Insuring Religious Freedom

By Paul Engel

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- How far will pro-abortion politicians go to get others to comply with their agenda?
- Can California require churches to pay for abortion coverage in the health insurance they provide to their employees?
- In the battle between religious freedom and those who wish to promote abortion, who will win?

“By hook or by crook” seems to be the sentiment of some who promote abortion in this country. When they could not get their way by federal law, they engaged the federal judiciary. When the judiciary abandoned them, they went back to using state law to get their way. And when state law didn’t get them all they wanted, they used regulation to “back door” themselves around the law. Such seems to be the case in California.

In 2014, the California Department of Managed Health Care (DMHC) sent letters to several private health insurers, directing that they remove any limitations or exclusions regarding abortion care services from their health care coverage. It seemed that the agency had approved plans with such limitations, which the DMHC’s Director believed to be in error.

Several churches, Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hills Church, after receiving the

Director's letters, asked if they could receive exemptions as religious organizations. They requested health care insurance coverage that did not cover all legal abortions. Specifically, they requested that their policies either excluded abortions or only covered abortions where the pregnancy unquestionably threatens the life of the mother. They were told by two insurers that they understood the DMHC letter to preclude even religious exemptions. This was incorrect. The DMHC had previously determined that religious employers could legally restrict abortion coverage consistent with their beliefs. The DMHC would later approve a request to exclude abortion care services for religious employers, except when the abortion was necessary to save the life of the mother. However, these churches were unable to secure coverage that aligned with their beliefs, leading to the case of federal district court Foothill Church, et al., v Mary Watanabe, in her official capacity as Director of the California Department of Managed Healthcare (Foothill Church v. Watanabe).

After nearly three years of litigation, the churches requested a religious exemption from DMHC. California's Attorney General stated that:

DMHC could only consider granting exemptions to health plans, not employers or other plan customers.

Foothill Church v. Watanabe

As of the issuing of the court order in Foothill Church v. Watanabe, no plan had asked for approval for an exemption for abortion coverage from DMHC.

In 2019, the District Court for the Eastern District of California dismissed the churches' claims. The Ninth Circuit affirmed the District Court's dismissal of the Establishment Clause claim, but sent the case back to consider the plaintiff's free exercise and equal protection claims. The court has reviewed the case, including an additional amicus

(third-party) brief from the California Catholic Conference. Let's look at the two claims separately, starting with the Free Exercise Claim.

Free Exercise Claim

The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, … provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I. However, the right to freely exercise one's religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"

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I know, Congress did not make this law, but the courts have been ignoring that little fact for decades. Even looking at the section of the First Amendment being quoted shows problems with the court's interpretation. The Constitution says Congress (which the courts have extended to all governments), shall make no law prohibiting the free exercise of religion. Yet here, the court says that is not entirely true. The court claims, based on previous opinions from the Supreme Court, that your right to freely exercise your religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Doesn't that mean that governments can coerce you into violating your religious beliefs as long as the law was neutral and generally applicable? Don't give up on this judge yet though.

Scrutiny

A law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's

conduct by providing 'a mechanism for individualized exemptions.'" … Nor is it generally applicable if it includes "a formal system of entirely discretionary exceptions . . . ." …

A valid and neutral law of general applicability must be upheld if it is rationally related to a legitimate governmental purpose. … In contrast, laws that are not neutral or are not generally applicable are subject to strict scrutiny. …. Under strict scrutiny, laws "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."

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If you've followed The Constitution Study for any time, you shouldn't be surprised that the question of "scrutiny" would come up in this case. Like most federal courts, rather than following the supreme law of the land, their standards seem focused on allowing government to meddle where the law does not allow. This is most easily shown by the standard of judicial review, or scrutiny, the court assigns to a case.

In U.S. constitutional law, when a court finds that a law infringes a fundamental con stitutional right, it may apply the **strict scrutiny** *standard to nevertheless hold the law or policy const itutionally valid if the government can demonstrate in court t hat*
the law or regulation is necessary to achieve a "compelling st ate interest".

Strict Scrutiny, The Free Legal Dictionary

Notice, scrutiny, also known as standards of judicial review, is not based in the Constitution of the United States, but in "constitutional law", which is nothing more than the opinion of judges about the Constitution. Whenever you hear the term "scrutiny" in a legal case, understand that what the court is

doing is deciding how hard the government must work in order for the court to allow it to infringe on your rights. In this case, the judge says the claims are subject to strict scrutiny, which is the highest level of effort the government must show to violate the Constitution.

Getting back to the case and the Free Exercise Claim:

The Churches argue "the mere 'creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given,'" …, and thus challenge the "State's decision to enforce the Abortion Coverage Requirement against the Churches' healthcare plans in the first place." … The Director argues the Churches are challenging her refusal to "extend an exemption to [p]laintiffs because they are not entities subject to regulation by DMHC under the [Knox Keene Act]." … In other words, the Churches argue the Director would not extend a religious exemption to them, while the Director claims she did not because [she] could not.

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Seems like a bit of a "He said, She said", but not really.

Nonetheless, as the court was careful to confirm at the hearing, the Director now concedes that the existence of a "system of individual exemptions" in the Knox Keene Act subjects her decision not to expand the plan exemption framework to the Churches to strict scrutiny. … Accordingly, the court must decide whether this policy "advances 'interests of the highest order' and is narrowly tailored to achieve those interests."

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Now everyone in the case agrees that the law under which the Director of DMHC acted is subject to "strict scrutiny". That means the court, and specifically this judge, will determine

if the interests advanced by this law are sufficient to deny the people of California their rights protected under the Constitution. Does anyone else see how insidious this is? You have a government actor, the judge, determining whether or not a government's interest is sufficient to infringe on your rights. This is exactly what the Bill of Rights was created to prevent.

While all parties in this case agree that the state needs to meet the highest burden of proof that they can infringe on your rights, the state still needs to make that case.

Director explains her decision not to make an exception at the Churches' request by citing her policy not to entertain requests for exceptions unless they come from a plan. She cites three compelling government interests.

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The Director of DMHC gives three reasons why the state should be allowed to infringe on the rights of these churches and their members. I want to look at them individually.

First, the policy prevents "a flood of exemption requests from over 26 million enrollees" who may object to their plan's covered care services.

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Look at the very first concern the Director brings up. She does not seem concerned with the impact on the people, or the infringement on their rights, but on how much work it might make for her department. Think of the arrogance that shows. In her mind, you should be forced to support the murder of unborn children because allowing you an exemption might make too much work for her department.

Second, it prevents "significant third-party harm to enrollees," which may occur if employers opt out of legally

mandated healthcare coverage.

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I'm not an expert in the California Constitution, but I am pretty sure the mandate the Director is referring to is not legal. Did the citizens of California delegate to their government the authority to regulate healthcare coverage? A quick search of the state's Constitution showed:

Notwithstanding any other provision of this Constitution or existing law, a person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer's share of the contribution necessary to such participation.

Constitution of the State of California, Article IV, Section 4.5

Beyond the members of the legislature, I could find no power delegated by the people to the State of California to place requirements on their healthcare coverage. Furthermore, by mandating that citizens of California purchase healthcare that meets certain requirements, they are depriving them of the liberty to choose a plan that best meets both their needs and beliefs. This violates the Due Process Clause of the constitution of both California and the of the United States.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without **due process** *of law.*

California Constitution, Article I, Section 15

No person shall … be deprived of life, liberty, or property, without due process of law;

U.S. Constitution, Amendment V

The Director's last argument is:

Third, it appropriately restricts DMHC's jurisdiction as authorized by the California State Legislature.

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The Director seems more worried about the restrictions put in place by the Legislature than the Constitutions she took an oath to support. Thankfully, none of these arguments persuaded the judge.

None of these interests are sufficiently compelling, nor is the department's rigid approach narrowly tailored.

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Equal Protection Clause Claim

What about the church's claim of a violation of the Equal Protection Clause?

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the law," U.S. Const. amend. XIV, which essentially "direct[s] that all persons similarly situated should be treated alike," … A viable Equal Protection claim must also "show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class."

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The question the judge is trying to answer is, did the Director target these churches because they were religious organizations? In other words, was the Director of DMHC attempting to discriminate against them. Here, the judge was not convinced.

This court previously dismissed the Churches' Equal Protection

Clause claim for two reasons. …. First, the Churches did not allege facts giving rise to a reasonable inference that the Director treated them differently than "similarly situated" persons and businesses. … The court noted "the challenged letters apply to [p]lans, not purchasers, and do not make any classification with respect to purchasers." … Second, the Churches did not allege facts showing that defendant acted "at least in part because of, not merely in spite of," plaintiffs' religious beliefs.

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Conclusion

The judge in this case split the decision. She granted summary judgment for the churches on their free exercise claim, but found for DMHC on the Equal Protection Claim. The case, however, is not over. While this order is in place, the judge also ordered both parties to provide supplemental briefings.

While this case moves forward, and whether you live in California or not, I want you to consider this: The only reason this judge found for the churches is she did not believe the Director made a sufficiently compelling case to infringe on the rights of these churches. Think about that for just a minute. Yes, this case was about the free exercise of religion, specifically whether or not churches could be forced to provide abortion coverage in their employee's health insurance, but the underlying jurisprudence came down to scrutiny and how hard government had to work to overrule the Constitution of the United States. Also, it seems that the reason the judge granted judgment to the Director on the Equal Protection Clause claim was because the state did not apply its rule to the churches directly, but got private third-parties to do it for them. Is this what passes for justice in America today? Is this what people call the rule of law? The protection of your rights determined by a single judge? How safe do you feel when the protection of your rights comes down

to how a judge feels about a “compelling government interest”? What about the compelling government interest laid down in the Declaration of Independence?

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

Declaration of Independence

Doesn’t the current abuse of judicial review, making the rights of the people subject to government interest, turn the purpose of government upside down?

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