

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendant.

No. 2:15-cv-02165-KJM-EFB

ORDER

This action arises from letters the California Department of Managed Health Care (“DMHC”) issued to seven private health insurers, which required them to remove any limitations on or exclusions of abortion services from the health care coverage they offer. Second Am. Compl. (“SAC”), Ex. 1, ECF No. 72-1. Plaintiffs Foothill Church, Calvary Chapel Chino Hills and Shepherd of the Hills Church (“plaintiffs”), three churches who offer their employees DMHC-regulated health coverage through these insurers, filed this action against defendant Michelle Rouillard (“defendant”), Director of the DMHC, alleging the letters violate the plaintiffs’ constitutional rights under the First and Fourteenth Amendments. This matter is before the court on defendant’s motion to dismiss the Second Amended Complaint. Mot., ECF No. 75. Plaintiffs oppose the motion. Opp’n, ECF No. 77. Defendant has replied. Reply, ECF No. 78.

1 The motion was submitted without oral argument and, as explained below, the court GRANTS  
2 the motion.

3 I. STATUTORY FRAMEWORK

4 In California, the DMHC and the California Department of Insurance (“CDI”)  
5 oversee regulation of the health care industry. The DMHC regulates “health care service plans”  
6 under the Knox Keene Health Care Service Plan Act of 1975 (“Knox Keene Act”), Cal. Health &  
7 Safety Code §§ 1340 *et seq.* The Knox Keene Act defines “health care service plans” as “[a]ny  
8 person who undertakes to arrange for the provision of health care services to subscribers or  
9 enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a  
10 prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.” Cal. Health &  
11 Safety Code § 1345(f)(1). Health maintenance organizations (“HMOs”) and other structured  
12 managed care organizations (“MCOs”) are “health care service plans” under this definition. *Rea*  
13 *v. Blue Shield of Cal.*, 226 Cal. App. 4th 1209, 1215 (2014).

14 The Knox Keene Act requires a person to secure a license from the Director of the  
15 DMHC before offering a health care service plan. Cal. Health & Safety Code § 1349. One  
16 requirement for licensure is that “a health care service plan contract [must] provide to subscribers  
17 and enrollees all the basic health care services” specified in the statute. *Id.* § 1367(i). Relevant to  
18 this action, the defendant has promulgated regulations defining the scope of this requirement to  
19 include “a variety of voluntary family planning services.” Cal. Code Regs. tit. 28, § 1300.67(f)(2).  
20 The letters assert that, in conjunction with “the California Reproductive Privacy Act and multiple  
21 California judicial decisions that have unambiguously established under the California  
22 Constitution that every pregnant woman has the fundamental right to choose to either bear a child  
23 or to have a legal abortion,” the Knox Keene Act requires health care service plans to cover  
24 elective abortions. SAC, Ex. 1.

25 The Knox Keene Act provides for a number of categorical and individualized  
26 exemptions. For example, the Act offers religious employers exemptions from providing  
27 coverage for “FDA-approved contraceptive methods that are contrary to [their] religious tenets,”

28 /////

1 Cal. Health & Safety Code § 1367.25(c), or coverage for “forms of treatment of infertility in a  
2 manner inconsistent with [their] religious and ethical principles,” *id.* § 1374.55(e).

3 II. FACTUAL AND PROCEDURAL BACKGROUND

4 On October 23, 2017, plaintiffs filed the operative Second Amended Complaint,  
5 ECF No. 72, which contains the following allegations largely paralleling the allegations of their  
6 original complaint and their First Amended Complaint (“FAC”). On August 22, 2014, the  
7 defendant Director of the DMHC sent letters to seven private health insurers stating the DMHC  
8 had reviewed their contracts and the relevant legal authorities and “concluded that it erroneously  
9 approved or did not object to” language in some previous evidence of coverage (EOC) filings that  
10 may discriminate against women by limiting or excluding coverage for terminations of  
11 pregnancies. SAC ¶¶ 4, 32 & Ex. 1.

12 Plaintiffs are three non-profit Christian churches located in Southern California.  
13 *Id.* ¶¶ 13–15. Each plaintiff has more than fifty full-time employees and must, therefore, provide  
14 health coverage for its employees under the federal Patient Protection and Affordable Care Act of  
15 2010. *Id.* ¶¶ 54–55. The Churches offer health insurance plans to their employees through  
16 various insurers, each of which received a letter from the DMHC as described above. *Id.* ¶ 32 &  
17 Ex. 1. Plaintiffs all hold what they describe as “historic and orthodox” Christian teachings on the  
18 sanctity of human life. *Id.* ¶ 18. They “believe and teach that abortion destroys an innocent  
19 human life” and that “participation in, facilitation of, or payment for an abortion that violates their  
20 religious beliefs is itself sin.” *Id.* ¶¶ 20–21. In furtherance of these beliefs and principles,  
21 plaintiffs consulted with their insurance brokers and/or insurers in an effort to provide employee  
22 group health plans that do not pay for abortions. *Id.* ¶¶ 28–30. However, plaintiffs’ insurance  
23 brokers and/or insurers have informed them that the DMHC’s letters prevent their group health  
24 insurance plans from excluding or limiting coverage for abortions. *Id.* ¶ 31.

25 This action followed. The original complaint alleged that the DMHC’s letters  
26 violated plaintiffs’ rights under the Free Exercise, Establishment, Free Speech and Equal  
27 Protection clauses of the U.S. Constitution. *See* Compl. ¶¶ 104, 114, 119, 126, ECF No. 1. The  
28 court previously dismissed the Establishment and Free Speech claims with prejudice, but allowed

1 the plaintiffs to file an amended complaint to cure defects in their Free Exercise and Equal  
2 Protection claims. First Order at 22, ECF No. 39. The plaintiffs then filed their First Amended  
3 Complaint, which the court again dismissed in resolving defendant’s motion to dismiss, once  
4 again granting plaintiffs leave to amend their Free Exercise and Equal Protection claims. *See*  
5 FAC; Second Order, ECF No. 68. In support of their Free Exercise claim, plaintiffs now allege  
6 “[t]he Knox–Keene Act, as interpreted and applied by Defendant, is neither neutral nor generally  
7 applicable.” SAC ¶ 167. Specifically, plaintiffs allege the Director has used her “broad,  
8 unfettered discretion” to provide exemptions “in a way that prefers some religious beliefs to  
9 others.” *Id.* ¶¶ 170–72. Thus, they allege, “Defendant Rouillard has interpreted and selectively  
10 applied the Knox–Keene Act and its ‘basic health care services’ requirement against the Churches  
11 to suppress specific religious beliefs about when it is morally permissible to provide health  
12 insurance coverage for elective abortions.” *Id.* ¶ 175. Plaintiff’s Equal Protection claim is  
13 similarly based on alleged disparate treatment of different religious employers. *See id.* ¶¶ 191–  
14 93.

### 15 III. LEGAL STANDARD

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the  
17 court’s subject matter jurisdiction. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036,  
18 1039–40 (9th Cir. 2003). When a party moves to dismiss for lack of subject matter jurisdiction,  
19 “the plaintiff bears the burden of demonstrating that the court has jurisdiction.” *Boardman v.*  
20 *Shulman*, No. 2:12-cv-00639-MCE-GGH, 2012 WL 6088309, at \*2 (E.D. Cal. Dec. 6, 2012),  
21 *aff’d sub nom. Boardman v. Comm’r*, 597 F. App’x 413 (9th Cir. 2015). If a plaintiff lacks  
22 standing, the court lacks subject matter jurisdiction under Article III of the U.S. Constitution.  
23 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

24 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to  
25 dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ.  
26 P. 12(b)(6). The motion may be granted only if the complaint “lacks a cognizable legal theory or  
27 sufficient facts to support a cognizable legal theory.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*,  
28 707 F.3d 1114, 1122 (9th Cir. 2013) (citation omitted).

1           Although a complaint need contain only “a short and plain statement of the claim  
2 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to survive a motion  
3 to dismiss, this short and plain statement “must contain sufficient factual matter . . . to ‘state a  
4 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  
5 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something  
6 more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” or “‘labels and  
7 conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.* (quoting  
8 *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss  
9 for failure to state a claim is a “context-specific task that requires the reviewing court to draw on  
10 its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

11           In making this context-specific evaluation, this court must construe the complaint  
12 in the light most favorable to the plaintiff and accept its factual allegations as true. *Erickson v.*  
13 *Pardus*, 551 U.S. 89, 93–94 (2007). This rule does not apply to “a legal conclusion couched as a  
14 factual allegation,” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286  
15 (1986)), “allegations that contradict matters properly subject to judicial notice,” *Sprewell v.*  
16 *Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001), or material attached to or  
17 incorporated by reference into the complaint, *see id.* A court’s consideration of documents  
18 attached to a complaint, documents incorporated by reference in the complaint, or matters of  
19 judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United*  
20 *States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington*, 51 F.3d  
21 1480, 1484 (9th Cir. 1995); *cf. Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th  
22 Cir. 2002) (even though court may look beyond pleadings on motion to dismiss, generally court is  
23 limited to face of the complaint on 12(b)(6) motion).

#### 24   IV.   ANALYSIS

##### 25       A.   Standing

26           In its previous two orders granting dismissal, the court found plaintiffs had  
27 sufficiently alleged standing to challenge defendant’s letters. First Order at 12; Second Order at  
28

1 5–6. Defendant again moves to dismiss on the basis that plaintiffs lack standing, Mot. at 6–8<sup>1</sup>,  
2 and its arguments with respect to the Second Amended Complaint are the same as before.  
3 Defendant has not demonstrated the court’s prior rulings were incorrect, and the pleadings have  
4 not changed in a manner that alters the standing analysis. The court once again finds plaintiffs  
5 have sufficiently pled standing to challenge the letters.

6 B. Free Exercise of Religion

7 The Free Exercise Clause of the First Amendment, which applies to the states  
8 through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides  
9 that “Congress shall make no law respecting an establishment of religion, or prohibiting the free  
10 exercise thereof,” U.S. Const. amend. I. However, the right to freely exercise one’s religion  
11 “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of  
12 general applicability on the ground that the law proscribes (or prescribes) conduct that his religion  
13 prescribes (or proscribes).’” *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United*  
14 *States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., *concurring in the judgment*)).<sup>2</sup> A valid  
15 and neutral law of general applicability must be upheld if it is rationally related to a legitimate  
16 governmental purpose. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075–76, 1084 (9th Cir.  
17 2015). In contrast, laws that are not neutral or are not generally applicable are subject to strict  
18 scrutiny. *Id.* at 1076. Under strict scrutiny, laws “must be justified by a compelling  
19 governmental interest and must be narrowly tailored to advance that interest.” *Church of Lukumi*  
20 *Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

21 “The tests for ‘[n]eutrality and general applicability are interrelated, and . . . failure  
22 to satisfy one requirement is a likely indication that the other has not been satisfied.’” *Stormans*,  
23 794 F.3d at 1076 (alterations in original) (quoting *Lukumi*, 508 U.S. at 531).

---

24 <sup>1</sup> All page references in briefs are to the page number assigned by the filing party, rather  
25 than the number assigned by the court’s ECF system.

26 <sup>2</sup> Although *Smith* was superseded by the Religious Freedom Restoration Act of 1993  
27 (“RFRA”), the Supreme Court has clarified that RFRA applies only to the federal government  
28 and not to the states. See *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015); *Stormans, Inc. v.*  
*Wiesman*, 794 F.3d 1064, 1075 n.4 (9th Cir. 2015).

1           1.     Neutrality

2           A law is not neutral if its object is to infringe upon or restrict practices because of  
3 their religious motivation. *Stormans*, 794 F.3d at 1076 (citing *Lukumi*, 508 U.S. at 533). In  
4 determining whether a law is neutral, courts consider both the text and the operation of the law.  
5 “A law lacks facial neutrality if it refers to a religious practice without a secular meaning  
6 discernable from the language or context.” *Lukumi*, 508 U.S. at 533. The letters at issue here and  
7 the underlying laws they purportedly enforce do not refer to any religious practice, conduct, belief  
8 or motivation on their face; they are facially neutral. *See* SAC, Ex. 1 (citing authority relied on as  
9 Cal. Const. art. 1, § 1, Cal. Health & Safety Code § 1340 *et seq.*, Cal. Health & Safety Code §  
10 123460 *et seq.*, and the regulations implementing the cited statutes).

11           Even if a law or enforcement action based on the law is facially neutral, it is not in  
12 fact neutral if it operates as a “covert suppression of particular religious beliefs.” *Lukumi*, 508  
13 U.S. at 534 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). In determining whether a law  
14 covertly suppresses beliefs, a court may consider “the historical background of the decision under  
15 challenge, the specific series of events leading to the enactment or official policy in question, and  
16 the legislative or administrative history.” *Id.* at 543.

17           In granting defendant’s prior motions to dismiss, the court found that plaintiffs’  
18 original complaint and First Amended Complaint failed to allege sufficient facts to state a claim  
19 that the letters were not neutral in operation. First Order at 16; Second Order at 7–8. In addition  
20 to the arguments plaintiffs made in opposition to defendant’s first and second motions to dismiss,  
21 plaintiffs now argue defendant knew that only religious organizations would be affected, not just  
22 that she knew her actions would generally affect religious entities; their argument tracks their  
23 amended pleading. Opp’n at 14 (citing *inter alia* SAC § 91). Plaintiffs also attach new  
24 documents to the current complaint, which they allege provide essential background to the  
25 issuance of the letters, including details about communications and at least one meeting between  
26 and among defendant, other DMHC staff and Planned Parenthood. *See* SAC ¶¶ 71, 75, 77, 78, 81  
27 & Exs. 2–5. These new allegations and evidence, however, do not alter the court’s analysis or  
28 conclusion as explained below.



1 First, for purposes of this motion, accepting as true plaintiffs’ allegation that  
2 defendant knew only religious organizations would be affected does not, without more, make it  
3 plausible that her object was to target religious employers. Rather, plaintiffs must demonstrate  
4 more than “awareness of consequences.” *Lukumi*, 508 U.S. at 540. Plaintiffs must plausibly  
5 plead that defendant acted “because of, not merely in spite of” the impact of her actions on  
6 religious entities, *id.*, and they have not done so here, *see* SAC ¶¶ 89-94. Plaintiffs’ allegations  
7 attributing motivations to “abortion advocates” who sought and obtained meetings with defendant  
8 or her staff, *id.* ¶¶ 65, 70, 73-75, does not alter this conclusion. Second, the new exhibits  
9 provided by plaintiffs provide details in support of the same allegations they pled in their previous  
10 two complaints: that defendant issued the letters after abortion rights groups communicated with  
11 her or her staff, having learned of the actions of two Catholic universities, and that defendant  
12 knew or should have known her letters would only affect health plans purchased by religious  
13 organizations. *See* SAC ¶¶ 89-94; *cf.* Compl. ¶¶ 40-48 and FAC ¶¶ 44-56. The exhibits do not,  
14 as plaintiffs contend, cure the deficiencies in their pleadings as addressed by the court’s prior  
15 orders dismissing plaintiffs’ earlier complaints.

16 Plaintiffs have not alleged sufficient facts to call the letters’ facial neutrality into  
17 question.

## 18 2. General Applicability

19 A law or state action based on a law is not generally applicable if it “impose[s]  
20 burdens only on conduct motivated by religious belief” in a “selective manner.” *Lukumi*,  
21 508 U.S. at 543. Plaintiffs argue the defendant’s letters are not generally applicable because  
22 defendant has “unbridled discretion” to exempt plans from the abortion coverage requirement and  
23 in fact has exercised her discretionary exemption authority in a discriminatory way. Opp’n at 15–  
24 16 (referencing SAC ¶¶ 117-46). Plaintiffs contend their Second Amended Complaint states an  
25 “as-applied” challenge to the Knox-Keene Act, distinguishing this complaint from the two prior  
26 attempts the court previously dismissed. *See id.* at 16 n.5. However, as defendant points out in  
27 the reply, “statutory exclusions undermine the general applicability of a statute only in a facial  
28 challenge to the statute,” Reply at 5 (citing *Lukumi*, 508 U.S. at 543–45; *Stormans*, 586 F.3d at



1 1079–81), and plaintiffs have not raised a facial challenge to the Knox Keene Act here.<sup>3</sup> As  
2 defendant argues, plaintiffs still have “not allege[d] that any Plans . . . previously offered products  
3 that excluded or limited abortion coverage for religious reasons.” Mot. at 15.

4 Accordingly, plaintiffs have not alleged sufficient facts to call the letters’ general  
5 applicability into question.

6 3. Individualized Assessment Exception

7 Finally, plaintiffs allege that the law bestowing discretion on defendant on to  
8 exempt plans from the abortion coverage requirement triggers strict scrutiny because “the law on  
9 which that coverage requirement is based involves ‘a system of individual exemptions.’” Opp’n  
10 at 9 (quoting *Smith*, 494 U.S. at 884). An exception to the general rule that neutral and generally  
11 applicable laws are subject to rational basis review does provide that “where the State has in place  
12 a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious  
13 hardship’ without compelling reason.” *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d  
14 957, 961 (9th Cir. 1991) (*Thornburgh*) (quoting *Smith*, 494 U.S. at 884). For example, the  
15 Supreme Court in *Lukumi* applied strict scrutiny because the ordinance at issue required the city  
16 to determine when ritual slaughter of an animal was necessary, and the city’s “application of the  
17 ordinance’s test of necessity devalue[d] religious reasons for killing by judging them to be of  
18 lesser import than nonreligious reasons.” 508 U.S. at 537. Plaintiffs argue the exception  
19 articulated in *Thornburgh* applies here, because provisions of the Knox Keene Act give defendant

20 /////

---

21 <sup>3</sup> Challenging purported “unbridled discretion” granted by a statute or regulation is most  
22 appropriate in the context of a facial challenge. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781,  
23 794 (1989) (finding that outside of licensing context, a facial challenge must “fall[] within [a]  
24 narrow class of . . . allegedly unconstrained grants of regulatory authority”); *see also Citizens for*  
25 *Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 958 (N.D. Cal. 2015) (quoting  
26 *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990)) (“Although facial challenges to  
27 legislation are generally disfavored, they have been permitted in the First Amendment context  
28 where the licensing scheme vests unbridled discretion in the decisionmaker and where the  
regulation is challenged as overbroad.”). Akin to challenging a statute as overbroad on its face,  
an “unbridled discretion” challenge examines whether a statute provides articulable standards that  
place limits on an administrator’s exercise of discretion. *See Forsyth Cty., Ga. v. Nationalist*  
*Movement*, 505 U.S. 123, 133 (1992) (finding ordinance facially unconstitutional where it vested  
“unbridled discretion” in county administrator).

1 broad discretion to grant exemptions, and thereby “creates a system of ‘individualized  
2 assessments.’” Opp’n at 10 (citing *Stormans*, 794 F.3d at 1081–82).

3 Plaintiffs argue the allegations of the Second Amended Complaint differ from the  
4 previous complaints because they now “establish that the Director and DMHC were aware of  
5 previously-approved and ‘open’ plan filings that provided coverage consistent with the Churches’  
6 religious beliefs yet required the health plans to withdraw those filings or amend them so that  
7 they covered all legal abortions.” Opp’n at 11 (citing SAC ¶¶ 45–47, 147–55). Defendant argues  
8 correctly the “allegations do not support a reasonable inference that the Director deliberately  
9 sought to give preference to one set of religious beliefs regarding abortion over others” because  
10 “reasonable alternate non-discriminatory explanations exist for the Director’s actions.” Reply at  
11 8; see *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). Plaintiffs  
12 still have not sufficiently alleged that any plan that would be acceptable to them has been  
13 submitted to defendant for approval, nor that she has rejected any such plan. Cf. Second Order at  
14 9-10.

15 C. Equal Protection

16 The Equal Protection Clause of the Fourteenth Amendment prohibits a state from  
17 “deny[ing] to any person within its jurisdiction the equal protection of the law,” U.S. Const.  
18 amend. XIV, which essentially “direct[s] that all persons similarly situated should be treated  
19 alike,” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

20 Plaintiffs’ Second Amended Complaint alleges defendant has not applied the Knox  
21 Keene Act equally to all similarly situated employers, who are the purchasers of insurance  
22 coverage as relevant here. SAC ¶¶ 185-99; Opp’n at 20. As defendant contends, the Second  
23 Amended Complaint “alleges no new facts that could create any reasonable inference the Director  
24 is treating Plaintiffs ‘differently than similarly situated persons and businesses.’” Mot. at 18. As  
25 explained in the court’s previous two orders, “the challenged letters apply to Plans, not  
26 purchasers, and do not make any classification with respect to purchasers.” Second Order at 10.

27 Moreover, a viable Equal Protection claim must “show that the defendants acted  
28 with an intent or purpose to discriminate against the plaintiff based upon membership in a

1 protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (citing *Washington*  
2 *v. Davis*, 426 U.S. 229, 239-40 (1976)). Determining discriminatory intent “demands a sensitive  
3 inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of*  
4 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Still, “[d]iscriminatory  
5 purpose . . . implies more than intent as violation or intent as awareness of consequences . . . . It  
6 implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in  
7 part because of, not merely in spite of, its adverse effects upon an identifiable group.” *Pers.*  
8 *Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (internal citation and quotations  
9 omitted).

10 Here, plaintiffs fail to plead how defendant acted “at least in part because of, not  
11 merely in spite of” an awareness that her decision may have an adverse effect on plaintiffs’  
12 religious beliefs. *Id.* Plaintiffs claim they were subject to disparate treatment when defendant  
13 refused to approve plans consistent with their beliefs, “but later granted an exemption for  
14 religious beliefs that differ from those of [plaintiffs].” Opp’n at 20 (citing SAC ¶¶ 134-55). But  
15 plaintiffs do not plead how, or in what manner, any exercise of exemption authority by defendant  
16 amounts to discriminatory intent. As defendant notes, “An equal protection claim will not lie by  
17 ‘conflating all persons not injured into a preferred class receiving better treatment’ than the  
18 plaintiff.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (citing *Joyce v.*  
19 *Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)).

20 For these reasons plaintiffs still have not adequately pleaded a claim under the  
21 Equal Protection Clause.

## 22 V. LEAVE TO AMEND

23 Federal Rule of Civil Procedure 15(a)(2) states “[t]he court should freely give  
24 leave [to amend pleadings] when justice so requires” and the Ninth Circuit has “stressed Rule  
25 15’s policy of favoring amendments,” *Ascon Props. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160  
26 (9th Cir. 1989). “In exercising its discretion [to grant or deny leave to amend] ‘a court must be  
27 guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on  
28 the pleadings or technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.

1 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). However, “the  
2 liberality in granting leave to amend is subject to several limitations.” *Ascon Props.*, 866 F.2d at  
3 1160. “Leave need not be granted where the amendment of the complaint would cause the  
4 opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or  
5 creates undue delay.” *Id.* In addition, a court should look to whether the plaintiff has previously  
6 amended the complaint, as “the district court’s discretion is especially broad ‘where the court has  
7 already given a plaintiff one or more opportunities to amend [its] complaint.’” *Id.* at 1161  
8 (quoting *Leighton*, 833 F.2d at 186 n.3).

9 Plaintiffs have had three opportunities to state a claim upon which relief may be  
10 granted, yet remain unable to sufficiently plead their Free Exercise and Equal Protection claims.  
11 Allowing plaintiffs another chance to plead these claims would be futile, and the court therefore  
12 DENIES plaintiffs leave to amend. *Williams v. California*, 764 F.3d 1002, 1027 (9th Cir. 2014)  
13 (affirming dismissal without leave to amend where plaintiffs failed in two chances to sufficiently  
14 plead their claims, including an Establishment Clause claim).

15 VI. CONCLUSION

16 For the foregoing reasons, the court GRANTS defendant’s motion to dismiss for  
17 failure to state a claim. The court DISMISSES plaintiffs’ claims without leave to amend. The  
18 Clerk of Court is directed to enter judgment in favor of defendant and CLOSE this case.

19 This order resolves ECF No. 75.

20 IT IS SO ORDERED.

21 DATED: March 6, 2019.

22  
23   
24  
25  
26  
27  
28  
UNITED STATES DISTRICT JUDGE