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 SKYLINE WESLEYAN CHURCH'S REPLY BRIEF

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INTRODUCTION

As detailed in Skyline Wesleyan Church's opening brief, the California Department of Managed Health Care has mandated since August 2014 that all California health insurers include elective abortions in their health plans. The DMHC's mandate applies to all insureds, including religious organizations that morally oppose abortion. In fact, the mandate even applies to Skyline Church, which exclusively employs members of its congregation who *agree* with its beliefs about abortion. Why would the DMHC impose such a mandate on those who do not want it? Because it received objections from pro-abortion advocates who were upset that the DMHC had allowed two Catholic universities to limit abortion coverage in their plans.

The DMHC contends that the Church has no standing to challenge this nearly four-and-a-half year violation of its religious beliefs. But the Church's Article III standing is well established under both Supreme Court and Ninth Circuit precedent. The Church's past and ongoing injuries result from the "determinative or coercive effect" the DMHC's actions had on California insurers. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). And the Church's retrospective and prospective

claims for relief are ripe because they arise from the DMHC's past and ongoing enforcement of the law, meaning the abortion-coverage requirement "has been formalized and its effects felt in a concrete way." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003).

Because the Church's legal challenge presents a ripe and justiciable case and controversy, this Court should overturn the lower court's decision dismissing the case. Further, this Court should exercise its discretion and address the merits of the Church's federal free-exercise claim so that the Church will not be forced to continue violating its religious convictions during a lengthy remand proceeding.

ARGUMENT

I. The Church's claims for retrospective relief are ripe and justiciable.

The DMHC does not dispute that the August 22, 2014 letter changed Skyline Church's healthcare plan, or that an award of nominal damages redresses past violations of constitutional rights. Yet it asks this Court to ignore the Church's claims for retrospective relief because the Church ostensibly "waived" standing and ripeness for those claims "by failing to raise [them] below." Br. 26. This is wrong for two independent reasons.

First, the Church did not waive anything. The Church's complaint plainly seeks nominal damages based on past violations of its constitutional rights. *See* ER 418. And the Church argued below that the court had jurisdiction over the *entire* action, including all causes of action and claims for relief.[1]

Second, "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). Because the questions at issue here—redressability and ripeness—go to subject matter jurisdiction, the Church could not "waive" relevant arguments even if it wanted to. This Court must determine standing and ripeness for itself, an analysis that is not limited by the parties' arguments on appeal, let alone those raised (or not raised) below. *E.g.*, *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1116 (9th Cir. 2015) ("[I]t is our duty to consider *sua sponte* whether [a suit] is ripe.").

[1] Both parties briefed Article III standing in the lower court. But because the District Court raised ripeness *sua sponte*, *see* ER 26, neither party briefed that issue.

Because the Church's claims for retrospective relief arise from past constitutional injuries and can be redressed by nominal damages, they alone warrant reversal of the District Court's decision. *E.g.*, *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (an "award of nominal damages" is an "appropriate means" of "vindicating" constitutional rights); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 426–27 (9th Cir. 2008) (nominal damages award can redress past constitutional injuries); *Gemtel Corp. v. Comm. Redev. Agency of the City of Los Angeles*, 23 F.3d 1542, 1545 (9th Cir. 1994) ("It is hard to see how a claim for damages could be unripe."). And though the Church cited all three of these authorities in its opening brief, the DMHC does not even mention them, effectively conceding the point.

II. The Church also has standing to assert claims for prospective relief, and those claims are ripe too.

In addition to seeking a judgment and nominal damages for past violation of constitutional rights, Skyline Church seeks declaratory and injunctive relief to stop the DMHC's ongoing enforcement of the abortion-coverage requirement. These claims for prospective relief are likewise ripe and justiciable.

A. The Church's standing is well established under Supreme Court and Ninth Circuit precedent.

Skyline Church has standing to assert claims for prospective relief because the DMHC's actions caused the Church's injury, that injury is ongoing, and it is likely to be redressed by a favorable decision.

i. A favorable decision is likely to redress the Church's injury because at a minimum it would remove a regulatory obstacle.

Both the District Court and the DMHC say that a favorable court decision is unlikely to redress Skyline Church's injury. That is wrong for a couple of reasons.

First, a favorable ruling could *order* the DMHC to accommodate the Church's beliefs. The agency is expressly authorized to exempt "any class of persons" from the Act's requirements, including the "basic health care services" provision. Cal. Health & Safety Code § 1343(b). And while the DMHC insists this exemption authority is limited to "health plans, not consumers," Br. 40 n.20, it cites no support for that assertion. Nor can any be found. Quite the opposite, the Act broadly defines "person" to include any "corporation," "association," or "organization." Cal. Health & Safety Code § 1345(j). And it allows the DMHC to "waive any requirement of any rule" if it determines the

"requirement is not necessary in the public interest." *Id.* § 1344(a). What is more, the DMHC admitted that it has no internal rules, policies, or procedures limiting the exercise of its exemption authority. ER 193–95. The agency plainly has the power to exempt churches and religious organizations. A court order requiring it to do so would redress the Church's ongoing injury.[2]

Second, all that redressability requires is that it "be likely, as opposed to merely speculative," that Skyline 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 "guarantee that [its] injury will be redressed by a favorable decision." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). Rather, it must show only that a favorable decision would lead to a "change in a legal status" increasing the likelihood of it "obtain[ing] relief that directly redresses the injury

[2] The DMHC's alternative argument that the Church has somehow waived its right to request such relief, Br. 40 n.20, is also meritless. *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) ("Redressability is a constitutional minimum, depending on the relief that federal courts are *capable* of granting. [The plaintiff] does not lose standing because she proposed an injunction that the district court thought too narrow.")

suffered." *Id.* So, Skyline Church does not have to show an insurer would be obligated to give back the Church's old plan. It is enough that a favorable ruling would remove a regulatory obstacle, making it more likely that the Church could once again obtain a plan limiting abortion coverage consistent with its beliefs.

While the DMHC asserts that there is no evidence an insurer "ever has provided" a plan "that would meet [Skyline's] needs," Br. 40, that assertion is so flatly contradicted by the record that it must have been made by mistake.

The undisputed deposition testimony is that California health insurers voluntarily provided religious organizations with plans excluding elective abortion coverage before August 22, 2014. *E.g.*, ER 168. Indeed, Skyline Church had just such a plan. ER 119–20, 133; *see also* ER 4 (District Court concluding that, "[b]efore August 22, 2014, Skyline Church had an employee health plan that restricted abortion coverage consistent with the Church's religious beliefs").

Plan documents and filings further establish that insurers previously requested (and were granted) DMHC approval for products allowing 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.

These insurers, including the Church's, stopped offering religious organizations abortion coverage exclusions and limitations only after the DMHC told them that they violated California law. *Accord* DMHC Br. 12 (conceding insurers "promptly" removed abortion exclusions and limitations from their plans in response to the August 22, 2014 letter).

Given these undisputed facts, Article III standing's redressability prong is easily satisfied. As previously explained, both the Supreme Court and this Court have regularly exercised jurisdiction where the plaintiff's injury arises from a third party's compliance with a statute or rule. Skyline Br. 31–34 (citing cases). And courts considering the precise issue presented here have uniformly exercised jurisdiction. *E.g.*, *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 957 (8th Cir. 2015) (employees had standing to bring free-exercise challenge to the ACA's contraceptive coverage mandate because an insurer's

previous willingness to offer a contraceptive-free plan was "persuasive evidence" that injunctive relief was likely to redress the employees' injuries); *Real Alternatives, Inc. v. Burwell*, 150 F. Supp. 3d 419, 432 (M.D. Pa. 2015) (holding that employer had standing to challenge the ACA's contraceptive coverage mandate, rejecting argument that the injury was not redressable where it was "contingent upon the actions" of a third-party insurer and there was no "independent proof that the insurer [was] willing to provide the requested coverage").

Although the DMHC advocates for a different result here, it does not identify a *single* case coming out the other way (nor did the District Court). The DMHC does not even bother to address the Ninth Circuit cases supporting the Church's position. Skyline Br. 34 (citing *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009)). And for good reason: the DMHC knows full well that the Church has standing under this Court's precedent.

This Court also should reject the DMHC's attempts to distinguish the other cases cited in support of the Church's position. For example, the DMHC suggests that this Court should ignore the Supreme Court's

decision in *Bennett v. Spear*, 520 U.S. 154 (1997), and the Eighth Circuit's decision in *Wieland* because those cases were decided "at the pleading stage." Br. 41, 42 n.22. And it claims (incorrectly) that the Supreme Court's decisions in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980), have no relevance here because they are "entirely devoid" of any standing analysis. Br. 40. The real problem is that the DMHC cannot meaningfully distinguish any of these cases.

Indeed, in *Bennett*, the Supreme Court unanimously held that plaintiff-ranchers satisfied the redressability prong of Article III standing where the Fish and Wildlife Service's opinion had a "coercive" and "virtually determinative effect" on the Bureau of Reclamation's decision to restrict water flow, which in turn injured the ranchers. 520 U.S. 154, 168–71 (1997). The ranchers had standing even though the Bureau, which was not a party to the suit, "retained ultimate responsibility" for deciding whether to restrict water flow. *Id.*

Similarly, in *Wieland*, the Eighth Circuit held that employees had standing to challenge the ACA's contraceptive mandate even though a favorable ruling could not promise the employees a contraceptive-free

plan. On remand, the district court held that the employees also established standing *at the summary judgment stage*, rejecting the precise argument the DMHC raises here—to satisfy Article III standing, the employees must prove they could definitely "obtain a healthcare plan" accommodating their beliefs. 196 F. Supp. 3d 1010, 1015 (E.D. Mo. 2016).

And the Supreme Court plainly addressed standing in *Consumers Union*, holding that the consumer group's challenge to a state bar rule prohibiting attorney advertising presented a "case or controversy" and a "sufficiently concrete dispute." 446 U.S. at n.15. The same is true for *Bantam Books*, where the Court held that the standing of out-of-state book publishers to challenge government regulation of in-state book distributors could not be "successfully questioned." 372 U.S. at 64 n.6.

Finally, with respect to the DMHC's dismissive treatment of *Conestoga Wood Specialties*, it is one thing to note that the district and appellate courts there did not explicitly address redressability. *See* Br. 41 n.21. But it is quite another to advocate, as the DMHC does, for a new standing rule that would mean those courts, including the

Supreme Court, improperly exercised jurisdiction and resolved merits issues they had no business resolving.[3]

In sum, the Church's standing here is well established. The DMHC's interpretation and application of the law, as set forth in its August 22, 2014 letter, had a "determinative or coercive effect" on insurers removing abortion exclusions and limitations from religious organizations' healthcare plans. *Bennett*, 520 U.S. at 169. Because a favorable decision would undo the letter, the Church's injury is redressable.

ii. The Church suffered (and continues to suffer) an injury-in-fact traceable to the DMHC's actions.

The DMHC further contends that the Church has not satisfied the first two elements of Article III standing. But the record shows that the Church suffered an injury traceable to the DMHC's actions—a fact that the District Court properly recognized. ER 15 (assuming the Church

[3] The district court, Third Circuit, and Supreme Court all exercised jurisdiction over Conestoga Wood's challenge to the ACA's contraceptive mandate without requiring confirmation from an insurer that it was willing to provide Conestoga Wood with its desired contraceptive-free coverage. *Conestoga Wood Specialties Corp. v. Sebelius*, 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); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

"has satisfied the first and second conditions necessary for Article III standing").

Before August 22, 2014, the Church's healthcare plan excluded elective abortion coverage consistent with its religious beliefs. ER 119–20, 133. But that changed when the DMHC rescinded prior approvals of religious accommodations and mandated immediate coverage of all legal abortions "[r]egardless of existing [plan] language," a coverage requirement that remains in effect more than four years later. ER 301. Because providing elective abortion coverage in its healthcare plan violates its religious beliefs, the Church has suffered (and continues to suffer) an injury-in-fact traceable to the DMHC'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.").

Yet the DMHC contends a real injury is lacking here because the Church (1) has not asked a health insurer to renew a religious exemption request with the DMHC *after* its plan was changed, and (2) "chose to offer health coverage regulated by DMHC" instead of pursuing some other "option," such as self-insurance or Christian medical sharing. Br.

at 43–45. But those arguments only concern *who must remedy the harm*. They are irrelevant to whether the Church has in fact suffered an injury caused by the DMHC's actions. It plainly has.

Moreover, the Church *did* ask its insurer (Aetna) about a religious exemption immediately after learning elective abortion was added to its plan. ER 74–75, 82–83. And in October 2014 and October 2016, the Church made similar requests to California Choice, a health insurance exchange that offers employers a multitude of healthcare plans from major health insurers such as Anthem Blue Cross, Kaiser Permanente, and United Healthcare. ER 78–80, 86–87. Each time, the Church was told that, consistent with the August 22, 2014 letter, all healthcare plans must cover elective abortion and that religious organizations were not exempt. In fact, Aetna specifically told the Church's insurance broker that it could no longer offer the Church a plan limiting or excluding abortion coverage *because of* "the 08-22-2014 California abortion mandate." ER 82.

What is more, the DMHC has been directly asked to accommodate the Church's religious beliefs. *E.g.*, ER 218–20; Appellant's Mot. to Suppl. Record. The agency has not done so, despite having unfettered

statutory exemption authority, *see* Cal. Health & Safety Code §§ 1343(b), 1344(a), 1367(i), and despite admitting that it has no internal rules, policies, or procedures limiting that authority. ER 193–95.

Finally, whether the Church "chose to offer health coverage regulated by DMHC," Br. 44, makes no difference to whether it suffered an injury caused by the DMHC's actions. What matters for purposes of standing is whether the plaintiff could have so easily avoided its injury that it lacks any real "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Here, the DMHC blindsided the Church, rescinding existing religious accommodations and mandating *immediate* coverage of elective abortion. Without any warning, the Church had no chance of avoiding the resulting injury. Moreover, the undisputed record evidence shows that, since being subjected to the abortion-coverage requirement, the Church has evaluated self-insurance and healthcare sharing ministries and determined that neither "option" is viable. ER 122–23, 137–38, 147.

Because the DMHC's actions directly harmed Skyline Church, and because a favorable decision is likely to redress the Church's injury, the District Court's ruling should be reversed.

B. The Church's claims for prospective relief are ripe because they arise from the DMHC's past and ongoing enforcement of the abortion-coverage requirement.

Skyline Church's claims for prospective relief are also constitutionally and prudentially ripe. Constitutional ripeness is satisfied because, as explained above, the Church has suffered an injury-in-fact. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (constitutional ripeness "coincides squarely with standing's injury in fact prong"). Prudential ripeness is satisfied because the prospective claims arise from past and ongoing enforcement of the law, meaning that the abortion-coverage requirement has been "formalized and its effects felt in a concrete way." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003).

The DMHC's contrary arguments are unsupported. This case does not challenge the constitutionality of the "DMHC's exemption process." Br. 32–33. Rather, it challenges the DMHC's interpretation and application of the Act's "basic health care services" provision set forth in the August 22, 2014, letter—*i.e.*, the abortion-coverage requirement. *E.g.*, ER 411 (Complaint alleges that the DMHC's "implementation and

enforcement of the [abortion-coverage] Mandate violates the Free Exercise Clause"). The DMHC's discretionary exemption authority simply serves as *additional evidence* for why strict scrutiny should apply to the agency's interpretation and application of the law. *See supra* pp. 22–28.

Nor does the DMHC's mere ability "to *consider*" renewed exemption requests make the Church's claims unripe. DMHC Br. 30 (emphasis added). This Court said exactly that in *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012), where it held that the possibility of requesting a religious exemption does not make prospective claims unripe when the government has already enforced the law and harmed the plaintiff.

The DMHC does not meaningfully address this Court's decision in *Oklevueha*. It simply asserts that this case is different because none of the "requisite components of a pre-enforcement claim have been met." Br. 34. But this case is not, and never was, a pre-enforcement action. The abortion-coverage requirement applies to the Church's plan *right now* (not some future date) and has since August 22, 2014. And although it has already done so, the Church need not ask the DMHC to

stop enforcing the law against it for its claims to be ripe. Because the Church's claims for prospective relief arise from past and ongoing enforcement of the law, they are fit for decision now.

Furthermore, withholding judicial review would impose a substantial hardship on the Church because it would continue to suffer the very injury—provision of elective abortion coverage in its employee healthcare plan—on which its claims are based. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (hardship factor of prudential ripeness "certainly met" for the plaintiffs' free-exercise claims because withholding review would subject them to "the very injury they assert"); *accord, e.g.*, *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Even though the DMHC does not dispute that the abortion-coverage requirement substantially burdens the Church's religious beliefs, it says that withholding judicial review here would cause no hardship. This paradox, according to the DMHC, flows from the Church not immediately filing suit and being "free to obtain non-DMHC-

regulated healthcare," such as self-insurance or a healthcare sharing ministry. Br. 31. Both of these arguments are meritless.

First, the DMHC cites no legal support for the proposition that waiting to file a lawsuit demonstrates that the plaintiff would suffer no hardship if judicial review were withheld. The argument makes zero sense here when considering that the DMHC simultaneously argues that the Church *prematurely* filed suit. So which is it: did the Church file its lawsuit too soon or did it wait too long? The answer is neither.

Second, the suggestion that withholding review will not cause hardship because the Church could theoretically self-insure or participate in a healthcare sharing ministry in the meantime misses the point of this lawsuit and contravenes the undisputed record evidence. The Church argues that the DMHC violated its constitutional rights by requiring its healthcare plan to cover elective abortion. If withholding judicial review forces the Church to give up its plan for some other "option," that is not a prudential ripeness ruling—it is an adverse merits decision. Regardless, the undisputed record establishes that the Church evaluated healthcare sharing ministries and self-insurance

after August 22, 2014, and determined that neither are viable options. ER 122–23, 137–38, 147. The DMHC's arguments fail as a result.

III. Addressing the merits of the Church's free-exercise claim would serve both justice and judicial economy.

As explained in the opening brief, this Court should address the merits of Skyline Church's federal free-exercise claim. That claim presents a purely legal issue, has been briefed (both here and in the court below), and is informed by a fully developed record. Skyline Br. 50–51; *accord Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014) (this Court has "discretion" to decide issues that the lower court did not explicitly address when "the issue presented is a purely legal one and the record below has been fully developed").

Contrary to the DMHC's assertion, both justice and judicial economy weigh in favor of this Court addressing the merits of the free-exercise claim. To be sure, the DMHC correctly notes that *Foothill Church, et al. v. Rouillard*, Case No. 2:15-cv-02165-KMJ-EFC (E.D. Cal.), and *Missionary Guadalupanas v. Rouillard*, Case No. C083232 (Cal. Ct. App., 3rd Dist.), also involve challenges to the abortion-coverage requirement. But future rulings in those cases will not be binding here. In contrast, a merits ruling by this Court would provide

the *Foothill* court with a binding and likely case-dispositive answer to the important constitutional question at issue. And it would provide the state court in *Missionary Guadalupanas* with persuasive guidance.

More important, addressing the merits would prevent the Church from suffering a substantial injustice. When the DMHC issued the August 22, 2014 letter, it rescinded all existing religious accommodations and mandated *immediate* coverage of elective abortion. Affected churches and religious organizations thus had no notice or opportunity to comment on this dramatic change to their plans. The resulting constitutional injuries have continued for more than four years, and a remand proceeding would essentially guarantee that they continue for at least one or two more. This would be unfair and unnecessary. This Court should exercise its discretion and address the Church's federal free-exercise claim.

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

Depending on the nature of the challenged law or government action, a free-exercise claim prompts either strict scrutiny or rational basis review. "Neutral" and "generally applicable" laws often receive rational basis review. *Emp't Div., Dep't of Human Res. of Or. v. Smith*,

494 U.S. 872, 879 (1990).[4] But strict scrutiny applies where, as here, the law or government action burdening religion is neither neutral nor generally applicable, or if it involves a system of "individualized governmental assessment[s]" of the reasons for the regulated conduct. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531, 537 (1993); *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006) ("When such regulations involving individualized assessments impose substantial burdens on religious exercise, they are subject to strict scrutiny to protect and vindicate the right to free exercise of religion from governmental encroachment.").

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

The DMHC does not directly respond to the argument that strict scrutiny applies because the Act's "basic health care services" provision involves "a system of individual exemptions," *Smith*, 494 U.S. at 884,

[4] Even so, the Supreme Court recently noted that, despite *Smith*'s general rule, not all "application[s] of a valid and neutral law of general applicability" are "necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)).

but it seems to suggest that strict scrutiny should not apply because there is no risk of religious discrimination. *See* Br. 58–59. That view cannot be squared with the plain text of the law or the facts of this case.

The Knox-Keene Act empowers the DMHC to grant or deny exemptions from the "basic health care services" provision (and thus abortion-coverage requirement). But this power is based on vague and subjective notions of "good cause" and "in the public interest"—terms that the Supreme Court has long held are ripe for governmental abuse. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988) (too much discretion allowed where "nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest'"); *GTE Sylvania, Inc. v. Consumers Union of the U.S., 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").

Indeed, the "basic health care services" provision allowing exemptions "for good cause," Cal. Health & Safety Code § 1367(i), uses the exact same discretionary exemption language that triggered strict scrutiny in *Sherbert v. Verner*, 374 U.S. 398 (1963). What is worse, this

broad exemption authority has been delegated to numerous individuals within the DMHC's Office of Plan Licensing, with no rules, policies, or procedures in place to ensure a transparent and fair application of the exemption authority. ER 193–95. And the record shows that the DMHC has exercised its discretion in a way that targeted religious belief, choosing to rescind *all* existing religious accommodations despite concluding beforehand that religious employers like Skyline Church could in fact legally exclude elective abortion coverage in their plans. ER 208–13 (Director Rouillard admitting that agency "had done research" before issuing the letter and reached that legal conclusion).

Because the challenged law involves a regime of individualized, discretionary exemptions, applying the abortion-coverage requirement to the Church's healthcare plan demands strict scrutiny.

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

Strict scrutiny also applies because the Act's "basic health care services" provision is not generally applicable. Because general applicability is concerned with unequal treatment, regardless of targeting, motive, or an improper object, courts look at whether the

underlying law exempts nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." *Lukumi*, 508 U.S. at 543–44.

The "basic health care services" provision, and thus abortion-coverage requirement, does not apply to all healthcare plans. In fact, certain categories of plans have been exempted from the Act's requirements entirely. *E.g.*, Cal. Health & Safety Code § 1343(e) (exempting, for instance, 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"). Although the DMHC disclaims responsibility for these statutory exemptions, Br. 60, analyzing a law's general applicability asks whether the *government as a whole* has pursued its purported interests evenhandedly. If the government's interest here is ensuring that healthcare plans cover "basic health care services" and, by extension, elective abortions (as the DMHC says it is, *see* Br. 60–61), then these statutory exemptions have undermined that interest. It makes no difference that the California Legislature did the undermining instead of the DMHC.

Besides, the DMHC *itself* has exempted entire categories of healthcare plans from the Act's requirements by formal rule and regulation. For example, the DMHC has exempted "small plans" administered solely by an employer that "does not have more than five subscribers." Cal. Code Regs. tit. 28, § 1300.43. It did not have to do so; but it did.

Moreover, as noted, the DMHC "may, for good cause, by rule or order exempt a plan contract or any class of plan contracts from [the basic health care services] requirement." Cal. Health & Safety Code § 1367(i). It also may exempt plans from the Act's requirements if deemed to be "in the public interest." *See id.* §§ 1343(b), 1344(a).

Given the nature of these numerous exemptions, the DMHC's reliance on *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), is misplaced. In that case, this Court considered whether a Washington state law requiring pharmacies to deliver prescriptions, including those for emergency contraceptives, was generally applicable for purposes of a free-exercise challenge. At issue were the law's five enumerated exemptions, which "permit[ted] pharmacies to deny delivery for certain business-related reasons, such as fraudulent prescriptions or a

customer's inability to pay," as well as a provision allowing for additional exemptions in circumstances "substantially similar" to the five enumerated exemptions. *Id.* at 1071, 1073.

Holding that the exemptions did not destroy the law's general applicability, this Court explained that they allowed for only "minimal governmental discretion." *Id.* at 1080–82. The court specifically noted that the provision allowing for additional exemptions in "substantially similar" circumstances was directly tethered to and bound by the five business-related exemptions, which "further[ed] the rules' stated goal of ensuring timely and safe patient access to medications." *Id.* Because the exemptions at issue were "tied directly to limited, particularized, business-related, [and] objective criteria," this Court held that the law was generally applicable. *Id.* at 1082.

In stark contrast, the enumerated exemptions and discretionary exemption authority at issue here are not tied to anything that "further the [law's] stated goal." *Id.* at 1080–82. Indeed, the exemptions identified above *undermine* the government's purported interest in ensuring that all healthcare plans cover "basic health care services" and elective abortion.

That is not to say that the State of California and the DMHC were wrong to allow exemptions from the "basic health care services" provision; an evaluation of the law's general applicability passes no judgment on that. The proper inquiry asks whether the government has determined that the interests advanced by the law need not be pursued in all circumstances. *See id.* at 1079 ("A law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.").

Because the underlying law does not uniformly pursue the government's purported interest in ensuring coverage of basic health care services and elective abortion, strict scrutiny applies. *Lukumi*, 508 U.S. at 537 (the government may not refuse to extend a religious exemption "without compelling reason" when "individualized exemptions from a general requirement are available," because doing so "devalues religious reasons" and "judg[es] them to be of lesser import than nonreligious reasons").

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

Strict scrutiny also applies because the DMHC's application of the law was not (and is not) neutral. The DMHC contends that the lack of any reference to religion in the August 22, 2014 letter proves its "object was a wholly permissible one." Br. 53. But the Free Exercise Clause forbids even "subtle departures from neutrality" and thus demands a much more searching inquiry. *Lukumi*, 508 U.S. at 534. Relevant to this inquiry is "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." *Id.* at 540. So too is "the effect of a law in its real operation," which "is strong evidence of its object." *Id.* at 535.

Here, the events leading up to the August 22, 2014 letter and "the effect of [the letter] in its real operation," *Lukumi*, 508 U.S. at 535, establish that the DMHC's decision was not just a subtle departure from neutrality; to the contrary, religious belief was the *object* of the DMHC's actions all along.

The DMHC says that it first considered the abortion-coverage issue when it received "media inquiries" and "consumer complaints" in October 2013. Br. 54. But those inquiries and complaints specifically related to Santa Clara University and Loyola Marymount University, two Catholic universities that, consistent with their religious beliefs, removed elective abortion coverage from their healthcare plans. SER 52–66. The record further establishes that the DMHC's numerous meetings and communications with pro-abortion advocates before issuing the August 22, 2014 letter focused on how the agency could reverse the universities' religiously motivated decisions. *E.g.*, ER 312 (requesting meeting with the DMHC because "LMU and Santa Clara University recently went public that they were eliminating abortion coverage from their employee health plans"); ER 324 (Planned Parenthood demanding that the DMHC develop "an administrative solution" that would "fix the already approved plans being offered to employees of LMU for 2014 and SCU for 2015").[5]

[5] The DMHC's contention that it "did not discuss religious employers" during these meetings, Br. 57, is contradicted by the record. The Director's own handwritten notes from the initial November 2013

The DMHC does not genuinely dispute that the healthcare plans truly affected by the August 22, 2014 letter—that is, those limiting or excluding abortion coverage—were *exclusively* offered to and purchased by religious organizations. Nor could it. The plan documents and filings themselves show that the abortion coverage exclusions and limitations that the DMHC previously approved were made available *only* to religious organizations. *E.g.*, ER 263 (elective abortion exclusion available "only for religious groups"). And the insurers that received approval to offer such exclusions and limitations, including Skyline Church's insurer at time, explicitly told the DMHC that only religious organizations had plans limiting or excluding abortion coverage. *E.g.*, ER 340 (Aetna told the DMHC that four employer groups had purchased coverage excluding abortion services and that all four qualified as "religious employer[s]"); ER 342 (Kaiser told the DMHC 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 345 (Blue

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meeting with the pro-abortion advocates specifically reference both Santa Clara University and Loyola Marymount University. SER 87.

Shield told the DMHC that only 10 of its employer groups had "negotiated alternative [abortion] coverage" and all were "religious or religious-affiliated organizations").

Ignoring this evidence, the DMHC resorts to wordplay, claiming that both "'religious employers' *as defined in state law* (§ 1367.25(c)(1)) and nonreligious employers" had plans affected by the August 22, 2014 letter. Br. 54 (emphasis added). Tellingly, the DMHC points to *no evidence* showing that abortion coverage exclusions or limitations were purchased by (or even made available to) secular employers—despite having in its possession every single plan document and regulatory filing submitted by California health insurers. That is because there is none. *E.g.*, ER 172–74, 224–25, 234 (admitting that, when the DMHC issued the August 22, 2014 letter, the agency had no reason to believe that it had approved, or insurers were offering, abortion coverage exclusions or limitations to secular employers).

In short, the DMHC's use of the term "nonreligious employer" does not actually mean the employer was a secular one; it simply means the employer does not meet the restrictive definition of "religious" set forth

in California Health and Safety Code § 1367.25(c)(1).[6] By using that definition, the DMHC apparently believes it can fairly characterize religious organizations like Santa Clara University and Loyola Marymount University as "nonreligious employers." *E.g.*, ER 213 (Director Rouillard testifying that SCU would not be considered religious under that definition). But such a self-serving characterization reflects neither reality nor the reach of the Free Exercise Clause. *E.g.*, *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 undisputed record evidence shows that the DMHC's decision to rescind existing religious accommodations and apply the abortion-

[6] Under § 1367.25(c)(1), a "religious employer" is "an entity for which each of the following is true: (A) [t]he inculcation of religious values is the purpose of the entity; (B) [t]he entity primarily employs persons who share the religious tenets of the entity; (C) [t]he entity serves primarily persons who share the religious tenets of the entity; (D) [t]he 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."

coverage requirement to the Church's plan was not—and is not—neutral toward religion. Strict scrutiny applies for this reason as well.

D. The DMHC fails strict scrutiny because forcing the Church to provide abortion coverage is not a compelling government interest.

Forcing Skyline Church to include coverage for elective abortion in its healthcare plan fails strict scrutiny because it does not "advance 'interests of the highest order'" and is not "narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). The DMHC barely tries to argue otherwise, proclaiming only that it "has a compelling governmental interest in ensuring compliance with state law." Br. 61. But this Court must "look[] beyond broadly formulated interests" in applying strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Here, it is difficult to imagine a broader (or more circular) governmental interest than the one the DMHC articulates. If ensuring compliance with state law served a compelling interest, every law that infringed constitutional rights would be upheld as constitutional. That this is the best argument the DMHC can muster is telling. There is and

has never been a legitimate governmental interest in forcing Skyline Church to cover elective abortions in violation its sincerely held beliefs and the beliefs of the its employees.

CONCLUSION

For the foregoing reasons, and those set forth in Skyline Church's opening brief, this Court should reverse the District Court's judgment and enter summary judgment in favor of the Church on its federal free-exercise claim.

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Respectfully submitted,

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