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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

FOOTHILL CHURCH, CALVARY CHAPEL CHINO HILLS, and SHEPHERD OF THE HILLS CHURCH,

Plaintiffs,

v.

MARY WATANABE, in her official capacity as Director of the California Department of Managed Health Care,

Defendant.

2:15-CV-02165-KJM-EFB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Dept: Courtroom 3, 15th Fl.
Judge: Hon. Kimberly J. Mueller
Hearing: June 17, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

INTRODUCTION

Plaintiffs are three Christian churches who desire to operate according to their religious beliefs that all human life—including life in the womb—is made in the image of God and deserving of protection. But in August 2014, the California Department of Managed Health Care ("DMHC" or "the State") mandated that the Churches' employee healthcare plans cover elective abortion, regardless of their religious beliefs. Remarkably, the DMHC did not even notify the Churches of this policy change when implemented in August 2014. Instead, the Churches discovered this mandate on their own, promptly sought exemptions from their insurers, but were denied because of the DMHC's directive. Still, nearly eight years later, the DMHC refuses to change its policy or to accommodate the Churches' beliefs.

The constitutional violation is now undeniable. This Court previously dismissed the Churches' free exercise and equal protection claims, but the Ninth Circuit vacated and remanded following the Supreme Court's recent decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In *Fulton*, the Supreme Court reaffirmed that a law or regulation that provides a "mechanism for individualized exemptions" is not generally applicable. *Id*. at 1877. Thus, when the state creates a system of discretionary exemptions from a policy, it must grant exemptions for cases of "religious hardship" or present compelling reasons not to do so. *Id.*

Under *Fulton*, the Churches are entitled to summary judgment. Individualized exemptions from the State's Abortion Coverage Requirement are available for "good cause" or if "in the public interest." So *Fulton* is decisive: strict scrutiny must apply. And the State cannot survive "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Forcing the Churches to provide likeminded church employees with elective abortion coverage is in no way a compelling interest. Nor is the coverage requirement the least restrictive way to achieve any interest the State might have. Indeed, the State's "creation of a system of exceptions" undermines any claim that the coverage requirement "can brook no departures." *Fulton,* 141 S. Ct. at 1882. Equally, the coverage requirement intrudes upon the Churches' internal autonomy, which also infringes their First Amendment rights. *See* U.S. CONST. amend. I.

And the State's preference to accommodate some religious beliefs, but not the Churches, violates the Equal Protection Clause. *See* U.S. CONST. amend. XIV.

Accordingly, the Court should grant the Churches' motion and end the ongoing constitutional violation.

FACTUAL BACKGROUND

A. The Churches and their religious beliefs.

Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hills Church ("the Churches") are three Christian churches in California. Plaintiff' Statement of Undisputed Material Facts ("SUMF") ¶¶ 1–3. They believe the Holy Bible is the inspired and inerrant Word of God and thus it guides every aspect of Christian life, practice, morals, and doctrine. *Id.* ¶ 5. The Bible teaches—and the Churches believe—that all human life begins at conception, is purposefully created by God, is the only living creature made in His image, and is sacred and worthy of protection from conception to natural death. *Id.* ¶ 6. As a result, the Churches believe abortion is a sin and plainly contrary to their Christian beliefs. *Id.* ¶ 7.

This belief about the sanctity of human life motivates the Churches' ministries and outreach. For instance, Foothill Church financially supports and volunteers at a local pregnancy center that encourages and assists parents in choosing life. Lewis Decl. ¶ 12. Calvary Chapel Chino Hills likewise supports local medical centers that offer free, life-affirming counseling and medical services to women facing unexpected pregnancies. Hibbs Decl. ¶ 8. And Shepherd of the Hills Church counsels and helps women who have had abortions. Rutherford Decl. ¶ 12. The Churches frequently preach on the sanctity of life, encourage members to engage in pro-life causes, and provide other information and helpful resources to families contemplating—or healing from—abortion. *E.g.*, Lewis Decl. ¶¶ 11–12.

The Churches' religious beliefs also dictate that they care for their employees, which they do so in part by providing health insurance to their employees and families. SUMF ¶¶ 10–12. But because the Churches believe abortion is a sin, they cannot pay for or facilitate coverage for elective abortion in their employee healthcare plans. *Id.* ¶¶ 8–9, 13. Although DMHC had allowed religious organizations to obtain coverage consistent with their religious beliefs before, *id.* ¶¶ 25–

26, the DMHC director summarily announced in August 2014 that it was illegal for insurers to exclude or limit abortion coverage in their healthcare plans, *id.* ¶¶ 15–20. Since 2014, the Churches' health care plans have been forced to provide elective abortion coverage, in violation of the Churches' sincerely held religious beliefs. *Id.* ¶¶ 49–55.

B. The DMHC and the Knox-Keene Act.

Defendant Mary Watanabe is the director of the DMHC. The DMHC is the regulatory body responsible for enforcing California's Knox-Keene Health Care Service Plan Act of 1975 ("Knox-Keene Act") and its related regulations. Cal. Health & Safety Code § 1340, et seq.

Under the Knox-Keene Act, "health care service plans" must provide coverage for "all of the basic health care services included in subdivision (b) of Section 1345." Cal. Health & Safety Code § 1367(i) ("basic health care services" provision). As defined, "basic health care services" means: (1) physician services; (2) hospital inpatient services and ambulatory care services; (3) diagnostic laboratory and diagnostic and therapeutic radiologic services; (4) home health services; (5) preventive health services; (6) emergency healthcare services; and (7) hospice care. *Id.* § 1345(b). Under its regulatory authority, the DMHC has defined the scope of "basic health care services" to include services only "where medically necessary." Cal. Code Regs. tit. 28, § 1300.67.

Yet the "basic health care services" provision is riddled with exemptions. For example, the director of the DMHC "may, for good cause, by rule or order exempt a plan contract or any class of plan contracts from that requirement." Cal. Health & Safety Code § 1367(i). The director also may exempt "any class of persons or plan contracts" from any of the Act's requirements, including the "basic health care services" provision, if she believes such exemption is "in the public interest." *Id.* § 1343(b); *see also id.* § 1344(a) (director may "waive any requirement of any rule" if the director determines in her "discretion" that the requirement is not "in the public interest"). There are no rules, policies, or procedures governing this discretionary exemption authority. SUMF ¶ 31.

What's more, the State has categorically exempted certain healthcare plans from the Act's requirements, either by statute or regulation. *See, e.g.*, Cal. Health & Safety Code § 1343(e)

(exempting health care plans "directly operated by a bona fide public or private institution of higher learning"); Cal. Code Regs. tit. 28, § 1300.43 (exempting "small plans" administered solely by an employer that "does not have more than five subscribers").

C. Abortion advocates lobby the DMHC to eliminate religious accommodations.

Before August 2014, the DMHC allowed religious organizations to exclude or limit abortion coverage in their healthcare plans. SUMF ¶¶ 23–26. It approved a variety of abortion exclusions and limitations for religious organizations, including provisions that:

- Excluded coverage for "elective abortions" and "voluntary termination of pregnancy." Galus Decl. Ex. 8 at 2 (insurer deleting this approved plan language for religious employers in response to August 2014 letters); Galus Decl. Ex. 6 at Bates 1–2 (showing insurer offered these exclusions for religious employer groups);
- Excluded coverage for "voluntary abortion, except when medically necessary to save the mother's life," *see, e.g.*, Galus Decl. Ex. 8 at 4 (insurer deleting this approved plan language for religious employers in response to August 2014 letters);
- Excluded coverage for "elective terminations of pregnancy." Galus Decl. Ex. 7 at 1 (showing insurer had contracts with nine religious employer groups that used this language); and
- Limited coverage to abortions performed when, "due to an existing medical condition, the mother's life would be in jeopardy as a direct result of pregnancy," Galus Decl. Ex. 10 (letter from DMHC approving this plan language for Catholic hospital system).

But in November 2013, the DMHC was contacted by the National Health Law Program ("NHeLP"), an organization that promotes the expansion of abortion access and "develops strategies in partnership with state . . . policymakers" to eliminate religious "refusals."[1] SUMF ¶ 35. NHeLP told the DMHC that two Catholic universities—Loyola Marymount University ("LMU") and Santa Clara University ("SCU")—recently announced, "they were eliminating abortion coverage from their employee health plans." *Id.* NHeLP therefore requested a meeting with DMHC officials to "resolve these issues." *Id.* In response, the DMHC met with representatives of NHeLP, the ACLU, and Planned Parenthood, and began surveying insurers about the scope of abortion coverage in their healthcare plans. *Id.* ¶¶ 35–37. The survey

[1] National Health Law Program, *Reproductive & Sexual Health, Health Care Refusals*, https://perma.cc/VFV6-V3AD (last visited February 1, 2022).

confirmed that the DMHC had approved plans excluding or limiting abortion coverage for religious organizations. *Id*. ¶¶ 15–16, 23–26. In contrast, there was no evidence that the DMHC had approved such plans for secular, nonreligious employers. *Id.* ¶¶ 27–28.

While the DMHC was contemplating what to do, Planned Parenthood worried about the "DMHC's ability to find a solution" and warned that it was considering legislation to eliminate religious exemptions for abortion coverage. *Id.* ¶¶ 38–39. But Planned Parenthood said it would forgo that effort in exchange for an "administrative solution," provided the DMHC agreed to "not approve any further plans that exclude coverage for abortion," "clarif[y] that there is no such thing as an elective or voluntary abortion exclusion," "rescind [its] approval" of "plans that include an abortion exclusion," and "find a solution to fix the already approved plans being offered to employees of LMU for 2014 and SCU for 2015." *Id.* ¶ 40. The DMHC's parent agency—California Health and Human Services Agency—responded that it was "working with" the DMHC to "resolv[e] the problem." *Id.* ¶ 41.

D. The "Abortion Coverage Requirement" and its effect on the Churches.

DMHC's "solution," it turned out, was for it to say for the first time since the Act's passage that the Knox-Keene Act mandated elective abortion coverage. On August 22, 2014, the DMHC sent letters to seven health insurers informing them that the Knox-Keene Act required coverage for all legal abortion because the DMHC considered abortion a "basic health care service." *Id.* ¶ 15; *see also* Galus. Decl. Ex. 1. The letters stated that DMHC surveyed plan filings and determined that language limiting or excluding coverage for abortion was present in filings "covering a very small fraction of California health plan enrollees." SUMF ¶ 16; Galus. Decl., Ex. 1. The letters instructed the health insurers to "amend current health plan documents" to remove "any exclusion of coverage for 'voluntary' or 'elective' abortions and/or any limitation of coverage to only 'therapeutic' or 'medically necessary' abortions." SUMF ¶ 17; Galus. Decl. Ex. 1. The DMHC, through the letters, thus mandated that the health insurers immediately begin covering all legal abortions in plan contracts that limited or excluded elective abortion coverage. *Id.* ¶ 18.

To comply with the requirement, DMHC told the health insurers that they could "omit any mention of coverage for abortion services in health plan documents," which some insurers opted to do, such as Aetna and Blue Shield. *Id.* ¶ 19. That led to some of the Churches' health plans being silent about abortion services, but which, in reality, covered abortion services without ever informing the Churches of the change. All health insurers immediately complied with this Abortion Coverage Requirement, causing religious employers—like the Churches—to cover abortions in violation of their beliefs. *Id.* ¶ 21.

Because "the DMHC did not even suggest in the Letters that it would entertain any exemption requests, or establish a specific procedure to review any exemption requests," *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 752–53 (9th Cir. 2020), pro-life groups told DMHC that the coverage requirement violated federal law and urged the department to reverse course. The DMHC refused: it said it "carefully considered all relevant aspects of state and federal law in reaching its position" and would "not reverse its position on the scope of required abortion coverage . . . outlined in the letters [DMHC] sent to health plans on August 22, 2014." SUMF ¶ 44. This led to the Churches filing a complaint in September 2014 with the Office of Civil Rights of the federal Health and Human Services Agency, claiming DMHC had violated the Hyde-Weldon Amendment. *Id.* ¶ 45. But DMHC remained adamant; in December 2014 it told a U.S. Commissioner on Civil Rights that it had "carefully considered both state and federal law before reaching [the] position" set forth in the August 22, 2014, letters. *Id.* ¶ 46.

In disbelief over the mandate, the Churches asked their insurers to verify that they really had to cover elective abortions. *Id.* ¶¶ 47–48. The insurers responded that the DMHC had mandated elective abortion coverage for all plans and there were no religious exemptions. *Id.* ¶ 49. For example, Aetna explained it could no longer offer plans that excluded elective abortions due to "the 08-22-2014 California abortion mandate." *Id.* ¶ 50. Kaiser concurred: "[r]eligious employers have no exception [from the Abortion Coverage Requirement] so they, too, must cover elective abortions. This is not a decision over which we have discretion. DMHC's directive was clear and we are obliged to comply." *Id.* ¶ 51; *see also* Lewis Decl. ¶ 21 (Kaiser explaining it

could no longer remove elective abortion coverage from Foothill Church's healthcare plan, even though Kaiser previously agreed to do so). So the Churches directly pleaded with DMHC and sent a letter to the Director asking for a religious exemption. *Id*. ¶ 55. But that too was denied. *Id.*

In sum, because of DMHC's Abortion Coverage Requirement, the Churches cannot obtain a health insurance plan consistent with their religious beliefs about abortion. *Id.* ¶ 53.

E. Procedural History.

The Churches filed their first complaint over six years ago alleging DMHC violated the Free Exercise, Free Speech, Equal Protection, and Establishment Clauses of the U.S. Constitution. ECF No. 1. The Court granted DMHC's first motion to dismiss. ECF No. 39. Although the Court dismissed the free speech and establishment claims without leave to amend, it gave the Churches leave to amend their complaint with respect to the free exercise and equal protection claims. *Id*. at 22. The Churches amended, but the Court again dismissed the Churches' free exercise and equal protection claims without prejudice. ECF No. 68. The Churches filed their second amended complaint in October 2017. ECF No. 72. The second amended complaint sought, among other things: (1) a declaration that application of the Abortion Coverage Requirement to the Churches is unlawful; (2) a permanent injunction requiring DMHC not to enforce the Abortion Coverage Requirement against the Churches and similar religious organizations; (3) an award of costs and attorney's fees. *Id*. at 31–32.

DMHC again moved to dismiss. ECF No. 75. The Court granted that motion without leave to amend, *id.* at 12, holding that DMHC's Abortion Coverage Requirement was neutral and generally applicable as alleged, and therefore only had to satisfy rational basis review under the Free Exercise Clause, *id.* at 7–10. Similarly, the Court dismissed the equal protection claim for lack of "discriminatory intent." *Id.* at 11.

The Churches appealed the dismissal of their Free Exercise, Equal Protection, and Establishment Clause claims. ECF No. 88. The Ninth Circuit decided to hold the case until the Supreme Court issued its decision in *Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104 (2020) (No. 19-123). *See* Order at 1, *Foothill Church v. Rouillard*, No. 19-15658 (9th Cir. Nov 24, 2020). After *Fulton* came down in June 2021, the Ninth Circuit "vacate[d] the district

court's rulings on the Free Exercise and Equal Protection claims and remand[ed] for further consideration in light of *Fulton*." *Foothill Church v. Watanabe*, 3 F.4th 1201 (9th Cir. 2021) (citation omitted); ECF No. 93; *see also Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021). It also affirmed the dismissal of the Establishment Clause claim in a separately filed memorandum opinion. *See Foothill Church v. Watanabe,* 854 F. App'x 174 (9th Cir. 2021). The Ninth Circuit's Mandate issued August 10, 2021. ECF No. 95.

Judge Bress dissented from the court's vacate-and-remand order because it did "not go nearly far enough—or move nearly fast enough—to address the significant constitutional violation that the churches plead." *Foothill*, 3 F.4th at 1201–02 (Bress, J., dissenting). In his view, "the Director's broad discretionary authority to issue individualized exemptions from the abortion coverage obligation means that [the court] must apply strict scrutiny to California's requirement that the churches' health plans cover elective abortions." *Id.* at 1202. Expressing concern that "California has been giving the churches the run-around in an area where great sensitivity is warranted," Judge Bress would have held that the Churches "clearly stated a claim for relief under the Constitution's Free Exercise and Equal Protection Clauses." *Id*. at 1204.

LEGAL STANDARD

Summary judgment is required when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The party moving for summary judgment bears the initial burden of identifying the evidence in the record that shows the absence of any genuine issue of material fact. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Once met, the nonmoving party must then put forth "specific facts showing that there is a genuine issue for trial." *Id.* (emphasis deleted). When the case involves a "mixed question of fact and law and the only disputes relate to the legal significance of undisputed facts, the controversy collapses into a question of law suitable to disposition on summary judgment." *Thrifty Oil Co. v. Bank of Am. Nat. Tr. & Sav. Ass'n,* 322 F.3d 1039, 1046 (9th Cir. 2003).

ARGUMENT

I. The Churches are entitled to summary judgment on their free exercise claim.

A. The Abortion Coverage Requirement violates the Free Exercise Clause because it triggers—and fails—strict scrutiny under *Fulton*.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," meaning it "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *accord Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876–77 (2021). The undisputed material facts prove the following: that the State has burdened—and continues to burden—the Churches' religious exercise by forcing them to provide elective abortion coverage in their healthcare plans; that the Abortion Coverage Requirement is not generally applicable or neutral; that the State does not have a compelling interest in applying the coverage requirement to the Churches' plans; and that enforcing the coverage requirement against the Churches is not the least restrictive way to achieve any purported interest.

1. The Abortion Coverage Requirement substantially burdens the Churches' religious exercise.

The State cannot genuinely dispute that its Abortion Coverage Requirement substantially burdens the Churches' religious exercise. The State imposes a substantial burden on religion when it "coerce[s] [observers] into acting contrary to their religious beliefs," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), or when it exerts "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). This is so even when the "compulsion may be indirect." *Thomas*, 450 U.S. at 718.

The Churches believe and teach that abortion is the intentional destruction of innocent human life, conflicts with the Bible's teachings about the sanctity of human life, violates the Bible's command against murder, and is sin. SUMF ¶¶ 6–7. So they cannot provide health insurance coverage for elective abortion. *Id.* ¶¶ 8–9, 13. But the Abortion Coverage Requirement forces them to do exactly that. That unquestionably burdens the Churches' religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 726 (2014) (contraceptive coverage mandate

substantially burdened employers' religious exercise); *see also Skyline*, 968 F.3d at 748 (church "suffered an injury in fact" when the DMHC mandated "immediate[]" coverage of elective abortion in violation of the church's beliefs).

2. The Abortion Coverage Requirement triggers strict scrutiny because it is not generally applicable.

The substantial burden established, the Abortion Coverage Requirement must satisfy strict scrutiny if it is not "neutral" or "generally applicable." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990). While the Coverage Requirement fails to meet either standard, it is "more straightforward to resolve this case under the rubric of general applicability." *Fulton*, 141 S. Ct. at 1877. As the Supreme Court recently explained, a law is not generally applicable if it provides "a mechanism for individualized exemptions" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* The Abortion Coverage Requirement does both.

i. The Abortion Coverage Requirement includes a system of individualized exemptions.

The "key feature" of the Abortion Coverage Requirement "that takes it outside of rational basis review and places it squarely into strict scrutiny is the Director's broad discretion to grant exemptions from the Knox-Keene Act's 'basic health care services' requirement." *Foothill Church v. Watanabe*, 3 F.4th 1201, 1204 (9th Cir. 2021) (Bress, J., dissenting).

In *Fulton,* the Supreme Court reaffirmed that the government may not withhold a religious exemption without compelling reason "where the State has in place a system of individual exemptions." 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). There, the City of Philadelphia had refused to contract with Catholic Social Services (CSS) for foster care services unless the organization agreed to certify same-sex couples as foster parents in violation of its beliefs. *Id.* at 1875–76. In so doing, the city invoked the contract's nondiscrimination provision, claiming that it categorically prohibited CSS from declining to certify same-sex couples based on its religious beliefs. *Id.* at 1875. But exceptions from the nondiscrimination provision were in fact available at the city's "sole discretion." *Id.* at 1878. That discretion, the Court held, created "a system of individual exemptions," making the nondiscrimination provision not generally applicable. *Id.* And

it did not matter if the city had ever granted an individualized exemption. The Court explained that the mere "*creation* of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Id*. at 1879 (emphasis added).

The same is true here. Like the foster-care contract in *Fulton*, the Knox-Keene Act creates a "system of individual exemptions" that allows the DMHC to grant exemptions from the Abortion Coverage Requirement for essentially any reason. It does so in at least three separate ways.

First, California Health & Safety Code § 1367(i) allows the DMHC to exempt any plan contract or class of plan contracts from the "basic health care services" provision—and thus the Abortion Coverage Requirement—for "good cause." Second, § 1343(b) allows the DMHC to exempt "any class of persons or plan contracts" from the entire Knox-Keene Act if such exemption is deemed to be "in the public interest." Third, § 1344(a) allows the DMHC to waive any requirement of any rule, including the Abortion Coverage Requirement, if it believes that would be "in the public interest."

Just one of these exemptions overcomes any assertion of general applicability. All three, considered together, obliterate it. *See, e.g.*, *Smith*, 494 U.S. at 884 ("good cause" standard "create[s] a mechanism for individualized exemptions"); *Fulton*, 141 S. Ct. at 1877 ("good cause" standard destroys general applicability because it "permit[s] the government to grant exemptions based on the circumstances underlying each application"); *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 384–85 (1980) (phrases such as "in the public interest" and "for good cause" are "vague" and give agency officials "broad discretion" that is "often abused").

What's more, the DMHC's director has delegated this unbridled exemption authority to individual staff members within the department's Office of Plan Licensing, without providing any rules, policies, or procedures for when and how to exercise this incredibly broad and important power. SUMF ¶¶ 30–31. So individual staff members must "consider the particular reasons," *Fulton*, 141 S. Ct. at 1877, for any requested exemption and then unilaterally determine whether

those reasons constitute "good cause" or are "in the public interest," Cal. Health & Safety Code §§ 1367(i), 1343(b), 1344(a). And, of course, what may be "good cause" or "in the public interest" for one staff member may not be for another.

In fact, a staff member within the Office of Plan Licensing has exercised this discretionary authority, unilaterally approving a plan in October 2015 that excluded elective abortions except for rape and incest and to save the life of the mother. SUMF ¶ 33. But that plan does not satisfy the Churches' religious beliefs about abortion. *Id.* ¶ 34. And even though exemptions can be (and have been) awarded for virtually any reason, the DMHC refuses to lift a finger to accommodate the Churches.

Because the DMHC may grant exemptions for "good cause" or if "in the public interest," "there is no doubt" the Abortion Coverage Requirement lacks general applicability and "must be reviewed under strict scrutiny." *Foothill*, 3 F.4th at 1205; *see also Fulton*, 141 S. Ct. at 1879.

ii. There are categorical exemptions from the Abortion Coverage Requirement.

A law also "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. One exemption is enough: "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.*; *accord Fulton*, 141 S. Ct. at 1877.

The only interests identified by the State in support of its Abortion Coverage Requirement are "ensuring employers provide basic health care services" and "protecting a woman's fundamental right under California law to obtain an abortion." ECF No. 75 at 17. But the Abortion Coverage Requirement is "underinclusive for those ends." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). While the State pursues these asserted interests against the Churches, it does not do so "across-the-board." *Smith*, 494 U.S. at 884.

Besides the individualized exemption authority detailed above, the Knox-Keene Act also includes categorical exemptions from its requirements (including the Abortion Coverage Requirement) for secular reasons. For example, healthcare plans operated by higher learning educational institutions need not comply with any of the Act's requirements. Cal. Health & Safety Code § 1343(e)(2). Nor must "small plans" administered by an employer with no more than five subscribers. Cal. Code Regs. tit. 28, § 1300.43.

So the State treats some healthcare plans, such as those operated by educational institutions and small employers, more favorably than the Churches' plans. These plans are "comparable" because the "asserted government interest[s]"—ensuring healthcare plans provide coverage for all basic health care services and protecting employees' abortion rights—apply equally to *all* plans. *Tandon,* 141 S. Ct. at 1296. Put another way, the exempted plans are "comparable" to the Churches' plans for the general applicability analysis because the government's purported interests in ensuring elective abortion coverage applies even when an educational institution operates a plan or a small employer administers a plan. Because exempting those plans "endangers" the State's purported interests to "a similar or greater degree" than would accommodating the Churches' beliefs, strict scrutiny applies. *Lukumi*, 508 U.S. at 543; *see also Tandon*, 141 S. Ct. at 1296–97 (California's COVID gathering restrictions were not generally applicable where three households could not gather for in-home religious services but could gather at hair salons, retail stores, and personal care services because those secular activities did not "pose a lesser risk of transmission" than the in-home religious services).

3. The Abortion Coverage Requirement also triggers strict scrutiny because it is not neutral.

While it is "more straightforward" to decide this case based on the lack of general applicability, *Fulton*, 141 S. Ct. at 1877, strict scrutiny also applies because the Abortion Coverage Requirement is not neutral.

The "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* A lack of neutrality can be "masked, as well as overt," so courts must scrutinize the law or regulation for even "subtle

departures from neutrality." *Lukumi*, 508 U.S. at 534. Courts therefore must "survey meticulously" the totality of the evidence, analyzing "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements by members of the decision-making body." *Id*. at 534, 540. A "slight suspicion" of hostility is enough to trigger strict scrutiny. *Id*. at 547. Here, the lack of neutrality manifests itself in at least four ways.

First, the Abortion Coverage Requirement's effect in "real operation," *Lukumi*, 508 U.S. at 535, fell only on religious organizations—something the DMHC knew would be the case before issuing the Coverage Requirement in August 2014. Indeed, because of its "survey" of existing plan documents, the DMHC learned that plans excluding or limiting elective abortion coverage were made available only to religious organizations. SUMF ¶¶ 22–28. The actual plan language not only made that explicit, *e.g.*, Galus Decl. Exs. 6, 7, but the DMHC specifically asked the insurers which type of employers had bought plans restricting abortion coverage. Their answers were loud and clear: only religious organizations. Galus Decl. Ex. 6 (purchased only by "religious employer[s]"); Galus Decl. Ex. 7 (same); Galus Decl. Ex. 3 (purchased only by "religious or religious-affiliated organizations"). The DMHC did not receive any information that *secular, nonreligious* employers had purchased those plans. SUMF ¶ 27. But it still issued the coverage requirement anyway.

Second, the Abortion Coverage Requirement cannot be deemed neutral when the DMHC admittedly issued the mandate in direct response to demands that it prevent religious universities from excluding or limiting abortion coverage in their plans. *See supra* pp. 4–5. That is religious targeting, plain and simple. And government action that "target[s] religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533.

Third, the DMHC intentionally applied the Abortion Coverage Requirement to "religious employers," even though it conducted its own legal analysis—before August 22, 2014—that concluded "religious employers" *could* legally restrict abortion coverage in their health plans. SUMF ¶ 42. By telling insurers they could not through the August 2014 letters, the DMHC

crafted a "religious gerrymander"—"an impermissible attempt to target [religious employers] and their religious practices." *Lukumi*, 508 U.S. at 535 (cleaned up).

Fourth, the DMHC has played favorites by exempting organizations with different religious beliefs: those that sought to exclude abortion coverage except in the cases of rape, incest, or to save the life of the mother. SUMF ¶ 33. The DMHC has thus engaged in "covert suppression of *particular* religious beliefs." *Lukumi*, 508 U.S. at 534 (emphasis added and citation omitted).

4. The Abortion Coverage Requirement fails strict scrutiny.

Because the Abortion Coverage Requirement includes a mechanism for individualized exemptions, contains multiple categorical exemptions, and is not neutral towards religion, it must satisfy strict scrutiny under the Free Exercise Clause. It can do so "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546). It fails both prongs.

If the State "can achieve its interests in a manner that does not burden religion, it must do so." *Id.* Generalized, or "broadly formulated," interests are insufficient. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 420 (2006). Rather, the State must prove that it has a compelling interest in applying the Abortion Coverage Requirement *to the Churches*—"the particular claimant[s] whose sincere exercise of religion is being substantially burdened." *Id*. The State must therefore establish that it has a compelling interest in enforcing the coverage requirement against the Churches' plans, not that it has a compelling interest in elective abortion coverage generally. *Fulton*, 141 S. Ct. at 1881.

Yet there is simply no interest, let alone a compelling one, in forcing the Churches to pay for an employee's elective abortion—particularly when all employees share the Churches' beliefs. No court has held as much. To the contrary, the Supreme Court has often held that the government does not have a compelling interest in enforcing a law or regulation that would force a religious institution to violate its religious beliefs or prohibit it from following those beliefs. *E.g.*, *Fulton*, 141 S. Ct. at 1882 (no compelling interest in forcing a faith-based foster-care provider to certify same-sex couples in violation of its religious beliefs); *O Centro*, 546 U.S. at

439 (no compelling interest in barring a religious group's sacramental use of hoasca). So whatever interests the State might have in ensuring elective abortion coverage, they are not strong enough to overcome a church's right to operate according to its beliefs.

Even the DMHC seems to agree: it has not asserted any "compelling" interest in enforcing the coverage requirement against the Churches. *See* ECF No. 75 at 17; *accord Foothill*, 3 F.4th at 1206 (Bress, J., dissenting) (the State "has never identified" a compelling interest).

Nor is applying the Abortion Coverage Requirement to the Churches narrowly tailored to achieve any purported compelling interest. It fails this prong for at least three reasons. First, as explained above, state statutes and regulations already exempt entire categories of plans from the requirement and allow even more exemptions on an individualized basis. This "system of exceptions under the [Act] undermines the [State's] contention that its [coverage requirement] can brook no departures." *Fulton*, 141 S. Ct. at 1882. Second, the coverage requirement cannot be narrowly tailored when the State has crafted less restrictive alternatives—by exempting religious employers—in the contraceptive mandate context. *See* Cal. Health & Safety Code § 1367.25(c). The State could simply do the same here. Third, the State historically accommodated religious organizations by approving healthcare plans that excluded elective abortion coverage, *see* SUMF ¶¶ 25–26, and other states continue to provide similar religious exemptions, *e.g.*, Me. Rev. Stat. tit. 24-A, § 4320-M(4) (exempting religious employers from Maine's abortion coverage requirement). The fact that religious accommodations were historically available in California and are currently available in sister jurisdictions demonstrate a lack of narrow tailoring. *Ramirez v. Collier*, No. 21-5592, 2022 WL 867311, at *10 (U.S. Mar. 24, 2022) (cleaned up) (history and practice in other jurisdictions inform narrow tailoring analysis).

B. The Abortion Coverage Requirement violates the church autonomy doctrine.

The Abortion Coverage Requirement also violates the First Amendment because it impermissibly interferes with the Churches' autonomy. The First Amendment guarantees houses of worship the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). The right to church autonomy is separate

and apart from traditional free exercise claims and is not governed by *Smith's* neutral and generally applicable standard. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). Whereas "*Smith* involved government regulation of only outward physical acts," church autonomy concerns "government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* The right thus precludes governmental regulation of "church administration," *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 710 (1976), "internal organization," *id.* at 713, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107.

At bottom the Abortion Coverage Requirement tells the Churches how they must spend their funds: they must use parishioners' sacrificial tithes and offerings to subsidize elective abortion coverage for Church employees. This is so even though the Churches restrict employment to those who agree with the Churches' beliefs about the sanctity of life and abortion. SUMF ¶ 14. Part of the Churches' faith and mission is to preach and spread the teachings of the Holy Bible, which includes teachings about the sanctity of life. *Id.* ¶¶ 4–6. A church cannot very well claim abortion is sin on Sunday, and then cut a check for its insurance plan that provides abortion coverage on Monday. By forcing the Churches to spend their funds to subsidize abortion, the DMHC decides for the Churches how to operate and what internal decisions to make about employee relationships. *See E.E.O.C. v. Townley Eng'g & Mfg. Co*., 859 F.2d 610, 618 n.13 (9th Cir. 1988) (noting the First Amendment limits the government's "ability to regulate the employment relationships within churches and similar organizations"). It cannot be constitutionally permissible for the DMHC to commandeer these private core decisions.

The Churches simply desire to not fund private conduct by its employees that violate their fundamental teachings. Surely, the First Amendment safeguards the Churches' ability to make such administrative decisions that have absolutely no effect on anyone outside the Church. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2406 (2020) (Ginsburg, J., dissenting) ("exemption granted to houses of worship" from the Affordable Care Act's contraceptive mandate "was justified on First Amendment grounds").

II. The Abortion Coverage Requirement violates the Equal Protection Clause.

The Equal Protection Clause requires the government to apply laws in a nondiscriminatory manner and to treat different classes of people the same. *See Freeman v. City of Santa Ana,* 68 F.3d 1180, 1187 (9th Cir. 1995). If the government interferes with a fundamental right or if it discriminates against a suspect class, strict scrutiny applies. *Kadrmas v. Dickinson Pub. Sch*., 487 U.S. 450, 457–58 (1988). A suspect class is one based on "inherently suspect distinctions, such as . . . religion." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Classifications based on a suspect class or that infringe fundamental rights are "presumptively invidious." *Plyler v. Doe,* 457 U.S. 202, 216–17 (1982).

Here, the Abortion Coverage Requirement violates the Equal Protection Clause for many of the same reasons explained above. It not only violates the Churches' fundamental right to the free exercise of religion, but it also has not been applied equally. In fact, the DMHC has refused to accommodate the Churches' beliefs but has approved plan language for different beliefs. SUMF ¶¶ 33–34. The DMHC has thus impermissibly drawn lines based on religious beliefs and its unequal treatment cannot survive strict scrutiny for the same reasons as above.

CONCLUSION

For the foregoing reasons, the Court should: (1) grant summary judgment for the Churches; (2) declare that the Abortion Coverage Requirement—which mandates the Churches and other religious organizations cover elective abortions in their employee healthcare plans—violates the Free Exercise and Equal Protection Clauses; (3) permanently enjoin Defendant from enforcing the Abortion Coverage Requirement to prevent the Churches and other religious organizations from obtaining a healthcare plan that comports with their religious beliefs; and (4) award costs and attorney's fees.

Dated: April 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, service of the foregoing Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment was made by way of the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 1, 2022

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