No. A153662

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 4

EVAN MINTON,

Plaintiff and Appellant,

vs.

DIGNITY HEALTH dba MERCY SAN JUAN MEDICAL CENTER,

Defendant and Respondent.

RESPONDENT'S BRIEF

From a Judgment of the San Francisco Superior Court
Hon. Harold E. Kahn
Case No. CGC 17-558259

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Respondent Dignity Health identifies the following interested entities or parties pursuant to California Rules of Court, Rule 8.208(d)(3):

CommonSpirit Health, a Colorado nonprofit corporation, is the sole member of Dignity Health.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

Plaintiff Evan Minton is a transgender man who sought a hysterectomy at Mercy San Juan Medical Center (Mercy or MSJMC) to treat his medical condition of gender dysphoria. Mercy, located in Sacramento, is a Catholic hospital, bound to follow the Ethical and Religious Directives for Catholic Health Care Services (ERDs) issued by the U.S. Conference of Catholic Bishops. The ERDs prohibit direct sterilization and require that bodily and functional integrity be protected and preserved. As the trial court found, both sides agreed that Mercy declined to permit the procedure because the ERDs did not allow it. Dignity Health, which owns Mercy, promptly enabled Minton's physician to receive temporary surgical privileges to perform the procedure at Methodist Hospital, another Dignity Health-owned Sacramento hospital that was not subject to the ERDs.

Minton received the procedure at Methodist Hospital within 72 hours of the original surgery date. He then sued Dignity Health for intentional sex discrimination under the Unruh Act, Civ. Code, § 51. The trial court sustained Dignity Health's demurrers, after allowing Minton leave to try to cure his complaint's deficiencies, which he could not do. In doing so, the court was guided by the California Supreme Court's discussion of an analogous situation in *North Coast Women's Care Med. Grp. v. Superior Court* (2008) 44 Cal.4th 1145, where the Court explained that a health care provider with religious objections to a particular medical procedure provides "full and equal access" and may avoid liability under the Unruh Act if it makes available another provider who does not object to performing the service. The trial court correctly concluded that Dignity Health did that here, and ruled that Minton could not allege a claim for denial of full and equal access given that he promptly received the procedure at a non-Catholic Dignity Health hospital in Sacramento.

The court's judgment of dismissal should be affirmed for multiple reasons.

First, Mercy did not refuse to permit Minton to have a hysterectomy *because* he is transgender. It did not permit the procedure because the ERDs prohibit sterilizing procedures for any patient unless a narrow and inapplicable exception is met. Minton could not allege that Mercy would deny him any hospital medical treatment not prohibited by the ERDs, or that it would not have allowed him a hysterectomy if he needed it to treat a condition affecting the uterus itself, such as uterine cancer, which would fall within the ERDs' exception to the general ban on sterilizing procedures. The Unruh Act prohibits only intentional and willful discrimination.[1] Where, as here, the defendant acts under a facially neutral policy and does not single out a protected group for different treatment because of its protected status, no Unruh claim is stated. That Mercy's policy implementing the ERDs may disproportionately impact transgender individuals is irrelevant; adverse impact claims are "not actionable under the Unruh Act, even when [the policy] has a disproportionate impact on a protected class."[2]

Second, Minton alleged that Mercy acted on the basis of his alleged medical condition of gender dysphoria. The Unruh Act prohibits discrimination based on certain specific medical conditions; gender dysphoria is not one of them. Minton's original complaint repeatedly alleged that the purported discrimination was due to his "medical condition." Minton's attempts to alter those allegations in his amended pleading should be disregarded as sham.[3]

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[1] *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 ("a plaintiff must . . . plead and prove a case of intentional discrimination to recover under the Act"), superseded on other grounds by Civ. Code, § 51, subd. (f); *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854.
[2] *Turner v. Association of Am. Med. Colls.* (2008) 167 Cal.App.4th 1401, 1408.
[3] *Larson v. UHS of Rancho Springs* (2014) 230 Cal.App.4th 336, 343-344.

Third, the Court in *North Coast* stated that a health provider does not deny a patient "full and equal access" to its facilities if it denies a procedure based on religious objections but ensures that the patient may receive the procedure from a provider without those objections. Dignity Health did precisely this, as the trial court concluded.

Fourth, even had Minton stated a viable Unruh claim, compelling Mercy to perform a hysterectomy that is prohibited by fundamental Catholic religious precepts would violate the California and U.S. Constitutions, which protect religious organizations' rights of free exercise of religion and free expression. Religious freedom is "guaranteed" under the state Constitution.[4] And the U.S. Supreme Court recently explained that determining when a state antidiscrimination law must yield to religious principles is a "delicate question" that requires a "balanc[ing]" of the important interests involved.[5] Where a faith-based non-profit organization (rather than an individual) is asserting religious objections, courts recognize that the objections merit extreme "solicitude."[6]

Finally, forcing Mercy to allow hysterectomies that violate the ERDs could be calamitous. Catholic hospitals, which provide health care, charitable care, and community benefits to millions of people across California and the country, may find themselves unable to function and provide these vital services if required to perform services that offend their most fundamental religious values.

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[4] Cal. Const., art. I, § 4.
[5] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, 1723-1724.
[6] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012) 565 U.S. 171, 189.

II. STATEMENT OF THE CASE

A. The Parties.

Minton alleged he is a transgender man diagnosed with gender dysphoria. (1-CT-150 ¶ 9; 1-CT-152-153 ¶ 17.) Minton wanted a hysterectomy to treat his condition. (1-CT-153 ¶ 18.) Minton's obstetrician/gynecologist, Dr. Lindsey Dawson, has privileges at Mercy and regularly performs hysterectomies there. (*Id.* ¶ 20.) Dr. Dawson scheduled Minton's procedure at Mercy for August 30, 2016. (1-CT-153 ¶ 19.)

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."[7] Mercy was founded in 1967 by the Sisters of Mercy, a congregation of Catholic women religious who carry out the healing ministry of Jesus. They do so by bringing health care to millions of people through the founding and administration of hospitals. The Sisters of Mercy first arrived in Sacramento in 1857 and provided healthcare to the community before the turn of the century.[8] Today the Sisters of Mercy serve in six health systems and many related facilities across the United States.[9]

Mercy is listed in the Official Catholic Directory (OCD), establishing that it is an official part of the Catholic Church. (1-CT-190.)[10] Mercy thus is bound to follow the

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[7] https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values.

[8] https://www.dignityhealth.org/sacramento/about-us/our-history.

[9] https://www.sistersofmercy.org/what-we-do/healthcare/. The California Supreme Court has recognized that a religious hospital sponsored by orders of the Roman Catholic Church and 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. (*McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 323-324, superseded on other grounds by Gov't Code, § 12926.2.)

[10] "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].)

ERDs promulgated by the U.S. Conference of Catholic Bishops.[11] (1-CT-192.) 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 "to 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.) Directive 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 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 cites the Congregation for the Doctrine of the Faith, Responses to Questions Proposed Concerning "Uterine Isolation" and Related Matters (July 31, 1993)[12] (see 1-CT-232, endnote 34), which further explains that a hysterectomy may be permitted where necessary to "counter an immediate serious threat to the life or health of the mother ...."[13] (See fn. 12, *supra*.)

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[11] "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.)

[12] http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_31071994_uterine-isolation_en.html.

[13] Last month, the Church confirmed that "the removal of the uterus [is] morally licit when there is a grave and present danger to the life or 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

Thus, where "the 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.[14] (*Ibid.*)

Directive 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 and employment ...." (1-CT-203 [emphasis added].)[15] Catholic hospitals that fail to adhere to the ERDs would violate their own mission and may no longer be qualified as a "Catholic" entity or permitted to describe themselves as "Catholic."[16]

B. Minton's Original Complaint.

Minton filed his verified complaint on April 19, 2017. (1-CT-7.) He alleged he is a transgender man diagnosed with gender dysphoria. (1-CT-9 ¶ 9; 1-CT-11 ¶ 17.) His

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Doctrine of Faith to a question on the liceity [legitimacy] of a hysterectomy in certain cases (Jan. 3, 2019) http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/01/03/190103c.html.

[14] Thus, for example, a Catholic hospital may permit a hysterectomy to cure uterine cancer because the direct effect is the cure or alleviation of the cancer, treating the cancer is itself not prohibited by Catholic doctrine, and there is no simpler treatment available.

[15] 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 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.)

[16] http://archive.azcentral.com/ic/pdf/1221olmsted-decree.pdf; http://abcnews.go.com/Health/abortion-debate-hospital-stripped-catholic-status/story?id=12455295.

physician, Dr. Dawson, scheduled a hysterectomy for Minton at Mercy on August 30, 2016. (1-CT-12 ¶ 19.) On August 28, 2016, Minton told a nurse at Mercy 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 then spoke with a Mercy nurse manager and with Mercy's president, Brian Ivie, to discuss the cancellation. (*Ibid.*)

Minton's original complaint alleged that his surgery was cancelled because it was to treat his "medical condition" of gender dysphoria:

> • According to MSJMC personnel, Dr. Dawson was prevented from performing Mr. Minton's hysterectomy at MSJMC *based on Mr. Minton's diagnosis of gender dysphoria*. *Gender dysphoria is a serious medical condition* .... (1-CT-8 ¶ 3 [emphasis added].)
>
> • ... Defendant routinely allows Dr. Dawson and other physicians to perform hysterectomies for patients on the bases of *diagnoses other than gender dysphoria* … . (1-CT-8 ¶ 4 [emphasis added].)
>
> • MSJMC's president, Brian Ivie, [stated to Dr. Dawson that] MSJMC would not allow the hysterectomy to proceed *because it was scheduled as part of a course of treatment for gender dysphoria, as opposed to any other medical diagnosis*. (1-CT-12-13 ¶ 22 [emphasis added].)
>
> • Dr. Dawson routinely performs hysterectomies for her patients .... Other physicians who practice at MSJMC also regularly perform hysterectomies at the hospital for patients *who have not been diagnosed with gender dysphoria, for indications such as chronic pelvic pain and uterine fibroids*. (1-CT-13 ¶ 26 [emphasis added].)
>
> • 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. (1-CT-14 ¶ 34 [emphasis added].)

The original complaint also alleged that Dr. Dawson performed Minton's hysterectomy on September 2, 2016, three days after the originally scheduled date, at Methodist Hospital, a non-Catholic Sacramento hospital owned by Dignity Health. (1-

CT-13 ¶ 25.) This was done at the "suggest[ion]" of Mr. Ivie and the three-day delay was due to Dr. Dawson's schedule:

> • As an alternative [to obtaining a hysterectomy at Mercy], *Mr. Ivie suggested* that Dr. Dawson could get emergency admitting privileges at Methodist Hospital, a non-Catholic Dignity Health hospital about 30 minutes away from MSJMC.[17] (1-CT-13 ¶ 24.)
>
> • Dr. Dawson's schedule could not accommodate that alternative immediately. (1-CT-13 ¶ 24.)
>
> • Ultimately, Dr. Dawson was able to secure emergency surgical privileges for later in the week, and she performed Mr. Minton's hysterectomy at Methodist Hospital on Friday, September 2. (1-CT-13 ¶ 25.)

Dignity Health demurred to the original complaint. (1-CT-91.) It argued Minton had not alleged an Unruh violation because (among other reasons) Dignity Health promptly accommodated his surgery at another Dignity Health hospital. (1-CT-84:10-19.) As Dignity Health pointed out, this coincided with a discussion in *North Coast*, 44 Cal.4th 1145. There, physicians at a fertility clinic refused to perform intrauterine insemination (IUI) for a lesbian, allegedly because of their religious beliefs. Other physicians at the clinic did not have those religious objections. The Supreme Court held that the doctors' religious views did not exempt the doctors from compliance with Unruh, but it also stated that "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.)

The trial court agreed that Dignity Health's arranging for Dr. Dawson's temporary privileges to perform Minton's hysterectomy at its non-Catholic hospital complied with

[17] The AOB asserts the trial court *incorrectly* indicated that Dignity Health affirmatively sought to accommodate Minton's procedure. (AOB 8.) But Minton's original complaint admitted this.

North Coast. 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." (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 MSJMC's interpretation of the Ethical and Religious Directives for Catholic Health Care Services*." (*Ibid.* [emphasis added].) The court sustained the demurrer with leave for Minton to amend. (*Ibid.*)

C. Minton Attempts to Rewrite His Case With Contradictory Allegations.

Minton filed a First Amended Complaint (FAC) that attempted to plead around the demurrer ruling. (1-CT-148.) The FAC abandoned the allegation that Mr. Ivie "suggest[ed]" that Dr. Dawson perform the procedure at Methodist. Instead, the FAC alleged that Minton and Dr. Dawson exerted pressure on Dignity Health through their media and political connections, allegedly leading Dignity Health to agree that the procedure could be performed at Methodist.[18] (1-CT-154-156 ¶¶ 28-30, 32-34.) The FAC also dropped the original complaint's admission that Dr. Dawson was not immediately available to perform the procedure at Methodist.

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[18] These allegations are belied by the very media coverage Minton cited. One article reported that "[t]he hospital tried to schedule Minton's hysterectomy at another hospital, but it conflicted with the [*sic*] Dawson's schedule." (http://www.kcra.com/article/carmichael-faith-based-hospital-denies-transgender-man-hysterectomy/6430342; 1-CT-155, fn. 10; see also http://www.sacbee.com/news/local/article98943597.html ["Despite Tuesday's surgery cancellation, Dr. Dawson said Dignity Health officials were helpful in getting her set up with emergency privileges at Methodist Hospital of Sacramento, a Dignity Health facility that is not bound by Catholic doctrines. 'I don't blame the staff,' Dawson said. 'I don't blame the administrators. I blame the (Catholic) doctrines.'"]; 1-CT-155 ¶ 30.)

The FAC alleged that "Dr. Dawson and others discussed with Mr. Ivie and other Dignity Health officials the possibility that Dr. Dawson could perform Mr. Minton's surgery at Methodist Hospital, a non-Catholic Dignity Health hospital also located in the Sacramento metropolitan area." (1-CT-156 ¶ 35.) Dr. Dawson and Minton agreed that obtaining the surgery at Methodist was "the best remaining option," Dr. Dawson was granted temporary surgical privileges, and the hysterectomy was performed at Methodist on September 2. (1-CT-156-157 ¶¶ 36-39.)

In the FAC, Minton also attempted to walk back the original complaint's numerous allegations that Dignity Health cancelled the procedure at Mercy because it was intended to treat his "medical condition" of gender dysphoria. The FAC still alleged, in substance, that Mercy cancelled the procedure because it was intended to treat a medical condition, alleging that Mr. Ivie told Dr. Dawson that "MSJMC would not allow the hysterectomy to proceed because of the 'indication' it was intended to address." (1-CT-154 ¶¶ 23-24.) Minton alleged his medical file reflected an "indication" of gender dysphoria.[19] (1-CT-154 ¶ 24.) But the FAC also alleged that "Dr. Dawson explained [to Minton] her understanding that the hospital had cancelled his hysterectomy because he was transgender." (1-CT-154 ¶ 25.) And the FAC added or substituted references to transgender status where the original complaint referred only to the medical condition of gender dysphoria. (Compare 1-CT-8 ¶¶ 3-4 with 1-CT-149 ¶¶ 3-4; compare 1-CT-13-14 ¶¶ 27, 32-34 with 1-CT-157-158 ¶¶ 43, 48-50.)

D. The Court Dismisses the FAC Without Leave to Amend.

Dignity Health demurred again, and the court dismissed the FAC with prejudice. The court found that the FAC still did not plead that Minton was denied full and equal

[19] Minton alleged the indication in his medical file was "gender identity disorder," the name by which gender dysphoria was previously known. (1-CT-154 ¶ 24.)

access to medical procedures when Dignity Health permitted the surgery at Methodist. (2-CT-431.) The court stated:

> 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 MSJMC was substantially motivated by Mr. Minton's gender identity.

(2-CT-431.)[20] Minton did not seek further leave to amend.

III. ARGUMENT

The trial court's ruling that Minton failed to allege a violation of the Unruh Act was correct for several independent reasons, discussed in Part III.A below. In addition, as discussed in Part III.B, the Unruh Act cannot be enforced to compel a Catholic hospital to perform a procedure in violation of its fundamental constitutional rights of free exercise of religion and free speech. The trial court's dismissal of this case should be affirmed.[21]

A. Mercy Did Not Violate the Unruh Act as a Matter of Law.

Minton argues Dignity Health failed to provide him "full and equal access" to public accommodations, as the Unruh Act requires. The Court need not reach this

[20] The court did not find the procedure was denied based on Minton's gender identity. Minton never alleged any facts to suggest Dignity Health acted because Minton is a transgender person, or that Mercy refused, or would refuse, service to Minton for any other medical condition (besides a sterilization prohibited by the ERDs) that Minton might need as a Mercy patient. Thus, Minton's assertion that the court "concluded" Dignity Health's actions were "substantially motivated by Mr. Minton's gender identity" is incorrect. (AOB 23.)

[21] The sustaining of the demurrer is reviewed de novo. (*City of Morgan Hill v. Bay Area Air Quality M'gmt Dist.* (2004) 118 Cal.App.4th 861, 869.)

question because the statute does not apply. Even if it did apply, Dignity Health provided Minton with full and equal access.

1. Mercy's Adherence to the ERDs Is a Facially Neutral Policy That Is Not Subject to the Unruh Act.

The Unruh Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, … medical condition, … [or] sexual orientation … are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(Civ. Code, § 51, subd. (b).) The statute expressly provides that it 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, medical condition, 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*, 167 Cal.App.4th at 1408 [emphasis added].)

The trial court observed, and Minton does not challenge this observation, that Mercy denied the procedure based on its "interpretation of the Ethical and Religious Directives for Catholic Health Care Services." (1-CT-147.) Mercy's policy of refusing to perform a hysterectomy in accordance with the ERDs—which require that bodily integrity be preserved and prohibit sterilizing procedures that do not prevent a serious threat to life or health—is facially neutral and thus not prohibited by the Unruh Act.

2. The Unruh Act Bars Only Intentional Discrimination, Which Minton Did Not Allege.

The central principle of the Unruh Act is a prohibition of *intentional* discrimination based on certain characteristics. The California Supreme Court has

explained: "the 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*, 52 Cal.3d at 1149 [rejecting Unruh claim on demurrer; italics in original, bold added].)[22] The statute 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*. (*Koebke*, 36 Cal.4th at 854.)

Minton did not allege Dignity Health denied the procedure at Mercy because it wanted to discriminate against transgender individuals. Minton did not allege that Dignity Health's denial of a hysterectomy to treat a transgender man for gender dysphoria is intentional discrimination against transgender people because they are transgender or was put in place in order to accomplish such discrimination. Rather, as the trial court found, Mercy denied the procedure for the purpose of complying with the ERDs, as it had to do.[23] (1-CT-147.) The ERDs articulate binding rules for Catholic hospitals and do not concern the gender identity of any patient. (1-CT-192-234.)

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[22] See also *Munson v. Del Taco* (2009) 46 Cal.4th 661, 671 (discussing *Harris's* holding "that unintentional discrimination did not violate the Unruh Civil Rights Act *at all*") (emphasis in original). *Munson* held that under a post-*Harris* amendment to Unruh, a plaintiff alleging disability discrimination based on a violation of the Americans With Disabilities Act (ADA) need not prove intentional discrimination. But *Munson* did not disturb *Harris*'s holding requiring intentional discrimination outside the limited ADA/disability context. *Munson* thus reflects the "well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)

[23] California and federal law have long accommodated health care providers' religious objections to particular medical services. For example, courts have recognized that under the Church Amendment, 42 U.S.C. § 300a-7(c), religious hospitals that receive federal Hill-Burton Act funds do not act under color of state law and are "properly permit[ted] to

Minton's allegations actually established the absence of intentional discrimination.[24] He alleged Dignity Health, the only defendant, *arranged* for Minton's physician to perform a hysterectomy on Minton, a transgender individual, at another Dignity Health hospital. (1-CT-157 ¶¶ 38-39.) This cannot be intentional discrimination against Minton for being transgender. The circumstances here plainly point to Dignity Health's observance of the ERDs as the sole basis for its actions, as the trial court found. That is religious observance, nothing else.[25]

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, and could not, allege that Dignity Health would have refused to allow him a hysterectomy for any such reasons. He did not allege that Dignity Health refused or would refuse to provide any medical treatment to Minton at Mercy other than sterilization prohibited by the ERDs. Minton did not allege that Dignity Health would have denied him another, non-sterilizing

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refuse to perform sterilizations." (*Taylor v. St. Vincent's Hospital* (9th Cir. 1975) 523 F.2d 75, 77 ["If the hospital's refusal to perform sterilization [pursuant to the ERDs] 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]; 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 …"].)

[24] Minton cannot allege intentional discrimination solely by the alleged fact that Dr. Dawson told Minton that it was "her understanding," based on an alleged conversation with Mercy, that the hysterectomy was cancelled because Minton is transgender." (1-CT-154 ¶ 25.) Discrimination cannot be established by hearsay. (*Morgan v. Regents of U. of Cal.* (2000) 88 Cal.App.4th 52, 70.)

[25] Minton's physician said the same thing. (See fn. 18, *supra*.)

treatment for his gender dysphoria at Mercy. And he did not allege that Mercy would perform a hysterectomy on a healthy organ for *any* person, transgender or otherwise.[26]

Mercy's adherence to the ERDs is the very antithesis of discrimination.[27] As a Catholic hospital, Mercy treats all patients with respect and compassion. The Church articulated this requirement at the Second Vatican Council in 1965, stating: "with 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."[28] 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].)

Minton alleged no intentional discrimination, so the Unruh Act claim fails as a matter of law.

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[26] 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 (conc. opn. of Gorsuch, J.) ["there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic"] [emphasis in original].)

[27] In general, even outside the context of ERDs or other religious principles, courts respect hospitals' decisions about what services to provide. (See *Mateo-Woodburn v. Fresno Community Hospital and Medical Center* (1990) 221 Cal.App.3d 1169, 1184; *Lewin v. St. Joseph's Hospital of Orange* (1978) 82 Cal.App.3d 368, 384-385.)

[28] http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (Vatican Council II, Pastoral Constitution of the Church in the Modern World, n. 29 [emphasis added].)

3. Minton Alleged Only Disparate Impact, Which Is Not Actionable.

Minton claims Dignity Health discriminated on the basis of his transgender status, because only transgender people are diagnosed with gender dysphoria.

This is a claim for disparate impact discrimination, which is not actionable. Where a defendant's policy is facially neutral and does not single out any group for differential *treatment*, that a protected group may be disproportionately *impacted* by the policy is not sufficient to state an Unruh claim. (*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 ["plaintiffs' argument ... 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. Accordingly, the reasons we gave for rejecting disparate impact in *Harris* would seem to apply with equal force to plaintiffs' theory."] [emphasis in original]; *Turner*, 167 Cal.App.4th at 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"] [emphasis added].) This interpretation makes sense: "[b]y 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.)[29]

[29] The *Harris* Court explained that disparate impact analysis was developed for housing and employment cases, on which the Legislature wanted to place a special focus. In contrast, "'[t]he Unruh Act … aims to eliminate arbitrary discrimination in the provision of *all* business services to all persons. Adoption of the disparate impact theory to cases under the Unruh Act would expose businesses to new liability and potential court

The allegedly discriminatory practice applies not solely to those seeking a sterilizing procedure because of gender dysphoria, but to any person seeking a sterilizing procedure for any reason not fitting within the exception in the ERDs. Thus, even assuming that the alleged practice mainly affects transgender people, the analysis does not change.[30] 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 [dismissing Unruh claim on demurrer notwithstanding disparate impact on women created by landlord's requirement that renters have certain minimum income]; *Koebke*, 36 Cal.4th at 853 [dismissing Unruh claim where club's policy extending benefits only to married spouses disparately impacted unmarried same-sex couples, and "may have resulted in some degree of unfairness to committed couples like plaintiffs"][31]; *Turner*, 167 Cal.App.4th at 1408-1409 [time limit imposed on test-takers did not violate Unruh notwithstanding disparate impact on persons with learning or reading-related disabilities]; *Greater L.A. Agency on Deafness v. CNN* (9th Cir. 2014) 742 F.3d 414, 427 [CNN's practice of not

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regulation of their day-to-day practices in a manner never intended by the Legislature.'" (*Harris*, 52 Cal.3d at 1174 [quoting Court of Appeal opinion; emphasis in original].)

[30] Not every transgender man with gender dysphoria seeks a hysterectomy. Minton alleged that a 2015 study showed that 14 percent of transgender men had undergone a hysterectomy and 57 percent wanted to do so. (1-CT-152 ¶ 16.) That leaves almost 30 percent who do not want a hysterectomy.

[31] The *Koebke* Court separately concluded that the club's policy did violate Unruh after the passage of the Domestic Partner Act, to the extent the club differentiated between married couples and registered domestic partners. (*Koebke*, 36 Cal.4th at 850.) Years after *Koebke*, the Supreme Court held that same-sex couples are able to marry. (*Obergefell v. Hodges* (2015) 135 S.Ct. 2584.) In doing so, the Court "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection ...." (*Id.* at 2607.)

making closed-captioning available for on-line videos did not violate Unruh notwithstanding its disparate impact on hearing-impaired persons]; *Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1237 [requirement that cable customers buy video service in order to buy audio service did not violate Unruh notwithstanding its disparate impact on blind persons]; *Cullen v. Netflix* (N.D. Cal. 2012) 880 F.Supp.2d 1017, 1024-1025 [failure to provide closed captioning on much of Netflix's streaming library did not violate Unruh notwithstanding disparate impact on hearing-impaired persons, and any inference of intentional discrimination offset by company's continuing efforts to improve access for the hearing-impaired].)

Although Dignity Health discussed most of these cases in its demurrer briefs, Minton cites only *Harris*. And his sole mention of *Harris* (in a footnote) is not for its unequivocal holding that "[a] disparate impact analysis or test does not apply to Unruh Act claims." (*Harris*, 52 Cal.3d at 1175.) Instead, Minton misleadingly cites *Harris* to suggest that a disparate impact analysis can apply to Unruh claims where an individual was treated differently as a result of a facially neutral policy. (AOB 17, fn. 2.) He relies on a statement in *Harris* explaining that where a plaintiff *has pleaded an actionable intentional discrimination claim*, there is no "blanket rule of exclusion" of evidence of adverse *impact* if it is probative of the intentional discrimination claim. (*Id.* at 1175.) But using evidence of a neutral policy's impact on a protected group to prove intentional discrimination against an individual is very different from pursuing a *claim* based solely on disparate impact—as *Harris* itself makes clear. Where a plaintiff's discrimination claim is based on inferences to be drawn from the "*effects* of a facially neutral policy on a particular group," it is a disparate impact theory that is not actionable. (*Koebke*, 36 Cal.4th at 854 [emphasis in original].) The absence of any meaningful discussion of

Harris in Minton's AOB, and Minton's disregard of other decisions, including the Supreme Court's decision in *Koebke*, are telling.

Minton cites *Hankins v. El Torito Restaurants* (1998) 63 Cal.App.4th 510, for the proposition that disparate impact may prove intentional discrimination. (AOB 17, fn. 2.) In *Hankins*, a restaurant required customers to use a second-floor restroom and refused a disabled customer access to its first-floor employee restroom. *Hankins* held this was *intentional* discrimination against disabled persons. (*Id.* at 520.) To the extent *Hankins* suggests the Unruh Act supports a claim based only on disparate impact, its holding has been questioned, criticized, and not followed. (*Greater Los Angeles Agency on Deafness*, 742 F.3d at 426-427 ["*Hankins* does nothing to alter the California Supreme Court's clear statement ... that the Unruh Act requires a showing of *willful, affirmative misconduct to establish intentional discrimination*"] [emphasis added]; *National Fed'n of Blind v. Target Corp.* (N.D. Cal. 2007) 582 F.Supp.2d 1185, 1206 ["[*Hankins*] is far from clear on the nature of the intent showing required by the Unruh Act"].)[32]

4. Any Differential Treatment Based Solely on Minton's Medical Condition of Gender Dysphoria Is Not Actionable.

Minton's claim also fails because the discrimination he alleged is not based on his status as a transgender person (which would be covered by Unruh's prohibition on sex discrimination[33]), but rather on his *medical condition* of gender dysphoria. Such "discrimination" is not actionable.

The Unruh Act prohibits discrimination on the basis of "medical condition"—a defined and limited term that does not include gender dysphoria. (Civ. Code, § 51, subd.

[32] Minton also cites *Boemio v. Love's Restaurant* (S.D. Cal. 1997) 954 F.Supp. 204, 208, which, like *Hankins*, improperly applied Unruh to a disparate impact claim.
[33] Civ. Code, § 51, subd. (e)(5).

(e)(3); Gov't Code, § 12926, subd. (i).) "Medical condition" encompasses only two situations: "[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer" or "[g]enetic characteristics."[34] (Gov't Code, § 12926, subd. (i)(1), (2).) Discrimination on the basis of any other "medical condition" is not covered. (*Muller v. Automobile Club of S. Cal.* (1998) 61 Cal.App.4th 431, 445-446, disapproved on other grounds by *Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019.)[35]

Minton's original complaint repeatedly alleged that Dignity Health discriminated against Minton based on his "medical condition" of gender dysphoria. (See *supra* Part II.B; 1-CT-8 ¶ 3 [alleging the hysterectomy was not allowed "based on Mr. Minton's diagnosis of gender dysphoria. Gender dysphoria is a serious medical condition"]; 1-CT-8-9 ¶ 22 [alleging the hysterectomy was not allowed "because it was scheduled as part of a course of treatment for gender dysphoria, as opposed to any other medical condition"].) Minton alleged in both complaints that gender dysphoria is a recognized "medical condition," with a range of treatments, one of which is a hysterectomy for a transgender man. (1-CT-10-11 ¶¶ 12-16; 1-CT-151-152 ¶¶ 11-16.) Minton also alleged that gender dysphoria is treated as a medical condition in the DSM and by the World Professional Association for Transgender Health, whose Standards of Care allegedly "have been

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[34] The term "genetic characteristics" is defined to mean only certain genes or characteristics that may cause or increase risk of a particular disease or disorder. (Gov't Code, § 12926, subd. (i)(2).) Minton did not allege that he was discriminated against because of a genetic predisposition to gender dysphoria.

[35] When *Muller* was decided, "medical condition" included only cancer-related conditions. The term "genetic characteristics" was added as an additional basis in 1998, to address issues with employers conducting genetic testing to detect diseases and then terminating or refusing to hire healthy individuals based on the results. (Sen. Comm. on Jud. Report on SB 654, as introduced Feb. 25, 1997, hearing April 8, 1997 (1997-1998 Reg. Sess.).)

recognized as the authoritative standards of care by leading medical organizations ....” (1-CT 151 ¶¶ 12-13.)

In the FAC, however, Minton backpedaled from these allegations. He attempted to shift focus from his avowed “medical condition” of gender dysphoria to his *status* as a transgender individual. (See *supra* Part II.C.) Minton added or substituted the word “transgender” where he initially referenced only his medical condition of gender dysphoria. (Compare 1-CT-8 ¶¶ 3-4 with 1-CT-149 ¶¶ 3-4; compare 1-CT-13-14 ¶¶ 27, 32-34 with 1-CT-157-158 ¶¶ 43, 48-50.)

But Minton’s original allegations are binding, and control over the contradictory FAC allegations. “[W]here an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them[,] [t]he court may examine the prior complaint to ascertain whether the amended complaint is merely a sham. Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations. ... A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint ....” (*Larson*, 230 Cal.App.4th at 343-344 [citations omitted]; see also *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384 [a plaintiff cannot “avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings”]; *Continental Ins. Co. v. Lexington Ins. Co.* (1997) 55 Cal.App.4th 637, 646 [a plaintiff may not “‘discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading’”] [citation omitted].) Minton never explained the inconsistencies, and merely disputed their existence. (2-CT-246, fn. 4.)

Minton's judicial admissions in the original, verified complaint "'remain within the court's cognizance,'" and the new allegations "'designed to conceal fundamental vulnerabilities in [his] case will not be accepted.'" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061 [citations omitted].) Moreover, the FAC still alleged that Dr. Dawson was informed that Mercy "would not allow the hysterectomy to proceed because of the 'indication' it was intended to address," which was gender dysphoria. (1-CT-154 ¶¶ 23-24.) Minton's claim is not covered by the Unruh Act.

5. Dignity Health Provided Minton With "Full and Equal Access."

Even if the Unruh Act applied, the FAC would not state a claim. Minton's allegations showed Dignity Health provided Minton full and equal access to a hysterectomy because it arranged for his surgeon to obtain temporary surgical privileges at another nearby Dignity Health hospital that is not bound by the ERDs, and the surgery was performed at that hospital when her schedule permitted, within 72 hours after the originally scheduled time.

The California Supreme Court considered an analogous situation in *North Coast*. The Supreme Court rejected two doctors' argument that their constitutional rights to free speech and free exercise of religion immunized them from Unruh when they refused to perform IUI 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 the clinic arranged for the procedure to be performed by other doctors who worked at the clinic and who had no 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 [emphasis added; citations omitted].) The trial court here recognized that this discussion in *North Coast* fit this case. It concluded that under *North Coast*, Minton had not stated a claim: "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 ...." (2-CT-431.)

This is consistent with California law providing that a religious health care provider may comply with obligations to provide treatments that conflict with its religious beliefs by ensuring that the patient is *transferred* to another provider without such a conflict. In *Brownfield v. Daniel Freeman Marina Hosp.* (1989) 208 Cal.App.3d 405, 409, fn. 2, the court held that a plaintiff could state a claim for medical malpractice if an emergency provider, including a religious hospital, did not provide rape victims with "access" to pregnancy-preventing treatment, and explained that "'[a]ccess to' the treatment may take the form of transfer of the patient to another medical facility or another physician." In *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 311, the court explained that "no physician should be forced to act against his or her personal moral beliefs if the patient can be transferred to the care of another physician who will follow the [patient's] direction." In the context of compliance with advance health care directives, the California Legislature has expressly authorized transfer of patients to avoid burdening the deeply held religious beliefs of health care providers. (See Probate Code,

§ 4736 ["A health care provider ... that declines to comply with an individual health care instruction or health care decision shall … immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision"].)

Minton's arguments that the court erred in finding full and equal access based on *North Coast* are unavailing.

a. Access to the Surgery at a Non-Catholic Dignity Health Hospital Was "Full and Equal."

Minton argues he was denied full and equal access—even though he received the surgery he wanted, from the doctor he wanted, within three days of the original schedule, at another area Dignity Health hospital. This argument lacks merit.

First, Minton cites only inapposite cases where a member of a protected group was clearly denied the primary benefits of the defendant's business because the defendant bore an animus to the person's race, disability, or other protected characteristic.[36] For instance, in *Jones v. Kehrlein* (1920) 49 Cal.App. 646, the court affirmed a judgment for plaintiffs where the defendant allowed people of color to sit only in one section of the movie theater. In *Hutson v. The Owl Drug Co.* (1926) 79 Cal.App. 390, Unruh's predecessor was violated when a diner served an African-American woman, but put her

[36] Minton argues "'if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.'" (AOB 19 [quoting *Elane Photography, LLC v. Willock* (N.M. 2013) 309 P.3d 53, 62].) Mercy did not offer any patient a "full menu" that included a sterilizing procedure to treat a non-pathological condition. Moreover, *Elane* was decided under a New Mexico statute that differs from Unruh, as it prohibits "*mak[ing] a distinction*, directly or indirectly, in offering or refusing to offer … services, facilities, accommodations or goods to any person" for a protected reason. (N.M. Stat. Ann. § 28-1-7(F) [emphasis added].)

food among the dirty dishes and yelled at her and hit her.[37] A defendant violated the same statute in *Suttles v. Hollywood Turf Club* (1941) 45 Cal.App.2d 283, when it refused the plaintiff admission to a box seat on account of his race, although he could have been seated in the grandstand. In *Stevens v. Optimum Health Inst. – San Diego* (S.D. Cal. 2011) 810 F.Supp.2d 1074, a holistic health center's refusal to allow a blind woman to attend the program without bringing and paying for a sighted companion violated Unruh.[38]

These cases are not remotely analogous. Telling an African-American person that he cannot sit in the good seats because African-Americans are not allowed in those seats is invidious racism and is not comparable to telling a transgender person that he cannot have a specific surgery at a Catholic hospital because it is prohibited by the ERDs but that he can have the procedure at another hospital under common ownership. Similarly, Minton's references to the invidious "separate but equal" doctrine are completely off base and offensive to Catholic health care, which treats everyone without regard to color, creed, sex, or sexual identity. The "separate but equal" doctrine was intended to keep the races separate from each other.[39] A hospital's denial of one procedure to a person who

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[37] Minton cites *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, which involved discounts for women but not men, and rejected an argument that Unruh did not apply because men were not totally excluded.

[38] *Engel v. Worthington* (1997) 60 Cal.App.4th 628, is an irrelevant decision concerning attorneys' fees. It cites to a different, *unpublished* opinion relating to prohibited sex discrimination by a photographer who refused to include a portrait of a same-sex couple in a memory book. The Supreme Court specifically ordered depublication of that opinion. Not only does Minton improperly attempt to rely on an unpublished opinion, but the unpublished opinion is itself irrelevant, where Minton received full and equal access to the treatment he sought.

[39] See *Plessy v. Ferguson* (1896) 163 U.S. 537, 557 (dis. opn. of Harlan, J.) ("Every one knows that the statute in question [requiring the provision of separate but equal railroad cars for the races] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches

may obtain that procedure at another identically licensed hospital owned by the defendant and who can obtain virtually any other procedure at the first hospital does not relegate the patient to separate facilities.

Second, Minton argues that an Unruh violation occurred "at the moment [Dignity Health] cancelled Mr. Minton's scheduled procedure because of his gender identity." (AOB 8-9.) That overlooks the critical part of the statute providing that there is no violation unless there is a denial of "full and equal access." Dignity Health could comply with the statute despite the cancellation by providing an alternative means for Minton to have *full and equal* access to the procedure, and it did so.[40]

Third, Minton complains that Methodist Hospital was less convenient and the surgery was delayed for three days.[41] But these are incidental ramifications of Dignity Health's effort to accommodate Minton by promptly rescheduling the procedure and granting his physician temporary privileges to perform the procedure. *North Coast* did not require that "full and equal" access be *identical* or that the "North Coast physician lacking defendants' religious objections" must be able to perform the procedure at the exact same time that the defendant doctors might have been able to perform it. Surely, the Supreme Court understood that any such arrangement to schedule a major health

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occupied by or assigned to white persons. ... The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.").

[40] *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, cited by Minton, is inapposite. It held Unruh does not require a plaintiff to affirmatively demand equal treatment and be denied before he can sue. That does not mean that when an event occurs that a person believes denies him full and equal access under Unruh, the defendant is immediately liable and cannot take action to avoid a violation.

[41] The FAC deleted the original allegation that the delay was due to Dr. Dawson's conflicting schedule. (1-CT-13 ¶ 7.)

procedure with other clinic physicians might take a few days. Small inconveniences must be tolerated if necessary to preserve the right of a religious provider not to perform prohibited procedures but still ensure the procedures are performed in a full and equal manner. Forcing a faith-based hospital to allow a procedure that violates its faith simply to avoid inconveniencing a patient would give no weight to the fundamental requirement of tolerance for the free exercise of religion.

For instance, in *Allen v. Sisters of St. Joseph* (N.D. Tex. 1973) 361 F.Supp. 1212, the court refused to compel a Catholic hospital to perform a sterilization against its religious beliefs. While the primary basis for the decision was that the hospital was not acting under color of state law for purposes of a 42 U.S.C. section 1983 claim, the court also concluded that the inconveniences to the plaintiff of receiving the procedure at another nearby hospital did not justify ordering the procedure. (*Allen*, 361 F.Supp. at 1213-1214.) "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 [to another hospital that would perform sterilization] or await a later date for her sterilization." (*Id.* at 1214.)

Fourth, Minton argues that Dignity Health failed to take unilateral, affirmative steps to reschedule the procedure at Methodist until pressured to do so. He cites a public statement allegedly issued by Dignity Health, explaining Dignity Health's no-discrimination policy, stating that Mercy was bound to follow the ERDs' prohibition on direct sterilization, and asserting that "[w]hen 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." (1-CT-155 ¶ 31.) This statement does *not* convey that Dignity Health will do nothing to accommodate a patient seeking a prohibited service and will

instead place the entire onus on the patient and physician. Further, Minton admitted that Mercy's president "suggested" that the procedure be done at Methodist, and his physician could perform the procedure at Methodist only because Dignity Health and Methodist awarded her temporary surgical privileges to do so.[42] And Minton cites no support for the notion that Unruh requires the hospital to make all of the arrangements without any participation from his physician.

Fifth, Minton argues that the cancellation of the surgery caused him dignitary harm of the sort that Unruh targets. (1-CT-154 ¶¶ 25-26; 1-CT-157 ¶¶ 41-42; 1-CT-158 ¶ 53; AOB 21-22.) But dignitary harm cannot support a discrimination claim when the reason for the denial was the hospital's exercise of its religious rights. In such circumstances, such action is an "exercise of religion, an exercise that [the protected group] could recognize and accept without serious diminishment to their own dignity and worth." (*Masterpiece*, 138 S. Ct. at 1727.)

Finally, Minton seeks to limit the import of *North Coast*'s statement only to physicians in the same "doctors' office" (AOB 27), thereby making it inapplicable to multiple hospitals under common ownership. But the Supreme Court understood that all manner of business establishments may be defendants in Unruh cases. *North Coast* happened to involve a single clinic with multiple physicians, some with religious

[42] The Joint Commission, which accredits hospitals, requires that hospitals grant temporary privileges only in limited circumstances, including where necessary to meet an important patient care, treatment, or service need, and only after the physician's licensure and current competency are verified. (http://www.hcpro.com/content.cfm?content_id=42302; https://credentialingresourcecenter.com/resources/bylaws-language-granting-temporary-privileges-joint-commission%E2%80%93accredited-hospitals, at attached document 1705_CRCJ_Bylaws language for granting temporary privileges in Joint Commission–accredited hospitals.docx.)

objections and some without; there is no principled reason to read its discussion as inapplicable to the analogous scenario of a single hospital system with multiple hospitals, some with religious objections and some without.

b. The Court Did Not Err in Following the Analysis in *North Coast.*

Minton argues that *North Coast*'s discussion was merely dictum and the court improperly relied upon it. This is unavailing for three reasons.

First, the Court's analysis was more than dictum. The conclusion—that conflict between religious principles and the Unruh Act would have been avoided had the procedure been performed by another North Coast clinic doctor—was an essential element in the balancing test the Court employed when asking whether the Unruh Act was the least restrictive means of achieving the state's antidiscrimination goal in the face of a constitutional freedom of religion challenge. (*North Coast,* 44 Cal.4th at 1159.) Had the Court not concluded that providing a physician without a religious objection would comply with Unruh, it could not have held that application of Unruh was the least restrictive alternative in the case before it. The Court needed to look at other available alternatives in order to determine whether the one at issue was least restrictive. Minton acknowledges that the discussion about other doctors was part of the Court's strict scrutiny analysis. (AOB 33.)

Second, the trial court itself considered *North Coast*'s least-restrictive analysis to be dictum, making Minton's argument irrelevant. And assuming arguendo the analysis was dictum, it does not follow that the court improperly relied on it. "Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive." (*United Steelworkers of Am. v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 835.) In fact:

> To say that dicta are not controlling ... does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed. In short, while a court is free to disregard a dictum that it strongly disapproves, it is quite likely to rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle.

(9 Witkin, Cal. Proc. (5th ed. 2008) Appeal § 511; see also *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 ["Generally speaking, follow dicta from the California Supreme Court. That was good advice then and good advice now"].) The trial court was right to conclude that "[b]ecause it appears to be considered of import by the Supreme Court and part of the teachings of that case, there is no basis for this court to ignore the dicta in *North Coast*." (2-CT-431.) The court explained: "I feel like [the language] was purposeful in that opinion, and although not part of the holding, it is not something that I can ignore." (2-RT-17:18-20.)

Third, the Supreme Court's statements are binding, and not dicta, when they are responsive to arguments raised by counsel and presumably intended to guide the Court and attorneys. (*United Steelworkers*, 162 Cal.App.3d at 834-835.) The *North Coast* discussion responded to arguments that were briefed. The plaintiff's brief specifically argued that any burdens that compliance with Unruh placed on the doctors' religious beliefs "easily could [be] avoid[ed] ... by selecting at least one member of their medical staff to prepare semen samples and perform IUI for all patients equally, instead of choosing only staff members who have religious objections to doing so for lesbians." (2-CT-309.) Minton argues that the *North Coast* defendants did not respond to this point, but that says nothing about whether the *Court* was responding to it. The plaintiff's suggestion likely was the genesis of the Court's statement.

Minton failed to allege an Unruh Act violation. The judgment may be affirmed on this basis, and the Court need not reach the constitutional implications of a contrary ruling, discussed below. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10 ["'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us'"] [citation omitted].)

B. The Unruh Act Cannot Be Enforced in a Manner That Violates Mercy's Constitutional Rights of Free Exercise of Religion and Freedom of Expression.

Even 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.[43] (Cal. Const., art. I, §§ 2, 4; U.S. Const. amend. I; *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"].) Using Unruh to force Mercy to violate the ERDs 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. These violations could not pass any level of scrutiny.

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[43] Minton's counsel, the ACLU, has acknowledged that it is inappropriate to require religious health care providers to perform procedures that violate their religious principles. For instance, ACLU's president testified in support of the Religious Freedom Restoration Act (RFRA), noting that the statute safeguarded "such familiar practices" as "*permitting religiously sponsored hospitals to decline to provide abortion or contraception services*." (The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) [Prepared Statement of Nadine Strossen, pp. 80-81, https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf] [emphasis added].)

1. The State May Not Constitutionally Compel a Catholic Hospital to Allow Procedures That Violate Its Fundamental Religious Precepts.

The U.S. Supreme Court has 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 of Russian Orthodox Church in N. Am.* (1952) 344 U.S. 94, 116.) Freedom of religion is more than "mere freedom of worship"; it encompasses "respect for freedom of conscience" as well.[44] Mercy was exercising its freedom of conscience when it denied Minton's procedure, and that exercise merits protection from Unruh Act liability.

a. The California Constitution Prohibits the State From Compelling Mercy to Perform Procedures Prohibited by Binding Religious Doctrine.

California's Constitution provides that "free exercise and enjoyment of religion without discrimination or preference are guaranteed." (Cal. Const., art. I, § 4.) "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 [quoting 25 Ops.Cal.Atty.Gen. 316, 319 (1955)].)

The California Supreme Court has not determined what level of scrutiny applies to freedom of religion claims under the California Constitution. (*North Coast*, 44 Cal.4th at 1158; *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 559.)[45]

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[44] Pope Benedict XVI, Address to the Bishops of the United States of America from Region IV on Their *Ad Limina* Visit (Jan. 19, 2012), available at http://w2.vatican.va/content/benedict-xvi/en/speeches/2012/january/documents/hf_ben-xvi_spe_20120119_bishops-usa.html.

[45] The federal standard articulated in *Employment Division, Dep't of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872 (see discussion *infra* Part III.B.1(b)) does not apply to claims under the California Constitution. (*North Coast*, 44 Cal.4th at 1158; *Catholic Charities*, 32 Cal.4th at 560.)

However, the Court applied strict scrutiny to such claims in its most recent cases. (*North Coast*, 44 Cal.4th at 1158 [applying strict scrutiny without deciding applicable test because state law passed that stringent standard]; *Catholic Charities*, 32 Cal.4th at 562 [same].)

Moreover, where a case challenges constitutional religious rights of a not-for-profit faith-based organization, strict scrutiny is appropriate because such organizations *exist* in order 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 they deserve heightened constitutional protection. (See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints 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) 134 S.Ct. 2751, 2794 (dis. opn. of Ginsburg, J.) ["The First Amendment's free exercise protections, [as] the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations."].) This Court should apply strict scrutiny here and hold that the Unruh Act cannot interfere with a Catholic hospital's constitutional right to abide by its historic religious commitments.

Under strict scrutiny, a state law that substantially burdens a party's 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 the Unruh Act to compel Mercy to perform procedures that violate governing religious doctrine and its Catholic mission, and to risk losing its Catholic status, would

substantially burden Mercy's religious freedom.[46] Moreover, there is a less restrictive means to achieve the state's goal under Unruh: allowing Dignity Health to accommodate Minton's need for the procedure at another hospital that does not share Mercy's religious objections. In *North Coast*, when holding that the Unruh Act as applied *did* pass strict scrutiny because there was no less restrictive means available to achieve the state's goal, the Court also explained that Unruh would not be violated had the clinic provided another doctor without the same objections to perform the procedure. (*North Coast*, 44 Cal.4th at 1159; see also *id.* at 1162 (conc. opn. of Baxter, J.).) That is what happened here when Dignity Health arranged for Minton's physician to perform the procedure at Mercy's sister non-Catholic hospital, Methodist.

With respect to a hypothetical "sole practitioner" who lacked access to other providers within his practice to whom he could refer a patient for a procedure he or she found morally objectionable, Justice Baxter's concurrence in *North Coast* identifies serious concerns. Justice Baxter did not say that Unruh would require that practitioner to render the objectionable service. Instead, addressing the majority's statement that it would be permissible for another doctor at the clinic to perform the procedure, Justice Baxter said:

> I am 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

[46] "For these purposes, a law substantially burdens a religious belief if it 'conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, 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].)

> the Unruh Civil Rights Act against the doctor would not be the means "least restrictive" on religion of furthering the state's legitimate interest.

(*North Coast*, 44 Cal.4th at 1162-1163 (conc. opn. of Baxter, J.); see also *Morrison*, 206 Cal.App.3d at 312 [physician with moral objections to removing a patient's feeding tube cannot be compelled to do so if the patient can be transferred to another physician who will, noting that "[t]his case does not presently pose the dilemma created when no physician can be found who will follow the conservator's direction"].)

Here, where performing the procedure at Methodist was a less restrictive alternative, application of the Unruh Act to compel Mercy to provide a hysterectomy in violation of the ERDs would not pass strict scrutiny under the California Constitution.

b. The Federal Constitution Prohibits the State From Compelling Mercy to Perform a Procedure Prohibited by Binding Religious Doctrine.

The U.S. Constitution's protection for religious freedom presently is less rigorous than California's. (*Sands*, 53 Cal.3d at 883 ["California courts have interpreted the [California constitutional] clause as being more protective of the principle of separation than the federal guarantee"]; *Carpenter v. City & Cty. of San Francisco* (9th Cir. 1996) 93 F.3d 627, 629 ["In general, the religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution."].) Nonetheless, the federal Constitution is significant here.

The U.S. Supreme Court has articulated a general rule that religious beliefs protected under the Free Exercise Clause of the U.S. Constitution do not exempt an individual from complying with a neutral state law of general applicability that does not target religion. (*Smith*, 494 U.S. at 879.) The Unruh Act is such a law (*North Coast*, 44 Cal.4th at 1156), as was Colorado's public accommodation law at issue in *Masterpiece*.

But the *Smith* principle does not mean a facially neutral law will *always* be upheld in *any* application. As shown by the Court's post-*Smith* decisions, *Smith* is not applied in a mechanical, all-or-nothing manner. Rather, whether *Smith* will require in any particular case that the asserted religious freedom must yield to a neutral state law presents "difficult" and "delicate" questions. (*Masterpiece*, 138 S. Ct. at 1723-1724.) While the *Masterpiece* Court did not need to resolve those questions,[47] its opinion spoke of "reconciliation" of the state's right to protect persons from discrimination with the right to exercise freedom of religion (*id.* at 1723); "determin[ing]" a "balance" between free exercise of religion and "an 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 of religion over antidiscrimination law. (*Id.* at 1728-1729.) The Court clearly did not consider the application of *Smith* to be cut and dried. Instead, the Court 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.)

Thus, accommodating freedom of religion and principles of antidiscrimination involves a balancing. (*Trinity Lutheran Church of Columbia v. Comer* (2017) 137 S.Ct. 2012, 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

[47] These questions were not answered because the Court concluded that Colorado had not applied its law in a neutral manner. (*Masterpiece*, 138 S. Ct. at 1732.)

Clause"].) This recognizes that "[w]hile antidiscrimination laws reflect a constitutional value, religious liberty occupies a commensurate level in the constitutional hierarchy. As often happens with First Amendment cases, this is 'a collision between two interests of the highest order: the Government's interest in eradicating discrimination ... and the constitutional right of a church to manage its own affairs free from governmental interference.' Thus, the desire to prevent discrimination cannot be the beginning and the end of the discussion." (*Catholic Charities*, 32 Cal.4th at 573 (dis. opn. of Brown, J.) [quoting *EEOC v. The Catholic U. of Am.* (D.C. Cir. 1996) 83 F.3d 455, 460].)

(1) *Smith* Addressed the Rights of Individuals, Not Religious Institutions.

An approach that is fully consistent with *Smith* yet affords "constitutionally protected space for religious organizations" is to recognize that *Smith* constrains the ability of *individuals* to practice their religion in a manner that would violate generally applicable state law. Nothing in *Smith*, which involved affirmative religious practices of individuals, purported to reach the fundamental religious tenets of a religious organization itself. (*EEOC v. The Catholic U.*, 83 F.3d at 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 [same]; *Combs v. Central Texas Annual Conf. of the United Methodist Church* (5th Cir. 1999) 173 F.3d 343, 348-349 [same].) 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 the one at issue here.

Smith has never been applied to require a religious hospital to perform a procedure prohibited by religious doctrine. The First Amendment "gives special solicitude to the rights of religious organizations." (*Hosanna-Tabor*, 565 U.S. at 189.) The *Smith* Court may have had this solicitude in mind when it stated it had "never held that an *individual's* religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" and that it has "consistently held that the right of free exercise 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)." (*Smith*, 494 U.S. at 878-879 [emphasis added].) 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]; see also *Catholic Charities*, 32 Cal.4th at 572 (dis. opn. of Brown, J.) [recognizing *Smith*'s references to the religious practices of individuals and noting that "[i]t is ... far from self-evident, if or how, *Smith* applies to laws that directly contravene the religious conduct of religious organizations"].)

(2) Courts Traditionally Respect the Rights of Religious Organizations Not to Be Compelled to Violate Their Faith.

The Supreme Court has repeatedly reaffirmed the notion that courts will not compel churches, or those who carry out the church's mission, to engage in acts prohibited by the church's fundamental tenets. In *Hosanna-Tabor*, the Court noted that even 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." (*Hosanna-Tabor*, 565 U.S. at 189.)

The Court in *Masterpiece* considered 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 free exercise of religion" so self-evident that it could merely be "assumed." (*Masterpiece*, 138 S. Ct. at 1727.). The Court was concerned about the potential for an exception that protected, for one example, clergy who declined to perform same-sex weddings, to slide down a slippery slope and perpetuate the type of stigma that antidiscrimination law combats. The Court explained that if the "exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." (*Masterpiece*, 138 S.Ct. at 1727.)

Similarly, the Court explained that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons." (*Id.* at 1728-1729.) But it was clear to the *Masterpiece* Court that protecting the clergy from being compelled to perform marriage services to which they object on religious grounds would present *no concerning stigma*. Rather, that exception "would be well understood in our constitutional order as

an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." (*Ibid.*)[48]

Protecting Catholic hospitals that object to performing surgeries prohibited by the ERDs is no different. The ERDs are the culmination of centuries of efforts of Catholic health care practitioners to minister in accord with the Church's teaching, and were adopted to provide uniform instructions to Catholic health care providers on ethical medical practices.[49] The ERDs are well established and an entrenched part of health care at Catholic hospitals nationwide. Just as with *Masterpiece*'s respect for the inability of members of the clergy to perform marriage ceremonies at odds with their faith, transgender individuals could "recognize and accept [Catholic health care providers' adherence to the ERDs] without serious diminishment to their own dignity and worth." (*Ibid.*) And 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 perform 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 here because Mercy does not exclude

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[48] Minton argues *Masterpiece*'s example of acts that could not be compelled over religious objections is strictly limited to the specific situation of members of the clergy declining to perform same-sex weddings. (AOB 26-27.) That is a nonsensical narrowing of the opinion's example. The subject matter of *Masterpiece* was religious objections to same-sex weddings, making the clergy example a relevant point of comparison to the baker. There is no logic in recognizing the self-evident proposition that clergy cannot be compelled to perform ceremonies prohibited by their religious principles but not recognizing that Catholic hospitals cannot be compelled to allow invasive surgical procedures prohibited by their religious principles.

[49] 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.

transgender persons from obtaining the hospital's services—only particular services are involved. (See *Masterpiece*, 138 S. Ct. at 1730 [noting that while the plaintiff baker had refused to sell a wedding cake to a gay couple, he was willing to sell gay persons and couples other baked goods that did not carry the symbolism and message of a wedding cake][50]; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston* (1995) 515 U.S. 557, 572 [under freedom of speech protections, parade organizer could not be compelled to allow a gay parade unit to march, but noting that the parade organizers did not seek to exclude gay people from marching in the parade, only from participating as a distinct unit with its own banner].)

Accordingly, application of the Unruh Act to Mercy is impermissible under the Free Exercise Clause.

2. 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; *Gerawan Farming v. Lyons* (2000) 24 Cal.4th 468, 490.) Forcing Mercy to act contrary to the ERDs would impermissibly intrude on this freedom. Some "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" (*Texas v. Johnson* (1989) 491 U.S. 397, 404 [citation omitted]; *Masterpiece*, 138 S.Ct. at 1741 (conc. opn. of Thomas, J.)

[50] 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 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.) Again, there is no allegation that Dignity Health refused or would refuse to provide Minton any health care other than sterilization prohibited by the ERDs.

["Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech."].) That is the case here.

"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*, 135 S.Ct. at 2607.) The ERDs provide that "Catholic health care *expresses* the healing ministry of Christ," the "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 Christ. (1-CT-203, 211, 218.) Mercy's expression includes its professed mission, the crucifix adorning its edifice, and religious sacraments and symbols throughout the hospital.

Interpreting the Unruh Act to require Mercy to perform medical procedures prohibited by Catholic doctrine 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, LLC v. NLRB* (2007) 42 Cal.4th 850, 865; *Anderson v. City of Hermosa Beach* (9th Cir. 2010) 621 F.3d 1051, 1063.) There are less restrictive means of enforcing the state's antidiscrimination goals (*supra* Part III.B.1), and the statute cannot stand as applied here.

North Coast and *Catholic Charities* rejected religious doctors' and organizations' claims that freedom of speech protected them from Unruh liability, but acknowledged

that the religious person/entity would remain free to express objections to the procedures/treatments at issue even while being compelled by state law to provide them. (*Catholic Charities*, 32 Cal.4th at 558 ["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."]; *North Coast*, 44 Cal.4th at 1157.)

By contrast, for a Catholic hospital, whose mission and identity are 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 being compelled to perform. It would be impossible for Mercy to express the core message embodied in the ERDs while simultaneously violating 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].)

C. Using the Unruh Act to Compel Catholic Hospitals to Violate the ERDs Could Lead to Loss of Societal Benefits.

Finally, ordering Mercy to allow a prohibited procedure, or else violate the law and be subject to contempt of court, could have devastating societal consequences. Such a ruling could force Catholic hospitals to decline to provide certain procedures—such as hysterectomies—to anyone, under any circumstances. (*Catholic Charities*, 32 Cal.4th at 562 [noting that religious organization could avoid conflict between Unruh and its religious beliefs "simply by not offering coverage for prescription drugs"]; Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions* (2014) 48 U.C. Davis 703, 766, fn. 316 [quoting Senate discussion of need for conscience protections in Church

Amendment, citing "the 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"]; Wilson, *The Erupting Clash between Religion and the State over Contraception, Sterilization and Abortion* in Religious Freedom in America: Constitutional Traditions and New Horizons (Allen Hertzke edit., 2014) pp. 135, 147; *Allen*, 361 F.Supp. at 1214.) The risk of losing health care services must be considered in any decision to compel a Catholic hospital to allow procedures that its religion forbids.

IV. CONCLUSION

Minton did not state an Unruh claim, and could not amend to do so. Moreover, any claim would be constitutionally barred. The judgment should be affirmed.

Dated: February 14, 2019

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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this Respondent's Brief contains 13,903 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: February 14, 2019 MANATT, PHELPS & PHILLIPS, LLP

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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 **February 14, 2019**, I served the within **RESPONDENT'S BRIEF** on the interested parties in this action addressed as follows:

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Clerk, Supreme Court of California 350 McAllister Street San Francisco, CA 94102-7303	*Electronically served pursuant to CRC 8.212(c)*

☒ **(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 **February 14, 2019**.

Brigette Scoggins