No. S_____

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

EVAN MINTON,

Plaintiff and Appellant,

vs.

DIGNITY HEALTH,

Defendant and Respondent.

PETITION FOR REVIEW

After a Published Opinion
of the First District Court of Appeal, Division Four
Case No. A153662

Superior Court of California
County of San Francisco
Hon. Harold E. Kahn
Case No. CGC-17558259

Service on Attorney General required by Cal. Rules of Court, rule 8.29(c)
Service on Solicitor General required by Civ. Code, § 51.1

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Dignity Health petitions for review of the September 17, 2019 published decision of the Court of Appeal, First Appellate District, Division Four (Appendix), and prays that, upon review, the decision be reversed.

I. QUESTION FOR REVIEW

Can a Catholic hospital that refuses to allow a procedure because the procedure is prohibited by the Ethical and Religious Directives for Catholic Health Care Services (ERDs) be liable for intentional discrimination under the Unruh Act?

II. SUMMARY OF REASONS FOR REVIEW

The Opinion holds that a Catholic hospital can be liable under the Unruh Act for refusing to allow a non-emergency sterilization procedure because the procedure is forbidden by the ERDs—in effect, that a Catholic hospital can be liable under the Act for being a Catholic hospital. The ERDs define and bind Catholic health care. Until the Opinion, no state or federal court had ever attempted to impose an antidiscrimination statute to require a Catholic hospital to forsake the ERDs and its Catholic identity by allowing medical procedures that are forbidden by and antithetical to Catholic teaching. The Opinion's casual disdain toward religion cannot be reconciled with the Constitution's "special solicitude to the rights of religious organizations."[1]

The Opinion misapplies *North Coast Women's Care Medical Group v. Superior Court* (2008) 44 Cal.4th 1145. It misreads *North Coast* to conclude that this Court has *already declared* that the Unruh Act survives strict scrutiny under the California Constitution in every case where a

[1] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012) 565 U.S. 171, 189.

medical procedure is denied based on religious objections—and that "*any burden* the Unruh Act places on the exercise of religion *is justified* by California's compelling interest in ensuring full and equal access to medical treatment for all its residents, and that there are no less restrictive means available for the state to achieve that goal." (Slip Op. 10-11 [emphasis added].) *North Coast* held no such thing. It did not involve doctrinal prohibitions on a religious institution's provision of particular medical procedures. There, this Court considered the constitutionality of the Unruh Act only where *individual doctors* had religious objections to performing certain procedures. The Opinion ignores the very different context here and misuses *North Coast* as a foundation for subordinating religion and making it *always* less important than unfettered access to a faith-based hospital. This creates an untenable conflict with the Constitution's "guarantee[]" of religious freedom.[2]

Courts consistently require that faith-based institutions' doctrinal principles be accorded respect, including in the face of statutes prohibiting discrimination. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, 1727, the U.S. Supreme Court considered a Colorado public accommodations law functionally identical to the Unruh Act, and recognized the proposition that "a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform [a same-sex wedding] ceremony without denial of his or her right to the free exercise of religion" was so self-evident that it could be "assumed." The Opinion disregarded this key observation in *Masterpiece*, instead cherry-picking language from that decision to try to

[2] Cal. Const., art. I, § 4.

support the Opinion. But *Masterpiece* does *not* support the Opinion; it struck down a ruling imposing the antidiscrimination law on the faith-based objector. *Masterpiece* is replete with statements mirroring Dignity Health's position in this case. (See *infra* Part IV.D.2.) Exactly the same point expressed in *Masterpiece* exists here: just as one would correctly "assume" that a member of the clergy would not be compelled by antidiscrimination statutes to perform a prohibited ceremony, the law should "assume" that Mercy San Juan Medical Center (Mercy), a Catholic hospital, cannot be compelled to perform procedures the ERDs prohibit. Contrary to *Masterpiece*, the Opinion boldly "inferred" that adherence to the ERDs *is* intentional discrimination against transgender people.[3] Such hostility to religion cannot be the law.

If not reviewed and reversed, the Opinion threatens to impose a massive burden on religion and a major obstacle to the functioning of the many Catholic hospitals across California. The Opinion may force Catholic hospitals to cease providing certain procedures—such as hysterectomies—to anyone, under any circumstances, to avoid being accused of invidious discrimination.[4] But refusing to comply with the ERDs is not an option for a Catholic hospital. Without adherence to the ERDs, Mercy would cease being a Catholic institution.

The law must recognize that a Catholic hospital's adherence to the

[3] Slip Op. 7.

[4] See Wilson, *When Governments Insulate Dissenters From Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions* (2014) 48 U.C. Davis L.Rev.703, 766, fn. 316 (quoting Senate discussion of need for conscience protections: there is a "real and present danger that many of these religious hospitals, if coerced into performing operations for abortions or sterilizations contrary to their religious precepts, will simply eliminate their obstetrics department").

ERDs is not intentional discrimination against any person or group, but is an act of religious faith. The ERDs differentiate among *procedures*, not among *classes of people*. This case involves a transgender man who sought a hysterectomy (an elective sterilization operation) at a Catholic hospital as treatment for gender dysphoria. The case law consistently recognizes the rights of Catholic hospitals to deny procedures, including sterilizations, that the ERDs prohibit. (See *infra* Part IV.D.2.) As the trial court found in an unchallenged ruling, "both sides agree that the reason [the procedure was denied] was [Mercy's] interpretation of the [ERDs]."[5] But the Opinion expressly holds that the purported disparate impact of the ERDs on transgender persons supported an "inference" that Mercy intended to discriminate against that group.[6] This Court has rejected precisely such a theory, because disparate impact is not prohibited by the Unruh Act.[7] Disparate impact is the basis of the Opinion. That conflict with *Koebke* cannot be allowed to stand. It will create confusion in Unruh Act jurisprudence.

Finally, the Opinion never resolves its conflict with the U.S. Constitution and with the U.S. Supreme Court's recent statements that determining when a state antidiscrimination law must yield to religious principles is a "delicate question" requiring "balanc[ing]" the important interests involved.[8] Nor does it consider that *Employment Division v. Smith* (1990) 494 U.S. 872—holding that religious beliefs do not exempt individuals from complying with neutral state laws of general

[5] 1-CT-147.
[6] Slip Op. 7.
[7] *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854.
[8] *Masterpiece*, 138 S.Ct. at 1723-1724.

applicability—has never been applied to an institutional faith-based provider of patient care services, such as a Catholic hospital.

Review is warranted given the potentially significant impact of the Opinion on Catholic health care, to resolve the conflicts identified above, and to consider the required balancing of constitutional interests of institutional Catholic health care, prohibited medical procedures, and public accommodations law. The Opinion's animosity to religion—according no respect to the ERDs, failing to balance the constitutional interests involved, and treating the hospital's refusal to allow the performance of an elective hysterectomy as an actionable claim for intentional discrimination—requires that it be subjected to strict scrutiny and reversed.

III. STATEMENT OF THE CASE

Mercy is a Catholic hospital owned by Dignity Health. (1-CT-150-151 ¶ 10.) Dignity Health's mission is to "further[] the healing ministry of Jesus."[9] Mercy was founded in 1967 by the Sisters of Mercy, a congregation of Catholic women religious carrying out the healing ministry of Jesus by bringing health care to millions of people through the founding and administration of hospitals.[10]

Mercy is listed in the Official Catholic Directory (OCD), establishing that it is an official part of the Catholic Church.[11] (1-CT-

[9] <https://dignityhlth.org/2BdvifR>

[10] <https://dignityhlth.org/2MIalPr>

[11] "An entity is listed in the [OCD] only if a bishop of the Roman Catholic Church determines the entity is 'operated, supervised, or controlled by or in connection with the Roman Catholic Church.' Courts view the [OCD] listing as a public declaration by the Roman Catholic Church that an organization is associated with the Church." (*Overall v. Ascension* (E.D. Mich. 2014) 23 F.Supp.3d 816, 831 [citation omitted].)

190.)[12] Mercy thus is bound to follow the ERDs promulgated by the U.S. Conference of Catholic Bishops (USCCB).[13] (1-CT-192.)[14] The ERDs' purpose is to "reaffirm the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person" and "provide authoritative guidance on certain moral issues that face Catholic health care today." (1-CT-194-195; see also *Means,* 2015 WL 3970046, at *3.)

ERD 53 provides that "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." (1-CT-218 [endnote omitted].) ERD 53 references the Congregation for the Doctrine of the Faith, Responses to Questions Proposed Concerning "Uterine Isolation" and Related Matters (July 31, 1993)[15] (1-CT-232, endnote 34), which further explains that a hysterectomy may be allowed where necessary to "counter an immediate serious threat to the life or health of the mother ...."[16] Thus, where "the

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[12] See *McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 323-324 (recognizing that a Catholic hospital subject to the ERDs, whose sole member was Dignity Health's predecessor Catholic Healthcare West, is a "religious association or corporation" within the meaning of FEHA).

[13] The trial court took judicial notice of the ERDs. (2-CT-432; see also Slip Op. 3, fn. 2.)

[14] "Individual bishops exercise authority under Canon Law to bind all Catholic health care institutions located within their diocese to the ERDs as particular law within the diocese." (*Means v. U.S. Conf. of Catholic Bishops* (W.D. Mich. 2015) 2015 WL 3970046, at *3, aff'd (6th Cir. 2016) 836 F.3d 643.)

[15] <https://bit.ly/2QlFbNx>

[16] The Church recently confirmed that "the removal of the uterus [is] morally licit [proper] when there is a grave and present danger to the life or

pathological condition of the uterus (e.g., a hemorrhage which cannot be stopped by other means) ... makes its removal medically indicated" and where "the uterus ... constitute[s] in and of itself [a] present danger to the woman," the procedure is permissible. (*Ibid.*)

ERD 29 provides that "[a]ll persons served by Catholic health care have the right and duty to protect and preserve their bodily and functional integrity. The functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available." (1-CT-211 [endnote omitted].)

ERD 5 provides that "Catholic health care services must adopt these Directives as policy, [and] require adherence to them within the institution as a condition for medical privileges...." (1-CT-203.) Catholic hospitals that fail to adhere to the ERDs violate their own governing documents and mission and may no longer be qualified as "Catholic" or permitted to describe themselves as "Catholic."[17]

Plaintiff Evan Minton alleged he is a transgender man diagnosed with gender dysphoria. (1-CT-9 ¶ 9; 1-CT-11 ¶ 17.) His physician, Dr. Dawson, scheduled a hysterectomy for Minton at Mercy on August 30, 2016 as part of his course of treatment for gender dysphoria.[18] (1-CT-12

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health of the mother," and further clarified that a hysterectomy is permissible where "the reproductive organs are not capable of protecting a conceived child up to viability, namely, they are not capable of fulfilling their natural procreative function." ("Responsum" of the Congregation for the Doctrine of Faith to a question on the liceity [legitimacy] of a hysterectomy in certain cases (Jan. 3, 2019) <https://bit.ly/32me4Zy>.)

[17] <https://bit.ly/33wd9WL>; <https://abcn.ws/2OWFXn4>

[18] Dr. Dawson was bound to follow the ERDs "as a condition for medical privileges" at Mercy. (1-CT-203.) The ERDs explain: "When the health care professional and the patient use institutional Catholic health care, they also accept its public commitment to the Church's understanding of and

¶ 19.) On August 28, 2016, Minton told a Mercy nurse he is transgender. (1-CT-12 ¶ 21.) The following day, Mercy notified Dr. Dawson that the procedure was cancelled. (1-CT-12 ¶ 26.) Dr. Dawson discussed the cancellation with a Mercy nurse manager and with Mercy's president. (*Ibid.*) The parties disagree about the ensuing course of events, but they agree, and the court recognized, that Dr. Dawson was allowed to perform the procedure three days later at Methodist Hospital, a non-Catholic Sacramento hospital owned by Dignity Health. (1-CT-13 ¶ 25.) After having the procedure at Methodist, Minton sued Dignity Health for violating Unruh. (1-CT-7.)

The trial court sustained Dignity Health's demurrer. (1-CT-147.) The court noted that "[a]lthough Mr. Minton's complaint is silent about the reason why his request for a hysterectomy at [Mercy] was denied, both sides agree that the reason was [Mercy's] interpretation of the [ERDs]." (*Ibid.*)

Subsequently, the court sustained Dignity Health's demurrer to the First Amended Complaint (FAC) with prejudice. The court found that Minton did not plead he was denied full and equal access to medical procedures when Dignity Health promptly allowed the surgery at Methodist. (2-CT-431.) Minton did not seek further leave to amend.

The Court of Appeal reversed. It held that, because Dignity Health

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witness to the dignity of the human person. The Church's moral teaching on health care nurtures a truly interpersonal professional-patient relationship. This professional-patient relationship is never separated, then, from the Catholic identity of the health care institution. The faith that inspires Catholic health care guides medical decisions in ways that fully respect the dignity of the person and the relationship with the health care professional." (1-CT-210.)

did not accommodate the surgery simultaneously with denying the procedure at Mercy, Minton's allegations stated an Unruh claim. The court stated at the outset of the Opinion that it could decide the case on a "narrow[]" ground (Slip Op. 1), yet it came to conclusions about Mercy's constitutional rights using perfunctory analysis, and it published the Opinion. The court rejected Dignity Health's argument that compelling a Catholic hospital to permit prohibited procedures violated its freedom of religion and freedom of speech, concluding that *North Coast* already held that the Unruh Act is a compelling state interest that will always outweigh these constitutional freedoms in the "medical treatment" context. (Slip Op. 10-11.)

IV. REVIEW SHOULD BE GRANTED

The Unruh Act prohibits *intentional* discrimination against a protected group *because* of their protected characteristic. (Civ. Code, § 51.) "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit *intentional* discrimination .... [A] plaintiff must ... plead and prove a case of intentional discrimination to recover under the Act." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [rejecting Unruh claim on demurrer; emphasis in original], superseded on other grounds by Civ. Code, § 51, subd. (f).) By its express terms, the statute does not apply to facially neutral policies: "This section shall not be construed to confer any right or privilege on a person ... that is *applicable alike* to persons" regardless of sex, sexual orientation, and other classes. (Civ. Code, § 51, subd. (c) [emphasis added].) Thus, "[a] policy that is neutral on its face is *not actionable* under the Unruh Act, even when it has a disproportionate impact on a protected class." (*Turner v. Association of*

Am. Med. Colls. (2008) 167 Cal.App.4th 1401, 1408 [emphasis added].)

The Opinion holds that Minton's complaint states a claim for violation of Unruh simply by alleging the hospital denied the procedure. The court opines that damages could be "mitigated" by evidence demonstrating that Dignity Health's accommodation of Minton's surgery at another hospital met the court's undefined standard for "full and equal" access. (Slip Op. 9.) However, the court gives only passing and dismissive consideration to the profound constitutional implications of imposing such a massive burden on the religious and expressive rights of institutional Catholic health care. Review is needed to hold that a Catholic hospital's adherence to the ERDs is not intentional discrimination and thus cannot violate Unruh.

A. A faith-based institution's adherence to binding religious teaching is not "intentional discrimination."

The parties and the trial court agreed that Mercy denied the non-emergency procedure based on its "interpretation of the [ERDs]." (1-CT-147.) Mercy's policy of not allowing a hysterectomy because of the ERDs is *facially neutral* and thus not prohibited by Unruh. The Opinion entirely disregards the nature and purpose of religious teaching and implicitly attributes to Dignity Health a pernicious intent that is fundamentally irreconcilable with the ERDs.

Minton did not allege that Dignity Health's denial of a hysterectomy to treat gender dysphoria is *intentional discrimination* against transgender people *because they are transgender* or that the prohibition was put in place to accomplish such discrimination. He did not allege that Mercy refused or would refuse to provide any medical treatment to Minton or any other transgender person *other than* sterilization prohibited by the ERDs. Minton

did not allege that Mercy would have denied him another, non-sterilizing treatment for his gender dysphoria. Minton alleged that hysterectomies are performed at Mercy to treat various pathologies: uterine fibroids, endometriosis, pelvic support problems, abnormal uterine bleeding, chronic pelvic pain, and gynecological cancer. (1-CT-152 ¶ 15.) Minton might have needed a hysterectomy for any of these reasons, but he did not allege that he needed the procedure for any of these reasons or that Mercy would have refused to allow him a hysterectomy for any such reasons. And he did not allege that Mercy would perform a hysterectomy on a healthy organ for *any* person, transgender or otherwise.[19]

Rather, as the trial court found, Mercy denied the procedure for the purpose of complying with the ERDs, as it was required to do. (1-CT-147.) The ERDs articulate binding rules for procedures at Catholic hospitals and do not concern gender identity or other protected characteristics of any patient. (1-CT-192-234.) No person, male or female, whether transgender or not, can have a hysterectomy at Mercy in the absence of a serious physical condition or pathology of the uterus.

Mercy's adherence to the ERDs is the antithesis of intentional discrimination. As a Catholic hospital, Mercy treats all patients with

[19] In his concurring opinion in *Masterpiece*, Justice Gorsuch recognized a distinction between refusing to provide a particular service based on religious principles and refusing to provide a service to a particular type of person. He recognized that a baker's refusal to bake a wedding cake celebrating a same-sex marriage was not the same thing as refusing to sell any cake at all to a same-sex couple. "[I]t was the kind of cake, not the kind of customer, that mattered to the bakers." (*Masterpiece*, 138 S.Ct. at 1735-1736 ["there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic"] [emphasis in original].) Similarly, here, the ERDs prohibit rendering certain procedures, not treating certain people.

respect and compassion. The Church articulated this requirement at the Second Vatican Council in 1965: "[W]ith respect to the fundamental rights of the person, *every type of discrimination*, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent."[20] And ERD 23 provides that "[t]he inherent dignity of the human person must be respected and protected regardless of the nature of the person's health problem or social status. The respect for human dignity extends to *all persons who are served by Catholic health care*." (1-CT-210 [emphasis added].)

Even though Minton alleged no facts to suggest anything other than Dignity Health's reliance on the ERDs, the Court of Appeal presumed an intent to discriminate that required further evidentiary development. (Slip Op. 6-7.) The court compared its decision to *North Coast*, where this Court remanded for trial on whether individual doctors, asserting religion-based objections, had refused to perform a fertility procedure on a woman because she was a lesbian (prohibited by Unruh) or because she was unmarried (not prohibited by Unruh). (Slip Op. 7.) But that part of *North Coast* is not comparable. The claimed religious objections there were asserted by individuals based on unspecified personal religious beliefs. Thus, there was room for an evidentiary debate about the actual basis for their refusal to perform the procedure.

There is no such room here. The ERDs are not a subjective set of personal beliefs, but an objective doctrine arising from the foundational principles that bind and define institutional Catholic health care—principles developed by the USCCB many years before this dispute arose. The

[20] <https://bit.ly/WyDi4S> (Vatican Council II, Pastoral Constitution of the Church in the Modern World, n. 29 [emphasis added].)

ERDs' prohibitions indisputably are based not on characteristics of the person who seeks a procedure, but on the nature of the procedure itself. (*Masterpiece*, 138 S.Ct. at 1735-1736 [conc. opn. of Gorsuch, J.].) Hospitals perform all manner of medical services for all manner of patients suffering from all manner of conditions. But a Catholic hospital *is forbidden* to remove a uterus from *any patient* unless there is a serious physical condition or pathology. That is not because the hospital intends to provide unequal service to transgender persons. It is because the hospital must disallow procedures resulting in sterilization under such circumstances and must preserve bodily integrity where possible to do so. No further factual development could illuminate the point.

B. Disparate impact is not prohibited by the Unruh Act.

The Opinion acknowledges the established rule that the Unruh Act does not reach cases of disparate impact of a facially neutral policy on a protected group. (Slip Op. 6; see also *Harris*, 52 Cal.3d at 1175 ["A disparate impact analysis or test does not apply to Unruh Act claims."]; *id.* at 1172 ["No case has extended the [disparate impact] test to the Unruh Act."]; *Koebke*, 36 Cal.4th at 854; *Turner*, 167 Cal.App.4th at 1408.) "By its nature, an adverse impact claim challenges a standard that is applicable alike to all such persons based on the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny. If the Legislature had intended to include adverse impact claims, it would have omitted or at least qualified this language [exempting standards that are 'applicable alike to persons of every sex ...']." (*Harris*, 52 Cal.3d at 1172-1173.)

The Opinion conflicts with these cases because it is squarely based

on a disparate impact theory. That would be true of any case holding that denial of a service based on the ERDs is intentional discrimination. Here, the court drew an "inference" of intentional discrimination against transgender people from the presumed fact that the ERDs' prohibition on removal of a healthy uterus will primarily affect that group. It stated: "Denying a procedure as treatment for a condition that affects only transgender persons supports an inference that Dignity Health discriminated against Minton based on his gender identity." (Slip Op. 7.) The court said it relied on *Koebke*, but *Koebke* expressly rejected such an inference where "plaintiffs' argument, like disparate impact analysis, relies on the *effects* of a facially neutral policy on a particular group and would require us to infer *solely* from such effects a discriminatory intent." (*Koebke*, 36 Cal.4th at 854 [emphasis in original].)

Instead, *Koebke* requires an allegation that a defendant adopted or applied its policy *for the purpose of accomplishing discrimination* or as a *disguised device to accomplish discrimination*. (*Ibid.*; see also *Turner*, 167 Cal.App.4th at 1411 ["In *Koebke,* the court recognized that an Unruh Act violation might arise from a situation in which a neutral policy was used as a pretext to discriminate against a protected class of individuals."].) In *Koebke*, the plaintiffs alleged that a facially neutral policy extending membership benefits only to married spouses and not to unmarried partners was discriminatorily enforced against the gay plaintiffs, based on their sexual orientation. (*Koebke*, 36 Cal.4th at 854.) The Court held the plaintiffs could show disparate application of the policy to gay people to prove their claim that the defendant *intended* its policy to exclude gay partners. (*Id.* at 854-855.)

Here, there is no such allegation, nor could there be in the context of

objective policies developed independently based on religious concerns for bodily integrity. Minton did not allege Mercy applied the ERDs in a manner intended to disfavor transgender people, such as that it did not enforce or apply the ERDs' prohibition on non-emergency sterilizations sought by cisgender men and women. He did not allege that the USCCB wanted to use the ERDs to prevent transgender persons from having surgical treatment because they are transgender. In fact, Minton never even mentioned *Koebke* until his reply brief on appeal, despite Dignity Health's extensive reliance on *Koebke* in two demurrers. And he never asserted that he could amend to allege this theory. Nonetheless, the Opinion improperly assumed that he could allege these sorts of facts and then "inferred" that the presumed facts stated a cause of action.

The allegedly discriminatory practice here applies not solely to transgender persons seeking elective sterilizing procedures because of gender dysphoria, but to any person (including cisgender men and women) seeking an elective sterilizing procedure for any reason prohibited by the ERDs. Thus, even assuming that the alleged practice disproportionately affects transgender people, the analysis does not change. Unruh's exclusion of disparate impact claims has been recognized in numerous factual scenarios where the allegedly discriminatory rule or practice has an impact primarily on one protected group. (*Harris*, 52 Cal.3d at 1172 [no Unruh claim for disparate impact on women created by landlord's income requirement]; *Koebke,* 36 Cal.4th at 853 [no Unruh claim where policy extending benefits only to married spouses disparately impacted unmarried same-sex couples]; *Turner,* 167 Cal.App.4th at 1408-1409 [no Unruh claim despite disparate impact on learning-disabled persons]; *Belton v. Comcast Cable Holdings* (2007) 151 Cal.App.4th 1224, 1237 [no Unruh claim

despite disparate impact on blind persons].)

C. The full and equal access requirement must be applied to accommodate religious beliefs.

The Opinion contemplates that a Catholic hospital abiding by the ERDs could mitigate its liability under Unruh for intentional discrimination if it denied a procedure but also provided the transgender person with alternative "full and equal" accommodation. Dignity Health argued (and the trial court found) that Dignity Health avoided any liability when it made arrangements for Minton to have the surgery, performed by his own surgeon, at a nearby Dignity Health non-Catholic hospital as soon as the doctor's schedule permitted (within 72 hours). The Court of Appeal held that the facts as alleged—including Minton's admission that he received the procedure three days later—did not suffice because they suggested that Dignity Health did not offer this accommodation contemporaneously with denying the procedure at the Catholic hospital. (Slip Op. 9-10 ["At that point in time [of denial], ... Minton was denied full and equal access to health care treatment, a violation of the Unruh Act."].)

The issues that could arise from Catholic hospitals' efforts to ensure full and equal access to procedures these hospitals cannot themselves provide illustrate the absurdity—not to mention the interference with hospitals' religious and expressive freedoms—of the Opinion's allowance for mitigating Unruh damages. The Opinion creates untenable questions that should be irrelevant to the Unruh Act and are not proper subjects for judicial inquiry into the practice of religion. For instance, what happens if a Catholic hospital cannot provide sufficient "full and equal" access to a procedure prohibited by the ERDs, because it does not have a non-Catholic affiliate where the procedure can be performed? What happens if, as here,

the hospital makes efforts to accommodate the individual at an affiliated non-Catholic hospital, but a court, after the fact, deems those efforts not fast enough?

No faith-based hospital should be compelled to compromise its religious principles by cooperating in ensuring that a patient receives a prohibited procedure or else be subject to judicial scrutiny of the adequacy of its efforts. The constitutional infirmity of placing such burdens on religion was settled by the U.S. Supreme Court years ago, when it recognized "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." (*Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 116.) Any effort to adjudicate Minton's claim by interpreting the ERDs or evaluating the lengths to which a Catholic hospital must go to assist in the provision of a procedure that its religion forbids would require a "nuanced discussion" of how sterilization is understood and treated under Catholic teaching. The courts should not be in that business.[21]

[21] Under the ecclesiastical abstention doctrine, "[s]tate courts must not decide questions of religious doctrine; those are for the church to resolve." (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 473.) In *Means*, 2015 WL 3970046, at *12-*13, the court dismissed on ecclesiastical abstention grounds claims that would require the court to conduct a "nuanced discussion about how a 'direct abortion' is defined in Catholic doctrine." The court explained it "cannot determine whether the establishment of the ERDs constitute[s] negligence because it necessarily involves inquiry into the ERDs themselves, and thus into Church doctrine," and "[w]here the Court must scrutinize religious doctrine to assess the merits of a legal position, the Court risks excessively entangling the law in the free exercise of religion."

D. State and federal constitutional guarantees of freedom of religion and speech weigh heavily against the Opinion's interpretation of the Unruh Act.

The constitutional issues inherent in this case could have been avoided by recognizing that following the ERDs is not intentional discrimination under the plain language of the Unruh Act. Instead, the Opinion creates a constitutional crisis by attempting to use Unruh to force Mercy to violate the ERDs, imposing an unacceptable burden on Mercy's religious freedom and expression. (*Ingels v. Westwood One Broadcasting Servs.* (2005) 129 Cal.App.4th 1050, 1072-1074 [declining to apply Unruh to discrimination claim based on defendant's First Amendment speech, where no compelling state interest justified its application]; *Hart v. Cult Awareness Network* (1993) 13 Cal.App.4th 777, 792 [same for freedom of association].) The Opinion decided the constitutional issues without analysis or reasoning.

1. The California Constitution prohibits the state from compelling Mercy to permit procedures prohibited by binding religious teaching.

California's Constitution provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4; *People v. Woody* (1964) 61 Cal.2d 716, 718, fn.1, 727 [religious freedom is "guaranteed" under the California Constitution, and "the right to free religious expression embodies a precious heritage of our history"].) "The Attorney General of this state has observed that '[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion' than that found in the 'no preference' clause ...." (*Sands v. Morongo Unified Sch. Dist.* (1991) 53 Cal.3d 863, 883 [citation omitted].)

The Opinion says the argument that Unruh cannot compel Catholic hospitals to violate their religious principles was "soundly rejected in *North Coast*." (Slip Op. 10.) It says this Court "held that *any burden* the Unruh Act places on the exercise of religion is *justified* by California's compelling interest in ensuring full and equal access to medical treatment for all its residents, and that there are no less restrictive means available for the state to achieve that goal." (*Id.* 10-11 [emphasis added].) *North Coast*, however, did not say or imply this and did not address the rights of institutional religious organizations such as Catholic hospitals. Strict scrutiny requires a particularized, "focused," case-by-case analysis of the particular facts and context of a case. (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) 546 U.S. 418, 430-431 [rejecting "categorical" application of strict scrutiny and explaining that courts "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants"].) "'[S]trict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose[].'" (*Id.* at 432 [citation omitted; emphasis in original].)

This Court has not determined what level of scrutiny applies to freedom of religion claims under the California Constitution, although it applied strict scrutiny in recent cases. (*North Coast*, 44 Cal.4th at 1158; *Catholic Charities v. Superior Court* (2004) 32 Cal.4th 527, 559, 562.) Where a case challenges constitutional religious rights of a not-for-profit faith-based organization, strict scrutiny is appropriate because such organizations *exist* to use their religious principles in service of the community; thus, their religious expression is especially exposed to the risk

of being chilled by government action and deserves heightened constitutional protection. (*Corporation of the Presiding Bishop v. Amos* (1987) 483 U.S. 327, 344-345 (conc. opn. of Brennan. J.) ["unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster."]; *id.* at 342 ["furtherance of the autonomy of religious organizations often furthers individual religious freedom as well"]; *Burwell v. Hobby Lobby Stores* (2014) 573 U.S. 682, 752 (diss. opn. of Ginsburg, J.) ["The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations."].)

Under strict scrutiny, a state law that substantially burdens freedom of religion may not be enforced unless it serves a compelling state interest and there is no less restrictive means to accomplish that interest. (*North Coast*, 44 Cal.4th at 1158.) Applying Unruh to compel Mercy to allow procedures that violate governing religious teaching and its Catholic mission, and to risk losing its Catholic status, is obviously a substantial burden on Mercy's religious freedom.[22] Moreover, there is a less restrictive means to achieve the state's goal under Unruh: Minton could obtain the hysterectomy at another hospital without religious objections—and in fact he did so, when Dignity Health allowed the procedure to be performed at its

[22] "[A] law substantially burdens a religious belief if it 'conditions receipt of an important benefit upon conduct proscribed by a religious faith … thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (*Catholic Charities*, 32 Cal.4th at 562 [citation omitted].)

affiliated non-Catholic hospital.

The question whether less restrictive alternatives exist in a particular case requires a balancing, which the court here did not perform. In *North Coast*, the Court rejected two doctors' argument that their constitutional rights to free speech and exercise of religion immunized them from Unruh when they refused to perform a fertilization procedure for a lesbian patient. (*Id.* at 1157-1159.) However, the Court explained that the statute could have been honored, without conflicting with the doctors' religious views, had they denied the procedure for all patients or arranged for the procedure to be performed by other doctors at the clinic without religious objection to the procedure:

> To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physicians' employer. Or, because they incur liability under the Act if they infringe upon the right to the "full and equal" services of North Coast's medical practice, defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives "full and equal" access to that medical procedure through a North Coast physician lacking defendants' religious objections.

(*Id.* at 1159 [citations omitted].)

Mercy did and does "simply refuse" to perform hysterectomies on "any patient" with a healthy uterus. Further, while Justice Baxter, in concurrence, agreed that "in the circumstances before us, the burden imposed on [the doctors'] constitutional right was not sufficient to overcome the state's interest" because there were less restrictive alternatives, he was:

> not so certain this balance of competing interests would produce the same result in the case of a sole practitioner ... who lacks the opportunity to ensure the patient's treatment by another member of the same establishment. At least where the patient could be referred with relative ease and convenience to another practice, I question whether the state's interest in full and equal medical treatment would compel a physician in solo practice to provide a treatment to which he or she has sincere religious objections. *One might well conclude that, in that situation, application of the Unruh Civil Rights Act against the doctor would not be the means "least restrictive" on religion of furthering the state's legitimate interest.*

(*Id.* at 1162-1163 (conc. opn. of Baxter, J.) [emphasis added]; see also *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 312 [physician with moral objections to removing feeding tube cannot be compelled to do so if patient can be transferred to another physician who will, noting "[t]his case does not presently pose the dilemma created when no physician can be found who will follow the conservator's direction"].)

These discussions show that evaluating less restrictive alternatives depends on the circumstances of each case. With a Catholic hospital bound by the ERDs, less restrictive alternatives exist if the patient can access the service elsewhere. But when he or she cannot, that does not automatically mean, as the Opinion held, that the state interest outweighs the burden on religion. Strict scrutiny requires balancing all factors and may come out differently on different facts.

2. The U.S. Constitution prohibits the state from compelling Mercy to permit procedures prohibited by binding religious teaching.

The Opinion entirely ignored Mercy's rights under the federal Constitution, which also are impermissibly burdened by the Opinion's

interpretation of the Unruh Act. The Opinion's overt disrespect for Mercy's religious principles itself invokes the strict scrutiny analysis required where a state's acts are non-neutral or hostile to religion. (*Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520, 546; *Masterpiece*, 138 S.Ct. at 1730 [religious animus of adjudicatory body reflected hostility to religion and subjected its decision to strict scrutiny]; *id.* at 1734 (conc. opn. of Gorsuch, J.); *Trinity Lutheran Church v. Comer* (2017) 137 S.Ct. 2012, 2021-2022 [policy expressly discriminating against religion subject to strict scrutiny].) The Opinion manifests animus to religion, rejecting out of hand any consideration of the burden on religious principles.

The U.S. Supreme Court's general rule that religious beliefs protected under the Free Exercise Clause do not exempt individuals from complying with neutral state laws of general applicability (*Smith*, 494 U.S. at 879) does not support the Opinion. As shown by the Court's post-*Smith* decisions, *Smith* is not applied in a mechanical, all-or-nothing manner.[23] (*Trinity Lutheran*, 137 S.Ct. at 2021, fn. 2 [explaining that *Smith* did not say "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause"].) Whether *Smith* requires in any particular case that asserted religious freedom must yield to neutral state laws presents "difficult" and "delicate" questions. (*Masterpiece*, 138 S.Ct. at 1723-1724.)

While *Masterpiece* did not resolve those questions, it spoke of "reconciliation" of the state's right to protect persons from discrimination

[23] Four Justices recently indicated willingness to reconsider *Smith*. (*Kennedy v. Bremerton Sch. Dist.* (2019) 139 S.Ct. 634, 639 (conc. opn. of Alito et al., JJ).)

with the exercise of religious freedom (*id.* at 1723); "determin[ing]" a "balance" between free exercise of religion and "otherwise valid exercise of state power" (*id.* at 1723-1724); "weigh[ing]" the state's interest against the baker's "sincere religious objections" (*id.* at 1732); and placing "sufficient[] constrain[ts]" on any decision favoring free exercise over antidiscrimination law. (*Id.* at 1728-1729.) The Court clearly did not consider the application of *Smith* to be cut and dried. Instead, it said "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." (*Id.* at 1732.) The Opinion ignores what matters most in *Masterpiece*, and overlooks completely the Supreme Court's other religious freedom decisions.

The Supreme Court has repeatedly recognized that religious institutions may permissibly prohibit certain conduct even if doing so draws distinctions among protected classifications. Thus, in *Hosanna-Tabor*, 565 U.S. at 189, the Court observed that the plaintiff and the EEOC "acknowledge[d] that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary." In *Masterpiece*, 138 S.Ct. at 1727, the Court explained that the proposition that "a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform [a same-sex wedding] ceremony without denial of his or her right to the free exercise of religion" was so self-evident

it could be "assumed." The Opinion here cherry-picked *Masterpiece*, citing it for an isolated statement but never coming to terms with its actual holding or its recognition that religious principles must be protected in any balance among competing interests when applying state antidiscrimination law.

An approach that is fully consistent with *Smith* yet affords "special solicitude to the rights of religious organizations"[24] is to recognize that *Smith* constrains *individuals*' ability to practice their religion in violation of generally applicable state law. Nothing in *Smith*, which involved affirmative religious practices of individuals and state regulation of lawless behavior, purported to reach the fundamental religious tenets of a religious organization itself. (*EEOC v. The Catholic U. of Am.* (D.C. Cir. 1996) 83 F.3d 455, 462 [noting *Smith*'s focus on individuals, not religious organizations]; *Gellington v. Christian Methodist Episcopal Church* (11th Cir. 2000) 203 F.3d 1299, 1303-1304; *Combs v. Central Texas Annual Conf. of the United Methodist Church* (5th Cir. 1999) 173 F.3d 343, 348-349.) Free exercise cases involve "two strands"—"[1] restrictions on an individual's actions that are based on religious beliefs and [2] encroachments on the ability of a church to manage its internal affairs.... *Smith*'s language is clearly directed at the first strand …, where an individual contends that, because of his religious beliefs, he should not be required to conform with generally applicable laws." (*Combs*, 173 F.3d at 349.) The second strand, which "was not at issue in *Smith*" (*Gellington*, 203 F.3d at 1303), is at issue here.

Smith has never been applied to require a religious hospital to

[24] *Hosanna-Tabor*, 565 U.S. at 189.

perform a procedure prohibited by religious teaching. Thus, "[i]t does not follow [from *Smith*] that a *church* may never be relieved from such an obligation." (*EEOC v. The Catholic U.*, 83 F.3d at 462 [citations omitted; emphasis in original].)

California and federal law have long accommodated Catholic hospitals' religious objections to performing particular medical services, including elective sterilizations. (*Taylor v. St. Vincent's Hosp.* (9th Cir. 1975) 523 F.2d 75, 77 ["If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions'"] [citation omitted]; *Watkins v. Mercy Med. Ctr.* (D. Idaho 1973) 364 F.Supp. 799, 803 ["Mercy Medical Center has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs"], aff'd (9th Cir. 1975) 520 F.2d 894; *Allen v. Sisters of St. Joseph* (N.D. Tex. 1973) 361 F.Supp. 1212, 1214 ["The interest that the public has in the establishment and operation of hospitals by religious organizations is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or await a later date for her sterilization"], aff'd (5th Cir. 1974) 490 F.2d 81; *Chrisman v. Sisters of St. Joseph of Peace* (9th Cir. 1974) 506 F.2d 308, 312 ["'There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions'"] [citation omitted]; see also Probate Code, § 4734, subd. (b) ["A health care institution may decline to comply with an individual health care instruction or health care decision if the instruction or decision is contrary to a policy

of the institution that is expressly based on reasons of conscience …"].) There are no contrary decisions.

The ERDs are the religious foundation of Catholic health care nationwide, the culmination of centuries of efforts of Catholic health care practitioners to minister in accord with the Church's teaching. They were adopted to provide uniform instructions to Catholic health care providers on ethical medical practices.[25] Under our constitutional system, such rules demand respect. Just as with *Masterpiece*'s respect for the inability of clergy to perform marriage ceremonies at odds with their faith, transgender individuals could "recognize and accept [Catholic hospitals' adherence to the ERDs] without serious diminishment to their own dignity and worth." (*Masterpiece*, 138 S.Ct. at 1727.) There is no danger of a slippery slope in the narrowly constrained and well-defined context of religious hospitals subject to established doctrinal prohibitions on certain activities. Allowing Catholic hospitals to decline to provide surgeries prohibited by the ERDs does not implicate the concern expressed in *Smith*—allowing an individual, "by virtue of his beliefs, 'to become a law unto himself.'" (*Smith*, 494 U.S. at 885 [citations omitted].) Any "stigma" also is mitigated because Mercy does not exclude transgender persons from obtaining the hospital's services—only particular services are involved. (*Masterpiece*, 138 S. Ct. at 1730 [noting that plaintiff baker refused to sell wedding cakes to gay couples, but would sell gay persons other baked goods lacking the symbolism and message of wedding cakes].)[26]

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[25] O'Rourke et al., *A Brief History: A Summary of the Development of the Ethical and Religious Directives for Catholic Health Care Services* (Dec. 2001) Health Progress, p. 18.

[26] The baker conceded "if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a

3. Compelling a Catholic hospital to violate the ERDs would violate freedom of expression.

The state and federal Constitutions guarantee free speech. (Cal. Const., art. I, § 2; U.S. Const., amend. I.) "Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech." *Masterpiece*, 138 S.Ct. at 1741 (conc. opn. of Thomas, J.).) Forcing Mercy to violate the ERDs would impermissibly intrude on this freedom. The Opinion brushed aside the serious constitutional implications of its holding.

"The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths ...." (*Obergefell v. Hodges* (2015) 135 S.Ct. 2584, 2607.) The ERDs provide that "Catholic health care *expresses* the healing ministry of Christ," "Catholic health care ministry is rooted in a commitment to promote and defend human dignity," and "the biblical mandate to care for the poor requires" Catholic health care institutions "to *express this in concrete action* at all levels of Catholic health care." (1-CT-199, 201 [emphasis added].) ERD 5, requiring Catholic health care services to adopt the ERDs as policy, and ERDs 29 and 53, obliging Catholic hospitals to preserve the functional integrity of the human body and prohibit direct sterilization, inform Catholic health care providers how they must express the healing ministry of Jesus. (1-CT-203, 211, 218.) Mercy's expression includes its professed mission, the crucifix

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strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law." (*Id.* at 1728.) There is no allegation Mercy refused or would refuse to provide Minton any health care other than sterilization prohibited by the ERDs.

adorning its edifice, and religious sacraments and symbols throughout the hospital.

Interpreting Unruh to require Mercy to permit medical procedures prohibited by Catholic teaching would severely burden Catholic health care's ability to express its message about human dignity. Content-based restrictions on speech are subject to strict scrutiny. (*Fashion Valley Mall v. NLRB* (2007) 42 Cal.4th 850, 865.) There are less restrictive means of enforcing the state's antidiscrimination goals (*supra* Part IV.C), and the statute cannot stand as applied here.

This Court has rejected religious doctors' and organizations' claims that freedom of speech protected them from Unruh liability, explaining that the religious person/entity could express objections to the procedures even while being compelled by state law to provide them. (*Catholic Charities*, 32 Cal.4th at 558; *North Coast*, 44 Cal.4th at 1157.) The Opinion cursorily cited these cases, assuming Catholic hospitals can choose whether to express the central message of the ERDs and that compelling Catholic hospitals to provide prohibited procedures conveys no message other than that the hospitals are complying with the statute. (Slip Op. 11.) But this again shows disrespect for the religious obligations of Catholic hospitals, whose mission and identity are controlled, defined, and expressed by the ERDs.

It is no answer to the constitutional problem to say that the hospital may disclaim that it does not endorse a procedure it is compelled to allow. It would be impossible for Mercy to express the core message embodied in the ERDs while simultaneously allowing procedures that violate the ERDs. "Because the government cannot compel speech, it also cannot 'require speakers to affirm in one breath that which they deny in the next.'"

(*Masterpiece*, 138 S.Ct. at 1745 (conc. opn. of Thomas, J.) [citation omitted]; see also *National Inst. of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2371 [law compelling organizations opposed to abortion to provide abortion information is unconstitutional].)

V. CONCLUSION

Dignity Health requests that the Court grant review.

Dated: October 25, 2019 MANATT, PHELPS & PHILLIPS, LLP

By: s/Barry S. Landsberg
Attorneys for Defendant/Respondent
DIGNITY HEALTH

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.504, subdivision (d), I certify that this Petition for Review contains 8,290 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: October 25, 2019 MANATT, PHELPS & PHILLIPS, LLP

By: s/Barry S. Landsberg
Attorneys for Defendant/Respondent
DIGNITY HEALTH

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **October 25, 2019**, I served the within **PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

Christine Haskett Lindsey Barnhart COVINGTON & BURLING LLP Salesforce Tower 415 Mission Street, Suite 5400 San Francisco, CA 94105 Tel: (415) 591-6000 Fax: (415) 591-6091 Elizabeth O. Gill Christine P. Sun ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC. 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-8437 Amanda Goad Melissa Goodman ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1313 West Eighth Street Los Angeles, CA 90017 Tel: (213) 977-9500 x258 Fax: (213) 977-5297	*Via TrueFiling* *Attorneys for Plaintiff-Appellant Evan Minton*

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Superior Court of California San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	*Via U.S. Mail* *For delivery to the Hon. Harold E. Kahn*
Xavier Becerra Office of the Attorney General 1300 I Street Sacramento, CA 95814-2919	*Via U.S. Mail*
State Solicitor General in the Office of the Attorney General 1300 I Street Sacramento, CA 95814-2919	*Via U.S. Mail*
Clerk, Court of Appeal First Appellate District, Division Four 350 McAllister Street San Francisco, CA 94102-3600	

☒ **(BY ELECTRONIC MAIL)** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by TrueFiling.

☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **October 25, 2019**.

Brigette Scoggins

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Filed 9/17/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EVAN MINTON, Plaintiff and Appellant, v. DIGNITY HEALTH, Defendant and Respondent.	A153662 (City & County of San Francisco Super. Ct. No. 17-558259)

Plaintiff Evan Minton appeals the dismissal of his complaint against defendant Dignity Health, doing business as Mercy San Juan Medical Center, after the court sustained Dignity Health's demurrer without leave to amend. He contends the court erred in concluding that his complaint, based on Dignity Health's refusal to permit his doctor to perform a hysterectomy on him at one of its hospitals because of his sexual identity, fails to allege a violation of Civil Code[1] section 51, the Unruh Civil Rights Act (Unruh Act). Although the parties and several amici curiae regard the action as presenting a fundamental conflict between plaintiff's right to full and equal access to medical care and the hospital's right to observe its religious principles, we conclude that the present appeal may be resolved on narrower grounds. Without determining the right of Dignity Health to provide its services in such cases at alternative facilities, as it claims to have done here, we agree that plaintiff's complaint alleges that Dignity Health initially failed to do so and that its subsequent rectification of its denial, while likely mitigating plaintiff's damages, did not extinguish his cause of action for discrimination in violation of the Unruh Act. Accordingly, we shall reverse the judgment and remand for further proceedings.

[1] All statutory references are to the Civil Code.

Factual and Procedural Background

Minton filed a verified complaint alleging a cause of action for violation of section 51, subdivision (b), which guarantees all persons within the jurisdiction of the state "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." His complaint alleged as follows: Dignity Health is a tax-exempt nonprofit corporation that owns and operates a large network of hospitals. Dignity Health does business in Sacramento County as Mercy San Juan Medical Center (Mercy). Minton is a transgender man diagnosed with gender dysphoria.

The complaint alleges that gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders. "The medical diagnosis for the feeling of incongruence between one's gender identity and one's sex assigned at birth, and the resulting distress caused by that incongruence, is 'gender dysphoria.' " The "widely accepted standards of care for treating gender dysphoria" include "medical steps to affirm one's gender identity and help an individual transition from living as one gender to another." Transgender men often decide to undergo hysterectomy as a gender-affirming surgical treatment for gender dysphoria and "[a]ccording to every major medical organization and the overwhelming consensus among medical experts, treatments for gender dysphoria, including surgical procedures such as hysterectomy, are effective and safe."

As a course of treatment for his diagnosis, Minton's physician, Dr. Lindsey Dawson, scheduled a hysterectomy for Minton at Mercy on August 30, 2016. The complaint alleges that it was "the professional opinion of Mr. Minton's hysterectomy surgeon and two mental health professionals who counseled Mr. Minton" that the "hysterectomy was medically necessary care to treat his diagnosis for gender dysphoria." On August 28, 2016, Minton mentioned to a nurse at Mercy that he is transgender. The following day, Mercy notified Dr. Dawson that the procedure was cancelled. Mercy's president, Brian Ivie, informed Dr. Dawson that she would "never" be allowed to perform a hysterectomy on Minton at Mercy because "it was scheduled as part of a course of

treatment for gender dysphoria, as opposed to any other medical diagnosis." Mercy routinely allows Dr. Dawson and other physicians to perform hysterectomies for patients on the bases of diagnoses other than gender dysphoria, including "for indications such as chronic pelvic pain and uterine fibroids." Mercy's refusal to allow Dr. Dawson to perform the hysterectomy caused Minton "great anxiety and grief." The complaint explains that the timing of Minton's hysterectomy was particularly sensitive because it needed to be completed three months before his phalloplasty that was scheduled for November 23.

Ivie suggested that Dr. Dawson could get emergency admitting privileges at Methodist Hospital, a non-Catholic Dignity Health hospital about 30 minutes from Mercy. Ultimately, Dr. Dawson was able to secure emergency surgical privileges and performed Minton's hysterectomy at Methodist Hospital on Friday, September 2.

The complaint concludes, "Defendant prevented Dr. Dawson from performing Mr Minton's hysterectomy to treat his diagnosis of gender dysphoria, a medical condition unique to individuals whose gender identity does not conform to the sex they were assigned at birth. [¶] Defendant does not prohibit physicians at its hospitals from treating other diagnoses with hysterectomy. [¶] By preventing Dr. Dawson from performing Mr. Minton's hysterectomy to treat gender dysphoria, defendant discriminated against Mr. Minton on the basis of his gender identity."

Dignity Health filed a demurrer to the complaint on the ground that Minton failed to allege a violation of section 51, subdivision (b). Dignity Health argued that as a Catholic hospital, Mercy is bound to follow its facially neutral "Ethical and Religious Directives for Catholic Health Care Services" (the Directives) issued by the United States Conference of Catholic Bishops.[2] The Directives prohibit direct sterilization and require that bodily and functional integrity be protected and preserved. Dignity Health asserted further that as soon as the issue arose, it promptly enabled Minton's physician to receive temporary surgical privileges to perform the procedure at another of its hospitals that was

[2] Without objection the court judicially noticed the Directives.

not subject to the Directives. Dignity Health also asserted that even if Minton had alleged a cause of action for violation of his civil rights, its federal and state constitutional rights of free exercise of religion and freedom of expression bar his claim.

The demurrer was sustained with leave to amend. The court found the complaint "alleged insufficient facts to show that Dignity Health's conduct in permitting Mr. Minton to receive a hysterectomy at another of its hospitals violated Dignity Health's obligation per Civil Code 51(b) to provide 'full and equal' access to medical procedures without regard to gender."

Minton then filed an amended complaint. The amended complaint alleges that gender dysphoria is "a medical condition unique to individuals whose gender identify does not conform to the sex they were assigned at birth and thus usually experienced by transgender people." More significantly, the amended complaint also clarifies the circumstances under which Minton alleges he was first denied treatment at Mercy and three days later received the hysterectomy at another Dignity Health hospital.[3] He alleges that defendant suggested the alternative hospital only after Minton and Dr. Dawson exerted pressure on Dignity Health through the media and political connections. The pleading alleges that on the morning of August 29, after receiving notice that Minton's surgery had been cancelled, Dr. Dawson made numerous phones calls, including one to Ivie who said that she (Dawson) would never be allowed to perform the hysterectomy on Minton at Mercy. That afternoon, she and Minton contacted local media agencies who aired his story. In response, Dignity Health issued a statement regarding the Directives

[3] Dignity Health incorrectly argues that the allegations in the amended complaint are inconsistent with allegations in the original complaint. In the fist complaint, Minton alleged that Ivie "suggest[ed]" that Dr. Dawson perform the surgical procedure at Methodist Hospital but did not allege when the suggestion was made. As indicated in the following text above, the amended complaint alleges that the suggestion was forthcoming only after efforts had been made to reverse the initial denial of hospital facilities. Similarly, the difficulty presented by Dr. Dawson's lack of privileges at Methodist Hospital arose only when efforts were made to rectify the initial refusal to provide facilities for Minton's operation.

which stated, "When a service is not offered the patient's physician makes arrangements for the care of his/her patient at a facility that does provide the needed service." (Italics omitted.) That afternoon, Minton's attorney also contacted the hospital about the cancellation of the surgery. During this flurry of advocacy on Minton's behalf, Dr. Dawson and others discussed with Ivie the possibility that Dr. Dawson could perform Minton's surgery at the alternative hospital. However, it was not immediately clear that this was a viable option because Dr. Dawson did not have surgical privileges at the other hospital, it would be difficult to fit the surgery into her busy schedule at Mercy, and it was unclear that the hospital was within the network coverage of Minton's insurance policy.

Dignity Health filed a demurrer to the amended complaint on the grounds previously asserted with respect to the original complaint. After briefing and argument, the demurrer was sustained without leave to amend. The court explained, "As was true with Mr. Minton's complaint, the first amended complaint fails to allege sufficient facts to show that Dignity Health's conduct in permitting Mr. Minton to receive a hysterectomy at one of its hospitals other than the hospital where Mr. Minton desired to receive that procedure violated Dignity Health's obligation per Civil Code § 51(b) to provide full and equal access to medical procedures without regard to gender." Citing *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145 (*North Coast*), the court explained, "Mr. Minton has not alleged, nor does it appear that it is reasonably possible for him to allege, that his receiving the procedure he desired from the physician he selected to perform that procedure three days later than he had planned and at a different hospital than he desired deprived him of full and equal access to the procedure, even assuming, as the court is required to do on demurrer, that Dignity Health's refusal to have the procedure performed at [Mercy] was substantially motivated by Mr. Minton's gender identity."

A judgment of dismissal was entered and Minton timely filed a notice of appeal. With the court's permission, amicus curiae briefs have been filed on Minton's behalf by the National Center for Lesbian Rights and the California Medical Association and in

support of Dignity Health by the Catholic Health Association of the United States, the Alliance of Catholic Health Care, and the Catholic Medical Association.

Discussion

I. Standard of Review

"On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, the reviewing court assumes the truth of all facts properly pleaded by the plaintiff. [Citations.] We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged. [Citation.] We do not assume the truth of ' " 'contentions, deductions or conclusions of fact or law.' " ' [Citations.] We review the trial court's action de novo and exercise our own independent judgment whether a cause of action has been stated under any legal theory. [Citation.] We review the court's refusal to allow leave to amend under the abuse of discretion standard." (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986.)

II. The Unruh Act applies to Minton's intentional discrimination claim.

" '[A] plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act. A disparate impact analysis or test does not apply to Unruh Act claims.' " (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854.)

Dignity Health contends that Minton's pleading fails to allege a claim for intentional discrimination. It suggests that, at most, Minton has alleged a claim for disparate impact based on Mercy's adherence to the facially neutral Directives. (See *Turner v. Association of American Medical Colleges* (2008) 167 Cal.App.4th 1401, 1408 ["A policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class."]; § 51, subd. (c) ["This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. . . ."].)

In support of its demurrer, Dignity Health cites Directive No. 29 which states, "All persons served by Catholic health care have the right and duty to protect and preserve

their bodily and functional integrity. The functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available." (Endnote omitted.) Directive No. 53 states, "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available."

While Dignity Health may be able to assert reliance on the Directives as a defense to Minton's claim, the matter is not suitable for resolution by demurrer. (See *North Coast, supra*, 44 Cal.4th at p. 1161 [defendant physicians can "offer evidence at trial that their religious objections were to participating in the medical insemination of an unmarried woman and were not based on plaintiff's sexual orientation, as her complaint alleged."].)The allegations of the complaint are that Dignity Health refused to allow Dr. Dawson to perform the hysterectomy at Mercy hospital because of Minton's gender identity. The pleading alleges that Mercy allows doctors to perform hysterectomies as treatment for other conditions but refused to allow Dr. Dawson to perform the same procedure as treatment for Minton's gender dysphoria, a condition that is unique to transgender individuals. Denying a procedure as treatment for a condition that affects only transgender persons supports an inference that Dignity Health discriminated against Minton based on his gender identity. This is true even if the denial was pursuant to a facially neutral policy. (See *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 854 ["Evidence of disparate impact [can] be admitted in Unruh Civil Rights Act cases because 'such evidence may be probative of intentional discrimination in some cases.' "].) Moreover, if Dignity Health defends by asserting it was complying with the facially neutral Directives, Minton may attempt to establish that the hospital applied the Directives in a discriminatory manner. (*Id.* at pp. 854-855.)

Dignity Health's contention that its action was motivated by adherence to neutral Directives and not at all by Minton's medical condition or sexual orientation, contrary to the allegations in the complaint, is not susceptible to resolution by demurrer.

III. The pleading alleges that Dignity Health denied Minton "full and equal" access to medical care.

The trial court concluded that Minton's claim is precluded by dicta in the California Supreme Court's decision in *North Coast, supra,* 44 Cal.4th 1145. In *North Coast,* a patient sued a medical group and two of its employee physicians alleging their refusal to perform artificial insemination on her violated the Unruh Act. (*Id*. at pp. 1152-1153.) The patient was a lesbian and defendant doctors, citing their religious beliefs, refused to perform artificial insemination on the patient because of her sexual orientation. The question before the court was whether the physicians' First Amendment right to free exercise of religion exempted them from conforming their conduct to the Unruh Act's requirement to provide " 'full and equal accommodations, advantages, facilities, privileges, or services.' " (*Id*. at p. 1154.) The court held that the California Constitution's guarantee of free exercise of religion does not exempt physicians from conforming their conduct to the Unruh Act's antidiscrimination requirements even if compliance substantially burdens their religious beliefs. (*Id*. at p. 1158.) Applying a strict scrutiny analysis, the court explained that the Unruh Act "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal." (*Ibid.*) The court observed, however, "To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can simply refuse to perform the . . . medical procedure at issue here for any patient of North Coast, the physicians' employer. Or, because they incur liability under the Act if they infringe upon the right to the 'full and equal' services of North Coast's medical practice [citations], defendant physicians can avoid such a conflict by ensuring that every patient requiring [the procedure] receives 'full and equal' access to that medical procedure through a North Coast physician lacking defendants' religious objections." (*Id*. at p. 1159.)

Based on this explanation in *North Coast,* the trial court here concluded: "Mr. Minton has not alleged, nor does it appear that it is reasonably possible for him to allege,

that his receiving the procedure he desired from the physician he selected to perform that procedure three days later than he had planned and at a different hospital than he desired deprived him of full and equal access to the procedure, even assuming . . . that Dignity Health's refusal to have the procedure performed at [Mercy] was substantially motivated by Mr. Minton's gender identity." (Italics added.)

The trial court's fundamental error is that it misconstrues Minton's pleading. Minton does not allege, nor does he contend on appeal, that providing him with access to alternative hospital facilities violated the Unruh Act. He alleges that the Act was violated on August 29, 2016, when defendant cancelled the scheduled procedure at Mercy and Mercy's president told Dr. Dawson that she would never be allowed to perform Minton's hysterectomy at Mercy. According to the amended complaint, that refusal was not accompanied by advice that the procedure could instead be performed at a different nearby Dignity Health hospital. At that point in time, according to the amended complaint, Minton was denied full and equal access to health care treatment, a violation of the Unruh Act.

Allegedly in response to pressures brought to bear on defendant, within a relatively short period of time Ivie proposed use of the facilities at the alternative hospital. In doing so, and in making those alternate facilities available three days later, defendant undoubtedly substantially reduced the impact of the initial denial of access to its facilities and mitigated the damages to which Minton otherwise would have been entitled. However, the steps that were taken to rectify the denial in response to pressure from Minton and from the media did not undo the fact that the initial withholding of facilities was absolute, unqualified by an explanation that equivalent facilities would be provided at an alternative location.

To be clear, we do not question the observation in *North Coast* that "[t]o avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians . . . can avoid such a conflict by ensuring that every patient requiring [a procedure] receives 'full and equal' access to that medical procedure through a [hospital] physician lacking defendants' religious

objections." (*North Coast, supra,* 44 Cal.4th at p. 1159.) But the amended complaint alleges that Dignity Health failed to provide such assurance here, albeit for a relatively short period of time. The facts alleged in the amended complaint are that Dignity Health initially did not ensure that Minton had "full and equal" access to a facility for the hysterectomy. To the contrary, "he experienced a startling and painful notification that the surgery would not go forward." When his surgery was cancelled, he was subjected to discrimination. Dignity Health's subsequent reactive offer to arrange treatment elsewhere was not the implementation of a policy to provide full and equal care to all persons at comparable facilities not subject to the same religious restrictions that applied at Mercy. As Minton argued at the hearing on the demurrer, it cannot constitute full equality under the Unruh Act to cancel his procedure for a discriminatory purpose, wait to see if his doctor complains, and only then attempt to reschedule the procedure at a different hospital. "Full and equal" access requires avoiding discrimination, not merely remedying it after it has occurred.

Dignity Health argues that "[e]ven assuming Minton had alleged an Unruh Act violation, his claim still would be barred by the guarantees of religious freedom and freedom of expression enshrined in the California and federal Constitutions. (Cal. Const., art. I, §§ 2, 4; U.S. Const. amend. I . . .].) Using Unruh to force Mercy to violate the [ethical and religious directives] places an unacceptable burden on the constitutional right of religious freedom. Similarly, compelling Mercy to convey the message that a hysterectomy in these circumstances is consistent with the healing ministry of Jesus would violate Mercy's freedom of expression."

As explained above, upholding Minton's claim does not compel Dignity Health to violate its religious principles if it can provide all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions. If it cannot and to the extent there is any compulsion, Dignity Health's arguments were soundly rejected in *North Coast, supra,* 44 Cal.4th 1145. The Supreme Court, applying a strict scrutiny analysis, held that any burden the Unruh Act places on the exercise of religion is justified by California's compelling interest in ensuring full and equal access to medical treatment

for all its residents, and that there are no less restrictive means available for the state to achieve that goal. (*Id.* at p. 1158; see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) __ U.S. __, __ [138 S.Ct. 1719, 1727] ["While . . . religious and philosophical objections are protected [by the First Amendment], it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."].) The court also rejected the contention that compelling doctors to perform a procedure on all persons "infringes upon their First Amendment rights to free speech and free exercise of religion." (44 Cal.4th at p. 1157.) Quoting from *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 558, the court repeated, " 'For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose.' " (44 Cal.4th at p. 1157.)

Disposition

The judgment and the order sustaining the demurrer to the amended complaint are reversed. The trial court is directed to enter a new and different order overruling the demurrer. Plaintiff shall recover his costs on appeal.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.

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Trial judge:	Honorable Harold E. Kahn
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