No. 20-35507

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR PARK ASSEMBLY OF GOD OF KIRKLAND, WASHINGTON,

Plaintiff-Appellant,

v.

MYRON "MIKE" KREIDLER, in his official capacity as Insurance Commissioner for the State of Washington; JAY INSLEE, in his official capacity as Governor of the State of Washington,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Civil Case No. 3:19-cv-05181-BHS
Hon. Benjamin H. Settle

PLAINTIFF-APPELLANT'S OPENING BRIEF

DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

Counsel for Plaintiff-Appellant

KEVIN H. THERIOT
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
egraves@ADFlegal.org

Counsel for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Cedar Park Assembly of God of Kirkland, Washington is a nonprofit corporation with no parent companies or stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

STATEMENT OF JURISDICTION

Because Cedar Park Assembly of God of Kirkland, Washington's Supplemental Verified Complaint states claims under the First and Fourteenth Amendments through 42 U.S.C. § 1983, Excerpts of Record ("ER") 228–29 (incorporating ER 194–203), the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

28 U.S.C. § 1291 grants this Court jurisdiction to review the district court's order dismissing Cedar Park's Supplemental Verified Complaint under Rule 12(b)(1). *E.g.*, *El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1121 (9th Cir. 2014) ("We have jurisdiction under 28 U.S.C. § 1291 [to] review . . . a district court's decision to grant a motion to dismiss under Rule 12(b)(1).").

The district court dismissed Cedar Park's Supplemental Verified Complaint on May 6, 2020. ER 23–36. Cedar Park timely filed its Notice of Appeal on June 4, 2020, *id.* at 38, within the 30-day period set by 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES

Washington law requires most employee health plans issued or renewed after January 1, 2019, to cover (1) abortion, if they provide comprehensive maternity care, and (2) abortifacient contraceptives. This abortion-coverage mandate extends to houses of worship like Cedar Park who sincerely believe and teach that human life is sacred and that abortion ends a human life. Yet it does not apply to health care providers, religiously sponsored health carriers, or health care facilities who object to abortion coverage in their employee health plans.

Cedar Park filed suit based on the First and Fourteenth Amendments to obtain protection against Washington's abortion-coverage mandate. But the district court dismissed Cedar Park's supplemental complaint for lack of jurisdiction under Rule 12(b)(1), even though the church's insurance provider had altered Cedar Park's health plan to directly cover abortion in response to Senate Bill 6219.

Cedar Park presents one question on appeal:

Whether Cedar Park has Article III standing to challenge the application of Senate Bill 6219's abortion-coverage mandate to houses of worship.

PERTINENT STATUTES AND REGULATIONS

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

INTRODUCTION

Washington passed Senate Bill 6219, which requires most employers to include abortion and abortifacient-contraceptive coverage in their health plans. The law contains no religious exception despite many religious organizations' belief in the sanctity of human life and strong opposition to abortion. When churches protested, the bill's sponsor suggested they sue if they did not wish to comply. This extreme abortion-coverage mandate had its desired effect: insurance providers began inserting abortion coverage into ministries' health plans in direct violation of their religious teachings.

Plaintiff-Appellant Cedar Park Assembly of God of Kirkland, Washington is one of Senate Bill 6219's intended targets. The church is known for its belief that all human life is sacred and made in God's own image. And the church puts that belief into practice in many ways, such as by excluding abortion coverage from its health plan. But faced with Senate Bill 6219's mandate and stark penalties, Cedar Park's insurance provider refused to renew the church's abortion-excluding group health plan.

The church sued to vindicate its First and Fourteenth Amendment rights and to regain the abortion-excluding health plan it lost. Yet Washington officials sought to avoid judicial scrutiny of Senate Bill 6219 by moving to dismiss Cedar Park's case. The district court accepted this invitation, held the church lacked standing, and dismissed the case for lack of jurisdiction under Rule 12(b)(1).

The district court erred in its construction of both the law and the facts. The court began by relying almost entirely on facts from outside the complaint under the standard for a Rule 12(b)(1) "factual attack," while stating that no factual dispute existed. The court then confused merits questions with jurisdictional issues. And the court got the key extrinsic facts it cited wrong.

This Court recently employed the correct standing analysis in *Skyline Wesleyan Church v. California Department of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020), holding that a California church had standing to challenge California's statutory abortion-coverage requirement. The Court should apply *Skyline* here, confirm Cedar Park's Article III standing, and remand for merits proceedings. Doing so will vindicate "the paramount role Congress has assigned to the federal

courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 473 (1974).

STATEMENT OF THE CASE[1]

A. Cedar Park and its religious beliefs about the sanctity of human life

Cedar Park has served the Bothell and greater Eastside communities of Washington for nearly half a century. ER 227 (incorporating ER 182). Cedar Park is associated with the Assemblies of God, has over 600 members, and traditionally hosts about 1,500 people at its weekly services. *Id.* To serve its flock, Cedar Park employs a sizeable team and provides health coverage to roughly 185 people. *Id.*

Like many churches worldwide, Cedar Park holds and teaches the belief that each human life is sacred from the moment of conception because God formed that life in His own likeness. ER 227 (incorporating ER 182). This religious belief is enshrined in Cedar Park's governing documents—its Constitution and Bylaws—which explain:

[1] Cedar Park's statement of the case derives from its Supplemental Verified Complaint, which incorporates its Second Amended Verified Complaint, and the documents incorporated by reference therein, as well as the district court's dismissal order and the Declarations of Paul M. Crisalli and Jami M. Hansen.

> Under the *Imago Dei* principle, all human life is sacred and made by God, in His image. Because all humans are image-bearers, human life is of immeasurable worth in all of its dimensions, including pre-born babies, the aged, the physically or mentally challenged, and every other stage or condition from conception through natural death. As such, we as Christians are called to defend, protect, and value all human life. [ER 227 (incorporating ER 183).]

Abortion violates Cedar Park's religious belief in the sanctity of human life in four ways. *Id.* First, the church reads the Bible as prohibiting the "intentional destruction of innocent human life," including abortion. *Id.* Second, the church views abortion as incompatible with the dignity God conferred on humankind by making individuals in His image. *Id.* Third, Cedar Park believes and teaches that participating in, facilitating, or paying for abortion is a grave sin. *Id.* Fourth, the church views any approval of abortion as injurious to its religious mission of recognizing and preserving human life from conception until natural death. *Id.*

Cedar Park does not simply believe in the importance of human life, it puts those beliefs into practice. The church hosts an annual service known as "Presentation Sunday" in which the congregation prays for and supports couples experiencing infertility. ER 227 (incorporating ER 184). Cedar Park has also facilitated approximately 1,000 embryo adoptions in recent years. ER 227 (incorporating ER 184). To serve the

larger community, the church partners with a local pregnancy center that supports women experiencing unplanned pregnancies. *Id.* The church even hosted a mobile ultrasound unit on campus so that women considering abortion could see the unique individual growing inside them and choose life for their child. *Id.* Every year, church members and staff participate in Olympia's March for Life to promote Cedar Park's pro-life views in the state capitol. *Id.*

All of Cedar Park's employees are required to agree with and live by the church's religious teachings—including those about the sanctity of human life—at work and in their private lives. ER 227 (incorporating ER 183). To that end, each church employee signs an agreement to "liv[e] a life that reflects the values, mission, and faith of Cedar Park." ER 227 (incorporating ER 184). Church employees are barred from engaging in "behavior that conflicts or appears inconsistent with evangelical Christian standards as determined in the sole and absolute discretion of Cedar Park." *Id.*

B. Cedar Park's health plan

Like all of its other activities, Cedar Park's health plan affirmed the church's religious belief in the sanctity of human life. ER 227

(incorporating ER 185). In fact, it seriously violates Cedar Park's religious beliefs to provide health coverage that contradicts the church's biblical teachings. *Id.* Cedar Park's group health plan included comprehensive maternity care (as federal law requires) but excluded abortion coverage.[2] ER 227 (incorporating ER 186).

Health coverage is not just a vital employment benefit, it is one of the ways that Cedar Park performs its religious duty to care for church employees. ER 227–28 (incorporating ER 185, 193). This religious obligation extends past furthering employees' spiritual and emotional well-being to protecting their physical health. ER 227 (incorporating ER 185). A group health insurance plan is Cedar Park's only viable way of safeguarding its employees' health, which is not just a religious calling but a legal obligation under the federal Patient Protection and Affordable Care Act ("ACA"). *Id.*

[2] Cedar Park also obtained repeated assurances from its broker that the church's health plan excluded coverage of abortifacient contraceptives, including emergency contraception and copper intrauterine devices, that may destroy a fertilized embryo. ER 227 (incorporating ER 186). When the church discovered these guarantees were incorrect, it took immediate steps to exclude abortifacients from its health plan at the earliest opportunity. *Id.*

After evaluating self-insurance, Cedar Park discovered that it would cost roughly $243,125 more *annually* to become self-insured and that this number is expected to *double* within a few years due to increased plan use. *Id.* The church cannot outlay hundreds of thousands of dollars more each year for health insurance without significantly reducing its other ministries. *Id.* Purchasing group health insurance, which is regulated by the Washington State Office of the Insurance Commissioner, is the only sustainable way for Cedar Park to keep its religious ministries intact. *Id.*

C. Washington's abortion-coverage mandate

Washington Senate Bill 6219, which took effect on June 7, 2018, establishes new rules for group health plans issued or renewed in 2019 or later by requiring them to include coverage for abortions and abortifacients. A health plan that "provides coverage for maternity care or services . . . *must also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy*." ER 228 (incorporating ER 186); Wash. Rev. Code § 48.43.073(1) (emphasis added); Wash. Admin. Code § 284-43-7220(2). What's more, such a health plan generally "*may not limit in any way* a person's access to

services related to the abortion of a pregnancy." ER 228 (incorporating ER 186); Wash. Rev. Code § 48.43.073(2)(a) (emphasis added).

Group health plans also must cover (1) "*[a]ll* contraceptive drugs, devices, and other products, approved by the federal food and drug administration, including over-the-counter contraceptive drugs, devices, and products, approved by the federal food and drug administration," (2) "[v]oluntary sterilization procedures," and (3) related "consultations, examinations, procedures, and medical services that are necessary to prescribe, dispense, insert, deliver, distribute, administer, or remove" the above-mentioned items. ER 228 (incorporating ER 186); Wash. Rev. Code § 48.43.072(1) (emphasis added).[3]

Any person who violates Washington's abortion-coverage mandate is guilty of a gross misdemeanor and may be fined up to $1,000 and imprisoned up to 364 days, in addition to other potential penalties. ER 228 (incorporating ER 191); Wash. Rev. Code § 48.01.080. Nonetheless, Senate Bill 6219 contains no exemption for houses of worship or other

[3] The Insurance Commissioner's regulations implementing Senate Bill 6219's abortion-coverage requirement mostly restate the law's text and provides no material clarification of its meaning. Wash. Admin. Code § 284-43-7220.

religious ministries who object to covering abortion and abortifacient contraceptives in their health plans. ER 228 (incorporating ER 186–87).

Rejecting this crisis of conscience out of hand, the bill's sponsor—Senator Steve Hobbs—publicly stated that churches can sue if they do not wish to provide insurance coverage for abortion. ER 228 (incorporating ER 187). State officials thus deliberately targeted houses of worship for mandatory abortion coverage and, in so doing, intentionally violated their religious beliefs about the sanctity of human life. *Id.*

At the same time, state officials provided explicit secular exemptions to the abortion-coverage mandate. First, Senate Bill 6219 does not apply to all health plans. It excludes coverage incidental to a property/casualty liability insurance policy, workers' compensation coverage, self-funded health plans, and student-only plans, among other things. ER 228 (incorporating 188–89); Wash. Rev. Code § 48.43.005(29). Second, the bill's abortion-coverage mandate does not apply "to the minimum extent necessary for the state to be in compliance" with "federal requirements" that are a "condition to the allocation of federal funds to the state." ER 228 (incorporating ER 188); Wash. Rev. Code

§ 48.43.073(5). In other words, if federal dollars are at stake, Washington's abortion-coverage requirement gives way.

D. Washington's conscience statute

Another Washington statute purports to safeguard conscience rights in the insurance context. But the protection it affords to houses of worship—and most other conscientious objectors—is superficial and ultimately unhelpful. ER 228 (incorporating ER 189–92); Wash. Rev. Code § 48.43.065. From the beginning, § 48.43.065(1) makes clear that conscientious objectors enjoy protection only to the extent there is no impact on employees' ability "to receive the full range of services covered under the [basic health] plan," including abortion services.

The only accommodation § 48.43.065 gives houses of worship with religious objections to covering "a specific service" (like abortion) is that they are not *directly* required to "purchase coverage for that service" from an insurance provider. Wash. Rev. Code § 48.43.065(3)(a); *accord* ER 228 (incorporating ER 190). Simultaneously, the conscience law requires a church's insurance provider to provide *indirect* "coverage of, and timely access to, any service or services excluded from [an individual's] benefits package [like abortion] as a result of their

employer's . . . exercise of the conscience clause." Wash. Rev. Code § 48.43.065(3)(b); *accord* ER 228 (incorporating ER 190). And it allows insurance providers to make houses of worship *pay* for this abortion coverage, as "[n]othing in this section requires a health carrier . . . to provide any health care services without appropriate payment of premium or fee." Wash. Rev. Code § 48.43.065(4); *accord* ER 228 (incorporating ER 190).

In other words, Washington's conscience statute is a fig leaf that inflicts—rather than mitigates—Cedar Park's religious harm. It *requires* insurance providers to include objectionable abortion and abortifacient-contraceptive coverage in Cedar Park's group health plan, then authorizes insurance providers to *charge* Cedar Park for that abortion coverage. ER 228 (incorporating ER 190–91).

A Washington Attorney General opinion explains how insurance providers may pull off this sleight of hand: it suggests increasing Cedar Park's premiums by characterizing the cost of objectional services (like abortion) as "overhead." ER 228 (incorporating ER 191); Wash. Att'y Gen. Op. 2002 No. 5, *Interpretation of "Conscientious Objection" Statute Allowing Employers to Refrain from Including Certain Items in the*

Employee Health Care Benefit Package (Aug. 8, 2002), https://bit.ly/3fzu14B ("2002 AG Opinion").

Cedar Park—like many religious organizations—objects "to paying for, facilitating access to, or providing insurance coverage for abortion or abortifacient contraceptives *under any circumstance*." ER 228 (incorporating ER 192) (emphasis added). It does not matter whether the payment or facilitation of abortion is direct or indirect. Section 48.43.065 offers only a mirage of protection. Rather than providing Cedar Park with a meaningful accommodation, § 48.43.065 insists the church *include* objectionable abortion and abortifacient-contraceptive coverage in its health plan *and* pay for it too.

But Washington law does not deprive every employer of true conscience protection. Section 48.43.065(2)(a) safeguards health care providers, religiously-sponsored health carriers, and health care facilities from being "required by law or contract *in any circumstances* to participate in the provision of or payment of a specific service [like abortion] if they object to so doing for reason of conscience or religion." (emphasis added); *accord* ER 228 (incorporating ER 195). Health care providers, religiously-sponsored carriers, and health care facilities are

thus completely exempt from including abortion coverage in their employee health plans. ER 228 (incorporating ER 189–90). Neither must religiously-sponsored health carriers include abortion coverage in the plans they offer to others. All they must do is inform enrollees of the services they refuse to cover and ensure those enrollees have prompt access to written information about how they may directly access those services in an expeditious manner. *Id.*; Wash. Rev. Code § 48.43.065(2)(b).

In sum, Washington offers real conscience protection to health care providers, religiously-sponsored health carriers, and health care facilities. These entities need not include objectionable services like abortion in their employee health plans or pay for objectionable abortion coverage in any circumstance. ER 228 (incorporating 190). Yet because Cedar Park is a church and not a healthcare entity, Washington *forces* it to (at best) indirectly cover abortion in its health plan, and *authorizes* insurance providers to make Cedar Park pay for this

abortion coverage, in violation of its beliefs. ER 228 (incorporating ER 190–91).[4]

E. The impact of Washington's abortion-coverage mandate on Cedar Park and its health plan

Cedar Park offers its employees a health plan with comprehensive maternity coverage for religious reasons and because the ACA requires the church to do so. ER 228 (incorporating 192–93); *accord* 26 U.S.C. § 4980H; 42 U.S.C. § 18022(b)(1)(D). Otherwise, Cedar Park faces crippling fines of up to $100 per plan participant for *each day* it fails to comply. ER 228 (incorporating ER 193); 26 U.S.C. § 4980D. Just as the Washington Legislature anticipated, the church's group health plan thus automatically triggers Senate Bill 6219's abortion-coverage requirement. ER 228 (incorporating ER 193).

As a result, Cedar Park's insurance provider—Kaiser Permanente— informed the church on August 14, 2019, that it would directly include abortion coverage in the church's health plan, set to renew on September 1, 2019. ER 227. In fact, post-Senate Bill 6219,

[4] The Insurance Commission's regulations implementing Senate Bill 6219's abortion-coverage requirement lack substance and state only that the law "does not diminish or affect any rights or responsibilities provided under RCW 48.43.065." Wash. Admin. Code § 284-43-7220(3).

Kaiser offers no abortion exclusions to fully insured groups like Cedar Park, whether under § 48.43.065 or otherwise. ER 227–28.

But that does not mean Kaiser Permanente objects to the kind of policy Cedar Park needs to act in accord with its religious beliefs. To the contrary, Kaiser expressed its willingness to eliminate abortion coverage from Cedar Park's health plan mid-year if a court enjoined Senate Bill 6219's application to houses of worship. ER 228.

Without an injunction, accommodating Cedar Park's religious beliefs about the sanctity of human life poses too great of a risk to Kaiser Permanente and other nonreligious health insurers. Doing so would subject an insurer to Senate Bill 6219's harsh penalties, as well as to penalties and potentially devastating administrative action under Washington Revised Code § 48.30.010, which outlaws unfair or deceptive acts or practices in the insurance business, and Washington Revised Code § 48.30.300, which outlaws sex discrimination in the insurance business. ER 228 (incorporating 191–92).

The Washington Attorney General's 2002 opinion proposes *both* types of additional liability for a nonreligious insurance provider that includes comprehensive prescription drug coverage in Cedar Park's

group health plan, while simultaneously excluding coverage for abortifacient contraceptives. 2002 AG Opinion. And the Washington Attorney General did so by characterizing insurance providers' accommodation of Cedar Park's religious objection to abortifacient coverage as both an "unfair practice" and "sex discrimination."[5] *Id.*

In short, Kaiser Permanente's insertion of direct abortion coverage into Cedar Park's health plan was the natural result of Washington's enactment of Senate Bill 6219. ER 227–28. Once Cedar Park received notice of this involuntary change to its plan, the church had only 18 days to act before its policy renewed. ER 227. To ensure that Cedar Park's employees did not experience a devastating lapse in health coverage, the church was forced to renew its modified plan under protest. *Id.*

F. Proceedings in the district court

Cedar Park filed suit in the U.S. District Court for the Western District of Washington to obtain protection against Washington's

[5] Washington law did not actually make accommodating Cedar Park's religious beliefs illegal until Senate Bill 6219 took effect. The Washington Attorney General's 2002 opinion was unfounded and nonbinding. *Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 305 P.3d 1079, 1082 (Wash. 2013) (en banc).

abortion-coverage mandate, just as Senate Bill 6219's sponsor—Senator Steve Hobbs— boasted was the church's only recourse. ER 42–66.

1. Procedural history[6]

The church's Verified Complaint raised free exercise, establishment, religious autonomy, and equal protection claims based on the First and Fourteenth Amendments. ER 55–64. Less than a month later, Cedar Park filed its First Amended Verified Complaint, ER 67–94, which added a request for facial relief against Senate Bill 6219's application to houses of worship, ER 90.

Instead of an answer, Washington officials moved to dismiss in April 2019. ER 95–123. Cedar Park thereafter sought leave to file a Second Amended Verified Complaint that explicitly challenged § 48.43.065—Washington's conscience statute—and corrected two factual allegations that were inadvertently incorrect.[7] The district court

[6] Cedar Park does not challenge in this appeal the district court's denial of its renewed preliminary-injunction motion, only the district court's dismissal for lack of standing. Because Cedar Park's preliminary-injunction motions are not relevant to this appeal, they do not feature in this procedural history.

[7] Pl.'s Mot. for Leave to File Second Am. Compl., *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 3:19-cv-05181 (W.D. Wash.), ECF 42.

granted both Washington officials' motion to dismiss and Cedar Park's motion to amend in August 2019. ER 1–22.

Cedar Park filed a Second Amended Verified Complaint shortly thereafter. ER 178–208. But that complaint did not include three facts that developed later: (1) because of Senate Bill 6219, Kaiser Permanente inserted abortion coverage directly into Cedar Park's health plan; (2) Kaiser Permanente refused to grant Cedar Park even § 48.43.065's ineffective conscience protection; and (3) Kaiser Permanente was willing to exclude abortion coverage from Cedar Park's health plan mid-year if Senate Bill 6219 did not apply to the church. In October 2019, Cedar Park moved for leave to file a Supplemental Verified Complaint adding these new facts.[8]

Washington officials filed a renewed motion to dismiss, ER 242–59, and a supporting declaration by Paul M. Crisalli, ER 234–36, with an attached press release, ER 238–40. Two of their main arguments were that (1) Cedar Park lacked standing as it "does not suffer an injury-in-fact because of the Defendants' acts" and (2) "[e]ven if there

[8] Pl.'s Mot. for Leave to File Suppl. V. Compl., *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 3:19-cv-05181 (W.D. Wash.), ECF 51.

were an injury in fact, it is caused by the market, not the Defendants, meaning that [a court order] in favor of Cedar Park would not redress any possible harms."[9] ER 256. Both points were built on the September 19, 2019 press release issued by the Office of the Insurance Commissioner, which the Crisalli Declaration verified. ER 234–40.

2. The Crisalli Declaration

The press release attached to the Crisalli Declaration announces the Office of the Insurance Commissioner's approval of three plans offered by Providence Health Plan in six Washington counties: Clark, Spokane, Thurston, Benton, Franklin, and Walla Walla. ER 238. It explains that Providence is the first religious health insurer to state a faith-based objection to covering abortion in its health plans. *Id.* As a result, Providence's plans will cover abortion "only if there is a severe threat to the mother, or if the fetus cannot be sustained." *Id.* Providence

[9] The state heavily regulates Washington's insurance market. In particular, Senate Bill 6219 makes "[h]ealth carriers . . . responsible for compliance with the [abortion-coverage mandate] and . . . for the compliance of any person or organization acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements concerning the coverage of, payment for, or provision of contraceptive services and supplies, voluntary sterilization, and abortion." Wash. Admin. Code § 284-43-7200(2).

need only inform enrollees that they can access separate abortion coverage through "the Washington Department of Health (DOH) Family Planning Program" because Washington's conscience law "allows providers, insurers, and facilities to refuse to participate in or pay for [abortion] services for reason of conscience or religion." ER 238–39.

Cedar Park had roughly 20 days to determine what the Insurance Commissioner had done and respond to Mr. Crisalli's declaration in its district court filings. That timeframe was insufficient for the church or its healthcare consultant to determine—in any verifiable manner—whether Cedar Park could purchase a Providence group health plan. Yet the district court assumed (incorrectly, as it turns out) that Cedar Park was eligible to purchase such a plan and ruled against the church on that basis.

3. The district court's ruling

At the outset, the district court granted Cedar Park's motion to file its Supplemental Verified Complaint. ER 31, 36. It then ruled on the Washington officials' motion to dismiss as a factual attack on jurisdiction—in the form of Article III standing—under Federal Rule of

Civil Procedure 12(b)(1).[10] ER 31. The court considered evidence from outside the complaint and determined that "extrinsic evidence" from the Crisalli Declaration "establish[ed] that Providence offers a plan that conforms with Cedar Park's desired needs." *Id.* In the district court's view, Washington's approval of three Providence health plans in six Washington counties on September 19, 2019, stripped Cedar Park of Article III standing to challenge Senate Bill 6219. ER 32–35.

First, the district court held the church lacked an injury in fact because Providence offers a product that meets Cedar Parks' requirements. ER 33. The district court criticized Cedar Park for "maintain-[ing] a business relationship" with Kaiser Permanente "despite the potential availability of suitable alternatives" from Providence, ER 33, even though no evidence indicated that Providence offered a group health plan where Cedar Park is located.

That the church's health plan renewed on September 1, 2019—weeks before the Insurance Commissioner approved any Providence

[10] *But see* ER 31–32 ("A factual attack [on jurisdiction] requires a factual dispute, and there is none here." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). Therefore, in the absence of a factual dispute, the Court will consider the evidence in the record when analyzing the issue of standing.").

health plans—made no difference. ER 226 (incorporating ER 180). When Cedar Park pointed out that "it was impossible to do business with Providence" during the relevant timeframe, the court faulted the church for failing to predict the Insurance Commissioner's unforeseeable actions and prove *ex ante* that no suitable "plan from Providence" was obtainable either by "fact or plausible allegation." ER 33.

Second, the district court looked outside the complaint once again to the Declaration of Jason ("Jay") Smith—Cedar Park's lead pastor—and an attached email from Kaiser Permanente, which the church filed in support of its preliminary-injunction motion. ER 33 (citing "Dkt. 50-1 at 2").[11] The court misread that email as showing that Kaiser (a nonreligious insurance provider) could obtain permission from the Insurance Commissioner to offer an abortion-excluding, Providence-like health plan. ER 33. And it pointed to that misconception as evidence that "the marketplace," not "government directed or sanctioned religious discrimination" was responsible for Cedar Park's injury. ER 34; *accord* ER 32–34.

[11] The Smith Declaration and attached emails are located at ER 209–25.

The district court ignored that Washington only gives religious health carriers (like Providence, not Kaiser) the option to exclude abortion coverage from the group health plans they sell. Wash. Rev. Code § 48.43.065(2)(a). And Kaiser Permanente's email shows not that Kaiser could seek approval of an abortion-excluding group plan from the Insurance Commissioner, but that "if an exception to SB 6219 were made for churches or houses o[f] worship for Cedar Park, such as by court order" or the regulations implementing Senate Bill 6219, Kaiser "would remove abortion coverage from Cedar Park's health care plan" mid-year.[12] ER 210; *accord* ER 213.

Third, the district court held that Cedar Park failed to show that the absence of a group health plan "in the marketplace that complied with" the church's religious beliefs when it "needed to renew its health insurance plan" was "*because of* SB 6219." ER 34. It attributed this problem to "the marketplace," ER 33, not Washington's abortion-coverage mandate, based on the fact that "Providence offers what

[12] Ultimately, the Insurance Commissioner's regulations implementing Senate Bill 6219 did not allow secular insurance providers like Kaiser Permanente to exclude abortion from Cedar Park's group health plan. They add nothing to § 48.43.065's facile religious accommodation for houses of worship. Wash. Admin. Code § 284-43-7220(3).

appears to be an acceptable product despite the continued applicability of SB 6219," ER 34.

The district court overlooked that § 48.43.065(2)(a) allows religious insurance providers like Providence to exclude abortion from their plans, but not secular providers like Kaiser Permanente. And the court held that "Cedar Park has failed to establish an injury or an injury that is fairly traceable to SB 6219" based on that mistake. ER 34.

Fourth, the district court ruled that Cedar Park lacked standing to bring an equal-protection claim because the church is not "similarly situated" to the health care providers, religiously-sponsored health carriers, and health care facilities that § 48.43.065(2)(a) categorically exempts from participating in or paying for abortion. ER 34. The court recognized that Cedar Park shares the "the same religious beliefs" about abortion as the entities § 48.43.065(2)(a) exempts. *Id.* But the court held that similarity made no difference because health care providers, religiously-sponsored health carriers, and health care facilities "are in the business of providing health care," whereas the church is "purchasing health care." ER 35. This deprived Cedar Park of

the ability to "establish . . . 'unequal treatment'" and thus an equal-protection "injury." *Id.*

But § 48.43.065(2)(a)'s religious exemption is not limited to the provision of health care services. ER 35. It extends to "any circumstances" in which health care providers, religiously-sponsored health carriers, and health care facilities would be "required by law" to "pay[] [for] a specific service." Wash. Rev. Code § 48.43.065(2)(a). That includes Senate Bill 6219's demand that health care providers, religiously-sponsored health carriers, and health care facilities include and pay for abortion coverage in their employee health plans—the exact same requirement that Cedar Park challenges here.

After all was said and done, the district court concluded that "Cedar Park ha[d] failed to meet its burden in establishing an injury in fact on any of its claims, and . . . grant[ed] the State's motion to dismiss for lack of jurisdiction" under Federal Rule of Civil Procedure 12(b)(1). ER 35; *accord* ER 36. It entered judgment the same day, dismissing the church's complaint "for lack of jurisdiction" and closing Cedar Park's case without a hearing before any discovery could took place. ER 37.

G. Cedar Park's inability to acquire a Providence plan

In light of the district court's unexpected ruling and reliance on a mere press release to reject the church's standing, Cedar Park asked its healthcare consultant, Jami M. Hansen, Vice President for Arthur J. Gallagher & Company's health and welfare consulting services, to determine whether the church could purchase "any group health plans that do not cover abortions and abortifacients" from Providence "in the two counties where Cedar Park operates: King and Snohomish." Decl. of Jami M. Hansen in Supp. of Pl.-Appellant's Mot. to Suppl. the Record at 2, *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, No. 20-35507 (9th Cir. July 31, 2020), ECF No. 15-2 ("Hansen Decl."). Ms. Hansen contacted Providence in June 2020.

Debby Kemp, a Providence account executive, informed Ms. Hansen that Providence "does *not* offer a group health plan that excludes abortion and abortifacients where Cedar Park is located." *Id.* (emphasis added). "Providence does offer a self-funded plan in King County but that is not a viable option for Cedar Park. It is cost prohibitive and would not meet the needs of several [church] employees and their beneficiaries who have ongoing serious illnesses." *Id.* at 2–3. Moreover,

Providence has "no current plans to expand" its "fully insured group offerings" into King and Snohomish Counties. *Id.* at 4 (Ex. A).

Because no Providence group health plans are available to Cedar Park, the Insurance Commissioner's approval of three Providence health plans does not diminish the church's injury. It simply proves that Washington conditions Cedar Park's ability to purchase health insurance that comports with its religious beliefs on a religiously-sponsored health carrier (1) independently objecting to offering abortion coverage under § 48.43.065(2)(a), and (2) providing a group health plan in the area where Cedar Park is located.

Washington law thus conditions Cedar Park's fundamental right to the free exercise of religion on a religious insurance provider's exercise of its own faith-based objection to covering abortion and separate decision to enter into the local market. If Cedar Park's free-exercise rights are respected, it is merely a happy byproduct of these two coincidences and Washington's greater respect for religiously-sponsored health carriers' religious autonomy. Because the stars did not align for Cedar Park, Washington law directly caused Cedar Park to lose its abortion-excluding group health plan.

SUMMARY OF THE ARGUMENT

Cedar Park has Article III standing under this Court's recent decision in *Skyline*, which held that a California church had standing to challenge a California abortion-coverage requirement that mirrors Washington's. Just as Washington officials intended, Senate Bill 6219's abortion-coverage mandate and penalties for noncompliance caused Cedar Park's insurance provider to discontinue its abortion-excluding health plan, forcing the church to purchase a group health plan that violates its religious teachings. That injury in fact is fairly traceable to Senate Bill 6219's abortion-coverage mandate, and it will be remedied by a court order declaring the law's application to houses of worship unconstitutional and enjoining that implementation of the law.

The district court reached the opposite result by misconstruing facts from outside the complaint, although Washington officials never raised a factual attack on the court's jurisdiction. Because the district court's holding turns on extrinsic evidence that it should not have considered, its order is fatally flawed, and this Court should confirm Cedar Park's standing and remand for further proceedings.

Even looking to extrinsic facts, the district court misread them. No evidence supports the court's assumption that Cedar Park could obtain an abortion-excluding group health plan from a different insurance provider. That such a plan might be available to a few ministries elsewhere has no impact on Cedar Park's injury or standing to challenge Senate Bill 6219's application.

STANDARD OF REVIEW

This Court reviews "*de novo* a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999). Under that standard, this Court gives no deference to the district court's ruling, but "freely considers the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (cleaned up).

ARGUMENT

I. The facts of Cedar Park's complaint demonstrate its standing to challenge Senate Bill 6219's application to houses of worship.

Standing is a threshold question in every federal case. *McMichael v. Napa Cty.*, 709 F.2d 1268, 1269 (9th Cir. 1983). To get through the courthouse door, "a plaintiff must 'show that the facts alleged present

the court with a 'case or controversy' in the constitutional sense.'" *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973)). And that means establishing three familiar elements: "(1) injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable decision." *Skyline*, 968 F.3d at 746 (cleaned up).

Any fair assessment of Cedar Park's complaint shows that the church meets all three requirements. Cedar Park's insurance provider inserted abortion coverage directly into the church's health plan—over the church's objection—in response to Senate Bill 6219, which took effect as soon as the church's plan renewed. This caused Cedar Park irreparable spiritual harm. By holding that Cedar Park lacked standing to challenge Senate Bill 6219, the district court erred.

A. Cedar Park's insurer inserted abortion coverage into the church's health plan as soon as Senate Bill 6219 took effect, causing injury to its religious beliefs.

Article III demands that plaintiffs allege an injury in fact that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Skyline*, 968 F.3d at 747. The Supreme Court has long deemed "intangible" free-exercise harms "[c]oncrete" for

standing purposes. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)). And no doubt exists that Washington's abortion-coverage mandate imposes a particularized injury on Cedar Park or that it affects the church "in a personal and individual way." *Id.* at 1548.

Cedar Park's Supplemental Verified Complaint alleges that before Senate Bill 6219 came into force, Kaiser Permanente offered the church a group health plan that accorded with the church's religious beliefs.[13] ER 227 (incorporating ER 185). Kaiser willingly included comprehensive maternity care in the church's health plan, while excluding abortion coverage. ER 227 (incorporating ER 185–86). Kaiser was also happy to exclude abortifacient-contraceptive coverage from Cedar Park's health plan. *Id.*

Once Senate Bill 6219 took effect, Kaiser Permanente was no longer able to accommodate Cedar Park's religious beliefs. Kaiser

[13] Because the district court granted Cedar Park's motion to file a supplemental complaint, that "supplemental pleading . . . became the operative pleading in the case on which subject-matter jurisdiction must be based." *Northstar Fin. Advisors v. Schwab Invs.*, 779 F.3d 1036, 1047 (9th Cir. 2015). That remains true even though Cedar Park's supplemental complaint contains "allegations of events that occurred after the commencement of the action." *Id.* at 1046.

informed the church that Kaiser would directly include abortion coverage in the church's health plan when it renewed on September 1, 2019, and Kaiser did just that. ER 227. In light of Washington's abortion-coverage mandate, Kaiser adopted a policy of no abortion exclusions for fully insured groups like Cedar Park, even if they are houses of worship. ER 227–28.

But if the church succeeds in enjoining Senate Bill 6219's application to houses of worship, Kaiser has pledged to eliminate the abortion coverage in its health plan at the earliest opportunity. ER 228. The only thing standing between Cedar Park and the group health plan it had and seeks to regain is not Kaiser, but Washington's abortion-coverage mandate. *Id.*

Under this Court's precedent, the allegations of Cedar Park's supplemental complaint establish an injury in fact. Indeed, this is not the first the Court has considered an abortion-coverage mandate imposed by a state in this Circuit. When a California agency demanded that insurance providers insert abortion coverage into churches' health plans, Skyline Wesleyan Church filed suit. *Skyline*, 968 F.3d at 744–45. State officials argued the church lacked standing and the district court

agreed. *Id.* at 45–46. This Court correctly held "that Skyline . . . suffered an injury in fact," *id.* at 747, and its logic applies equally here.

Just like Cedar Park, before California officials issued an abortion-coverage mandate, "Skyline had insurance that excluded abortion coverage in a way that was consistent with its religious beliefs." *Id.* Afterwards, "Skyline did not have that coverage, and it . . . presented evidence that its new coverage violated its religious beliefs." *Id.* Give those circumstances, this Court held that "[t]here is nothing hypothetical about the situation" and that "Article III [did] not require Skyline to . . . take[] further steps before seeking redress in court for its injury." *Id.* Skyline's injury was complete because it had "already lost something it previously had," *id.* at 748, in particular, a group insurance policy that complied with its religious beliefs about the sanctity of life.

Because Senate Bill 6219 caused Cedar Park to lose the life-affirming health policy it previously had and wants reinstated, the church's free-exercise injury is just as complete as Skyline's. There is nothing "hypothetical" or uncertain about the church's harm. *Id.* at 747. Cedar Park is saddled with a health plan that directly includes abortion

coverage in violation of its religious beliefs. Far less of an injury satisfies Article III. *Spokeo*, 136 S. Ct. at 1549 (recognizing that mere "risk of real harm can[ ] satisfy the requirement of concreteness").

Cedar Park also pled a classic equal-protection injury: religiously "discriminatory conduct" where the church is "the direct target of the discrimination." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1055 (9th Cir. 2002). The complaint alleges that Senate Bill 6219's abortion-coverage mandate applies to churches' employee health plans and that Washington's conscience law offers houses of worship no meaningful religious exemption. ER 228 (incorporating ER 186–87, 190–91). Simultaneously, Washington's conscience law exempts health care providers, religiously-sponsored health carriers, and health care facilities from including religiously-objectionable abortion coverage in their employee health plans. ER 228 (incorporating 189–91).

Because Cedar Park alleged that Washington law deprives the church of "fundamental" free-exercise rights not to facilitate or pay for abortion "guaranteed to other similarly situated entities," the church unquestionably has "standing to press its equal protection claim." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 904 (9th Cir. 2018).

B. Cedar Park's loss of group health coverage that comports with its religious beliefs is fairly traceable to Washington officials' enactment and implementation of Senate Bill 6219.

Once the plaintiff demonstrates an injury in fact, it must show the "injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Skyline*, 968 F.3d at 748 (cleaned up). That does not mean that Cedar Park must show Washington officials' enactment and implementation of SB 6219 is "the sole source of [its] injury." *Id.* (cleaned up). An injury is fairly traceable to a defendant's conduct even when there are "multiple links in the chain" of causation. *Id.* (cleaned up). The links must simply be "plausib[le]."[14] *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (cleaned up).

In *Skyline*, this Court held that there was "a direct chain of causation from [California officials] requiring seven insurers [to insert abortion] coverage, to Skyline's insurer's doing so, to Skyline's losing access to the type of coverage it wanted." 968 F.3d at 748. What's more,

[14] Because Cedar Park's equal-protection claim is based on the unequal terms of Washington's conscience law, there is no question that the church's injury is fairly traceable to the state.

it could "hardly be said that Skyline caused its own injury when it ha[d] shown that, if it were to pursue any of the alternatives floated by the" state-agency defendant, Skyline "would remain worse off than it had been before" California officials required the insurers to change their coverage. *Id.* at 748–49.

The same is true here: Washington officials' enactment and implementation of Senate Bill 6219 led to Kaiser Permanente's insertion of abortion coverage into Cedar Park's health plan, which resulted in the church losing the abortion-excluding health plan it previously enjoyed. There is a direct chain of causation from Washington's directive to Cedar Park losing the type of coverage it wanted.

Cedar Park's case for traceability is even stronger than Skyline's. Cedar Park's insurance provider, Kaiser Permanente, has pledged to exclude abortion coverage from Cedar Park's health plan at the earliest opportunity *if* Senate Bill 6219's application is enjoined. ER 228. In contrast, Skyline lacked such evidence. So no doubt exists as to what is causing Cedar Park's harm: the church's allegations demonstrate that

Senate Bill 6219 is the only roadblock to it reclaiming the abortion-excluding health plan it lost.

Nor may Washington officials argue that Cedar Park's injury is self-inflicted because it could (1) drop health coverage and incur massive ACA penalties, (2) self-insure at astronomical cost, or (3) avoid SB 6219's application some other way. Cedar Park, like Skyline before it, showed that these "alternatives would be a worse fit for its needs than having a [group health] plan." *Skyline*, 968 F.3d at 748.

Purchasing group health coverage subject to Washington's abortion-coverage mandate is the only viable way for the church to safeguard its employees' health. ER 227 (incorporating ER 185). Dropping health coverage would (1) violate Cedar Park's religious beliefs ER 227 (incorporating 185); (2) incur massive ACA penalties, ER 228 (incorporating ER 193), 26 U.S.C. § 4980D; and (3) prevent the church from attracting high-quality pastors and other employees for its ministries, ER 228 (incorporating 193). Self-insurance is not an option because it (a) would cost Cedar Park $243,125 more *annually*, (b) the cost would likely *double* in a few years due to increased plan use, and

(c) such an expenditure would detriment the church's other ministries, some of which might not survive. ER 227 (incorporating 185).

Simply put, if Cedar Park "were to pursue any of the alternatives floated by [Washington officials], it would remain worse off than it had been before" the abortion-coverage mandate came into effect. *Skyline*, 968 F.3d at 748–49. No plausible argument exists that Cedar Park "caused its own injury." *Id.* at 748. The fault lies with Washington officials who intentionally enacted Senate Bill 6219 with no religious exception and implemented the law against houses of worship.

C. Enjoining Senate Bill 6219's application to houses of worship would redress Cedar Park's injury.

The final component of standing is redressability, which requires a plaintiff to show "that it is likely, as opposed to merely speculative, that its injury will be redressed by a favorable decision." *Skyline*, 968 F.3d at 749 (cleaned up). Article III does not require a "guarantee that the plaintiff's injuries will be redressed." *Id.* (cleaned up). Cedar Park must simply show that the relief its complaint requests would likely redress its alleged injury. *Id.*

This Court in *Skyline* held that Skyline's injury was redressable by its request for a declaration that California's coverage requirement

violated the Free Exercise Cause and should be enjoined. *Id.* Although Skyline could not show (as can Cedar Park) that an insurer would likely offer coverage consistent with Skyline's beliefs if the California regulations were enjoined, this Court recognized that a plaintiff has standing "when the defendant's actions produce injury through their determinative or coercive effect upon the action of someone else." *Id.* (cleaned up). And California's actions certainly had a coercive effect on insurers who offered health plans that did not cover abortion. In fact, this Court concluded that the predictable effect of granting Skyline its requested relief would be "that at least one insurer would be willing to sell [Skyline] a plan that accords with its religious beliefs." *Id.* at 750.

Here, the church's complaint similarly requests (1) a declaration that applying Senate Bill 6219 to Cedar Park and other houses of worship violates their First and Fourteenth Amendments rights, and (2) a permanent injunction forbidding Washington officials from enforcing the abortion-coverage mandate against Cedar Park and other houses of worship. ER 229. Together, "these forms of relief . . . would likely provide [the church] redress." *Skyline*, 968 F.3d at 749.

Senate Bill 6219's abortion-coverage mandate, and stark penalties for violations, have a "coercive effect" on nonreligious insurance providers. *Id.* at 750 (cleaned up). Before Senate Bill 6219 came into effect, Kaiser voluntarily offered the church a group health plan that "comported with [its] beliefs." *Id.* That willingness ended when Senate Bill 6219 made Kaiser's exclusion of abortion coverage illegal if a health plan offers comprehensive maternity care, as almost all of them do. The harm caused to Cedar Park and other houses of worship was the natural and entirely "predictable effect of [Senate Bill 6219] on the decisions of" secular insurance providers. *Id.* at 749 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)).

If Cedar Park obtains a declaratory judgment and related injunction against Senate Bill 6219's application, Kaiser Permanente has pledged to remove abortion coverage from its health plan at the earliest opportunity. ER 228. No doubt exists that "at least one insurer would be willing to sell [Cedar Park] a plan that accords with its religious beliefs." *Skyline*, 968 F.3d at 750. And that would remedy the harm Senate Bill 6219 caused by restricting the church's options to purchasing a group health plan that includes abortion coverage in

"conflict[] with its beliefs." *Id.* It would also remedy Cedar Park's equal-protection injury by granting the church the same religious exemption afforded to health-care-related entities.

D. Cedar Park has standing, and *Bell v. Hood* required the district court to entertain its suit.

Generally speaking, "any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction." *Trustees of Screen Actors Guild-Producers Pension & Health Plans v. NYCA, Inc.*, 572 F.3d 771, 775 (9th Cir. 2009) (cleaned up). Cedar Park's supplemental complaint makes out "colorable federal claim[s] that properly belong[ ] in federal court." *Id.*; *accord Skyline*, 968 F.3d at 742 ("Skyline's federal free exercise claim is justiciable."). The district court did not dispute this conclusion. It simply held that extrinsic facts from the Crisalli Declaration, which are fully consistent with Cedar Park's factual allegations, *infra* Part II, put the church's standing in doubt.

This was error. Federal courts take "a broad view of constitutional standing in civil rights cases." *Wood v. City of San Diego*, 678 F.3d 1075, 1083 (9th Cir. 2012). The Ninth Circuit accordingly characterizes "jurisdictional dismissals in cases premised on federal-question jurisdiction [as] exceptional" and demands they "satisfy the requirements specified

in *Bell v. Hood*, 327 U.S. 678 (1946)." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Bell explains that federal courts must entertain suits lodged under the Constitution unless "the alleged claim . . . appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Safe Air for Everyone*, 373 F.3d at 1039 (quoting *Bell*, 327 U.S. at 682–83). It does not allow district courts to dismiss well-pled complaints "by mixing up a merits issue" with a jurisdictional issue like standing. *Careau Grp. v. United Farm Workers of Am.*, 940 F.2d 1291, 1294 (9th Cir. 1991). As the Supreme Court explained in *Bell*:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. [327 U.S. at 682.]

Questions like (1) whether *any* abortion-excluding group health plan is available to Cedar Park from *any* insurance provider in the state, or (2) whether houses of worship that object to including abortion coverage in their employee health plans are similarly situated to healthcare-related entities that have the same religious objection to

including abortion coverage in their employee health plans, may inform the merits of the church's claims.[15] But they have no bearing on the district court's jurisdiction to decide Cedar Park's case.

For example, "what conduct [Senate Bill 6219] prohibits . . . is a merits question. Subject matter jurisdiction, by contrast, refers to a tribunal's power to hear a case." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (cleaned up). No plausible argument exists that federal-question jurisdiction or standing is lacking here. And no one argues that Cedar Park's constitutional "claims are 'immaterial,' 'made solely for the purpose of obtaining federal jurisdiction,' or 'wholly insubstantial and frivolous.'" *Safe Air for Everyone*, 373 F.3d at 1040 (quoting *Bell*, 327 U.S. at 682–83). Consequently, *Bell* required the district court to "entertain th[is] suit." *Bell*, 327 U.S. at 681–82.

II. The district court erred in looking to extrinsic evidence because Washington officials failed to raise a factual attack on the court's jurisdiction.

Generally speaking, defendants must base motions to dismiss on the complaint and any documents incorporated therein. *Van Buskirk v.*

[15] ER 32, 34–35 (citing these factors as support for the district court's holding that Cedar Park lacks standing).

Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). One exception is when a defendant "disputes the truth of . . . allegations" that are relevant to "federal jurisdiction" under Federal Rule of Civil Procedure 12(b)(1). *Safe Air for Everyone*, 373 F.3d at 1039. Then the district court may consider extrinsic evidence without converting a motion to dismiss into a motion for summary judgment. *Id.*

Cedar Park consistently argued that the district court should not "consider evidence outside of the pleadings" like the Crisalli Declaration. ER 31. But the district court rejected that argument by characterizing Washington officials' motion to dismiss as a factual attack under Rule 12(b)(1) that allows defendants to "present[ ] extrinsic evidence for the court's consideration." *Id.* (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000), for the proposition that "jurisdictional attacks can be either facial or factual"). Paradoxically, the district court also recognized that: (1) "neither party attacks the truthfulness of the [other's] offered facts," (2) "[a] factual attack requires a factual dispute, and there is none here," and (3) this case involved "the absence of a factual dispute." ER 31–32 (cleaned up).

The district court could not have it both ways. Either Washington officials "challeng[ed] Plaintiff['s] allegations" that are relevant to federal court jurisdiction, in which case they could present extrinsic evidence, such as "declarations and affidavits," with competing facts. *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). Or the parties agreed on the relevant facts, in which case Washington officials failed to raise a factual attack on the district court's jurisdiction and the court's consideration of extrinsic evidence was improper. *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

In this case, the latter is true, and the district court erred by considering facts from outside the complaint. Washington officials never disputed Cedar Park's material factual allegations. They never submitted competing evidence. All they did was seek to *add* evidence that *supported* what Cedar Park had already alleged.

Specifically, Washington's officials asked the district court to consider a press release from the Office of the Insurance Commissioner—issued over 6 months after this case was filed—announcing three abortion-excluding Providence health plans available in six Washington counties. ER 234–40. Their renewed motion to

dismiss expressly admitted this evidence is "*consistent* with the allegations in Cedar Park's second amended complaint."[16] ER 249 (emphasis added). Washington officials thus failed to lodge a factual attack on the district court's jurisdiction, as the district court expressly recognized when it noted that "'[a] factual attack requires a factual dispute, and there is none here.'" ER 31 (quoting *Constitution Party of Pa*, 757 F.3d at 358).

A Rule 12(b)(1) factual attack, by definition, "challenge[s] the facts upon which subject matter jurisdiction depends." *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001). But that is not what Washington officials did. Time and again, they acknowledged the truth of Cedar Park's factual claims. *E.g.*, ER 249 (arguing the Crisalli Declaration is "*consistent* with the allegations in Cedar Park's second amended complaint") (emphasis added); Defs.-Appellees' Resp. to Pl.-Appellant's Mot. to Suppl. the Record at 1, ECF No. 16 ("Appellees' Resp.") ("Cedar Park acknowledged that Defendants

[16] *See* ER 228 (incorporating ER 188) (alleging that "[d]iscovery and investigation will demonstrate that the Insurance Commissioner has exempted at least one insurance carrier from complying with SB 6219's provisions requiring insurance coverage of abortion services").

allowed [religious] insurers (specifically Providence) to provide health plans" that exclude abortion coverage).

Washington officials never proffered "outside evidence that would disprove plaintiffs' allegations." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Because they made no factual attack on the district court's jurisdiction, the court erred in "review[ing] evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone*, 373 F.3d at 1039.

III. Because the district court's consideration of extrinsic evidence fatally infected its dismissal order, this Court should confirm Cedar Park's standing and remand.

Occasionally, when a district court wrongly grants a motion to dismiss based on Rule 12(b)(1), an appellate court may "proceed to address whether petitioners' allegations state a claim" under Rule 12(b)(6). *Morrison*, 561 U.S. at 254. This is not one of those instances. Disregarding the district court's error is appropriate when "nothing in [its] analysis . . . turned on the mistake[n]" choice to rule under Rule 12(b)(1) instead of Rule 12(b)(6). *Id.* In Cedar Park's case, that error made all the difference.

By labeling Washington officials' motion to dismiss as a factual attack on jurisdiction under Rule 12(b)(1), the district court was allowed to "proceed as it never could under Rule 12(b)(6)." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). And it did, focusing nearly all of its standing analysis on facts from outside the complaint, which is occasionally allowed under Rule 12(b)(1), *Safe Air for Everyone*, 373 F.3d at 1039, but is never permitted under Rule 12(b)(6), *Van Buskirk*, 284 F.3d at 980.

In this case, the district court's dismissal order hinged on the Crisalli Declaration's extrinsic evidence regarding the approval of Providence's three abortion-excluding health plans in six Washington counties. *E.g.*, ER 31 (stating that "the State's evidence establish[es] that Providence offers a plan that conforms with Cedar Park's desired needs"); ER 33 ("Kaiser Permanente does not offer a product that meets Cedar Park's requirements, while Providence does offer such a product"); ER 33 (rejecting Cedar Park's argument "that it was impossible to do business with Providence as of September 19, 2019" because the church did not show that it faces "any penalty . . . if it chose to switch providers" at some later date).

Ruling on Washington officials' dismissal motion under Rule 12(b)(1) rather than 12(b)(6) made all the difference. The district court would not have considered the Crisalli Declaration under Rule 12(b)(6). And that declaration is what persuaded the court that Cedar Park lacked standing. Under these circumstances, the Court should affirm Cedar Park's Article III standing, reverse the district court's dismissal order, and remand "for a determination on the merits." *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 141 (9th Cir. 1983).

IV. Even if this Court considers extrinsic facts, the district court misread them: Cedar Park does not qualify for a Providence group health plan.

Even if this Court considers the Crisalli Declaration's extrinsic facts, the district court got them wrong. What the attached press release from September 19, 2019 says is that the Office of the Insurance Commissioner approved Providence Health Plan to sell three plans in the individual market in six Washington counties: Clark, Spokane, Thurston, Benton, Franklin, and Walla Walla. ER 238.

Because "Providence is the first health insurer [in Washington] to invoke its religious conviction to limit coverage of abortion services to its enrollees," the state allows its health plans to cover abortion "only if

there is a severe threat to the mother, or if the fetus cannot be sustained." *Id.* Enrollees in Providence's plans may access separate abortion coverage "through the Washington Department of Health (DOH) Family Planning Program." *Id.* In short, Washington officials accommodated Providence because § 48.43.065(2)(a) "allows providers, insurers, and facilities to refuse to participate in or pay for services for reason of conscience or religion," including abortion. ER 239.

Nothing in the Crisalli Declaration or the attached press release indicates that Providence offers a group health plan in the counties where Cedar Park operates. *Accord* Appellees Resp. at 8 ("Washington never alleged that the OIC approved plans consistent with Cedar Park's religious beliefs in King and Snohomish Counties"). Yet the district court made that presumption and dismissed Cedar Park's supplemental complaint on that basis. *Supra* p. 52. This was error.[17]

[17] A district court's jurisdictional fact-finding under Rule 12(b)(1) "deprives litigants of the protections" they normally enjoy under Rule 12(b)(6) and Rule 56. *Sun Valley*, 711 F.2d at 139. So this Court has "defined certain limits." *Id.* One of those checks is that the court may not look to extrinsic evidence and engage in jurisdictional fact-finding "when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Safe Air for Everyone*, 373 F.3d at 1039 (cleaned up). Because the district court's fact-finding

A declaration by Jami M. Hansen, Vice President for Arthur J. Gallagher & Co.'s Health and Welfare Consulting Services, and Cedar Park's benefits consultant for 11 years, proves the district court's key factual assumption wrong: Providence does not offer an abortion-excluding group health plan where Cedar Park is located. Hansen Decl. at 1–2.

Ms. Hansen contacted Debby Kemp, a Providence account executive, on Cedar Park's behalf to determine whether the church could obtain "any group health plans that do not cover abortions and abortifacients because Cedar Park has strong biblical beliefs prohibiting its participation in plans including those benefits." *Id.* at 2. She specifically inquired into such a plan's availability in the "two counties where Cedar Park operates: King and Snohomish." *Id.*

Ms. Kemp answered that Providence "does not offer a group health plan that excludes abortion and abortifacients where Cedar Park is located," *id.*, and that Providence has "no current plans to expand" its

---

regarding Cedar Park's ability to obtain *any* abortion-excluding group health plan from *any* insurance provider in the state is "intermeshed" with the merits, the court erred in resolving this case under Rule 12(b)(1) for this independent reason. *Thornhill*, 594 F.2d at 735.

"fully insured group offerings" into these geographic areas, *id.* Ex. A at 4. "Providence does offer a self-funded plan in King County but that is not a viable option for Cedar Park" because it is "cost prohibitive and would not meet the needs of several [church] employees and their beneficiaries who have ongoing serious illnesses." Hansen Decl. at 2–3.

It is precisely because a plaintiff lacks the ability at the motion-to-dismiss stage to challenge a defendant's extra-record, self-serving "evidence" that district courts should decline to entertain them. Yet the district court did the exact opposite here, then compounded its error by presuming that if Providence offered an acceptable health plan in other locations, then Providence would be willing to offer one in the places where Cedar Park is located. And left unstated was yet another district-court presumption: that if Providence offered such a plan in a place where Cedar Park could purchase it, that Providence's price point was one that Cedar Park could afford. As it turns out, each of these presumptions was proven wrong once Cedar Park had an opportunity to investigate the press release's allegations and the district court's unwarranted presumptions.

In sum, the district court's dismissal order is grounded on several unfounded presumptions about the Crisalli Declaration and the attached press release. And the Hansen Declaration proves the district court's unsupported assumption wrong: Cedar Park cannot purchase an abortion-excluding, Providence health plan because Providence does not offer such a plan in areas where Cedar Park is located, and while Providence may offer a self-funded plan in King County, it would be at a price point Cedar Park simply cannot afford.

Because a Providence plan is unavailable to Cedar Park, facts related to Providence health plans' accessibility *to others* cannot detract from the church's standing to challenge Senate Bill 6219. So even if this Court considers extrinsic evidence like the Crisalli Declaration, it must reverse and remand.

CONCLUSION

Cedar Park respectfully requests that, consistent with *Skyline*, the Court confirm the church's Article III standing, reverse the district court's dismissal order for lack of jurisdiction, and remand for further proceedings on the merits.

Date: September 2, 2020

Respectfully submitted,

/s/ John J. Bursch

DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd, NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org
rgray@ADFlegal.org

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

KEVIN H. THERIOT
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@ADFlegal.org
egraves@ADFlegal.org

Counsel for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-35507

I am the attorney or self-represented party.

This brief contains 10,669 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ John J. Bursch **Date** September 2, 2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system on September 2, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

/s/ John J. Bursch
John J. Bursch

ADDENDUM

ADDENDUM TABLE OF CONTENTS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 48.01.080 - Penalties

Except as otherwise provided in this code, any person violating any provision of this code is guilty of a gross misdemeanor and will, upon conviction, be fined not less than ten dollars nor more than one thousand dollars, or imprisoned for not more than three hundred sixty-four days, or both, in addition to any other penalty or forfeiture provided herein or otherwise by law.

Wash. Rev. Code § 48.43.005(29) - Definitions

(29) "Health plan" or "health benefit plan" means any policy, contract, or agreement offered by a health carrier to provide, arrange, reimburse, or pay for health care services except the following:

(a) Long-term care insurance governed by chapter 48.84 or 48.83 RCW;

(b) Medicare supplemental health insurance governed by chapter 48.66 RCW;

(c) Coverage supplemental to the coverage provided under chapter 55, Title 10, United States Code;

(d) Limited health care services offered by limited health care service contractors in accordance with RCW 48.44.035;

(e) Disability income;

(f) Coverage incidental to a property/casualty liability insurance policy such as automobile personal injury protection coverage and homeowner guest medical;

(g) Workers' compensation coverage;

(h) Accident only coverage;

(i) Specified disease or illness-triggered fixed payment insurance, hospital confinement fixed payment insurance, or other fixed payment insurance offered as an independent, noncoordinated benefit;

(j) Employer-sponsored self-funded health plans;

(k) Dental only and vision only coverage;

(l) Plans deemed by the insurance commissioner to have a short-term limited purpose or duration, or to be a student-only plan that is guaranteed renewable while the covered person is enrolled as a regular full-time undergraduate or graduate student at an accredited higher education institution, after a written request for such classification by the carrier and subsequent written approval by the insurance commissioner;

(m) Civilian health and medical program for the veterans affairs administration (CHAMPVA); and

(n) Stand-alone prescription drug coverage that exclusively supplements medicare part D coverage provided through an employer group waiver plan under federal social security act regulation 42 C.F.R. Sec. 423.458(c).

Wash. Rev. Code § 48.43.065 – Right of individuals to receive services—Right of providers, carriers, and facilities to refuse to participate in or pay for services for reason of conscience or religion--Requirements

(1) The legislature recognizes that every individual possesses a fundamental right to exercise their religious beliefs and conscience. The legislature further recognizes that in developing public policy, conflicting religious and moral beliefs must be respected. Therefore,

while recognizing the right of conscientious objection to participating in specific health services, the state shall also recognize the right of individuals enrolled with plans containing the basic health plan services to receive the full range of services covered under the plan.

(2)(a) No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.

(b) The provisions of this section are not intended to result in an enrollee being denied timely access to any service included in the basic health plan services. Each health carrier shall:

(i) Provide written notice to enrollees, upon enrollment with the plan, listing services that the carrier refuses to cover for reason of conscience or religion;

(ii) Provide written information describing how an enrollee may directly access services in an expeditious manner; and

(iii) Ensure that enrollees refused services under this section have prompt access to the information developed pursuant to (b)(ii) of this subsection.

(c) The insurance commissioner shall establish by rule a mechanism or mechanisms to recognize the right to exercise conscience while ensuring enrollees timely access to services and to assure prompt payment to service providers.

(3)(a) No individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion.

(b) The provisions of this section shall not result in an enrollee being denied coverage of, and timely access to, any service or services excluded from their benefits package as a result of their employer's or another individual's exercise of the conscience clause in (a) of this subsection.

(c) The insurance commissioner shall define by rule the process through which health carriers may offer the basic health plan services to individuals and organizations identified in (a) and (b) of this subsection in accordance with the provisions of subsection (2)(c) of this section.

(4) Nothing in this section requires a health carrier, health care facility, or health care provider to provide any health care services without appropriate payment of premium or fee.

Wash. Rev. Code § 48.43.072 – Required contraceptive coverage—Restrictions on copayments, deductibles, and other form of cost sharing

(1) A health plan issued or renewed on or after January 1, 2019, shall provide coverage for:

(a) All contraceptive drugs, devices, and other products, approved by the federal food and drug administration, including over-the-counter contraceptive drugs, devices, and products, approved by the federal food and drug administration;

(b) Voluntary sterilization procedures;

(c) The consultations, examinations, procedures, and medical services that are necessary to prescribe, dispense, insert, deliver, distribute, administer, or remove the drugs, devices, and other products or services in (a) and (b) of this subsection.

(2) The coverage required by subsection (1) of this section:

(a) May not require copayments, deductibles, or other forms of cost sharing, unless the health plan is offered as a qualifying health plan for a health savings account. For such a qualifying health plan, the carrier must establish the plan's cost sharing for the coverage required by subsection (1) of this section at the minimum level necessary to preserve the enrollee's ability to claim tax exempt contributions and withdrawals from his or her health savings account under internal revenue service laws and regulations; and

(b) May not require a prescription to trigger coverage of over-the-counter contraceptive drugs, devices, and products, approved by the federal food and drug administration.

(3) A health carrier may not deny the coverage required in subsection (1) of this section because an enrollee changed his or her contraceptive method within a twelve-month period.

(4) Except as otherwise authorized under this section, a health benefit plan may not impose any restrictions or delays on the coverage required under this section, such as medical management techniques that limit enrollee choice in accessing the full range of contraceptive drugs, devices, or other products, approved by the federal food and drug administration.

(5) Benefits provided under this section must be extended to all enrollees, enrolled spouses, and enrolled dependents.

(6) This section may not be construed to allow for denial of care on the basis of race, color, national origin, sex, sexual orientation, gender expression or identity, marital status, age, citizenship, immigration status, or disability.

Wash. Rev. Code § 48.43.073 – Required abortion coverage--Limitations

(1) Except as provided in subsection (5) of this section, if a health plan issued or renewed on or after January 1, 2019, provides coverage for maternity care or services, the health plan must also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy.

(2)(a) Except as provided in (b) of this subsection, a health plan subject to subsection (1) of this section may not limit in any way a person's access to services related to the abortion of a pregnancy.

(b)(i) Coverage for the abortion of a pregnancy may be subject to terms and conditions generally applicable to the health plan's coverage of maternity care or services, including applicable cost sharing.

(ii) A health plan is not required to cover abortions that would be unlawful under RCW 9.02.120.

(3) Nothing in this section may be interpreted to limit in any way an individual's constitutionally or statutorily protected right to voluntarily terminate a pregnancy.

(4) This section does not, pursuant to 42 U.S.C. Sec. 18054(a)(6), apply to a multistate plan that does not provide coverage for the abortion of a pregnancy.

(5) If the application of this section to a health plan results in noncompliance with federal requirements that are a prescribed condition to the allocation of federal funds to the state, this section is inapplicable to the plan to the minimum extent necessary for the state to be in compliance. The inapplicability of this section to a specific health plan under this subsection does not affect the operation of this section in other circumstances.

Wash. Admin. Code § 284-43-7200 – Purpose and scope

(1) The purpose of this subchapter is to establish uniform regulatory standards for required coverage of contraceptive services and other reproductive health services and supplies, voluntary sterilization, and abortion under RCW 48.43.072 and 48.43.073.

(2) This subchapter applies to all health plans, except as otherwise expressly provided in this subchapter. Health carriers are responsible for compliance with the provisions of this subchapter and are responsible for the compliance of any person or organization acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements concerning the coverage of, payment for, or provision of contraceptive services and supplies, voluntary sterilization, and abortion. A carrier may not offer as a defense to a violation of any provision of this subchapter that the violation arose from the act or omission of a participating provider or facility, network administrator, claims administrator, or other person acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements under a contract with the carrier rather than from the direct act or omission of the carrier.

(3) Effective January 1, 2021, except as otherwise provided, this subchapter applies to all student health plans deemed by the insurance commissioner to have a short-term limited purpose or duration, including short-term limited purpose student health plans and guaranteed renewable plans while the covered person is an enrolled student as a regular full-time undergraduate or graduate student at an accredited higher education institution.

Wash. Admin. Code § 284-43-7220 – Coverage required

A health plan must provide coverage for all services and supplies required under RCW 48.43.072 and 48.43.073. Effective January 1, 2021, a student health plan must also provide coverage for all services and supplies required under RCW 48.43.072.
(1) Required coverage of contraceptive services and supplies includes, but is not limited to:

(a) All prescription and over-the-counter contraceptive drugs, devices, and other products approved by the Federal Food and Drug Administration;

(b) Voluntary sterilization procedures; and

(c) The consultations, examinations, procedures, and medical services that are necessary to prescribe, dispense, insert, deliver, distribute, administer, or remove the drugs, devices, and other products or services in (a) and (b) of this subsection.

(2) A health plan that provides coverage for maternity care or services must also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy. For the coverage to be substantially equivalent, a health plan must not apply cost-sharing or coverage limitations differently for abortion and related services than for maternity care and its related services unless the difference provides the enrollee with access to care and treatment commensurate with the enrollee's specific medical needs, without imposing a surcharge or other additional cost to the enrollee beyond normal cost-sharing requirements under the plan.

(3) This subchapter does not diminish or affect any rights or responsibilities provided under RCW 48.43.0

SB 6219

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6219

Chapter 119, Laws of 2018

65th Legislature
2018 Regular Session

REPRODUCTIVE HEALTH--HEALTH PLAN COVERAGE

EFFECTIVE DATE: June 7, 2018

Passed by the Senate
March 3, 2018
Yeas 27 Nays 22

KAREN KEISER

President of the Senate

Passed by the House
February 28, 2018
Yeas 50 Nays 48

FRANK CHOPP

Speaker of the House of Representatives

Approved March 21, 2018
10:53 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6219** as passed by Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

March 23, 2018

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 6219

AS AMENDED BY THE HOUSE

Passed Legislature – 2018 Regular Session

State of Washington 65th Legislature 2018 Regular Session

By Senate Health & Long Term Care (originally sponsored by Senators Hobbs, Saldaña, Dhingra, Ranker, Carlyle, Takko, Kuderer, Hasegawa, Palumbo, Chase, Nelson, Frockt, Keiser, Wellman, Darneille, Mullet, Billig, Pedersen, Rolfes, Hunt, and Liias)

READ FIRST TIME 01/23/18.

AN ACT Relating to improving access to reproductive health; adding new sections to chapter 48.43 RCW; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds and declares that:

(1) Washington has a long history of protecting gender equity and women's reproductive health;

(2) Access to the full range of health benefits and preventive services, as guaranteed under the laws of this state, provides all Washingtonians with the opportunity to lead healthier and more productive lives;

(3) Reproductive health care is the care necessary to support the reproductive system, the capability to reproduce, and the freedom and services necessary to decide if, when, and how often to do so, which can include contraception, cancer and disease screenings, abortion, preconception, maternity, prenatal, and postpartum care. This care is an essential part of primary care for women and teens, and often reproductive health issues are the primary reason they seek routine medical care;

(4) Neither a woman's income level nor her type of insurance should prevent her from having access to a full range of reproductive health care, including contraception and abortion services;

(5) Restrictions and barriers to health coverage for reproductive health care have a disproportionate impact on low-income women, women of color, immigrant women, and young women, and these women are often already disadvantaged in their access to the resources, information, and services necessary to prevent an unintended pregnancy or to carry a healthy pregnancy to term;

(6) This state has a history of supporting and expanding timely access to comprehensive contraceptive access to prevent unintended pregnancy;

(7) Existing state and federal law should be enhanced to ensure greater contraceptive coverage and timely access for all individuals covered by health plans in Washington to all methods of contraception approved by the federal food and drug administration;

(8) Nearly half of pregnancies in both the United States and Washington are unintended. Unintended pregnancy is associated with negative outcomes, such as delayed prenatal care, maternal depression, increased risk of physical violence during pregnancy, low birth weight, decreased mental and physical health during childhood, and lower education attainment for the child;

(9) Access to contraception has been directly connected to the economic success of women and the ability of women to participate in society equally;

(10) Cost-sharing requirements and other barriers can dramatically reduce the use of preventive health care measures, particularly for women in lower income households, and eliminating cost sharing and other barriers for contraceptives leads to sizable increases in the use of preventive health care measures;

(11) It is vital that the full range of contraceptives are available to women because contraindications may restrict the use of certain types of contraceptives and because women need access to the contraceptive method most effective for their health;

(12) Medical management techniques such as denials, step therapy, or prior authorization in public and private health care coverage can impede access to the most effective contraceptive methods;

(13) Many insurance companies do not typically cover male methods of contraception, or they require high cost sharing despite the critical role men play in the prevention of unintended pregnancy; and

(14) Restrictions on abortion coverage interfere with a woman's personal, private pregnancy decision making, with his or her health and well-being, and with his or her constitutionally protected right to safe and legal medical abortion care.

NEW SECTION. **Sec. 2.** A new section is added to chapter 48.43 RCW to read as follows:

(1) A health plan issued or renewed on or after January 1, 2019, shall provide coverage for:

(a) All contraceptive drugs, devices, and other products, approved by the federal food and drug administration, including over-the-counter contraceptive drugs, devices, and products, approved by the federal food and drug administration;

(b) Voluntary sterilization procedures;

(c) The consultations, examinations, procedures, and medical services that are necessary to prescribe, dispense, insert, deliver, distribute, administer, or remove the drugs, devices, and other products or services in (a) and (b) of this subsection.

(2) The coverage required by subsection (1) of this section:

(a) May not require copayments, deductibles, or other forms of cost sharing, unless the health plan is offered as a qualifying health plan for a health savings account. For such a qualifying health plan, the carrier must establish the plan's cost sharing for the coverage required by subsection (1) of this section at the minimum level necessary to preserve the enrollee's ability to claim tax exempt contributions and withdrawals from his or her health savings account under internal revenue service laws and regulations; and

(b) May not require a prescription to trigger coverage of over-the-counter contraceptive drugs, devices, and products, approved by the federal food and drug administration.

(3) A health carrier may not deny the coverage required in subsection (1) of this section because an enrollee changed his or her contraceptive method within a twelve-month period.

(4) Except as otherwise authorized under this section, a health benefit plan may not impose any restrictions or delays on the coverage required under this section, such as medical management techniques that limit enrollee choice in accessing the full range of contraceptive drugs, devices, or other products, approved by the federal food and drug administration.

(5) Benefits provided under this section must be extended to all enrollees, enrolled spouses, and enrolled dependents.

(6) This section may not be construed to allow for denial of care on the basis of race, color, national origin, sex, sexual orientation, gender expression or identity, marital status, age, citizenship, immigration status, or disability.

NEW SECTION. **Sec. 3.** A new section is added to chapter 48.43 RCW to read as follows:

(1) Except as provided in subsection (5) of this section, if a health plan issued or renewed on or after January 1, 2019, provides coverage for maternity care or services, the health plan must also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy.

(2)(a) Except as provided in (b) of this subsection, a health plan subject to subsection (1) of this section may not limit in any way a person's access to services related to the abortion of a pregnancy.

(b)(i) Coverage for the abortion of a pregnancy may be subject to terms and conditions generally applicable to the health plan's coverage of maternity care or services, including applicable cost sharing.

(ii) A health plan is not required to cover abortions that would be unlawful under RCW 9.02.120.

(3) Nothing in this section may be interpreted to limit in any way an individual's constitutionally or statutorily protected right to voluntarily terminate a pregnancy.

(4) This section does not, pursuant to 42 U.S.C. Sec. 18054(a)(6), apply to a multistate plan that does not provide coverage for the abortion of a pregnancy.

(5) If the application of this section to a health plan results in noncompliance with federal requirements that are a prescribed condition to the allocation of federal funds to the state, this section is inapplicable to the plan to the minimum extent necessary for the state to be in compliance. The inapplicability of this section to a specific health plan under this subsection does not affect the operation of this section in other circumstances.

NEW SECTION. **Sec. 4.** The governor's interagency coordinating council on health disparities shall conduct a literature review on disparities in access to reproductive health care based on socioeconomic status, race, sexual orientation, gender identity, ethnicity, geography, and other factors. By January 1, 2019, the council shall report the results of the literature review and make recommendations on reducing or removing disparities in access to reproductive health care to the governor and the relevant standing committees of the legislature.

Passed by the Senate March 3, 2018.

Passed by the House February 28, 2018.

Approved by the Governor March 21, 2018.

Filed in Office of Secretary of State March 23, 2018.

--- END ---