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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SKYLINE WESLEYAN CHURCH,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE; **MICHELLE ROUILLARD**, in her official capacity as Director of the California Department of Managed Health Care,

Defendants.

Case No.: 3:16-cv-00501-H-DHB

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: June 20, 2016
Time: 10:30 a.m.
Courtroom: 15A
Judge: Hon. Marilyn L. Huff

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INTRODUCTION

For millennia, a central tenet of the Christian faith has been that every human life is created by God and has intrinsic worth from the moment of conception. Consistent with that longstanding belief, Plaintiff Skyline Church teaches that complicity in abortion is a grave sin because it intentionally ends an innocent human life. Its beliefs about the sanctity of human life also lead it to care for the physical, mental, emotional, and spiritual well-being of its employees, which it does, in part, through the provision of generous health insurance coverage. Until recently, Skyline Church was free to follow its religious beliefs without interference from the government. Now, because of a rogue mandate issued by the California Department of Managed Health Care and its Director, Michelle Rouillard (collectively, the "Department"), the Church must sacrifice its beliefs or suffer ruinous fines and penalties.

On August 22, 2014, the Department issued an unprecedented mandate requiring group health plans issued in California to cover all legal abortions, regardless of whether they are medically necessary (the "Mandate"). The Department promulgated the Mandate without public notice or comment, opting instead to mail letters to seven private health insurers that offered plans excluding or limiting coverage for abortion. Remarkably, the Department demanded that the insurers immediately amend the terms of those plan contracts, yet encouraged them to "omit any mention of coverage for abortion services in health plan documents." Compl., Ex. 1. Although the Department claims to have simply exercised its enforcement authority under the Knox-Keene Health Care Service Plan Act of 1975 ("Knox-Keene Act") to ensure that group health plans cover "basic health care services," the Department's long history of approving plans that excluded or limited abortion coverage undermines that explanation. The truth is that "basic health care services" does not contemplate coverage for elective abortions, and the federal Hyde-Weldon Amendment, which prohibits discrimination against health care plans based on whether they cover abortion, specifically prohibits that interpretation.

Despite compelling churches—for the first time in our country's history—to pay for an act that their religion teaches is murder, the Department urges this Court to dismiss the Complaint, claiming that Skyline Church lacks standing and has failed to allege enough facts to support a single claim. The Court should deny its request for two reasons. First, Skyline Church has standing because the Mandate inserted abortion coverage into the Church's health plan without its knowledge and in violation of its religious beliefs. Skyline Church has been forced to choose between violating its beliefs and suffering disastrous financial consequences ever since. Second, Skyline Church alleges ample facts—which must be taken as true—to support a reasonable inference that the Mandate subjects the Church's religious beliefs to hostile and disfavored treatment in violation of the First and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 4 and 7 of the California Constitution. The Complaint also alleges facts sufficient to show that the Mandate is a regulation within the meaning of California's Administrative Procedures Act and thus subject to its notice and comment requirements, which the Department did not follow. Skyline Church therefore respectfully requests that the Court deny the Department's Motion to Dismiss.

LEGAL STANDARD

The Department moves to dismiss this case for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

When a party moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of demonstrating that the court has jurisdiction. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). When a 12(b)(1) motion is based on lack of standing, however, the Court must defer to the plaintiff's factual allegations and "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual

allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, a Rule 12(b)(6) motion may be granted only if the complaint's factual allegations do not support a "cognizable legal theory." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In making this context-specific evaluation, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

ARGUMENT

I. Skyline Church sufficiently alleges standing.

Federal standing requires that a plaintiff "show (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 Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). At this stage, "general factual allegations of injury" suffice because a court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

A. Skyline Church suffered an injury in fact when the Department changed the Church's health plan to include abortion coverage without its approval and in violation of its religious beliefs.

Skyline Church suffered a real injury. The Complaint alleges that Skyline Church's religious beliefs forbid it from offering abortion coverage to its employees. *See, e.g.*, Compl. ¶¶ 19–30. Yet that is precisely what the Mandate caused the Church to do. *Id.* ¶¶ 31–34. And it did so without the Church's knowledge or approval. *Id.* ¶ 7. In other words, the Department interfered with Skyline Church's insurance contract in a way that caused the Church to violate its religious beliefs. That is enough to confer standing. *See Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931

(9th Cir. 2008) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing.").

Moreover, Skyline Church's injury is ongoing. Not only did the Mandate change the terms of the Church's employee health plan, but it also has prevented the Church from obtaining a plan that excludes coverage for abortions consistent with its religious beliefs. *See* Compl. ¶¶ 32–33, 57. Indeed, the only way for Skyline Church to avoid the effects of the Mandate is to subject itself to significant financial consequences. *See id.* ¶¶ 28, 74–76, 112.

The Department downplays all of this by claiming that Skyline Church fails to allege an injury because it could simply self-insure or choose a health plan regulated by another agency. *See* Defs' Memo. at 9. What the Department proposes here is novel. According to the Department, whenever the government burdens the religious beliefs of a person or organization, it is up to the religious person or organization to change their behavior to eliminate the burden. This turns free exercise jurisprudence on its head. Under this dangerous view of the law, the government could violate the law and religious exercise in an unending manner and no legal challenge could ever be brought. In any event, the Complaint plainly alleges that the Mandate has left the Church with no viable options. *See* Compl. ¶¶ 28–33, 56–57. To conclude otherwise would be to ignore the applicable legal standard: the Church's allegations must be accepted as true at this stage, not the Department's.

The theoretical availability of riskier and cost-prohibitive insurance (like self-funded plans) or insurance that the Department itself acknowledges would also cover abortions (like CDI plans), *see* Defs' Memo. at 9 n.4, does not bar the courtroom door for at least two other reasons. First, switching employee health plans would at the very least result in administrative costs and affect the health care of employees. Second, the general uncertainty caused by the Mandate inhibits the Church's ability to recruit and retain employees and places it at a competitive disadvantage. *See* Compl. ¶¶ 81, 113–115. Skyline Church purchased a generous group health plan that both promoted its

employees' physical, emotional, and spiritual well-being, and was competitive in the marketplace. Being required to change plans solely because of its religious beliefs qualifies as an injury too. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing.").

Nor should the possibility of dropping employee health insurance and "instead pay[ing] an employer shared responsibility tax" under the Affordable Care Act (ACA) prevent Skyline Church from seeking legal redress. *See* Defs' Memo. at 10 n.5.[1] Imposition of an additional tax demonstrates an actual or imminent injury—it doesn't disprove it. Indeed, the U.S. Supreme Court rejected a similar argument in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In *Hobby Lobby*, the Court noted that an employer faces "substantial economic consequences" under the ACA if it drops insurance coverage and that, even so, such an argument "ignores the fact" that an employer may "have religious reasons for providing health insurance coverage for their employees." *Id.* at 2776. Skyline Church, like the *Hobby Lobby* plaintiffs, provides employee health insurance "in part, no doubt, for conventional business reasons, but also in part because [its] religious beliefs govern [its] relations with [its] employees." *Id.*; *see also* Compl. ¶¶ 19, 24, 27. It is no solution for Skyline Church to violate one religious belief just so that it can follow another, especially when it was free to exercise both before the Mandate.

Finally, the Court should reject the argument that Skyline Church cannot file a lawsuit until it requests (and is denied) a waiver from the Mandate. Indeed, this lawsuit is a clear request for a waiver. If the Department were going to grant one, it would have done so already. The Department simply does not (and cannot) offer any legal support

[1] Under the ACA, every employer with more than fifty full-time employees must provide health insurance, and a failure to do so violates federal law and triggers significant monetary penalties. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014); *see also* 26 U.S.C. § 4980H.

for the argument that Skyline Church must double-check with it before suing.

In short, the Mandate injected abortion coverage into Skyline Church's employee health plan without its knowledge and in violation of its religious beliefs. The Church is now stuck between violating its religious beliefs and suffering economic injury. This is an "actual and imminent," as well as "concrete and particularized," injury.

B. Skyline Church's injury is "fairly traceable" to the Department because the Church could follow its religious beliefs without threat of punishment before the Mandate.

The Department next argues that Skyline Church's injury is not "fairly traceable" to the Mandate, but is instead caused by the Church itself, federal law, or, alternatively, state law. The Department mistakes a "fairly traceable" cause for an exclusive one. Skyline Church "need not eliminate any other contributing causes to establish its standing." *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011).

Before the Mandate, neither federal nor state law required Skyline Church to pay for abortions in its health plan.[2] While the ACA required Skyline Church to offer health insurance, and the Knox-Keene Act required its health plan to cover "basic health care services," neither mandated unlimited abortion coverage. The status quo changed when the Department reinterpreted "basic health care services." Then—and only then—did Skyline Church face the unprecedented conflict before it now.

C. A favorable decision is likely to redress the injury because it would once again allow Skyline Church to purchase a health plan consistent with its religious beliefs.

Finally, the Department claims that Skyline Church lacks standing unless it can "demonstrate" that insurers "will make choices" that will redress the Church's injury. Defs' Memo. at 11. This overstates the plaintiff's burden. Skyline Church "need not

[2] In fact, as discussed in more detail below, the federal Hyde-Weldon Amendment explicitly prohibits California from discriminating against health care plans based on whether they cover abortion. *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Division H, Title V, § 507(d), 129 Stat. 2242, 2649 § 507(d) (Dec. 18, 2015).

demonstrate that there is a guarantee that its injury will be redressed by a favorable decision"; rather, it must show that a favorable decision would lead to a "change in a legal status" that "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (internal quotations omitted).

Here, Skyline Church alleges that a favorable legal decision from this Court would restore the status quo and clear the way for religious employers to once again purchase health plans limiting or excluding abortion coverage. Specifically, the Complaint contends that, before the Mandate, at least seven private health insurers made the voluntary, independent business decision to offer health plans that excluded or limited abortion coverage and that they would continue to do so in the absence of the Mandate. *See* Compl. at ¶¶ 58–60, Ex. 1. This is not speculative. Indeed, Skyline Church "previously obtained a group health plan that excluded coverage for voluntary and elective abortions" and was told by its insurer that such a plan could no longer be offered because of the Mandate. *Id.* ¶¶ 30–33. These allegations, which must be accepted as true, plainly satisfy the "redressability requirement" for purposes of a motion to dismiss. *See Bernhardt*, 279 F.3d at 870. It would be clever indeed for the government to issue a new rule to insurers that causes a free exercise violation only to then give the Court a claim that undoing the cause of the violation would be insufficient redress.

Because Skyline Church sufficiently alleges facts supporting standing, the Court should deny the Department's Motion to Dismiss on this ground.

II. Skyline Church states claims for relief under the First and Fourteenth Amendments to the United States Constitution.

When a defendant moves to dismiss under Rule 12(b)(6), the court "must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true." *Siaperas v. Mont. State Comp. Ins. Fund*, 480 F.3d 1001, 1003 (9th Cir. 2007). Here, Skyline Church alleges ample facts to support

cognizable legal theories under the First and Fourteenth Amendments, and should be permitted to prove its claims through discovery.

A. Skyline Church sufficiently alleges that the Mandate violates the Free Exercise Clause.

If a law appears to be neutral and generally applicable on its face, but in practice covertly targets a religious belief or selectively exempts secular conduct, the law cannot pass constitutional muster unless it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotation marks omitted). Neutrality and general applicability are interrelated, and the "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

The Department claims that it merely is enforcing neutral and generally applicable state law that does not target or selectively burden religion. The question that the Court must answer at this stage, however, is not whether the Department *in fact* targeted or selectively burdened religion, but rather whether Skyline Church presents "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Skyline Church's complaint easily meets this threshold.

1. *The Mandate forces Skyline Church to violate its religious beliefs or suffer financial consequences.*

Before addressing neutrality or general applicability, the Department first contends that inserting abortion coverage into Skyline Church's health plan does not burden the Church's religious beliefs. But the Department's argument is so similar to the one thoroughly rejected by the Supreme Court in *Hobby Lobby* that it is a wonder why the Department even raised it.

In *Hobby Lobby*, the Supreme Court found unpersuasive the government's argument that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the

fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 134 S. Ct. at 2777. The Court explained that such an argument "dodges" the question of whether the government's mandate "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*" and "instead addresses a very different question that federal courts have no business addressing"—that is, whether the asserted religious belief is "reasonable." *Id.* at 2778 (emphasis in original).

Here, the Department regurgitates the same argument described in *Hobby Lobby*: it claims that the Mandate does not burden Skyline Church's religious beliefs because the Church's "sole connection" to abortion "is by way of its employer-contribution toward its employee's health coverage premiums." Defs' Memo. at 14–15. But, like the employers' beliefs in *Hobby Lobby*, Skyline Church's "belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." 134 S. Ct. at 2778. In maintaining that its abortion Mandate does not burden Skyline Church's religious beliefs, the Department has "in effect" impermissibly told the Church that its "beliefs are flawed" and asks this Court to do the same. *Id.* This Court must follow the Supreme Court, which has "repeatedly refused to take such a step." *Id.*

Without mentioning *Hobby Lobby*, the Department tries to avoid its result by claiming that cases decided under RFRA (which *Hobby Lobby* was) are "distinguishable" because "RFRA defines an 'exercise of religion' more expansively than courts have under the Free Exercise Clause." Defs' Memo. at 13 n.6. But the Department "conflates two distinct questions": "(1) what constitutes an 'exercise of religion' and (2) what amounts to a 'substantial burden' on the exercise of that religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1076 (9th Cir. 2008) (en banc). Contrary to the Department's argument, "RFRA's amended definition of 'exercise of religion' merely expands the scope of what may not be substantially burdened …. It

does not change what level or kind of interference constitutes a 'substantial burden' upon such religious exercise." *Id.* at 1077. The Department therefore cannot escape *Hobby Lobby* simply because it was decided under RFRA.

Nor do the cases cited by the Department compel a different result. *See* Defs' Memo. at 13–14. Both *United States v. Lee*, 455 U.S. 252 (1982), and *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), are distinguishable because they are government taxpayer cases, with *Lee* involving social security taxes and *Autenrieth* involving income taxes. Furthermore, the Supreme Court in *Lee* actually held that requiring an Amish employer to pay social security taxes burdened that employer's religious beliefs; it upheld application of the tax only after concluding that it was necessary to accomplish a compelling governmental interest. 455 U.S. at 257–61. Similarly, the other case relied on by the Department, *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996), is distinguishable because the plaintiffs there were not required to purchase the health insurance at issue. Moreover, unlike here, that case "involve[d] a challenge to the way in which the University, a governmental entity, spends its money." *Id.* at 1301. Overlooking these critical distinctions, the Department offers an interpretation of *Goehring* that cannot be reconciled with the Supreme Court's ruling in *Hobby Lobby*.

Because the Complaint asserts that Skyline Church has been forced to violate its religious beliefs or suffer financial consequences (an almost identical burden to that at issue in *Hobby Lobby*), it sufficiently alleges a substantial burden of its religion.

2. *The Mandate is not neutral because it operates to suppress religion or religious conduct.*

In evaluating whether a law is neutral, courts examine not only the text, but also the law's object or intended effect. *See Lukumi*, 508 U.S. at 533–34. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533. Because there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct," the Court may determine neutrality by considering "the historical background of the decision

under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history," *Id.* at 533, 541.

Here, Skyline Church alleges sufficient facts to support a reasonable inference that the Department, through the Mandate, sought to suppress religion or religious conduct. For example, the Complaint alleges that:

- Only a "very small fraction" of California group health plans excluded or limited abortion coverage, Compl., Ex. 1 at 1, 3, 5, 7, 9, 11, and 13, and the Department knew that the Mandate would primarily affect churches and religious employers and coerce them to violate their sincerely held religious beliefs. *Id.* ¶¶ 6, 53, 77, 117.

- Because existing law and regulations define "basic health care services" to include services only "where medically necessary," *Id.* ¶ 39, the Department previously permitted health insurance plans to limit or exclude abortion coverage. *Id.* ¶¶ 41–42, 58–60.

- The Department issued the Mandate only after learning that two Catholic universities eliminated elective abortion coverage from their health care plans. *Id.* ¶ 61.

- The Department promulgated the Mandate without any public notice or comment, and encouraged the health plan providers to hide the inclusion of abortion coverage, telling them that they could "omit any mention of coverage for abortion services in health plan documents." *Id.* ¶¶ 44–45, 48, 55; *see also id.*, Ex. 1. at 2, 4, 6, 8, 10, 12, and 14.

- The Department knew that the Mandate violated the federal Hyde-Weldon Amendment, but issued it anyway. *Id.* ¶¶ 85–90.

- Although there are categorical and individualized exemptions to the Knox-Keene Act and the Mandate's requirements, the Department refuses to grant one to employers with religious beliefs like Skyline Church's. *Id.* ¶¶ 62–69.

- The Department chose to apply the Mandate to churches and religious employers even though California exempts religious employers from similar provisions of the Knox-Keene Act (*e.g.*, coverage for contraceptives and fertility treatments). *Id.* ¶¶ 49–52.

These allegations support a reasonable inference that the Mandate operates as a "covert suppression of particular religious beliefs" or "religious gerrymander." *Lukumi*, 508

U.S. at 534–35. This is especially apparent when considering the allegation that the Department has granted at least one exemption from the Mandate to accommodate employers with religious beliefs about abortion that are acceptable to the government. *See* Compl. ¶¶ 64–67; Defs' Memo. at 6 n.2.

Not to be forgotten is that, for the first time in our Nation's history, the government is claiming that it can compel *churches* to pay for what they sincerely believe to be the taking of an innocent human life. That alone is enough to raise a cognizable claim under the First Amendment. *See Lukumi*, 508 U.S. at 538 ("It is not unreasonable to infer … that a law which visits 'gratuitous restrictions' on religious conduct, seeks not to effectuate the stated government interests, but to suppress the conduct because of its religious motivation."); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (noting that the First Amendment "gives special solicitude to the rights of religious organizations").

Because the Complaint includes enough facts to show a lack of neutrality, the Court should deny the request to dismiss Skyline Church's free exercise claim and allow the Church to prove its claim through discovery. *See Lukumi*, 508 U.S. at 547 ("The Free Exercise Clause commits government itself to religious tolerance, and upon even *slight* suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.") (emphasis added).

3. *The Mandate is not generally applicable because it is underinclusive and the Department has unfettered discretion to grant exemptions.*

A law is not generally applicable if it selectively applies to religiously motivated conduct but exempts comparable conduct. *See Lukumi*, 508 U.S. at 542–43. If the alleged purpose of the Mandate is to ensure that women have employer-funded abortion access, then it uses substantially underinclusive methods to pursue that end.

Troublingly, the Department's abortion Mandate does not apply to all religious

and secular groups alike. The Mandate requires churches and other religious employers to pay for abortion services. By contrast, the law purportedly applied by the Mandate (the Knox-Keene Act) exempts entire categories of plans from its basic health care services requirement.[3] For example, health plans directly operated by educational institutions are exempt. *See* Cal. Health & Safety Code § 1343(e). So too are health plans operated by the California Small Group Reinsurance Fund, *see id.*, and "small plans" administered solely by an employer that "does not have more than five subscribers." *See* Cal. Code Regs. tit. 28, § 1300.43. These exemptions dramatically undermine the governmental interest that the Mandate allegedly is designed to achieve.

Even more problematic is that the Department has unfettered discretion to grant individual exemptions and waivers from the Knox-Keene Act and, by extension, the Mandate. *See* Cal. Health & Safety Code §§ 1343(b) & 1344(a). The legal consequence of this is clear: "[W]here the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990); *see also Lukumi*, 508 U.S. at 537; *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("[A] system of individualized exemptions [is] the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny."); *Midrash v. Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234–35 (11th Cir. 2004) (holding that 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, 365 (3d Cir. 1999) ("[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is

[3] If, as the Director argues, the Mandate simply applies the "basic health care services" provision of the Knox-Keene Act, then the Mandate cannot operate in isolation from the Act; an exemption from one is an exemption from the other.

sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.")

In *Smith*, the U.S. Supreme Court held that the Free Exercise Clause did not prohibit application of a state's controlled substance law to sacramental peyote use. 494 U.S. 872. In so doing, the Court contrasted the neutral and generally applicable drug law with the unemployment compensation laws that the Court found to be constitutionally infirm in prior cases. *Id.* at 882–84 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987)). The difference in those cases, the Court noted, was that the unemployment programs "invite[d] consideration of the particular circumstances behind an applicant's unemployment" because they "provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused to work." *Id.* at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). The Court reasoned that its "decisions in the unemployment cases stand for the proposition that where 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.*

The Supreme Court reiterated this legal principle in *Lukumi*. In that case, the Court reviewed the constitutionality of several municipal ordinances regulating the slaughter of animals, one of which punished "[w]hoever … unnecessarily … kills any animal." 508 U.S. at 537. Because the ordinance required the government to evaluate the reason for the killing, the Court concluded that it was not generally applicable and represented an impermissible system of "individualized governmental assessment of the reasons of the relevant conduct." *Id.* (quoting *Smith*, 494 U.S. at 884).

The degree of discretion the Department has here is just as bad, if not worse, than the discretion at issue in *Lukumi* and the discretion afforded by the unemployment compensation programs discussed in *Smith*. Indeed, Director Rouillard wields almost unlimited authority to grant individualized exemptions. For example, similar to the

unemployment compensation laws, the Knox-Keene Act states that "the director may, *for good cause*, by rule or order exempt a plan contract or *any* class of plan contracts from [the basic health care services] requirement." Cal. Health & Safety Code § 1367(i) (emphasis added). The Knox-Keene Act further provides that the Director may "waive any requirement of any rule or form in situations where in the *director's discretion that requirement is not necessary in the public interest* …." *Id.* § 1344(a) (emphasis added). The Director may also "*unconditionally*" exempt from the Knox-Keene Act "*any* class of persons or plan contracts *if the director finds the action to be in the public interest* …." *Id.* § 1343(b) (emphases added).

Recognizing the threat that this system of individualized exemptions poses, the Department protests that Skyline Church "do[es] not allege that she has exercised her discretion in a manner that selectively burdens religious entities." Defs' Memo. at 20. But this misunderstands the law. The constitutional infirmity is that she has been "afford[ed] unfettered discretion that could lead to religious discrimination." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015).

In *Stormans*, the Ninth Circuit found permissible a degree of *minimal* governmental discretion in a regulatory rule that exempted both conduct "substantially similar" to five enumerated exemptions and "good faith compliance" with a sister rule. *Id.* at 1081–82. The "substantially similar" conduct was directly tethered to and bound by five enumerated exemptions. *See id.* at 1082. The "good faith compliance" likewise left little discretion because it was directly tied to the objective standard of a sister rule. *See id.* The Court concluded that "because the exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct." *Id.*

Unlike the regulator's authority to grant individualized exemptions in *Stormans*, the Department's power here is not tied to enumerated exemptions or limited by any particularized, business-related, or objective criteria. The basic health care services

requirement and abortion Mandate may be waived—and any plan or class of persons may be exempted—so long as the Director finds it is "for good cause" or in the "public interest." Cal. Health & Safety Code §§ 1343(b), 1344(a), 1367(i). This broad discretion undoubtedly lends itself to "individualized governmental assessment of the reasons for the relevant conduct" and opens the door to impermissible religious discrimination. *Stormans*, 794 F.3d at 1081 (quoting *Smith*, 494 U.S. at 884); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988) (concluding that ordinance gave too much discretion to mayor where "nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest'"); *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 384–85 (1980) (noting that "vague" phrases, such as "in the public interest" and "for good cause," gave agency officials "broad discretion" that was "often abused").

Significantly, this power has not lain dormant. The Department has already granted one health plan an individualized exemption, allowing it to include some limits on abortion coverage, and is in discussions with "at least" one other health insurer about granting a similar exemption. *See* Defs' Memo. at 6 n.2; *see also* Compl. ¶¶ 64–66. That the Department is enforcing the Mandate in some circumstances but not others shows that the law is not generally applicable and highlights the importance of allowing Skyline Church to prove its claims through discovery.

4. *The Mandate is unnecessary and not narrowly tailored to achieve any purported government interest.*

Because the Mandate is neither neutral nor generally applicable, the law "must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. As such, it cannot pass constitutional muster unless it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Id.*

Guaranteeing access to employer-funded elective abortions is not an interest of the highest order. Indeed, no court has ever concluded that forcing a third party to pay for another person's abortion is a legitimate, let alone compelling, interest. In fact, the

federal Hyde-Weldon Amendment explicitly prohibits states (like California) that receive funding under the Labor, Health and Human Services, and Education Appropriations Act from discriminating against health care plans based on whether they cover abortion. *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Division H, Title V, § 507(d), 129 Stat. 2242, 2649 (Dec. 18, 2015); Compl. ¶¶ 85–90.

Nor is the Mandate narrowly tailored to achieve any purported government interest. When categorical and individualized exemptions from the Mandate already exist, forcing churches and religious employers to violate their religious beliefs and subsidize elective, voluntary, and medically unnecessary abortion services is unwarranted. *See Lukumi*, 508 U.S. at 546 (holding that "underinclusive" ordinances could not be considered narrowly tailored).

The Mandate cannot survive strict scrutiny. Because Skyline Church has set forth sufficient facts to plead a cognizable Free Exercise Claim, the Department's request to dismiss that claim should be denied.

B. Skyline Church sufficiently alleges that the Mandate treats similarly situated employers differently in violation of 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.

The Mandate does not apply to similar groups equally. As discussed above, the Complaint alleges that Skyline Church is being forced to pay for abortion services, but several secular classes of employers are exempt from providing abortion coverage. Compl. at ¶¶ 68–69. Moreover, Skyline Church asserts—and the Department has admitted—that at least one health plan provider has been allowed to offer contracts limiting (not excluding) abortion coverage to certain religious employers since the Department issued its Mandate. *See* Compl. ¶¶ 64–66; Defs' Memo. at 6 n.2. Apparently, some employers' religious beliefs on when they can in good conscience pay

for an abortion are palatable to the Department, but Skyline Church's beliefs are not.

Simply put, Skyline Church is significantly disadvantaged before the law because it holds disfavored religious beliefs. The Mandate forces it to make an impossible choice between following its religious convictions about the sanctity of human life, or violating federal law and no longer providing comprehensive care for the physical well-being of its employees. It also places the Church at a substantial competitive disadvantage, affecting its ability to recruit and retain employees due to the uncertainty about whether it will continue to offer group health insurance. Other similarly situated employers have not been presented with this dilemma or marketplace disadvantage—either because their group health plan falls within one of the Knox-Keene Act's enumerated exemptions or the Department has exercised its discretionary authority so that they, unlike Skyline Church here, can obtain a health plan consistent with their beliefs on abortion. The Department lacks a compelling or even a rational state interest for this disparate treatment. And, as explained above, any purported government interest is not being advanced by the least restrictive means possible.

Because the Complaint pleads sufficient facts showing that Skyline Church has intentionally been subjected to disparate treatment because of its religious beliefs, the Church has stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment.

C. Skyline Church sufficiently alleges that the Mandate is hostile towards religion and prefers some religious beliefs to others in violation of the Establishment Clause.

The Establishment Clause prohibits the government from disapproving of or showing hostility towards religion. *See Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120–21 (9th Cir. 2002). Under the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government conduct violates the Establishment Clause if it "(1) has a predominantly religious purpose; (2) has a principal or primary effect of advancing or inhibiting religion; or (3) fosters excessive

entanglement with religion." *Catholic League for Religious & Civil Rights v. City & County of San Francisco*, 624 F.3d 1043, 1060 (9th Cir. 2010) (Silverman, J., concurring). Skyline Church alleges sufficient facts supporting a reasonable inference that the Mandate fails the first two prongs of the *Lemon* test, either one of which is sufficient to trigger an Establishment Clause violation.

The first prong of the *Lemon* test questions whether the government's actual motivation underlying the regulation was to advance or inhibit religion. As explained above, the allegations support a reasonable inference that the Department issued the Mandate to force churches and religious employers to conform their consciences to government-approved views on abortion coverage. Demanding that people of faith conform their consciences or suffer penalty demonstrates hostility towards religious belief. What's more, the Department has since allowed at least one health plan "to offer contracts limiting abortion coverage to 'religious employers.'" Defs' Memo. at 6 n.2; *see also* Compl. ¶¶ 64–66. That the Department has exempted a health plan to accommodate the religious objections of some employers—yet refuses to do so for Skyline Church—evidences impermissible discrimination among religious beliefs and presents a quintessential Establishment Clause violation. *See McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("The touchstone for [the Court's] analysis is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'"). An objective observer familiar with the Mandate, the history and context in which it was promulgated, as well as the Department's selective enforcement of it, could conclude that it was issued for a predominately religious purpose under the first prong of the *Lemon* test. *See Catholic League*, 624 F.3d at 1060 (relying on an "objective observer" standard to determine the predominate purpose of a government action).

Furthermore, according to the Department, the vast majority of California group health plans already included abortion coverage before the Mandate. *See* Compl., Ex. 1 (noting that a "very small fraction" of plans excluded abortion coverage). Drawing

reasonable inferences in favor of Skyline Church, one could determine that the primary effect of the Mandate is to weed out certain religious objections to paying for abortion coverage in employee health plans. Thus, the Mandate also fails prong two of the *Lemon* test.

Either a primarily religious purpose or predominantly religious effect alone violates the Establishment Clause. Skyline Church has pleaded sufficient facts to state a cognizable claim that the Department issued the Mandate to impose a theological view of abortion—a religious purpose—and that the Mandate's primary effect is inhibiting the religious exercise of those who object to abortion. Skyline Church has stated a claim under the Establishment Clause and should be permitted to prove it through discovery.

III. Skyline Church states claims for relief under the California Constitution and the California Administrative Procedures Act.

In addition to stating claims for relief under the federal Constitution, the Complaint sufficiently alleges claims under Article I, Sections 4 and 7 of the California Constitution and the California Administrative Procedures Act ("APA").

A. Skyline Church sufficiently alleges that Mandate burdens its religion and disfavors its religious beliefs in violation of Article I, Section 4 of the California Constitution.

Article I, Section 4 of the California Constitution includes a free exercise clause and establishment clause, stating that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed" and that "[t]he Legislature shall make no law respecting an establishment of religion."

Skyline Church sufficiently alleges a free exercise claim under Article I, Section 4 of the California Constitution. Although the Department claims that "the free exercise clause of Article I, Section 4 of the California Constitution mirrors the free exercise clause [of the] United States Constitution," Defs' Memo. at 25, the California Supreme Court has explained that the meaning of Article I, Section 4 "is not dependent on the meaning of any provision of the federal Constitution." *Catholic Charities of*

Sacramento, Inc. v. Superior Court, 85 P.3d 67, 90 (Cal. 2004). Indeed, the California Supreme Court has expressly stated that the U.S. Supreme Court's decision in *Smith* "does not control our interpretation of the state Constitution's free exercise clause." *Id.* So even though it "has not determined the appropriate standard of review" for free exercise challenges under the state Constitution, *North Coast Women's Care Med. Grp., Inc. v. San Diego County Superior Court*, 189 P.3d 959, 968 (Cal. 2008), it is worth noting that the California Supreme Court has continued to subject even neutral laws of general applicability to strict scrutiny review after *Smith*. *See id.*; *Catholic Charities*, 85 P.3d at 91. As established above, Skyline Church alleges facts sufficient to show that the Mandate cannot survive that exacting level of review. *See supra* Section II.A.4.[4]

The Complaint likewise asserts a cognizable establishment clause claim under the California Constitution. Because "the protection against the establishment of religion embedded in the California Constitution [does not] create[] broader protections than those of the First Amendment," *E. Bay Asian Local Develop. Corp. v. California*, 13 P.3d 1122, 1138 (Cal. 2000), the Church's establishment clause claim under Article I, Section 4 survives for the reasons set forth above. *See supra* Section II.C.

B. Skyline Church sufficiently alleges that the Mandate treats similarly situated employers differently in violation of Article I, Section 7 of the California Constitution.

The California Constitution's guarantee of equal protection (Cal. Const., art. I, § 7) is "substantially equivalent" and "analyzed in a similar fashion" to the Fourteenth Amendment's Equal Protection Clause. *Landau v. Superior Court*, 97 Cal. Rptr. 2d 657, 671 (1998). Thus, for the reasons above, Skyline Church's claim under Article I, Section 7 of the California Constitution should also survive the Motion to Dismiss.

[4] Application of the *Smith* rule would not change the result because the Complaint also shows that the Knox-Keene Act, and the Department's application of it, is neither neutral nor generally applicable. *See supra* Sections II.A.2. & II.A.3.

C. Skyline Church sufficiently alleges that the Department adopted a new and inconsistent interpretation of the Knox-Keene Act in violation of the California Administrative Procedures Act.

The California APA establishes "basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations" promulgated by administrative agencies. Cal. Gov't Code § 11346(a). Its major purpose is to ensure that those affected by the regulation "have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly." *Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 303 (Cal. 1996). This "public participation in the regulatory process directs the attention of agency policymakers to the public they serve," and thus protects against "bureaucratic tyranny." *Id.*

Under the APA, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any … regulation" without complying with the APA's notice and comment provisions. Cal. Gov't Code § 11340.5(a). Any regulation that is implemented without fulfilling the requirements of the APA is an "underground regulation" and may be declared invalid by a court. *Morning Star Co. v. State Bd. of Equalization*, 132 P.3d 249, 253 (Cal. 2006); Cal. Code Regs. tit. 1, § 250. Consistent with its goals, the APA defines regulation "very broadly." *Tidewater*, 927 P.2d at 304. A regulation subject to the APA has two principal identifying characteristics: (1) "the agency must intend its rule to apply generally, rather than in a specific case"; and (2) "the rule must implement, interpret or make specific the law enforced or administered by [the agency], or … govern [the agency's procedure]." *Morales v. California Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724, 729 (Ct. App. 2008); *see also* Cal. Gov't Code § 11342.600.

The Mandate is a regulation. It applies generally to all employee health plans regulated by the Department, and it purports to implement, interpret or make specific the Knox-Keene Act's basic health care services requirement. *See* Compl., Ex. 1. The Department, however, argues that the APA requirements should not apply here because the Mandate represents "the only legally tenable interpretation of the law." Defs'

Memo. at 26–29. Specifically, the Department contends that the Knox-Keene Act and its implementing regulations define "basic health care services" to encompass "lawful abortion" and that the California Constitution and California's Reproductive Privacy Act forbid any other interpretation. *See* Defs' Memo. at 28–29.

Requiring third parties to pay for another person's elective abortion is not the "only legally tenable interpretation" of the law. Notably, the issue for the Court here is "whether the Department has adopted the only 'legally tenable' interpretation of the law, *not* whether its interpretation is or is not consistent with the law. The former inquiry is significantly more circumscribed than the later." *Morning Star*, 132 P.3d at 259. So while the APA's requirements do not apply when the agency adopts the "only legally tenable" interpretation of the law, that exception is "narrow," *Ctr. For Biological Diversity v. Dep't of Fish & Wildlife*, 183 Cal. Rptr. 3d 736, 772 (Ct. App. 2015), and applies only if the interpretation is "patently compelled by, or repetitive of, the statute's plan language." *Morning Star*, 132 P.3d at 257 ("As the APA establishes that 'interpretations' typically constitute regulations, it cannot be the case that *any* construction, if ultimately deemed meritorious after a close and searching review of the applicable statutes, falls within the exception provided for the sole 'legally tenable' understanding of the law. Were this the case, the exception would swallow the rule.").

The most obvious and glaring reason why the new interpretation cannot be the "only legally tenable" interpretation of the law is that for the past 40 years the Department has interpreted the law differently. The Department strains credulity by arguing that two conflicting interpretations are both the "only one" tenable. Indeed, before issuing the Mandate in August 2014, the Department reviewed and approved health plans that excluded or limited coverage for abortion. *See* Compl. ¶¶ 58–60. The Department, of course, claims that those plans slipped through the cracks and should not have been approved. At this stage, however, the Court must accept the Complaint's allegations as true and draw all reasonable inferences in favor of the plaintiff. And the Complaint here tells a different story—one where the Department knowingly approved

those plans and changed its interpretation of the law only after receiving pressure from abortion advocates who had learned that two Catholic universities had decided to eliminate elective abortion coverage from their health plans. *See id*. ¶¶ 58–61. Both sides should have the opportunity prove their allegations through discovery.

Moreover, the Department's current interpretation of the Knox-Keene Act is inconsistent with existing statutes and regulations. For example, existing regulations define the scope of "basic health care services" to include services only "where medically necessary." Cal. Code Regs. tit. 28, § 1300.67. Not all abortions are medically necessary. Elective abortions, for example, are not medically necessary. And while sex-selective abortions may be legal in California, they are not medically necessary under any interpretation of the term. That is why the Department goes only so far as to claim that abortion "*can be* a medically necessary way of treating the condition of pregnancy." Defs' Memo. at 28 (emphasis added). The Mandate goes much further than existing law allows it to go. By requiring unlimited coverage for abortion, the Mandate deems *all* abortions as medically necessary. That isn't even a tenable interpretation of the law, let alone the "only legally tenable" one.

It is telling that the Department focuses so much on the Reproductive Privacy Act, California Constitution, and a case interpreting the Medi-Cal Act, instead of the Knox-Keene Act. *See* Defs' Memo. at 28–29. The Knox-Keene Act, after all, shows that the California Legislature did not think that contraceptive coverage and coverage for fertility treatments qualified as "basic health care services" and thus was required to add such coverage via separate statutory provisions. *See* Cal. Health & Safety Code §§ 1367.25(c), 1374.55(e). The Department does not even try to explain how interpreting "basic health care services" to include elective abortions, but not contraceptives and fertility treatments, is the "only legally tenable" interpretation of the law.

Another fatal flaw in the Department's argument is that its interpretation conflicts with the federal Hyde-Weldon Amendment. The Hyde-Weldon Amendment prohibits states that receive funding under the federal Labor, Health and Human Services, and

Education Appropriations Act, such as California, from discriminating against health care entities based on whether they "provide for, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Division H, Title V, § 507(d), 129 Stat. 2242, 2649 (Dec. 18, 2015). The Hyde-Weldon Amendment defines "health care entity" to include "a health insurance plan." *Id.* Because the Mandate discriminates against health plans that exclude or limit abortion coverage, it is undoubtedly in conflict with, and thus preempted by, federal law. *See Puente Arizona v. Arpaio*, No. 15-15211, 2016 WL 1730588, at *3 (9th Cir. May 2, 2016) ("[P]reemption may implied where the state law … conflicts with federal law."); *Indep. Living Ctr. of S. California, Inc. v. Shewry*, 543 F.3d 1050, 1059 (9th Cir. 2008) (treating a "claim of preemption under a federal statute passed pursuant to Congress's spending power" the same as a claim of preemption under other federal statutes). Simply put, the Department's interpretation of the Knox-Keene Act cannot be the "only legally tenable" one when federal law preempts that interpretation.

The Complaint alleges a legally cognizable APA claim because other reasonable—indeed, better—interpretations of the Knox-Keene Act exist and the Department did not subject its Mandate to any public notice and comment as required by the APA. The Court should deny the Department's request to dismiss that claim.

CONCLUSION

Because Skyline Church alleges sufficient facts, taken as true, to establish standing and to state claims for relief under the First and Fourteenth Amendments, the California Constitution, and the California Administrative Procedures Act, it respectfully requests that the Court deny the Department's Motion to Dismiss and allow its claims to proceed. Should the Court decide to grant any portion of the Department's Motion to Dismiss, Skyline Church respectfully requests leave to amend its complaint.

Respectfully submitted this 6th day of June 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2016, service of Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss was made by way of the Court's ECF system on the following case participants:

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