No. 19-15658

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOOTHILL CHURCH, a California non-profit corporation, CALVARY CHAPEL, a California non-profit corporation, CHINO HILLS, SHEPHERD OF THE HILLS CHURCH, a California non-profit corporation,
Plaintiffs–Appellants

v.

MICHELLE ROUILLARD, in her official capacity as Director of the California Department of Managed Health Care,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California, Sacramento
No. 2:15-cv-02165-KJM-EFB

APPELLANTS' REPLY BRIEF

John J. Bursch
David A. Cortman
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20001
(202) 393-8690

Alexander M. Medina
MEDINA MCKELVEY LLP
983 Reserve Drive
Roseville, CA 95678
(916) 960-2211
alex@medinamckelvey.com

Kristen K. Waggoner
Kevin Theriot
Jeremiah J. Galus
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
jgalus@ADFlegal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

INTRODUCTION

The California Department of Managed Health Care and its Director, Michelle Rouillard, have mandated since August 2014 that California insurers include elective abortion coverage in their health-care plans. This coverage requirement applies to religious organizations morally opposed to abortion. And though the State previously exempted houses of worship from similar coverage mandates, the Director now enforces this abortion-coverage requirement against churches, even those that employ individuals who *agree* with their employer's beliefs about abortion, such as Plaintiff Churches here.

The Director asserts no compelling governmental interest in forcing churches to provide abortion coverage for employees who, for religious reasons, are morally opposed to abortion procedures. Rather, the Director contends forcing churches to cover elective abortions is permissible under her August 2014 interpretation of the Knox-Keene Act—an over 40-year-old state law that requires healthcare plans to cover medically necessary basic healthcare services. But the Director's actions violate the U.S. Constitution and, if allowed to continue, will have dire consequences that extend far beyond this case.

Imagine, for instance, that a government official interprets a broadly worded public health and safety law to prohibit the sale of head coverings. Under the Director's view of the Constitution, a lawsuit filed by a Muslim woman whose beliefs compel the wearing of a hijab could not even survive a motion to dismiss so long as the government identified "secular reasons" for its interpretation. Ans. Br. 32. This is true, in the Director's opinion, even if the plaintiff alleged that the interpretation followed citizen complaints about Muslims wearing head coverings, religious adherents were the only ones affected by the new interpretation, and the government exempted others from the prohibition but enforced it against the sale of hijabs despite concluding it had no legal obligation to do so.

That is not, and has never been, the law. As detailed below, the Free Exercise, Equal Protection, and Establishment Clauses provide far more protection than the Director says. And here, those constitutional provisions prohibit the Director and the DMHC from interfering with the Churches' internal affairs and needlessly forcing them to provide elective abortion coverage to employees who do not want it and often spend their professional time actively opposing abortion.

ARGUMENT

I. The Churches have standing to challenge the Director's enforcement of the abortion-coverage requirement.

Having unsuccessfully challenged standing three times, *see* ER 6–7, 18–19, 33–36, the Director no longer disputes that the Churches have sufficiently alleged injury. The Director now rests her argument on causation and redressability. Ans. Br. 17–20. But as the District Court recognized, the Churches' "injuries can be traced directly" to the Director's actions, and "[a] favorable legal decision would significantly increase the likelihood" they will be redressed. ER 35–36.

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 Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The Second Amended Complaint easily satisfies all three elements.

The Churches allege that, before August 22, 2014, California health insurers voluntarily offered healthcare plans to religious organizations that excluded elective abortion coverage consistent with the Churches' beliefs. ER 59–60 (¶¶ 45–48, 52). The insurers stopped only because the Director's August 2014 letter revoked the DMHC's approval of such plan language, told the insurers that it was illegal to limit or exclude abortion coverage in any way, and mandated immediate coverage of elective abortion—a coverage requirement still in effect more than five years later. ER 83–96.

Because providing elective abortion coverage in their employee healthcare plans violates the Churches' religious beliefs, ER 55 (¶¶ 21–22), the Churches have suffered (and continue to suffer) an injury-in-fact traceable to the Director's actions. *See Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing."). And a favorable court ruling prohibiting the Director from enforcing the abortion-coverage requirement against the Churches' healthcare plans is more than likely to redress their injuries, as the Second Amended Complaint

alleges that California insurers were perfectly willing to—and in fact did—provide the exact coverage the Churches seek. ER 59–60 (¶¶ 45–48, 52); *accord, e.g., Missionary Guadalupanas of the Holy Spirit Inc. v. Rouillard*, 251 Cal. Rptr. 3d 1, 11 (Cal. Ct. App. 2019) (California insurers offered plan language excluding all abortions unless necessary to save the life of the mother).

The Churches' standing to sue is well established. Both the Supreme Court and this Court have routinely exercised jurisdiction in cases like this one, when the plaintiff's injury flows directly from a third party's compliance with a statute or rule. *E.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (out-of-state book publishers had standing to challenge regulation directed at in-state book distributors); *Sup. Ct. of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 724–25, 736 n.15 (1980) (consumer group had standing to challenge state bar rule prohibiting attorney advertising, where group encountered difficultly preparing a legal services directory because lawyers were reluctant to supply information due to the rule); *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).

Despite forcing all insurers to provide the coverage, the Director sardonically says redressability is lacking because insurers are "free to make independent business decisions" about whether to exclude elective abortion coverage. Ans. Br. 19. The Director would have this Court believe that participants in a heavily regulated industry will just ignore the government's dictates. But the Supreme Court has already rejected that very theory in *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, 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. *Id.* at 168–71. The Court explained that the ranchers' injury was "fairly traceable" to the agency opinion and thus "likely" 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.* That is because the Bureau was unlikely to follow a course of action that deviated from the Fish and Wildlife opinion.

So too here. The Director's August 2014 letter had a "coercive" and "determinative" effect on California insurers, forbidding them from offering healthcare plans to religious organizations that limit or exclude abortion coverage that they were already supplying. Indeed, if an individual insurer decided to offer a plan that excluded abortion coverage, the Director was likely to target and punish the insurer. As in *Bennett*, a favorable court decision undoing the effect of the Director's letter is more than likely to redress the Churches' injuries. *See also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) ("[Plaintiffs'] theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties.").

What's more, the Churches need not prove a favorable ruling will cause them to obtain their desired coverage, as the Director suggests. Ans. Br. 19–20. Article III standing requires no such "guarantee." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). The Churches must show only that a favorable decision would lead to a "change" in "legal status" making it more "likel[y]" they will "obtain relief that directly redresses the injury suffered." *Id.* (citation omitted). And here, a

favorable decision would make legal what the Director has made illegal. That alone is enough for redressability. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (redressability established when "a favorable decision will relieve a discrete injury" to the plaintiff; the plaintiff "need not show that a favorable decision will relieve his *every* injury").

Nor does the California Court of Appeals' recent ruling in *Missionary Guadalupanas* change the analysis. The Director contends that case validates her interpretation of the Knox-Keene Act and thus "confirms" the Churches' injuries are "traceable" to the "requirements of state law," not her actions. Ans. Br. 18.

But that "case d[id] not present" nor did the court "address any claim that the Department's actions in carrying out California law substantially burdened the petitioner's exercise of religion." *Missionary Guadalupanas*, 251 Cal. Rptr. 3d at 4 n.1. And, as recognized by the District Court, the Churches allege "the Director and the DMHC did not interpret or enforce state law" to mandate coverage for "elective and voluntary abortions before the Director issued the letters." ER 35; *see, e.g.*, ER 59 (¶ 43). There was no injury until the Director interpreted and enforced state law the way she did.

In any event, the Second Amended Complaint directly challenges the constitutionality of the Knox-Keene Act's basic healthcare services provision, as applied to the Churches. ER 51 (¶¶ 1–2). The whole point of this lawsuit is that the Churches believe they are entitled to a religious exemption under the U.S. Constitution, which supersedes conflicting state law. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing the Supremacy Clause). Whether the abortion-coverage requirement is based on a distorted or correct interpretation of the Knox-Keene Act makes no difference to the Churches' standing. A favorable ruling will prevent the Director from enforcing the coverage requirement either way—a "change" in "legal status" that would significantly increase the likelihood of the Churches "obtain[ing] relief that directly redresses the injury suffered." *Renee*, 686 F.3d at 1013.

II. The abortion-coverage requirement violates the Free Exercise Clause.

A. The abortion-coverage requirement violates the church-autonomy doctrine.

As detailed in the Churches' opening brief, this Court need not decide whether the Director's interpretation and application of the abortion-coverage requirement is neutral and generally applicable to trigger strict scrutiny. *See* Opening Br. 22–28.

The Supreme Court has rejected the proposition that "any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). And the general rule explained in *Employment Division v. Smith*, 494 U.S. 872 (1990), does not apply when, as here, a church's internal affairs are at stake. *E.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002) ("The Supreme Court's decision in [*Smith*] does not undermine the principles of the church autonomy doctrine.").

While the Director insists our Founders imposed no obstacle to the government forcing *churches* to use tithes and offerings to fund what their faith teaches is murder, the First Amendment was drafted in part to establish a "scrupulous policy . . . against a political interference with religious affairs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184–85 (2012) (citation omitted). That is why the Supreme Court has long recognized that churches possess broad autonomy in all matters of doctrine and governance. *E.g.*, *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 722

(1976); *Hosanna-Tabor*, 565 U.S. at 185–86. And that is why courts, including this one, look skeptically at even neutral laws of general applicability when they intrude upon a church's internal affairs. *E.g.*, *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) (applying compelling-interest test).

The Director's narrow view of the church-autonomy doctrine would have this Court take a very different and wayward path. The Director does not even try to identify a compelling interest served by her actions (because there is none). Yet she asks this Court to rubber-stamp her unprecedented and unnecessary intrusion into internal church affairs. The Free Exercise Clause, according to the Director, provides no exemption from funding elective abortions because each church remains free to "tak[e] whatever stance it wishes regarding abortion as a matter of religious doctrine." Ans. Br. 47.

Not true. The Churches cannot take "whatever" stance they wish; they wish to stand against including elective abortion coverage in their employee healthcare plans, but the Director's actions have caused them to do the exact opposite. *See* ER 60 (¶¶ 49–51). And the Free Exercise Clause protects more than the Churches' right to *profess* religious

beliefs about abortion; it also preserves their right to *act* consistently with those beliefs. This is especially so for action limited to the internal structuring of employee relationships and affecting only those who have voluntarily associated with the Churches and agree with their beliefs.

Simply put, the church-autonomy doctrine is not limited to "church employment decisions involving clergy" and "internal church disputes regarding religious doctrine or church governance," as the Director claims. Ans. Br. 45. To be sure, the doctrine recognizes that churches retain exclusive authority over deciding who will direct and implement their religious missions, *Hosanna-Tabor*, 565 U.S. at 195–96, and it forbids the government from resolving "quintessentially religious controversies," *Milivojevich*, 426 U.S. at 720. But the doctrine also extends more broadly, applying "with equal force" to matters of "church administration," *id.* at 710, and to other matters affecting the church's "faith and mission," *Hosanna-Tabor*, 565 U.S. at 190.

As the Seventh Circuit put it, the church-autonomy doctrine "respects the authority of churches to select their own leaders, define their own doctrines, resolve their own disputes, *and run their own institutions* free from governmental interference." *Korte v. Sebelius*, 735

F.3d 654, 677 (7th Cir. 2013) (emphasis added) (cleaned up). This freedom necessarily includes a church's decision not to cover elective abortions in its employee healthcare plan. *Pennsylvania v. President United States*, 930 F.3d 543, 570 n.26 (3d Cir. 2019) ("Supreme Court precedent *dictates* a narrow form of exemption [from contraceptive coverage mandate] for houses of worship.") (emphasis added), *cert. granted*, 2020 WL 254168 (No. 19-454); *see also* Coverage of Certain Preventative Services Under the Affordable Care Act, 80 Fed. Reg. 41318-01, 41,325 (July 14, 2015) ("exemption for churches and houses of worship" from ACA's contraceptive coverage mandate "was provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship").

And for good reason. It would make no sense for the church-autonomy doctrine to preserve a church's ability to select its ministers but then yield to laws or regulations preventing the church from *applying* the ministers' teachings to its internal affairs and employee relationships. The First Amendment's protections for churches are hardly so circumscribed.

The Director's observation that the church-autonomy cases referenced in the Churches' opening brief "do not address" a factual scenario like this one, Ans. Br. 47–48, thus speaks more to the unprecedented nature of her actions than it does the doctrine's scope. Before August 2014, no government official anywhere in the United States maintained that houses of worship should have to cover elective abortions in their healthcare plans. It was common ground—even in California—that the First Amendment prohibited such an unnecessary and serious intrusion into religious belief and church autonomy. *E.g.*, Cal. Health & Safety Code § 1367.25(c) (exempting houses of worship from the Knox-Keene Act's contraceptive coverage requirement).

In fact, the DMHC's own behavior inadvertently underscores the point. The Director's August 2014 letter declares that restricting abortion coverage in any way violates not just state law but also the *state constitution*. ER 83. Yet in October 2015 (the same month the Churches filed this lawsuit), the DMHC secretly approved plan language allowing "religious employers" to limit abortion coverage. ER 73 (¶¶ 141–42). How? There is but one explanation: the DMHC derived its authority from the Free Exercise Clause of the U.S. Constitution and its

guarantee that churches have the power "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).[1]

B. The abortion-coverage requirement triggers strict scrutiny even under a *Smith* analysis.

Although *Smith* involved a dispute about an individual's use of illicit drugs, and thus does not apply to cases involving a church's institutional right to autonomy, strict scrutiny still applies even under a *Smith* analysis. Under *Smith*, a law or government action burdening religion triggers strict scrutiny if it is neither neutral nor 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, 531, 537 (1993). The Director's decision here involves a system of individualized assessments and is neither neutral nor generally applicable.

[1] The approved plan language still requires coverage of certain elective abortions that conflict with the Churches' beliefs. *See* ER 73 (¶ 146).

1. The Director's decision to withhold an exemption triggers strict scrutiny under *Smith*'s "individualized assessments" exception.

As previously explained, the "individualized assessments" or "individualized exemptions" exception to *Smith* triggers strict scrutiny whenever there is a system of individual exemptions but the government "refuse[s] to extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884 (citation omitted); Opening Br. 29–32.

Here, the Director does not dispute that she has virtually unlimited authority to grant exemptions. The Knox-Keene Act allows her to grant exemptions for "good cause" and if "in the public interest." Cal. Health & Safety Code §§ 1343(b), 1344(a), 1367(i). The DMHC has adopted no rules, policies, or procedures limiting her discretion. ER 71–72 (¶¶ 123, 133). And she has exercised this authority. ER 73 (¶ 142).

Even so, the Director contends the "individualized assessments" exception does not apply because no "benefit" is "contingent upon" an "individualized assessment" of the Churches' "motivation[s]," and the DMHC has not "made any individual determination" about the Churches "that devalued religiously motivated conduct." Ans. Br. 37–39. Both arguments fail.

First, obtaining (or being denied) the "benefit" of an exemption from the abortion-coverage requirement is undeniably "contingent upon" an individualized assessment of the Churches' "motivations." The Director cannot decide whether there is "good cause" for an exemption or whether an exemption would be "in the public interest" without considering *why* an exemption is requested.

Second, the facts as alleged do not allow this Court to conclude, at the motion-to-dismiss stage, that the Director and the DMHC have not made any determination devaluing religiously motivated conduct. Favorable inferences are drawn in the nonmoving party's favor—the Churches here, not the State. *Werft*, 377 F.3d at 1100. And the Second Amended Complaint alleges, most notably, that the Director rescinded existing religious accommodations despite federal law prohibiting states from requiring abortion coverage and the DMHC's own legal analysis concluding that religious employers can legally exclude elective abortion coverage. ER 67–68 (¶¶ 95–106).[2] The Court should not just assume the Director acted, and is acting, with benign motives.

[2] The federal government recently confirmed that the DMHC's abortion-coverage mandate violates the federal Weldon Amendment. *See* U.S. Dep't of Health & Human Servs., Office for Civil Rights,

More to the point, the "individualized assessments" or "individualized exemptions" doctrine does not require the Churches to establish that the Director made assessments that devalued religion. The Free Exercise Clause does not demand mindreading. Rather, it demands strict scrutiny if the law "permits individualized, discretionary exemptions because such a regime *creates the opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (emphasis added).

The Director's ability to grant and withhold exemptions—based on vague and subjective notions of "good cause" and "in the public interest"—creates just such an opportunity. As this Court noted, the Supreme Court has held that "an open-ended, purely discretionary standard like 'without good cause' easily could allow discrimination against religious practices or beliefs." *Stormans, Inc. v. Wiesman*, 794

Notice of Violation Letter to Attorney General of California (Jan. 24, 2020), https://bit.ly/2sY80dk.

F.3d 1064, 1081 (9th Cir. 2015).[3] Applying strict scrutiny wisely guards against this discrimination.

2. Strict scrutiny also applies because the law does not pursue the State's purported interests evenhandedly and thus is not generally applicable.

Strict scrutiny also applies because the law on which the abortion-coverage requirement is purportedly based, the Knox-Keene Act's basic healthcare services provision, is not generally applicable.

General applicability is concerned with unequal treatment—not, as the Director contends, religious targeting, motive, or an "intent" to "burden" religion. Ans. Br. 40. For example, in *Lukumi*, the Supreme Court stated that a law is not generally applicable if existing exemptions undermine the government's purported interests "in a similar or greater degree than [religious conduct] does." 508 U.S. at 543–44.

Here, there are many exemptions undermining the State's purported interest. *See* Opening Br. 32–33. Indeed, the Director hardly

[3] *Accord GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 384–85 (1980) (phrases such as "in the public interest" and "for good cause" are "vague" and give agency officials "broad discretion" that is "often abused").

tries to argue otherwise, choosing to disclaim responsibility for them by stating that they "all predate" her tenure. Ans. Br. 40.[4] The general applicability analysis, however, asks this Court to consider whether the *government*, not just a single government official, has pursued its purported interest evenhandedly. And if the State's interest here is to ensure "all health plans" cover all legal abortions, as the Director and the DMHC say it is (ER 167), then the existing exemptions undermine that interest.

In reality, the State's pursuit of its purported interest has been underinclusive and unpredictable. Not only has the California Legislature and the DMHC exempted entire categories of healthcare plans from the Knox-Keene Act's requirements, including any abortion-coverage requirement, *see* Cal. Health & Safety Code § 1343(e); Cal. Code Regs. tit. 28, §§ 1300.43–43.15, the Director has virtually unlimited authority to grant individualized exemptions "for good cause" or if "in the public interest, *see* Cal. Health & Safety Code §§ 1343(b),

[4] The Director does not defend the District Court's erroneous conclusion that categorical exemptions can undermine general applicability "only in a facial challenge to a statute." ER 9; *see* Opening Br. 33–34 (explaining courts routinely consider such exemptions in cases involving as-applied challenges).

1344(a), 1367(i). What is more, the Director delegated this exemption authority to other individuals within the DMHC and placed no limits on when or when not to exercise it. ER 71 (¶¶ 122–23).

Given these exemptions, the Director's reliance on *Stormans*, 794 F.3d 1064, is misplaced. Although the Director says *Stormans* held the "mere existence" of discretionary exemption authority does not destroy general applicability, Ans. Br. 35, she neglects an important qualifier. This Court stated that "[t]he mere existence of an exemption that affords some *minimal governmental discretion* does not destroy a law's general applicability." *Stormans*, 794 F.3d at 1082 (emphasis added).

In *Stormans*, this Court considered the constitutionality of a Washington state law requiring pharmacies to deliver emergency contraceptives. At issue were five enumerated exemptions "permit[ting] pharmacies to deny delivery for certain business reasons, such as fraudulent prescriptions or a customer's inability to pay," and a provision allowing additional exemptions in circumstances "substantially similar" to the five enumerated exemptions. *Id.* at 1071, 1073.

Holding that the exemptions did not destroy general applicability for free-exercise purposes, this Court found that the enumerated exemptions did not undermine the government's interest but "further[ed] the rules' stated goal of ensuring timely and safe patient access to medications." *Id.* at 1080. This Court then noted that, because the provision allowing for "substantially similar" exemptions was "tethered directly to" the enumerated exemptions, it was "tied to particularized, objective criteria" that did "not afford unfettered discretion that could lead to religious discrimination." *Id.* at 1081–82.

The exact opposite is true of the exemptions here. The categorical exemptions not only undermine the government's stated interest in ensuring "all health plans" cover abortion, but the Director's discretionary exemption authority is tied to no objective criteria at all. Exemptions depend on individualized and subjective determinations of "good cause" and "in the public interest," whatever those are.

That does not mean the State of California was wrong to carve out exemptions; the general applicability analysis passes no judgment on that. All it asks is whether the government has decided—either through

official exemption or selective enforcement—to not pursue its purported interest "across-the-board." *Smith*, 494 U.S. at 884.

Because the State decided there are some secular reasons for not requiring elective abortion coverage, its decision to pursue that interest against the Churches' healthcare plans must survive strict scrutiny.

3. Strict scrutiny also applies because the Director's actions were not, and are not, neutral.

Strict scrutiny applies for another reason: the Director's interpretation and application of the abortion-coverage requirement was not, and is not, neutral.

The Director points to the August 2014 letter's facial neutrality, which she says "make[s] clear" that "the purpose of her action was to enforce the requirements of the Knox-Keene Act and other provisions of state law." Ans. Br. 21. But "[f]acial neutrality is not determinative"; the Free Exercise Clause demands a much more searching inquiry, forbidding even "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534 (citation omitted). And the Director's main defense that she was merely "enforc[ing] the requirements of state law," Ans. Br. 25–26, falls flat given the Churches' allegation that the Director's enforcement of the law went further than even she believed was required. ER 52 (¶ 6)

(alleging Director rescinded approval of abortion exclusions and limitations offered to "religious employers," despite the DMHC's own legal analysis concluding religious employers could legally exclude abortion coverage).

This allegation evidences more than just a subtle departure from neutrality; it shows religious belief was the Director's object all along. The State's answering brief effectively concedes the point. In response, the Director says she "had legitimate reasons" for disregarding the department's legal analysis because existing "abortion coverage limitations" were "vague" and might have extended to a "broader class of 'religiously-affiliated' organizations," a class of employers the DMHC apparently determined should be subject to the abortion-coverage mandate. Ans. Br. 30–31.

But this assertion also conflicts with the allegations of the Second Amended Complaint. The Churches allege the Director rescinded approval of plan language that communicated *only* "religious employers," as defined by California, could exclude or limit abortion coverage, *e.g.*, ER 52, 59, 66 (¶¶ 6, 47, 92), and that she did so at the request of Planned Parenthood, the ACLU, and the National Health

Law Program, *e.g.*, ER 62, 64–65 (¶¶ 63–67, 79). The Director's explanation that she had to eliminate *all* abortion coverage exclusions and limitations because they might also benefit "religiously-affiliated" employers is not the real reason. And it doesn't explain why, for the past five years, the DMHC has fought tooth and nail to avoid accommodating religious beliefs shared by Christian churches and an order of Catholic nuns—quintessential "religious employers" even under California law. *See Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, No. 18-55451 (9th Cir. filed Apr. 6, 2018); *Missionary Guadalupanas*, 251 Cal. Rptr. 3d 1.

The Director's explanation further proves religious targeting in two additional ways.

First, if the DMHC concluded that "religious employers" need not comply with the abortion-coverage requirement but "religiously-affiliated organizations" must, as the Director implies (Ans. Br. 30–31), then why didn't the August 2014 letter simply say so? Instead, the letter falsely tells California health insurers that "all health plans" must cover elective abortions and required them to provide immediate abortion coverage "[r]egardless of existing [plan] language." ER 83–84.

This needless—yet deliberate—decision to enforce the abortion-coverage requirement against plans offered only to churches and other religious employers easily supports a claim of non-neutrality. As the Supreme Court stated, it is reasonable "to infer . . . that a law which visits 'gratuitous restrictions' on religious conduct seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538 (citation omitted).

Second, the Churches allege—and the Director's explanation all but confirms—that the plans limiting or excluding abortion coverage were purchased only by religious organizations ("religious employers" and "religiously-affiliated organizations," to use the Director's language).[5] ER 66–67 (¶¶ 89–94). What's more, the Second Amended Complaint asserts the Director *knew* this was the case when she sent the August 2014 letter. *Id.* These allegations further establish non-neutrality.

[5] The Director's distinction between the two groups finds no support in the First Amendment. *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (the term "religious organization" "clearly includes organizations less pervasively religious than churches" and the Ninth Circuit has "often assumed without discussion that organizations with religious elements have Free Exercise rights").

The Director responds to this last point by saying a law can be neutral even if "religious entities might be burdened disproportionately." Ans. Br. 29. True. But the Churches do not allege a disproportionate impact; they allege an *exclusive* one. The Director does not identify any case holding that a law is neutral when, in real operation, it burdens religious conduct exclusively. Nor should this Court be the first to do so, especially at the motion-to-dismiss stage and when the Supreme Court has made clear that "the effect of a law in its real operation is *strong evidence* of its object." *Lukumi*, 508 U.S. at 535 (emphasis added).[6]

4. The Director concedes the abortion-coverage requirement fails strict scrutiny, and it does not survive rational basis review either.

The Director does not argue that her interpretation and application of the abortion-coverage requirement satisfies strict scrutiny—effectively conceding it does not. The Director identifies no compelling

[6] The Director contends throughout her brief that free-exercise claimants must provide "evidence that the religious practices or beliefs at issue were targeted 'because of' their religious motivation" to trigger strict scrutiny. Ans. Br. 24. While the Churches' complaint satisfies this standard, strict scrutiny does not rest on a showing of religious hostility or animus. *See* Opening Br. 37–38.

interest in forcing the Churches' plans to cover elective abortions, nor is there one: numerous exemptions exist and are available (except to the Churches), and the DMHC's own legal analysis (which the Director ignores) concluded that religious employers have no legal obligation to cover elective abortion. The Director's actions here are unnecessary.

Unable to satisfy strict scrutiny, the Director asserts that enforcing the abortion-coverage requirement against the Churches' healthcare plans survives only rational basis review. But even under that standard, the Director's actions fail. Under rational basis review, the government's actions survive only if "they are rationally related to a legitimate governmental purpose." *Stormans*, 794 F.3d at 1084.

Here, the Director contends her actions are rationally related to enforcement of state law. Ans. Br. 44. But as noted, the Churches allege the DMHC concluded, *before* issuing the August 2014 letter, that no state law mandates "religious employers" like the Churches cover elective abortions in their healthcare plans. ER 67 (¶¶ 95–98).[7] Yet the

[7] While this allegation is treated as true at the motion-to-dismiss stage, the Director essentially concedes its veracity. *See* Ans. Br. 30–31. Moreover, the DMHC's conclusion is hardly surprising given the serious free-exercise concerns with forcing churches to fund abortion coverage and the California Legislature's history of exempting

Director mandated and continues to mandate that coverage. Her actions cannot be "rationally related" to enforcing state law when no state law requires that enforcement and when other exemptions exist.

III. The abortion-coverage requirement violates the Equal Protection Clause.

As detailed in the Churches' opening brief, the Second Amended Complaint sufficiently alleges a violation of the Equal Protection Clause because the abortion-coverage requirement interferes with the Churches' fundamental right to the free exercise of religion and has not been enforced evenhandedly. *See* Opening Br. 41–42. The Director's arguments to the contrary are unavailing.

The Director's main argument is that, because the DMHC "regulates only Plans" and "not the purchasers," the Churches cannot "identify any classification" that the Director made "with respect to purchasers." Ans. Br. 50. This lack of classification, the Director says, is fatal to the Churches' equal protection claim. But this ignores the reality of the DMHC's regulations and the Director's decision to grant a

---

religious employers from similar coverage requirements. *See* Cal. Health & Safety Code § 1367.25(c) (contraceptives); *id.* § 1374.55(e) (infertility treatments).

"subsequent lone exemption," Ans. Br. 50, accommodating some religious beliefs but not others. Indeed, the DMHC's regulatory authority affects not just the health insurers, but also plan purchasers and enrollees. And the Director's decision to grant (or withhold) a religious exemption from the abortion-coverage requirement necessarily involves a consideration of the potential purchaser's religious beliefs and identity. The Director admits as much. *See* Ans. Br. 30–31 (expressing concern that certain abortion coverage exclusions and limitations might have benefitted "religiously-affiliated organizations").

Thus, the allegation that Director Rouillard and the DMHC rescinded approval of plan language accommodating the Churches' religious beliefs, ER 60 (¶ 52), but later secretly accommodated different beliefs, ER 73 (¶¶ 141–42), shows the State selectively enforced the law along inherently suspect lines. This violates the Equal Protection Clause. *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (law triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as . . . religion").[8]

[8] The Director's actions also fail rational basis review under the Equal Protection Clause for the reasons identified above. *See supra* Section II.B.4.

IV. The abortion-coverage requirement also violates the Establishment Clause because the Director has selectively enforced it, preferring some religious beliefs over others.

In evaluating the Churches' Establishment Clause claim, the Court should first determine whether the Director's enforcement of the abortion-coverage requirement creates a "denominational preference." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989). If it does, this Court must apply strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982), not the three-part *Lemon* test. *Hernandez*, 490 U.S. at 695.

Here, the Director improperly disregards the strict-scrutiny analysis required under *Larson* and instead jumps straight to the *Lemon* test. *See* Ans. Br. 52–53. But as explained in the Churches' opening brief, the Director and the DMHC have created a "denominational preference" through their selective enforcement of the abortion-coverage requirement. Opening Br. 42–43. The Second Amended Complaint alleges that, since issuing the August 2014 letter, the DMHC secretly agreed to accommodate religious employers whose beliefs allow abortion in the cases of rape, incest, and to save the life of the mother, but will not accommodate religious employers whose beliefs

allow for abortion only when necessary to save the life of the mother. ER 52–53 (¶ 7). Exempting some religious beliefs while regulating others amounts to a religious preference, plain and simple.

Moreover, even though the *Lemon* test does not apply, the Director's selective enforcement of the abortion-coverage requirement would not survive under that test either for the same reasons the Director's actions lack neutrality. A "reasonable observer" who is "familiar with the history of the government practice," *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993), as alleged in the Churches' complaint, would conclude it has a "predominantly religious purpose" and the "principal or primary effect of advancing or inhibiting religion." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1060 (9th Cir. 2010) (Silverman, J., concurring).

CONCLUSION

For these reasons, and those set forth in the Churches' opening brief, this Court should reverse the District Court's ruling dismissing the Churches' Second Amended Complaint.

Dated: January 27, 2020

Respectfully submitted,

s/Jeremiah Galus

John J. Bursch
David A. Cortman
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, D.C. 20001
(202) 393-8690

Alexander M. Medina
MEDINA MCKELVEY LLP
983 Reserve Drive
Roseville, CA 95678
(916) 960-2211
alex@medinamckelvey.com

Kristen K. Waggoner
Kevin Theriot
Jeremiah J. Galus
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
jgalus@ADFlegal.org

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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

9th Cir. Case Number(s) 19-15658

I am the attorney or self-represented party.

This brief contains 6, 027 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Jeremiah Galus **Date** January 27, 2020
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the above 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 January 27, 2020. 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
Jeremiah Galus
Attorney for Plaintiffs-Appellants