No. A153662

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

EVAN MINTON,

Plaintiff-Appellant,

vs.

DIGNITY HEALTH, d/b/a MERCY SAN JUAN MEDICAL CENTER,

Defendant-Respondent.

Appeal from the Superior Court of the State of California
for the County of San Francisco
The Honorable Harold E. Kahn, Judge Presiding
Superior Court Case No. 17-558259

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INTRODUCTION

The Unruh Act promises more than separate but equal treatment: It guarantees full and equal access to public accommodations. Evan Minton was denied that guarantee when Respondent cancelled a scheduled surgery because he is transgender. Since the conditions under which Mr. Minton eventually received care were different only because he is transgender, he did not receive "full and equal" access to that care. Respondent therefore violated the Unruh Act.

Respondent's opposition mischaracterizes many of Mr. Minton's factual allegations in the course of attempting to frame its rejection of Mr. Minton as neutral, when it was in fact discriminatory. Respondent has set a low bar for its treatment of its patients, and invites the Court to sign off on its discriminatory practices. This Court should decline that invitation and maintain the robust standard for equal treatment required by the Unruh Act.

STATEMENT OF THE CASE

Respondent's arguments rely on mischaracterizations of Mr. Minton's well-pleaded allegations and extraneous information *not* alleged in the operative complaint, neither of which may be considered for purposes of this appeal. Neither Respondent's self-serving and unreasonable interpretation of Mr. Minton's allegations nor the extrinsic information it seeks to introduce are relevant to the determination of whether the allegations *in the operative complaint* are sufficient to state a

claim under the Unruh Act. *See Fremont Indemn. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113-14 (2007) ("A demurrer is simply not the appropriate procedure for determining the truth of disputed facts."). Accordingly, before addressing the myriad deficiencies in Respondent's legal arguments, it is necessary to correct the factual record.

Respondent denied Mr. Minton access to a hysterectomy because of his gender identity. The operative complaint ("FAC") alleges that, one day before Mr. Minton's medically necessary hysterectomy procedure was scheduled, Respondent abruptly cancelled the procedure after Mr. Minton told a nurse at Mercy San Juan Medical Center ("MSJMC") that he is transgender. ROA 153-54. Brian Ivie, MSJMC's president, then told Mr. Minton's physician, Dr. Dawson, that Dr. Dawson "would *never* be allowed to perform a hysterectomy on Mr. Minton at MSJMC." *Id.* 154 (emphasis added). The superior court correctly found that these allegations, taken as true, plausibly establish that Respondent's "refusal to have the procedure performed at MSJMC was substantially motivated by Mr. Minton's gender identity." *Id.* 431.

The allegations in the FAC and the superior court's own words thus directly contradict Respondent's bald assertion that the superior court "did not find the procedure was denied based on Minton's gender identity." Resp. 21 n.20. In fact, at the demurrer hearing, the superior court *rejected* Respondent's counsel's request to modify the language of the tentative

ruling to reflect only that Mr. Minton "alleged" that his denial of care was motivated by gender identity, rather than that the superior court must assume the truth of those allegations at the demurrer stage. Nov. 17, 2017 Hr'g Tr. 18:21-19:12. The superior court affirmed that, "[l]iberally construed," the allegations are that Mr. Minton was denied care based on his gender identity, and "I have to assume the truth of that." *Id.* 18:26-28.

Throughout its appeal brief, Respondent attempts to distract from the unambiguous allegations in the FAC by pointing to the Ethical and Religious Directives ("ERDs"), promulgated by the U.S. Conference of Catholic Bishops, to which Respondent is purportedly bound. *See, e.g.*, Resp. 12 ("[MSJMC] 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."). But whether and to what extent the ERDs drove Respondent's decision to deny Mr. Minton care is not at issue here. Indeed, the ERDs are not even part of the factual record that may be considered at the demurrer stage. Though Respondent dedicates pages of its appeal brief to discussion of the ERDs, *see* Resp. 14-16, the superior court *never granted* Respondent's request to take judicial notice of the documents to which Respondent cites. Nor do the ERDs form

part of the allegations in the FAC.[1] In other words, any discussion of how the ERDs operate is extrinsic to the universe of facts that may be considered when ruling on the demurrer. To the extent Respondent seeks to *dispute* the veracity of the allegations in the FAC based on information contained in the ERDs, that factual dispute in and of itself requires that the demurrer be overruled. *See Int'l Bhd. of Teamsters v. City of Monterey Park*, 30 Cal. App. 5th 1105, 1114 (2019) (reversing trial court's ruling sustaining demurrer given factual questions). The FAC alleges—and the superior court found, based on those allegations—that Respondent denied care to Mr. Minton immediately after learning of his transgender status and because of his gender identity. Those are the only facts on which the demurrer may be evaluated.[2] Respondent's general "practices" based on the ERDs—which may be discriminatory in their own right—are simply not at issue in this appeal. *See* Resp. 27.

Respondent also attempts to revive its frivolous argument that the FAC's allegations that MSJMC denied medical care to Mr. Minton because

[1] The FAC quotes a news article stating that Respondent referenced the ERDs in response to media inquiries regarding its discrimination against Mr. Minton. ROA 155. But the FAC does not include any allegations as to how the ERDs operated as a factual matter in Mr. Minton's case.

[2] Respondent's assertion that the superior court "found" that MSJMC denied Mr. Minton care "for the purpose of complying with the ERDs" is wrong. Resp. 23. Respondent misleadingly quotes from an earlier ruling by the superior court—which is *not* the ruling that forms the basis of this appeal—and disregards the superior court's clear holding in the ruling that is at issue that the denial of care was "substantially motivated by Mr. Minton's gender identity." ROA 154.

of his gender identity are "sham." *See* Resp. 12, 20, 31-32. This argument was not even entertained by the superior court, and should likewise be rejected in this appeal. Indeed, the superior court implicitly rejected this argument when it found that the FAC plausibly alleges that Respondent's denial of care was "substantially motived by Mr. Minton's gender identity." ROA 154. Contrary to Respondent's assertion, the allegations in the FAC do not "contradict[]" any of the allegations in Mr. Minton's original complaint. Resp. 31. Rather, Mr. Minton properly clarified and amplified his factual allegations in the FAC, after being granted leave to do so by the superior court (and in response to Respondent's mischaracterization of the allegations in its demurrer to the original complaint). *See* ROA 146; *Hahn v. Mirda*, 147 Cal. App. 4th 740, 751 (2007) ("The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process . . . The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts."); *Leasequip, Inc. v. Dapeer*, 103 Cal. App. 4th 394, 404 n.6 (2002) (finding second amended complaint not a sham when the allegations "amplified, but did not contradict" those in prior complaint).

Mr. Minton obtained the medical care he needed only after expending substantial efforts of his own and enlisting third parties' help—not because Respondent proactively granted access to the procedure. As anticipated in Mr. Minton's opening brief, in this appeal

Respondent continues to mischaracterize the allegations in the FAC regarding the absence of proactive steps by Respondent to ensure Mr. Minton received full and equal access to medically necessary care. *See* Op. Br. at 12-13, 20-21. Nowhere in the FAC—which constitutes the universe of facts that may be considered at this juncture—does Mr. Minton allege that Respondent made any affirmative effort to ensure that Mr. Minton received the hysterectomy. Nevertheless, Respondent baselessly asserts in its brief that it "promptly enabled" Mr. Minton to receive treatment, Resp. 11, and that Mr. Minton "admitted" that "Respondent affirmatively sought to accommodate Minton's procedure," *Id.* 18 n.17. As an illustrative example, Respondent argues that Mr. Minton alleged in his original complaint that Respondent "*arranged* for Minton's physician to perform a hysterectomy on Minton, a transgender individual, at another Respondent hospital." *Id.* 24 (citing ROA 157 ¶¶ 38-39). But the cited allegations say no such thing: "On Thursday, September 1, paperwork regarding emergency surgical privileges for Dr. Dawson at Methodist Hospital was fully executed. Dr. Dawson performed Mr. Minton's hysterectomy at Methodist Hospital on Friday, September 2." ROA 157 ¶¶ 38-39.

The Court should disregard Respondent's improper and self-serving mischaracterization of the facts alleged in the FAC. When properly construed in Mr. Minton's favor, the allegations in the FAC describe the

enormous efforts *Mr. Minton* undertook to obtain the medical care he needed:

- Mr. Minton and Dr. Dawson elicited substantial media coverage of the denial of care. ROA 154.
- Mr. Minton obtained assistance from Jenni Gomez, a Legal Aid attorney, to pressure Respondent to provide the access to medical care to which Mr. Minton was entitled under law. *Id.*
- Mr. Minton sought and obtained support from Dave Jones (the California Insurance Commissioner), as well as a number of state legislators, legislative staff members, and Sacramento-area lobbyists to communicate the urgency of Mr. Minton's need for care. *Id.*
- Only after Dr. Dawson managed to negotiate an alternative venue for the surgery, secure emergency admitting privileges for herself there, and sort out insurance coverage issues, was Mr. Minton able to receive the medically necessary care. *Id.* 155-157.
- Meanwhile, Respondent issued a public statement confirming that "[w]hen a service is not offered [by a Respondent hospital], *the patient's physician makes arrangements* for the care of his/her patient at a facility that does provide the needed service." *Id.* 154 (emphasis added).

To the extent there is any factual dispute as to whether Respondent ensured Mr. Minton's "full and equal access" to care, that dispute is not properly resolved at the pleadings stage and requires that the demurrer be overruled.

Respondent is a business establishment subject to the requirements of the Unruh Act, not a church. Respondent also improperly seeks to introduce extrinsic "facts" to establish that it is "an official part of the Catholic Church," so as to support certain of its legal arguments. Resp. 14-16; *see also id.* 47 (citing cases regarding "the constitutional right of a church to manage its own affairs free from governmental interference"). But the FAC does not contain any allegations that reasonably suggest Respondent is a "church." Rather, the FAC alleges that Respondent operates the fifth-largest health system in the country and is the largest hospital provider in California. ROA 150-51. In 2014, Respondent reported annual revenue of over $10 billion and employed nearly 50,000 people, *Id.* 151; as of 2018, those numbers ballooned to over $14 billion in annual revenue and over 60,000 employees.[3] Moreover, Respondent's own public press releases state that it is "*not* an official ministry of the Catholic

[3] https://www.dignityhealth.org/about-us/press-center/press-releases/2018-09-28-dignity-health-reports-financial-results-for-fy-2018.

church."[4] Even if Respondent's status as a "church" were at issue—which it is not—the allegations in the FAC control, and Respondent's attempt to rely on extrinsic information must be rejected at the demurrer stage.

When determining the discrete legal issues presented on this appeal, the Court should disregard Respondent's mischaracterization of the factual record and introduction of extrinsic information. As the superior court found, the FAC plausibly alleges that Respondent denied Mr. Minton medically necessary care because of his gender identity. At issue here is whether a single sentence from *North Coast* excuses Respondent from Unruh Act liability for that denial of care merely because Mr. Minton was ultimately able to secure access to that care at another facility and at a later date. As the superior court observed, the determination of this "issue of first impression" is a conclusion with which "it is very possible a court of appeal will not" agree. Nov. 17, 2017 Hr'g Tr. 10:13-16. Indeed, the superior court expressly sought help from the court of appeal, observing that "we have so little guidance" on the law in this area, that the court of appeal is "probably . . . better off to review" this issue. *Id.* For the reasons stated in Mr. Minton's opening brief and herein, the Court should correct the superior court's erroneous conclusion, affirm that the Unruh Act requires full and

[4] https://www.dignityhealth.org/about-us/press-center/press-releases/catholic-healthcare-west-is-now-dignity-health.

equal access to services, and permit Mr. Minton's claims to proceed to discovery.

ARGUMENT

I. Respondent Violated the Unruh Act by Cancelling Mr. Minton's Hysterectomy.

The superior court properly concluded that Respondent's decision to cancel Mr. Minton's procedure was "substantially motivated by Mr. Minton's gender identity," as it was "required to do on demurrer." ROA 431. This Court should not disturb the lower court's factually supported holding that Respondent intentionally discriminated against Mr. Minton. The superior court's error was to disregard the broad construction afforded to the Unruh Act in finding that Mr. Minton was granted full and equal access to medical treatment, which is simply not the case, even under the distorted facts asserted by Respondent.

A. Respondent's Decision to Cancel Mr. Minton's Hysterectomy Denied Him Full and Equal Access to Medical Care.

"The Legislature's desire to banish [discrimination] from California's community life has led [the California Supreme Court] to interpret the [Unruh] Act's coverage 'in the broadest sense reasonably possible.'" *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 75–76 (1985) (quoting *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468 (1962)), *as modified on denial of reh'g* (Dec. 19, 1985). Respondent

ignores this, instead arguing for unprecedented limits on the scope of the Act. To the contrary, the California Supreme Court has determined that "the scope of the Unruh Act is not narrowly limited to practices which totally exclude classes or individuals from business establishments. *Koire v. Metro Car Wash*, 40 Cal.3d 24, 30 (1985). Time and again, California courts have interpreted the Unruh Act to prohibit discrimination of the type that Mr. Minton experienced. Here, Respondent canceled Mr. Minton's hysterectomy—the day before the procedure was scheduled to take place—and informed his doctor that he would never be able to undergo the procedure at MSJMC, thus denying him "full and equal" access to that business establishment. Civ. Code § 51(b). The dignitary harm, delay, and inconveniences that Mr. Minton suffered as a result of the cancellation further illustrate that he has properly alleged an Unruh Act violation.

Respondent asserts without citation that it "arranged for [Mr. Minton's] surgeon to obtain temporary surgical privileges at another" hospital. Resp. 32. This continues Respondent's pattern of mischaracterizing its actions, instead of relying on the FAC's allegations, which are the only available facts on this appeal. *See* ROA 170–71. The FAC alleges that after Respondent cancelled the surgery, it was Dr. Dawson who initiated communication with MSJMC management seeking to reschedule the surgery, ROA 154, and that over the next several days Mr. Minton had to scramble to secure surgery, with no assurance that

he would be able to undergo it elsewhere. ROA 156. There are no allegations that Respondent made arrangements for Mr. Minton's surgery before or after cancelling his hysterectomy, or in any way spared him from the anxiety the cancellation caused.

For these reasons, and as described more fully below, the *North Coast* dicta offers no shelter to Respondent, because Mr. Minton's hysterectomy was cancelled with Respondent having taken no affirmative steps to "*ensur[e]* that [Mr. Minton] receives 'full and equal' access to that medical procedure." *North Coast Women's Care Med. Grp., Inc. v. Sup. Ct.*, 44 Cal.4th 1145, 1159 (2008) (emphasis added).

Even assuming Respondent eventually took steps to reschedule Mr. Minton's appointment, which it did not, that is no defense to an Unruh Act violation. Obtaining medical care days later, at a different hospital, and after enduring the horror of not knowing if or when he would able to receive care, is not the same treatment Respondent's other patients receive. Indeed, such treatment fails to achieve the objective of the Unruh Act, as a federal court noted when applying the Act:

> We must be guided by reason and the broad construction given to the Unruh Act. The standard cannot be "is access achievable in some manner". We must focus on the equality of access. If a finding that ultimate access could have been achieved provided a defense, the spirit of the law would be defeated.

Boemio v. Love's Rest., 954 F. Supp. 204, 208 (S.D. Cal. 1997). Further, "[t]he Legislature's choice of terms evidences concern not only with *access* to business establishments, but with *equal treatment* of patrons in all aspects of the business." *Koire*, 40 Cal.3d at 29 (emphasis added). Accordingly, since the conditions under which Mr. Minton eventually received care were different because he is transgender, he did not receive "full and equal" access to that care, and Respondent violated the Unruh Act.

Case after case applying the Unruh Act and its predecessors explain that the "full and equal" language requires that individuals must have *equal* access to facilities, not access on different terms. Courts do not qualify that requirement by inquiring whether the discriminatory conduct was motivated by "animus," as Respondent argues. Resp. 34. For example, in *Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283 (1941), the court held that refusing patrons access to a racetrack clubhouse was a denial of "full and equal" accommodations, even when they had access to the grandstand. *Id.* 284–85, 287. In *Suttles*, it was sufficient for the court to note that the patrons were "denied entry on the ground that they were members of the Negro race," *Id.* 285, just as here, Respondent would not permit Mr. Minton to obtain a hysterectomy at MSJMC because he is transgender. FAC ¶ 24. Likewise, in *Stevens v. Optimum Health Inst.-San Diego*, 810 F. Supp. 2d 1074 (S.D. Cal. 2011), an Unruh Act violation was established by

showing that additional requirements were placed on a blind patron to enter a facility—there was no discussion of animus against patrons with disabilities. *Id.* 1090. Indeed, Respondent fails to cite any court holding that a denial of full and equal access must be accompanied by "invidious racism" or similar conduct to violate the Unruh Act.[5]

Respondent's attempt to undermine the harm that Mr. Minton suffered by relying on *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973) is misplaced. That federal case out of Texas does not apply California's Unruh Act, much less analyze the Act's broad "full and equal" standard. Under the Unruh Act, even an "inconvenience" can establish a violation of the Act. *See Jackson v. Superior Court*, 30 Cal. App. 4th 936, 941 (1994) (finding Unruh Act violation where bank refused to permit African American investment advisor the "courtesy" of accompanying clients); *see also Boemio*, 954 F. Supp. at 208 ("While the defense offered that with additional time, patience, and jockeying of the wheelchair, access could have been achieved, this was not reasonable nor

[5] Respondent also seems to imply that Mr. Minton deserves less protection under the Unruh Act because he was subject to sex discrimination, instead of racial discrimination. Resp. 35. That is not the case. "Public policy in California strongly supports eradication of discrimination based on sex." *Koire*, 40 Cal.3d at 36. Furthermore, that Mr. Minton was discriminated against as a transgender man does not diminish the protections to which he is entitled. "The legality of sex-based [discrimination] cannot depend on the subjective value judgments about which types of sex-based distinctions are important or harmful." *Id.* 39.

consistent with the public policy interest in providing physically handicapped persons with equal access to public facilities . . . .").

Moreover, Mr. Minton did not suffer mere "inconvenience[]" when Respondent cancelled his hysterectomy. After Respondent cancelled his surgery and informed his doctor that he would never be able to get it at MSJMC, Mr. Minton was "so shocked, hurt, and distraught . . . that he recalls sinking to the ground and then collapsing entirely." ROA 154. As a result, Mr. Minton experienced "great anxiety and grief," he was "devastated" to learn the hospital was refusing him care because he is transgender, and Respondent's discriminatory treatment made him feel "downtrodden" and "deeply hurt." ROA 154, 157. Under the Unruh Act, a plaintiff suffers an "actual injury," and is "adversely affected" by discriminatory conduct if it "made him feel that he was being treated unfairly." *Koire*, 40 Cal.3d at 34; *see also Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (refusing equal services "result[s] 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"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding state public accommodations act "protects the State's citizenry from a number of serious social and personal harms" such as the "stigmatizing injury, and the denial of equal opportunities that accompanies" discrimination).

This Court now has an opportunity to clarify that the Unruh Act does not permit the "separate but equal" treatment for which Respondent is advocating. The superior court lamented that it felt compelled by *North Coast* dicta's interpretation of "full and equal" to disregard the harms suffered by Mr. Minton, even though "[i]t harkens back to *Plessy vs Ferguson*," and "has a smell of 'separate but equal' which as we know was abandoned in 1954." Aug. 30, 2017 Hr'g Tr., 5:6–5:14. Accordingly, Respondent's outrage at comparisons between separate but equal doctrine and its own policies are better directed to the lower court, which made the connection and later reiterated that the comparison was still of serious concern. Nov. 17, 2017 Hr'g Tr., 8:7–8:14. The superior court was right to be concerned about Respondent's interpretation of "full and equal," but wrong that it was bound by such a standard. Mr. Minton did not have full and equal access to medical care, and the harm he suffered as a result is sufficient to allege an Unruh Act violation.

B. North Coast Does Not Exempt Respondent From Providing Full And Equal Treatment to Mr. Minton.

The superior court erred in treating dicta from the *North Coast* decision as dispositive on the different facts of this case. The *North Coast* case holds that the appropriate "balance" between religious liberty and individual civil rights does not entail allowing religious preference to justify harmful discrimination against members of minority groups. The

dicta from the *North Coast* decision cannot be used as cover for such harmful discrimination. The *North Coast* court merely suggested that a defendant health care organization may not be liable for discrimination under the Unruh Act if it accommodates an employee's religious objections, so long as it provides all patients full and equal access to the treatments they seek. [6]

As described above, Mr. Minton was not provided full and equal access to the treatment he sought, so the *North Coast* dicta do not apply. Instead, he experienced a startling and painful notification that his surgery would not go forward, as a direct result of his disclosure to MSJMC staff that he is transgender. In order to access surgery at a different hospital, he

[6] Similarly, Respondent's efforts to rely on cases and a statute pertaining to other types of medical care delivery are unavailing. Since Mr. Minton's physician, Dr. Dawson, was ready and willing to perform the procedure he needed, cases like *Conservatorship of Morrison* regarding the right of individual physicians to decline to provide particular treatments are inapposite; *Morrison* also did not entail any allegation of discriminatory care denial, since the physician at its center evidently had a moral objection to ending life-sustaining treatment for patients generally. 206 Cal. App. 3d 304, 310 (1988). In *Brownfield v. Daniel Freeman Marina Hospital*, a sexual assault survivor sought (only) declaratory and injunctive relief vis-à-vis a hospital that had declined to tell her about or provide emergency contraception. 208 Cal.App. 3d 405, 408 (1989). The Court of Appeal sustained a demurrer on various technical grounds, but noted that "appellant's right to control her treatment must prevail over respondent's moral and religious convictions" and clarified that a similarly situated survivor could pursue damages claims. 208 Cal.App. 3d 405, 414. Finally, Respondent's reference to the Uniform Health Care Decisions Act, wherein the Legislature expressly provided that a health care institution in certain circumstances may decline for "reasons of conscience" to honor a patient's advance directive regarding end-of-life care, merely reinforces that the Unruh Act contains no such exception and applies to religiously affiliated entities choosing to offer the general public health care services. Op. at 33 (citing Probate Code § 4736); Probate Code § 4734(b).

was forced to endure a delay and a drive across town, and his surgeon had to perform the procedure in an unfamiliar operating room, without the support of familiar operating room nurses and other staff she was accustomed to relying on. FAC ¶¶ 35-42. The tangible as well as intangible differences between the care Mr. Minton would have received if he were a cisgender woman seeking a hysterectomy at MSJMC or another Respondent hospital, and the experiences he had as a transgender man seeking the exact same treatment, are a far cry from the prompt on-site treatment by another in-clinic doctor that the California Supreme Court posited in *North Coast* would have constituted "'full and equal' access" to medical care for Plaintiff Guadalupe Benitez and thus compliance with the Unruh Act.

Respondent's argument that it escaped liability by allowing Mr. Minton's cancelled surgery to go forward days later at a different location would be facially absurd if a corporate entity in any other industry attempted to deploy it. If a hair salon, for example, notified a customer that his appointment had been cancelled in response to his mentioning that he was African-American and the salon manager's discomfort with cutting black hair, but could be rescheduled for a few days later at another salon within the same chain, the chain's initiation of rebooking him at the second salon could not possibly excuse the discriminatory denial of service at the

first salon.[7] By the same token, if a restaurant that shared ownership and branding with a sister location across town refused to serve alcohol to women for religious reasons, its manager's taking the initiative to shift a woman customer's reservation to the other location upon her advance inquiry about the restaurant's wine list could not possibly obviate the Unruh Act violation resulting from the first location's denial of full and equal service to that customer.

Respondent seeks to use dicta from the *North Coast* decision as cover for just such a denial, by misrepresenting the import of the Supreme Court's guidance to the North Coast clinic. Having a doctor within the clinic (who did not personally object to working with lesbian patients) provide IUI services to all comers, as the Court suggested, would be analogous to having a barber or waitress with no objections serve the hypothetical customers above when each arrived at the originally agreed location and time to obtain the requested services. This type of arrangement would constitute a far less significant disruption to the customer's

[7] *See, e.g.*, *Denny v. Elizabeth Arden Salons, Inc*., 456 F.3d 427, 435, 438 (4th Cir. 2006) (statement declining to "do black people's hair" represented "not only strong but direct evidence of…intent to discriminate" despite salon staff's indications that they lacked adequate training to manage the texture of African-American patrons' hair).

experience, and sense of inclusion in the community, than the cross-town rescheduling Mr. Minton experienced.[8]

Thus, even assuming that the *North Coast* dicta is binding on this case, it does not permit Respondent's less than equal treatment of Mr. Minton—indeed, *North Coast* requires he have seamless access to medical care. Here, there was a provider ready and willing to treat Mr. Minton, who had no religious objection, and still he was denied full and equal access to care. If anything, *North Coast* supports the denial of the demurrer.

C. Respondent Intentionally Discriminated Against Mr. Minton Because He Is Transgender.

The superior court concluded that Respondent's decision to cancel Mr. Minton's procedure was "substantially motivated by Mr. Minton's gender identity." ROA 431. There is no reason to disturb that holding.[9] Mr. Minton's allegations are more than sufficient to support the court's conclusion: they describe how MSJMC regularly permits hysterectomies for cisgender female patients, but cancelled Mr. Minton's hysterectomy because he is transgender.

[8] Respondent's claim that Mr. Minton suffered no legal injury because he was able to secure surgery at a different hospital located across metropolitan Sacramento begs the question of whether it would extend this argument to a situation in which a patient denied service in Carmichael were forced to obtain care in Stockton, San Francisco, or Los Angeles.

[9] Respondent improperly cites to a prior superior court order when it contends that the court *did not* hold that Mr. Minton was subject to intentional gender identity discrimination. Resp. 23.

1. Cancelling Mr. Minton's Procedure Constituted Intentional Discrimination by Respondent.

There are ample allegations that Respondent's discrimination was intentional. MSJMC regularly offers cisgender female patients hysterectomies, ROA 149, 153, which Respondent does not contest. Resp. 24. Dr. Dawson alone performs about one to two hysterectomies per month at MSJMC, and had a hysterectomy scheduled for a cisgender patient on the same day that Mr. Minton's procedure was scheduled for originally. ROA 149, 153. However, unlike the other hysterectomies that Dr. Dawson has been routinely permitted to perform, Mr. Minton's hysterectomy was cancelled after he noted to a MSJMC nurse that he is transgender. ROA 153–54. When Dr. Dawson protested the cancellation, MSJMC's president informed her that she would never be permitted to perform a hysterectomy on Mr. Minton at MSJMC because he was a transgender man undergoing the procedure as part of his gender transition. ROA 154.

These allegations establish intentional discrimination by Respondent, on the basis of Mr. Minton's gender identity. Refusing to treat patients because of their gender identity is sex discrimination in violation of the Unruh Act. Civ. Code § 51(b), (e)(5) (defining "sex" to "include[] a person's gender identity and gender expression"). Respondent was aware of the decision to cancel Mr. Minton's procedure, and stood by that decision despite protest, which is "the 'willful, affirmative misconduct' required to

state an Unruh Act claim." *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1053 (N.D. Cal. 2012) (quoting *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824, 853 (2005)).

As described above, *see infra* at TK, Respondent misrepresents the standard for intentional discrimination under the Unruh Act by attempting to inject a requirement of "animus," which it implies means hostility towards the protected group. Resp. 34. Regardless of whether the discrimination Mr. Minton experienced was in fact based on hostility towards transgender people or whether a judicial analysis of "animus" requires any finding of hostility, there is no requirement that a denial of equal access to services be motivated by hostility to qualify as an Unruh Act violation. Courts still find violations even where "[t]he goodwill and purposeful resolution of the compliance issues certainly indicate the spirit of Defendants to comply with the law," and their past practice "supports the lack of any animus." *Boemio*, 954 F. Supp. at 208.

Respondent's argument that it would offer transgender patients other services is also not a defense to denying them services offered to cisgender women. Claiming to treat all patrons with "respect and compassion," Resp. 25, but providing them a different menu of options, is still discrimination. *See Stevens*, 810 F. Supp. 2d at 1089–90 (holding facility that denied blind plaintiff entry alone violated Unruh Act, despite facility's offer to "welcome" plaintiff, "but only if she brought a companion" (internal

quotation marks omitted)). Additionally, denying Mr. Minton necessary medical care does not treat him with respect and compassion—it reinforces harmful stereotypes about transgender people, and is "precisely" the "sort of class-based generalization as a justification for differential treatment . . . prohibited by the Unruh Act." *See Koire*, 40 Cal.3d at 34, 35 (holding that "differential pricing based on sex" violates the Unruh Act as it "reinforces harmful stereotypes"). For Respondent to cancel Mr. Minton's procedure—despite his documented medical need for it and widely respected, evidence-based standards about medical treatment for gender dysphoria—is evidence of Respondent's class-based generalization of Mr. Minton as a transgender patient, and subjects him to the harmful stereotype that he is not worthy of necessary, gender-affirming medical care.

2. Respondent's Application of the ERDs Is Discriminatory and Violates the Unruh Act.

The superior court never granted Respondent's request to take judicial notice of the documents related to the ERDs, and the ERDs themselves are not part of the allegations in the FAC. Nonetheless, Respondent relies on facts not in the FAC to support its argument that the ERDs are facially neutral and applied in a nondiscriminatory manner. Resp. 12, 22–25. However, the allegations in the FAC do not demonstrate that the ERDs are facially neutral, or that Respondent applied its policies in a neutral way. *See Koebke*, 36 Cal.4th at 855 (remanding to determine if a

neutral "policy was discriminatorily applied in violation of the Act"). And in its most recent order, upon which this appeal is based, the superior court did not find that Mr. Minton's procedure was cancelled based on Respondent's policy, that the policy was facially neutral, or that the policy was consistently applied. The lower court simply—and correctly—held that Respondent's conduct was "substantially motivated by Mr. Minton's gender identity." ROA 431. "[A]n Unruh Act violation might arise from a situation in which a neutral policy was used as a pretext to discriminate against a protected class of individuals." *Turner v. Ass'n of Am. Med. Colleges*, 167 Cal. App. 4th 1401, 1411 (2008) (citing *Koebke*, 36 Cal.4th at 854–55), *as modified on denial of reh'g* (Nov. 25, 2008). Thus, the mere existence of the ERDs as a policy does not establish that the Unruh Act was not violated. At this procedural posture, Respondent's assertion that it cancelled Mr. Minton's procedure because of the ERDs cannot overcome his allegations of intentional discrimination.

Regardless of whether Respondent's decision to cancel Mr. Minton's hysterectomy in fact arose from its interpretation of the ERDs, utilization of a business policy does not immunize Respondent from an Unruh Act violation. Crucially, Mr. Minton has alleged intentional discrimination by Respondent, which makes the neutrality of Respondent's policies irrelevant. A business's policy can result in a violation of the Unruh Act, if it in fact treats protected class members differently than other individuals.

"Courts have repeatedly held that the Unruh Act is applicable where unequal treatment is the result of a business practice." *Koire*, 40 Cal.3d at 29 (citing *People v. McKale*, 25 Cal.3d 626 (1979); *Suttles*, 45 Cal. App. 2d at 287; *Hutson v. The Owl Drug Co.*, 79 Cal. App. 390 (1926); *Jones v. Kehrlein*, 49 Cal. App. 646, 651 (1920)).

For example, a restaurant argued that its policy to deny patrons access to the first floor bathroom was "not discriminatory because it applied to all restaurant patrons." *Hankins v. El Torito Restaurants*, 63 Cal. App. 4th at 518. Regardless of the neutrality of the policy itself, the court explained that:

> a combination of [the restaurant's] policy and the physical layout of its premises allowed patrons who were not physically handicapped to use a restroom while dining at the restaurant (the one on the second floor), but denied that same service to physically handicapped patrons even though there was a restroom on the premises (the one behind the kitchen) that a physically disabled person could otherwise use.

Id. Likewise, Respondent's policy provides cisgender female patients access to hysterectomies, but denies the same service to transgender men because of their gender identity. Respondent's policy is thus not "applicable alike to persons of every sex." Cal. Civ. Code § 51(c). Just as the court held that the restaurant's "policy thus discriminated against disabled patrons," *Hankins*, 63 Cal. App. 4th at 518, this Court should

affirm that Respondent's policy discriminates against transgender male patients.

Even assuming the accuracy of Respondent's description of the ERDs as neutral—which this Court need not do—it supports the conclusion that Respondent intentionally discriminated against Mr. Minton. If Respondent had *neutrally* applied its policy that "[p]rocedures 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," Resp. 15, Mr. Minton's procedure should have been permitted.[10] Mr. Minton was diagnosed with gender dysphoria, which is a serious, often life-threatening condition recognized in the Diagnostic and Statistical Manual of Mental Disorders and International Classification of Diseases. ROA 151, 153. Treatment of gender dysphoria may require medical steps to affirm a

[10] The United States Conference of Catholic Bishops ("USCCB"), which issues the ERDs, is clear that it does not recognize transgender people or the necessity of gender-affirming care. In response to a proposed federal rule prohibiting discrimination based on gender identity in medical settings, the USCCB submitted a comment stating, "[W]e believe . . . that medical and surgical interventions that attempt to alter one's sex are, in fact, detrimental to patients. Such interventions are not properly viewed as health care because they do not cure or prevent disease or illness. Rather they reject a person's nature at birth as male or female." USCCB, *et al.*, Comment Letter on Proposed Rule on Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172 (Sept. 8, 2015) at 9, *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf. Such a policy discriminates against transgender patients by blocking them from getting necessary medical care. For Respondent to cite USCCB's policy as neutral and nondiscriminatory is disingenuous, and adherence to the ERDs is hardly "the very antithesis of discrimination." Resp. 25.

person's gender identity. *Id.* 152. For Mr. Minton, in the professional judgment of Dr. Dawson and two mental health professionals, a hysterectomy was necessary to treat his gender dysphoria. *Id.* 153. Thus, even under Respondent's "neutral" policy as described, Mr. Minton's hysterectomy was medically necessary and should have been permitted.

II. The United States and California Constitutions Do Not Grant Respondent A Right to Discriminate in Violation of the Unruh Act.

Respondent argues that if it were made to honor the civil rights of all patients using its facilities, its constitutional rights to free exercise of religion and freedom of expression would be violated. Respondent's radically broad interpretation of religious freedom would exempt it from compliance with *any* law so long as it claimed the law conflicted with a religious belief. The relief that Mr. Minton seeks—that if Respondent chooses to provide a service to some patients, it will provide that same service to all patients regardless of gender—does not infringe on Respondent's rights of freedom of religion and expression as protected by the United States and California Constitutions.

A. Requiring Respondent To Comply with the Unruh Act Does Not Violate Its Religious Freedom Rights.

1. The First Amendment Right to Free Exercise of Religion Does Not Excuse Respondent From Complying with Laws of General Applicability, Including The Unruh Act.

The U.S. Supreme Court has long held that religious beliefs do not

excuse compliance with neutrally applied laws of general applicability. *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 879. In fact, according to the Supreme Court, it has "*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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." *Id.* 878-879.[11] Last year the Court reaffirmed this principle in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, holding that the First Amendment does not allow "actors in the economy and in society" to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. *Masterpiece Cakeshop*, 138 S. Ct. 1727.

The California Supreme Court has already recognized that, under the *Smith* test, the Unruh Act is a neutral law of general applicability for purposes of a federal free exercise analysis. *North Coast*, 44 Cal.4th 1145, 1156. Thus Respondent cannot claim a free exercise right under the U.S.

[11] *See, e.g., Welch v. Brown*, 58 F.Supp.3d 1079, affirmed 834 F.3d 1041, amended on denial of rehearing, certiorari denied, 137 S.Ct. 2093 ("The right to freely exercise one's religion [under the First Amendment] 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."); *Bob Jones University v. U.S.*, 461 U.S. 574, 604, n. 30 (1983); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5 (1968) (*per curiam*).

Constitution to violate the Unruh Act. Given the clarity of the law in this arena, Respondent is left with either red herrings or rhetoric. Neither lead to a conclusion that Respondent should be permitted to violate one of California's primary non-discrimination law based on its religious beliefs.

First, Respondent has no basis for arguing that *Smith* applies only to the federal free exercise claims of individuals, not organizations. Resp. 47. Indeed, the California Supreme Court has explicitly rejected this argument. In *Catholic Charities of Sacramento, Inc. v. Superior Court*, the court assessed whether the Women's Contraception Equity Act (WCEA)—a generally applicable state law—applied to Catholic Charities, which, like Respondent, was a religiously-affiliated nonprofit, that claimed it operated as an organ of the Roman Catholic Church. *Catholic Charities* 32 Cal.4th 537, 568 (2004). The court began its analysis by stating: "[a]ny analysis of Catholic Charities' free exercise claim must take into consideration the United States Supreme Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith.*" *Id.* 547. The Court ultimately held, after applying *Smith*, that Catholic Charities was required to comply with the WCEA.

Second, Respondent's rhetoric around the importance of religiously-affiliated organizations is just that—rhetoric. *See, e.g.*, Resp. 48 ("Courts Traditionally Respect the Rights of Religious Organizations Not to Be Compelled to Violate Their Faith."). None of the cases or hypotheticals Respondents cite have any bearing on this case. In *Hosanna-Tabor*

Evangelical Lutheran Church and School v. E.E.O.C.. 565 U.S. 171, 196 (2012), the U.S. Supreme Court addressed the applicability of federal employment discrimination law—Title VII—to "claims concerning the employment relationship between a religious institution and its ministers." *Id.* 188. The Court explicitly disclaimed the notion that "the exception bars other types of suits" in the Title VII context, much less in other contexts. *Id.* 196. Nor is the dicta from *Masterpiece Cakeshop* in which the Court assumes that a hypothetical clergy member with religious objections could not be forced to marry a same-sex couple in any way relevant to this case, which involves a business open to the general public. Resp. 49.

The California Supreme Court's analysis in *Catholic Charities* is instructive as to Respondent's free exercise claim in other ways as well. In that case, as here, Catholic Charities argued that the core mandate of the WCEA—that employers who provided prescription coverage to employees include coverage for contraceptives—put it in an untenable position: Catholic Charities claimed that providing contraception coverage violated its religious belief that contraception was a sin, as did the alternative, to decline to provide prescription coverage to its employees, which violated Catholic teachings about an employer's moral obligation to employees, *Catholic Charities*, 32 Cal.4th 540. The Court nonetheless held that while the law clearly impacted Catholic Charities' sincerely held beliefs, such impact was "incidental." *Id.* 549. And that the law "does not implicate

internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church." *Id.* 543.[12] As such, under *Smith*, the Court held the WCEA did not violate Catholic Charities' federal free exercise rights. *Id.*

Similarly, the Unruh Act's general nondiscrimination mandate—applying broadly to "services in all business establishments of every kind whatsoever"—is not a law intended to interfere with religious practices nor does it implicate "internal church governance." And compliance with the Unruh Act does not, as Respondent claims, "compel" any action on the part of Respondent. The law simply requires that if Respondent chooses to operate a business open to the general public, it must admit that public on nondiscriminatory terms. Religious "objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop* 138 S. Ct. 1727.

[12] As discussed above, there is no evidence in the record on appeal that Respondent is in fact a "church" as its discussion of its constitutional religious freedom rights strongly suggests.

2. The California Constitution Does Not Exempt Respondent From Laws of General Applicability, Including The Unruh Act.

Under Respondent's analysis, the California Constitution should be read to provide religiously-affiliated organizations with a virtually unlimited free pass to violate California law. But even applying the highest level of constitutional scrutiny, the California courts have never found this to be true; instead, our highest court has in fact concluded that compliance under the Unruh Act is required even under the strictest level of constitutional scrutiny. *North Coast*, 44 Cal.4th 1158.

The decision in *North Coast* is in line with other California precedent, in which California courts have repeatedly held that protecting the public health through the regulation of medical care is a compelling state interest in the context of state free exercise claims. *Id.*; *Walker v. Sup. Ct.*, 47 Cal.3d 112 (1988), *rehearing denied, certiorari denied* 491 U.S. 905 (holding California Constitution did not bar criminal prosecution of Christian Scientist who, because of religious beliefs, failed to obtain medical treatment for child, because of State's compelling interest in assuring provision of medical care to gravely ill children); *Brown v. Smith*, 24 Cal. App. 5th 1135 (2018) (holding that state laws requiring mandatory immunization for schoolchildren did not violate free exercise clause of state constitution; preventing the spread of disease was compelling interest).

The *North Coast* Court also specifically concluded that the Unruh

Act is the least restrictive means for the state to accomplish its compelling interest in full and equal access to medical care. Contrary to Respondent's suggestion that this analysis look to the specific facts of this case, Op. at 44, the California Supreme Court has already concluded that the Unruh Act itself meets the test for strict scrutiny: "The Act furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of [protected characteristics], and there are no less restrictive means for the state to achieve that goal." *North Coast*, 44 Cal.4th 1158.

B. Requiring Respondent Not to Discriminate Against Transgender Patients Does Not Violate Freedom of Expression.

Respondent argues that "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." Resp. 41. This exact argument was raised and rejected by the California Supreme Court in *North Coast*:

> Here, defendant physicians contend that exposing them to liability for refusing to perform the IUI medical procedure for plaintiff infringes upon their First Amendment rights to free speech and free exercise of religion. Not so.

North Coast, 44 Cal.4th 1157. The Court went on to explain that "'[f]or 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. Such a rule would,

in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.'" *Id*. The Court in Catholic Charities reached the same conclusion, holding that "compliance with a law regulating health care benefits is not speech." *Catholic Charities* 32 Cal.4th 558.

Despite the clarity of this precedent, Respondent again claims that these holdings do not apply here. As with its attempt to distinguish *Smith*, Respondent argues *North Coast* dealt with the speech of individual doctors and not a religiously-affiliated organization like Respondent. Yet the Court in *North Coast* explicitly premised its holding on the decision in *Catholic Charities*, which as described above, did specifically address the rights of another religiously-affiliated nonprofit. Respondent's argument here that it has special First Amendment rights because its "mission and identity are defined" by its religious beliefs, Resp. 53, is precisely the argument that the Court rejected in *Catholic Charities*. Catholic Charities argued that it existed and provided health care to employees to enact its religious beliefs, and the Court nonetheless concluded that "compliance with a law regulating health care benefits is not speech." *Catholic Charities*, 32 Cal.4th 558. This makes sense, as otherwise Respondent's expansive interpretation of organizational free expression rights would provide First Amendment protection for any violation of any state law, so long as the action was motivated by religious belief.

Like all other medical care providers in California, Respondent must comply with the Unruh Act. If it chooses to open its doors to the general public, it may not discriminate in its provision of services. Religious freedom does not shield Respondent, a corporate entity and the largest private provider of health services in the state of California, from legal accountability.

CONCLUSION

Petitioner Evan Minton respectfully asks the Court to reverse the superior court's November 2017 order and overrule Respondent's demurrer.

DATED: April 5, 2019

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the text of this brief contains 8,270 words, including footnotes. In making this certification, I have relied upon the word count of Microsoft Word, used to prepare the brief.

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