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 ANSWER TO BRIEFS OF AMICI CALIFORNIA MEDICAL ASSOCIATION AND NATIONAL CENTER FOR LESBIAN RIGHTS ET AL.

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

MANATT, PHELPS & PHILLIPS, LLP
Barry S. Landsberg (Bar No. CA 117284)
Harvey L. Rochman (Bar No. CA 162751)
*Joanna S. McCallum (Bar No. CA 187093)
Craig S. Rutenberg (Bar No. CA 205309)
11355 W. Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224
jmccallum@manatt.com

David L. Shapiro
(pro hac vice)
Harvard Law School
Langdell 336
1563 Massachusetts Ave.
Cambridge, MA 02138

Attorneys for Defendant and Respondent
DIGNITY HEALTH dba MERCY SAN JUAN MEDICAL CENTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Amici curiae appearing in support of Appellant Evan Minton—the National Center for Lesbian Rights et al. (NCLR) and the California Medical Association (CMA)—fail to address the issues presented in this appeal. The dispute here concerns the application of the Unruh Act to a faith-based hospital system that referred a patient it could not treat at a Catholic hospital for ethical and religious reasons to another local community hospital within the same system that could and did provide the care he wanted. It also concerns the right of a religious organization to abide by its core religious principles—here, the Ethical and Religious Directives for Catholic Health Care Services (the ERDs)—to the extent the Unruh Act does apply and to the extent Dignity Health's prompt provision of services to Minton at another Dignity Health hospital for treatment does not dispel the Unruh Act claim.

Neither amicus says a word about the constitutional dimensions of the relief Minton seeks. And neither acknowledges that if the circumstances here constitute prohibited intentional discrimination under the Unruh Act, then Catholic hospitals and other faith-based service organizations, which *cannot* violate their religious principles, will not be able to provide permissible services such as hysterectomies to treat uterine cancer to any person, no matter the patients' medical needs. Amici's failure to acknowledge the actual questions posed by this case, and to rely instead on inapplicable generalities and doctrines, makes their briefs unhelpful.

Contrary to the picture amici would paint, the case is not a referendum on the validity of gender dysphoria as a medical condition, or on the efficacy or medical necessity of any treatment for that condition. This case does not implicate the "corporate practice of medicine," where an unlicensed entity improperly controls a physician's

medical judgment.[1] Such a claim was never raised below, and the physician's independent judgment here was not impacted by Mercy San Juan Medical Center's (Mercy) inability to allow the procedure at that Catholic hospital for religious reasons.

Nor is this a case of intentional discrimination against transgender individuals, which is required to state a claim under the Unruh Act.[2] Dignity Health did not deny Minton a hysterectomy at its Mercy hospital because it intended to discriminate against transgender persons; rather, it authorized his physician to provide the procedure at one of Dignity Health's non-Catholic hospitals. Dignity Health did not and could not permit the procedure to take place at a Catholic hospital bound by the ERDs. This was a hospital administrative decision mandated by the ERDs' prohibition on sterilizing procedures and procedures that interfere with bodily integrity—ERDs with which Dignity Health's Catholic hospitals must comply, or risk losing their Catholic identity. It also was an exercise of Dignity Health's freedom of religion and freedom of speech—guaranteed constitutional freedoms that amici ignore.

After learning that Minton's physician had scheduled a prohibited procedure at a Catholic hospital, Dignity Health worked quickly to ensure that Minton could have the *same* procedure performed by the *same* physician at a non-Catholic hospital also owned by Dignity Health, as soon as the physician's schedule permitted, which was three days later. This effort (admitted in Minton's original complaint) to provide Minton with the health care he sought without requiring Mercy to violate its religious principles provided precisely the balance that the Supreme Court had in mind when it decided *North Coast Women's Care Med. Grp. v. Superior Court* (2008) 44 Cal.4th 1145. In contrast, CMA

[1] *Epic Medical Mgm't, LLC v. Paquette* (2015) 244 Cal.App.4th 504, 517-518.
[2] *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854.

dismisses Dignity Health's First Amendment rights completely, striking no balance at all. It makes no sense to conclude that Dignity Health must answer to Minton under the Unruh Act for intentional discrimination on the basis of his transgender status. Minton did not and could not allege that Dignity Health would ever refuse to treat Minton for any condition other than one prohibited by the ERDs. This case simply is an attack on a Catholic hospital for adhering to its religious precepts. On the basis of consistent California Supreme Court cases that amici (and Minton) mostly ignore,[3] Minton's claim is not actionable.

Respect for religious beliefs is required by the Constitution, is well established in American jurisprudence, and is a core American value, so the law must make room for an acceptable way to resolve the conflict between religious principles and discrimination laws. Any other result purporting to compel a religious health care provider to perform services contrary to its most fundamental beliefs would not erase "discrimination"; rather, it would force those providers to cease to perform the contested services altogether—or even leave the health care sector entirely. This obviously would be detrimental to society at large, and in particular to those underserved communities with which amici claim to be concerned.[4] For instance, if a court orders Mercy to perform hysterectomies to treat gender dysphoria because it performs hysterectomies to treat cancer, that will not result in

[3] See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175, superseded on other grounds by Civ. Code, § 51, subd. (f); *Koebke*, 36 Cal.4th at 854.

[4] Such an order arguably might violate the Constitution's Establishment Clause as it would compel a Catholic hospital to renounce its religious character in order to comply with state law, or else leave the market. (See, e.g., *Trinity Lutheran Church of Columbia v. Comer* (2014) 137 S.Ct. 2012, 2024 [disallowing a state law that "expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program"].)

Mercy providing hysterectomies to treat gender dysphoria but it could force Mercy to cease providing hysterectomies to anyone.

The brief filed by NCLR and other organizations argues that certain treatments are necessary to treat gender dysphoria and that it is harmful to those suffering from gender dysphoria to be denied medical treatment or otherwise marginalized when seeking medical care. These concerns are not at issue or in dispute here; it is undisputed that Dignity Health provided Minton with the medical treatment he sought, and that Mercy would have provided Minton, and any other transgender person, with any other medical treatment that did not violate the ERDs. NCLR argues in a vacuum that is entirely divorced from the fundamental and only reason Minton's procedure could not proceed at Mercy: the dictates of the ERDs and Mercy's religious rights. The NCLR brief does not mention religion even once. This case cannot be decided without acknowledging that Mercy acted, as the court found both sides agreed, based upon its interpretation of the ERDs, and thus in accordance with the tenets of its religion. Consequently, NCLR's arguments are irrelevant.

CMA's brief, which attacks the ERDs as an improper basis for Mercy's actions, puts the ERDs front and center as the sole basis for Mercy's action rather any act of intentional discrimination. CMA's focus on the ERDs implicitly confirms that a court could not order Mercy to perform a hysterectomy as a treatment for gender dysphoria without impinging on its constitutional rights to observe and exercise its religious freedoms—but CMA does not confront this necessary result.

Instead, CMA argues matters not in issue, and does so incorrectly. CMA contends that allowing a religious hospital to adhere to the ERDs is improper control over or interference with the independent medical judgment of physicians. This makes no sense

and Minton himself makes no such argument. Any doctor, including Dr. Dawson, Minton's physician, may (and in this case did) exercise her fully independent medical judgment to determine and recommend a procedure as medically appropriate and necessary for her patient. A hospital's administrative decision that certain services will not be provided at a particular facility for religious reasons does not interfere with such determinations. Hospitals routinely make decisions about what services will be provided on the basis of many factors, including cost, facility capability, and even ethics reasons unrelated to the ERDs or religion. (See *infra* Part III.B.)

Finally, CMA speculates that access to health care will be unduly restricted if religious health care providers are permitted to exercise their religious rights not to provide certain services that are prohibited by religious doctrine. To the contrary, any court orders demanding that religious health care providers compromise their principles and perform procedures to which they object—be it gender transition surgery, abortion, elective sterilization, or assisted suicide—will result in providers ceasing to perform services and potentially closing hospitals in much-needed, underserved areas. CMA itself emphasizes the prevalence and thus the importance of Catholic hospitals in the provision of health care to all persons in California and across the country. Mercy has never been anything other than a Catholic hospital since it opened its doors in 1967.[5] Exerting judicial pressures that could result in closure of such hospitals, cut-backs to the services they provide, or refusal to open new hospitals where they are needed,[6] is damaging to society as a whole.

[5] <https://www.dignityhealth.org/sacramento/about-us/our-history>

[6] Dignity Health's St. Mary's Medical Center, established in 1857, is the oldest continuously operating hospital in San Francisco, California. When the State of California and County of San Francisco abandoned the indigent sick, it was Catholic

None of the amici provides this Court with any reasoned or relevant basis to apply the Unruh Act to the actions taken in this case and to disregard Mercy's religious freedom.

II. RESPONSE TO BRIEF OF NATIONAL CENTER FOR LESBIAN RIGHTS

NCLR's brief discusses gender dysphoria, the nature and legitimacy of the condition, the efficacy of medical treatments, and the harmful effects of denial of medical treatment to transgender individuals. None of that is at issue. NCLR discusses the subject of medical treatment for gender dysphoria in isolation from the only reason that Minton did not receive a hysterectomy at Mercy—the ERDs. The brief identifies various problems that are not even alleged to have arisen in this case. For instance, NCLR discusses medical providers' refusal to call transgender people by their preferred names and pronouns; there is no allegation that happened here. NCLR discusses hospitals' failure to treat or delay in treating transgender patients in hospital emergency rooms; there is no allegation that happened here nor was any emergency even alleged. In fact, the FAC did not allege that Mercy would have denied Minton—or another transgender person—any procedure whatsoever other than a surgery that from a Catholic perspective compromises bodily integrity and directly results in sterilization despite the absence of a disease such as uterine cancer requiring the surgery. NCLR's very identification of inapplicable instances of invidious discrimination against a transgender person is precisely Dignity Health's point: absent these sorts of claims, there is no intentional discrimination here, but rather only the incidental impact of acts of religious conscience.

NCLR asserts that the Unruh Act is violated if a transgender person is denied care even if the care is made available at a sister hospital a short time later—as happened here.

---

health care that stepped into the void. <https://www.dignityhealth.org/bayarea/locations/stmarys/about-us/history>

But NCLR cites no authority for that proposition and does not even try to reconcile its view with the Supreme Court's statements in *North Coast*, 44 Cal.4th at 1159, which indicate that such actions would not violate the Unruh Act if necessary to avoid compelling a health care provider to perform medical services that violate its religious beliefs.

Contrary to NCLR's generic objections to the mistreatment of transgender persons in the context of medical treatment, the mission of Dignity Health's Catholic hospitals is to *provide* medical treatment to all, to "further[] the healing ministry of Jesus."[7] As a Catholic hospital, Mercy treats *all* patients with respect and compassion, in accordance with the statement at the 1965 Second Vatican Council that "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."[8] 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].) Thus, Minton did not and could not allege that a transgender person would have been denied any medical treatment at Mercy other than a procedure prohibited by the ERDs. The absence of such an allegation definitively disposes of Minton's Unruh Act claim as one not based on intentional discrimination against him.

---

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

[8] <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, fn. 29.)

As NCLR does not even acknowledge the religious basis for Mercy's decision, NCLR necessarily does not mention the constitutional constraints against compelling Mercy to allow a religiously prohibited hysterectomy.

III. RESPONSE TO BRIEF OF CALIFORNIA MEDICAL ASSOCIATION

A. CMA Confirms That the Case Does Not Involve Intentional Discrimination Against Transgender Persons, But Rather a Hospital's Adherence to Binding Catholic Doctrine.

As Dignity Health's Respondent's Brief explained at length, the decision not to allow Minton to receive a hysterectomy at Mercy was based solely on the application and interpretation of the ERDs, which prohibit "[d]irect sterilization of either men or women" and require the "protect[ion] and preserv[ation] [of] bodily and functional integrity." (1-CT-211, 218 [endnotes omitted].) For this reason alone, the Unruh Act claim fails as a matter of law, because the statute requires an allegation of intentional discrimination on the basis of a protected characteristic.[9] Mercy denied the procedure not because Minton is transgender, but because he sought a procedure that the ERDs forbid for *anyone* in the absence of certain specified conditions.[10] Minton never alleged that Mercy would have

[9] Despite CMA's thematic focus on the ERDs as the source of the dispute, it also asserts that Dignity Health intentionally discriminated against Minton, "under the guise of a conscience objection." (CMA 20.) Minton did not allege that Dignity Health's reliance on the ERDs was a "guise" or pretext. That is simply a baseless attack on a Catholic hospital, evidencing CMA's hostility to Dignity Health rather than offering a dispassionate presentation of argument to assist the Court.

[10] CMA repeatedly references the court's statement that it was required on demurrer to assume that, as Minton alleged, Dignity Health's action was substantially motivated by Minton's gender identity. (2-CT-431.) CMA even goes so far as to say that "[t]he superior court correctly found that the FAC alleged that Mercy's refusal to treat Mr. Minton was substantially motivated by Mr. Minton's gender identity. That finding should not be disturbed on appeal." (CMA 28.) But 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.

refused to provide health care services to Minton or any transgender person if those services would not require Mercy to violate the ERDs. CMA's attack on the ERDs as unscientific (CMA 13) only underscores that it is the ERDs alone that frame the dispute.[11]

The fact that Mercy's religious principles are concededly the only reason why Minton was unable to obtain a hysterectomy at Mercy means that this case falls within the sphere of decisions by institutional faith-based health care providers that are to be accorded respect and accommodation. This respect and accommodation are well recognized. (See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012) 565 U.S. 171, 189 [the First Amendment "gives special solicitude to the rights of religious organizations"]; *ibid.* [noting 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

[11] CMA's approach clashes with that of Minton, who has taken the provably false position that the ERDs are irrelevant to the allegations of the FAC. The court clearly did take judicial notice of the ERDs, without any written or even speaking objection from Minton. The court stated "[a]lthough Mr. Minton's complaint is silent about the reason why his request for a hysterectomy at Mercy . . . was denied, both sides agree that the reason was Mercy's interpretation of the Ethical and Religious Directives for Catholic Health Care Services. Based on this agreement and the parties' memoranda having addressed the religion-based arguments raised by Dignity Health, the court has treated those arguments as properly raised on demurrer." (CT 147.) Minton even stated that "Mr. Minton does not dispute that Defendant's decision to cancel his scheduled surgery arose from its interpretation of the . . . ERDs" (CT 100), and "Defendant also argues that the relief Mr. Minton seeks would burden its freedom of expression by forcing it to violate certain ethical and religious directives of the Catholic Church ('ERDs')." (CT 254) And the FAC alleged Dignity Health's August 30, 2016 public statement, stating "[i]n general, it is our practice not to provide sterilization services at Dignity Health's Catholic facilities in accordance with the Ethical and Religious Directives for Catholic Health Care Services (ERDs) . . . ." (CT 155 ¶ 31.)

ordination of women by the Catholic Church or by an Orthodox Jewish seminary"]; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719, 1727 [considering 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"].)

Earlier this month, the federal Office of Civil Rights (OCR) of the Department of Health and Human Services (HHS) reaffirmed the fundamental tenet that health care providers in HHS-funded programs—individuals *and institutions*—may not be compelled to engage in health care procedures that are forbidden by or cannot be reconciled with their own religious and moral beliefs.[12] The regulation sweepingly addresses 25 existing federal laws that already include conscience protections, creates private rights of action, and makes plain OCR's authority and intent to enforce those protections, including as applied to health care facility providers (not just individual physicians).[13] OCR explained that "[t]he rule . . . protects the right of diverse faith-based health care institutions to retain their religious beliefs and identity as part of their mission of serving others."[14] The rule emphasizes that "[t]he United States has a long history of providing protections in

[12] 45 C.F.R. Part 88, <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf>

[13] The City of San Francisco recently filed suit seeking to enjoin the federal conscience regulation. Also, the Medical Board of California is considering opposing the regulation, noting that the new rule "significantly broadens federal conscience protections." <http://www.mbc.ca.gov/About_Us/Meetings/Materials/1927/brd-AgendaItem3-20190528.pdf>

[14] <https://www.hhs.gov/sites/default/files/final-conscience-rule-factsheet.pdf>

health care for individuals and entities on the basis of religious beliefs or moral convictions."[15]

B. Adherence to the ERDs Does Not Implicate the Corporate Practice of Medicine or Interfere With Medical Judgment or Physician/Patient Relations.

CMA argues that allowing a hospital to decide that the ERDs prohibit it from authorizing a medical procedure is impermissible lay interference with the practice of medicine, prohibited by the ban on the "corporate practice of medicine." Minton never raised this argument in his complaint or at any time in the proceedings below, although his counsel is well aware of it, having tried to make a similar claim in another case challenging Dignity Health's right to rely on the ERDs to deny particular treatments that contravene religious directives. In particular, both the ACLU and the CMA, represented by the same lawyers here, pressed this very issue in *Chamorro v. Dignity Health*, San Francisco Superior Court No. CGC-15-549626, where the ACLU alleged that Dignity Health violated the unfair competition law and the corporate practice of medicine prohibition by refusing (based on the ERDs) to allow women to obtain sterilization procedures (tubal ligation after cesarean section) on the demand of the patients' physicians. The CMA sought leave to file a complaint in intervention in *Chamorro* in order to press the same issue, among others. The superior court dismissed the ACLU's

[15] <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf> The regulation's preamble actually twice cites this case, signaling that OCR views the sort of religious objections asserted by Mercy here as entitled to protection: "One of the purposes of the [former] Rule was to address confusion about the interaction between Federal conscience and anti-discrimination laws and other Federal statutes. [¶] For instance, some advocacy organizations have filed lawsuits claiming that Federal or State laws require private religious entities to perform abortions and sterilizations despite the existence of longstanding conscience and antidiscrimination protections on this topic. *See* . . . ***Minton v. Dignity Health***, No. 17-558259 (Cal. Super. Ct. Apr. 19, 2017) (hysterectomy) . . . ." <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf> p. 36 (emphasis added); see also *id.* p. 29, fn. 27.

claim without leave to amend on Dignity Health's initial demurrer. The court also denied CMA leave to intervene.[16] CMA could have appealed that ruling as it was a final order as to CMA. It elected not to do so. Here, neither Minton nor the CMA even tried to present a corporate practice of medicine argument.

In any event, CMA's corporate practice argument fails on the merits. The corporate practice of medicine doctrine does not come into play where a hospital imposes an administrative rule. The doctrine prohibits an unlicensed person—including a corporation such as a hospital—from practicing medicine by "exercis[ing] or . . . retain[ing] the right to exercise control or discretion over [a] physician's practice." (*Epic Medical Mgm't*, 244 Cal.App.4th at 517-518.) The corporate practice of medicine bar "protect[s] the professional independence of physicians and . . . avoid[s] the divided loyalty inherent in the relationship of a physician employee to a lay employer." (*California Medical Ass'n v. Regents of the U. of Cal.* (2000) 79 Cal.App.4th 542, 551.) The doctrine thus prohibits hospitals from employing physicians or engaging them as independent contractors to perform medical services. (*Pacific Employers Ins. Co. v. Carpenter* (1935) 10 Cal.App.2d 592, 594-95 ["it is well settled that neither a corporation nor any other unlicensed person or entity may engage, directly or indirectly, in the practice of certain learned professions, including the legal, medical and dental professions"]; 20 Ops.Cal.Atty.Gen. 6, 7 (1952) [a doctor "cannot contract to perform professional medical services for or through the hospital, because he would then be assisting the hospital to practice medicine indirectly"].)

16 <https://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=CGC15549626&SessionID=68842062DAA8D8CDE4CB61B401A1DE2977354EE7> entries on April 24 and June 8, 2016.

The doctrine clearly has no application here or to any situation where a physician seeks to perform a procedure that the hospital cannot permit for religious reasons.[17] Dignity Health, the only defendant, *permitted* the procedure at another hospital it owned that was not subject to the ERDs. Neither Mercy nor Dignity Health is alleged to (and does not) employ Dr. Dawson or exert any control over her or her medical decisions, nor did Mercy question or challenge Dr. Dawson's alleged conclusion that the procedure was the medically appropriate choice for Minton. (See *Epic Med. Mgm't,* 244 Cal.App.4th at 517-518 [rejecting corporate practice of medicine claim where there is a "strict delineation between the medical elements of the practice which the doctor controls, and the non-medical elements"].) The ERDs do not dictate or require a physician to make any decision on whether a medical treatment is appropriate or necessary. In applying the ERDs to prohibit a particular procedure, the hospital asserts no control over the physician's medical judgment and no "divided loyalties" of the physician are created. Here, for instance, Dr. Dawson wanted to perform a hysterectomy on Minton, and she did so—at a nearby Dignity Health non-Catholic hospital, as soon as her schedule permitted. The hospital's decision that the procedure could not be performed at Mercy—because it is a Catholic hospital, must adhere to the ERDs, and therefore cannot permit this procedure—is a faith-based administrative decision that is properly made by the governing body of the hospital as a matter of law.

Mercy's decision to decline a procedure for religious reasons is the practice of religion, not the practice of medicine. Nor is it intentional discrimination against a

[17] There is also no allegation that Mercy profits by its adherence to the ERDs or that it collects professional fees from non-physicians for physicians' services, the other common fact patterns posing a corporate practice of medicine problem. (See, e.g., 92 Ops.Cal.Atty.Gen. 56 n.l (2009) [unlicensed entity could not perform "professional radiology services" or "charg[e] and collect[] fees for such services"].)

protected group. And a hospital decides what services are offered for a variety of non-medical reasons. These include legal requirements,[18] funding, staffing, volume of procedures, availability of necessary equipment and facilities, and other reasons—which may include the hospital's religious rules. Courts repeatedly recognize that decisions about managing the operation of a hospital department are "purely administrative, and in furtherance of its endeavor to operate and maintain the hospital in an efficient manner." (*Blank v. Palo Alto-Stanford Hosp. Ctr.* (1965) 234 Cal.App.2d 377, 392; see also *Mateo-Woodburn v. Fresno Cmty. Hosp. & Med. Ctr.* (1990) 221 Cal.App.3d 1169, 1184 ["An important public interest exists in preserving a hospital's ability to make managerial and policy determinations and to retain control over the general management of the hospital's business."].) California law recognizes "[t]he right of hospitals to make rational management decisions, even when exercise of that right might prove adverse to the interests of specific individual practitioners." (*Redding v. St. Francis Med. Ctr.* (1989) 208 Cal.App.3d 98, 106.) Courts defer to non-arbitrary hospital administrative decisions because "courts [are] ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every nonprofit hospital corporation in the state." (*Lewin v. St. Joseph Hosp. of Orange* (1978) 82 Cal.App.3d 368, 385.)

Thus, a hospital might prohibit a physician from performing any non-emergency procedures or treatment if the patient cannot show he has insurance or is otherwise able to pay. Or a hospital might not have the necessary equipment for a procedure and will not purchase it; it could conclude that its physicians do not have the necessary experience

[18] See Cal. Code Regs., tit. 22, § 70005, subd. (a) (listing the eight basic services that a general acute care hospital must provide).

for a procedure; or it may have secular ethics rules that prohibit the procedure or action, including, for example, rules related to death and dying issues. Every hospital, whether affiliated with a religion or not, has an Ethics Committee that may recommend that a hospital not permit certain care in particular circumstances, for ethical reasons.

Moreover, Probate Code section 4736 specifically contemplates that a hospital may decline to provide a service requested by a patient—which could easily include a service recommended and/or approved by the patient's physician—and requires the hospital to attempt to transfer that patient to another facility that will comply with the request:

> A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision shall . . .: . . . (b) Unless the patient or person then authorized to make health care decisions for the patient refuses assistance, 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.

(Prob. Code, § 4736.) This statute expressly presupposes that a "health care institution" has lawfully declined a procedure for its own reasons.

CMA also argues that the hospital's prohibition on a procedure based on the ERDs interferes with the relationship between a physician and her patient. CMA is wrong here as well. (See *California Medical Ass'n*, 79 Cal.App.4th at 550, fn. 13 [CMA's allegations of "interference with 'existing relationships' between physicians and their patients appear more imagined than real, and certainly are not supported by the record in this case"].) Such relationships arise from contract (see *McNamara v. Emmons* (1939) 36 Cal.App.2d 199, 204), and incorporate a duty of reasonable care[19], a duty of disclosure

[19] *Colby v. Schwartz* (1978) 78 Cal.App.3d 885, 889-890.

regarding medical treatment[20], a duty to obtain the patient's informed consent[21], and a duty of confidentiality.[22] There is no allegation in this case that Dignity Health interfered with any of these. Doctors obviously may discuss procedures and treatments with their patients and, if appropriate, recommend them. Minton consulted with his physician, who agreed that a hysterectomy was appropriate. That is the practice of medicine, by the physician. In fact, here, Dignity Health arranged for Dr. Dawson to have temporary privileges at Methodist Hospital so that she could perform the procedure.

Nor do the ERDs impact the standard of care that Dr. Dawson or any other physician may provide to patients. Hospital policy simply provides that procedures prohibited by the ERDs cannot be performed *at Mercy*. Physicians (apparently including Dr. Dawson) typically have privileges at multiple hospitals and can perform a procedure at any hospital that allows it, thus providing the standard of care that they believe is appropriate.[23] A physician can also refer a patient to another doctor who practices at a hospital that can perform the procedure, ensuring the care he or she deems appropriate, or can obtain temporary permission to practice at that hospital to perform the procedure himself or herself.

CMA's entire argument proceeds from the false assumption that doctors decide what procedures are performed at particular hospitals. (CMA 14.) Not so, and "[s]uch a

---

[20] *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 110.
[21] *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164.
[22] *Snibbe v. Superior Court* (2014) 224 Cal.App.4th 184, 191-192.
[23] Here, Minton's two complaints never disclosed the other secular Sacramento hospitals at which his physician, Dr. Dawson, might have enjoyed privileges to perform the procedure. (See generally <https://health.usnews.com/doctors/lindsey-dawson-284973> [indicating that Dr. Dawson "is affiliated with multiple hospitals in the area," "including . . . Sutter Medical Center"]; <https://www.sutterhealth.org/smcs/find-doctor/dr-lindsey-dawson#practice-locations> [same].)

proposition establishing medical staff sovereignty is untenable. Ultimate responsibility is not with the medical staff, but with the governing body of the hospital." (*Hongsathavij v. Queen of Angels* (1998) 62 Cal.App.4th 1123, 1143; see also *El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976, 993.) The authorities make clear that the governing body of the hospital decides what services are offered to patients. (*Hongsathavij*, 62 Cal.App.4th at 1143; *El-Attar*, 56 Cal.4th at 983 [governing body of hospital oversees operations of the hospital]; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224 [governing body "takes ultimate responsibility for the quality and performance of the hospital; the medical staff "has responsibility for providing medical services, and is 'responsible to the governing body for the adequacy and quality of the medical care rendered"], disapproved on other grounds in *Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709; Cal. Code Regs., tit. 22, §§ 70035, 70701(6) ["The governing body shall . . . [p]rovide for the control and use of the physical and financial resources of the hospital."]; 42 C.F.R. § 482.12.)

Under CMA's theory, a Catholic hospital would be forced to allow a doctor on its staff to perform an abortion in the hospital—an absurd conclusion not required under any law. CMA has cited no authority that physicians practicing as part of the independent Medical Staff at Mercy have a right to demand that the hospital allow any procedure that doctors want to perform, notwithstanding the hospital's religious faith; and there is a plethora of legal authority to the contrary.[24] By analogy, this also would conflict with the

[24] See *Taylor v. St. Vincent's Hosp.* (9th Cir. 1975) 523 F.2d 75, 77 ("If the hospital's refusal to perform sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is outweighed by the need to protect the freedom of religion of denominational hospitals 'with religious or moral scruples against sterilizations and abortions'") (citation omitted); *Watkins v. Mercy Med. Ctr.* (D. Idaho 1973) 364 F.Supp. 799, 803 ("Mercy Medical Center has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those

Supreme Court's recent recognition that it can be "assumed" 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." (*Masterpiece Cakeshop*, 138 S.Ct. at 1727.)

Mercy's adherence to the ERDs has nothing to do with the corporate practice of medicine or physician judgment.

C. CMA's Supposed Interest in Access to Care Ignores the Far More Likely and Damaging Impact of Loss of Health Care Resources and Access.

CMA turns a blind eye to the fact that, if courts compel religious health care providers to perform services prohibited by their religious principles, these providers cannot simply abandon those principles. Here, Dignity Health found a way to honor Mercy's religious principles while still providing Minton with the services he sought. If this is held to be intentional discrimination, and providers ordered to perform services that are impermissible under their religious beliefs, then faith-based providers may cease providing permissible services for any patient who needs them, including hysterectomies to treat uterine cancer, which are permitted under the ERDs.

In attacking what it perceives as the dangers of allowing religious hospitals to follow religious doctrine in determining what services will not be allowed at the facility, CMA emphasizes the prevalence of Catholic health care providers in general, and

---

beliefs"), aff'd (9th Cir. 1975) 520 F.2d 894; *Allen v. Sisters of St. Joseph* (N.D. Tex. 1973) 361 F.Supp. 1212, 1214 ("The interest that the public has in the establishment and operation of hospitals by religious organizations is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or await a later date for her sterilization"), appeal dismissed (5th Cir. 1974) 490 F.2d 81; *Chrisman v. Sisters of St. Joseph of Peace* (9th Cir. 1974) 506 F.2d 308, 312 ("'There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions'") (citation omitted).

Dignity Health in particular, in the provision of hospital care in the United States and California. CMA professes that "it wishes to impress upon the Court the potential negative outcomes on access to care" implicated by this lawsuit. (CMA 10.) CMA asserts that it is necessary for courts to ignore providers' religious objections and compel them to perform objectionable procedures in order to ensure unfettered access to those procedures.

But CMA's argument actually supports the opposite point: the ruling CMA and Minton seek in this case would have a far more destructive impact on access to care than an order according due respect to the facility's conscience rights to limit the provision of specific procedures that violate the ERDs.[25]

While CMA stresses the prevalence of Catholic hospitals in providing health care (CMA 10, 12, 15-16), it ignores the fact that those same hospitals are precluded from rendering certain services by the very principles that lie at the heart of their existence. A Catholic hospital cannot perform procedures that the ERDs prohibit, and still retain its identity and status as a Catholic hospital.[26] Thus, an order compelling a Catholic hospital to perform a prohibited procedure would not result in the hospital abandoning its religious identity and allowing the procedure; it would result in the hospital eliminating categories of services (such as hysterectomies for any patient) so that the hospital cannot be accused of making an unlawful distinction, or exiting the market altogether, with the

[25] See also <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf> pp. 45-54 (reflecting HHS's Office of Civil Rights' rejection of argument that more rigorous enforcement of federal conscience laws will decrease access to care, concluding instead that increased access is a more likely result).

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

result that *all* patients in the region will lose access to *all* hospital services. CMA cites the example of a Dignity Health Catholic hospital in Mount Shasta that is a certified Critical Access Hospital, located 100 miles from other hospitals, to illustrate its point that there are "limited options" for patients seeking "gender affirming care or reproductive health care." (CMA 18, fn. 19.) But if it constitutes unlawful discrimination for a Catholic hospital to provide hysterectomies only when permitted by the ERDs (as, for example, a treatment for uterine cancer for women and transgender men), then that Catholic hospital would have no choice but to stop performing all hysterectomies for any person, regardless of the patients' conditions. CMA simply ignores this potential devastating impact on a wide swath of the population.

D. CMA Ignores Institutional Religious Rights and the "Balancing" Solution Offered in *North Coast.*

CMA argues that Dignity Health did not provide Minton with "full and equal access" to the procedure he sought when it disallowed the procedure at a Catholic hospital but allowed it at a non-Catholic hospital. In truth, as the superior court found and as Dignity Health explained at length in its Respondent's Brief at pages 32-40, Dignity Health did provide Minton with full and equal access. Dignity Health also explained that the issue does not even arise, because the Unruh Act does not apply, for numerous reasons CMA does not address: the preclusion of hysterectomies (and other directly sterilizing procedures) where not permitted by the ERDs is a facially neutral policy; any adverse impact on transgender persons is not covered by the statute; and purported discrimination based on the medical condition of gender dysphoria, as Minton alleged, is not actionable.

CMA mentions the conscience rights only of individual physicians, asserting that CMA promotes "balance" between patients' access to health care and the rights of

individual physicians to exercise their conscience. But CMA does not try to strike that "balance." It also provides no reasoned basis for supporting the conscience rights of individuals but not of religious organizations like a Catholic hospital. In fact, the CMA, and the American Medical Association (AMA) of which CMA is a part, have a long history of supporting the conscience rights of health care providers, *including hospitals*. (See AMA House of Delegates issued Policy 5.995 (Abortion) ["Neither physician, *hospital*, nor hospital personnel shall be required to perform any act violative of personally held moral principles"] [emphasis added].)[27]

North Coast showed how to achieve a "balance" and provide full and fair access by discussing a hypothetical that would result in the patient obtaining the treatment she sought, without compelling any individual physician with objections to the procedure to perform it. CMA attempts to distinguish *North Coast* by suggesting that the Court's discussion of a potential referral to another physician without religious objections was limited to individuals and would not apply to commonly owned facilities. But nothing

[27] CMA cited an AMA policy when it appeared as amicus in support of the defendant medical group in the Court of Appeal in *North Coast*, defending on religious freedom grounds the position of the physicians who had refused to provide fertility services to lesbian patients. CMA submitted an amicus brief, which it later withdrew, stating: "the AMA's Policies of the AMA House of Delegates concerning 'Access to Comprehensive Reproductive Care' provides: Our AMA reaffirms its policy that neither physician, **hospital**, nor hospital personnel shall be required to perform any act *violative of personally held moral principles*. (American Medical Association's House of Delegates Policy H-420.959. . . .)." (2005 WL 5955892 (May 5, 2005), at p. *9 [italics in CMA brief; bold added].) CMA's brief also relied on Probate Code, § 4736 and *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 311 (two authorities cited by Dignity Health, see RB, pp. 33, 34, 45) to support its argument that physicians may refuse treatment for reasons of conscience. (See 2005 WL 5955892, at pp. *7, *11.) The withdrawal of a filed brief, for whatever reason, does not mean that the points and authorities in that brief are wrong.

about the Court's discussion can be construed as recognizing a distinction between *physicians* with religious objections and *hospitals* with religious objections.

In *North Coast*, only physicians were asserting religious objections; the clinic itself was not. Therefore, the Court's analysis necessarily was focused on individuals who worked for one clinic, not on facilities jointly owned by the same entity. But there is no logical reason to assume that the *North Coast* Court would have said something substantively different had facilities been involved. In fact, as discussed in Dignity Health's Respondent's Brief, if anything, faith-based institutions have *more* protected status than individuals under *Employment Division, Dep't of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, which expressly limited the rights of *individuals* to assert religious objections where state laws of general application were involved. (See *EEOC v. Catholic U. of Am.* (D.C. Cir. 1996) 83 F.3d 455, 462 [noting *Smith*'s holding with regard to the obligations of individuals to abide by laws in conflict with their religious beliefs, and stating that "[i]t does not follow, however, that *Smith* stands for the proposition that a *church* may never be relieved from such an obligation"] [emphasis in original].)

Finally, after initially asserting that "CMA takes no position on the parties' disputed facts regarding the efforts to find an alternative location" for the surgery (CMA 9), CMA reverses course and argues that Minton and his doctor actually "made all necessary arrangements."[28] (CMA 29.) CMA then goes on to argue that such referrals cannot provide "full and equal access," complaining that such a "ruling allows one business establishment to discriminate against a person by referring them to another

[28] CMA does not acknowledge Minton's original complaint, in which he admitted that obtaining the procedure at a non-Catholic Dignity Health hospital was at the "suggest[ion]" of Mercy's president. (1-CT-13 ¶ 24.)

business altogether, so long as they are owned by the same corporate parent." (CMA 32.) Apart from CMA's advancement of a litigant's position that is belied by Minton's original complaint, CMA overlooks the absence of the critical missing premise: no intentional discrimination occurred in the first place when Mercy denied the procedure because of the ERDs. Moreover, allowing Dignity Health to accommodate Minton at another Dignity Health hospital is a far cry from "allow[ing] Dignity Health to systematically exclude transgender individuals from treatment at all 19 of its Catholic hospitals in the state . . . ." (CMA 32.) Neither Minton nor any other transgender individual was "exclu[ded]" from treatment at Mercy; there is no allegation that Minton, or any other transgender person, was or would be denied any health care procedure at a Dignity Health Catholic hospital other than one that directly violated the ERDs. Neither CMA nor Minton has ever come to terms with this point, despite Dignity Health's prominent focus on it in its briefing.

Dignity Health found and implemented a "balance" that served the needs of both Mercy and Minton. This effort is the antithesis of unlawful discrimination. A religious health care institution needs to be able to accommodate a patient's needs while not violating its own principles, without being held liable for unlawful discrimination.

E. Issues Involving Interpretation of the ERDs May Not Be Addressed by the Courts.

CMA argues that the ERDs are arbitrary and asserts that they are interpreted and applied differently across different Catholic health care facilities and in different Catholic dioceses. (CMA 25 ["depending on the diocese, what is prohibited in one Catholic hospital may be routinely performed in another Catholic hospital depending on who is heading the diocese in which the hospital is located and whether a dispensation has been granted to allow for flexibility and exceptions to ecclesiastical law"].) CMA provides no

examples; but at any rate, differing interpretations of the ERDs by different Catholic facilities does not demonstrate that Mercy's interpretation was wrong or arbitrary, much less that CMA has any place commenting on this subject.

To the contrary, any purported internal inconsistency in the interpretation of Catholic doctrine from diocese to diocese is a subject that is and must remain beyond the province of the courts. Under the ecclesiastical abstention doctrine (also known as the church autonomy doctrine), courts are prohibited from involving themselves in religious doctrine, including by selecting or opining on which division of a church properly interprets or enforces church doctrine. (See *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 473 ["State courts must not decide questions of religious doctrine; those are for the church to resolve"]; *Schofield v. Superior Court* (2010) 190 Cal.App.4th 154, 161-162 [in disputes involving "issues such as church doctrine, . . . or church governance and organization—the matter is to be left to internal decision-making processes of the church itself"].) In *Means v. U.S. Conf. of Catholic Bishops* (W.D. Mich., June 30, 2015) 2015 WL 3970046, at *12-*13, aff'd (6th Cir. 2016) 836 F.3d 643, the court dismissed claims against USCCB on ecclesiastical abstention grounds, where the plaintiff's claims would require the court to enter into a "nuanced discussion about how a 'direct abortion' is defined in Catholic doctrine." The court explained that it "cannot determine whether the establishment of the ERDs constitute[s] negligence because it necessarily involves inquiry into the ERDs themselves, and thus into Church doctrine," and "[w]here the Court must scrutinize religious doctrine to assess the merits of a legal position, the Court risks excessively entangling the law in the free exercise of religion." (*Id.*)

Similarly here, Dignity Health's Catholic hospitals are required to follow the ERDs. Any effort to adjudicate Minton's claims by addressing a purported conflict

among Catholic dioceses in the interpretation of the ERDS would require a "nuanced discussion" of how sterilization is defined and treated under Catholic doctrine.

IV. CONCLUSION

The amicus briefs submitted in support of Minton do not support his claim. The judgment should be affirmed.

Dated: May 28, 2019

MANATT, PHELPS & PHILLIPS, LLP

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

DAVID L. SHAPIRO

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this RESPONDENT'S ANSWER TO BRIEFS OF AMICI CALIFORNIA MEDICAL ASSOCIATION AND NATIONAL CENTER FOR LESBIAN RIGHTS ET AL. contains 7,680 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: May 28, 2019 MANATT, PHELPS & PHILLIPS, LLP

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

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **May 28, 2019**, I served the within **RESPONDENT'S ANSWER TO BRIEFS OF AMICI CALIFORNIA MEDICAL ASSOCIATION AND NATIONAL CENTER FOR LESBIAN RIGHTS ET AL.** on the interested parties in this action addressed as follows:

Christine Haskett Lindsey Barnhart COVINGTON & BURLING LLP Salesforce Tower 415 Mission Street, Suite 450 San Francisco, CA 94105 Tel: (415) 591-6000 Fax: (415) 591-6091 Email: chaskett@cov.com Email: lbarnhart@cov.com Elizabeth O. Gill Christine P. Sun ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC. 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-8437 Amanda Goad Melissa Goodman ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1313 West Eighth Street Los Angeles, CA 90017 Tel: (213) 977-9500 x258 Fax: (213) 977-5297	*Attorneys for Plaintiff-Appellant Evan Minton*

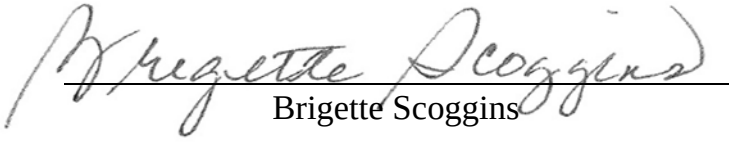
Lindsey Kaley ACLU FOUNDATION 125 Broad Street, 18th Floor New York, New York 10004 Tel: (212) 549-2500 Fax: (212) 549-2650 David Loy ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES P.O. Box 87131 San Diego, CA 92138-7131 Tel: (619) 232-2121 Fax: (619) 232-0036	
Julie Hayden Wilensky Asaf Orr National Center for Lesbian Rights 870 Market Street Ste 370 San Francisco, CA 94102-3009	*Attorneys for National Center for Lesbian Rights, et al.*
Benjamin B. Au Laura E. Miller Lauren E. Kapsky Durie Tangri LLP 217 Leidesdorff Street San Francisco, CA 94111 Francisco Javier Silva Long X. Do Lisa Matsubara California Medical Association 1201 "K" Street - Suite 800 Sacramento, CA 95814	*Attorneys for California Medical Association*
Stephen J. Greene, Jr. Greene & Roberts LLP 455 Capitol Mall, Suite 045 Sacramento, CA 95814 Email: sjg@greeneroberts.com	*Attorneys for Catholic Health Association of the United States and Alliance of Catholic Health Care*

Mark E. Chopko Jennifer Gniady Stradley Ronon Stevens & Young, LLP 1250 Connecticut Ave., NW Suite 500 Washington, DC 20036-2652 Email: mchopko@stradley.com	
Charles S. LiMandri Freedom of Conscience Defense Fund P O Box 9520 Rancho Santa Fe, CA 92067-9120 Email: climandri@limandri.com John J. Bursch Alliance Defending Freedom 440 First St., N.W. Suite 600 Washington, DC 20001 Email: jbursch@adflegal.org	*Attorneys for Catholic Medical Association*
Superior Court of California San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	*Via U.S. Mail* *For delivery to the Hon. Harold E. Kahn*
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 **May 28, 2019**.



Brigette Scoggins