No. 18-55451

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKYLINE WESLEYAN CHURCH,
Plaintiff–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-Appellees.

On Appeal from the United States District Court
for the Southern District of California, San Diego
No. 3:16-cv-00501-CAB-DHB

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Skyline Wesleyan Church states that it is a non-profit corporation and that no parent corporation or publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

In August 2014, the California Department of Managed Health Care, or DMHC, mandated all California religious organizations that maintained healthcare plans to cover legal abortions, regardless of the organization's religious beliefs. The DMHC's directive directly harmed Skyline Wesleyan Church, which had an employee-healthcare plan that excluded elective abortion coverage, consistent with the Church's beliefs. The DMHC did not even have the courtesy to notify the Church of this policy change when implemented in August 2014; the Church discovered the change on its own, more than a month later, while reviewing its plan documents. And despite the Church's repeated requests, the DMHC has not changed its policy. Today, more than four years later, the Church's health plan *still* covers abortion.

Although the Church has been forced to live for four years with this intentional violation of its religious beliefs, the District Court wrongly held that the Church could not even initiate this challenge. According to the District Court, the Church's injury is not redressable, and its claims are not ripe, because an *insurer* has not resubmitted plan language to the DMHC accommodating the Church's beliefs. *See* ER 10, 16.

But access to the courts is not nearly so limited. In fact, established Supreme Court precedent teaches that an "injury produced by determinative or coercive effect upon the action of someone else" is sufficient for standing. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). And claims are ripe when "an administrative decision has been formalized and its effects felt in a concrete way." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). The DMHC cannot evade judicial review merely by claiming that it will *consider* exemption requests on a case-by-case basis.

This is especially so because the DMHC has already enforced—and continues to enforce—the law in a way that harms Skyline Church, has not adopted any rules or policies ensuring the fair and timely resolution of exemption requests, and has refused to grant the Church an exemption despite its repeated requests. Because this legal challenge presents a ripe and justiciable case and controversy, this Court should reverse the lower court's decision dismissing the case, hold that the DMHC has violated the Church's free-exercise rights, and enter judgment as a matter of law in favor of the Church.

Admittedly, because of its grievous errors regarding justiciability, the District Court did not reach the merits of the Church's claim.[1] And the Church recognizes that a federal appellate court typically "does not consider an issue not passed upon below." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014). "But this rule is not inflexible." *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). And this Court "has discretion to decide whether to reach such an issue" when "the issue presented is a purely legal one and the record below has been fully developed." *Davis*, 755 F.3d at 1094.

Such circumstances are present here. In addition, it would be untenable to force the Church to continue violating its religious convictions during the pendency of a lengthy remand proceeding, particularly when the Church's free-exercise claim is so straightforward. Accordingly, the Church respectfully requests that this Court exercise its discretion and resolve this case on the merits.

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[1] Skyline Church has also alleged violations of the Establishment Clause of the U.S. Constitution, Article I, Section 4 of the California Constitution, and the California APA. Although the Church only asks the Court to address the merits of its free-exercise claim under the U.S. Constitution, it is not waiving its other claims. The Court may exercise its discretion to address the merits of those claims as well. *See Quinn*, 783 F.2d at 814.

STATEMENT OF JURISDICTION

Although this case was initially filed in state court, the DMHC removed it to federal court under 28 U.S.C. § 1441. ER 390–92. The complaint alleged violations of the U.S. Constitution, ER 409–13, and the District Court had federal-question jurisdiction under 28 U.S.C. § 1331. The District Court had supplemental jurisdiction of the Church's related state constitutional and state APA claims under 28 U.S.C. § 1367.

This Court has jurisdiction under 28 U.S.C. § 1291 because the Church appeals from a final judgment. On March 9, 2018, the District Court denied the Church's motion for summary judgment and granted the DMHC's on redressability and ripeness grounds. ER 2–17. The District Court entered judgment the same day and dismissed the action without prejudice. ER 1. "A dismissal of an action without prejudice is a final appealable order." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003); *accord, e.g.*, *Whisnant v. United States*, 400 F.3d 1177, 1180 (9th Cir. 2005) ("A dismissal for lack of subject matter jurisdiction is a final judgment over which this court has jurisdiction under 28 U.S.C. § 1291 ...."). Plaintiff timely filed a notice of appeal on April 6, 2018. ER 18–20; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

In August 2014, the DMHC required coverage of all legal abortions in the healthcare plans of religious organizations. It is undisputed that Skyline Church's religious beliefs forbid it from covering elective abortion, and that the DMHC's current interpretation and application of state law requires the Church's plan to provide such coverage. These circumstances present the following issues on appeal:

1. Whether a favorable court decision is likely to redress Skyline Church's ongoing injury, where California insurers previously offered plans that allowed religious organizations to limit and exclude abortion coverage before the DMHC told them it was illegal to do so.

2. Whether Skyline Church's claims for prospective relief are ripe because they are based on the DMHC's past and ongoing enforcement of the law.

3. Whether Skyline Church has standing to assert claims for retrospective relief based on past violations of its constitutional rights, and whether those claims are ripe.

4. Whether the DMHC's actions violate the Free Exercise Clause of the U.S. Constitution.

STATUTES AND REGULATIONS

Pertinent constitutional provisions, statutes, regulations, and rules are attached as an addendum to this brief.

STATEMENT OF THE CASE

A. Skyline Wesleyan Church and its religious beliefs about the sanctity of human life

Skyline Wesleyan Church ("Skyline Church" or "Church") is a Christian church located in La Mesa, California. ER 30. The Church adheres to *The Discipline of Wesleyan Church*, which forbids abortion except in those "rare pregnancies where there are grave medical conditions threatening the life of the mother." ER 30–31, 72. Consistent with this doctrine, the Church believes and teaches that elective abortion violates the Bible's command against the intentional destruction of innocent human life. ER 30, 109–13.

Skyline Church employs over 100 people. ER 145. As a condition of employment, the Church's employees must be members of the congregation and agree with and abide by the Church's religious beliefs, including its beliefs about abortion. ER 32. Because the Church believes it has a religious obligation to care for the physical, mental, and emotional health

of its employees, it offers them a generous health insurance plan. ER 32, 115–17.

The Church previously could—and did—purchase an employee healthcare plan that excluded elective abortion coverage consistent with its religious beliefs. ER 119–20, 133. But in August 2014, the DMHC summarily announced to insurers that it was now illegal for them to exclude or limit abortion coverage in their healthcare plans. ER 420–33. As a result of this mandate, the Church's healthcare plan was amended, without its knowledge or consent, to include elective abortion coverage in violation of the Church's beliefs. ER 106, 119–20, 133.

B. The DMHC and the Knox-Keene Act

The DMHC is the regulatory body responsible for enforcing California's Knox-Keene Health Care Service Plan Act of 1975 (the "Knox-Keene Act") and its related regulations. ER 162–64; *see also* Cal. Health & Safety Code § 1341(a). Michelle Rouillard has been the director of the DMHC since December 2013. ER 206.[2]

[2] Although the California Department of Insurance also oversees the state's health coverage market, the DMHC regulates the vast majority of the market. "96% of commercial and public health plan enrollment" was regulated by the DMHC last year. DMHC Annual Report (2017),

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

Notably, the "basic health care services" provision does not apply to all healthcare plans. For example, the DMHC's director "may, for good cause, by rule or order exempt a plan contract or any class of plan contracts from that requirement." Cal. Health & Safety Code § 1367(i). The director also may exempt plans from the Act's requirements if she deems

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https://www.dmhc.ca.gov/Portals/0/Docs/DO/2017-Annual-Report-web.pdf.

it to be "in the public interest." *See id.* §§ 1343(b), 1344(a). The DMHC has adopted no rules, policies, or procedures governing the exercise of this discretionary exemption authority. ER 193–95. But certain categories of health care plans *have* been exempted entirely—either by statute or regulation. *See, e.g.*, Cal. Health & Safety Code § 1343(e) (exempting, for example, health care plans operated by "[t]he California Small Group Reinsurance Fund" and plans "directly operated by a bona fide public or private institution of higher learning"); Cal. Code Regs. tit. 28, § 1300.43 (exempting "small plans" administered solely by an employer that "does not have more than five subscribers").

C. Events preceding the August 22, 2014 letter

Before August 22, 2014, the DMHC allowed religious organizations to exclude or limit abortion coverage in their healthcare plans. ER 168. For example, the DMHC previously approved plan language that permitted religious organizations to:

- Exclude coverage for "elective abortions" and "voluntary termination of pregnancy," ER 170–71, 262–65, 339;
- Exclude coverage for "voluntary abortion, except when medically necessary to save the mother's life," ER 265, 282, 288; and
- Limit coverage to "medically necessary" abortion, defined as an abortion performed when, "due to an existing medical

> condition, the mother's life would be in jeopardy as a direct result of pregnancy." ER 294–97.

In November 2013, Michelle Rouillard, the DMHC's present director, was contacted by representatives from the National Health Law Program ("NHeLP"), an organization that promotes the expansion of abortion access and seeks to eliminate "religious restrictions."[3] NHeLP advised Director Rouillard that two Catholic universities—Loyola Marymount University ("LMU") and Santa Clara University ("SCU")—"recently went public that they were eliminating abortion coverage from their employee health plans." ER 312.[4] NHeLP then asked Director Rouillard if she or "one of [her] staff" would speak with NHeLP and "a few of the allies" it had "been working with to figure out the best way of addressing these issues." *Id.*

In response, Ms. Rouillard and other DMHC officials met with representatives of NHeLP, the ACLU, and Planned Parenthood. Gary Baldwin, who attended the meeting and was the DMHC's deputy director

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[3] National Health Law Program, Reproductive Health, http://www.healthlaw.org/issues/reproductive-health.

[4] At that time, Ms. Rouillard had just been nominated as director of the DMHC. She officially assumed that role shortly thereafter in December 2013. ER 206.

of plan and provider relations at the time, said the situations at LMU and SCU "caused the Department to start looking into" what the agency's "policy should be in regards to those [abortion] exclusions." ER 256. Accordingly, in December 2013, the DMHC requested information from insurers about the scope of abortion coverage offered in their health care plans. ER 178.

For 40 years, California had *never* interpreted the Knox-Keene Act to require health plans to provide coverage for all legal abortions. Then, in February 2014, Planned Parenthood sent the DMHC a legal analysis claiming that coverage was required. ER 306–10. The very next month, Planned Parenthood warned that it was considering legislation to eliminate religious exemptions for abortion coverage, but said it would forgo that effort in exchange for an administrative solution, provided that the DMHC agreed to "not approve any further plans that exclude coverage for abortion," "clarif[y] that there is no such thing as an elective or voluntary abortion exclusion," "rescind [its] approval" of "plans that include an abortion exclusion," and "find a solution to fix the already approved plans being offered to employees of LMU for 2014 and SCU for 2015." ER 324.

In response, the DMHC's parent agency, California Health and Human Services (CHHS), asked Planned Parenthood whether it "had looked at any federal law and it's [sic] possible application to this issue, specifically the federal Health Care Provider Conscience Protection statutes." ER 331. Planned Parenthood answered that it had "researched federal law on conscience protections and religious exclusions both in general and within the ACA, and don't see them as a barrier here in California." ER 330.

In May 2014, CHHS asked Planned Parenthood to "get[ ] in touch" with Gary Baldwin because the "DMHC would like to request Planned Parenthood's assistance on some additional information." ER 334. Although Mr. Baldwin followed up with an email proposing to "talk on Monday," he now can't remember that conversation, or even whether it happened. ER 257.

In June 2014, the DMHC asked Aetna, Skyline Church's then-insurer, to (1) identify the number of employer groups that had purchased coverage limiting or excluding coverage for abortion and (2) indicate the number of those groups that qualified as a "religious employer" under California Health & Safety Code § 1367.25. ER 338–40.

Aetna responded that four employer groups had purchased coverage excluding abortion services and that all four qualified as "religious employers." ER 340.

The DMHC received similar information from other insurers. For example, Kaiser Permanente acknowledged that it had "contracts with nine groups who meet the definition of religious employer" under California law and "all of them exclude coverage for … elective terminations of pregnancy." ER 342. Blue Shield likewise informed the DMHC that 10 of its employer groups had "negotiated alternative [abortion] coverage" and all were "religious or religious-affiliated organizations." ER 345.

As for secular employers, the DMHC received no information showing that it had approved—or insurers were offering—healthcare plans that gave such employers the option to limit or exclude abortion coverage. *See* ER 172–74, 224–25, 234; *see also* ER 348.

D. The August 22, 2014 letter and revocation of existing religious exemptions

On August 22, 2014, the DMHC issued a letter to California health insurers "remind[ing]" them that the Knox-Keene Act's "basic health care

services" provision *mandates* coverage for all legal abortions. ER 300.[5] The DMHC claimed that it had reviewed plan documents and made a determination that it had "erroneously approved or did not object" to plan language "limiting or excluding coverage for termination of pregnancies." *Id.* The DMHC also declared that it "discovered" abortion exclusions and limitations in "products covering a very small fraction of California health plan enrollees." *Id.*

The DMHC directed insurers to immediately begin providing coverage for *all* legal abortions in their healthcare plans. ER 300–01; *see also* ER 182. Specifically, the letter stated that, "effective as of [August 22, 2014]" and "[r]egardless of existing [plan] language," healthcare plans "*must* comply with California law with respect to the coverage of legal abortions." ER 301 (emphasis added). The DMHC thus ordered the insurers to:

- "[R]eview all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion," including "plan documents previously approved or not objected to by the DMHC";

[5] The DMHC sent the letter to seven insurers that were offering products limiting or excluding coverage for abortion and posted them on its website as guidance. *See* ER 420–36. For ease of reference, this brief cites to the letter sent to Skyline Church's insurer at the time, Aetna.

- "[A]mend current health plan documents to remove discriminatory coverage exclusions and limitations," including but not limited to "any exclusion of coverage for 'voluntary' or 'elective' abortions and/or any limitation of coverage to only 'therapeutic' or 'medically necessary' abortions"; and
- "[F]ile any revised relevant health plan documents" with the DMHC within 90 days from August 22, 2014 "[t]o demonstrate compliance" with the law.

Id. Finally, the letter advised the insurers that they could cover all legal abortions without even mentioning abortion coverage in their plan documents. *Id.*; *see also* ER 181–82. In sum, the DMHC changed 40 years of California practice and sacrificed religious organizations to the abortion industry.

E. Events after the August 22, 2014 letter

In September 2014, the DMHC denied a request to reconsider the abortion-coverage requirement set forth in the letter. Specifically, the DMHC stated that it had "carefully considered all relevant aspects of state and federal law in reaching its position" and that it "will *not* reverse its position on the scope of required abortion coverage." ER 387 (emphasis added); *see also* ER 389 (denying another request to reconsider in December 2014).

In October 2014, Skyline Church, through its insurance broker, asked its insurer, Aetna, whether it was required to cover elective abortion as a result of the August 22, 2014 letter. ER 74–75, 82–83.[6] After consulting with its legal department, Aetna stated that it no longer offered plans that exclude abortion *because of* "the 08-22-2014 California abortion mandate." ER 82. Because Aetna's plans included elective abortion coverage "as a benefit" and Aetna "[could not] take it out," Aetna explained that the Church "would have to be self-funded" if it wanted to avoid covering elective abortions. *Id.* The Church determined that self-insurance was not a viable option. ER 137, 147.

The Church also contacted California Choice, which offers group healthcare plans from a multitude of health insurers, including such national behemoths as Anthem Blue Cross, Kaiser Permanente, and United Healthcare. ER 78–80, 86–87. The Church specifically asked California Choice to "advise if all your carriers have amended their plans

[6] In response to the August 22, 2014 letter, Aetna removed all references to abortion coverage in plan documents. ER 303. The Church was never notified about the change, and so did not learn about it until more than a month later. *See* ER 74–75, 120.

to cover elective abortions." ER 80. The company confirmed that all its carriers were "in compliance" with California law. *Id.*

A few days later, Skyline Church and six other California churches, filed an administrative complaint with the U.S. Department of Health and Human Services ("HHS"). ER 381–83. The complaint alleged that the DMHC's abortion-coverage requirement violated the federal Weldon Amendment, which prohibits states receiving certain federal funding from discriminating against a "health care entity," including a "health insurance plan," based on whether it "provide[s] coverage of … abortions." ER 382

While HHS was investigating that complaint, the DMHC surprisingly approved an Anthem Blue Cross plan in October 2015 that would allow "religious employers," as defined by California Health & Safety Code § 1367.25(c), to exclude coverage for abortion services except in the cases of rape, incest, and to save the mother's life. *See* ER 351, 379. During her deposition in September 2017, Director Rouillard testified that she did not know the DMHC had granted an exemption from the abortion-coverage requirement. ER 216–17. After being told about the partial exemption for the Anthem Blue Cross plan, she refused to say

whether the DMHC would approve plan language accommodating Skyline Church's religious beliefs. ER 218–20.[7]

Director Rouillard also was asked about a representation the DMHC had made to HHS during the Weldon Amendment investigation. The agency had claimed to HHS that it had since "informed plans that it would grant them an exemption from the requirements of the August 22nd letter for products offered exclusively to entities that meet the definition of a 'religious employer' in California Health and Safety Code 1367.25(b)(1)." ER 222–23. Director Rouillard testified that she was unaware of any such communications and that she did not remember instructing anyone to inform insurers about a religious exemption. ER 223–24.

Nancy Wong, the former deputy director of the DMHC's Office of Plan Licensing, provided some clarity. She testified that she had separate phone calls with four health insurers—Anthem Blue Cross, United

[7] The partial exemption does not accommodate Skyline Church's religious beliefs, which teach that abortion may be acceptable only when the mother's life is in danger. ER 30–31, 72; *see also* ER 31 (explaining that Pastor Garlow has adopted and raised four children who were the result of unwanted pregnancies, including a daughter who was conceived as the result of gang rape).

Health Care, Blue Shield, and Health Net—during which they discussed possibly submitting a religious exemption request. ER 183–88. Ms. Wong confirmed that these conversations were the representations that the DMHC had reported to HHS. ER 191.[8]

Ms. Wong further testified that those insurers asked the DMHC "what type of language they should use" if they decided to request a religious exemption. ER 188–89. Although Ms. Wong claimed in her deposition that the insurers could submit "whatever they want," she admitted to "point[ing]" them to a "multistate plan" that limited abortion coverage to the cases of rape, incest, and to save the mother's life. *Id.*[9] And when asked at her deposition what other abortion language might be acceptable to the DMHC, Ms. Wong testified that she did not know. ER 190, 193–94. The DMHC, she conceded, did not have "any written rules, policies, or procedures related to the types of abortion language that would be acceptable for a religious exemption." ER 193–94.

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[8] Although Ms. Wong "believe[d]" she may have had conversations with other plans, she did not "specifically" recall any. ER 192. Nor was she aware of the DMHC sending any written communications to other health insurers about the possibility of obtaining a religious exemption. *Id.*

[9] A multistate plan is a product that is offered through the federal Health Insurance Marketplace.

In July 2018, Skyline Church and three other California churches sent a letter to the DMHC requesting a religious exemption that would allow them, consistent with their religious beliefs, to exclude abortion coverage in their healthcare plans except when necessary to save the mother's life. *See* Appellant's Mot. to Supplement the Record. The DMHC has not granted the requested exemption. Such denial, whether considered implicit or explicit, is consistent with the actions of the DMHC over the past *four years* in refusing to reconsider its interpretation of state law or grant such exemption.

F. District Court proceedings

In February 2016, Skyline Church filed a state court complaint, seeking declaratory and injunctive relief and nominal damages. ER 398–418. The complaint asserted claims under the free exercise, establishment, and equal protection clauses of both the United States and California constitutions, as well as a state APA claim. *Id.* The DMHC removed the case to the U.S. District Court for the Southern District of California and moved to dismiss. *See* ER 461, 463 (Doc. Nos. 1, 20). Judge Marilyn L. Huff agreed to dismiss the equal protection claims but held

that the complaint sufficiently alleged standing as well as free exercise, establishment, and state APA claims. *See* ER 463 (Doc. No. 28).

Following discovery, the parties filed cross-motions for summary judgment in November 2017. After the parties filed their opposition briefs, Judge Huff recused herself from the case. *See* ER 467 (Doc. No. 79). Two more judges recused themselves before the case was reassigned to Judge Cathy Ann Bencivengo. *See* ER 467 (Doc. Nos. 81, 82, 83).

The District Court issued a tentative order granting summary judgment in favor of the DMHC on prudential ripeness grounds. ER 21–28. Although the parties had not briefed the question of ripeness, the District Court concluded that the DMHC's "standing arguments raise a ripeness question that compels discussion." ER 26.

After holding a hearing, the District Court issued its final decision on March 9, 2018. ER 2–17. It held that the Church's claims were neither constitutionally nor prudentially ripe and that the Church lacked standing because a favorable ruling was unlikely to redress its injury. *Id.*

In discussing constitutional ripeness, the District Court noted that Skyline Church had "an employee health plan that restricted abortion coverage consistent with the Church's religious beliefs" before August 22,

2014. ER 9. The District Court thus properly recognized that the Church "was injured as a result of the change to its health care plan." *Id.* Nevertheless, it held that the constitutional component of ripeness was not satisfied because the DMHC had since approved an Anthem Blue Cross plan that allowed "religious employers" to limit abortion coverage to rape, incest, and to save the mother's life. ER 9–10. According to the District Court, this partial exemption was an "intervening event" that created uncertainty about whether Skyline Church could once again obtain approval for a plan accommodating its particular religious beliefs. ER 9. The District Court asserted that there could be no constitutionally ripe case or controversy until the DMHC "receives and denies approval of a health care plan that reflects [the Church's] religious beliefs." ER 10.

The District Court relied on the same argument in holding that the Church's legal challenge was not prudentially ripe. The District Court asserted that, "[a]t bottom, what is missing here is a final decision from the DMHC on a health care plan that meets [the Church's] religious exemption requirements." ER 13. Even though the DMHC had rescinded *all* existing religious accommodations, including those that satisfied the Church's beliefs, the District Court did not think "[t]he revocations of the

earlier exemptions awarded to religious employers" provided "a reasonable justification for why health care plans should not apply for a subsequent exemption." ER 13–14.

Attempting to distinguish this Court's decision in *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012), the District Court described this case as a pre-enforcement action and stated that "none of the requisite components of a pre-enforcement claim have been met." ER 9–10. Despite the Church's nominal damages claim for past deprivations of constitutional rights, the District Court asserted that "this litigation would be unnecessary and any potential infringements on [the Church's] religious beliefs would cease to exist," "[i]f the DMHC were to receive and approve a plan that met [the Church's] requirements." ER 10.

As for standing, the District Court conceded that the Church satisfied the first two elements (injury-in-fact and causation), but held that the injury was not likely to be redressed by a favorable decision. ER 15. Believing that redressability "depends upon the actions" of third-party insurers, the District Court was "unwilling" to "presum[e]" that a favorable decision would result in an insurer once again offering the

Church with its desired coverage, ER 16–17, even though the Church previously had such a plan until the DMHC declared it illegal and instructed all California healthcare insurers to stop offering religious exemptions for abortion.

SUMMARY OF ARGUMENT

Skyline Church previously could—and did—purchase a healthcare plan that provided necessary medical coverage to its employees and their families while at the same time excluding elective abortion coverage consistent with its religious beliefs. But that changed on August 22, 2014, when the DMHC rescinded existing religious accommodations and mandated immediate coverage of all legal abortions "[r]egardless of existing [plan] language." ER 301. The District Court erred in concluding that the Church's challenge to the DMHC's actions does not present a justiciable case and controversy.

The District Court's error began with its failure to appreciate that the Church has requested both retrospective and prospective relief. Indeed, the lower court completely overlooked the Church's nominal damages claim based on past violation of its constitutional rights. The District Court's ruling must be reversed on that ground alone, because

the Church has standing to pursue claims for retrospective relief and those claims are ripe for review now.

The Church also has standing to pursue its claims for prospective relief. The DMHC's actions directly caused the Church's injury, that injury is ongoing, and it is likely to be redressed by a favorable ruling. It is undisputed that before the DMHC issued the August 22, 2014 letter, California insurers willingly offered plans that allowed religious organizations to exclude or limit abortion coverage consistent with their beliefs—indeed, the Church had such a plan. A favorable decision would remove the regulatory roadblock and allow the Church to once again freely negotiate for and purchase a plan accommodating its beliefs.

In addition, Skyline Church's claims for prospective relief are ripe because they arise from injuries that have already occurred as a result of the DMHC's past and ongoing enforcement of its new policy with respect to abortion coverage. No further factual development is needed to decide whether it is unlawful to apply the abortion-coverage requirement to the Church's healthcare plan. And § 1983 requires no more. At present, the DMHC could exempt the Church but has consistently refused to do so. The DMHC may not evade judicial review of its actions merely by

reserving the right to "consider" religious exemption requests on a case-by-case basis, especially when it has no rules, policies, or procedures governing such requests.

Because the Church's challenge to the abortion-coverage requirement presents a justiciable case and controversy, this Court must overturn the District Court's ruling on standing and ripeness.

But the Court should not stop there. Principles of fairness and judicial economy counsel in favor of addressing the merits of at least the Church's federal free-exercise claim. That claim presents a purely legal issue and can be decided with the benefit of a fully developed record. The Church's right to relief on its free-exercise claim is plain. And the Church would suffer substantial prejudice by undergoing an additional multi-year delay by being compelled to continue providing abortion coverage for the duration of a remand. The Church has suffered long enough; this Court can and should protect its constitutional rights now.

On the merits, the record shows that the Church is entitled to summary judgment under the Free Exercise Clause. The DMHC's decision to rescind existing religious accommodations and apply the abortion-coverage requirement to the Church's plan substantially

burdened—and continues to burden—the Church's religious beliefs, was based on an interpretation and application of state law that involves a system of "individualized assessments," and was neither neutral nor generally applicable as it targets religion at the behest of pro-choice lobbyists. Skyline Church's bureaucratic nightmare is precisely what the Free Exercise Clause was intended to prevent.

STANDARD OF REVIEW

A district court's ruling on cross-motions for summary judgment is reviewed de novo. *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007). "[V]iewing the evidence in the light most favorable to the nonmoving party," this Court must consider "whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* The Court "may review both the grant of the prevailing party's motion and the corresponding denial of the opponent's motion." *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 734 (9th Cir. 2012).

ARGUMENT

I. The Church has standing to assert claims for prospective relief, and those claims are ripe for review.

The Church used to have an employee healthcare plan that excluded elective abortion coverage consistent with its religious beliefs. The DMHC changed that when it rescinded its prior approvals of such plans and instructed insurers to issue plans covering all legal abortions. While the Church seeks a judgment and nominal damages for the past violation of constitutional rights caused by the DMHC's actions (*see infra* Section II), it also seeks declaratory and injunctive relief to stop the DMHC's ongoing enforcement of the abortion-coverage requirement.

A favorable court decision will redress the Church's ongoing injury because it would eliminate a regulatory prohibition to the Church obtaining a healthcare plan that offers coverage consistent with its religious beliefs. The claims for prospective relief are also ripe because the abortion-coverage requirement "has been formalized and its effects felt in a concrete way" by the Church. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003).

A. A favorable decision is likely to redress the Church's injury because it would remove a regulatory roadblock.

To establish Article III standing, a plaintiff must show: "(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 Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

The District Court correctly acknowledged that the Church suffered an actual injury because of the DMHC's actions. ER 15 (assuming that "Plaintiff has satisfied the first and second conditions necessary for Article III standing"). Nevertheless, it held that the Church lacked standing because "the DMHC cannot order or force a health care plan" to accommodate the Church's beliefs. ER 16. Without a "declaration" from an insurer promising the desired coverage, the District Court was "unwilling" to "presum[e]" that a favorable decision would redress the Church's injury. *Id.*

Nonsense. For one thing, the DMHC *can* require health care plans to accommodate religious beliefs. Just like the DMHC instructed health insurers to include abortion coverage in their plans, it can instruct them to limit or exclude that coverage when necessary to protect the religious freedom of purchasers. *See, e.g.*, Cal. Health & Safety Code § 1343(b) (allowing the director to exempt "any class of persons" from the law's requirements if the action is "in the public interest"); Cal. Health & Safety Code § 1344(a) (allowing the director to "prescribe different requirements for different classes"); *see also* Cal. Health & Safety Code § 1367.25(c) (stating that if a religious employer requests a health care plan without contraceptive coverage, then such a plan "*shall* be provided") (emphasis added).

More important, all that is required for redressability is that it "be likely, as opposed to merely speculative," that the Church's "injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Church need not show that a favorable ruling will immediately result in it getting its old plan back. Rather, the Church must show only that a favorable decision would lead to a "change in legal status" that "would amount to a significant increase in the *likelihood* that

[it] would obtain relief that directly redresses the injury suffered." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (emphasis added).

It cannot be disputed that a favorable decision would remove the very regulatory roadblock that violated the Church's religious rights. That fact proves redressability. Again, a "plaintiff satisfies the redressability requirement" by showing "that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Moreover, the record establishes that California insurers were willing to—and in fact did—provide exactly what the Church desires. They stopped only when the DMHC told them they were violating the law. A favorable decision will thus redress the Church's ongoing injury because it would result in a "change in legal status," *Renee*, 686 F.3d at 1013, allowing insurers to once again freely offer (and the Church to purchase) a healthcare plan that excludes or limits abortion coverage consistent with the Church's beliefs.

The Supreme Court has long exercised jurisdiction in cases where, like here, the plaintiff's injury arises from a third party's compliance with

a statute or rule. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for example, the Court held that out-of-state book publishers had standing to challenge a state agency's practice of sending notices to book distributors informing them that certain books were objectionable and unfit for distribution. Even though the notices "were circulated only to distributors," and the agency "made no claim to having jurisdiction of out-of-state publishers," the Court concluded that the publishers' "standing has not been, nor could it be, successfully questioned." *Id.* at 64 n.6. Because the notices had impaired the sales of the publishers' books, the Court reasoned that the case would have presented a justiciable claim of "unlawful interference in advantageous business relations" had it been a private action. *Id.* It made "no difference" to the Court "that the allegedly unlawful interference" was "the product of state action." *Id.*

Similarly, in *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 724–25, 736 n.15 (1980), the Supreme Court held that a consumer group had standing to challenge a state bar rule prohibiting attorney advertising, where the group encountered difficulty preparing a legal services directory because lawyers were reluctant to supply certain information as a result of the rule.

And in *Bennett v. Spear*, 520 U.S. 154, 168–71 (1997), the Supreme Court held that ranchers had standing to challenge a Fish and Wildlife opinion because that opinion had a "coercive" and "virtually determinative effect" on the Bureau of Reclamation's decision to restrict water flow, which injured the ranchers. The Court concluded that the ranchers' injury was "fairly traceable" to the agency opinion and thus "likely" to be redressed by a court order setting aside the opinion, even though the Bureau would "retain[ ] ultimate responsibility for determining" whether to restrict water flow. *Id.*

In each case, the Supreme Court exercised jurisdiction in circumstances indistinguishable from those here—where the plaintiff had no guarantee from the relevant third parties that they would take steps to completely redress the plaintiff's injury. The publishers in *Bantam Books* did not have to show that the distributors would resume distributing their books; the consumer group in *Consumers Union* did not have to show that the attorneys would in fact provide them with the requested information; and the ranchers in *Bennett* did not have to show that the Bureau of Reclamation would stop its harmful practice of restricting water flows if the agency opinion was set aside.

What mattered was the "determinative" or "coercive effect" the government's actions had "upon the action of someone else," which in turn caused or was likely to cause the plaintiff harm. *Bennett*, 520 U.S. at 169; *accord, e.g.*, *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942) (standing unaffected by "the fact that the regulations are not directed to appellant," because "[i]t is enough that … the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations"); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1172 (9th Cir. 2011) (holding, in a case similar to *Bennett*, that farmers' injury was likely to be redressed by a favorable ruling because "the Bureau *could* restore water flows without worrying about whether the flows would result" in a violation of the law) (emphasis added); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (individual pharmacists with religious objections to delivering abortifacient drugs had standing to challenge state rules requiring pharmacies to stock and deliver the objectionable drugs).

It should come as no surprise, then, that lower courts considering the issue have held that purchasers of healthcare plans have standing to challenge insurance-coverage mandates like this one.

In *Wieland v. U.S. Department of Health & Human Services*, 793 F.3d 949, 957 (8th Cir. 2015), the Eighth Circuit reversed a lower court decision holding that employees lacked standing to bring a free-exercise challenge against the ACA's contraceptive coverage mandate. The court concluded that an insurer's previous willingness to offer a contraceptive-free plan was "persuasive evidence" that injunctive relief was likely to redress the employees' injuries. *Id.*

Similarly, no insurer declaration or guarantee was required to establish standing in *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013), a case that also involved a challenge to the ACA's contraceptive mandate and whose merits the Supreme Court decided in conjunction with *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The district court, Third Circuit, and Supreme Court all exercised jurisdiction without requiring confirmation from an insurer that it was willing to provide Conestoga Wood with its desired contraceptive-free coverage. *See Conestoga Wood Specialties Corp.*, 917 F. Supp. 2d 394 (E.D. Pa. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013); *Hobby Lobby*, 134 S. Ct. 2751 (2014).

So too here. The August 22, 2014 letter plainly had a "coercive" and "determinative" effect on insurers, prohibiting them from offering healthcare plans that limit or exclude abortion coverage. A favorable court decision undoing the effect of that letter is more than likely to redress the Church's injury. And if this Court reaches a contrary result, it will create a direct split with the Eighth Circuit, and at least an indirect split with the Third Circuit. Accordingly, this Court should uphold the Church's right to immediately challenge the DMHC's wrongful conduct.

B. The claims for prospective relief are ripe because they arise from past and ongoing enforcement of the law.

The Church's claims for prospective relief are also ripe. "The ripeness inquiry contains both a constitutional and prudential component." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012). "The ripeness doctrine is peculiarly a question of timing designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action." *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010) (internal citations and quotations omitted).

It is well established that constitutional ripeness "coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Because the Church suffered an injury for standing purposes—a fact the District Court acknowledged (*see* ER 15)—the constitutional component of ripeness is satisfied here.

And while constitutional ripeness is jurisdictional, "[p]rudential considerations of ripeness are discretionary." *Thomas*, 220 F.3d at 1142. In fact, the Supreme Court has questioned the "continuing vitality" of the prudential ripeness doctrine, noting that it is in "tension" with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). Even so, the Church's claims for prospective relief satisfy the prudential considerations for ripeness, which require courts to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

The Church's claims for prospective relief are "fit for decision" because the "issues raised" by them are "primarily legal, do not require

factual development, and the challenged action is final." *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999). The claims ask whether the DMHC may lawfully apply the abortion-coverage requirement to the Church's healthcare plan. And no further factual development is needed to answer the question. Indeed, the parties have already engaged in extensive discovery and moved for summary judgment in the court below, agreeing that all of the Church's claims can be resolved as a matter of law.

The challenged agency action also is final. The August 22, 2014 letter, which rescinded the existing religious exemptions and required coverage for all legal abortion, was a "definitive statement of [the DMHC's] position," had "the status of law," required "immediate compliance with its terms," and had "a direct and immediate effect on [the Church]." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000).

Although the District Court agreed that the DMHC's decision to remove abortion coverage limitations and exclusions from plan documents "may well be a definitive and final decision," it still held that the Church's claims were not ripe because "the decision regarding the types of

exemptions to confer religious employers is far from settled." ER 10. The District Court asserted that the DMHC has since "informed health care plans it *would* grant religious exemptions," and it pointed to the partial exemption given to Anthem Blue Cross in October 2015 as evidence. ER 12, 14 (emphasis added). This is wrong for two independent reasons.

First, the record does not support the District Court's conclusion. When asked about the purported Anthem Blue Cross exemption at her deposition in September 2017, Director Rouillard had no knowledge of the DMHC declaring that a religious exemption was available or that the agency had granted an exemption. ER 218–23. Nancy Wong clarified that any subsequent communications about a religious exemption consisted of phone conversations she had with four health insurers, where they simply discussed the *possibility* of submitting an exemption request on a case-by-case basis. ER 191–92. Tellingly, neither Director Rouillard nor Ms. Wong knew what types of abortion language might be acceptable for a religious exemption. ER 190, 193–94, 218–20. And it is undisputed that the DMHC has no written rules, policies, or procedures governing such exemption requests. ER 193–94.

More to the point, Director Rouillard *refused to say* whether the DMHC would approve language accommodating Skyline Church's religious beliefs. ER 218–20. And the DMHC has refused to provide the Church with an exemption for years now—despite being free to do so, and despite being directly asked for one. *See* Appellant's Mot. to Supplement the Record. The DMHC's silence speaks volumes.

Second, the finality requirement for ripeness refers to *whether harm has already occurred*, not whether the government might someday change its mind. Otherwise, no claim involving adverse government action would ever be ripe, because it is always possible the government will take a different position in the future. The Church's claims are ripe because there has been "some concrete action applying the regulation to the [Church's] situation in a fashion that harms or threatens to harm [it]." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808.

This Court has previously considered—and rejected—the District Court's contrary conclusion. In *Oklevueha*, this Court held that the ability to request a religious exemption does not destroy ripeness where, like here, the government has already enforced the law in a way that harmed the plaintiff. 676 F.3d at 838. In that case, the DEA, relying on

the Controlled Substances Act (CSA), had seized and destroyed a package of marijuana intended for a Native American church and its spiritual leader. *Id.* at 834. The church and its leader alleged that the First Amendment and Religious Freedom Restoration Act (RFRA) protected their sacramental use of marijuana, and they sought declaratory and injunctive relief barring the government from enforcing the CSA against them. *Id.* at 833. Because the CSA had "already been enforced" against them and their injury had "already occurred," this Court held that their claims for prospective relief were ripe. *Id.* at 837.

In so holding, the *Oklevueha* Court rejected, expressly, the argument that the plaintiffs' failure to request an exception from the CSA's requirements made their claims unripe. *Id.* at 838. Noting that the CSA expressly allowed exception requests to be made to the DEA, the government had argued that the plaintiffs should be required to "exhaust this administrative remedy" because "doing so would allow the DEA to apply its expertise to Plaintiffs' claim, possibly moot the case if the claim is granted, and help build a record for judicial review." *Id.* But this Court correctly refused "to read an exhaustion requirement into RFRA where

the statute contains no such condition, and the Supreme Court has not imposed one." *Id.*

Skyline Church's claims for prospective relief here are no different. They too arise from past enforcement of the challenged law. And they too involve a statute, § 1983, that does not contain an exhaustion requirement and prohibits courts from imposing one. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 502 (1982) ("[E]xhaustion of administrative remedies in § 1983 actions should not be judicially imposed."). Like the *Oklevueha* plaintiffs, the Church was not required to submit an exemption request for its claims to be ripe.

Because the Church's claims for prospective relief are fit for decision, this Court need not reach "the second factor of the prudential ripeness inquiry—hardship to the parties in delaying review." *Oklevueha*, 676 F.3d at 838. That said, the District Court's conclusion that deferring review will not result in "real hardship" to the Church, ER 14, both fundamentally misunderstands the point of this lawsuit and overlooks this Court's precedent.

In *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009), this Court held that claims brought by a pharmacy and individual

pharmacists were prudentially ripe where the challenged law would require them to stock and dispense certain abortifacient drugs "over their religious and moral objections." This Court explained that the hardship factor of prudential ripeness was "certainly met" because withholding review would subject the plaintiffs to "the very injury they assert." *Id.* This was so even though the pharmacy and pharmacists could have theoretically requested an administrative exemption.

So too here. Withholding judicial review would impose a substantial hardship on the Church because it would continue to suffer the very injury—provision of abortion coverage in its employee healthcare plan—on which its claims are based. And the District Court's assertion that this harm can be "ameliorated" by "seek[ing] alternative forms of health insurance," such as "a medical sharing ministries plan or self-insurance," ER 14–15, is incorrect. To begin, the abortion-coverage requirement applies to the Church's plan *right now*, not some future date. "Both this court and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373

(1976)). Furthermore, the record establishes that the Church has evaluated healthcare sharing ministries and self-insurance and determined that they are not viable options.[10]

In short, the hardship prong weighs in favor of deciding the Church's claims now. "[D]elayed resolution of these issues would foreclose any relief from the present injury"—relief that would be "forthcoming" if the Church were to prevail in its claims. *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 82 (1978).

C. If affirmed, the District Court's ruling will cause constitutional violations to go unchallenged, allow administrative agencies to evade judicial review, and frustrate the purpose of § 1983.

The District Court's ruling is that the Church cannot challenge the DMHC's application of the abortion-coverage requirement until a third-party insurer resubmits plan language accommodating the Church's beliefs and the DMHC rejects that language. But the DMHC's August 22, 2014 letter explicitly prohibited the religious accommodations that

[10] The Church determined that healthcare sharing ministries provide neither the guarantee nor scope of coverage needed to satisfy its religious duty to care for its employees. *See* ER 122–23, 137–38. The Church determined that self-insurance was not a viable option given its reliance on voluntary donations and history of very serious (and costly) medical conditions involving Church employees and their families. ER 137, 147.

previously existed. Third-party insurers did not violate the Church's rights; the DMHC did.

As noted above, in *Bantam Books*, the Supreme Court recognized that "pragmatic considerations argue strongly" for the standing of plaintiffs in cases like this. 372 U.S. at 64 n.6. There, the Court held that book publishers could challenge agency notices sent to book distributors prohibiting the sale of certain books. Even though the notices were not directed at the publishers, the Court explained that a distributor who was prevented from selling a few titles was unlikely "to sustain sufficient economic injury to induce him to seek judicial vindication of his rights." *Id.* Book publishers, on the other hand, had a "greater economic stake." *Id.* And unless they were "permitted to sue," the Court reasoned, "infringements of freedom of the press may too often go unremedied." *Id.*

In the same way, the Church and other religious employers have the greater stake in challenging the abortion-coverage requirement. The increased costs of adding elective abortion coverage will be passed on to them, not paid by insurers in an act of goodwill and charity. And it is the religious employers that have religious objections to providing abortion coverage, not the insurers. Religious organizations, including the

Church, must be able to defend their constitutional rights without first recruiting others to join their cause.

The District Court's view of ripeness is no less problematic. According to the District Court, the Church's claims cannot be ripe until it convinces an insurer to resubmit its desired plan language for regulatory approval and that language is again denied by the DMHC. But that is not what § 1983 requires. And it is undisputed that the DMHC has adopted no policies, procedures, or rules governing exemption requests. ER 193–94. In fact, there is not even a deadline by which a request must be resolved, with the DMHC admitting that it can take months and even years for it to make a decision. *See* ER 165–67, 243–45. This "lack of a reasonable time limit" renders the District Court's suggested administrative remedy legally "inadequate" because it allows the DMHC "to delay the administrative processing of claims indefinitely, denying a litigant its day in court." *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

Simply put, an agency cannot be permitted to interpret and apply state law in a way that causes harm, then avoid judicial review of its actions by suggesting that it may change its mind at some, indefinite

future date if an aggrieved party asks. The mere possibility that the agency's enforcement of the law "may undergo some amendment" in the future does not insulate it from legal challenge now. *Stormans*, 586 F.3d at 1126. Otherwise, "a savvy agency" like the DMHC "could perpetually dodge review," *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 388 (D.C. Cir. 2012), and effectively "trap" civil rights plaintiffs in a "litigation limbo between mootness and unripeness," frustrating the very purpose of § 1983. *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 264 (3d Cir. 2002).

II. The District Court failed to address the Church's claims for retrospective relief, which are also redressable and ripe for review.

Believing that a favorable decision was unlikely to redress the Church's ongoing injury, the District Court dismissed the Church's entire lawsuit for lack of standing. But standing must be analyzed "for each form of relief sought." *Friends of the Earth*, 528 U.S. at 185. Here, the District Court ignored that the Church seeks not only prospective relief but also *retrospective* relief. Indeed, the District Court wrongly described this lawsuit as a "pre-enforcement" challenge, ER 10, failing to recognize that the Church's complaint requests "nominal damages for violation of its constitutional rights." ER 418. Because the Church has standing to

seek retrospective relief, and its claims for retrospective relief are undoubtedly ripe for review, the District Court's ruling must be overturned.[11]

It is undisputed that the Church suffered an injury-in-fact when its healthcare plan was amended to cover elective abortions—an injury that can be directly traced to the DMHC's August 22, 2014 letter. That injury can be redressed by an "award of nominal damages," which the Supreme Court has held is an "appropriate means" of "vindicating" constitutional rights. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 426–27 (9th Cir. 2008) (past constitutional injuries could be redressed by nominal damages award).

Likewise, the Church's claims for retrospective relief are ripe. Under the ripeness doctrine, a matter is considered premature for judicial review when the alleged injury is speculative. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The doctrine is thus "more useful when

[11] By removing the case to federal court, the DMHC waived its Eleventh Amendment immunity with respect to the Church's claims for retrospective relief. *See Lapides v. Bd. of Univ. Sys. of Georgia*, 535 U.S. 613, 624 (2002).

evaluating injuries that have not yet occurred," *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996), not where, like here, the plaintiff seeks damages for past injuries. As this Court has noted, "[i]t is hard to see how a claim for damages could [ever] be unripe." *Gemtel Corp. v. Comm. Redev. Agency of the City of Los Angeles*, 23 F.3d 1542, 1545 (9th Cir. 1994).

Accordingly, this Court should reverse the District Court's ruling and address the merits of the Church's free-exercise claim. *Cf. Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (holding that, even if a change in law or policy moots plaintiff's claims for injunctive and prospective relief, "[a] live claim for nominal damages will prevent dismissal for mootness").

III. The Court should address the merits and hold that the DMHC's abortion-coverage requirement violates the Free Exercise Clause of the U.S. Constitution.

Having before it a justiciable case and controversy, this Court should not remand but should instead address the merits and hold that the DMHC's application of the abortion-coverage requirement to the Church's healthcare plan violates the Free Exercise Clause of the U.S. Constitution.

A. The Court should exercise its discretion and address the merits of the Church's free-exercise claim.

While a federal appellate court generally "does not consider an issue" not addressed by the lower court, *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014), that rule "is not inflexible." *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). This Court has "discretion to decide whether to reach such an issue" when "the issue presented is a purely legal one and the record below has been fully developed." *Davis*, 755 F.3d at 1094. "In considering whether to exercise this discretion," the Court must consider "whether injustice might otherwise result.'" *Id.* at 1095.

Here, the Court should exercise its discretion and address the merits of the Church's federal free-exercise claim because it presents a purely legal issue and is informed by a fully developed record. Indeed, both parties engaged in discovery and moved for summary judgment on the claim in the court below. *See Dole Food Co. v. Watts*, 303 F.3d 1104, 1117–18 (9th Cir. 2002) (reaching legal issue not addressed by lower court because "the record [was] sufficiently developed and the issue [was] presented and argued").

Addressing the merits now would also avoid a substantial "injustice." As previously noted, violation of the Church's constitutional rights is ongoing—and has been for the past *four* years—due to the DMHC's continued enforcement of the law. If the case is remanded to the District Court for consideration of the merits, the Church's constitutional injury will continue, likely for another year or even two. In considering the risk that injustice might result, this Court "must be more concerned about the possible unjust deprivation of [the Church's] liberty than about any other source of injustice." *Quinn*, 783 F.2d at 814.

B. The abortion-coverage requirement violates the Free Exercise Clause because it violates the Church's religious beliefs and does not satisfy strict scrutiny.

1. The abortion-coverage requirement substantially burdens the Church's religious beliefs.

No one disputes that the Church sincerely believes providing coverage for elective abortion in its employee healthcare plan violates its religious beliefs. Yet that is precisely what the DMHC caused the Church to do. That this qualifies as a burden on the Church's religious beliefs is unquestionable. *Hobby Lobby*, 134 S. Ct. at 2778 (stating that one's obligation to avoid complicity in another's wrongdoing is a "difficult and

important question of religion and moral philosophy" that "federal courts have no business addressing").

The burden is also substantial. By making the abortion-coverage requirement effective immediately upon issuance of the August 22, 2014 letter and requiring plans to cover all legal abortions, the DMHC "coerce[d] [the Church] into acting contrary to [its] religious beliefs." *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988).

In addition, the DMHC's continued enforcement of the abortion-coverage requirement exerts "substantial pressure on [the Church] to modify [its] behavior and to violate [its] beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). This is because the Church cannot avoid violating its beliefs about abortion without dropping employee health insurance altogether. Yet federal law requires the Church to provide employee health insurance under threat of "substantial economic consequences." *Hobby Lobby*, 134 S. Ct. at 2776; *see also* 26 U.S.C. § 4980H; ER 148–49, 152–54 (explaining that the Church is subject to the ACA's employer mandate). And, in any event, the Church's religious beliefs require it to care for its employees and their

families, which it has done in part through providing employee health insurance. *See* ER 32, 115–17.

Because the DMHC's past enforcement of the abortion-coverage requirement caused the Church to violate its religious beliefs, and its ongoing enforcement puts the Church to the choice of violating its religious beliefs or suffering spiritual and financial consequences, the law substantially burdens the Church's religion.

2. Strict scrutiny applies because application of the abortion-coverage requirement involves a system of "individualized governmental assessments."

Strict scrutiny applies when a law burdening religion is not neutral or generally applicable or if it involves a system of "individualized governmental assessment[s]." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). Here, the DMHC's decision to apply the abortion-coverage requirement to the Church's healthcare plan triggers strict scrutiny because the law on which it is based—the Knox-Keene Act's "basic health care services" provision—involves "a system of individual exemptions." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990).

In *Smith*, the Supreme Court held that laws burdening religious exercise receive strict scrutiny if they are not "neutral" towards religion or "of general applicability." *Id.* at 879. Applying that rule, the Court concluded that the Free Exercise Clause did not prohibit a state from denying unemployment benefits to a worker fired for using illegal drugs, even if those drugs were used for religious reasons. *Id.* at 890.

But the Court was careful to distinguish a neutral and generally applicable drug law from laws allowing a government official to make an "individualized … assessment of the reasons for the relevant conduct." *Id.* at 882–84 (citing cases). In so doing, the Court pointed to its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), which involved an unemployment compensation law that allowed the government to deny unemployment benefits if the worker refused work "without good cause." *Smith*, 494 U.S. at 884. The Court explained that strict scrutiny was appropriate in *Sherbert* because the law's "good cause" inquiry "created a mechanism for individualized exemptions" that depended on the discretion of government officials. *Id.* at 884–85. The Court thus concluded that *Sherbert* and cases like it "stand for the proposition that where the State has in place a system of individual exemptions, it may

not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884.

This case fits squarely within the "individualized assessments" exception to *Smith* because the law on which the abortion-coverage requirement is based gives the director of the DMHC unbridled discretion to grant individualized exemptions. The director may "exempt a plan contract or any class of plan contracts" from the "basic health care services" provision "for good cause," Cal. Health & Safety Code § 1367(i)—the same vague standard that triggered strict scrutiny in *Sherbert*. Moreover, the Knox-Keene Act allows the director to "waive any requirement of any rule or form," including the basic health care services provision, "in situations where in the director's discretion that requirement is not necessary in the public interest." *Id.* § 1344(a). And the director may "unconditionally" exempt "any class of persons or plan contracts" from *all* of the Act's requirements if she deems it to be "in the public interest." *Id.* § 1343(b).

This unfettered exemption authority creates a system of "individualized assessments"—*i.e.*, whether "good cause" exists for an exemption or whether an exemption would be "in the public interest." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015) (system of

"individualized assessments" exists where the law at issue allows for "unfettered discretion that could lead to religious discrimination"). Because the DMHC's discretionary exemption authority is unfettered and not limited by any "particularized, business-related, [or] objective criteria," *id.* at 1082, the DMHC's decision to rescind already existing religious exemptions and apply the abortion-coverage requirement to the Church's healthcare plan triggers strict scrutiny.

3. Strict scrutiny also applies because the abortion-coverage requirement is not generally applicable.

Strict scrutiny also applies because the DMHC's abortion-coverage requirement is not generally applicable. For purposes of a free-exercise claim, a law is not generally applicable when it exempts *non*religious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." *Lukumi*, 508 U.S. at 543–44.

Here, entire categories of healthcare plans are not required to provide coverage for all legal abortions because they are explicitly exempted from the Knox-Keene Act's requirements, including its "basic health care services" provision. *See* Cal. Health & Safety Code § 1343(e);

Cal. Code Regs. tit. 28, §§ 1300.43–43.15. This includes, among others, healthcare plans operated by "[t]he California Small Group Reinsurance Fund" and plans "directly operated by a bona fide public or private institution of higher learning which directly provides health care services only to its students, faculty, staff, administration, and their respective dependents." Cal. Health & Safety Code § 1343(e)(2) & (5). It also includes "small plans" administered solely by an employer that "does not have more than five subscribers." Cal. Code Regs. tit. 28, § 1300.43. But the lack of general applicability does not stop there. As noted, the DMHC has unbridled discretion to grant additional exemptions from the Act's "basic health care services" provision, and it has already exercised that authority in partially exempting one plan from the abortion-coverage requirement, though the exemption is not of sufficient scope to alleviate Skyline Church's religious concerns.

Because these exemptions undermine the government's purported interest in having healthcare plans cover *all* legal abortions, the law is not generally applicable, and the DMHC's application of it to the Church's healthcare plan warrants strict scrutiny. *Lukumi*, 508 U.S. at 543–44; *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d

1214, 1234–35 (11th Cir. 2004) (exempting clubs and lodges, but not houses of worship, "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues"); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

4. Strict scrutiny also applies because the DMHC's decision to rescind existing religious exemptions and apply the abortion-coverage requirement was not neutral.

While deliberately targeting religious beliefs is "never permissible," a law also is not neutral if its practical effect or "object" is to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The Free Exercise Clause "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547.

"Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history.'" *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540)). Here, the DMHC's lack of neutrality manifested itself in at least three ways.

First, the DMHC rescinded existing religious exemptions and issued the August 22, 2014 letter in direct response to two Catholic universities taking steps to exclude or limit abortion coverage in their employee healthcare plans. This is religious targeting, plain and simple. And government action that "target[s] religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533.

Second, the real-life, practical effect of the August 22, 2014 letter fell only on religious organizations. Both before and after the letter, the DMHC received information confirming that only religious organizations had purchased contracts excluding or limiting abortion coverage. In fact, Skyline Church's health insurer at the time (Aetna) explicitly told the DMHC in July 2014 that only four employer groups had purchased plans

limiting or excluding abortion coverage and all four were "religious employers," as defined by California law. ER 338–40. In contrast, there is no evidence that the DMHC had approved—or insurers were offering—healthcare plans to secular employers that limited or excluded abortion coverage in any way. *See* ER 172–74, 224–25, 234; *see also* ER 348.

Third, the DMHC decided to rescind its approval of abortion coverage limitations and exclusions that it knew were being offered only to "religious employers," despite its own legal analysis concluding that "religious employers" could legally exclude abortion coverage in their plans. *See* ER 208–13 (Director Rouillard admitting that the agency "had done research" before issuing the letter and reached that legal conclusion). In other words, the DMHC required the healthcare plans of "religious employers" like Skyline Church to cover elective abortion even though it knew it was not legally obligated to do so. When asked at her deposition why the August 22, 2014 letter did not include a religious exemption in light of this legal analysis, Director Rouillard refused to answer the question. ER 214–15. The answer is obvious—because the abortion lobby requested that Director Rouillard act so as to promote abortion access at the expense of religious organizations who believe

abortion is murder. But no matter the answer, the Supreme Court has made clear that such "'gratuitous restrictions' on religious conduct[ ] seeks not to effectuate the stated government interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

In light of these facts, this Court "must draw the inference" that religious objections to providing elective abortion coverage simply were "not considered with the neutrality that the Free Exercise Clause requires." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. The decision to rescind existing religious exemptions and apply the abortion-coverage requirement to the Church's healthcare plan warrants strict scrutiny.

5. The DMHC's abortion mandate does not satisfy strict scrutiny.

Because strict scrutiny applies, the DMHC must prove that applying the abortion-coverage requirement to the Church's healthcare plan "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). Strict scrutiny requires this Court to "look[ ] beyond broadly formulated interests" and instead "scrutinize [ ] the asserted harm of granting specific exemptions to particular religious

claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

For instance, in *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), the Supreme Court exempted Amish children from a compulsory school attendance law, despite recognizing the government had a "paramount" interest in education. The Court explained that the government needs "to show with more particularity how its admittedly strong interest … would be adversely affected by granting an exemption *to the Amish*." *Id.* at 236 (emphasis added).

The DMHC cannot satisfy that lofty standard here. No court has ever held that forcing any third party—let alone a church—to fund abortion coverage for someone else is a compelling interest. In fact, requiring the Church's healthcare plan to cover elective abortion cannot reasonably be described as promoting the public interest because the only people affected are those who work at the Church and necessarily share the Church's beliefs about abortion. *See* ER 32.

Moreover, any purported government interest here cannot be considered compelling in light of the government's own behavior. As noted above, the law applied—the Knox-Keene Act's "basic health care

services" provision—is riddled with categorical and individualized exemptions. The government has tacitly admitted that the underlying law "cannot be regarded as protecting an interest of the highest order" because the existing exemptions already permit "appreciable damage to that supposedly vital interest." *Lukumi*, 508 U.S. at 547.

Nor is the law narrowly tailored to achieve any purported government interest. When categorical and individualized exemptions from the law already exist, forcing the Church's healthcare plan to cover elective abortions in violation of the Church's beliefs is unnecessary. *See Lukumi*, 508 U.S. at 546 (holding that "underinclusive" ordinances could not be considered narrowly tailored).

CONCLUSION

For more than four years now, Skyline Church has been forced to pay for and participate in what its religious beliefs sincerely teach is sin. It need not wait any longer to vindicate the past and ongoing violations of its constitutional rights. Because the Church's claims are ripe, redressable, and meritorious, it respectfully asks this Court to reverse the District Court's judgment and enter summary judgment in favor of the Church on its federal free-exercise claim.

Dated: September 14, 2018

Respectfully submitted,

s/ Jeremiah Galus

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, Skyline Church advises that it is not aware of any related cases currently pending before this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55451

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

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Signature of Attorney or Unrepresented Litigant: s/Jeremiah Galus

Date: Sep 14, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

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

s/ Jeremiah Galus
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ADDENDUM

Constitutional Provisions

Statutes and Regulations

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

CAL. CONST. art. I, § 4

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

STATUTES AND REGULATIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Cal. Health & Safety Code § 1343. Application of Chapter; Exemptions

(a) This chapter shall apply to health care service plans and specialized health care service plan contracts as defined in subdivisions (f) and (o) of Section 1345.

(b) The director may by the adoption of rules or the issuance of orders deemed necessary and appropriate, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any class of persons or plan contracts if the director finds the action to be in the public interest and not detrimental to the protection of subscribers, enrollees, or persons regulated under this chapter, and that the regulation of the persons or plan contracts is not essential to the purposes of this chapter.

(c) The director, upon request of the Director of Health Care Services, shall exempt from this chapter any county-operated pilot program

contracting with the State Department of Health Care Services pursuant to Article 7 (commencing with Section 14490) of Chapter 8 of Part 3 of Division 9 of the Welfare and Institutions Code. The director may exempt noncounty-operated pilot programs upon request of the Director of Health Care Services. Those exemptions may be subject to conditions the Director of Health Care Services deems appropriate.

(d) Upon the request of the Director of Health Care Services, the director may exempt from this chapter any mental health plan contractor or any capitated rate contract under Chapter 8.9 (commencing with Section 14700) of Part 3 of Division 9 of the Welfare and Institutions Code. Those exemptions may be subject to conditions the Director of Health Care Services deems appropriate.

(e) This chapter shall not apply to:

(1) A person organized and operating pursuant to a certificate issued by the Insurance Commissioner unless the entity is directly providing the health care service through those entity-owned or contracting health facilities and providers, in which case this chapter shall apply to the insurer's plan and to the insurer.

(2) A plan directly operated by a bona fide public or private institution of higher learning which directly provides health care services only to its students, faculty, staff, administration, and their respective dependents.

(3) A person who does all of the following:

(A) Promises to provide care for life or for more than one year in return for a transfer of consideration from, or on behalf of, a person 60 years of age or older.

(B) Has obtained a written license pursuant to Chapter 2 (commencing with Section 1250) or Chapter 3.2 (commencing with Section 1569).

(C) Has obtained a certificate of authority from the State Department of Social Services.

(4) The Major Risk Medical Insurance Board when engaging in activities under Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, Part 6.3 (commencing with Section 12695) of Division 2 of the Insurance Code, and Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code.

(5) The California Small Group Reinsurance Fund.

Cal. Health & Safety Code § 1344. Rules; Interpretive opinions; Good faith acts

(a) The director may from time to time adopt, amend, and rescind any rules, forms, and orders that are necessary to carry out the provisions of this chapter, including rules governing applications and reports, and defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of this chapter. For the purpose of rules and forms, the director may classify persons and matters within the director's jurisdiction, and may prescribe different requirements for different classes. The director may waive any requirement of any rule or form in situations where in the director's discretion that requirement is not necessary in the public interest or for the protection of the public, subscribers, enrollees, or persons or plans subject to this chapter. The director may adopt rules consistent with federal regulations and statutes to regulate health care coverage supplementing Medicare.

(b) The director may, by regulation, modify the wording of any notice required by this chapter for purposes of clarity, readability, and accuracy, except that a modification shall not change the substantive meaning of the notice.

(c) The director may honor requests from interested parties for interpretive opinions.

(d) No provision of this chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, order, or written interpretive opinion of the director, or any opinion of the Attorney General, notwithstanding that the rule, form, order, or written interpretive opinion may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Cal. Health & Safety Code § 1345. Definitions

As used in this chapter:

(a) "Advertisement" means any written or printed communication or any communication by means of recorded telephone messages or by radio, television, or similar communications media, published in connection with the offer or sale of plan contracts.

(b) "Basic health care services" means all of the following:

(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, including ambulance and ambulance transport services and out-of-area coverage. "Basic health care services" includes ambulance and ambulance transport services provided through the "911" emergency response system.

(7) Hospice care pursuant to Section 1368.2.

(c) “Enrollee” means a person who is enrolled in a plan and who is a recipient of services from the plan.

(d) “Evidence of coverage” means any certificate, agreement, contract, brochure, or letter of entitlement issued to a subscriber or enrollee setting forth the coverage to which the subscriber or enrollee is entitled.

(e) “Group contract” means a contract which by its terms limits the eligibility of subscribers and enrollees to a specified group.

(f) “Health care service plan” or “specialized health care service plan” means either of the following:

(1) Any 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 for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

(2) Any person, whether located within or outside of this state, who solicits or contracts with a subscriber or enrollee in this state to pay for or reimburse any part of the cost of, or who undertakes to arrange or arranges for, the provision of health care services that are to be provided wholly or in part in a foreign country in return for a prepaid or periodic charge paid by or on behalf of the subscriber or enrollee.

(g) “License” means, and “licensed” refers to, a license as a plan pursuant to Section 1353.

(h) “Out-of-area coverage,” for purposes of paragraph (6) of subdivision (b), means coverage while an enrollee is anywhere outside the service area of the plan, and shall also include coverage for urgently needed services to prevent serious deterioration of an enrollee's health resulting from unforeseen illness or injury for which treatment cannot be delayed until the enrollee returns to the plan's service area.

(i) "Provider" means any professional person, organization, health facility, or other person or institution licensed by the state to deliver or furnish health care services.

(j) "Person" means any person, individual, firm, association, organization, partnership, business trust, foundation, labor organization, corporation, limited liability company, public agency, or political subdivision of the state.

(k) "Service area" means a geographical area designated by the plan within which a plan shall provide health care services.

(*l*) "Solicitation" means any presentation or advertising conducted by, or on behalf of, a plan, where information regarding the plan, or services offered and charges therefor, is disseminated for the purpose of inducing persons to subscribe to, or enroll in, the plan.

(m) "Solicitor" means any person who engages in the acts defined in subdivision (*l*).

(n) "Solicitor firm" means any person, other than a plan, who through one or more solicitors engages in the acts defined in subdivision (*l*).

(o) "Specialized health care service plan contract" means a contract for health care services in a single specialized area of health care, including dental care, for subscribers or enrollees, or which pays for or which reimburses any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

(p) "Subscriber" means the person who is responsible for payment to a plan or whose employment or other status, except for family dependency, is the basis for eligibility for membership in the plan.

(q) Unless the context indicates otherwise, "plan" refers to health care service plans and specialized health care service plans.

(r) "Plan contract" means a contract between a plan and its subscribers or enrollees or a person contracting on their behalf

pursuant to which health care services, including basic health care services, are furnished; and unless the context otherwise indicates it includes specialized health care service plan contracts; and unless the context otherwise indicates it includes group contracts.

(s) All references in this chapter to financial statements, assets, liabilities, and other accounting items mean those financial statements and accounting items prepared or determined in accordance with generally accepted accounting principles, and fairly presenting the matters which they purport to present, subject to any specific requirement imposed by this chapter or by the director.

Cal. Health & Safety Code § 1367. Requirements for health care service plans

A health care service plan and, if applicable, a specialized health care service plan shall meet the following requirements: …

(i) A health care service plan contract shall provide to subscribers and enrollees all of the basic health care services included in subdivision (b) of Section 1345, except that the director may, for good cause, by rule or order exempt a plan contract or any class of plan contracts from that requirement. The director shall by rule define the scope of each basic health care service that health care service plans are required to provide as a minimum for licensure under this chapter. Nothing in this chapter shall prohibit a health care service plan from charging subscribers or enrollees a copayment or a deductible for a basic health care service consistent with Section 1367.006 or 1367.007, provided that the copayments, deductibles, or other cost sharing are reported to the director and set forth to the subscriber or enrollee pursuant to the disclosure provisions of Section 1363. Nothing in this chapter shall prohibit a health care service plan from setting forth, by contract, limitations on maximum coverage of basic health care services, provided that the limitations are reported to, and held unobjectionable by, the director and set forth to the subscriber or enrollee pursuant to the disclosure provisions of Section 1363.

Cal. Health & Safety Code § 1367.25. Contraceptive coverage; religious employer exemption

(a) A group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2000, to December 31, 2015, inclusive, and an individual health care service plan contract that is amended, renewed, or delivered on or after January 1, 2000, to December 31, 2015, inclusive, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits:

(1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration (FDA)-approved prescription contraceptive methods designated by the plan. In the event the patient's participating provider, acting within his or her scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient's medical or personal history, the plan shall also provide coverage for another FDA-approved, medically appropriate prescription contraceptive method prescribed by the patient's provider.

(2) Benefits for an enrollee under this subdivision shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(b)(1) A health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2016, shall provide coverage for all of the following services and contraceptive methods for women:

(A) Except as provided in subparagraphs (B) and (C) of paragraph (2), all FDA-approved contraceptive drugs, devices, and other products for women, including all FDA-approved contraceptive drugs, devices, and products available over the counter, as prescribed by the enrollee's provider.

(B) Voluntary sterilization procedures.

(C) Patient education and counseling on contraception.

(D) Followup services related to the drugs, devices, products, and procedures covered under this subdivision, including, but not limited to, management of side effects, counseling for continued adherence, and device insertion and removal.

(2)(A) Except for a grandfathered health plan, a health care service plan subject to this subdivision shall not impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on the coverage provided pursuant to this subdivision. Cost sharing shall not be imposed on any Medi-Cal beneficiary.

(B) If the FDA has approved one or more therapeutic equivalents of a contraceptive drug, device, or product, a health care service plan is not required to cover all of those therapeutically equivalent versions in accordance with this subdivision, as long as at least one is covered without cost sharing in accordance with this subdivision.

(C) If a covered therapeutic equivalent of a drug, device, or product is not available, or is deemed medically inadvisable by the enrollee's provider, a health care service plan shall provide coverage, subject to a plan's utilization management procedures, for the prescribed contraceptive drug, device, or product without cost sharing. Any request by a contracting provider shall be responded to by the health care service plan in compliance with the Knox-Keene Health Care Service Plan Act of 1975, as set forth in this chapter and, as applicable, with the plan's Medi-Cal managed care contract.

(3) Except as otherwise authorized under this section, a health care service plan shall not impose any restrictions or delays on the coverage required under this subdivision.

(4) Benefits for an enrollee under this subdivision shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(5) For purposes of paragraphs (2) and (3) of this subdivision, and subdivision (d), "health care service plan" shall include Medi-Cal managed care plans that contract with the State Department of Health Care Services pursuant to Chapter 7 (commencing with Section 14000) and Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code.

(c) Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for FDA-approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for contraceptive methods.

(1) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Every religious employer that invokes the exemption provided under this section shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.

(d)(1) Every health care service plan contract that is issued, amended, renewed, or delivered on or after January 1, 2017, shall cover up to a 12-month supply of FDA-approved, self-administered hormonal contraceptives when dispensed or furnished at one time for an enrollee

by a provider, pharmacist, or at a location licensed or otherwise authorized to dispense drugs or supplies.

(2) Nothing in this subdivision shall be construed to require a health care service plan contract to cover contraceptives provided by an out-of-network provider, pharmacy, or location licensed or otherwise authorized to dispense drugs or supplies, except as may be otherwise authorized by state or federal law or by the plan's policies governing out-of-network coverage.

(3) Nothing in this subdivision shall be construed to require a provider to prescribe, furnish, or dispense 12 months of self-administered hormonal contraceptives at one time.

(4) A health care service plan subject to this subdivision, in the absence of clinical contraindications, shall not impose utilization controls or other forms of medical management limiting the supply of FDA-approved, self-administered hormonal contraceptives that may be dispensed or furnished by a provider or pharmacist, or at a location licensed or otherwise authorized to dispense drugs or supplies to an amount that is less than a 12-month supply.

(e) This section shall not be construed to exclude coverage for contraceptive supplies as prescribed by a provider, acting within his or her scope of practice, for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for contraception that is necessary to preserve the life or health of an enrollee.

(f) This section shall not be construed to deny or restrict in any way the department's authority to ensure plan compliance with this chapter when a plan provides coverage for contraceptive drugs, devices, and products.

(g) This section shall not be construed to require an individual or group health care service plan contract to cover experimental or investigational treatments.

(h) For purposes of this section, the following definitions apply:

(1) "Grandfathered health plan" has the meaning set forth in Section 1251 of PPACA.

(2) "PPACA" means the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), and any rules, regulations, or guidance issued thereunder.

(3) With respect to health care service plan contracts issued, amended, or renewed on or after January 1, 2016, "provider" means an individual who is certified or licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or an initiative act referred to in that division, or Division 2.5 (commencing with Section 1797) of this code.

Cal. Code Regs. tit. 28 § 1300.67. Scope of basic health care services

The basic health care services required to be provided by a health care service plan to its enrollees shall include, where medically necessary, subject to any copayment, deductible, or limitation of which the Director may approve:

(a) Physician services, which shall be provided by physicians licensed to practice medicine or osteopathy in accordance with applicable California law. There shall also be provided consultation with and referral by physicians to other physicians.

(1) The plan may also include, when provided by the plan, consultation and referral (physician or, if permitted by law, patient initiated) to other health professionals who are defined as dentists, nurses, podiatrists, optometrists, physician's assistants, clinical psychologists, social workers, pharmacists, nutritionists, occupational therapists, physical therapists and other professionals engaged in the delivery of health services who are licensed to practice, are certified, or

practice under authority of the plan, a medical group, or individual practice association or other authority authorized by applicable California law.

(b) Inpatient hospital services, which shall mean short-term general hospital services, including room with customary furnishings and equipment, meals (including special diets as medically necessary), general nursing care, use of operating room and related facilities, intensive care unit and services, drugs, medications, biologicals, anesthesia and oxygen services, diagnostic laboratory and x-ray services, special duty nursing as medically necessary, physical therapy, respiratory therapy, administration of blood and blood products, and other diagnostic, therapeutic and rehabilitative services as appropriate, and coordinated discharge planning including the planning of such continuing care as may be necessary, both medically and as a means of preventing possible early rehospitalization.

(c) Ambulatory care services, (outpatient hospital services) which shall include diagnostic and treatment services, physical therapy, speech therapy, occupational therapy services as appropriate, and those hospital services which can reasonably be provided on an ambulatory basis. Such services may be provided at a hospital, any other appropriate licensed facility, or any appropriate facility which is not required by law to be licensed, if the professionals delivering such services are licensed to practice, are certified, or practice under the authority of the plan, a medical group, or individual practice association or other authority authorized by applicable California law.

(d) Diagnostic laboratory services, diagnostic and therapeutic radiological services, and other diagnostic services, which shall include, but not be limited to, electrocardiography and electroencephalography.

(e) Home health services, which shall include, where medically appropriate, health services provided at the home of an enrollee as prescribed or directed by a physician or osteopath licensed to practice in California. Such home health services shall include diagnostic and treatment services which can reasonably be provided in the home,

including nursing care, performed by a registered nurse, public health nurse, licensed vocational nurse or licensed home health aide.

(1) Home health services may also include such rehabilitation, physical, occupational or other therapy, as the physician shall determine to be medically appropriate.

(f) Preventive health services (including services for the detection of asymptomatic diseases), which shall include, under a physician's supervision,

(1) reasonable health appraisal examinations on a periodic basis;

(2) a variety of voluntary family planning services;

(3) prenatal care;

(4) vision and hearing testing for persons through age 16;

(5) immunizations for children in accordance with the recommendations of the American Academy of Pediatrics and immunizations for adults as recommended by the U.S. Public Health Service;

(6) venereal disease tests;

(7) cytology examinations on a reasonable periodic basis;

(8) effective health education services, including information regarding personal health behavior and health care, and recommendations regarding the optimal use of health care services provided by the plan or health care organizations affiliated with the plan.

(g)(1) Emergency health care services which shall be available and accessible to enrollees on a twenty-four hour a day, seven days a week, basis within the health care service plan area. Emergency health care services shall include ambulance services for the area served by the plan to transport the enrollee to the nearest twenty-four hour

emergency facility with physician coverage, designated by the Health Care Service Plan.

(2) Coverage and payment for out-of-area emergencies or urgently needed services involving enrollees shall be provided on a reimbursement or fee-for-service basis and instructions to enrollees must be clear regarding procedures to be followed in securing such services or benefits. Emergency services defined in section 1317.1 include active labor. "Urgently needed services" are those services necessary to prevent serious deterioration of the health of an enrollee, resulting from an unforeseen illness, injury, or complication of an existing condition, including pregnancy, for which treatment cannot be delayed until the enrollee returns to the plan's service area. "Urgently needed services" includes maternity services necessary to prevent serious deterioration of the health of the enrollee or the enrollee's fetus, based on the enrollee's reasonable belief that she has a pregnancy-related condition for which treatment cannot be delayed until the enrollee returns to the plan's service area.

(h) Hospice services as set forth in Section 1300.68.2.

Cal. Code Regs. tit. 28 § 1300.43. Small plans

A health care service plan or specialized health care service plan which provides health care services or specialized health care services only to the employees of one employer, or only to the employees of employers under common ownership and control, which is administered solely by the employer, and which does not have more than five subscribers (regardless of the number of persons enrolled based upon their relationship to or dependence upon such subscribers) is exempt from all provisions of the Act and the rules thereunder, except Sections 1381, 1384 and 1385. Such plans are exempt from any rules adopted pursuant to such sections unless such rules are made specifically applicable to plans exempted under this section.