No. 19-15658

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

No. 2:15-cv-02165- KJM-EFB
The Honorable Kimberly J. Mueller, Judge

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INTRODUCTION

Plaintiffs fail to and cannot allege facts sufficient to establish that the Director of the California Department of Managed Health Care (Director or DMHC) targeted religious belief when she issued letters in 2014 to health care service plans requiring that they remove limitations on coverage of abortion that were inconsistent with state law. Indeed, the California Court of Appeal recently confirmed that state law enforced by the Director through her letters unambiguously requires health care service plans subject to the Director's authority (Plans) to provide coverage of legal abortion services. The requirements identified in the Director's letters apply to all Plans, and thus apply equally to both secular and religious entities that subscribe to health coverage from such Plans.

Plaintiffs, three churches that offer health coverage for their employees, similarly fail to and cannot establish that the Director intended to give preference to any particular religious views when she allowed an accommodation for religious opposition to abortion. As Plaintiffs allege, the Director allowed one unidentified Plan, upon its request, to offer coverage to qualifying "religious employers" that excludes coverage of abortion except in cases involving rape, incest, or to preserve the woman's life. Plaintiffs allege that this accommodation is inadequate because they object to abortion

in any circumstance other than to save the woman's life. However, this bare allegation fails to support a plausible claim that the Director intended to give preference to one set of beliefs regarding abortion over another because of its association with any particular religious group.

The Court need not reach these arguments, however, as Plaintiffs lack standing to bring their claims. The California Court of Appeal's recent decision confirming that the Knox-Keene Act unambiguously requires Plans to cover legal abortion confirms that Plaintiffs lack any redressable claim for relief against the Director's letters enforcing the Act. And, to the extent Plaintiffs claim injury from the Director not having exempted a Plan from the Act to allow it to offer coverage that excludes all abortions except to save the woman's life, any such claim is not redressable, or alternately, is unripe, as Plaintiffs do not allege that any Plan has submitted and been denied such a request after the Director issued her 2014 letters.

Even if the Court concludes it has jurisdiction, the district court properly determined that Plaintiffs failed to allege facts sufficient to state claims for violations of their rights under the Free Exercise, Equal Protection, and Establishment Clauses of the United States Constitution. Its decision should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as Plaintiffs appeal from the district court's judgment entered upon its dismissal of Plaintiffs' Second Amended Complaint without leave to amend.

ISSUES PRESENTED

Whether Plaintiffs have alleged facts sufficient to establish:

(1) That the Director caused Plaintiffs injury that is redressable through this action;

(2) That the Director's enforcement of California law requiring health Plans to include coverage of lawful abortion violates Plaintiffs' right to freely exercise their religion;

(3) That the Director discriminated against Plaintiffs in violation of the Equal Protection Clause; and

(4) That the DMHC engaged in preference for one set of religious beliefs over another in violation of the Establishment Clause.

STATEMENT OF THE CASE

I. THE DIRECTOR MUST ENSURE THAT PLANS PROVIDE BASIC HEALTH CARE SERVICES, INCLUDING ABORTION SERVICES

The DMHC regulates Plans pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Knox–Keene Act or Act). Cal. Health & Saf.

Code §§ 1340–1399.864.[1] The Act "provides the legal framework for the regulation of California's individual and group health care plans, including health maintenance organizations (HMO) and other similarly structured managed care organizations (MCO)." *Rea v. Blue Shield of Cal.*, 226 Cal. App. 4th 1209, 1215 (2014).

The Act's intent and purpose are "to promote the delivery and the quality of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by, a health care service plan or specialized health care service plan." § 1342. The DMHC and the Director are charged under the Act with executing California law relating to Plans to ensure that Plans "provide enrollees with access to quality health care services and protect and promote the interests of enrollees." § 1341(a).

To obtain a license from the DMHC to operate in the state, a Plan must submit documentation identifying coverage to be offered, materials to be issued to subscribers or enrollees, and the form of the contract to be issued to Plan subscribers. § 1351(f), (g). Any amendments to coverage or other documents must be submitted to the DMHC before the Plan may utilize them. § 1352.1(a). Unless the DMHC objects to the amendment by written

[1] Unless otherwise noted, all statutory references are to the California Health & Safety Code.

notice within 30 days on the basis that it is untrue, misleading, deceptive, or otherwise not in compliance with the Knox-Keene Act, the Plan may utilize the amended language. *Id.* A Plan that has been continuously licensed for the preceding 18 months may utilize amendments even before submission to the DMHC under certain conditions. § 1351(b).

The Act requires that Plans "provide to subscribers and enrollees *all* of the basic health care services included in subdivision (b) of Section 1345." § 1367(i) (emphasis added). Section 1345(b) delineates seven broad categories of services that health plans must offer, including "Physician services," "Preventive health services," and "Emergency health care services." § 1345(b)(1), (5) (6).

The Act authorizes the Director to define the scope of required basic health care services. § 1367(i); *Rea*, 226 Cal. App. 4th at 1215. The DMHC has promulgated regulations pursuant to this authority, identifying services that a Plan must provide to enrollees where "medically necessary." Cal. Code Regs. tit. 28, § 1300.67. These regulations define "physician services," and identify "preventive health services" as including, among other things, "a variety of voluntary family planning services." *Id.*, § 1300.67(a), (f).

The Director has authority to exempt Plan contracts from the requirement that they cover "all" basic health services for good cause. § 1367(i). And under certain circumstances, she may exempt Plans and Plan contracts from the Act or waive the requirements of any rule or form issued by the DMHC. §§ 1343(b), 1344(a).

In a recent decision, the California Court of Appeal concluded that "abortion services are unambiguously included in the statutory categories of 'basic health care services' set forth in the statute." *Missionary Guadalupanas of the Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 427 (2019), *review and depublication request denied* (Nov. 20, 2019). The court rejected the argument "that voluntary abortions are necessarily inconsistent with regulatory language that limits the scope of 'basic health care services' to 'medically necessary' services." *Id.* at 427 (citing Cal. Code Regs. tit. 28, § 1300.67).

II. OTHER SOURCES OF CALIFORNIA LAW PROTECT THE RIGHT TO REPRODUCTIVE CHOICE

Since 1972, article I, section 1 of California's Constitution has protected the inalienable right to privacy, which includes the right to reproductive choice. *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 262 (1981). Under article 1, section 1, "all women in this state rich and

poor alike possess a fundamental constitutional right to choose whether or not to bear a child." *Id.* This right is protected against interference not only by government, but also by private parties. *Chico Feminist Women's Health Cent. v. Butte Glen Med. Soc'y*, 557 F. Supp. 1190, 1202-03 (E.D. Cal. 1983); *see Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 20 (1994).

Echoing these constitutional protections, the Reproductive Privacy Act declares as state public policy that "[e]very woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion." § 123462(b). The Act expressly provides that "[t]he state may not deny or interfere with a woman's right to choose or obtain an abortion." § 123466.

III. THE DIRECTOR REQUIRED SEVEN PLANS TO REMOVE IMPROPER LIMITATIONS ON ABORTION COVERAGE

In 2013, the DMHC, after becoming aware that some Plans offered products limiting coverage of abortion, conducted a review of Plan filings to identify limitations that had been included in coverage documents. ER 62-63 (¶¶ 64-69). The Director determined that restrictions included in such documents issued by a number of Plans were inconsistent with California law, and that the DMHC erroneously had not objected to such language in Plan filings. *See* ER 83-96.

Accordingly, the Director on August 22, 2014, sent identically-worded letters to seven Plans that had included such restrictions in some of their contracts "to remind plans that the [Knox-Keene Act] requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy." ER 83.[2] "Thus," the Director continued, "all health plans must treat maternity services and legal abortion neutrally." *Id.* The letters also advised that exclusions and limitations on abortion services are incompatible with the Reproductive Privacy Act and judicial decisions recognizing that the California Constitution protects a pregnant woman's right to choose to either bear a child or to have a legal abortion. *Id.*

The Director noted that limitations such as "any exclusion of coverage for 'voluntary' or 'elective' abortions and/or any limitation of coverage to 'therapeutic' or 'medically necessary' abortions" are "inconsistent with the Knox-Keene Act and the California Constitution." *Id.* Accordingly, the letters called on each Plan to review and amend current health plan documents to ensure that they complied with the Knox-Keene Act. *Id.*

[2] As the letters are substantively identical, reference here and following are to the first of the seven letters attached to Plaintiffs' Second Amended Complaint and included in the Excerpts of Record.

Plaintiffs allege that the seven Plans changed their coverage documents in accordance with the Director's letters. ER 58 (¶ 39).

IV. AFTER THREE UNSUCCESSFUL ATTEMPTS BY PLAINTIFFS TO STATE A CLAIM AGAINST THE DIRECTOR, THE DISTRICT COURT DISMISSED PLAINTIFFS' COMPLAINT WITHOUT LEAVE TO AMEND

A. Plaintiffs' Allegations

Plaintiffs, three California churches, allege that the Director's letters violate their constitutional rights under the First and Fourteenth Amendments. In their Second Amended Complaint, Plaintiffs assert that their religious beliefs and the employee health coverage requirements of federal law oblige them to purchase employee health coverage, and that products from Plans regulated by the DMHC are their only "viable" option for providing such coverage. *See* ER 57, 60-61 (¶¶ 27-28, 54-55). They allege that the Director's enforcement of state law in her letters therefore requires them to subscribe to Plans that provide coverage for abortion in circumstances to which they object on religious grounds. *See* ER 61 (¶ 56). Plaintiffs allege that before the Director issued her letters, health coverage products were available that were consistent with their religious beliefs. *See* ER 59 (¶¶ 45-47) . Plaintiffs do not allege that they had previously subscribed to such coverage, but assert that the Director's enforcement of

state law in her letters now prevents them from obtaining coverage consistent with their beliefs. *See* ER 60 (¶¶ 49-52.)

Plaintiffs also allege that after the Director issued her letters, one Plan, not identified by name, sought and was granted permission by the DMHC to offer health coverage to "religious employers" as defined by California law[3] that would exclude coverage of abortion except in cases of rape, incest, and to save the life of the woman. ER 73 (¶¶ 141-42). However, Plaintiffs allege that such an exemption from the coverage requirements of the Knox-Keene Act is consistent with the religious beliefs of some "religious employers" but is not consistent with their beliefs. *Id*. (¶¶ 143-46). While Plaintiffs would accept a Plan that covers abortion to save the woman's life, they object to coverage of abortion in cases of rape or incest, which they

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[3] "Religious employers" are defined in a provision of the Knox-Keene Act as entities for whom each of the following is true:

> (A) The inculcation of religious values is the purpose of the entity.
> (B) The entity primarily employs persons who share the religious tenets of the entity.
> (C) The entity serves primarily persons who share the religious tenets of the entity.
> (D) The entity is a nonprofit organization as described Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986,[] as amended.

§ 1367.25(c) (footnote omitted).

refer to as forms of "elective" or "voluntary" abortion. *See* ER 59-60 (¶¶ 47-48). However, Plaintiffs do not allege that any Plan has asked the Director for an exemption since she issued her letters that would allow the Plan to exclude abortion coverage in a manner consistent with Plaintiffs' religious beliefs and that the Director has denied such a request.

B. Procedural History

Plaintiffs filed their action on October 16, 2015, in the Eastern District of California, seeking declaratory and injunctive relief against the Director's letters on the basis that the letters violated their rights under the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, and under the Fourteenth Amendment's Equal Protection Clause. ER 150-65. The Director moved to dismiss the Complaint on the grounds that Plaintiffs lacked standing and failed to state a claim. *See* ER 25-46. The district court found that Plaintiffs had standing, but granted the motion and dismissed the Complaint in its entirety. *Id.* The court dismissed Plaintiffs' free speech and Establishment Clause claims with prejudice, but granted Plaintiffs leave to amend their free exercise and equal protection claims. ER 46.

Plaintiffs filed a First Amended Complaint that largely reasserted the principal allegations of the previously dismissed complaint. ER 113-34. However, the Director had since disclosed that the DMHC had granted the

exemption allowing a Plan to offer coverage to "religious employers" that limited coverage of abortion, and Plaintiffs included new allegations that in doing so, the DMHC had given preference to one set of religious beliefs relating to abortion over another. *Id*. The Director again moved to dismiss, and the district court again concluded that while Plaintiffs sufficiently alleged standing, they failed to support a free exercise or equal protection claim. ER 14-24. The district court again granted Plaintiffs leave to amend those claims. ER 24.

Plaintiffs then filed a Second Amended Complaint, which largely added only evidentiary detail to their prior allegations, relying upon documents obtained in discovery in a closely related action, *Skyline Wesleyan Church v. California Department of Managed Health Care,* U.S. District Court, Southern District of California, No. 3:16-cv-00501-CAB-DHB (*Skyline*), some of which they attached to the Second Amended Complaint as exhibits. *See* ER 62–65, 97–108.[4]

The Director again moved to dismiss for lack of standing and for failure to state claims under the Free Exercise or Equal Protection Clauses.

[4] An appeal from the final judgment in *Skyline* is currently pending before this Court, No. 18-55451, and was argued and submitted on November 4, 2019.

See ER 2–13. The district court again found that Plaintiffs had sufficiently alleged standing, but held that they had failed to state a claim and so dismissed the Second Amended Complaint, this time without leave to amend. ER 6-13. Plaintiffs then filed this appeal. ER 47-49.

STANDARD OF REVIEW

This Court examines "de novo, a decision granting a motion to dismiss with prejudice, *i.e.*, without leave to amend." *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002). "If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning." *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

A complaint must be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

SUMMARY OF ARGUMENT

Plaintiffs' allegations, first, fail to establish standing as necessary to support this Court's exercise of jurisdiction. The California Court of Appeal's recent determination that the Knox-Keene Act unambiguously requires Plans to provide coverage of legal abortion confirms that Plaintiffs cannot change the requirements of state law identified in the Director's letters. Therefore, Plaintiffs do not allege injury that is traceable to the Director's issuance of her letters and that is redressable through their action. Moreover, in the absence of any allegation that any Plan has requested an exemption from the coverage requirements of state law that would be consistent with Plaintiffs' religious beliefs and that has been denied by the Director, there is no relief that a court may order that would result in Plaintiffs obtaining Plan coverage that avoids the conflict with their beliefs.

Even if this Court determines that Plaintiffs have standing, the district court's dismissal of Plaintiffs' lawsuit should be affirmed because Plaintiffs fail to allege facts sufficient to establish that the Director's actions violated the Free Exercise, Equal Protection, or Establishment Clauses.

Free Exercise. Plaintiffs' allegations fail to support any reasonable inference that the Director's enforcement of state law through her August 2014 letters targeted religious opposition to abortion or was crafted

to apply only to conduct motivated by religious belief. As her action, therefore, was both neutral toward religion and generally applicable, it is subject to rational basis review under the Supreme Court's well-established rubric for analyzing free exercise claims. As the Director acted to enforce the requirements of state law, her action was rationally related to a legitimate government purpose.

Plaintiffs' arguments that the Director's action should be subject to strict scrutiny on various grounds are without merit. Plaintiffs contend that strict scrutiny applies because the Director is granted broad discretionary authority to exempt Plans and Plan products from requirements of the Knox-Keene Act. However, this discretionary authority standing alone is insufficient to establish that her enforcement of state law did not apply generally to both secular and religious entities. Plaintiffs fail to allege facts sufficient to support a reasonable inference that the Director exercised her exemption authority in a discriminatory manner against religion.

Nor is strict scrutiny applicable under a line of cases involving individual benefit determinations under statutory schemes that call for assessment of a person's religious motivation for their conduct. The Knox-Keene Act does not involve such a scheme, nor do Plaintiffs challenge any such individual determinations.

Plaintiffs' contention that strict scrutiny applies because the Knox-Keene Act and DMHC regulations exclude certain types of plans is similarly misplaced. These categorical statutory exemptions in no way undermine the Director's rationale for her actions of enforcing the requirements of state law as to Plans subject to her authority. These exemptions, therefore, fail to support any inference that the Director sought to selectively burden only religious opposition to abortion but not such opposition when based on secular grounds.

Finally, the Director's action does not affect Plaintiffs' ability to shape the faith and mission of their respective churches or interfere with church governance or administration. As her action does not interfere with recognized areas of church autonomy, strict scrutiny of her action is not warranted under the Free Exercise Clause.

Equal Protection. Plaintiffs fail to and cannot support an equal protection claim, as the Director's letters apply to Plans, not purchasers or subscribers such as Plaintiffs, and Plaintiffs do not identify any classification made by the Director with respect to purchasers that demonstrates that similarly situated purchasers were given differential treatment.

Establishment Clause. Plaintiffs' allegations are insufficient to support a conclusion by a "reasonable observer" that the Director sought to

prefer one view regarding abortion because of its association with any church or religious denomination over another religion-based view of abortion. Plaintiffs, therefore, also fail to support any conclusion that the Director's actions resulted in religious preference in violation of the Establishment Clause.

For these reasons, this Court should affirm the district court's judgment dismissing Plaintiffs' Second Amended Complaint without leave to amend.

ARGUMENT

I. PLAINTIFFS LACK STANDING

Plaintiffs' allegations fail to support the requirements for Article III standing. "Standing is an essential and unchanging part of the case-or-controversy requirement" and is therefore a prerequisite to this Court's exercise of jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although the district court found that Plaintiffs had sufficiently alleged standing (ER 6-7, 18-19, 33-35), this Court has "an independent obligation" to ascertain its jurisdiction. *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009).

To satisfy the "case or controversy" requirement of Article III, a plaintiff "must show that (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. Sys. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

Here, particularly in light of the California Court of Appeals' recent conclusion in *Missionary Guadalupanas* that the Knox-Keene Act unambiguously requires health Plans to include coverage of abortion, this Court cannot grant the injunctive or declaratory relief Plaintiffs seek against the Director's letters. In *Missionary Guadalupanas*, the Court concluded that "abortion services are unambiguously included in the statutory categories of 'basic health care services'" under the Knox-Keene Act and that the Director's letters reflect the "only legally tenable interpretation of the law." 38 Cal. App. 5th at 427, 437. This Court is bound by the California court's conclusion. *See Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266-67 (9th Cir. 2017) (Court is bound by state intermediate appellate court decision on issue of state law in absence of "persuasive data" that state supreme court would rule differently). *Missionary Guadalupanas* confirms Plaintiffs cannot establish that their asserted injury is traceable to the challenged actions of the Director, as opposed to the unambiguous requirements of state law. A favorable decision would not result in a

"'change in a legal status'" because Plans would still be obligated to comply with the requirements of state law identified in the Director's letters. *Renne v. Duncan* 686 F.3d 1002, 1013-14 (9th Cir. 2012).

Plaintiffs fail to allege a redressable injury for an additional reason. Plaintiffs appear to seek a court order that employee health coverage be made available to Plaintiffs that excludes abortion coverage in a manner consistent with Plaintiffs' religious beliefs. But no court could require a Plan to offer such coverage to Plaintiffs. Even assuming a Plan was permitted to do so, Plans remain free to make independent business decisions whether to offer coverage containing such exclusions. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46 (1976) (plaintiffs lacked standing where it remained speculative whether hospitals would provide services to indigent persons following decision granting relief sought by plaintiffs).

Plaintiffs do not allege that in the years after the Director issued her letters in 2014 any Plan requested an exemption relating to abortion coverage consistent with Plaintiffs' religious beliefs, or that any Plan is even contemplating doing so. Thus, there is no basis for any inference that a favorable judicial ruling would result in Plaintiffs obtaining the type of coverage they seek from a Plan to avoid their alleged injury. "Plaintiffs

cannot rely on speculation about 'the unfettered choices made by independent actors not before the court'" to establish standing. *Clapper v. Amnesty Int'l USA, Inc.*, 568 U.S. 398, 414 n.5 (2013). Rather, where, as here, a plaintiff is not the "object" of government action and redress depends on such choices by independent actors, the plaintiff must allege "facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. In these circumstances, standing is generally "'substantially more difficult' to establish," and is not established here. *Lujan*, 504 U.S. at 562.

II. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO ESTABLISH THAT THE DIRECTOR IN ENFORCING STATE LAW VIOLATED THE FREE EXERCISE CLAUSE

Even if the Court determines that Plaintiffs have sufficiently alleged standing, Plaintiffs fail to establish that strict scrutiny under the Free Exercise Clause applies to the Director's action or that she violated Plaintiffs' free exercise rights.

The Supreme Court has recognized that an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990). Under the principles set out in *Smith*, even if a law incidentally burdens a particular religious belief

or practice, its enforcement must be upheld if it is a "valid and neutral law of general applicability" and is rationally related to a legitimate government interest. *Stormans v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015) (internal quotations and citations omitted); *see Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (upholding enforcement of law requiring applicant for driver's license to divulge social security number in conflict with plaintiff's religious beliefs). A law that is not neutral or generally applicable in relation to religion is subject to strict scrutiny. *Stormans*, 794 F.3d at 1076.

Plaintiffs engage in a strained effort to avoid rational basis review under *Smith,* claiming that the Director's actions were not neutral or generally applicable, and that exceptions to *Smith* for laws that call for "individualized assessments" of religious motivation or that infringe on "church autonomy" apply. As the district court properly determined, none of these contentions have merit.

A. The Director's Enforcement of State Law Was Neutral Towards Religion

As the Director's letters make clear, the purpose of her action was to enforce the requirements of the Knox-Keene Act and other provisions of state law that require health Plans to provide coverage of abortion and

protect the right of California women to reproductive choice. ER 83-96. Plaintiffs fail to support any reasonable inference that the Director's intent was, instead, to target opposition to abortion because of its religious motivation. Plaintiffs fail to establish, therefore, that the Director's action was not neutral towards religion, as the district court appropriately concluded. ER 8-9.

1. To Demonstrate Non-Neutrality, Plaintiffs Must Support a Reasonable Inference that the Director Targeted Religious Belief

A law is not neutral, and is subject to strict scrutiny, if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

To determine whether the "object or purpose of a law is the suppression of religion or religious conduct" courts examine both the text and operation of the law. *Lukumi*, 508 U.S. at 533-34. A law lacks facial neutrality "if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533. A law lacks neutrality in operation if it targets a religious tenet or practice despite being neutral on its face. *Id.* at 534. The background or history of a challenged decision may provide relevant evidence of its object. *Id.* at 540.

The fact that religious entities might be burdened disproportionately, or even exclusively, by a facially neutral law, however, does not demonstrate that the law is not neutral in operation. As this Court has recognized, "[t]he Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct." *See Stormans*, 794 F.3d at 1077.

In *Stormans*, for example, this Court considered a free exercise challenge to a rule requiring that pharmacies deliver all lawfully prescribed drugs and devices to patients. The Court held that "[t]he possibility that pharmacies whose owners object to the distribution of emergency contraception for religious reasons may be burdened disproportionately does not undermine the rules' neutrality." *Stormans*, 794 F.3d at 1077.

While a law's disproportionate effect on religious conduct may be evidence of a discriminatory object, it does not, standing alone, demonstrate that the object of the law was to target religion. Rather, as the Supreme Court noted in *Lukumi*, proof of a discriminatory object requires evidence that the decisionmaker acted at least in part "because of, not merely in spite of," the effect upon an identifiable group. *Lukumi*, 508 U.S. at 540 (internal quotations and citation omitted). In *Stormans*, for example, the Court found that the pharmacy delivery rule, was neutral in operation, notwithstanding its

presumed disproportionate impact on pharmacy owners with religious objection to abortion, in the absence of any persuasive evidence that the law was intended to target religious opposition to "morning after" pills. 794 F.3d at 1078-79.

Contrary to Plaintiffs' suggestion, the district court did not hold, nor does the Director contend, that anti-religious motive or animus is necessary to demonstrate non-neutrality. AOB at 37-38. However, as the Court's statements in *Lukumi* make clear, non-neutrality does require evidence that the religious practices or beliefs at issue were targeted "because of" their religious motivation; in other words, that there was a "discriminatory object." *Lukumi*, 508 U.S. at 533, 540.[5]

Courts must be "'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (quoting *Mueller v. Allen*,

[5] Plaintiffs incorrectly suggest that the "because of, not merely in spite of" standard referenced by the district court improperly borrows from equal protection and nondiscrimination law. AOB 37-38. The Supreme Court itself in *Lukumi* noted that equal protection cases provide "guidance," and referenced the standard in analyzing the neutrality of the ordinances at issue in *Lukumi*. 508 U.S. at 540 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). In *Feeney*, the Court held that proof of a discriminatory object implies that the decisionmaker acted at least in part "'because of,' not merely 'in spite of,'" the adverse effect upon an identifiable group. *Feeney*, 442 U.S. at 279.

463 U.S. 388, 394-95 (1983)). Thus, where a plausible explanation exists that would make challenged conduct lawful, a plaintiff must do more than rely solely on allegations that are merely "consistent with their favored explanation" to survive a motion to dismiss. *In re Century Aluminum Co. Securities Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). Rather, a plaintiff must allege "[s]omething more," such as "facts tending to exclude the possibility that the alternative explanation [for their action] is true." *Id.* (citing *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 554, 557, 567).

2. Plaintiffs' Allegations Do Not Negate the Director's Non-Discriminatory Reasons for Issuing the Letters and Therefore Fail to Support a Reasonable Inference that She Targeted Religion

Plaintiffs do not contend that the Director's enforcement of state law through her letters lacked facial neutrality, nor could they. Her letters applied to all Plans and to all health coverage products offered by Plans, whether purchased by religious or secular employers. Rather, Plaintiffs contend that the background to the Director's action and its practical effect demonstrate that she "targeted" religious belief. AOB 35-37. However, these allegations fail to support a reasonable inference that the object of the Director's action was to burden only religious opposition to abortion. Upon becoming aware of the abortion coverage issue, the Director was obliged to

enforce the requirements of state law, and Plaintiffs' allegations are insufficient to contradict the non-discriminatory reasons identified by the Director for her action.

a. The Director acted to enforce state law

In her letters, the Director identified several interrelated bases under California law compelling her action. As she explained, the Knox-Keene Act requires Plans to provide "basic health care services," and the California Constitution "prohibits health plans from discriminating against women who choose to terminate a pregnancy." ER 83. Thus, she continued, "all health plans must treat maternity services and legal abortion neutrally." *Id.* Additionally, she noted, exclusions and limitations on abortion coverage are incompatible with "both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion." *Id.*

As the California Court of Appeal has confirmed that the Director's letters reflect the "only legally tenable interpretation of the law," the Director's stated reasons cannot be considered implausible or pretextual. *Missionary Guadalupanas*, 38 Cal. App. 5th at 437. This Court must accept

the California Court of Appeal's ruling "'unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Poublon*, 846 F.3d at 1266 (citations omitted).

No persuasive evidence exists that the California Supreme Court would hold any differently than the court in *Missionary Guadalupanas*. Indeed, the Supreme Court just recently denied a request by petitioners in that matter for depublication of the Court of Appeal's opinion. *See Missionary Guadalupanas of the Holy Spirit v. Rouillard,* Cal. Supreme Court No. S258380.[6] The state Supreme Court's denial of review supports the conclusion that it would not hold any differently than the Court of Appeal. *Poublon*, 846 F.3d at 1267. Moreover, the Supreme Court has held, consistent with the rationale provided by the Director for her letters, that the right to privacy under the California Constitution protects a woman's right to reproductive choice and that neither government nor private parties can interfere with privacy rights. *Myers*, 29 Cal. 3d at 262; *Hill*, 7 Cal. 4th at 20.

The Director is responsible for ensuring "the execution of the laws of this state relating to health care service plans . . . including . . . those laws

[6] *See* Nov. 20, 2019 entry in Register of Action available at: https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2299387&doc_no=S258380&request_token=NiIwLSIkTkg9WzBJSyNdVEpIQEw0UDxTJiBeSzJTMCAgCg%3D%3D.

directing the [DMHC] to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees." § 1341(a), (c). The Director, therefore, was obliged to advise Plans with limitations on abortion coverage inconsistent with California law to remove such restrictions from Plan products. *Missionary Guadalupanas* precludes any finding that the Director acted, instead, to target religious belief.

b. Plaintiffs' allegations are insufficient to override the non-discriminatory reasons identified by the Director for her actions

In support of their assertion that the Director targeted religion, Plaintiffs first point to their allegations that the Director issued her letters after pro-choice organizations complained that two religiously affiliated universities had excluded or limited abortion coverage in their employee health plans. AOB 35. However, the allegation that pro-choice groups raised complaints with the Director has no bearing on whether the Director sought to target religious belief through her letters. "Pro-choice" does not mean "anti-religion." Both religious and secular groups take a variety of

positions on the extent to which abortion should be legally permitted.[7] And, there is nothing improper or suspicious about advocacy groups seeking to make government officials aware of instances of noncompliance with the law. Plaintiffs' allegation that these groups raised the issue in connection with abortion exclusions or limitations in health plans maintained by two religiously-affiliated universities similarly does nothing to overcome the "obvious alternative explanation" for the Director's action reflected in her letters. *Iqbal,* 556 U.S. at 682. Plaintiffs' allegations provide no basis to infer the Director would have acted any differently if the issue of abortion limitations in existing Plans had been brought to her attention in connection with coverage obtained by secular institutions.

Plaintiffs next point to their allegations that only religious organizations had health plans that excluded or limited abortion coverage. AOB 36. However, as explained above, the fact that religious entities might be burdened disproportionately by a facially neutral law "does not undermine" the neutrality of such action. *Stormans*, 794 F.3d at 1077. "The Free Exercise Clause is not violated even if a particular group, motivated by

[7] *See*, *e.g.*, Secular Pro Life, at http://www.secularprolife.org; Religious Coalition for Reproductive Choice, at http://rcrc.org; Catholics for Choice, at http://www.catholicsforchoice.org.

religion, may be more likely to engage in the proscribed conduct." *Id.*; *see also Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (upholding ban on polygamy though polygamy practiced primarily by members of the Mormon Church).

The alleged exclusive impact on religious employers, therefore, fails to establish a reasonable inference that the Director acted "because of, not merely in spite of" the effect of her letters on religious employers. *Lukumi*, 508 U.S. at 540. Her action applied to all Plans, and now affects all purchasers of Plan coverage, whether religious or secular.

Finally, Plaintiffs point to their allegation that the Director in issuing her letters, rescinded limitations on abortion coverage maintained by "religious employers" despite a DMHC legal analysis that had concluded that such "religious employers" could legally limit abortion coverage. AOB 36. However, these allegations similarly are insufficient to undermine the Director's neutral explanations for her action.

Because of the breadth and vagueness of the abortion coverage limitations addressed by the Director in her letters, the Director had legitimate reasons to require that they be withdrawn notwithstanding any analysis that some form of accommodation for "religious employers" might be appropriate. As Plaintiffs recognize, not only "religious employers" as

defined under the Knox-Keene Act, but also a broader class of "religiously-affiliated" organizations had purchased products that included limitations on abortion coverage. *See* ER 66 (¶ 91). Plaintiffs do not (and could not) allege that the Department's legal analysis also concluded that a similar accommodation would be appropriate for this broader class of religiously affiliated entities.

Moreover, as the letters note, Plans had excluded abortion coverage with terms such as "elective abortion" and "voluntary abortion." ER 84. Such terms have no foundation in California law, lack clarity as to when an abortion would or would not be covered, and are misleading as they may be understood to preclude coverage of abortions that are not necessary to save the woman's life. *See Missionary Guadalupanas*, 38 Cal. App. 5th at 434-36 (identifying attempt to distinguish "voluntary" and "medically necessary" abortion procedures as a "false dichotomy").[8] Thus, the Director had

[8] California's policy regarding lawful abortion is memorialized in the Reproductive Privacy Act, which does not utilize terms such as "voluntary" or "elective" abortion. §§ 123460-123468. Rather, the Act identifies the "fundamental right" of "[e]very woman" to "choose to bear a child or to choose to obtain an abortion." § 123462(b). Many health services commonly described as "voluntary" or "elective" may still be "medically necessary." *See Missionary Guadalupanas*, 38 Cal. App. 5th at 434-36. Medical necessity under the Knox-Keene Act "does not depend upon whether the service is 'voluntary,'" and is at least in part a "clinical determination" based upon the patient's medical needs. *Id.* at 436.

legitimate reasons to enforce the general requirements of state law and require Plans to remove broad limitations on coverage of abortion services.

And, as Plaintiffs acknowledge, when subsequently presented with a request by a Plan for exemption from state law that would allow the Plan to offer health coverage to religious employers, the Director *granted* such an exemption, demonstrating a willingness to accommodate, rather than target, religious objection to abortion. *See* ER 73 (¶¶ 141-42).

In the face of the secular reasons identified by the Director for issuing her letters—the enforcement California law that unambiguously requires Plans to cover abortion services and protects women's rights to reproductive choice—Plaintiffs' allegations fail to provide a plausible basis to "attribute unconstitutional motives" to the Director's actions. *Kreisner*, 1 F.3d at 782. The Director's actions, accordingly, were neutral and, thus, subject to rational basis review under *Smith*.

B. The Director's Enforcement of State Law Was Generally Applicable

Plaintiffs' argument that the Director's letters are not generally applicable rests on their allegations that the Knox-Keene Act grants the Director discretionary authority to exempt Plans from the Act or its coverage requirements, or from rules established by the DMHC, and that the Act and

DMHC regulations exempt certain categories of Plans. AOB 32-34. Neither of these contentions are sufficient to establish that the Director selectively applied state law to burden only opposition to abortion motivated by religious belief.

Whether a law may be considered "generally applicable" turns on whether it "in a selective manner impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. As this Court further explained in *Stormans*: "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. [Citation]. In other words, if a law pursues the government's interest 'only against conduct motivated by religious belief' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Stormans*, 794 F.3d at 1079 (citing *Lukumi*, 508 U.S. at 542-56, 545).

The Director's enforcement of state law did not selectively burden only religious conduct or belief. Her letters did not provide that abortion restrictions were permissible for Plans offered to secular employers but not to religious employers, nor do Plaintiffs allege any facts remotely suggesting

so. Rather, the requirement that Plans provide coverage of legal abortion enforced through the Director's letters applies equally to coverage offered to secular and religious employers. Plaintiffs fail to establish, therefore, that the Director's action selectively prohibited religiously motivated conduct while permitting substantial comparable secular conduct. *Lukumi*, 508 U.S. at 543; *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) (holding pharmacy delivery rules generally applicable in absence of evidence that defendants "pursued their interests only against conduct with a religious motivation" and because rules did not burden only refusals to deliver medications that are based on "religious reasons").

1. The Director's Individualized Exemption Authority Does Not Support Application of Strict Scrutiny

Plaintiffs assert that the requirements identified in the Director's letters are not generally applicable, in part, because the Director has authority to grant individual exemptions. AOB 33. In addition, they contend that this statutory exemption authority independently calls for strict scrutiny under an exception to the rules in *Smith*. AOB 29-32. Neither of these contentions withstands scrutiny.

In support of these arguments, Plaintiffs point to the Director's authority to exempt Plan contracts for "good cause" from the Knox-Keene

Act's requirement that they cover "all" basic health services (§ 1367(i)), and to exempt, under certain circumstances, Plans and Plan contracts from the Act or to waive the requirements of any DMHC "rule or form" (§§ 1343(b), 1344(a)). *See* AOB 30-31.[9] However, because Plaintiffs do not allege that the Director has used this authority to burden religious but not secular opposition to abortion, the existence of this discretionary authority in no way undermines the general applicability of the Director's action.

This Court and sister circuits have made clear that the mere existence of discretionary exemption authority under a statutory scheme does not support the application of strict scrutiny in a challenge to the scheme. *See Stormans*, 794 F.3d at 1082 (noting that "mere existence" of exemption affording discretion "does not destroy a law's general applicability"); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3d Cir. 2007) ("[T]he existence of an amendment procedure" allowing for zoning exemptions to a city redevelopment plan "does not make the Plan less than generally applicable."); *Grace United Methodist Church v. City of*

[9] Plaintiffs' contention that Director may exempt a Plan or contract for good cause from the Act's "basic health services provision" mischaracterizes the meaning of section 1367(i). AOB 30. Contrary to Plaintiffs' broad reading, the section authorizes the Director to exempt a Plan from the requirement that they cover "all" basic health services; in other words, to allow a Plan to exclude or limit coverage of particular services.

Cheyenne, 451 F.3d 643, 651, 655 (10th Cir. 2006) (noting that multiple circuit courts reject a "*per se* approach" and finding a zoning variance ordinance generally applicable in the absence of evidence of anti-religious animus or discriminatory application). Rather, there must be evidence that government established the discretionary exemption authority for discriminatory purposes or that it has been used in a manner that discriminates against religion. *See Stormans*, 794 F.3d at 1082, n.8 (noting that as-applied challenge to law could be available if commission were to apply rule affording discretion in manner discriminatory towards conduct with religious motivation); *Lighthouse*, 510 F.3d at 277 (approving *Grace United*, 451 F.3d at 653-55, and finding zoning ordinance generally applicable absent evidence of discriminatory purpose or enforcement, or devaluation of religious reasons for variance requests).

Here, Plaintiffs do not contend that the Director exercised her individual exemption authority in a manner that favors secular over religious opposition to abortion or that such authority was established to permit religious discrimination. The discretionary exemption authority given to the Director under the Knox-Keene Act, therefore, does not undermine the general applicability of her action.

In addition, there is no merit to Plaintiffs' separate but related contention that the Knox-Keene Act's provisions granting the Director certain exemption authority mandate application of strict scrutiny under an "'individualized assessments' exception" to *Smith*. AOB 30. This purported exception to *Smith* has no application here.

The line of cases to which Plaintiffs appear to refer concern statutory schemes that invite "individualized assessments" of a person's religious motivation for the conduct at issue, and was "developed in cases involving unemployment benefits programs under which persons were ineligible for benefits if they failed to accept available employment 'without good cause.'" *Stormans*, 794 F.3d at 1081. As the Supreme Court noted in *Smith*, such schemes created a system of individualized exemptions" that invited "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. However, Plaintiffs fail to acknowledge that in those cases, strict scrutiny was applied not to constitutionality of the law or rules themselves, but rather, to the *individual decisions* made pursuant to such schemes in individual cases—that is, the denial of a

particular individual's unemployment benefits.[10] Thus, the Supreme Court has identified only that where such individualized assessment schemes are in place, government may not "refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

This doctrine has no application here, first, because the Knox-Keene Act establishes no such "system" of individualized assessments. Unlike in the context of unemployment benefits or zoning, the Act does not make any benefit that is the subject of the statutory scheme contingent upon an individualized assessment of a Plan or Plan subscriber's motivation for any particular action. The Knox-Keene Act, therefore, is unlike unemployment compensation programs whose "eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884; *see also Am. Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405, 1408 (9th Cir. 1992) (noting that exception to *Smith* applies to challenge arising "'in a context that len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct").

[10] *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) (denial of unemployment benefits); *Sherbert v. Verner*, 374 U.S. 398, 402-10 (1963) (same); see also *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 140-46 (1987) (same).

Second, Plaintiffs do not and cannot complain that the Director improperly made any individual determination as to Plaintiffs that devalued religiously motivated conduct. Indeed, Plaintiffs' allegations establish that to the extent the Director has utilized her individualized exemption authority, she has *granted*, rather than refused, an accommodation for religious opposition to abortion. ER 73 (¶¶ 141–142). Plaintiffs suggest that the Director's decision to "rescind" previously existing religious accommodations through her letters triggers strict scrutiny under the "individualized assessment" principle. AOB at 32. But the Director was not utilizing her discretionary exemption authority in requiring Plans to remove restrictions on abortion that were inconsistent with state law.

The Knox-Keene Act's provisions granting the Director discretionary exemption authority, therefore, do not support application of strict scrutiny to the Director's actions here.

2. Categorical Exemptions from the Knox-Keene Act Do Not Undermine the General Applicability of the Director's Actions

Plaintiffs' argument that categorical exemptions from the Knox-Keene Act for certain types of health plans undermine the general applicability of the Director's action is misplaced. AOB 33-34 (citing § 1343(e) & Cal. Code Regs. tit. 28, § 1300.43-43.15). Plaintiffs point, in particular, to

exemptions provided under the Knox-Keene Act for health plans operated by colleges and universities that "directly provide health care services" only to students, employees, and their dependents, and for "[t]he California Small Group Reinsurance Fund." AOB 33 (citing §§ 1343(e)(2) & (e)(5)). Additionally, Plaintiffs note an exemption from the Act established under DMHC regulations for "small" health plans self-administered by an employer with "not more than five subscribers." *Id.* (citing Cal. Code Regs. tit. 28, § 1300.43). These exemption provisions, however, do not and could not evince any intent by the Director to burden religious opposition to abortion. Indeed, the provisions all predate the Director's tenure. Moreover, none undermine the Director's interest in enforcing the requirements of state law regarding abortion coverage in connection with Plans that are subject to her regulatory authority.

None of the statutory or regulatory exemptions give rise to any inference that the purpose of the Director's action was to selectively target religious belief, nor do they render the Act's requirements fatally underinclusive. The obligation to provide coverage of abortion applies to all Plans and to all Plan subscribers regardless of beliefs regarding abortion, religious or secular. Both religious and secular entities could qualify for these categorical exemptions. Moreover, where the exemptions apply, they

generally exempt health plans and other entities from all aspects of the Act, not just the obligation to cover abortion as part of the basic health services coverage requirement. The sole exemption that exempts a health plan from only some of the Act's basic health service coverage requirement that might be pertinent to women of childbearing age nevertheless requires that the Plan provide "physician services" and hospital inpatient and outpatient (ambulatory care) services, all of which could include abortion services. *See* Cal. Code Regs. tit. 28, § 1300.43.13;[11] *Missionary Guadalupanas*, 38 Cal. App. 5th at 434.

The exemptions cited as examples by Plaintiffs apply to narrow classes of Plans that could be maintained by religious as well as secular entities, including colleges and universities that directly provide care to students and school employees (typically of limited scope at college clinics) or small self-administered Plans. DMHC regulation of these self-administered plans generally would be preempted, in any event, by the Employee Retirement

[11] It is not clear if any health Plan would still qualify for this highly limited grandfathering exemption. The exemption pertains only to a health plan registered as of June 30, 1976, under law preceding the Knox-Keene Act that is a "bona fide mutual benefit society" comprised of a "mother lodge" and one "subordinate lodge" consisting of not more than 800 persons located in a county whose population exceeds 1,500,000 persons. Cal. Code Regs. tit. 28, § 1300.43.13.

Income Security Act of 1974 (ERISA). *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); 29 U.S.C. § 1003(a). The Small Group Reinsurance Fund exemption has no potential relevance, as the Fund only provides financial support *for* Plans, and does not directly support or provide services to subscribers or enrollees. *See* Cal. Ins. Code § 10719 (fund authorized "solely to allow carriers to share in financing the cost of covering high risk small employer groups").

Other categorical exemptions established in the Knox-Keene Act and DMHC regulations not specifically noted by Plaintiffs similarly have no relevance here. These include, for example, exemptions for other entities that do not provide health coverage (§ 1343(e)(4)) and for health plans that provide health coverage for seniors (§ 1343(e)(3); Cal. Code Regs. tit. 28, § 1300.43.10), that are regulated by other entities (§ 1343(e)(1)), or that provide only limited services such as ambulance services (Cal. Code Regs. tit. 28, § 1300.43.3), dental care (*id*. § 1300.43.12), or referrals for appropriate health care services (*id*. § 1300.43.14).

Thus, unlike the categorical exclusions to city ordinances in *Lukumi,* which demonstrated a city government's intent to prohibit animal killings only in ceremonies by the Santeria religion, the categorical exclusions here do not evince any intent to "impose burdens only on conduct motivated by

religious belief." 508 U.S. at 543. Indeed, as already noted, Plaintiffs' allegations establish that the Director has *accommodated* religious beliefs by granting the only abortion-related exemption that she has received from a Plan for coverage to be offered to religious employers.

The Director also has not explained her actions in any way that is contradicted or undermined by these categorical exclusions. As the Director's letters themselves reflect, she issued her letters to ensure that Plans subject to her authority provide coverage consistent with the requirements of Knox-Keene Act and other state law. The categorical exclusions from her authority under the Knox-Keene Act do not undermine the Director's rationale.

In contrast, in each of two decisions cited by Plaintiffs as examples of courts' consideration of categorical exemptions in connection with the general applicability of government *conduct*, the exemptions at issue directly related to and undermined the *specific* interests asserted by defendants for the challenged action. *See Ward v. Polite*, 667 F.3d 727, 739-40 (6th Cir. 2012) (allowances in ethics code for referral of patient by one counselor to another undercut university's claim to unwritten policy barring such referrals); *Blackhawk v Pennsylvania*, 381 F.3d 202, 211 (2004) (categorical exemptions for zoos and nationally recognized circuses undermined asserted

interests in enforcement of permit fee requirement for keeping wild and exotic animals for religious practice).

C. The Director's Letters Further the Purposes of State Law and Therefore Easily Meet Rational Basis Review

Because the Director's enforcement of state law was neutral and generally applicable, it is subject to rational basis review under *Smith*. *See Stormans*, 794 F.3d at 1084. The Director's action is plainly supported by a rational basis, and Plaintiffs do not contend otherwise.

The rational basis test asks whether a law is "rationally related to a legitimate governmental purpose." *Id.* Plaintiffs "have the burden to negat[e] every conceivable basis" which might support the law. *Id.* (citation and internal quotation marks omitted).

Here, not only was the Director's action "rationally related" to the application and enforcement of the Knox-Keene Act, it applied and enforced the "only legally tenable" interpretation of the law. *Missionary Guadalupanas*, 38 Cal. App. 5th at 437. The Director's letters also furthered the purposes of other state laws referenced in the letters, including the constitutional rights of privacy and equal protection and the California Reproductive Privacy Act, as well as judicial decisions recognizing rights to

legal abortion. *See* ER 83. Protecting these established statutory and constitutional rights is unquestionably a legitimate governmental purpose.

As the Director's actions meet rational basis review, the district court's judgment dismissing Plaintiffs' free exercise claim should be affirmed.

D. The Director's Enforcement of State Law Did Not Interfere with Internal Church Affairs

Plaintiffs' contention that the Director's letters interfere with internal church affairs in violation of the Free Exercise Clause lacks any foundation. *See* AOB 22-25. The Director's action did not touch upon Plaintiffs' ability to shape the faith and mission of their respective churches. The authority on which Plaintiffs rely in contending that strict scrutiny applies to the Director's action almost entirely involve the "ministerial exception" to civil rights laws as applied to church employment decisions involving clergy. That doctrine has no application to the circumstances here. Those cases, and other authority cited by Plaintiffs involving judicial *abstention* from internal church disputes regarding religious doctrine or church governance, are not remotely analogous here.

Under the "ministerial exception," courts have held that the Free Exercise Clause generally protects a church from application of employment discrimination laws in connection with disputes regarding the hiring and

firing of clergy. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*, 656 U.S. 171, 188 (2012) (recognizing "ministerial exception"); *Werft v. Desert Sw. Annual Conf. of United Methodist Church,* 377 F.3d 1099, 1100-04 (9th Cir. 2004) (applying three-part balancing test in holding minister's disability discrimination claim barred).

Although constitutional protections have been recognized against judicial oversight of other internal church matters such as church administration, such protection has not, however, been extended, as Plaintiffs suggest, to "any" matters "generally affecting the church's 'faith and mission.'" AOB 24 (citing *Hosanna-Tabor*, 656 U.S. at 190). No statement in *Hosanna-Tabor* extends so broadly.

In *Hosanna-Tabor*, the Supreme Court held that *Smith*'s recognition that neutral and generally applicable law may be applied to religious practice without violating the Free Exercise Clause did not foreclose recognition of an exception for matters involving the church-clergy employment relationship. *Hosanna-Tabor*, 565 U.S. at 188. In so holding, the Court held only that the Free Exercise Clause protects the right of a church to "shape its own faith and mission *through its appointments.*" *Hosanna-Tabor*, 565 U.S. at 188 (emphasis added). The Court did not, as Plaintiffs suggest, conclude that *any* governmental action that touches upon

"matters generally affecting [a] church's 'faith and mission'" would be constitutionally suspect. AOB 24. Rather, the Court recognized constitutional protection against application of civil rights law to clergy employment decisions because a church's hiring of its ministers involves an "*internal* church decision that *affects* the faith and mission" of the church, *Id.* at 190 (emphasis added).

This case, of course, does not involve a church's ability to determine who should be a minister or any application of law to a church; it involves government regulation of health care Plans and coverage. Plaintiffs' unbounded reading of *Hosanna-Tabor*, if accepted, would all but swallow the rule in *Smith*. Here, each Plaintiff remains free to "shape its faith and mission" by taking whatever stance it wishes regarding abortion as a matter of religious doctrine. Indeed, while the decisions on which Plaintiffs rely involve disputes between the church and a current or former employee or member, reflecting their internal nature, this case does not involve any such intra-church dispute.

Indeed, the only cases cited by Plaintiffs involving alleged "church autonomy" in areas beyond church employment do not address whether neutral, generally applicable law may be applied to a church matter, or what level of government interest must be met to permit it. Rather, each involves

disputes relating to internal church governance or administration, and whether judicial oversight or legislative interference in such matters is appropriate at all. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (judicial abstention over internal discipline ordered by church); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952) (invalidating state law purporting to grant autonomy to North American branch of denomination). This case does not involve any such disputes regarding church administration and governance, or any claim for judicial abstention.

There is no support, therefore, for Plaintiffs' contention that the Director's actions affecting their employee health care plans involves a "violation of church autonomy" and therefore must be subject to strict scrutiny. AOB 25. As this Court has recognized a "generalized and diffuse concern for church autonomy, without more, does not exempt [churches] from the operation of secular laws." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

III. PLAINTIFFS FAIL TO SUPPORT ANY PLAUSIBLE CLAIM THAT THE DIRECTOR VIOLATED THE EQUAL PROTECTION CLAUSE

Plaintiffs' allegations fail to support a claim for violation of the Equal Protection Clause, as the district court correctly held. ER 11-12. On appeal,

Plaintiffs contend that they have asserted a cognizable equal protection claim because the Director has not "evenhandedly" applied state law requiring that Plans provide abortion coverage. AOB 41. However, Plaintiffs' allegations fail to support their contention.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal citations omitted). To prove an equal protection violation, Plaintiffs must show that the Director acted with an intent or purpose to discriminate against Plaintiffs based upon their membership in a protected class. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166-67 (9th Cir. 2005).

Plaintiffs allege that the Director's enforcement has not been evenhanded because the Director has granted an exemption that accommodates some religious beliefs, but has "rescinded approval of plan language accommodating the Churches' religious beliefs about abortion." (AOB 41). These allegations mischaracterize the Director's action enforcing state law in her letters, as noted above, and in any event, do not evince any discriminatory classification. Plaintiffs fail to allege any facts sufficient to

raise a plausible claim that the Director's actions treated Plaintiffs differently than any other similarly situated purchaser of Plan products, or that the Director acted with any intent or purpose to discriminate against Plaintiffs based on their religious beliefs. *See* ER 78-80.

In order for a state action to trigger equal protection review, "that action must treat similarly situated persons disparately." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002), *abrogated on other grounds by Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). Here, however, the Director regulates only Plans, and not the purchasers, such as Plaintiffs, of Plan health coverage products. Plaintiffs do not, and cannot, identify any classification made by the Director as between similarly-situated religious and secular groups. As the district court repeatedly recognized, the Director's letters "apply to Plans, not plan purchasers, and do not make any classification with respect to purchasers." ER 11.

As set forth above, the Director's August 2014 letters to Plans make no reference to religious belief, set forth principles applicable to all Plans, and impact equally both secular and religious employers who may wish to, or wish not to, include abortion coverage in products purchased from DMHC-regulated Plans. See ER 83-84. The subsequent lone exemption Plaintiffs allege the Director has granted did not differentiate between any religious

beliefs. AOB 41. And for reasons more fully addressed below, Plaintiffs' allegations are insufficient to support a plausible claim that the Director, in granting the exemption, intended to give preference to any religious group, or to one view of abortion over another, because of any association of those views with a particular church or religious denomination. *See infra*, § IV. As the district court noted, Plaintiffs "do not plead how, or in what manner, any exercise of exemption authority by defendant amounts to discriminatory intent." ER 12.

Just because Plaintiffs hold different religious views regarding abortion than other religious groups who would find the exemption granted by the DMHC to be acceptable does not mean that government action that does not meet all the requirements of their faith violates equal protection. As the district court appropriately noted, "[a]n equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." ER 12 (citing *Thornton*, 425 F.3d at 1167 (citing *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)).

For these reasons, Plaintiffs fail to adequately plead an equal protection claim, as the district court properly concluded.

IV. PLAINTIFFS FAIL TO SUPPORT ANY PLAUSIBLE CLAIM THAT THE DIRECTOR VIOLATED THE ESTABLISHMENT CLAUSE

Plaintiffs' contention that the DMHC's exercise of exemption authority "effectively" resulted in "religious preference" in violation of the Establishment Clause lacks any merit. *See* AOB 42-43. In support of their claim, Plaintiffs contend first that the Director's letters "rescinded" Plan limitations on abortion coverage that were consistent with their views regarding abortion (though they do not allege they utilized such a Plan when it was available). Yet, they argue, the DMHC allowed a Plan to accommodate other "religious employers" who find abortion in a broader range of circumstances to be doctrinally acceptable. AOB 43.[12] These allegations fail to support an Establishment Clause claim, as the district court appropriately concluded.

While Plaintiffs do not refer to the "*Lemon* test" for analyzing government conduct under the Establishment Clause pursuant to *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), that test remains the "dominant mode of Establishment Clause analysis." *Freedom From Religion Found.,*

[12] Plaintiffs' contention that the DMHC "still refuses" to make accommodation "for churches whose religious beliefs allow for abortion only when necessary to save the life of the mother" is unsupported by any citation to the record or by any allegations in their Second Amended Complaint and should be disregarded.

Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1149 (9th Cir. 2018). Under *Lemon*, government conduct passes muster under the Establishment Clause if it: (1) had a secular purpose, (2) did not have as its "principal or primary effect advancing or inhibiting religion," and (3) did not foster an "excessive entanglement" with religion. *Am. Family Ass'n, Inc. v. City & Cty. of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002). Plaintiffs' contention the Director in exercising her exemption authority has given preference to one religious view over another appears to allege that the Director's action fails to meet the second "effect" prong of the *Lemon* test. The Director's action, however, meets this test.

To determine the principal or primary effect of a government action under *Lemon*, the Court must determine whether "'it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.' . . . This inquiry is conducted 'from the perspective of a 'reasonable observer' who is both informed and reasonable'" . . . and who is 'familiar with the history of the government practice at issue.'" *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 604 (9th Cir. 2009), *on reh'g en banc,* 624 F.3d 1043 (9th Cir. 2010) (citations omitted).

Here, no "reasonable" observer could construe the DMHC's actions to have sent any message in favor of or against any religion or church because of its views on abortion. Indeed, the Supreme Court already has considered and rejected the contention that legislative limitations on government coverage of abortion except in cases of rape, incest, or to protect the woman's life violate the Establishment Clause. *Harris v. McRae,* 448 U.S. 297, 319 (1980). As the Court noted, such restrictions are as much a reflection of "'traditionalist' values" as they are the embodiment of "the views of any particular religion." *Id.* Thus, the fact that such restrictions "may coincide with the tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.* at 319-20.

Such exceptions for abortion in circumstances involving rape, incest, and risk to the pregnant woman's life are commonplace in federal law otherwise barring federal funds from being utilized for abortion. *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 13, §§ 202, 614, 810 (2019) ("Hyde Amendment" provisions); 42 U.S.C. § 1397jj(a)(16) (permitting funding of abortion under child health insurance program "only" within Hyde Amendment exceptions). There is, therefore, nothing suspect about the Director's approval of an exemption for Plan products to be

offered to religious employers that is consistent with these well-established exceptions to abortion funding exclusions.

Plaintiffs' reliance on *Larson v. Valente*, 456 U.S. 228, 244 (1982), does not support their suggestion that the operational effect of conduct on some denominations but not others, standing alone, supports an Establishment Clause claim. As the *Larson* Court noted, the government's "express design" in adopting the law at issue in that action—which imposed registration and reporting requirements only upon religious organizations that solicit more than half of their funds from nonmembers—was "to burden or favor selected religious denominations" and thus revealed a design to accomplish "'religious gerrymandering.'" *Id.* at 254–55; *see also Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989) (noting that history of the law at issue in *Larson* revealed "hostility to 'Moonies' and intent to 'get at . . . people that are running around airports'").

Plaintiffs' allegations fail to support any plausible inference that, from the perspective of a reasonable observer, the DMHC's actions could be construed as sending primarily a message of endorsement or disapproval of one religious denomination or church over another. The district court, therefore, properly dismissed Plaintiffs' Establishment Clause claim.

CONCLUSION

For all these reasons, the district court's order dismissing Plaintiffs' Second Amended Complaint without leave to amend should be affirmed.

Dated: December 4, 2019

Respectfully submitted,

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No. 19-15658

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

STATEMENT OF RELATED CASES

The following related case is pending:

Skyline Wesleyan Church v. California Department of Managed Health Care, U.S. Court of Appeals, Ninth Circuit, No. 18-55451.

Dated: December 4, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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