No. 19-15658

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hills Church state that they are non-profit corporations and that no parent corporation or publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

This case is about whether churches may operate according to their religious beliefs about the sanctity of human life—"free from state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hills Church are three California churches that used to be free to operate consistently with their religious beliefs about abortion; the Churches could obtain a healthcare plan that provided necessary medical coverage to their employees and their families while at the same time excluding elective abortion consistent with their beliefs.

All that changed on August 22, 2014, when the California Department of Managed Health Care, or DMHC, mandated that religious organizations cover elective abortions in their employee healthcare plans. Although this abortion-coverage requirement undeniably violates the Churches' sincerely held religious beliefs, the DMHC refuses to change its policy or to accommodate the Churches' beliefs.

Concluding that the DMHC and its director, Michelle Rouillard, did not engage in any intentional religious discrimination when they forced religious organizations to cover elective abortions in their healthcare plans, the District Court held that the Churches could not state a claim for relief under the Free Exercise, Equal Protection, or Establishment Clauses. Although the allegations of the operative complaint plausibly show that they imposed the abortion-coverage requirement for discriminatory reasons, the Churches need not establish intentional religious discrimination to prevail.

The Churches sufficiently alleged a free-exercise violation because the abortion-coverage requirement (1) impermissibly interferes with the Churches' religious autonomy and internal affairs and (2) triggers (and fails) strict scrutiny because it involves a system of "individualized assessments" and is neither neutral nor generally applicable. The Churches also adequately stated claims for relief under the Equal Protection and Establishment Clauses because the DMHC has subsequently enforced the abortion-coverage requirement in a way that prefers some religious beliefs to others. This Court should reverse and hold that the Churches are free to operate according to their faith.

STATEMENT OF JURISDICTION

On March 7, 2019, the District Court granted Director Rouillard's motion to dismiss the second amended complaint for failure to state a claim. ER 2–13. The court entered judgment the same day and dismissed the action with prejudice. ER 1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In August 2014, Director Rouillard mandated that religious organizations' healthcare plans provide coverage for all legal abortions. The Churches filed suit, alleging that their religious beliefs forbid them from covering elective abortion in their employee healthcare plans. The Churches further alleged that (1) Director Rouillard imposed the coverage requirement in response to religious institutions limiting or excluding abortion coverage in their employee healthcare plans, (2) the only plans truly affected were provided exclusively to religious organizations, and (3) there are numerous secular exemptions from the coverage requirement. The issue on appeal is whether those allegations, taken as true, state a claim for relief under the Free Exercise, Equal Protection, or Establishment Clauses of the U.S. Constitution.

STATUTES AND REGULATIONS

Pertinent constitutional provisions, statutes, regulations, and rules are attached as an addendum to this brief.

STATEMENT OF THE CASE

A. The Churches' religious beliefs about abortion and the sanctity of human life

Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hills Church believe the Bible is the inspired Word of God and the authoritative guide for all Christian life, practice, and doctrine. ER 54. Because the Bible teaches that human life is formed by and bears the image of God, the Churches believe and teach that each human life is sacred from the moment of conception to natural death and that elective abortion is a sin. ER 54–55.

This belief about the sanctity of human life motivates much of the Churches' ministries and outreach. Indeed, Foothill Church supports and partners with organizations dedicated to protecting and promoting the sanctity of all human life, including those serving victims of sex-trafficking, at-risk children and families, and women facing unplanned pregnancies. ER 55–56. Similarly, Calvary Chapel Chino Hills ministers to the homeless, incarcerated, and children with special

needs, and it supports local medical centers and clinics that provide free counseling and medical services to women facing unexpected pregnancies. ER 56. Shepherd of the Hills Church likewise provides a support and recovery program for individuals and families affected by addiction; ministers to those in prison; offers a support class for hurting moms and dads who have lost a baby through miscarriage; and hosts a confidential ministry designed to assist women who have had abortions. ER 56–57.

The Churches' religious beliefs about the sanctity of human life also compel them to provide health insurance to their employees and families. ER 57. But because the Churches believe elective abortion is a sin, they cannot pay for or facilitate coverage for elective abortion in their employee healthcare plans. ER 55, 57. Although the Churches used to be able to obtain coverage consistent with their religious beliefs, ER 59–60, Director Rouillard summarily announced in August 2014 that it was illegal for private insurers to exclude or limit abortion coverage in their healthcare plans, ER 57–58. The Churches' plans must now cover elective abortion in violation of the Churches' beliefs. ER 60.

B. The DMHC and the Knox-Keene Act

The DMHC is the regulatory body responsible for enforcing California's Knox-Keene Health Care Service Plan Act of 1975 (the "Knox-Keene Act") and its related regulations. ER 54; *see also* Cal. Health & Safety Code § 1341(a). Michelle Rouillard has been DMHC's director since December 2013. ER 54.

Under the Knox-Keene Act, "health care service plans" must provide coverage for "all of the basic health care services included in subdivision (b) of Section 1345." Cal. Health & Safety Code § 1367(i) (the "basic healthcare services provision"). As defined, "basic health care services" means: (1) physician services; (2) hospital inpatient services and ambulatory care services; (3) diagnostic laboratory and diagnostic and therapeutic radiologic services; (4) home health services; (5) preventive health services; (6) emergency healthcare services; and (7) hospice care. *Id.* § 1345(b). Pursuant to its regulatory authority, the DMHC has defined the scope of these "basic health care services" to include services only "where medically necessary." Cal. Code Regs. tit. 28, § 1300.67.

Although the Knox-Keene Act generally requires healthcare plans to cover medically necessary basic healthcare services, that rule is flexible. Under the Act, Director Rouillard may exempt "a plan contract or any class of plan contracts" from the basic healthcare services provision "for good cause." Cal. Health & Safety Code § 1367(i). And she may "unconditionally" exempt "any class of persons or plan contracts" from *all* the Act's requirements—including the basic healthcare services provision—if she deems such exemption to be "in the public interest." *Id.* § 1343(b); *see also id.* § 1344(a) (allowing the director to "waive any requirement of any rule or form" if "in the public interest"). There are no rules, policies, or procedures governing this discretionary exemption authority. ER 71–72.

In addition, the California Legislature and the DMHC have exempted entire categories of healthcare plans from the Knox-Keene Act's basic healthcare services provision—either by statute or regulation. *E.g.*, Cal. Health & Safety Code § 1343(e) (exempting healthcare 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"); Cal. Code Regs. tit. 28, § 1300.43

(exempting "small plans" administered solely by an employer that "does not have more than five subscribers").

C. Abortion advocates lobby the DMHC to eliminate religious accommodations for abortion coverage.

Before August 2014, the DMHC allowed religious organizations to exclude or limit abortion coverage in their healthcare plans. ER 59. It approved a variety of abortion exclusions and limitations for religious organizations, including provisions that excluded coverage for "elective abortions," excluded coverage for "voluntary termination of pregnancy," and limited coverage to "medically necessary abortion[s]," defined as an abortion performed to save the life of the mother. ER 59–60.

But in November 2013, Director Rouillard met with Planned Parenthood, the ACLU, and the National Health Law Program, an organization that promotes the expansion of abortion access and seeks to eliminate "religious refusals."[1] ER 62. Those organizations requested a meeting after learning that two Catholic universities—Loyola Marymount University ("LMU") and Santa Clara University ("SCU")—

[1] National Health Law Program, Reproductive Health, http://www.healthlaw.org/issues/reproductive-health.

were able to purchase an employee healthcare plan that excluded elective abortion coverage. *Id.*[2] Director Rouillard met with representatives of the pro-abortion groups to discuss the Catholic universities' ability to limit or exclude abortion coverage in accordance with their faith. *Id.* Following that meeting, the DMHC set out to gather more information about its prior approvals of abortion exclusions and limitations for religious organizations, and it requested information from California health insurers about the scope of abortion coverage offered in their healthcare plans. ER 62–63. During this time, the pro-abortion groups advocated for an interpretation of the Knox-Keene Act that would prohibit religious organizations from excluding or limiting abortion coverage in their healthcare plans. ER 63.

For 40 years, California had *never* interpreted the Knox-Keene Act to require coverage for elective abortion. Then, in February 2014, Planned Parenthood sent the DMHC a "legal analysis" asserting that the Act mandates elective abortion coverage. ER 63; *see also* ER 100.

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[2] At that time, Ms. Rouillard had just been nominated as director of the DMHC. She officially assumed that role shortly thereafter in December 2013. ER 54.

The very next month, Planned Parenthood arranged a meeting with California Health and Human Services (CHHS), the DMHC's parent agency, to "address the issue that DMHC has approved, and Catholic Universities have been purchasing," healthcare plans that "exclude certain types of abortions." ER 100. The purpose was to "explore whether there is a regulatory/administrative fix." *Id.*

A few days after the meeting, Planned Parenthood warned CHHS that it was considering legislation to eliminate religious exemptions for abortion coverage, but said it would forgo a legislative effort in exchange for an administrative solution. ER 64, 103–04. Specifically, Planned Parenthood promised not to pursue legislation if the DMHC agreed to: (1) stop "approv[ing]" plans "that exclude coverage for abortion"; (2) "clarif[y] that there is no such thing as an elective or voluntary abortion exclusion"; and (3) "rescind approval" of "plans that include an abortion exclusion" and "find a solution to fix the already approved plans being offered to employees of LMU for 2014 and SCU for 2015." *Id.*[3]

[3] Not surprisingly, the August 22, 2014 letter accomplishes all three demands.

In April 2014, Planned Parenthood followed up "to check in on [CHHS] and DMHC progress" in developing an administrative "solution." ER 64, 108. CHHS said it was "still working with DMHC on the legal and practical issues relating to the 'updated' interpretation." ER 65, 107. Then, in May 2014, CHHS asked Planned Parenthood to "get[ ] in touch" with DMHC's Deputy Director of Plan and Provider Relations because the "DMHC would like to request Planned Parenthood's assistance on some additional information." ER 65, 106. Shortly thereafter, the DMHC asked California health insurers to identify (1) the number of employer groups that had purchased coverage limiting or excluding coverage for abortion; and (2) the number of those groups that qualified as a "religious employer." ER 65.

In response, the insurers reiterated that only religious organizations had purchased healthcare plans limiting or excluding elective abortion coverage. ER 66–67. The DMHC had not approved—and insurers had not offered—plan language allowing any secular, nonreligious employers to limit or exclude abortion coverage. ER 52, 67.

D. Director Rouillard issues the August 2014 letter, rescinds existing religious accommodations, and mandates immediate coverage of elective abortion.

On August 22, 2014, Director Rouillard sent a letter to California health insurers "remind[ing]" them (for the very first time) that the Knox-Keene Act's basic healthcare services provision requires coverage for all legal abortions, including elective abortions. ER 83–96.[4] The letter asserted that the DMHC had reviewed plan documents and "discovered" abortion exclusions and limitations in products covering a "very small fraction" of plan enrollees. *Id.* Claiming that the DMHC had "erroneously approved or did not object" to these exclusions and limitations, the letter mandated *immediate* coverage of all legal abortions. *Id.*

The letter went on: "effective as of [August 22, 2014]" and "[r]egardless of existing [plan] language," healthcare plans "*must* comply with California law with respect to the coverage of legal abortions." *Id.* (emphasis added). The letter ordered insurers to:

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[4] Director Rouillard sent the letter to seven insurers that were offering products to religious organizations limiting or excluding coverage for abortion. ER 83–96.

- "[R]eview all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion," including "plan documents previously approved or not objected to by the DMHC";
- "[A]mend current health plan documents to remove discriminatory coverage exclusions and limitations," including but not limited to "any exclusion of coverage for 'voluntary' or 'elective' abortions and/or any limitation of coverage to only 'therapeutic' or 'medically necessary' abortions"; and
- "[F]ile any revised relevant health plan documents" with the DMHC within 90 days from August 22, 2014 "[t]o demonstrate compliance" with the law.

Id. Finally, the letter advised insurers that their plan documents need not reference abortion coverage *at all* (thus hiding the coverage from insureds), even though the insurers would be adding elective abortion coverage to religious employer plans that previously lacked it. *Id.*

In sum, Director Rouillard and the DMHC changed 40 years of practice and sacrificed religious organizations to the abortion industry.

E. The DMHC selectively enforces the abortion-coverage requirement.

In addition to secular exemptions, Director Rouillard and the DMHC have selectively enforced the abortion-coverage requirement since August 2014. Although they refuse to accommodate the Churches'

beliefs, they have since accommodated religious employers whose beliefs allow them to *cover* elective abortions in some circumstances.

Indeed, in both September and December 2014, Director Rouillard rejected requests to reverse her August 2014 letter, claiming that the DMHC had "carefully considered all relevant aspects of state and federal law in reaching its position." ER 74–75, 110, 112. Director Rouillard and the DMHC again refused to change their position when the Churches filed an administrative complaint with the U.S. Department of Health and Human Services, alleging violation of the federal Weldon Amendment. *See* ER 72, 187–89. And Director Rouillard and the DMHC have vigorously defended the abortion-coverage mandate over four years and three separate lawsuits, including this one.[5]

Yet, certain government officials within the DMHC's Office of Plan Licensing had off-the-record conversations with a few health insurers about restoring a religious accommodation for religious

[5] *See Skyline Wesleyan Church v. California Department of Managed Health Care*, No. 18-55451 (9th Cir.); *Missionary Guadalupanas of the Holy Spirit Inc. v. Rouillard*, C083232 (Cal. Ct. App., 3d Dist.).

employers whose beliefs allowed abortion coverage in the cases of rape, incest, and to save the mother's life. ER 72. Although the August 2014 letter insisted that *all* healthcare plans must cover *all* legal abortions and rescinded existing religious exemptions, the DMHC secretly approved plan language in October 2015 allowing "religious employers," as defined by California Health & Safety Code § 1367.25(c), to exclude abortion services except when performed in the instances of rape, incest, and to save the mother's life. ER 73.

F. District Court proceedings

The Churches filed a § 1983 lawsuit in the U.S. District Court for the Eastern District of California in October 2015. The initial complaint sought declaratory and injunctive relief and alleged violations of the Churches' rights under the Free Exercise, Establishment, Free Speech, and Equal Protection Clauses of the U.S. Constitution. ER 150–65.

Director Rouillard moved to dismiss for lack of standing and failure to state a claim. The District Court held that the Churches had standing, but it dismissed for failure to state a claim. ER 25–46. The District Court dismissed the establishment and free-speech claims with prejudice but granted the Churches leave to amend their free-exercise

and equal-protection claims, ER 46, which they did in August 2016, ER 113–34.

The District Court then granted Director Rouillard's motion to dismiss the first amended complaint, but again gave the Churches leave to amend. ER 14–24. The Churches filed their second amended complaint in October 2017, adding further factual support for their free-exercise and equal-protection claims. ER 50–81. The District Court dismissed the action with prejudice in March 2019. ER 1–13.[6]

Free Exercise. In dismissing the Churches' free-exercise claim, the District Court determined that the abortion-coverage requirement is subject to rational basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990), because it is based on a "neutral law of general applicability." ER 7. In the District Court's view, allegations that the Director and the DMHC knew *only* religious organizations would be affected by the August 2014 letter did not, without more, "make it plausible that [their] object was to target religious employers." ER 9. The court stated that, to establish a lack of neutrality, the Churches

[6] In all three orders granting dismissal, the District Court held that the Churches sufficiently alleged standing. ER 7, 18–19, 33–36.

must show more than "awareness of consequences" and instead must "plausibly plead that defendant acted 'because of, not merely in spite of' the impact of her actions on religious entities." *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)).

The District Court also determined that the abortion-coverage requirement is generally applicable, even though: (1) the Knox-Keene Act—the law on which the requirement purportedly is based—exempts entire categories of healthcare plans from its requirements; (2) the Knox-Keene Act gives Director Rouillard broad discretion to grant individualized exemptions from the basic healthcare services provision (and thus the abortion-coverage requirement); and (3) Director Rouillard and the DMHC exercised this discretionary exemption authority to accommodate some (but not all) religious objections to the abortion-coverage requirement. ER 9–10. The District Court claimed that it could not consider the effect the statutory exemptions and discretionary exemption authority had on the coverage requirement's general applicability because the Churches brought an as-applied (as opposed to facial) constitutional challenge. *Id.*

Finally, the District Court held that the individualized assessment exception to *Smith* did not trigger strict scrutiny, even though the law gives Director Rouillard virtually unfettered exemption authority and the DMHC subsequently granted an exemption for some (but not all) religious objections to abortion coverage. ER 10–11. According to the District Court, the individualized assessment exception applies only when the plaintiff can establish that the government engaged in intentional religious discrimination. *See* ER 11. The court believed that the operative complaint's "allegations d[id] not support a reasonable inference that the Director deliberately sought to give preference to one set of religious beliefs regarding abortion over others because reasonable alternate non-discriminatory explanations exist for the Director's actions." ER 11.

Equal Protection. In dismissing the Churches' equal-protection claim, the District Court first determined that the August 2014 letter "appl[ies] to Plans, not [plan] purchasers, and do[es] not make any classification with respect to purchasers." ER 11. Next, the District Court concluded that a viable equal-protection claim must "show that the defendants acted with an intent or purpose to discriminate against

the plaintiff based upon membership in a protected class," which the court did not believe had been established. ER 11–12.

Establishment Clause. In dismissing the Churches' Establishment Clause claim, the District Court applied what it described as the "much maligned" *Lemon* test. ER 42. The District Court then held that the abortion-coverage requirement had the "plausible secular purpose" of ensuring that "women in California have access to what the Director views as 'basic health services,' and that plans do not discriminate against women who choose to terminate their pregnancies, regardless of the plans' religious or other affiliations." ER 43. Moreover, the District Court held that "a reasonable observer" would not view the coverage mandate as "sending 'primarily' a message disapproving of religion," because the August 2014 letter did not "mention any religious practice or belief" and "opposition to coverage of abortion services is not an exclusively religious position." *Id.*

SUMMARY OF ARGUMENT

The District Court improperly dismissed the Churches' legal challenge to the abortion-coverage requirement.

Taken as true, the Churches' allegations state a claim under the Free Exercise Clause because they establish that the abortion-coverage: (a) interferes with the Churches' ability to conduct their internal affairs consistently with their religious beliefs about abortion and thus violates the church autonomy doctrine; and (b) substantially burdens the Churches' religious beliefs, involves a system of "individualized assessments," and is neither neutral nor generally applicable.

The Churches also adequately alleged a violation of the Equal Protection Clause because Director Rouillard interfered with a fundamental right, intentionally applied and interpreted the Knox-Keene Act in an unfair way, and created an inherently suspect classification for who may be exempted from the abortion-coverage requirement.

Finally, the Churches sufficiently alleged a violation of the Establishment Clause because Director Rouillard and the DMHC exercised their discretionary exemption authority in a way that discriminates among religions, violating the Establishment Clause's absolute mandate of government neutrality in religion.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal for failure to state a claim upon which relief can be granted. *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1100 (9th Cir. 2004). In reviewing the lower court's ruling, this Court must "take all allegations [of the complaint] as true and construe them in the light most favorable to the plaintiff." *Id.*

ARGUMENT

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

The Churches' allegations, taken as true, support a free-exercise claim for two, independent reasons. *First*, enforcing the abortion-coverage requirement against the Churches' employee healthcare plans "interfere[s] with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). *Second*, the abortion-coverage requirement triggers (and fails) strict scrutiny because it involves a system of "individualized assessments" and is neither neutral nor generally applicable.

A. The abortion-coverage requirement impermissibly interferes with church autonomy.

The District Court failed to consider that *Employment Division v. Smith*, 494 U.S. 872 (1990), does not apply to free-exercise claims implicating a church's internal affairs and religious autonomy. The District Court did not even acknowledge, let alone meaningfully address, the fact that the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

The Supreme Court has rejected the proposition that "any application" of a neutral and generally applicable law is "necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017). And it has consistently held that the First Amendment prohibits laws interfering with a religious organization's ability to conduct its internal affairs consistently with its faith and teachings, regardless whether the interference results from a neutral law of general applicability. *E.g.*, *Hosanna-Tabor*, 565 U.S. 171 (2012); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (First Amendment protects the power of religious organizations "to

decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

For example, in *Hosanna-Tabor*, the Supreme Court unanimously held that the government could not enforce a neutral and generally applicable nondiscrimination law against a religious school because it would have interfered with the school's selection of its teachers and "internal governance." 565 U.S. at 188. Declining to apply *Smith*, the Court explained that *Smith* concerned an across-the-board criminal prohibition on the possession of peyote and thus "involved government regulation of only outward physical acts." *Id.* at 190. In contrast, the situation in *Hosanna-Tabor* "concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190. "[A] church's selection of its ministers," the Court stated, "is unlike an individual's ingestion of peyote." *Id.*

This Court has likewise declined to apply *Smith* in cases implicating church autonomy. *E.g.*, *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) (applying compelling-interest test post-*Smith*); *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999) (same). So too have

other federal appeals courts. *E.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002) ("The Supreme Court's decision in [*Smith*] does not undermine the principles of the church autonomy doctrine."); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) ("It does not follow … that *Smith* stands for the proposition that a *church* may never be relieved from" compliance with an otherwise neutral law of general applicability).

Although this Court's decisions in *Werft* and *Bollard* involved claims arising from clergy-church employment relationships, "[t]he [Supreme] Court has made clear that the constitutional protection extends beyond the selection of clergy to other internal church matters." *Bryce*, 289 F.3d at 656. The church autonomy doctrine "applies with equal force" to matters of "church administration," *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976), and matters generally affecting the church's "faith and mission." *Hosanna-Tabor*, 565 U.S. at 190.

This includes a church's beliefs about the sanctity of human life and the immorality of abortion, as courts have long recognized. *E.g.*, *Curay-Cramer v. Ursuline Academy of Wilmington*, 344 F. Supp. 2d 923,

935 (D. Del. 2004) (teacher at Catholic school could be fired for supporting abortion rights), *aff'd*, 450 F.3d 130 (3d Cir. 2006); *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112, 1124 (7th Cir. 1977) (recognizing a bishop's right "to discharge" a "heretical" teacher at a religious school who "advocate[d] the cause of birth control to his or her students or favor the availability to poor people of abortion"). Indeed, that is why federal and state governments—*including California*—have historically exempted churches from this sort of coverage requirement. The California Legislature exempted houses of worship from the Knox-Keene Act's contraceptive coverage mandate. Cal. Health & Safety Code § 1367.25(c). And the federal government exempted churches from the Affordable Care Act's contraceptive coverage mandate, specifically noting that such an exemption was "provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship." *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 345 (3d Cir. 2017) (quoting 80 Fed. Reg. 41,318, 41,325 (July 14, 2015)).

Because the abortion-coverage requirement involves a government violation of church autonomy, this Court must weigh:

> (1) the magnitude of the [law's] impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Werft, 377 F.3d at 1102; *Bollard*, 196 F.3d at 946. Applying this three-part balancing test, the abortion-coverage requirement is unconstitutional.

1. That the abortion-coverage requirement substantially burdens the Churches' religious exercise is beyond dispute. The second amended complaint alleges that it violates the Churches' sincerely held religious beliefs to provide elective abortion coverage in their employee healthcare plans, ER 55, yet that is precisely what the DMHC's abortion-coverage requirement forces them to do, ER 57. By enforcing the coverage requirement against the Churches' healthcare plans, Director Rouillard has "coerce[d] [the Churches] into acting contrary to [their] religious beliefs," *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988), and has exerted "substantial pressure on [them] to modify [their] behavior and to violate [their] beliefs." *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981).

2. There can be no compelling government interest in forcing *churches* to provide their employees with elective abortion coverage in violation of their shared religious convictions. California has virtually unlimited methods to ensure that abortion coverage is available, and to the extent the State believes it necessary to offer such coverage to employees who share their employers' pro-life convictions, the government is free to use those alternatives.

3. For the same reason, exempting churches will not impede any purported governmental interest. If so, then the government would not have granted so many other exemptions from the coverage requirement. *See infra* Sections I.B.1, I.B.2.

Because the abortion-coverage requirement interferes with the Churches' internal affairs and institutional autonomy, the District Court wrongly dismissed the Churches' free-exercise claim. Just as the Churches have a First Amendment right to decide "who will preach their beliefs, teach their faith, and carry out their mission," *Hosanna-Tabor*, 565 U.S. at 196, so too must they have the right to structure their internal affairs and employee relationships consistently with their religious beliefs and convictions. *See Pennsylvania v. President United*

States, No. 17-3752, 2019 WL 3057657, at *13 n.26 (3d Cir. July 12, 2019) (church exemption from contraceptive mandate "dictate[d]" by "Supreme Court precedent" and churches' special status); *see also E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 n.13 (9th Cir. 1988) (First Amendment limits the government's "ability to regulate the employment relationships within churches and similar organizations"). After all, why would the First Amendment protect a church's right to select who teaches its faith and hire only those who share its beliefs, if it did not also protect the church's right to follow those teachings and beliefs within its four walls?

Finally, the general rule articulated in *Smith* should not apply to this case for another reason: it is bad law and should be overturned. While the Churches recognize that this Court is bound by Supreme Court precedent, it is undeniable that *Smith* has fostered conflict and confusion in the lower courts and that it has "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring). The Churches preserve this additional argument for any potential appeal.

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

The abortion-coverage requirement also triggers—and fails—strict scrutiny because it is neither neutral nor generally applicable and because it involves a system of "individualized governmental assessment[s]." *Lukumi*, 508 U.S. at 537.

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

The District Court should have at least subjected the abortion-coverage requirement to strict scrutiny—not rational basis review—because the law on which it is based—the Knox-Keene Act's basic healthcare services provision—involves "a system of individual exemptions." *Smith*, 494 U.S. at 884.

In *Smith*, the Supreme Court concluded that laws burdening religious exercise must survive strict scrutiny if they are not "neutral" towards religion or "of general applicability." *Id.* at 879. Applying that test, the Court held that the Free Exercise Clause did not prohibit the government from denying unemployment benefits to a worker fired for using illegal drugs, even if the drugs were used for religious reasons. *Id.* at 890. In so doing, the Court was careful to distinguish neutral,

generally applicable drug laws from laws allowing a government official to make an "individualized … assessment of the reasons for the relevant conduct." *Id.* at 882–84 (citing cases).

In explaining this distinction, the Court discussed *Sherbert v. Verner*, 374 U.S. 398 (1963), which involved an unemployment compensation law that allowed the government to deny unemployment benefits if the person refused work "without good cause." *Smith*, 494 U.S. at 884. The Court explained that strict scrutiny properly applied in *Sherbert* because the law's "good cause" inquiry "created a mechanism for individualized exemptions" depending on a government official's discretion. *Id.* at 884–85. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884.

This case fits squarely within the "individualized assessments" exception to *Smith*. The Knox-Keene Act gives Director Rouillard nearly unbridled discretion to grant individualized exemptions. Director Rouillard may "exempt a plan contract or any class of plan contracts" from the Act's basic healthcare services provision "*for good cause*." Cal. Health & Safety Code § 1367(i) (emphasis added). She may also "waive

any requirement of any rule or form," including the abortion-coverage requirement, "in situations where in the director's discretion that requirement is not necessary in the public interest." Cal. Health & Safety Code § 1344(a). And she may "unconditionally" exempt "any class of persons or plan contracts" from *all* of the Act's requirements, including any abortion-coverage requirement, if "in the public interest." *Id.* § 1343(b). What is more, Director Rouillard delegated this broad, discretionary exemption authority to the DMHC's Office of Plan Licensing without providing *any* guidance about how or when to apply it. ER 71–72.

The District Court declined to apply the "individualized assessments" exception to *Smith* based on the view that Director Rouillard did not "*deliberately*" seek "to give preference to one set of religious beliefs regarding abortion over others because reasonable alternate non-discriminatory explanations exist for the Director's actions." ER 11 (emphasis added). But proof of intentional religious discrimination is not needed to trigger strict scrutiny. The "individualized assessments" doctrine triggers strict scrutiny whenever a system of individual exemptions is in place, but the government "refuse[s] to

extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884; *accord Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015) (individualized assessments exist where a law allows for "unfettered discretion that *could lead* to religious discrimination") (emphasis added).

Because Director Rouillard's unfettered exemption authority creates a system of "individualized assessments"—*i.e.*, whether "good cause" exists for an exemption, or whether one would be "in the public interest"—the decision to rescind already-existing religious accommodations and enforce the abortion-coverage requirement against the Churches' plans triggers strict scrutiny, regardless whether Director Rouillard deliberately targeted churches.

2. Strict scrutiny also applies because the abortion-coverage requirement is not generally applicable.

For purposes of a free-exercise claim, a law or regulation is not generally applicable when it 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. Here, there are numerous secular exemptions from the abortion-coverage requirement.

As just explained, Director Rouillard has unfettered discretion to grant exemptions for almost any reason. Moreover, California has used statutes and regulations to exempt entire categories of healthcare plans from the abortion-coverage requirement. Cal. Health & Safety Code § 1343(e); Cal. Code Regs. tit. 28, §§ 1300.43–43.15.

For example, healthcare plans "directly operated by a bona fide public or private institution of higher learning which directly provides health care services only to its students, faculty, staff, administration, and their respective dependents" are not required to comply with any of the Knox-Keene Act's requirements, which by extension includes the abortion-coverage requirement. Cal. Health & Safety Code § 1343(e)(2). Nor must healthcare plans operated by "[t]he California Small Group Reinsurance Fund," *id.* § 1343(e)(5), or "small plans" administered solely by an employer that "does not have more than five subscribers." Cal. Code Regs. tit. 28, § 1300.43.

While the District Court concluded that these exemptions can undermine general applicability "only in a facial challenge to a statute," ER 9, there is no legal support for this proposition. To the contrary, courts routinely consider the effect exemptions have on general

applicability in cases involving as-applied free-exercise challenges. *E.g.*, *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004) (Alito, J.).

Because the numerous exemptions here undermine the government's purported interest in guaranteeing employee access to abortion coverage just as much as, if not more than, any religious exemption would, the coverage requirement is not generally applicable. *Lukumi*, 508 U.S. at 543–44; *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234–35 (11th Cir. 2004) (exempting clubs and lodges, but not houses of worship, "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues"); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

3. Strict scrutiny applies because rescinding existing religious exemptions and forcing the Churches' plans to cover abortion is hardly neutral.

A law or regulation is non-neutral if its practical effect or "object" is to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Relevant factors "include '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.'" *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540)). Here, applying the abortion-coverage requirement to the Churches' healthcare plans is not neutral for three independent reasons.

First, Director Rouillard rescinded existing religious accommodations and issued the August 2014 letter in direct response to requests by pro-abortion organizations complaining that two religious institutions excluded or limited abortion coverage in their employee healthcare plans. *See* ER 62–66, 98, 100, 104. That is targeting, and government action that "target[s] religious beliefs as such is never permissible." *Lukumi*, 508 U.S. at 533.

Second, the August 2014 letter's practical effect fell exclusively on religious organizations. Indeed, *only* religious organizations had healthcare plans excluding or limiting abortion coverage, and the DMHC did not approve (nor were insurers offering) plan language that allowed secular, nonreligious employers to limit or exclude abortion coverage. ER 52, 66–67. This practical "effect" of the abortion-coverage requirement "in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535–36; *see also Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996) ("A regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays.").

Third, Director Rouillard rescinded existing abortion exclusions and limitations for religious employers despite the DMHC's *own legal analysis* concluding that such "religious employers" could legally exclude or limit abortion coverage under California law. ER 67. In other words, Director Rouillard required religious employer plans to cover elective abortion even though she knew they had no legal obligation to do so. Such "gratuitous restrictions on religious conduct[ ] seeks not to

effectuate the stated government interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

Despite all this, the District Court dismissed the Churches' free-exercise claim because it did not think the operative complaint's allegations established that Director Rouillard had "acted 'because of, not merely in spite of' the impact of her actions on religious entities." ER 9. But the allegations, when taken as true and viewed in the light most favorable to the Churches, establish that Director Rouillard issued the August 2014 letter "because of" the effect it would have on religious entities. *See Central Rabbinical Congress of U.S. & Canada v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 195 (2d Cir. 2014) (holding that regulation singled out religious practice, and thus triggered strict scrutiny, where government admitted that religious practice "prompted" the regulation and religious practice was "the only presently known conduct" covered by the regulation).

Even so, the District Court erred by holding that anti-religious motive is *necessary* to trigger strict scrutiny. In fact, the language used by the District Court—that the Churches must prove the State acted "because of, not merely in spite of" their religious beliefs—is the

language of equal protection and nondiscrimination law. Under that body of law, a plaintiff challenging a facially neutral law as "a purposeful device to discriminate," *Washington v. Davis*, 426 U.S. 229, 246 (1976), may show that the law was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

In contrast, "at a *minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532 (emphasis added). Because "close scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus," strict scrutiny must apply to the abortion-coverage requirement for the reasons above. *Central Rabbinical Congress*, 763 F.3d at 197; *accord Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006) ("[T]he Free Exercise Clause is not limited to acts motivated by overt religious hostility or prejudice.").

4. The abortion-coverage requirement, as applied to the Churches, cannot satisfy strict scrutiny.

Because strict scrutiny applies, Director Rouillard must prove that applying the abortion-coverage requirement to the Churches' healthcare plans "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). Strict scrutiny requires this Court to "look[ ] beyond broadly formulated interests" and to instead "scrutinize [ ] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

In *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), for example, the Supreme Court exempted Amish children from a compulsory school attendance law, even though the government had a "paramount" interest in education. The Court explained that the government needs "to show with more particularity how its admittedly strong interest … would be adversely affected by granting an exemption *to the Amish*." *Id.* at 236 (emphasis added).

California cannot meet that lofty standard here. No court has held—ever—that requiring a church to fund abortion coverage for its

employees is a compelling governmental interest. And that for good reason: forcing churches to cover elective abortion does not promote the public interest because the only people affected are church employees who share and abide by the church's pro-life religious beliefs.

Moreover, any purported governmental interest cannot be considered compelling when based on the State's own behavior. As detailed above, California's abortion-coverage requirement is riddled with exemptions. Such exemptions show that the law "cannot be regarded as protecting an interest of the highest order" because the existing exemptions already permit "appreciable damage to that supposedly vital interest." *Lukumi*, 508 U.S. at 547.

Nor is the abortion-coverage requirement narrowly tailored to achieve any purported government interest. When categorical and individualized exemptions already exist, forcing the Churches' to cover elective abortions in violation of their sincerely held religious beliefs and convictions is unnecessary. *See id.* at 546 ("underinclusive" ordinances are not narrowly tailored).

Finally, it is axiomatic that a program is not narrowly tailored when there are less intrusive alternatives available. Here, California

has many means of ensuring that employees of pro-life churches have access to abortion, and it has not proven that these options are not viable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–29 (2014) (engaging in analogous analysis under RFRA).

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

The Equal Protection Clause requires that "all persons similarly situated should be treated alike" by the government. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). No group should be preferred; no group should be disfavored.

Here, the abortion-coverage requirement—as applied to the Churches—violates the Equal Protection Clause for many of the same reasons explained above. The coverage requirement not only violates the Churches' fundamental right to the free exercise of religion, it also has not been applied evenhandedly. Director Rouillard and the DMHC rescinded approval of plan language accommodating the Churches' religious beliefs about abortion, ER 59–60, but later accommodated different religious beliefs, ER 72–73. Such selective enforcement has created an inherently suspect classification for who may be exempted, in violation of the Equal Protection Clause. *E.g.*, *City of New Orleans v.*

Dukes, 427 U.S. 297, 303 (1976) (law or regulation triggers strict scrutiny under the Equal Protection Clause if it "is drawn upon inherently suspect distinctions such as … religion.").

III. The abortion-coverage requirement has been selectively enforced in violation of the Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). In *Larson*, the challenged law required charitable organizations to abide by a series of income reporting requirements. *Id.* at 231–32. Although the law initially exempted all religious organizations, the legislature later narrowed the exemption so that it applied only to religious organizations that obtained more than half of their contributions from their own members and affiliated organizations—a definition that did not include the Unification Church. *Id.* at 230–32. The statute did not mention any organization or denomination by name, yet the Supreme Court held that it did not "operate evenhandedly" and "grant[ed] denominational preferences." *Id.* at 246, 253.

So too here. The DMHC's exercise of its discretionary exemption authority has effectively resulted in religious preference. When Director

Rouillard issued the August 2014 letter, the DMHC knowingly rescinded approval of all existing religious exemptions, including those accommodating the Churches' religious beliefs. *See* ER 59–60. But in October 2015 (the same month the Churches filed their lawsuit), the DMHC's Office of Plan Licensing secretly approved plan language accommodating "religious employers" whose beliefs allow for abortion in the cases of rape, incest, and to save the life of the mother. *See* ER 72–73. Five years later, the DMHC still refuses to make a similar accommodation for churches whose religious beliefs allow for abortion only when necessary to save the life of the mother. This disparate treatment violates the Establishment Clause. *See Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.")

CONCLUSION

For five years now, the Churches have been forced to pay for and participate in what their religious beliefs teach is sin. This is an unprecedented, unnecessary, and unlawful infringement of church autonomy and religious belief. The Churches respectfully request that this Court reverse the judgment of the District Court.

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Respectfully submitted,

s/Jeremiah Galus

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STATEMENT OF RELATED CASES

Pursuant to 9th Cir. Rule 28-2.6, the Churches advise that the related case of *Skyline Wesleyan Church v. California Department of Managed Health Care*, No. 18-55451, which involves closely related issues and involves the same transaction or event, is currently pending before this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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s/ Jeremiah Galus
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