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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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12 **SKYLINE WESLEYAN CHURCH,**
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 Plaintiff,
 14
 v.
 15
 16 **CALIFORNIA DEPARTMENT OF**
MANAGED HEALTH CARE;
 17 **MARY WATANABE, in her official**
capacity as Director of the California
 18 **Department of Managed Health**
Care,¹
 19
 Defendants.
 20

3:16-cv-00501-TWR-MSB

**RESPONSE TO PLAINTIFF’S EX
 PARTE MOTION TO SET
 SUPPLEMENTAL BRIEFING
 SCHEDULE (DKT. NO. 115)**

21
 22 **INTRODUCTION**

23 Defendants California Department of Managed Healthcare (DMHC) and Mary
 24 Watanabe, in her official capacity as Director of DMHC, hereby submit the
 25 following response to Plaintiff’s Ex Parte Motion to Set Supplemental Briefing
 26 Schedule, filed September 7, 2021. Dkt. No. 115. As set forth in more detail below,

27 ¹ Director Mary Watanabe replaces former Director Michelle Rouillard as
 28 defendant, in her official capacity, as by operation of Federal Rule of Civil
 Procedure 25(d).

1 Defendants respectfully request that this Court schedule a status conference for
2 October 2021 in lieu of setting a briefing schedule at this time.

3 **DISCUSSION**

4 This case is one of two actions filed by religious institutions challenging the
5 constitutionality of letters that DMHC sent to seven licensed health plans stating
6 that, under California law, health plans cannot discriminate against lawful abortion
7 coverage. Plaintiff’s case has been pending in this Court since February 2016. *See*
8 Dkt. No. 1 (Notice of Removal). The companion case, *Foothill Church, et al. v.*
9 *Dep’t of Managed Health Care*, was filed in the Eastern District of California a few
10 months prior. Case No. 2:15-02165-KJM-EFB. In both cases, the district courts
11 dismissed the plaintiffs’ claims and the plaintiffs appealed to the Ninth Circuit.

12 **A. *Skyline Wesleyan Church***

13 In *Skyline*, the case before this Court, the parties filed cross-motions for
14 summary judgment. This Court dismissed Plaintiff’s claims without prejudice on
15 jurisdictional grounds. Dkt. No. 93. On appeal, the Ninth Circuit reversed in part,
16 vacated in part, and remanded to this Court for further proceedings. Dkt. No. 105.
17 The Ninth Circuit held that Plaintiff’s claim under the First Amendment’s Free
18 Exercise Clause is justiciable, but declined to reach Plaintiff’s other claims. *Skyline*
19 *Wesleyan Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 753 (9th
20 Cir. 2020). Instead, the Ninth Circuit remanded to this Court “to reassess the
21 justiciability of Skyline’s remaining claims in light of our decision.” *Id.*

22 The Ninth Circuit also declined to reach the merits of Plaintiff’s free exercise
23 claim in light of the Supreme Court’s grant of a petition for a writ of certiorari in
24 *Fulton v. City of Philadelphia*, No. 19-123. *See* 140 S. Ct. 1104 (2020) (granting
25 certiorari). Because Plaintiff’s free exercise claim implicated the same case law at
26 issue in *Fulton*, the Ninth Circuit decided to “wait to decide the appeal until after
27 the Supreme Court has ruled.” *Skyline*, 968 F.3d at 754. In the interim, the Ninth
28 Circuit remanded to this Court with instructions that the Court “determine, after

1 resolving whether Skyline’s other claims are justiciable ... when it would be
2 appropriate to proceed to the merits of Skyline’s claims for which there is
3 jurisdiction.” *Id.* (internal citation omitted).

4 The Supreme Court issued its opinion in *Fulton* on June 17, 2021. *Fulton v.*
5 *City of Philadelphia*, 141 S. Ct. 1868. The Supreme Court held that the City of
6 Philadelphia had burdened the plaintiffs’ religious exercise by requiring them to
7 certify same-sex couples to be foster parents, which was contrary to their religious
8 beliefs about marriage. *Id.* at 1882-83.

9 Shortly after the Supreme Court issued its decision in *Fulton*, Plaintiff
10 requested that this Court convene a status conference “at the Court’s earliest
11 convenience to address procedures and scheduling for summary judgment
12 briefing.” Dkt. No. 110 at 2 (Notice of Ruling in Related Case and Request for
13 Status Conference).

14 **B. Foothill Church**

15 The *Foothill Church* case pending in the Eastern District of California has
16 proceeded in a similar fashion. The district court dismissed the complaint; on
17 appeal, following oral argument, the Ninth Circuit vacated submission of the case
18 “pending the issuance of a decision by the Supreme Court in *Fulton*.” 9th Cir. Case
19 No. 19-15658, Dkt. No. 43 (Nov. 24, 2020).

20 Once the Supreme Court issued its decision in *Fulton*, the Ninth Circuit
21 vacated “the district court’s rulings on the Free Exercise and Equal Protection
22 claims” and remanded to the Eastern District “for further consideration in light of
23 *Fulton*.” *Foothill Church v. Watanabe*, 3 F.4th 1201 (9th Cir. 2021). In a separate
24 memorandum disposition, the Ninth Circuit affirmed the district court’s dismissal
25 of the plaintiffs’ Establishment Clause claim. *Foothill Church v. Watanabe*, 854 F.
26 App’x 174 (9th Cir. 2021).

27 The mandate issued in August 2021, and the case is now back in front of the
28 Eastern District of California. That court (Chief Judge Kimberly J. Mueller) has

1 scheduled a status conference for October 29, 2021. EDCA Case No. 2:15-cv-
2 02165-KJM-EFB, Dkt. No. 96 (Aug. 12, 2021).

3 **C. Settlement Discussions**

4 In advance of the Eastern District status conference, and in recognition of the
5 changed landscape surrounding these cases in *Fulton*'s wake, the DMHC and
6 Director Watanabe have been in active discussions with Plaintiff regarding a
7 potential settlement or resolution of both cases. Eisenberg Decl. ¶¶ 5-10; *see also*
8 Galus Decl. in Support of Ex Parte Mot. ¶¶ 4-9 (acknowledging that Defendants
9 have been discussing settlement). Plaintiff declined the Director's request that the
10 parties attempt to resolve the case via mediation. Eisenberg Decl. ¶ 6; *accord* Galus
11 Decl. ¶ 5. As a result, the Director has been diligently working through the
12 complex internal process required to generate settlement offers in cases of this
13 magnitude. Eisenberg Decl. ¶¶ 9-12; *see also* Galus Decl. ¶¶ 8-9 (acknowledging
14 that Defendants' counsel has kept Plaintiff's counsel apprised of their efforts to
15 generate a settlement proposal).

16 Despite the Director's request that Plaintiff consider a joint motion to set a
17 status conference in this Court around the same time as in the companion case
18 pending in the Eastern District, Plaintiff instead filed the instant Ex Parte Motion to
19 Set Supplemental Briefing Schedule. Plaintiff requests that this Court set a
20 supplemental summary judgment briefing schedule so that the parties can "file
21 supplemental briefs addressing *Fulton*." Dkt. No. 115-1 at 5.

22 **D. Defendants Request a Status Conference In Lieu of Supplemental** 23 **Briefing**

24 Defendants remain in active internal discussions about resolving these high
25 profile cases. An order requiring supplemental briefing at this time would not only
26 waste judicial resources, but would interfere with those efforts. Accordingly,
27 Defendants oppose Plaintiff's ex parte request that the Court set a supplemental
28 briefing schedule at this time.

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DECLARATION OF KARLI EISENBERG IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S EX PARTE MOTION TO SET SUPPLEMENTAL BRIEFING SCHEDULE (DKT. NO. 115)

23 I, KARLI EISENBERG, declare as follows:

24 1. I am a Supervising Deputy Attorney General with the Office of the
 25 Attorney General for the State of California, and am a member in good standing of
 26 the State Bar of California. I am assigned to represent Defendants the California

27 ¹ Director Mary Watanabe replaces former Director Michelle Rouillard as
 28 defendant, in her official capacity, as by operation of Federal Rule of Civil
 Procedure 25(d).

1 Department of Managed Healthcare (DMHC) and Mary Watanabe, in her official
2 capacity as Director of DMHC, in this matter.

3 2. On July 19, 2021, the Ninth Circuit remanded this matter to this Court.
4 On July 21, 2021, Plaintiff Skyline Wesleyan Church filed a request for a status
5 conference.

6 3. On August 12, 2021, the Eastern District of California court scheduled a
7 status conference in the companion case, *Foothill Church v. Watanabe*, Case No.
8 15-cv-02165-KJM-EFB, for October 29, 2021.

9 4. That same day, counsel for Plaintiff informed me that “[i]n lieu of a
10 status conference ... it might be easier for everyone involved if the parties just
11 jointly submitted a proposed briefing schedule” and inquired whether this approach
12 was acceptable to Defendants.

13 5. After consulting with my client, I reached out to counsel for Plaintiff by
14 phone the next day and then followed up by e-mail. I proposed that the parties
15 explore mediation in an attempt to resolve these cases, explaining that the Supreme
16 Court’s recent decision in *Fulton* had changed the landscape and that Defendants
17 were interested in resolving the case. I provided information about the Eastern
18 District of California’s Volunteer Dispute Resolution Program and suggested we
19 utilize the program to resolve the case.

20 6. On August 17, 2021, counsel for Plaintiff informed me that his client “is
21 open to entertaining any offer of settlement from Defendants,” but “is not interested
22 in mediation at this time.” Counsel requested that I “let [him] know whether
23 Defendants are willing to join a motion setting a supplemental briefing schedule.”
24 Upon receipt of this email, I began working with my client on putting together a
25 written settlement offer. Counsel followed up with another email on August 20,
26 2021, informing me that he “plan[ned] to file the motion by COB today.”

27 7. I responded a few minutes later, stating again that “defendants believe
28 that mediation is appropriate in light of the recent *Fulton* decision,” but because

1 Plaintiff was “unwilling to participate in mediation, I am working with my client to
2 provide you with an offer of settlement.” I informed counsel that “I hope to provide
3 you with an offer of settlement next week” and for that reason “I do not believe it is
4 a good use of our clients’ resources or the court’s time to push forward with
5 additional briefing.” I stated that if Plaintiff were to file a motion for supplemental
6 briefing, Defendants would oppose the motion, explaining to the Court the present
7 circumstances—namely that “defendants have recommended mediation given
8 *Fulton*, your client has refused to participate in mediation, we are in the midst of
9 proffering settlement terms, and as such, we do not believe that additional briefing
10 at this time is a good use of the court’s time or client resources.”

11 8. Counsel for Plaintiff responded by asking if there were “alternative
12 briefing dates that Defendants would like to propose to accommodate their
13 anticipated settlement offer.” I responded that “I still need to talk to my client,” and
14 suggested that instead of a briefing schedule, the parties “stipulate to an October
15 CMC at which the court can set a briefing schedule if a) the parties have not yet
16 settled and b) if the court believes that additional briefing would be useful.” I noted
17 that “[a]rranging an October CMC would also put the Skyline case on the same
18 timeline as the Foothill Church case, thereby facilitating concurrent settlements.”
19 Counsel for Plaintiff stated that he would “consider that possibility and will let you
20 know next week after we receive Defendants’ settlement proposal.”

21 9. While I awaited counsel’s response during the week of August 23, 2021,
22 I continued to consult with my client about a potential settlement offer. My client
23 informed me, however, that the process of obtaining approval for a settlement offer
24 was likely to take longer than a week, making it improbable that we would be able
25 to offer Plaintiff a settlement by the end of the week as promised.

26 10. I contacted counsel for Plaintiff by telephone and by email on Friday,
27 August 27, 2021. I advised him in both a voicemail and email that “I do not have
28 approval to send you a written settlement proposal today,” but that “[w]e are

1 working diligently with our clients in obtaining that approval” and “hope to provide
2 you with a written settlement proposal as soon as possible.”

3 11. On Tuesday, August 31, 2021, counsel for Plaintiff informed me that if I
4 was “unable to secure client approval by the end of this week” Plaintiff would
5 “move forward with a motion asking for a supplemental briefing schedule.” He
6 never addressed my suggestion that we request an October status conference in lieu
7 of setting a briefing schedule.

8 12. During this time, I have continued to work on obtaining authorization for
9 a written settlement proposal. To obtain settlement approval in a case like this
10 involves a complex internal process, requiring a number of different approvals from
11 within the state executive branch.

12 13. Without any follow-up about the status of my discussions with my client
13 regarding a settlement offer, Plaintiff filed the instant *ex parte* motion to set a
14 supplemental briefing schedule on Tuesday, September 7, 2021.

15

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17 I declare under penalty of perjury that the foregoing is true and correct and of
18 my own personal knowledge.

19 Executed on September 14, 2021, in Sacramento, California.

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s/Karli Eisenberg

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Karli Eisenberg

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