18-55451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SKYLINE WESLEYAN CHURCH,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE; MICHELLE ROUILLARD, in her official capacity as Director of the California Department of Managed Health Care,

Defendants and Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 3:16-cv-00501-CAB-DHB
Hon. Cathy Ann Bencivengo, Judge

ANSWERING BRIEF

XAVIER BECERRA
Attorney General of California
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
NIROMI W. PFEIFFER
Supervising Deputy Attorney General
KARLI EISENBERG, State Bar No. 281923
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7913
Fax: (916) 324-5567
Email: Karli.Eisenberg@doj.ca.gov
Attorneys for Defendants/Appellees California Department of Managed Health Care, et al.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

REGULATONS

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

INTRODUCTION

The Department of Managed Health Care (DMHC or the Department) does not regulate employers, including churches, or other purchasers of health care service plans (health plans). DMHC only regulates certain types of health plans, and when it learned that it had erroneously approved health plan products that violated California law, it notified those seven health plans of this error on August 22, 2014.[1]

The August 22, 2014 letters to seven licensed health plans stated that, under California law, health plans cannot discriminate against lawful abortion coverage. The Director's letters explained the law and required these plans to amend their documents. No plan objected to the Director's letters, and all submitted amended documents complying with state law.

[1] Consistent with state law, the term "plan" as used here refers to the company that offers health coverage, as distinct from one or more "products" covering a specific package of benefits and services that a plan may offer to purchasers. The term "plan" is defined under the Knox-Keene Act as "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost of those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." Cal. Health & Safety Code § 1345(f)(1). Under federal regulations promulgated under the Public Health Services Act, the entity that offers the coverage would be called a "health insurance issuer." 45 C.F.R. § 144.103. What is referred to here and under state law as a product—the specific package of benefits and services covered under a contract with a purchaser—would be referred to as a "plan" under these federal regulations. *See id.*

One health plan has since obtained an exemption from DMHC to offer a product that limits abortion coverage exclusively to religious employers.

Over a year after the seven letters issued, appellant brought the underlying lawsuit. Appellant does not challenge the state law underlying the August 22, 2014 letters. Rather, appellant asserts that DMHC's grant of a legally permissible exemption to the abortion coverage requirements identified in the letters violates its Constitutional rights. This exemption accommodates religious opposition to abortion, consistent with federal law, by allowing a health plan to offer coverage to qualifying "religious employers" that excludes abortion coverage except in the cases of rape, incest, and when the woman's life is in danger. To date, no health plan has requested approval of a product that appellant wishes to provide to its employees that would exclude abortion coverage in all instances, including pregnancies resulting from rape or incest; the only exception being to save the life of a woman. And, DMHC cannot force a private health plan to provide such a product for appellant.

This Court should affirm the district court's order granting summary judgment to the Department. First, appellant's claims are not constitutionally ripe because they rely on subsequent events that are "too abstract and hypothetical." Excerpts of Record (ER) at 9. Second,

appellant's claims are not prudentially ripe because (a) the "evidentiary record makes it abundantly clear that no health plan has approached the DMHC seeking an exemption that would satisfy [appellant's] beliefs" (ER 11) and (b) there is "no evidence" that deferring review of appellant's claims will result in "real hardship" (ER 14). Third, appellant lacks standing to pursue its claims because appellant mustered no evidence that a health plan would offer the type of product it wants, so that a favorable decision from the Court is unlikely to redress its alleged injury. ER 15. Moreover, appellant has several health plan options, outside of a DMHC-regulated health plan. And, appellant has not asked its health plan to seek an exemption from DMHC.

Even if this Court concludes that appellant's claims are ripe and appellant has standing, the general rule is to remand for the district court to consider the remaining issues and determine whether the matter can be resolved by summary judgment or whether there are disputed facts. To the extent that this Court reaches appellant's Constitutional claim, appellant has insufficient evidence to demonstrate that, as a matter of law, DMHC violated the Free Exercise Clause. Appellant failed to demonstrate that the object of the Director's letters was anything but the permissible and important one of fulfilling the DMHC's statutory mandate of ensuring health plan compliance

with California law. For these reasons, as set forth more fully below, the Court should affirm summary judgment in favor of the Department.

JURISDICTIONAL STATEMENT

Appellees agree that this Court has jurisdiction.

ISSUES PRESENTED FOR REVIEW

(1) Whether the district court properly concluded, at summary judgment, that appellant had not demonstrated that its complaint was constitutionally ripe.

(2) Whether the district court properly concluded, at summary judgment, that appellant had not demonstrated that its complaint was prudentially ripe.

(3) Whether the district court properly concluded, at summary judgment, that appellant had not demonstrated that it had standing.

(4) Whether this Court should follow the "general rule" and remand to allow the district court to consider in the first instance the merits of appellant's Free Exercise claim.

(5) Whether, based on the factual record, appellant demonstrated that there are no genuine issues of material fact as to its Free Exercise claim and whether it has shown that it is entitled to summary judgment as a matter of law.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

A. Health Coverage Options for Employers and DMHC's Regulatory Authority

California employers, including appellant, have a number of options regarding the provision of health coverage for their employees, only some of which are subject to regulation by DMHC, or any state entity.

In California, two state entities, the DMHC and the California Department of Insurance (CDI), oversee the health coverage market. DMHC regulates "health care service plans" (health plans)[2] under the Knox-Keene Act. Cal. Health & Safety Code § 1340 *et seq.*[3] Insurers, on the other hand, "are subject to regulation by [CDI]" under the provisions of the Insurance Code. *Rea*, 226 Cal. App. 4th at 1215; Cal. Ins. Code §§ 740-742.1. The Knox-Keene Act does not apply to entities regulated by CDI.

---

[2] The Knox-Keene Act defines a "health care service plan" as a person or entity that arranges for health care services for subscribers or enrollees for a periodic charge. Cal. Health & Safety Code § 1345(f). Pursuant to this definition, DMHC regulates and oversees health plans, including those that offer health maintenance organizations, as well as "preferred provider" or "exclusive provider" arrangements. *See Rea v. Blue Shield of Cal.*, 226 Cal. App. 4th 1209, 1215 (2014).

[3] Unless otherwise noted, all statutory references are to the California Health & Safety Code.

Cal. Ins. Code §§ 740(g), 742(b); Cal. Health & Safety Code §§ 1343(a)(1), 1349.

Further, "self-funded" or "self-insured" employer health plans are not regulated by the State at all, but instead, in most cases, are regulated by the U.S. Department of Labor under the Employee Retirement Income Security Act of 1974 (ERISA). *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); 29 U.S.C. § 1003(a). Self-funded health plans subject to ERISA need not comply with most state health coverage requirements, including those at issue in this case. *See D.C. v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992). And a self-funded plan sponsored by a church could also be exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2).[4]

B. The Director's Authority and Responsibilities

DMHC is charged with executing the Knox-Keene Act "to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees." § 1341(a). The purpose of the Knox–Keene Act is "to promote the delivery and the quality

[4] Approximately 5.7 million Californians are enrolled in self-funded health plans. For Millions of Insured Californians, State Health Laws Don't Apply, California Health Line, *available at* https://californiahealthline.org/news/for-millions-of-insured-californians-state-health-laws-dont-apply/.

of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan." § 1342. There are 78 full-service health plans, with 26 million enrollees in California.[5]

The Knox-Keene Act requires that health plans "provide to subscribers and enrollees all of the basic health care services included in subdivision (b) of Section 1345." § 1367(i). Section 1345 delineates seven broad categories of services that health plans must offer, including:

(1) Physician Services, including consultation and referral.

(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 health care services. . . .

(7) Hospice care pursuant to Section 1368.2.

[5] Department of Managed Health Care, https://wpso.dmhc.ca.gov/hpsearch/viewall.aspx; https://wpso.dmhc.ca.gov/dashboard/MarketPlace.aspx.

§ 1345(b)(1)-(7). The Act authorizes the Director of DMHC to define the "scope" of required basic health care services. § 1367(i); *Rea*, 226 Cal. App. 4th at 1215.

DMHC promulgated regulations pursuant to this authority, and among other things, defined "physician services" to include services provided by licensed physicians, and "preventive health services" to include "a variety of voluntary family planning services." Cal. Code Regs. tit. 28, § 1300.67(a), (f).[6]

C. California Law Protects the Right to Procreative Choice

In 1972, California voters amended the state Constitution to include a right of privacy among the inalienable rights protected by article I, section 1. *Chico Feminist Women's Health Cent. v. Butte Glen Med. Soc'y*, 557 F. Supp. 1190, 1201-1202 (E.D. Cal. 1983) (citing *White v. Davis*, 13 Cal. 3d 757 (1975)). Under article I, section 1, "all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or

[6] The Legislature logically did not require that every one of the thousands of different medical procedures falling under "basic health care services" be specifically identified in regulation. SER 70-71. As a practical matter, the regulatory process simply cannot keep pace with medical developments. SER 71. For these reasons, as instructed by the Legislature, the law must set forth basic health care services as a broad "scope" of categories that defer to medical professionals' judgment and best and current medical practices. § 1367(i).

not to bear a child." *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 262 (1981).

Under state law, private parties cannot interfere with the right to procreative choice under article I, section 1. *Chico*, 557 Supp. at 1202-03; *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 20 (1994). In addition, the Constitutional right of a woman to decide whether to bear a child or terminate a pregnancy, guaranteed under article I, section 1, is protected from State interference. *Chico*, 557 F. Supp. at 1202; *Myers*, 29 Cal. 3d at 284.

Echoing these constitutional protections, the Reproductive Privacy Act of 2002 (RPA) declares as state public policy that "[e]very woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion." § 123462(b). The RPA expressly provides that: "The state may not deny or interfere with a woman's right to choose or obtain an abortion . . . ." § 123466.

//

//

//

II. FACTUAL AND PROCEDURAL BACKGROUND

A. As a Result of Media Inquiries Regarding Employers Restricting Access to Abortion Coverage from Employee Health Plans, DMHC Conducted a Legal Analysis to Determine What is Required Under California Law

DMHC was first alerted to the abortion coverage issue in October 2013 when Santa Clara University publicized that it was excluding abortion coverage from employee health plans. This issue quickly hit U.S. news outlets and starting in October 2013, DMHC began receiving media inquiries. SER 88-89; SER 62-66, 53-55.[7] DMHC also received consumer inquiries, including from a professor at Santa Clara. *See, e.g.*, SER 58-61, 56-57, 51-52.

In November 2013, after this issue was publicized and DMHC had begun its legal research, stakeholder groups, including the National Health Law Program (NHeLP), ACLU, and Planned Parenthood, also began

[7] *See, e.g.*, CD 78 at 4 (Dec. 22, 2017) (citing Seipel, Tracy, Santa Clara University President Triggers Abortion Uproar, Mercury News.com (Oct. 9, 2013), *available at* https://www.mercurynews.com/2013/10/09/santa-clara-university-president-triggers-abortion-uproar/; Gordon, Larry, Santa Clara University Drops Insurance for Elective Abortions, LA Times (Oct. 10, 2013), available at http://articles.latimes.com/2013/oct/10/local/la-me-ln-abortion-university-20131010).

contacting DMHC requesting meetings.[8] ER 312; *See also* ER 306, 318, SER 84-87; ER 253 (general topic at meetings was on abortion coverage and whether health plans were required to provide it); ER 254-255 (discussed abortion coverage); SER 116 (meetings discussed general topic of pregnancy termination).

B. The Director Issued Letters to Seven Health Plans, Reflecting What is Required by California Law

After reviewing relevant law and plan documents, DMHC concluded that it had "erroneously approved or did not object to [] discriminatory language" as it pertained to abortion restrictions. ER 420. Accordingly, the Director, on August 22, 2014, sent letters to the seven health plans that had such restrictions "to remind plans that the [Knox-Keene Act] requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally." ER 420-33. The health plans receiving the letters had previously provided coverage for some abortions, but their

[8] Notably, these stakeholder groups, including Planned Parenthood, which is a Medi-Cal provider, and their lobbyists, routinely contact California governmental entities that regulate health care issues. SER 92-94, 117-120); SER 114; *see also* SER 96-99.

coverage documents contained abortion coverage "limitations or exclusions" that were discriminatory and incompatible with protections under state law. *Id*. The Director noted that limitations such as "any exclusion of coverage for 'voluntary' or 'elective' abortions and/or any limitation of coverage to 'therapeutic' or 'medically necessary' abortions" are "inconsistent with the Knox-Keene Act and the California Constitution." *Id.* The letters further advised that exclusions and limitations on pregnancy termination services are incompatible with reproductive privacy and choice rights established under the RPA and the California Constitution. *Id*. Accordingly, the letters called on each recipient health plan to review and amend current health plan documents to ensure that they complied with the law. *Id.* at 421.[9]

The seven health plans at issue each removed the improper restrictions promptly and without objection. SER 71; ER 402.

//

//

[9] The letters noted that, "[a]lthough health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion." ER 420 n.3.

C. One Health Plan Requested an Exemption for "Religious Employers," Which DMHC Granted

Following issuance of the letters, one plan, Anthem Blue Cross, sought an exemption from DMHC. It requested approval of a contract limiting abortion coverage for "religious employers" as defined in state law that would, consistent with federal law, exclude abortion coverage except in the cases of rape, incest, or where the woman's life is in danger. SER 71. In October 2015, the Director granted Anthem's exemption request in full. *Id.*[10]

To obtain an exemption, it is the responsibility of a health plan to request one. §§ 1343, 1344, 1367(i). All health plans know that it is

[10] Appellant mischaracterizes the testimony of Ms. Wong. AOB 19. Ms. Wong explained that sometimes health plans contacted DMHC to inquire as to what type of language should be included in their filings. ER 188. In response to such an inquiry, Ms. Wong would typically point to sample language in an effort to aid the regulated entity. ER 188-189. However, Ms. Wong emphasized that health plans can submit "whatever" filings that they wanted and each would be reviewed on a case-by-case basis. ER 188-189.

In this case, Anthem requested sample language for their exemption from the August 2014 letters. ER 188. In response, Ms. Wong informed Anthem that DMHC had "been in conversations with the federal government regarding the multistate plan" and that Anthem could copy the language in the multistate plan that had already been approved. *Id.* Neither Anthem nor any other health plan "mention[ed] or ask[ed] about other language." ER 189. Ms. Wong further explained that *all* health plans are aware of the possibility of seeking an exemption. SER 126-27.

possible to seek an exemption under the Knox-Keene Act. SER 126-27. Yet, no health plan has sought an exemption for a product that excludes all abortion coverage (including in cases of rape and incest), where the only exception is to protect the life of the woman. SER 83. There is also no evidence that any health plan offered such a product, even before August 2014. Although some health plans had language indicating that they did not cover "elective" or "voluntary" abortions, those terms were undefined, and there is no evidence in the record to indicate that such language did not cover abortion unless the life of the woman was at risk.

DMHC's Director expressly left open the possibility that a product that satisfies appellant's religious beliefs could be approved, if requested by a plan, noting that she would need to first discuss it with counsel. ER 219-220.

D. Appellant and its Actions from 2014-2016

Appellant is a Christian church. ER 400. Appellant learned of the Director's August 22, 2014 letters when it was contacted by its current counsel Alliance Defending Freedom. SER 163. Upon learning about the letters, appellant did not file a lawsuit. Instead, in October 2014, appellant filed a complaint with the U.S. Department of Health and Human Services (HHS). ER 408. On June 21, 2016, HHS issued a letter, explaining that it

found no violation of federal law stemming from DMHC's issuance of the August 22, 2014 letter. SER 45-40; 83 Fed. Reg. 3880, 3890 (Jan. 26, 2018).[11]

At no point has appellant properly attempted to avail itself of the "religious employer" exemption. Although the appellant's complaint acknowledges the existence of the current "religious employer" exemption, appellant's agents, responsible for selecting health benefits for appellant's employees, were unaware of this exemption. *See*, *e.g.*, SER 143, 164-65. Appellant's "person most knowledgeable" regarding employee benefits testified that she was not sure whether appellant's health plans *before* issuance of the August 22, 2014 letters included coverage for abortion in the case of rape and incest. SER 143, 145, 138, 136-138. Indeed, at the time of filing this lawsuit, appellant's health plan was not among those deemed noncompliant by DMHC for excluding or limiting abortion coverage. ER 400; ER 420-33.

[11] On October 2, 2017, HHS reopened its investigation. This investigation remains pending. On January 26, 2018, HHS also promulgated a proposed regulation wherein it specifically referenced this case, HHS's June 2016 letter, and provided proposed "guidance" on this issue. 83 Fed. Reg. 3880, 3889-90 (Jan. 26, 2018). The proposed rule is not yet finalized.

Nor has appellant opted to purchase a non-DMHC-regulated plan. SER 135-36; ER 5 (citing SER 150-51, 153-58).[12]

E. The Proceedings Below

1. The Complaint Challenges the Grant of an Exemption

On February 4, 2016—well over a year after the letters issued—appellant filed the underlying complaint. ER 402 (*Id.* ¶¶ 29, 27).[13] Appellant asserted state and federal Constitutional claims, and a state Administrative Procedure Act claim.[14] Appellant's Constitutional claims—its Free Exercise and Establishment claims—are based on DMHC's subsequent grant of the "religious employer" exemption from the August 22, 2014 letters. ER 410, 412, 414.[15] Appellant does *not* challenge the Knox-

---

[12] Appellant did, however, change its health plan a number of times during the course of this litigation. ER 15; SER 135-36.

[13] There is some discrepancy in the record as to the scope of the exemption appellant wants in its health plan. *Compare*, *e.g.*, SER 165 (exception permitted only where the physical life of the woman is "definitely threatened"); SER 152 ("opposed to abortion in any situation"); ER 134 (exception permitted in "unique situations"); ER 134-135 (there may be "certain circumstances," including where there is danger to the life of the woman "or for other reasons").

[14] On June 20, 2016, the district court dismissed appellant's federal and state equal protection claims with leave to amend. CD 28 (June 20, 2016); SER 168-203. Appellant chose not to amend its complaint.

[15] Appellant's only remaining state constitutional claim is its free exercise claim, asserted under Article I, Section 4 of the California

Keene Act on its face. In connection with its claims, appellant never sought a temporary restraining order or a preliminary injunction.

The parties conducted extensive discovery in the district court. Appellant deposed seven current or former DMHC employees, including the Director herself. At no point, however, did appellant depose a health plan or seek discovery from a health plan. After discovery closed, both parties moved for summary judgment. Like its complaint, appellant's Constitutional arguments relied on the Department's subsequent grant of an exemption. CD 67-1 at 8-12 (relying on Department's purported "individualized assessments" to support its Free Exercise claim), 18-19 (relying on the Department's "discretionary exemption authority" to support its Establishment Clause claim).[16]

2. The District Court Dismisses the Complaint

The court dismissed appellant's claims without prejudice for three reasons: (1) appellant's claims were not constitutionally ripe, (2) appellant's claims were not prudentially ripe, and (3) appellant lacked standing. ER 2-17; SER 1-39.

Constitution. This claim mirrors the free exercise clause of the United States Constitution. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 992 n.12 (9th Cir. 2013).

[16] All court docket (CD) citations are to the district court's docket.

1. The court noted that since issuing the August 22, 2014 letter, the DMHC has allowed health plans "to offer religious employers plans limiting termination of pregnancy to situations involving rape, incest or where the woman's life is in danger." ER 9. The court explained that appellant improperly ignored this intervening factual event and "appellant's inability to obtain approval of a desirable health care plan is far from certain." ER 9. The court concluded that "[u]ntil the DMHC receives and denies approval of a health care plan that reflects appellant's religious beliefs," "appellant's claims do not present a constitutionally ripe case or controversy." ER 10.

2. The district court held that "[e]ven if [it] were to conclude that [appellant] presents a ripe case or controversy in the constitutional sense, [it] would decline jurisdiction under the prudential component of the ripeness doctrine." ER 10-11. The court explained that the "evidentiary record makes it abundantly clear that no health plan has approached the DMHC seeking an exemption that would satisfy [appellant's] beliefs," and no health plan "has actually been asked to provide [appellant] with a policy that contains its desired abortion limitations." ER 11, 12. Further, appellant failed to "demonstrate[] that should a health care plan apply for such an exemption, [DMHC] would deny it or that such an application would be futile." ER 13-14.

As to hardship, the court found that "there is no evidence" "to demonstrate that deferral of review of [appellant's] claims will result in real hardship." ER 14. Appellant could "seek alternative forms of health insurance for its employees," "such as a non-regulated DMHC plan, a medical sharing ministries plan, or self-insurance could be purchased." ER 15.

3. Assuming arguendo that appellant demonstrated injury-in-fact and traceability, the court turned to redressability and found that "the injury complained of would not be redressed by a favorable decision." ER 15. The court noted that "DMHC cannot order or force a health care plan to create or offer a plan that satisfies [appellant's] needs, and it cannot create the plan itself." ER 15 (noting that appellant failed to provide a "declaration from a health plan"). The court reiterated that because "not a single health care plan is a party to this case, any relief the [c]ourt could accord would only be against the DMHC"—a governmental entity that does not provide health plans and is simply a regulatory body. ER 16.

Appellant timely filed this appeal. ER 18-19.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order granting summary judgment.

As a threshold matter, appellant's federal claims are not constitutionally ripe. Appellant's federal claims—its Free Exercise Clause claim and its Establishment Clause claim—rest on the Department's application of the exemption process. Appellant does not bring a facial challenge to the underlying statute or the exemption process. Instead, appellant's federal claims rest on "contingent future events," i.e. whether a health plan will seek an exemption that satisfies appellant's religious beliefs and whether DMHC would grant such an exemption request. *Texas v. United States*, 523 U.S. 296, 300 (1998). DMHC has not, however, been presented with a request by any health plan to be permitted to offer health coverage that would be consistent with appellant's religious beliefs regarding abortion.

Appellant's claims also lack prudential ripeness. Appellant's federal claims challenge an action that is not yet final and requires further factual development. *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). Specifically, appellant's federal claims rest on the application of the exemption process to a hypothetical future request by a health plan for an exemption that would allow it to offer health coverage that does not include abortion under any circumstances except to save the life of the woman. However, DMHC "has never been provided with an actual

plan" that would satisfy appellant's religious beliefs. ER 13. Nor has DMHC denied such a plan or indicated that it would deny such a plan. ER 13-14. Further, appellant has not demonstrated hardship that would result from waiting until DMHC grants or denies such an exemption request, as appellant has several alternative health plan options and has demonstrated that it is willing to change health plans.

Lastly, as the district court correctly found, appellant lacks standing. First, appellant fails to demonstrate that it is "likely" that its purported injury will be redressed by a favorable decision because redressability hinges on "unfettered choices made by independent actors [health plans] not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Moreover, there is "reason to doubt" that providing appellant with its requested relief would redress its injury where appellant does not challenge the law underlying the Director's letters. *Renne v. Geary*, 501 U.S. 312, 319 (1991). Second, appellant fails to proffer evidence that a health plan sought an exemption that would satisfy appellant's beliefs and that such an exemption was denied. *Humanitarian Law Project v. US Dep't of Treasure*, 578 F.3d 1133, 1151 (9th Cir. 2009). Third, appellant cannot establish that the Director's enforcement of state law causes it harm, since appellant admits that it need not purchase health coverage regulated by DMHC; appellant has

several other health care options. *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F.2d 433, 438 (D.C. Cir. 1989) (harm following from a plaintiff's own choices is not "fairly traceable" to a defendant's actions).

STANDARD OF REVIEW

This Court reviews the determination of ripeness and standing de novo. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011); *Mortensen v. Cnty. of Sacramento*, 368 F.3d 1082, 1086 (9th Cir. 2004). Similarly, a district court's decision to grant summary judgment is reviewed de novo. *See Ward v. Ryan*, 623 F.3d 807, 810 (9th Cir. 2010); *Guatay Christian Fellowship*, 670 F.3d at 970.

The appellate court's review of an order granting summary judgment is governed by the same standard used by the trial court under Federal Rules of Civil Procedure 56(c). *Ward*, 623 F.3d at 810. In reviewing cross motions for summary judgment, the court must determine whether there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56).

The party moving for summary judgment can meet its initial burden by showing "that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan*

Fire & Marine Ins. Co. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party discharges this burden, "the nonmoving party must produce evidence to support its claim or defense." *Id.* at 1103. This evidence must be "significant" and "probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact," the moving party prevails on the motion for summary judgment. *Nissan Fire*, 210 F.3d at 1103; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Lee v. Am. Nat. Ins. Co.*, 260 F.3d 99, 1001-02 (9th Cir. 2001) (even if viable state law claim remains, insufficient for case to remain in federal court).

This Court "'may affirm summary judgment on any ground supported by the record.'" *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017).

ARGUMENT

I. APPELLANT'S CLAIMS ARE NOT CONSTITUTIONALLY RIPE

Article III of the Constitution requires that a plaintiff's claims be ripe for judicial consideration—that is, that the challenged action "has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967). Thus, "[a] claim is not ripe for adjudication [under the Constitution] if it rests upon contingent

future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300; *St. Clair v. City of Chico*, 880 F.2d 199, 202-04 (9th Cir. 1989) (examining each claim asserted by plaintiff and finding that none were ripe where the government had not reached final, definitive positons rejecting plaintiff's proposals).

In the administrative context, the Court has explained that, "ripeness is a justiciability doctrine designed to prevent the courts through avoidance of premature adjudication from entangling themselves in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). The ripeness requirement is designed "to protect the agencies from judicial interference until an administration decision has been formalized and its effect felt in a concrete way by challenging parties." *Id*. at 807-08.

To show constitutional ripeness, plaintiff must demonstrate a constitutional "case or controversy," and "that the issues presented are definite and concrete, not hypothetical or abstract." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). The inquiry the Court must consider before it exercises its jurisdiction is "whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of defendants' allegedly illegal action or whether the alleged injury

is too imaginary or speculative to support jurisdiction." *Id.* at 1141. To make this determination, the Court must evaluate the claims asserted, not just the relief requested. *Id*. (examining whether the factual context is concrete to render a decision on appellant's First Amendment claim).

In this instance, several undisputed facts support the district court's conclusion that appellant failed to demonstrate that its federal claims were ripe: (1) appellant presented no firm evidence that any plan ever offered a product that meets its needs; (2) since issuance of the letters, no plan requested the exemption that appellant seeks (ER 5 (citing SER 83)); (3) no plan has been asked to provide appellant with a policy that contains its desired abortion coverage (ER 12); (4) appellant has discussed its request with its insurance agent only, but has not communicated with health plans (SER 137, 141); and (5) these foregoing steps would not be futile where the Director expressly left open the possibility that she may grant an exemption that would suit appellant's needs if she were ever presented with it (ER 13; ER 219-220). *See Thomas*, 220 F.3d at 1141.

Appellant's brief largely hinges on several arguments that were not raised in the district court. For instance, for the first time on appeal, appellant asserts that the district court failed to distinguish between its request for prospective and retrospective relief, including its claim for

damages. AOB 24. However, appellant waived this argument by failing to raise it below. *See, e.g.*, *Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1117 (9th Cir. 2017). Appellant failed to raise this issue in the district court. Indeed, at no point during the oral argument, did appellant discuss "damages," "prospective" relief, "retrospective" relief, or assert these related arguments. *See* SER 1-39. Nor were these arguments made in the briefing. *See* CD 74 at 3-11.[17]

With regard to appellant's unidentified "claims for prospective relief," appellant asserts that it sought "declaratory and injunctive relief to stop the DMHC's ongoing enforcement of the abortion-coverage requirement" and that the August 22, 2014 letters are formalized and its effects felt by appellant. AOB 28, 36. However, appellant's request for relief must be connected to a ripe legal claim. *Texas*, 523 U.S. at 300; *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (a plaintiff must demonstrate standing for each claim it seeks to press). Here, appellant's Free Exercise Claim, as demonstrated *infra*, is not a challenge to the issuance of the letters, but is a challenge to DMHC's subsequent grant of

[17] Nor did the district court have a "duty to search for evidence" or for legal issues that would create a ripe dispute. *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007).

an exemption. *See infra* at 57-59; AOB 51-55; CD 67-1 at 6-16 (asserting that strict scrutiny applies due to DMHC's alleged "individualized assessments," i.e. exemptions). Similarly, appellant's Establishment Clause claim hinges on DMHC's exemption process—not the issuance of the August 22, 2014 letters or the law underlying those letters. CD 67-1 at 19 (relying on DMHC's application of "discretionary exemption authority" to support its Establishment Clause claim). Because appellant's federal claims are not ripe, the district court properly dismissed this case without prejudice.

Appellant further alleges that DMHC has violated its rights through its "ongoing" refusal to accommodate appellant's religious beliefs. AOB 36. However, as noted *supra*, DMHC does not regulate employers, like appellant, and therefore is unable to grant appellant any "accommodation." Furthermore, appellant's argument is incongruous with the facts, as it has acknowledged that DMHC is willing to consider relevant exemptions, but has not demonstrated that any health plan has sought and been denied an exemption that would allow it to offer coverage that suits appellant's needs. Thus, as DMHC has not been presented with or taken action on any exemption request that would, hypothetically, meet appellant's needs, appellant can point to no "effects felt in a concrete way" as needed for ripeness on its federal claims. *Abbott Labs*, 387 U.S. at 148-149.

As to appellant's unidentified "claims for retrospective relief," appellant relies on its request for "nominal damages." AOB 47. However, Section 1983 nominal damages—as distinguished from punitive and compensatory damages—are awarded to "vindicate rights." *Cummings v. Connell*, 402 F.3d 936, 942 (9th Cir. 2005). Where appellant's asserted rights are brought under appellant's Free Exercise and Establishment Clause claims and those claims—distinct from the relief requested—are not ripe and where appellant has not demonstrated it has standing to pursue those claims, a request for nominal damages to vindicate those rights cannot magically transform an otherwise unripe claim into a ripe one. *See St. Clair*, 880 F.2d at 202-04.

II. APPELLANT'S CLAIMS LACK PRUDENTIAL RIPENESS

The district court properly concluded that, based on the evidence, the case was not ripe for judicial review based on the fitness of the issues and the hardship to the parties. ER 10-11. "Principles of federalism lend this doctrine additional force when a federal court is reviewing a state agency decision at an interim stage in an evolving process." *US West Communications*, 193 F.3d at 1118. As this Court explained, a "concrete factual situation is necessary to delineate boundaries of what conduct the government may or may not regulate." *Thomas*, 220 F.3d at 1141 (relying

on the maxim that courts do not decide "constitutional questions in a vacuum"); *Oklevuha Native American Church of Hawaii, Inv. v. Holder*, 676 F.3d 829, 838, 834 (9th Cir. 2012) (Courts have "regularly declined on prudential grounds to review challenges" to promulgated laws or regulations "in favor of awaiting an actual application of the new rule.").

Prudential review requires the court to evaluate (A) "the fitness of the issues for judicial decision and ([B]) the hardship to the parties." *Nat'l Park*, 538 U.S. at 808.

A. Appellant's Federal Claims Are Not Fit for Judicial Review

A claim is fit for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *US West Communications*, 193 F.3d at 1118; *Full Valley Advisors, LLC v. SEC*, 633 F.3d 1101, 1106 (D.C. Cir. 2011). Moreover, prudence "'restrains courts from hastily intervening in matters that may best be reviewed at another time or in another setting, especially when the uncertain nature of an issue might affect a court's ability to decide intelligently.'" *LA Envtl. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996). "This is especially true when the issue is one of constitutional important." *Full Valley Advisors*, 633 F.3d at 1106; *Portman v. Cnty. of Santa Clara*, 995

F.2d 898, 903 (9th Cir. 1993) ("Because of the great gravity and delicacy" of the courts' function in passing upon the validity of a governmental action, "the need is manifest for a full-bodied record").

As the district court explained, the evidentiary record "makes it abundantly clear" that appellant failed to satisfy this standard. ER 11. First, it is not yet certain that (a) a health plan wants to provide a product that would satisfy appellant's religious beliefs; (b) that the health plan would seek an exemption from DMHC; and (c) that DMHC would deny the health plan's request for an exemption. Where the "possibility that further consideration will actually occur before [implementation] is not theoretical, but real," a claim is not ripe. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998); *see Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 423 U.S. 172, 190-91 (1985). Here, DMHC is free to consider exemption requests. Indeed, the statutory provisions—statutes not challenged in this appeal—specifically contemplate that the Director has the ability to consider and grant such exemptions. Accordingly, appellant's constitutional claims challenging the Director's exemption process cannot possibly be in a "'concrete and final form' [citation], unless and until the [DMHC] denies" a health plan's request for an exemption. *Full Valley Advisors*, 633 F.3d at 1107; *Portman*, 995 F.2d at 903-04.

B. There is No Hardship in Declining Review

Appellant failed to demonstrate that delaying the constitutional decision will impose hardship on appellant. *Full Valley Advisors*, 633 F.3d at 1107. "To meet the hardship requirement, a plaintiff must show that withholding review would result in direct and immediate hardship," resulting in more than financial loss. *US West Communications*, 193 F.3d at 1118; *Full Valley Advisors*, 633 F.3d at 1106. Appellant delayed over a year before bringing suit and at no point sought injunctive relief. Appellant is also free to obtain non-DMHC-regulated healthcare.

C. Appellant's Remaining Arguments Lack Merit

Like its arguments pertaining to constitutional ripeness, appellant's prudential ripeness argument requires this Court evaluate issues appellant failed to raise before the district court. AOB 37. Appellant vaguely asserts that its "prospective claims ask whether the DMHC may apply the abortion coverage requirement to the church's healthcare plan." Tellingly, appellant does not identify a specific constitutional claim associated with its asserted prospective relief. AOB 37. However, as noted *supra*, appellant's constitutional claims are based not on the letters alone, but on the exemption process, and as the district court explained, in connection with that process, the Department's decision on a hypothetical request from a health plan

requesting an exemption that would meet appellant's needs is far from settled.

Appellant also raises two factually erroneous claims in support of its standing, that are irrelevant in any event. AOB 39-40. First, appellant claims that the DMHC did not inform health plans of the availability of the exemption. This is inaccurate. All plans know that they can apply to DMHC for an exemption if they want one, and several frequently do. SER 126-27; ER 191-92. That DMHC did not commit to blindly grant any and all exemptions that were submitted by licensed health plans does not demonstrate nefarious intent, wrongdoing, or religious targeting, as implied by appellant. OB 39; *see* ER 13.[18]

Second, appellant asserts that its claims are ripe because harm occurred when the letters issued on August 22, 2014. AOB 40. However, appellant's

[18] Appellant complains that at her deposition the Director refused to answer an incomplete hypothetical as to whether she would grant some future exemption request (OB 39; ER 217-219). If appellant wanted Director Rouillard to answer appellant's question, appellant could have pursued various discovery tools. It did not do so. Appellant also complains that DMHC has "refused to provide [appellant] with an exemption." AOB 40. But, DMHC does not regulate employers, like appellant. It regulates health plans. Appellant's attempt to introduce new (and incomplete) evidence on appeal to demonstrate that its claims are ripe, should not be entertained. *See* Ninth Circuit ECF No. 25; *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009) (plaintiff can not remedy a standing defect retroactively).

federal claims are not based on the August 22, 2014 letters; they hinge on DMHC's exemption process and whether DMHC will theoretically grant the type of exemption appellant wants. *Full Valley Advisors, LLC v. SEC*, 633 F.3d 1101, 1106 (D.C. Cir. 2011). If appellant's claims are not ripe, then appellant's case must be dismissed; a case cannot move forward simply on requested relief alone, without appellant having to demonstrate that it has presented an associated claim that is ripe. Here, appellant's constitutional claims are premised on the exemption process, including whether DMHC's exercise of the exemption process as applied to appellant, is unlawful. But, DMHC has not yet received a request that would satisfy appellant and certainly has not denied one. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009); *Nat'l Park*, 538 U.S. at 812. Appellant's constitutional claims may *well* become ripe if or when a health plan seeks approve of a plan that satisfies appellant's religious beliefs and DMHC denies such a plan. However, because there has not been "concrete action" applying the exemption process to appellant's request, appellant's claims are not ripe. *Id.* at 808.

Appellant's reliance on *Oklevuha Native American Church of Hawaii, Inv. v. Holder*, 676 F.3d at 838, 834 (9th Cir. 2012) is misplaced. There, this

Court held that when challenging the applicability of a criminal statute, arrest is not necessarily a prerequisite for an individual to bring a pre-enforcement claim. *Id*. at 835. The Court found that because the challenged criminal statute, the Controlled Substances Act, had already been enforced against plaintiffs, the case was "not the kind of abstract disagreement that the ripeness doctrine prevents courts from adjudicating. Plaintiffs' stake in the legal issues is concrete rather than abstract." *Id*. at 837. Under prudential grounds, the claims at issue arose from an enforcement action that had already occurred and presented a concrete factual scenario that demonstrated how the law, as applied, infringed plaintiffs' constitutional rights. *Id*. The circumstances here are quite different. Appellant has not shown that any of the requisite components of a pre-enforcement claim have been met. Furthermore, DMHC's exemption process—the process challenged in appellant's claims—has not been applied to appellant's desired, but not sought, health plan.

III. APPELLANT HAS NOT DEMONSTRATED ARTICLE III STANDING

Article III requires a plaintiff to demonstrate standing by showing that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely,

as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Sys.*, 528 U.S. 167, 180-81 (2000).

The standing requirement ensures a plaintiff has alleged "such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The requirement of standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Sep. of Church & State*, 454 U.S. 464, 472 (1982).

A plaintiff must establish "standing for each claim he seeks to press and for each form of relief that is sought." *Yamada v. Snipes*, 786 F.3d 1182, 1203 (9th Cir. 2015).

A party invoking this Court's jurisdiction bears the burden of establishing all the necessary elements. *Lujan*, 504 U.S. at 561. "When the suit is one challenging the legality of government action," to establish standing at the summary judgment stage, the nature and extent of the facts that must be averred depends "considerably upon whether plaintiff is himself

an object of the action (or forgone action) at issue." *Id*. at 561. When a third party is involved, "much more is needed." *Id*. at 562. In that case, "causation and redressability, ordinarily hinge on the response of the regulated" third party to the government action. *Id*. Thus, standing "depends on unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id*. As such, it is plaintiff's burden of adducing facts showing choices will be made by those third parties that permit the Court to exercise its jurisdiction. *Id*. Standing in such circumstances is "substantially more difficult" to demonstrate. *Id*.

Furthermore, where constitutional issues are concerned, like here, these standing inquiries are amplified. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *Reno v. Catholic Soc. Services*, 509 U.S. 43, 57 n.18 (1993).

Appellant has failed to establish standing because its purported injury (A) would not be redressed by a favorable decision because no evidence shows its health plan would offer the type of product it seeks; (B) results from its own decision not to request that its health plan seek an exemption; (C) is self-inflicted because appellant can choose to purchase a non-DMHC regulated Plan.

A. Appellant's Alleged Injury Would Not Be Redressed by a Favorable Decision

If "any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict," a plaintiff lacks standing. *Mayfield v. United States*, 599 F.3d 964, 972 (9th Cir. 2010). A plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561; *see, e.g, Fernandez v. Brock*, 840 F.2d 622, 626-28 (9th Cir. 1988); *Allen v. Wright*, 468 U.S. 737 (1984); *Clapper*, 568 U.S. at 410; *Levine v. Vilsack*, 587 F.3d 986, 991-95 (9th Cir. 2009); *Washington Envtl. Council*, 732 F.3d at 1142-43.

Because appellant was not the "object" of the Director's letters, it has the burden of showing that its health plan will likely redress its alleged injury—which it failed to do. The Director sent letters to seven health plans due to their improper restrictions on abortions, not to any employers, like appellant, that purchase health plan products. Assuming *arguendo* that the Court could grant relief that allows health plans to offer products excluding abortion coverage in the case of rape and incest, health plans would be under no obligation to do so (among other legal shortcomings, the health plans are not even parties to this lawsuit). Indeed, appellant's health plan at the time

of filing this lawsuit was not among those deemed noncompliant by DMHC for excluding or limiting abortion coverage. ER 400; ER 420-33. And appellant has not presented any evidence showing that its current health plan would alter course and begin offering products excluding abortion coverage in the case of rape and incest if that option was available. SER 83. Appellant also has no evidence that any other health plan would offer the exact type of product it wants: one that excludes health care coverage for women terminating their pregnancies, including when the pregnancy is the result of rape or incest; the only exception being where the life of the woman is at risk. *See* ER 399; SER 83. No health plan has ever sought DMHC approval for such a product.[19] SER 83. Because redress of appellant's alleged injury depends on the choices of health plans that have broad discretion over the products they offer—and appellant has failed to show that health plans would exercise that discretion to provide the type of product appellant seeks—appellant lacks standing.

Moreover, appellant's injuries would not be redressed where appellant does not challenge the law underlying the August 2014 letters. *Renne v.*

[19] Consistent with federal law, the health plan that currently offers health care to religious employers provides that abortions are permitted in the case of rape, incest, or to save the life of the woman.

Geary, 501 U.S. at 319 (finding "reason to doubt" that invalidation of provision would redress the injury where a state statute, "the constitutionality of which was not litigated" would remain intact). Thus, the legal requirements underpinning those letters, including the California Constitution, the Reproductive Privacy Act, and the Knox-Keene Act "would remain in place notwithstanding any action [the court] might take in regard to the" letters. *White v. United States*, 601 F.3d 545, 552-53 (6th Cir. 2010); *Takhar v. Kessler*, 76 F.3d 995, 1001 (9th Cir. 1996); *Doe v. Cuomo*, 755 F.3d 105, 114 & n.5 (2d Cir. 2014).

Appellant ignores the foregoing case law, including the heightened standard that applies because it is not itself the object of government action. Instead, appellant merely asserts that it has standing to assert claims for prospective relief. AOB 28. Specifically, appellant claims that a favorable decision would "eliminate a regulatory prohibition." AOB 29-30. However, as noted, appellant does not challenge the law underlying the August 22, 2014 letters—the Knox-Keene Act, the RPA, and the California Constitution. Thus, even a ruling invalidating the letters, would not change state law on which the letters were based. *Drakes Bay Oyster v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013); *Texas v. EPA*, 726 F.3d 180, 197-99 (D.C. Cir. 2013). Moreover, despite having the ability to conduct extensive

discovery, appellant has failed to put forth *any* evidence that a health plan ever has provided or now seeks to provide a product that would meet its needs. Appellant's mere speculation as to what health plans might do in response to an order from this Court is insufficient conjecture. *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (a plaintiff "must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment"); *Lujan*, 504 U.S. at 562 (plaintiff's burden to show choices by third parties will be made in a manner to redress plaintiff's alleged injury).[20]

Appellants' cases are inapposite. AOB 32-34. Relying on footnotes in *Batnam Books Inc. v. Sullivan*, 37 U.S 58, 64 n.6 (1963) and in *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 724-25, 736 n.15 (1980), appellant asserts its claims are redressable. AOB 32. As a threshold matter, neither case even mentions redressability; both cases are entirely devoid of any such standing analysis, particularly one

[20] Appellant also asserts that DMHC can require health plans "to accommodate religious beliefs." AOB 30. First, this relief was not requested in their complaint and as a result was not briefed. ER 417-18; *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-93 (9th Cir. 2000) (plaintiff could not proceed with new theory not pled in complaint); *Wasco Prods. Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Second, appellant's new requested relief is not authorized by law. The different "classes" referenced in the Knox-Keene Act refer to the classes of regulated entities—health plans, not consumers.

pertaining to redressability as it concerns a non-regulated entity challenging a regulator's action. *Id.*; *see Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (issues that "merely lurk in the record" but are not ruled upon by the court, "are not to be considered as having been so decided as to constitute precedents").[21] Appellant comes somewhat closer in relying on *Bennett v. Spear*, 520 U.S. 154 (1997) where the Court discusses standing and redressability. However, the Court's analysis was based on the fact that the case was at the pleading stage, as opposed to the summary judgment stage. *Id.* at 170-71 ("it is not difficult to conclude that petitioners have met their burden—which is relatively modest at this stage of litigation—of alleging that their injury . . . will 'likely' be redressed"); *id.* at 168 (outlining the different burdens of proof at the pleadings stage compared with summary

[21] Likewise, appellant relies on a series of cases where appellant concedes that the Courts did not address redressability. AOB 35 (citing *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 404-405 (E.D. Pa. 2013) (no discussion regarding redressability); *Conestoga Wood Specialties Corp. v. Sec'y of Health & Human Servs.*, 724 F.3d 377 (3rd Cir. 2013) (no discussion regarding redressability)). It is axiomatic that cases are not authority for propositions not considered. The *Conestoga* cases are further distinguishable in that, unlike in those cases, no existing law requires employers to purchase a DMHC-regulated health plan and no existing rule requires health plans to offer coverage that contains exemptions.

judgment).[22] Furthermore, while the *Bennett* Court concluded there that, based on the allegations the federal agency's opinion had a "coercive effect," here appellant has put forth no similar evidence. *See* ER 13 (the "evidence does not demonstrate that any plan was directly asked if it would be willing to provide [appellant] with a plan containing its desired exemption"); *Habecker v. Town off Estes Park, Colo.*, 518 F.3d 1217, 1224-26 (10th Cir. 2008) (plaintiff lacks standing where court cannot know with any degree of certainty what considerations motivate third parties not before the court).

B. Appellant Failed to Demonstrate Injury In Fact

Appellant has no injury in fact, and therefore lacks standing. Injury in fact does not exist when a plaintiff "is required to meet a precondition or follow a certain procedure to engage in an activity or enjoy a benefit and fails to attempt to do so." *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1161 (8th Cir. 2008). In *Pucket*, parents challenged a public school district's termination of busing services for children at a private

[22] For this same reason, appellant's reliance on *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 957 (8th Cir. 2015) is unavailing. AOB 35. There, too, the Circuit was weighing whether, at the pleading stage, appellants had "allege[d] facts that, if true, would show" redressability. *Id*. at 956; *id*. at 953 ("accepting as true all factual allegations in the complaint").

religious school. *Id.* at 1153. The parents had not established injury-in-fact because they had not requested the reinstatement of busing services—and had not presented evidence that such a request "would have been futile." *Id.* at 1161-62; *see also Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006); *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1093, 1095 (2d Cir. 1997).

Appellant has failed to demonstrate injury in fact because it has not shown that a health plan has sought an exemption so that it can enjoy the "benefit" of offering a health plan that excludes abortion coverage in the cases of rape and incest. *Pucket*, 526 F.3d at 1161. The record indicates that DMHC will grant exemptions for plan products offered to "religious employers" and has already granted one plan an exemption from the requirement to cover abortions. SER 71. No evidence shows that a health plan requested a product that would exclude health care coverage for a woman seeking to terminate a pregnancy in all instances, including if it is the result of rape or incest, the only exception being to save the life of the woman. SER 83. And no evidence shows that asking its plan to request this exemption from DMHC would be futile. *Id*. Because appellant's alleged injury results from its own decision not to follow the simple procedure of requesting that its health plan seek an exemption from DMHC, it lacks

standing to bring this case. *Jackson-Bey*, 115 F.3d at 1095; *Humanitarian Law Project*, 578 F.3d at 1151; *Women's Emergency Network v. Bush*, 323 F.3d 937, 947 (11th Cir. 2003).

C. Appellant's Alleged Injury Is Not Fairly Traceable to the Director

Self-inflicted injuries "cannot serve as the basis for standing because they are not fairly traceable to any action other than action by the plaintiff." *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1112 (D. Nev. 2014). In *Huron v. Berry*, 12 F. Supp. 3d 46, 47 (D.D.C. 2013), the plaintiffs lacked standing to challenge the defendants' approval of health plans excluding or limiting coverage of "speech generating devices," or "SGDs." Because the plaintiffs "voluntarily chose to enroll and stay enrolled in a plan that specifically excludes SGDs from coverage, despite having the option to select and transfer to a plan that covers SGDs," injury was self-inflicted. *Id.* at 52. It mattered not that plaintiffs' "decision to forgo these SGD coverage options was motivated by cost considerations." *Id.* at 53; *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012); *Petro-Chem Processing*, 866 F.2d at 438.

Appellant's alleged injury is not fairly traceable to the Director because it chose to offer health coverage regulated by DMHC—despite having the

option to purchase plans not subject to DMHC regulation. SER 140, 155-57. Since the Director issued the letters on August 22, 2014, appellant could have changed its employee health coverage to plans not regulated by DMHC, including, but not limited to, a (a) self-funded health insurance plan, or a (b) medical sharing ministry (including Liberty Health Share, Christian Healthcare Ministries, Samaritan Ministries, Medi-share). SER 143, SER 164-65[23]; ER 400 (alleging, inter alia, renewal months for plan years)); SER 140, 155-57.[24] Appellant could also have sought group health insurance regulated by CDI, rather than DMHC. *Id*. These available alternative types of health insurance would not be subject to the Director's jurisdiction. Or, Appellant could have chosen not to provide health insurance to its employees because it was not required by law to do so.[25] Although appellant has alleged that "purchasing a group health insurance plan was the

[23] *See also* CD 78-4 at 148 (offering Samaritan Ministries Healthcare); *id*. at 150-51; *id*. at 161-62 (discussing Liberty Healthshare).

[24] Indeed, appellant did change coverage from Aetna to Sharp Health Plan. ER 400. Sharp Health Plan was not one of the seven noncompliant Plans that received a letter. ER 420-33.

[25] While the Director supports employer sponsorship of group health coverage for their employees, the Director notes that appellant also retains the legal option not to offer group health coverage. Contrary to appellant's allegations that the ACA requires that it offer coverage for its employees (*see* ER 407), it can permissibly decline to provide such coverage and instead pay an employer-shared responsibility tax, as the ACA expressly allows. *See* 26 U.S.C. § 4980H(a), (c)(7); ER 407.

only affordable" option, ER 402, this confirms that its decision to buy DMHC-regulated insurance was "grounded in economics"—and was in no way "forced on" it by DMHC. *Grocery Mfrs. Ass'n*, 693 F.3d at 177; *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (regulation that operates to make practice of religious belief "more expensive" does not trigger Free Exercise Clause scrutiny). Because appellant's alleged injury stems from its own voluntary decisions and own weighing of cost considerations, it does not have standing to pursue its claims.

Moreover, an injury that is "the result of the independent action of some third party" is not fairly traceable to the defendant. *Bennett v. Spear*, 520 U.S. at 167. Appellant claims that *federal* law has caused its alleged predicament, so its purported injury is not fairly traceable to DMHC. *See* ER 407. Notably, neither DMHC nor its Director has the authority to enforce the penalty for failure to comply with the federal employer coverage mandate. *See Am. Freedom Def. Initiative v. Lynch*, 217 F.3d 100, 105-06 (D.D.C. 2016) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc)) ("[I]t is a 'long-standing rule that a plaintiff may not sue a[n] . . . official who is without any power to enforce the complained-of statute,'" as the plaintiff's injury is not fairly traceable to the official's actions).

Appellant failed to present evidence establishing that it has Article III standing, and, thus, the district court's judgment must be affirmed.

IV. IF THIS COURT CONCLUDES THAT APPELLANT'S CLAIMS ARE CONSTITUTIONALLY RIPE, PRUDENTIALLY RIPE, AND APPELLANT HAS STANDING, THIS COURT SHOULD REMAND

If this Court were to conclude that the district court erred, the proper remedy is to remand to the district court to allow the court to address the substantive issues not addressed in its dismissal order. *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). Appellant concedes that this Court "typically 'does not consider an issue not passed upon below.'" AOB 3; *id.* at 50. For several reasons, this Court should follow the "general rule" and decline to address appellant's constitutional claim in the first instance. *Quinn*, 783 F.2d at 814.

First, appellant's Free Exercise claim is not "beyond any doubt." *Singleton v. Wuff*, 428 U.S. 106, 121 (1976). For starters, a federal district court addressing nearly identical claims brought against the same Department based on the same letters by most of the same counsel as now represent appellant concluded that the plaintiff in that case failed to demonstrate a Free Exercise Claim. *See Foothill Church v. Rouillard*, No. 15-cv-02165, 2017 WL 3839972, at *5 (E.D. Cal. Sep. 1, 2017). Likewise, a state court action brought against the Department concluded that the

Department's letters reflect what is required under the law. *Missionary Guadalupanas v. Rouillard*, Case No. C083232 (Cal. 3rd Dist. Court of Appeal). Given that the district court did not reach any of appellant's substantive claims at summary judgment, the appropriate outcome is to remand to the district court so that it can address appellant's claims in the first instance. *See, e.g.*, *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014); *Centurion Properties III, LLC v. Chicago Title Ins., Co.*, 793 F.3d 1087, 1090 (9th Cir. 2015); *Verizon California, Inc. v. Peevey*, 413 F.3d 1069, 1072-73 (9th Cir. 2005); *United States v. Nakagawa*, 924 F.2d 800, 803 (9th Cir. 1991); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 337 (6th Cir. 1997).[26]

Second, "as a fundamental rule of judicial restraint," the Court must consider "nonconstitutional grounds for decision before reaching any constitutional questions." *See In re Ozenne*, 841 F.3d 810, 814-15 (9th Cir. 2016).

[26] Appellant erroneously relies on a case wherein "both parties agreed at oral argument" that the issue was properly before the Court. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1117 (9th Cir. 2002). And, in contrast to this case, *Dole Food* was an appeal from a district court's dismissal at the pleadings stage. *Id*. at 1108.

Third, appellant has not demonstrated that following the "general rule" that the Court remand to the district court for a determination in the first instance would result in "injustice." *Quinn*, 783 F.2d at 814; *Singleton*, 428 U.S. at 121. Appellant's demand that this Court deviate from its general practice and issue a decision on a constitutional claim unresolved by the district court is undermined by the fact that at no point did appellant move for injunctive relief. Further, appellant delayed this appeal in obtaining two extensions for filing its opening brief and requested a further extension for filing its reply brief. *See* Ninth Circuit ECF Nos. 9 (06/05/2018), 12 (07/30/2018).

Moreover, remanding this case will allow for further development of these issues. As noted, there are two related cases that remain pending. *See Missionary Guadalupanas v. Rouillard*, Case No. C083232 (Cal. 3rd Dist. Court of Appeal) (fully briefed and awaiting decision on whether the August 22, 2014 letters violate California's Administrative Procedure Act); *Foothill Church, et al. v. Rouillard*, Case No. 2:15-cv-02165-KMJ-EFC (E.D. Cal.) (fully briefed and awaiting decision on defendant's motion to dismiss). Additionally, HHS has reopened its investigation into DMHC's August 22, 2014 letters and promulgated a proposed regulation directly discussing these letters. If the investigation proceeds to a decision or a final rule is

implemented, such actions would have a direct impact on the substantive issue being pressed by appellant in its appeal.

Thus, in weighing these considerations, this Court should remand to allow the district court in the first instance to address appellant's substantive claim.

V. APPELLANT FAILED TO DEMONSTRATE A VIOLATION OF THE FREE EXERCISE CLAUSE OF THE U.S. CONSTITUTION

Even if appellant's claims were constitutionally and prudentially ripe and it did have standing, it has not presented evidence demonstrating that it is entitled to summary judgment on its Free Exercise claim.

A "neutral law of general application" that incidentally burdens religion does not violate the Free Exercise Clause if it is rationally related to a legitimate government interest. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015). Individuals are not excused "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" simply because of their religious beliefs. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Appellant failed to establish a Free Exercise Clause violation because the Director's enforcement of state law (A) is neutral on its face and in its operation; (B) does not exclude any secular conduct that undercuts the purpose behind enforcement; and, (C) is

rationally related to the legitimate governmental interests of ensuring access to health services and protecting women's constitutional rights.

A. The Director's Enforcement of State Law Was Neutral

If a law's "object . . . is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (Lukumi)*, 508 U.S. 520, 533 (1993). Courts assess laws challenged under the Free Exercise Clause for both facial and operational neutrality. A law is not facially neutral "if it refers to a religious practice without a secular meaning discernible from the language of context." *Id.* A law's operational effect is also "strong evidence of its object" because the effect of a law can "disclose an object remote from those legitimate concerns" and expose "an impermissible attempt to target . . . religious practices." *Id.* at 535 (ordinances regulating ritual animal slaughter had impermissible object because they "exclude[d] almost all killings of animals except for religious sacrifice" and "proscribe[d] more religious conduct than [was] necessary to achieve their stated ends"). But so long as a law does not prohibit conduct *because* it is religiously motivated, the law does not violate the Free Exercise Clause—even if "a particular group, motivated by religion, may be more likely to engage in the proscribed conduct." *Stormans*, 794 F.3d at 1077 (citing *Am. Life League, Inc. v. Reno*,

47 F.3d 642, 654 (4th Cir. 1995) (no Free Exercise violation for law that might disproportionately punish religiously-motivated individuals, as it "punish[ed] conduct for the harm it causes, not because the conduct is religiously motivated")).

Appellant failed to demonstrate that the Director's enforcement of state law targeted religion or any particular religious beliefs. The Director's letters contain no language referring "to any religious practice, conduct, belief, or motivation." *Stormans*, 794 F.3d at 1076; *see* ER 420-21. Nor do the underlying laws that the Director's letters enforced, unchallenged by appellant, contain any such language. *See* Cal. Const. Art. I, § 1; Cal. Health & Safety Code §§ 1367(i), 123462(b), 123466.

Likewise, appellant has not shown that the effect of the Director's enforcement of state law reveals an impermissible object to "infringe upon or restrict" religious practices. *Lukumi*, 508 U.S. at 533. First, all health plans are prohibited from establishing limitations or exclusions on abortion coverage, regardless of what their motivations would be for doing so. ER 420-33. Second, the Director's enforcement of the law, in practice, by considering requests for exemptions in connection with plans offered to certain religious employers, had the effect of "specifically protect[ing] religiously motivated conduct." *Stormans,* 794 F.3d at 1076-77 (law

requiring licensed pharmacies to timely deliver all prescriptions—including contraceptives—operated neutrally with respect to pharmacists, as pharmacies could accommodate pharmacists with religious objections).

The facts here are strikingly similar to those in *Stormans*, as health plans can seek to accommodate employers with religious objections to abortion coverage by seeking an exemption from DMHC. *See Foothill Church v. Rouillard*, No. 15-cv-02165, 2017 WL 3839972, at *5 (E.D. Cal. Sep. 1, 2017) (Director's exemption "evinces, if anything, the Director's intent to accommodate, rather than impose burdens on, religious beliefs"). As in *Stormans*, the Director's enforcement of state law in no way requires religious employers to provide health coverage "to which they object." 794 F.3d at 1077. Appellant has mustered no evidence showing that the effect of the Director's letters discloses an impermissible object. The letters themselves indicate that their object was a wholly permissible one: to ensure compliance with state law and prevent discrimination against women who choose to seek abortions. ER 420-33.

Appellant distorts facts to support its claim that DMHC's issuance of the letters was an "impermissible attempt to target . . . religious practices." *Lukumi*, 508 U.S. at 535. For instance, appellant asserts that DMHC issued its letter in response to religious universities "taking steps to exclude or limit

abortion coverage." AOB 59. This is inaccurate. This issue first came to DMHC's attention in October 2013 as a result of media inquiries requesting information on DMHC's authority to approve plans that restrict abortion access, and subsequent consumer complaints. SER 51-66. The question of whether health plans could include limitations on abortion simply had not arisen in the Department and they therefore had to look at this legal issue, which they did over the course of the next year. SER 104-06. According to appellant, DMHC was obliged to ignore the consumer complaints and the media inquiries, rather than examine this legal issue, simply because the issue came to public attention in connection with health plans obtained by institutions affiliated with the Catholic Church that limited abortion for their employees.

Second, appellant argues that the health plans that restricted abortion coverage were only offered to and purchased by religious organizations. AOB 59. This is flatly wrong. Both religious and secular purchasers of DMHC-regulated coverage, who may not want to provide abortion coverage, are indirectly affected by the letters. Indeed, before issuing the letters, DMHC knew that both "religious employers" as defined in state law (§ 1367.25(c)(1)) *and* nonreligious employers would be indirectly affected. SER 77 (explaining that out of 28,647 individuals enrolled in products with

restrictive abortion language, 1,392 individuals were employed by religious employers). Regardless, that DMHC knew its action would affect some religious employers is insufficient to establish that DMHC *targeted* religion in issuing the letters. Nor does it demonstrate that DMHC intended to infringe upon the beliefs of those employers because of their religious motivation. *Lukumi*, 508 U.S. at 533.[27]

Third, appellant misconstrues deposition testimony to assert that DMHC's "own legal analysis" counseled against issuance of the letters. AOB 60. No one at DMHC testified to that effect. Both Director Rouillard

[27] Appellant appears to assert that the Department had to identify and carve out religious exceptions, prior to issuing its August 22, 2014 letter; however, that is simply not required as a matter of law and would be entirely impracticable. As the depositions of appellant's own witnesses demonstrate, individuals' beliefs regarding the scope of abortion coverage vary widely. *See infra* at 16 n.13. If the government had to anticipate the religious beliefs of all indirect consumers and proactively carve out exceptions for those religious beliefs, the government would grind to a halt, especially for an entity like DMHC which regulates 78 full-service health plans, serving 26 million enrollees. *See Lyng v. NW India Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires"); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 362-63 (3rd Cir. 2017) ("[F]act that the Government may require insurers to offer coverage for expenditures for certain services that *some* might find objectionable on religious grounds cannot form the basis of requiring the Government to adjust its program on behalf of *all* employees"); *id* at 364 ("Medical treatments that some might view as objectionable are as varied as they are numerous.").

and Ms. Wong testified that health plans could seek an exemption from the letters, and such an exemption could include an exemption for a religious employer. ER 185-86, SER 126-27, 142-44; ER 213. Because the Director exercised her authority to grant an exemption does not undermine the legal basis upon which the letters were issued.[28] Appellant further asserts, without support, that the Director acted as a puppet for the "abortion lobby" and "abortion activists." AOB 60. As a threshold matter and as the record demonstrates, DMHC conducted an internal factual and legal review of the issues,[29] and made an independent determination as to the appropriate course of action. Moreover, that DMHC had meetings with stakeholder organizations does not demonstrate that DMHC sought to target religion. *See* SER 107-08 (explaining that DMHC frequently had meetings with various stakeholders about different issues and concerns); SER 112 (explaining it "was part of my job to talk to" lobbyists and stakeholders)).

---

[28] Appellant complains that the Director refused to answer questions that would reveal attorney-client privilege (OB 60; ER 217-19); however, as noted *supra* at 36 n.18, if appellant wanted Director Rouillard to answer a deposition question, appellant could have pursued various discovery tools, including a motion to compel. It did not do so.

[29] Indeed, appellant brought several motions to compel seeking to obtain access to these internal legal emails and memorandums spanning the course of the year, from October 2013 until the letters were issued on August 22, 2014. CD 50, 61.

And, the evidence demonstrates that these meetings did not discuss religious employers; rather, the discussion focused on whether abortion was required under the law. *See, e.g.*, SER 95 (no discussion of religious employers); ER 253-255 (discussion was generally about whether abortion services had to be covered, not about religious employers)).

B. The Director's Enforcement of State Law Did Not Exclude Secular Conduct so as to Undercut the Purpose of Enforcement

A law is generally applicable if it prohibits religiously motivated and secular conduct on an equal basis. *Stormans*, 794 F.3d at 1079; *Lukumi*, 508 U.S. at 543. Courts assess laws challenged under the Free Exercise Clause by first looking at the governmental interests a law advances. *Lukumi*, 508 U.S. at 543. Next, courts ask whether the law is "underinclusive" because it "fail[s] to prohibit nonreligious conduct that dangers these interests in a similar or greater degree" compared to the prohibited religious conduct. *Id.*

Appellant failed to demonstrate that the Director's enforcement of state law is underinclusive of nonreligious conduct and thus does not generally apply. The legitimate governmental interests furthered by the Director's letters include ensuring that DMHC-regulated health plans cover "basic health care services" and do not discriminate against women or interfere with their fundamental constitutional rights. ER 420-33. There is no

"substantial, comparable secular conduct" falling outside the application of the Director's letters. *Stormans*, 794 F.3d at 1079. The purpose of the letters was to ensure that DMHC-regulated health plans abide by state law—and all DMHC-regulated health plans are indeed subject to the dictates of state law as described in the Director's letters. Appellant itself already conceded that the letters were generally applicable. SER 167; ER 416.

Unable to demonstrate that the letters were not generally applicable, the crux of appellant's argument is that the Knox-Keene Act *itself* is not generally applicable. AOB 53 ("The Knox Keene Act . . . involves a system of individualized exemptions").; AOB 55 (asserting that the "law on which" the August 22, 2014 letters are based gives the Director discretion to grant exemptions). This argument is a red herring as appellant's complaint cannot be read to challenge the constitutionality of the Act. ER 409-416. Rather, it challenges DMHC's *exercise* of exemption authority.[30] Moreover, though the Director may "for good cause" exempt health plans from providing certain basic health care services they would otherwise be required to cover,

[30] To the extent that appellant is trying to now bring a *facial* challenge to the Knox-Keene Act, appellant failed to assert such a cause of action in its complaint and was thus barred from doing so at the eleventh hour during summary judgment. *Coleman*, 232 F.3d at 1292-93; *Wasco Prods.*, 435 F.3d at 992.

there is no evidence that these "exemptions will be interpreted broadly to permit discriminatory treatment of religion or religiously motivated conduct," *Stormans*, 794 F.3d at 1082 (law with several explicit exemptions, plus an exemption for "substantially similar" circumstances, was generally applicable).

Nor has appellant supplied any evidence demonstrating that the Director "in fact exercised her discretion in a discriminatory manner." *Foothill Church v. Rouillard*, No. 2:15-cv-02165-KJM, 2017 WL 3839972, at *5 (E.D. Cal. Sep. 1, 2017). Indeed, the unrefuted facts demonstrate that the Director did not act in a "selective manner impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. To the contrary, the Director has accommodated religious beliefs by granting the only abortion-related exemption requested by a plan for coverage to be offered to religious employers that she has received. SER 71.

Though appellant has alleged that "exemptions" render the Director's enforcement of state law not generally applicable, it has not presented evidence showing the existence of any exemption that gives the Director discretion to inhibit religion or showing that the Director has exercised her discretion in a discriminatory fashion. *See* ER 410. The "mere existence" of authority giving government discretion to grant exemptions "does not

destroy a law's general applicability." *Stormans*, 794 F.3d at 1082. First, some of the health plans that appellant has alleged are "exempt" fall outside the Director's jurisdiction—meaning that she had no discretion to exempt them. *See* AOB 56; ER 410. As appellant concedes, the health plans are not subject to the Director's enforcement because of limitations on her jurisdiction contained in the Knox-Keene Act and other laws, not because she exercised her discretion to exempt them. AOB 56. For instance, the Director does not have authority over plans "directly operated by a bona fide public or private institution of higher learning." § 1343(e). The Director also lacks jurisdiction over self-funded CalPERS plans.

C. The Director's Enforcement of State Law Furthers the Legitimate Purposes of Relevant Constitutional and Statutory Provisions

A neutral and generally applicable law must typically be upheld if it is "rationally related to a legitimate governmental purpose." *Stormans*, 794 F.3d at 1084. The Director's letters identify two legitimate government purposes for her actions. The first purpose is ensuring that all health plans cover all "basic health care services." *See* ER 420-33; *Deen v. Egleston*, 597 F.3d 1223, 1231 (11th Cir. 2010) (ensuring access to health care is a legitimate government purpose). The second is ensuring that health plans

comply with state law and do not discriminate against women or violate their fundamental constitutional rights. *See* ER 420-33; *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003) (protecting rights is a legitimate government purpose). By requiring amended coverage documents from health plans that had improper restrictions on abortion services interfering with women's rights, the Director's enforcement of state law furthered these legitimate government purposes. Because the Director's letters had a rational basis, and appellant has not proffered any evidence to the contrary, appellant's Free Exercise Clause claim does not survive summary judgment.

D. Even if Strict Scrutiny Applies, the Director's Enforcement of State Law Would Withstand Such Heightened Review

A law that is not neutral and generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. Assuming *arguendo* that strict scrutiny applied, the Director's enforcement of state law would be upheld because the Director has a compelling governmental interest in ensuring compliance with state law and her issuance of seven letters to noncompliant health plans was narrowly tailored to advance that interest. ER 420-33. Thereafter, the Director provided an accommodation for

religious employers. SER 71. Appellant's voluntary decision to provide coverage to its employees under a DMHC-regulated health plan and voluntary decision to not request that its health plan seek a "religious employer" exemption, does not constitute a violation of the Free Exercise Clause. SER 143; SER 164-65; SER 135-36.

In short, appellant failed to present evidence that would allow a reasonable fact-finder to conclude that the Department violated the Free Exercise Clause. Consequently, the district court properly granted summary judgment on this cause of action.

CONCLUSION

The Department respectfully requests that the Court affirm the district court's order granting summary judgment.

Dated: December 14, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
NIROMI W. PFEIFFER
Supervising Deputy Attorney General

/s Karli Eisenberg
KARLI EISENBERG
Deputy Attorney General
Attorneys for Defendants/Appellees California Department of Managed Health Care

18-55451

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SKYLINE WESLEYAN CHURCH,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE; MICHELLE ROUILLARD, in her official capacity as Director of the California Department of Managed Health Care,

Defendants and Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: December 14, 2018

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
NIROMI W. PFEIFFER
Supervising Deputy Attorney General

/s Karli Eisenberg
KARLI EISENBERG
Deputy Attorney General
Attorneys for Defendants/Appellees California Department of Managed Health Care

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-55451

I am the attorney or self-represented party.

This brief contains 13,655 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Karli Eisenberg **Date** 12/14/2018

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I certify that on December 14, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that services will be accomplished by the appellate EM/EC system.

Date: December 14, 2018 */s/ Karli Eisenberg*