Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CEDAR PARK ASSEMBLY OF GOD OF KIRKLAND, WASHINGTON,

Plaintiff,

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.

Civil No. 3:19-cv-05181

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTING DATE: APRIL 7, 2023

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INTRODUCTION

This case is about whether churches may operate according to their religious beliefs on the sanctity of human life—"free from state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Cedar Park was free to do so; the Church could have a health care plan that provided necessary medical coverage to its employees and their families while excluding elective abortion and abortifacients, consistent with its beliefs. SB 6219 changed that in violation of the Free Exercise Clause and Church Autonomy Doctrine.[1]

Defendants' Motion for Summary Judgment must be denied because their version of the facts is not supported by the record and their legal analysis defies recent Supreme Court precedent. SB 6219 contains secular exemptions that undermine its alleged purpose of protecting women's reproductive health but has no corresponding exemption for health plans of religious organizations like Cedar Park. And legislative history shows SB 6219 *purposely* does not accommodate Cedar Park's religious beliefs and is gerrymandered accordingly. So SB 6219's abortion-coverage mandate is not neutral and generally applicable, subjecting it to strict scrutiny which it cannot survive under *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

Defendants also fail to properly apply recent Supreme Court precedent holding that government interference with a religious organization's supervision of its employees violates the Church Autonomy Doctrine. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). It is undisputed that SB 6219 inhibits Cedar Park's ability to provide health insurance to its employees in accordance with its religious beliefs. The statute is therefore unconstitutional.[2]

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[1] SB 6219, codified at RCW §§ 48.43.072 & .073, states, "if a health *plan* 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." (emphasis added).

[2] Defendants' motion for summary judgment does not address Cedar Park's claim that the Conscience Clause, RCW § 48.43.065, also violates the Free Exercise Clause and religious autonomy because it interferes with internal operations and treats religious health care entities more favorably than churches. Second Am. Verified Compl. ¶¶ 59-72, ECF No. 46, as supplemented by ECF No. 52-1 ("Am. VC"). So this opposition brief does not address that claim

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Defendants' Motion for Summary Judgment must be denied.

STATEMENT OF FACTS

A. Cedar Park's religious beliefs broadly prohibit facilitating access to abortion through its insurance plan.

Many of the "facts" Defendants cite are either not supported by the record, or are selective excerpts that are conflicting or cited out of context. For example, Defendants selectively cite the complaint and other evidence to suggest that Cedar Park's religious beliefs prevent it only from *paying* for insurance that directly covers abortion and abortifacients. Defs.' Mot. for Summ. J. 11, ECF No. 104 (Defs.' MSJ). That is wrong. Cedar Park made clear from its very first pleading that even *indirectly facilitating* abortion violates its religious beliefs.

The Church alleged that it "believes and teaches that participation in, *facilitation of*, or payment for abortion *in any circumstance* is a grave sin." V. Compl. ¶ 29, ECF No. 1 (VC); Am. VC ¶ 29, ECF No. 46, as supplemented by ECF No. 52-1 ("Am. VC") (emphasis added). And the Church alleged that "Defendants have made no allowance for the religious freedom of religious employers and churches, such as Cedar Park, who object to paying for, *facilitating access to*, or providing insurance coverage for abortion or abortifacient contraceptives *under any circumstance*." VC ¶ 63; Am. VC ¶ 78 (emphasis added); *accord*, *e.g.*, VC ¶ 131; Am. VC ¶ 153 ("Defendants implemented and enforce SB 6219 with full knowledge that some religions and denominations object to participating in, paying for, *facilitating, or otherwise supporting abortion*, while others do not.") (emphasis added); VC ¶ 142; Am. VC ¶ 165 ("Cedar Park cannot provide insurance coverage for abortion or abortifacient contraceptives in its employee health plan.").

The Church's briefs said the same thing. For example, its renewed preliminary injunction motion noted that "[p]aying premiums or fees for any plan that covers these procedures or items, whether expressly or surreptitiously under another label like 'overhead expense,' would violate

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in any depth, but Cedar Park's motion for summary judgment explains why the Church is entitled to summary judgment on it. Plaintiff incorporates herein all of the legal arguments and factual statements in that motion.

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Cedar Park's beliefs." Renewed Mot. For Prelim. Inj. 3, ECF No. 49. That motion also noted that, as a result of SB 6219, even when Cedar Park does not directly pay for objectionable coverage, "access to such coverage is *facilitated* by Cedar Park's health care plan." *Id*. at n.1 (emphasis added). It relies on Pastor Smith's September 13, 2019, Declaration which states:

> It violates the religious beliefs of Cedar Park to provide any sort of payment, premium, or fee for a health care plan that provides coverage of or facilitates access to abortion or arbortifacient drugs, either directly or indirectly. Accordingly, it would violate Cedar Park's beliefs to pay an extra premium, fee, or any payment to its insurer for the payment of abortions and abortifacient contraceptives for plan beneficiaries, *even in an instance where Cedar Park's health insurance plan did not directly provide coverage of abortion or abortifacient drugs*.

Smith Decl. ¶ 6, ECF No. 50 (emphasis added).

In sum, the Church's beliefs prohibit purchasing a plan that results in its employees having access to abortion and abortifacients they otherwise would not have. Defendants mischaracterize this belief as "a right to prohibit a third party from facilitating coverage for abortion or certain contraceptives." Defs.' MSJ 20. But that distortion ignores the crucial fact that, under SB 6219, the Church's own health plan itself includes, or at the very least triggers provision of abortion or contraception by the carrier or a third party. That complicity violates Cedar Park's convictions.

B. The record shows that after SB 6219, all the plans available to Cedar Park, except self-insurance, facilitated access to abortion.

Defendants' contention that the Church's broker presented it with two plans that "accommodated Cedar Park's beliefs by excluding abortion," Defs.' MSJ 7, is also not supported by the record. Defendants themselves concede that SB 6219 leads to Cedar Park's employees getting "access to services to which Cedar Park objects." *Id*. at 1. In fact, this is precisely what SB 6219 requires: that "the health plan must also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy," RCW § 48.43.073(1). Similarly, the Conscience Clause stipulates "[t]he 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." RCW § 48.43.065(3)(b).

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The State's 30(b)(6) witness also confirmed that even if an employer chooses to exclude abortion in group or level funded insurance, "the plan actually provides for [abortion] access." Tocco Dep. 105, ECF No. 93-4; *accord* Orcutt Dep., ECF No. 92 at 45–46[3] ("It is my understanding from my discussions with Jami [our insurance broker] that even if we—if we expressed our desire to not cover abortions or specific contraceptives, they would be included in our plan."). Tellingly, enrollees in group or level-funded health plans would use the same insurance card to obtain abortifacients as non-objectionable drugs. Orcutt Decl. ¶ 12, ECF No. 94-1 (citing August 8, 2019, email from Hansen to Orcutt, ECF No. 92 at 216).[4]

Ignoring these facts and the sworn testimony of their own witness, Defendants rely on conflicting email statements which fail to establish any facts at all. Defs.' MSJ 8–9. First, they cite a June 25, 2019, Cigna email that says Cigna policies "including coverage for maternity care must also include abortion care" *and* "may exclude coverage," in the same breath. *Id*. at 8 (Citing Ex. E to Defs.' MSJ, ECF No. 105-1 at 335–341). That email also states that "enrollees cannot be denied coverage for any service excluded from their benefit package" as a result of the employer's opposition to providing a specific service. *Id*.[5] So the email confirms that Cedar Park's employees would have received access to abortion as a result of the Church's plan despite Cigna's assurances

[3] Citations to ECF No. 92 refer to the ECF heading page numbers.

[4] In other briefing Defendants assert that "nothing in the email on which Cedar Park relies describes Cigna's procedures: by this time, Cedar Park's emails discussed only Kaiser and not Cigna." MTD Reply 7. But the email specifically asks for information about "companies." It doesn't limit the information provided to Kaiser or any other carrier. August 8, 2019 email from Hansen to Orcutt, Ex. J to Defs.' Renewed MTD, ECF No. 92 at 216. And Cedar Park still had not decided whether to go with Kaiser and didn't do so until on or about August 14, 2019. *Id.* at 184–185.

[5] Defendants appear to conflate self-funded with level funded plans. Defs.' MSJ 8. Their assertion that Cigna's self-funded plan excluded both contraception and abortion is correct because SB 6219 does not apply to those more expensive and less comprehensive plans. RCW § 48.43.005(31)(j); Orcutt Decl. ¶ 18. But level funded plans *are* subject to SB 6219 because they are a hybrid between self-insurance and fully funded plans. Orcutt Decl. ¶ 10.They cannot simply exclude abortion and abortifacients like self-funded plans but must facilitate access to abortion under SB 6219.

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in the email that the objectionable coverage would be "outside of their plan." And Ms. Tocco's testimony, referenced above, also confirms this fact.

Defendants next cite a July 8, 2019, email where Cedar Park asked Cigna and Kaiser if they will be able to exclude abortions and abortifacients and "provid[e] the details if they select Yes." Ex. F to Renewed MTD, ECF No. 92 at 147. Cigna responded with, "Yes. Legal and administrative approval from CIGNA," but it did not provide any details as requested. *Id*. A week later Cedar Park's broker confirmed that "[t]he only reason Cigna is confirming [exclusion of objectionable coverage], is because it's a self funded plan." Ex. G to Renewed MTD, ECF No. 92 at 153. Self-funded plans are neither affordable nor comparable to the plan that SB 6219 took away from the Church. Orcutt Decl. ¶¶ 18–28.

Finally, Defendants contend a July 16, 2019, email exchange between Cedar Park's broker and Cigna vaguely stating that "[a]ll of the answers provided apply to both Level and Fully insured with exception of transgender services" suggests that Cigna's fully insured plan allowed for excluding abortion coverage. Defs.' MSJ 9. But it is unclear what "answers" that email refers to. The emails between the broker and Cedar Park immediately preceding that exchange don't contain any answers to questions about coverage of abortion and abortifacients. Theriot Decl. Ex. 3, ECF No. 102-4, Cedar Park Bates No. 221–3, 232. The only answers were about administrative matters like decision dates, deductibles, and COBRA. *Id*.

In short, the record clearly supports and Cedar Park understood—correctly and as required by Washington law—that the Cigna plans would have facilitated access to abortion and abortifacients through, or as a result of, the Church's plan. Either violates Cedar Park's religious beliefs. Defendants do not dispute that Cedar Park's purchase of a group or level-funded plan from Cigna would still have facilitated abortion coverage for its employees as required by Washington law. Defs.' MSJ 20. And in response to the evidence that coverage would have actually been part of Cedar Park's plan, Defendants rely on selective readings of confusing and ultimately unhelpful

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emails, while ignoring contradictory emails and sworn testimony. Defendants' selective record cites establish no facts at all, never mind any that contradict Plaintiff's.

C. Besides facilitating abortion, the Cigna plans were not cheaper and were not comparable to Cedar Park's plan SB 6219 made illegal.

1. The Cigna plans were not cheaper.

Defendants' assertion that "[t]he cost of both Cigna options was *cheaper* than the proposed plan the broker had negotiated with Kaiser for the same plan year," Defs.' MSJ 7, is not supported by the record either. And while this mischaracterization is not relevant since the Cigna plans actually facilitated abortion in violation of Cedar Park's beliefs, it is important to keep the record straight.

Defendants' "cheaper" argument ignores the fact that although the Cigna plan premiums may have been less expensive the first year, rates would have gone up—and in fact did go up significantly—in later years, which is hardly a "comparable" alternative. Orcutt Dep. at 64. ("Our broker had advised us that Cigna generally brings in a low rate in the first year and then significantly increases rates in future years, so the ability for Cedar Park in future years to provide high-quality health plans for our employees would've been in question because of increased costs among other things."). And that's exactly what happened: the very next year, Cigna did not even quote Cedar Park a fully insured plan, Orcutt Decl. ¶ 17, or a plan without an HMO option, and its level-funded, first-year 2020–21 cost was more expensive than Kaiser's fully insured plan. Ex. L to Defs.' Renewed MTD, ECF No. 92 at 260–87. Cigna raised the level-funded cost in its 2020–21 bid by $227,544 (24.9%). That made Cigna's level-funded bid $41,833 more expensive than Kaiser's 2020–21 fully insured bid. Orcutt Decl. ¶ 25. The record clearly shows that the Cigna plans facilitated abortion in violation of the Church's beliefs, and were considerably more expensive.

2. The Cigna Plans were not comparable.

Defendants do not argue that the Cigna plans were comparable to Cedar Park's pre-SB 6219 plan even though the Ninth Circuit determined that is an important factor in assessing the

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Statute's harm. *Cedar Park Assembly of God of Kirkland v. Kreidler*, 860 Fed. App'x 542, 543 (2021) ("Cedar Park's complaint plausibly alleged that, due to the enactment of SB 6219, its health insurer (Kaiser Permanente) stopped offering a plan with abortion coverage restrictions and Cedar Park could not procure *comparable replacement coverage*." (emphasis added)). That is because it is undisputed that neither the Cigna level-funded plan nor any other plan was comparable to the fully insured Kaiser Permanente plan that Cedar Park had in place before SB 6219.[6] Unlike fully insured plans, level-funded plan carriers do not bear all risk for claims exceeding premiums. The majority of increased high-cost claims pass through to employers in higher future premiums. *See* Orcutt Dep. 64–67; Orcutt Decl. ¶¶ 20–22. What's more, switching to Cigna's level-funded plan would require all Cedar Park employees and family members using Kaiser HMO to find new providers. *Id*.; Orcutt Decl. ¶ 29.

And the benefits for both Cigna plans were not comparable. For example, for the plan year 2019–20, Kaiser offered 5% enhanced coinsurance after deductible for office and specialist visits which no other carrier offered. Orcutt Decl. ¶¶ 15–17. Cigna plans had the added disadvantage of including a $4,500/$9,000 higher out-of-network annual deductible than Kaiser, and Cigna provided no out-of-network coverage for preventive care, while Kaiser's plan did. *Id*. Neither Cigna's level-funded plan nor its group plan was comparable to the Church's fully insured, pre-SB 6219 plan. Defendants' implication otherwise comes from whole cloth.

ARGUMENT

Defendants cannot succeed on their motion for summary judgment because their arguments contradict recent Supreme Court cases like *Tandon*, *Fulton*, and *Our Lady of Guadalupe*, which show they violated Cedar Park's right to free exercise and church autonomy as a matter of law.

[6] Defendants make the unsupported allegation that "Cedar Park cannot show that, prior to this case, it had a plan that did not facilitate abortion or contraceptives." Defs.' MSJ 20. But the evidence that the Church's pre-SB 6219 plan from Kaiser excluded abortion (Am. VC ¶ 47) and that Kaiser will offer that plan again if this Court enjoins SB 6219 (Am. VC ¶ 48.3) is uncontradicted and actually conceded in Defendants' summary judgment motion. Defs.' MSJ 7.

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The undisputed facts show that SB 6219 burdens the Church's beliefs against facilitating abortion. And the law is not generally applicable because Defendants exempt multiple insurance plans covering maternity and contraception, which undermines the State's asserted interest in furthering women's reproductive health. Those exemptions and SB 6219's lack of neutrality warrant strict scrutiny under the compelling interest test which Defendants cannot satisfy. And SB 6219's abortion and abortifacient mandates violate the Church Autonomy Doctrine because they interfere with Cedar Park's ability to manage its internal affairs in accordance with its religious teachings.

Defendants' motion for summary judgment must be denied.

I. Defendants' version of the facts is not supported by the record.

Cedar Park's claim has not "evolved." Defs.' MSJ 19. As shown above, the Church's religious beliefs and SB 6219's burden on those beliefs have been consistently plead and argued from the outset. And none of the health plans available to the Church are comparable to the one it had in place before SB 6219, which its carrier will offer again if the Court enjoins SB 6219. Defendants' mischaracterization of those beliefs and alternative plans is unsupported by the evidence and cannot justify awarding them summary judgment.

II. Defendants defy the Supreme Court's recent decisions in *Tandon* and *Fulton* in an unsuccessful attempt to obtain judgment as a matter of law.

A. SB 6219 burdens the Church's religious convictions.

Defendants argue SB 6219 does not require Cedar Park to facilitate abortion because "[a]ny facilitation or discussion of access occurs between the enrollee and either the carrier or another third party." Defs.' MSJ 20. But the Church, not the State, determines whether particular conduct makes it complicit with abortion. The Supreme Court rejected the government's similar argument in *Fulton*, where the religious adoption agency alleged Philadelphia's law requiring it to certify same-sex couples as foster parents required it to "approv[e] relationships inconsistent with its beliefs" because "certification is tantamount to endorsement." 141 S. Ct. at 1876. The City argued there was no endorsement since "certification reflects only that foster parents satisfy the statutory criteria." *Id.* But the Court was not convinced: "it is plain that the City's actions have burdened

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CSS's religious exercise . . . .[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

SB 6219 burdens Cedar Park's free exercise of religion by coercing it to facilitate abortion as a result of offering a group health plan. This is a prototypical substantial burden on religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720–22 (2014) (requiring companies to cover abortifacients in their employee health insurance plans substantially burdened their religious beliefs not to facilitate abortion); *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 747 (9th Cir. 2020) (church "suffered an injury in fact" when California mandated "immediate[]" coverage of elective abortion in violation of the church's beliefs).

Because Cedar Park believes that abortion ends a life, the Church teaches that participating in, facilitating, or paying for abortion in any circumstance is a grave sin. This includes indirect payments such as increased premiums, or abortion coverage triggered by the Church's plan, even if it is not included within the plan. Am. VC ¶ 29; Smith Decl. ¶ 6. That belief is constitutionally protected. For example, even submitting an accommodation request substantially burdened religious business owners' beliefs because it "trigger[ed] the provision of objectionable coverage by their [third party administrators], making them complicit in conduct that violates their religious beliefs." *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Hum. Services*, 801 F.3d 927, 938–41 (8th Cir. 2015), *vacated on other grounds*, 2016 WL 2842448 (May 16, 2016). "That they themselves do not have to arrange or pay for objectionable contraceptive coverage is not determinative of whether the required or forbidden act is or is not religiously offensive." *Id*. at 942.[7]

[7] Defendants cite *Zubik v. Burwell*, 578 U.S. 403 (2016), for the proposition that government can ensure that women working for religious employers who object to including coverage for abortifacient contraceptives in their health plans still have access to them as a result of the plan. But, unlike Cedar Park, the religious organizations suing did not object to the insurance company providing the objectionable items as result of their plan so long the "plan …does not include coverage for some or all forms of contraception." *Id.* at 408. And while the federal government initially said that it was feasible to provide abortifacient contraceptive coverage outside religious objectors' plan, it changed its mind. The very next year it said that it was impossible to modify the

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The undisputed facts also show that, unless the Church self-insures with a more expensive yet inferior policy, SB 6219 requires Cedar Park's group health plan to cover abortion and abortion causing drugs. The statute itself dictates: "A health plan issued or renewed on or after January 1, 2019, shall provide coverage for all contraceptive drugs," including arbortifacients, and "if a health plan 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." RCW §§ 48.43.072(1)(a) and .073(1) (cleaned up). Defendants' 30(b)(6) witness and insight provided by Cedar Park's insurance broker confirmed that, in practice, abortion is included in its plan, even if Cedar Park objects. Tocco Dep., 102 & 105 ("the plan actually provides for access"); Orcutt Dep. 45–46; Orcutt Decl. ¶ 12.

The exemption in RCW § 48.43.065(3) does not alleviate this burden because Washington's conscience statute specifically provides that "[t]he 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." *Id*. at 3(b).

SB 6219's barefaced requirement that Cedar Park's health plan facilitate abortion and abortifacient coverage burdens the Church's religious beliefs. Defendants can cite no facts that say otherwise.

B. Defendants concede SB 6219 has exemptions but misstate the law on general applicability in a failed attempt to excuse them.

Defendants concede that there are exemptions to SB 6219, but claim that they do not undermine the State's purpose in promoting reproductive health. Defs.' MSJ 16–17. That argument fails because at least seven of the exemptions include policies that cover maternity and/or contraception. Excluding those policies from SB 6219's abortion mandate means that women covered by them do not receive the Statute's purported benefits, undermining the Statute's alleged

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accommodation to resolve objectors' concerns. U.S. Dep't of Labor, *FAQs About Affordable Care Act Implementation Part 36* (Jan. 9, 2017), https://bit.ly/2Sv6Q3z.

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purpose of advancing access to women's reproductive health care.

Defendants begin by misstating the test for general applicability as "whether the law selectively imposes burdens *only on conduct motivated by religious belief*." Defs.' MSJ 15 (cleaned up, emphasis added). The test isn't that narrow. The Supreme Court recently clarified that:

> government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. *It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.*

Tandon, 141 S. Ct. at 1296 (emphasis added). *Tandon* cites with approval Justice Kavanaugh's concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73 (2020), which rejects the government's argument that there was no free exercise violation because some secular businesses were "treated less favorably than houses of worship." Justice Kavanaugh explained that:

> under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses. . . the State must justify why houses of worship are excluded from that favored class.

Id. (emphasis in original).

In *Fulton,* the Court summarized the test as: "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions. . . . A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Nowhere does the Court suggest the law must single out religion to lack general applicability.

SB 6219 fails the general-applicability test both ways.

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1. Categorical exemptions

Washington law exempts 13 types of insurance plans from the definition of "health plans." RCW § 48.43.005(31). These include four plans that the abortion mandate would otherwise govern because they cover maternity and abortifacients, such as short-term, limited-purpose plans; property/casualty liability plans; supplemental Medicare; and supplemental Tricare. Nollette Dep., 46–61, ECF No. 93-5.[8] SB 6219 also exempts plans if necessary to avoid violating federal conditions on state funding, and plans that do not provide comprehensive maternity care coverage. RCW § 48.43.073(1) & (5). And Washington exempts insurance plans provided by religious health care organizations. RCW § 48.43.065(2)(a); Tocco Dep. 74–75; Nollette Dep. 64. So at least seven exemptions undermine SB 6219's asserted purpose of protecting women's health.

Defendants contend that these exemptions don't affect general applicability because they are "tied directly to limited, particularized, business-related, objective criteria so they do not give the Insurance Commissioner unfettered discretion to discriminate." Defs.' MSJ 16–17.[9] But Defendants don't explain what the "limited, particularized, business-related, objective criteria"

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[8] Nollette testified that the short term, limited purpose plans, and property/casualty liability plans could cover maternity. Nollette Dep., 53–54; 58–59. She also testified that the supplemental plans cover maternity and contraception if it is covered by "the base plan." *Id.* at 46–48; 60–61. Medicare covers maternity and Tricare covers both maternity and contraception. *Does Medicare Cover Pregnancy?*, MEDICARE.ORG, http://bit.ly/3ZPS5HJ (last visited March 9, 2023) (noting "All pregnancy-related care you get when you are formally admitted into the hospital is covered by Original Medicare Part A hospital insurance. Medicare Part B covers all doctors' visits and other outpatient services and tests related to your pregnancy."); *Maternity (Pregnancy) Care, Covered Services*, TRICARE.MIL, http://bit.ly/3IYMV5z (last visited March 9, 2023) (noting "TRICARE covers all medically-necessary pregnancy care"); *Over-the-Counter Drugs and Supplies, Covered Services*, TRICARE.MIL, http://bit.ly/3ymtTBo (last visited Feb. 16, 2023) (noting "TRICARE covers some over-the-counter (OTC) drugs and supplies. . . . Levonorgestrel (Plan B One-Step Emergency Contraceptive) is covered without a prescription from your doctor.").

[9] Unfettered discretion is not relevant to whether SB 6219 has categorical exemptions for insurance policies. The exemptions make SB 6219 underinclusive and therefore not generally applicable, just like in *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520 (1993), where the law at issue prohibited animal sacrifice but not hunting. Both affected the City's interest in proper disposal of animal carcasses, and "this and other forms of underinclusiveness meant the ordinances were not generally applicable." *Fulton*, 141 S. Ct. at 1877. Unfettered discretion was irrelevant for the underinclusiveness analysis in *Lukumi*. 508 U.S. at 542–45.

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they rely on are. Instead, they make three general arguments that the exemptions do not undermine general applicability. The first is the exemptions "relate to …specific types of insurance products that only incidentally include health care services." Defs.' MSJ 16. But that consideration is not implicated by plans exempted because they affect federal funding, do not cover maternity, or are purchased by religious employers in the health care business. Moreover, all of the seven types of exempted insurance policies listed above implicate the Statute's purported interests even if they only incidentally include health care services. Defendants summarize those asserted interests as:

> (1) "better access to health benefits, which provides … healthier and more productive lives";
>
> (2) "protecting gender equity and women's reproductive health";
>
> (3) "providing essential primary care to women and teens, …since reproductive health issues are the primary reason they seek routine medical care";
>
> (4) "access to contraceptives,… which is connected to economic success of women and the ability to participate in society equally"; and
>
> (5) "minimizing restrictions on abortion coverage that would interfere with a woman's …pregnancy decision-making and her …right to safe and legal abortion care."

Id. at 18.

Defendants next argue that the insurance products exempted "are not designed to be comprehensive health plans due to duration or very limited benefits." *Id*. at 16. Once again, this consideration does not apply to religious medical provider plans or those that might affect federal funding and don't cover maternity. And Defendants don't explain how their asserted interest in promoting women's reproductive health is unaffected by policies covering only certain types of women's health care or that are limited in duration. No insurance policy covers everything indefinitely.

Finally, Defendants claim some of the exemptions "are particular health care options funded by entities the Insurance Commissioner does not have jurisdiction over (like Medicare)." Defs.' MSJ 16. But all of the seven exemptions listed above apply to plans that *are* regulated by

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the Commissioner, including the *supplemental* plans. Nollette Dep. 42–43.

Most importantly, all seven of the exemptions undermine the State's asserted interest in protecting women's access to health care. This is very different than Defendant's primary authority, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (*Stormans II*), where the "enumerated exemptions" did not undermine the State's interest in furthering access to emergency contraception because "the absence of these exemptions would likely drive pharmacies out of business or, even more absurdly, mandate unsafe practices. . . .[T]he exemptions actually increase access to medications by making it possible for pharmacies to comply with the rules, further patient safety, and maintain their business." *Id.* at 1080. Defendants cite no evidence that the exemptions to SB 6219 make health care more accessible to women or that insurance companies would be driven out of business without them.

Moreover, much of *Stormans II's* analysis is outdated because it did not have the benefit of the Supreme Court's direction in *Tandon* and *Fulton.* For example, it misstates the general applicability test as "if a law pursues the government's interest *only* against conduct motivated by religious belief but fails to include in its prohibitions *substantial, comparable secular conduct* that would similarly threaten the government's interest, then the law is not generally applicable." 794 F.3d at 1079 (emphasis added). But *Tandon* made clear that a law does not have to single religious conduct to lack general applicability and *any* exemption threatening the government's interest in regulating churches renders the law not generally applicable. 141 S. Ct. at 1696.

As the Ninth Circuit more recently held, a law is not generally applicable "if the law prohibits religious conduct while permitting secular conduct that also works against the government's interest in enacting the law." *Tingley v. Ferguson*, 47 F.4th 1055, 1088 (9th Cir. 2022) (cleaned up). The Ninth Circuit found the law at issue there to be generally applicable because, unlike the undisputed facts here, "Tingley is unable to show that Washington's law permits secular conduct that undermines the same interest Washington asserted in enacting SB 5722." *Id.* at 1089 (finding that the harms from exempting "gender affirming" care were different

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from the harms the legislature was trying to address by blocking conversations by minors with counselors about unwanted same-sex attraction).

2. Individualized exemptions

The government may not withhold a religious exemption without compelling reason "where the State has in place a system of individual exemptions." *Fulton*, 141 S. Ct. at 1877. In *Fulton*, the City of Philadelphia refused to contract with Catholic Social Services (CSS) unless the organization agreed to certify same-sex couples as foster parents in violation of its beliefs. *Id.* at 1875–76. The city invoked the contract's nondiscrimination provision, claiming that it categorically prohibited CSS from declining to certify same-sex couples based on its religious beliefs. *Id.* at 1875. But exceptions from the nondiscrimination provision were available at the city's "sole discretion." *Id.* at 1878. That discretion, the Court held, created "a system of individual exemptions," making the nondiscrimination provision not generally applicable. *Id.*

"Animus" is not even mentioned in *Fulton*, yet Defendants still maintain it is required. Defs.' MSJ 18. They rely on *Stormans II*, which held that "[t]he mere existence of an exemption that affords some minimal government discretion does not destroy a law's general applicability." 794 F.3d at 1082 (noting other circuits "apply a fact-specific inquiry to determine whether the regulation at issue was motivated by discriminatory animus" in the land use context).[10] But that is no longer good law because in *Fulton*, the Supreme Court held: "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S. Ct. at 1879 (cleaned up).

SB 6219 exempts plans from its abortion and contraceptive mandate if necessary to avoid violating federal conditions on state funding, and in doing so allows for individualized exemptions like Philadelphia did in *Fulton*. RCW § 48.43.073(5). For example, the Weldon Amendment

[10] Defendants also cite *Tingley*, but the law at issue there had "no exemption system whatsoever, not even one that affords some minimal governmental discretion." 47 F.4th at 1088 (cleaned up).

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restricts federal funding to states that discriminate against health plans refusing to cover abortion. Philhower memorandum to Nollette at 2, ECF No. 103-5. So Defendants exempt plans from SB 6219's abortion mandate if there is a Weldon Amendment problem, but they have no process governing that determination. Nollette Dep. at 29–30 ("If the office were concerned about a possible Weldon Amendment issue, we would contact our attorney"). Defendants resolve that dilemma case-by-case and in their sole discretion. *Id.* at 30; May 8, 2018, DeLeon memo to Nollette, at 7, ECF No. 103-1 ("because the language of the savings clause in SB 6219 requires an exemption 'to the minimum extent possible,' the OIC has authority and *discretion* to choose how to implement this exemption" (emphasis added)).

Similarly, the State of California's abortion mandate was subject to strict scrutiny under the Free Exercise Clause because the director's "discretion" to allow exemptions was not governed by "any written rules, policies, or procedures for requesting an exemption." *Foothill v. Watanabe*, __ F.Supp.3d___ (2022), 2022 WL 3684900 at *4 (E.D. Cal. 2022). And just like the OIC official here, when asked about whether she would approve a plan without abortion, the California state official said "she would need to consult with DMHC attorneys." *Id.* at *8. That discretion makes SB 6219 subject to strict scrutiny.

C. Defendants misstate the law on neutrality.

Defendants assert that "[a] law operates neutrally so long as it does not target a religious tenet or practice while appearing neutral on its face," Defs.' MSJ 14, but those are only two of four indicators that a lack of neutrality exists. Courts also consider the real-world operation of the law, as well as "circumstances surrounding the enactment," including historical background, precipitating events, and legislative history. *Lukumi*, 508 U.S. at 535, 540; *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

"Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. SB 6219 is not neutral because the secular exemptions catalogued above show the law is

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gerrymandered in its real-world operation. Legislative history shows it also targets conscientious objectors like Cedar Park.

1. SB 6219 is impermissibly gerrymandered.

A law is impermissibly gerrymandered against religious organizations like Cedar Park if it favors secular conduct, *Lukumi*, 508 U.S. at 537, or "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends." *Id*. at 538. SB 6219 suffers from both fatal flaws.

By offering multiple secular exemptions, Washington has failed to pursue its proffered objectives "with respect to analogous non-religious conduct." *Id.* at 546. The First Amendment prevents Cedar Park and other similarly situated organizations from "being singled out for discriminatory treatment," including Defendants' refusal to grant them an exemption that would not adversely affect the government's stated interest more than the secular exemptions the state already gives. *Id*. at 538. Providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

SB 6219 also proscribes more conduct than is necessary to achieve its end of furthering women's access to health care. *Lukumi*, 508 U.S. at 542 (law hindering "much more religious conduct than is necessary in order to achieve the legitimate ends asserted in [its] defense," is "not neutral."). Exempting Cedar Park would affect Church employees, all of whom share its beliefs about abortion. Am. VC ¶¶ 25–32. Forcing Cedar Park to provide abortion coverage that its employees will not use makes SB 6219 broader than necessary and impermissibly gerrymandered. And it lacks any rational basis. *See* 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012) (exempting churches from the ACA's contraception mandate because churches' employees "would be less likely to use contraceptives even if contraceptives were covered under their health plans.").

Defendants' primary authority, *Stormans II*, ignores this aspect of *Lukumi*, simply stating that the contraceptive coverage rules it upheld were neutral because they "prescribe and proscribe

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the same conduct for all, regardless of [religious] motivation." 794 F.3d at 1077. But whether a law is neutral is not limited to assessing whether it targets conduct based on religious motivation. "Government fails to act neutrally when it proceeds in a manner *intolerant of religious beliefs*." *Fulton*, 114 S. Ct. at 1877 (emphasis added). The Washington Legislature was intolerant of Cedar Park's religious beliefs because it refused to actually exempt them several times.[11]

2. Legislative history shows SB 6219 intentionally discriminates against religious organizations like Cedar Park.

Discriminatory intent is unnecessary to show a lack of neutrality, but it can show an anti-religious objective. "[U]pon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and the rights it secures." *Lukumi*, 508 U.S. at 547; *Kennedy v. Bremerton Sch. Dis.*, 142 S. Ct. 2407, 2422 n.1 (2022) ("A plaintiff may also prove a free exercise violation by showing that official expressions of hostility to religion accompany laws or policies burdening religious exercise" (cleaned up)). "Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece*, 138 S. Ct. at 1731 (cleaned up).

Three times, the legislature specifically refused to amend SB 6219 to include protection for religious organizations. Moreover, Washington State Senator Steve Hobbs, SB 6219's sponsor, stated that religious organizations can sue if they do not want to provide insurance coverage for abortion. Sec. Am. VC ¶ 54. Responding to religious organizations' strong protests that SB 6219 would compel them to pay for abortions, Senator Hobbs quipped: "Health care is about the

[11] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), was a *Bivens* action that is not relevant here because the Court imposes special requirements in that context. *Iqbal* cites the passage of *Lukumi* addressing the City of Hialeah's discriminatory purpose, but as shown above, intentional discrimination is just one way to demonstrate lack of neutrality. *Id.* at 666–67.

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individual, not about [religious organizations]."[12] This legislative history rejecting religious exemptions shows SB 6219 targets religious organizations that believe in the sanctity of life.

Senator Hobbs' statements were not, as Defendants allege (Defs.' MSJ 15 n. 4), merely "stray comments from Washington legislators speaking for themselves about experiences of friends and constituents" as was the case in *Tingley*, 47 F.4th at 1086. There the Ninth Circuit determined legislators' statements about the harms caused by modes of treatment and lack of success of conversion therapy did not show hostility toward religion sufficient to eliminate neutrality. *Id.* Here, the sponsor of the bill specifically mentions churches, refusing to accommodate their religious beliefs and requiring them to sue. And the legislature rejected attempts to include a broad exemption for churches providing more proof of legislative intent.

SB 6219 is not neutral because it is gerrymandered to target religious conduct as the legislature intended. It is thus subject to strict scrutiny.

III. Defendants misstate the law on Church Autonomy.

SB 6219's abortion mandate interferes with the ability of Washington churches like Cedar Park to teach their members, live by, and govern their internal affairs according to their religious doctrine. Before SB 6219, churches and religious organizations could freely ensure the integrity of their teaching and practice by declining to facilitate abortion. After SB 6219, churches must choose between their legal obligations and their faith. They cannot comply with both without spending more money for inferior health protection that will also limit their religious ministry.

Defendants' argument for judgment as a matter of law hinges on its unsupported assertion that "the purchase of a health plan is not an ecclesiastical decision." Defs.' MSJ 22. But the Church Autonomy Doctrine protects "the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion. . . .[A]ny attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an

[12] Matt Markovich, *Catholic Bishops of Wash. ask Gov. Inslee to Veto Abortion Insurance Bill*, KOMO NEWS (March 5, 2018), https://bit.ly/2Uuu5Nf.

establishment of religion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Defendants do not dispute that Cedar Park believes the health insurance coverage the ACA and its religious convictions require it to purchase for Church employees must reflect its pro-life views. Am. VC ¶¶ 45–47. The many cases protecting religious employers' right to provide employee health plans consistent with their pro-life beliefs show it is indeed a "matter[ ] of faith and doctrine…closely linked [to] matters of internal government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061, *see, e.g.*, *Hobby Lobby*, 573 U.S. at 720–22 (requiring religious company owners to cover abortifacients in their employee health insurance plans substantially burdened their religious beliefs not to facilitate abortion); *Skyline Wesleyan Church,* 968 F.3d at 747 (church "suffered an injury in fact" when California mandated "immediate[]" coverage of elective abortion in violation of the church's beliefs).[13]

"[C]ivil courts exercise no jurisdiction" over "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. 679, 733 (1871). Here, Cedar Park's pro-life beliefs and health plan decisions are based in (1) ecclesiastical government and (2) the conformity of its employees to a particular (pro-life) standard of morality. The religious autonomy doctrine protects both things, especially as Washington is trying to control and manipulate Cedar Park's internal decisions and expressions of its faith. *Kedroff*, 344 U.S. at 116 (churches are constitutionally protected "from secular control or manipulation").

The Church doesn't forfeit its religious autonomy when it "cho[oses] to enter the

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[13] *Our Lady of Guadalupe* does not hold that "[g]enerally applicable laws are not subject to the religious autonomy doctrine." Defs.' MSJ 21. That was the position of Justice Sotomayor's dissent, which only garnered two votes. 140 S. Ct. at 2076. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) ("This is not to say that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause" (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012))). Likewise, *Bollard v. Calif. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999), merely held that the ministerial exception did not preclude a sexual harassment claim against a religious organization: "[b]ecause the Jesuit order doctrinally disavows the harassment, the danger that the application of Title VII in this case will interfere with its religious faith or doctrine is particularly low."

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marketplace for health care." Defs.' MSJ 22. That's particularly true when the Affordable Care Act *requires* Cedar Park to have maternity coverage for its 150 plus employees. *Hobby Lobby*, 573 U.S. at 696; Sec. Am. VC ¶ 94. And the Church is not trying to "dictate to the State what private companies make available on the market," or "that private parties outside the church must comply with the church's religious views." Defs.' MSJ 22. Private companies like Kaiser *want* the freedom to offer abortion-free insurance coverage to churches like they did before SB 6219. Am. VC ¶ 48.3.

SB 6219 violates Cedar Park's church autonomy and, at minimum, cannot survive strict scrutiny as shown below. Moreover, church autonomy violations are per se unconstitutional so SB 6219 should be summarily enjoined without subjecting it to the compelling interest test. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 194 (2012) (summarily dismissing Title VII claim violating church autonomy without applying strict scrutiny or any other test).

IV. Defendants make no real attempt to show SB 6219 surives strict scrutiny.

Defendants' one paragraph strict scrutiny analysis, Defs.' MSJ 19, fails to carry their burden of proving why completely exempting church health insurance policies from the abortion and abortifacient mandates undermines SB 6219's purpose any more than completely exempting short term, limited purpose, and supplemental policies as well as those implicating federal funding, purchased by religious health care entities for their employees, or those not covering maternity. *Tandon*, 141 S. Ct. at 1297 ("instead of requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not translate readily to the home." (cleaned up)).

Under strict scrutiny, "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (cleaned up). Defendants summarily claim that "SB 6219 serves the compelling state interest in

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promoting public health caused by unintended pregnancies." Defs.' MSJ 19. But

> [r]ather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants. The question, then, is not whether the [government] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to [Cedar Park].

Fulton, 141 S. Ct. at 1881 (cleaned up). Defendants do not even attempt to show why exempting Cedar Park's health insurance plan will jeopardize its interest in "promoting public health caused by unintended pregnancies."

A. SB 6219 does not serve a rational, much less compelling, government interest.

First, Washington must "identify an 'actual problem' in need of solving." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). It has not done so. The OIC received no complaints about health care plans not covering abortion before the State enacted SB 6219. Daniel Dep. 13, ECF No. 103-3. And the only pre-SB 6219 complaints it received about health care plans not covering contraception concerned birth control pills and vasectomies. Daniel Dep. 14. Cedar Park does not object to covering either of those.

Moreover, SB 6219's variety of secular exemptions prove it "does not advance an interest of the highest order [because] it leaves appreciable damage to that supposedly vital interest unprohibited." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (cleaned up). An interest is not compelling when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546–47. The underinclusiveness of SB 6219 demonstrated above "is alone enough to defeat" the state's asserted interest. *Brown*, 564 U.S. at 802; *see also Lukumi*, 508 U.S. at 546–47.

For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), there was no exception to the government's ban on hallucinogenic tea. But a single exemption for peyote in another part of the controlled substances law showed no compelling interest because both substances undermined the government's asserted interest. The many exemptions to SB 6219 far exceed the one exception in *O Centro*. So the state must show that

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"granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id*. at 435. It cannot do so because Washington itself has "seriously compromised" SB 6219's universality through multiple exemptions. And the people primarily affected by an exemption for Cedar Park would be its employees, all of whom share the Church's beliefs about abortion. Am. VC ¶¶ 25–32. The government does not have a rational—much less compelling—interest in forcing a pro-life church to provide insurance coverage for abortion to people who will not use it.

Defendants must prove they have a compelling interest in applying the mandates to "the particular claimant[s] whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726. No broadly stated interest "in ensuring nondiscriminatory access to healthcare" is enough. *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1148 (D.N.D. 2021).

B. SB 6219 is not narrowly tailored.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (cleaned up). Under strict scrutiny, the government must also show the law "is the least restrictive means of achieving" its interests. *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). If means less burdensome on religious freedom exist, the government "must use [them]." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

Washington has many ways to accomplish its asserted interests without compelling churches to violate their beliefs. First, it could provide religious organizations an exemption from SB 6219 that does not require their carriers to provide objectionable coverage as a result of the plan or permit charging churches higher premiums. This would allow the government to enforce the law against those who do not object based on religion, while respecting the religious beliefs of churches like Cedar Park. The government has already demonstrated it can do this. Washington excuses religious health care providers, religiously sponsored health carriers, and religious health

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care facilities from the possibility of facilitating abortion coverage in any way. RCW § 48.43.065(2)(a); *accord Hobby Lobby*, 573 U.S. at 730–31 (noting that the government had shown its ability to provide an exemption to the Petitioners because it had granted such an exemption to a different class of religious objectors).

Moreover, Washington law completely exempts 13 different types of health care plans by excluding them from the definition of "health plan." RCW § 48.43.005(31). Defendants could extend this provision to Cedar Park and other similarly situated religious employers. *See Foothill*, 2022 WL 3684900 at *11 (holding California could more narrowly further its interest in its abortion mandate by creating an exemption for "employers who provide coverage to employees who share their religious beliefs"). Finally, the government itself could provide abortion coverage directly to employees whose health plans exclude coverage of abortion. Washington already has a fund to cover the costs of abortion for insureds with religious insurance carrier policies that exempt that procedure. Defs.' MSJ 6 n.3.

All these options are "workable," *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and much "less restrictive" of religious freedom, *Playboy*, 529 U.S. at 824. SB 6219 therefore is not narrowly tailored or the least restrictive means of serving the state's interest, and fails strict scrutiny.

CONCLUSION

For these reasons, Defendants' motion for summary judgment must be denied and Cedar Park's cross-motion granted.

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Respectfully submitted this 31st day of March, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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