* at 585.
[66] 483 U.S. 203 (1987).
[67] *Id.* at 211.
[68] *NFIB*, 567 U.S. at 582.
[69] 790 F.3d at 178. (internal quotation omitted).
[70] *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 570 (S.D.N.Y. 2019)
[71] *Id.*
[72] How Do States Pay for Medicaid?, Peter G. Peterson Foundation, (Feb. 5, 2024), https://www.pgpf.org/article/budget-explainer-how-do-states-pay-for-medicaid/ (showing the growth in Federal Medicaid spending).

Insurance Program funding and a significant portion of states' K-12 education funding.[73] Massachusetts, for instance, receives over 22 percent of its annual revenues from the federal government, with the vast majority of those funds flowing through agencies subject to the Weldon Amendment.[74] If the ACA's Medicaid expansion penalty pointed "a gun to [states'] head[s],"[75] the Weldon Amendment points several.

b. Addressing counterarguments

Lower court decisions. "[T]he Supreme Court has only once deemed a condition unconstitutionally coercive," in *NFIB*,[76] and the majority of lower courts to confront coercion challenges after *NFIB* have rejected them. But all of the lower court decisions that we reviewed assessed coercion claims based on the framework set forth here.[77] The primary reason those courts rejected coercion claims was because the spending conditions at issue in those cases threatened far smaller "independent grants" than in *NFIB*. In one case, for example, the challenged statute threatened a particular Department of Justice grant that, if entirely withdrawn, would impact less than 0.1 percent of the plaintiff states' annual budgets — "a smaller percentage loss even than that in *Dole*."[78] In another, only a portion of a public university's federal funding was at risk.[79] And, as noted above, a district court agreed that the Trump administration's 2019 Rule purporting to interpret the Weldon Amendment and other conscience provisions was coercive because a violation of the rule would result in the withdrawal of huge, *NFIB*-like sums.[80] The only district court to have considered the merits of a coercion challenge to the Weldon Amendment itself did reject the coercion claim.[81] But that 2005 decision pre-dated *NFIB* and rested more on the plaintiff's failure to develop the argument than on its merits.[82]

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[73] Three Key Things to Know about CHIP, Peter G. Peterson Foundation, (Dec. 23, 2024), https://www.pgpf.org/article/three-key-things-to-know-about-chip/; How is K-12 Education Funded?, Peter G. Peterson Foundation, (Aug. 19, 2024), https://www.pgpf.org/article/how-is-k-12-education-funded/.
[74] How much money does the federal government provide Massachusetts state and local government?, USA Facts, (Oct. 10, 2024), https://usafacts.org/answers/how-much-money-does-the-federal-government-provide-state-and-local-governments/state/massachusetts/.
[75] NFIB, 567 U.S. at 581.
[76] *New York v. Yellen*, 15 F.4th at 582.
[77] The courts tend to examine the size of the financial inducement at issue and decide whether it is more analogous to that in *Dole* or *NFIB*. *See, e.g.*, *State*, 951 F.3d at 84 (finding no coercion because the amount at issue in the case, "less than 0.1% of the State's annual" budget, was even less than the amount at issue in *Dole*); *Texas v. E.P.A.*, 726 F.3d 180, 197 (D.C. Cir. 2013) (finding no coercion because a construction delay of up to twelve months was nowhere near the "same magnitude and nature as the Medicaid expansion provision that would strip "over 10 percent of a State's overall budget."); *Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d at 184 (explaining that the threat of LSU losing under 10 percent of its funding is more like the "relatively mild encouragement" in *Dole* than the "gun to the head" in *NFIB*); *Mississippi Comm'n on Env't Quality v. E.P.A.*, 790 F.3d 138, 178 (D.C. Cir. 2015) (no coercion in part because the amount of funding at issue did "not even approach the over 10 percent of a State's overall budget at issue in NFIB.").
[78] *State v. Dep't of Just.*, 951 F.3d 84, 116 (2d Cir. 2020).
[79] *Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 184 (5th Cir. 2020) (explaining that the threat of LSU losing under 10 percent of its funding is more like the "relatively mild encouragement" in *Dole* than the "gun to the head" in *NFIB*).
[80] *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) (explaining that "[t]he threat to funding presented by [the rule's penalty of withdrawing all HHS funding] makes *NFIB* a more apt analogy here than *Dole*" because it "threatens not a small percentage of the States' federal health care funding, but literally *all* of it.").
[81] *Nat'l Fam. Plan. & Reprod. Health Ass'n*, 391 F. Supp. 2d at 207.
[82] *Id.* (explaining that there was "simply insufficient information on the record for the court to" make a decision on the plaintiff's coercion claim.").

Time elapsed since Weldon's original adoption. The Weldon Amendment has been on the books for twenty years, and some lower courts have rejected coercion claims where there has been a substantial lag between the imposition of the challenged condition and the litigation challenging it.[83] In doing so, many have relied on the D.C. Circuit's observation in dicta that "[t]he fact that" a state "has long accepted" federal funding "notwithstanding the challenged conditions may be an additional relevant factor in the contract-like analysis the Court has in mind for assessing the constitutionality of Spending Clause legislation."[84] The D.C. Circuit explained that, "[i]n both *Dole* and *NFIB*, the condition at issue was 'new' in two senses of the word: Both conditions had been recently enacted at the time of the litigation, and both conditions imposed additional requirements with which States had to comply to continue receiving preexisting federal funding."[85] But while it was true that "the *NFIB* state plaintiffs challenged the Affordable Care Act the day it became law,"[86] that did not factor into the *NFIB* plurality's analysis.

Throughout, the plurality discussed the Medicaid expansion provision as "new" only in the sense that it created a "new health care program" separate from traditional Medicaid, the funding of which Congress threatened.[87] This was key to rebutting the dissent's claim that the provision did "not threaten[] to withhold funds earmarked for any other program," and therefore did not lend itself to a *Dole*-style coercion analysis at all.[88]

The D.C. Circuit's suggestion that a lag between imposition of a condition and litigation challenging it could defeat a coercion claim relied on a quote about "surpris[e]" from a part of *NFIB* that was not about coercion at all. The D.C. Circuit quoted the *NFIB* plurality's reminder that, "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or retroactive conditions."[89] But this quote was from a part of *NFIB* that was not actually focused on the coercive potential of the ACA's Medicaid mandate, and instead on the potential ambiguity of the original Medicaid statute. There, the *NFIB* plurality was rejecting the government's claim that the Medicaid expansion requirement was simply an alteration of traditional Medicaid, which the Medicaid statute warned states was subject to revision.[90] But allowing Congress to "style[] the expansion a mere alteration of existing Medicaid" instead of as a "new health care program," the Court explained, would subject States to a "surprising . . . post-acceptance or retroactive condition[]" that could render the original Medicaid statute's reserved "right to alter, amend, or repeal any provision" unconstitutionally ambiguous.[91] Ensuring that conditions are unambiguous and noncoercive are two separate restrictions that the Spending Clause puts on Congress's spending power, the former of which is not the focus of this document.

Modified penalty. Project 2025's authors propose that the Trump administration enforce the Weldon Amendment by only withholding ten percent of a state's Medicaid funding, possibly because they

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[83] *See, e.g.*, *Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 184 (5th Cir. 2020); *Tennessee v. U.S. Dep't of State*, 329 F. Supp. 3d 597, 628 (W.D. Tenn. 2018), *aff'd sub nom. State by & through Tennessee Gen. Assembly v. United States Dep't of State*, 931 F.3d 499 (6th Cir. 2019).
[84] *Miss. Comm'n on Envtl. Quality v. E.P.A.*, 790 F.3d 138, 179 (D.C. Cir. 2015) (per curiam).
[85] *Id.*
[86] *Gruver*, 959 F.3d at 184.
[87] *NFIB*, 567 U.S. at 584 ("the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program" that Congress coerced states into implementing by threatening to withhold funding for traditional Medicaid).
[88] *Id.* at 582.
[89] *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 178 citing *NFIB*, 567 U.S. at 584.
[90] 567 U.S. at 582-84.
[91] Id. at 583. (rejecting the government's effort to fit Medicaid expansion into the Medicaid statute's "right to alter, amend, or repeal any provision" of Medicaid because "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

realize that withholding the full range of funds could raise constitutional concerns. Similarly, the Trump administration's attempted partial withdrawal of Medicaid funds from California did not reach all of the funding that the Weldon Amendment puts at risk.[92] But it is not clear that the plain text of the statute permits the government to modulate its penalty.[93] And even if it does, doing so would not cure the Weldon Amendment's constitutional defect, which stems from the coercive effect that the threat of enforcement of the Amendment's text poses.[94]

IV. ADDITIONAL CONSIDERATIONS

a. Health care entities and narrow constructions of Weldon

Of course, a state's ability to challenge the Weldon Amendment's constitutionality depends in part on the existence of a state policy that actually violates the rider. Some of the state laws that the Trump administration and anti-abortion advocates are likely to characterize as Weldon Amendment violations are no such thing. This is due both to their potentially mistaken understanding of the entities to which Weldon applies and to courts' narrow interpretation of the rider.

For instance, as discussed above the Biden Administration's OCR initially dismissed a Weldon complaint against California that alleged discrimination against a plan sponsor because a plan sponsor is not a "health care entity," and courts rejected the first Trump administration's attempt to expand the list of "health care entities" to which Weldon applied.[95] Additionally, courts have repeatedly affirmed narrow constructions of the Weldon Amendment that proscribe its application to

[92] U.S. Department of Health and Human Services, State of California Letter Re: OCR Transaction Numbers 17-274771 and 17-283890, (Aug. 13, 2021), https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html (explaining that the Trump administration sought to withdraw "$200,000,000 every quarter, for an annual disallowance total of $800,000,000, until the State complied with the Weldon Amendment."). California received $90 billion in federal Medicaid funding in 2023. Energy and Commerce Committee Democrats, Fact Sheet: Medicaid's Crucial Role in California & What Impact Republican Medicaid Cuts Could Have (Feb. 2025), https://pelosi.house.gov/sites/evo-subsites/pelosi.house.gov/files/evo-media-document/CA_2025.02.05_Medicaid%20State%20Fact%20Sheet.pdf.

[93] 2024 Weldon Amendment ("*None* of the funds made available in this Act may be made available…") (emphasis added).

[94] *See New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 571 (S.D.N.Y. 2019) ("As *NFIB* teaches, a federal threat to a State to 'do this, or else' is coercive at the moment it is uttered; the State's conduct may be influenced long before the 'or else' comes to pass.")

[95] U.S. Department of Health and Human Services, State of California Letter Re: OCR Transaction Numbers 17-274771 and 17-283890, (Aug. 13, 2021), https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html (reinstating California's Medicaid funding because several of the entities that had allegedly been discriminated against were plan sponsors (i.e. employers and employee benefits consultants), not "health care entities."); *City and Cty. of San Francisco*, 411 F. Supp. 3d at 1018 (including "plan sponsors" in the regulatory definition of "health care entity" exceeded the Department's authority under the Administrative Procedure Act because these entities were not included or contemplated in the statute); *cf.*, *New York*, 414 F. Supp. 3d at 574 (S.D.N.Y. 2019) (the Department lacked authority to promulgate rule defining "health care entity" in the Weldon Amendment to include plan sponsors under Housekeeping authority).

contraceptive care,[96] emergency abortion,[97] and requirements to disseminate information about abortion.[98]

b. A note on justiciability

States may be better positioned to pursue a pre-enforcement challenge than in the past. Courts cited procedural defects to squash California's and a nonprofit's initial legal challenges to the Weldon Amendment. In particular, a district court found that California lacked standing and the claims were not yet ripe because there was not "a clear conflict between state and federal law and an express statement from a federal official affirmatively finding such a conflict" and the state had yet to suffer an "injury."[99]

That may have been true about California in 2008, but the first Trump administration expressly stated that it viewed some state laws as violative of its expansive reading of the Weldon amendment, while attempting to withdraw hundreds of millions of dollars from California's Medicaid budget.[100] It further tried to expand the Weldon Amendment's reach through regulation in its 2019 rule.[101] And Project 2025 recommended that the second Trump administration withdraw Medicaid funding from states that require private health insurance plans to cover abortion care.[102]

It still may be the case that the Trump administration's past actions and Project 2025's recommendations are insufficient for a court to find an "imminent threat of enforcement" under the ripeness doctrine.[103] But should the Trump administration make an official statement about the scope and viability of the Weldon Amendment or make moves to implement Project 2025's recommendations to cut Medicaid funding from states that require abortion coverage, states could be in a position to mount a pre-enforcement constitutional challenge.

V. CONCLUSION

The Weldon Amendment should be held unconstitutional under any reasonable reading of the Supreme Court's spending clause precedents. Indeed, the Amendment raises the precise federalism concerns that animate the anti-coercion doctrine. When states lack a legitimate choice to reject

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[96] *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs., 867 F.3d 338, 354* (3d Cir. 2017); *Michigan Cath. Conf. & Cath. Fam. Servs.*, 55 F.3d at 397.
[97] *New York*, 414 F. Supp. 3d at 538 (concluding that the legislative history and wording of the Weldon Amendment indicated that it did not apply to emergency abortion); *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006) (accepted the federal government's construction that the Amendment permits states to enact facially neutral laws, including emergency care requirements that encompass abortion services, provided the law does not target abortion specifically).
[98] *Oklahoma v. United States Dep't of Health & Hum. Servs.*, 107 F.4th 1209, 1223 (10th Cir. 2024).
[99] *California*, 2008 WL 744840, at *1.
[100] Marcia Augsburger & Taylor Whitten, *California Medicaid Set to Lose $200 Million in Funding Next Quarter for its Universal Abortion Coverage Mandate*, JD Supra, (Dec. 29, 2020), https://www.jdsupra.com/legalnews/california-medicaid-set-to-lose-200-49605/.
[101] 2019 Rule.
[102] Project 2025 at 472.
[103] Courts do consider the "history of past . . . enforcement under the challenged statute" when evaluating ripeness, but ripeness may also require "the prosecuting authorities [to] have communicated a specific warning or threat to initiate proceedings." *Safer Chemicals, Healthy Fams. v. U.S. Env't Prot. Agency*, 943 F.3d 397, 414 (9th Cir. 2019) (internal quotations omitted).

federal funding, the federal government can achieve its policy aims without accountability.[104] In the Weldon Amendment's case, voters may mistakenly blame state officials for instituting less-than-fulsome reproductive protections, when in fact those officials are acting under duress from the federal government.

As states consider options to expand access to reproductive healthcare — for example, enacting new state-level protections, including requiring health insurers to offer abortion coverage free of cost-sharing if they do not already do so,[105] and continuing to enforce state laws and regulations that protect access to abortion — they should consider the possibility of bringing a constitutional challenge to the Weldon Amendment in an effort to protect such measures.

[104] *NFIB*, 567 U.S. at 677 (J. Scalia, J. Kennedy, J. Thomas, and J. Alito, concurring with the Court's judgment on Medicaid expansion).
[105] States with pro-choice governing trifectas but without abortion insurance mandates include: Connecticut, Hawaii, Rhode Island, New Mexico, Minnesota (cost sharing allowed if there is cost sharing for similar services in the plan), New Jersey (cost sharing allowed if there is cost sharing for similar services in the plan). *See* Kaiser Family Foundation, Interactive: How State Policies Shape Access to Abortion Coverage, (Accessed: Feb. 25, 2025), https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/.