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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH,

Petitioners,

v.

DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY MEDICAL CENTER REDDING,

Respondent.

Case No. CGC 15-549626

Hon. Harold E. Kahn

RESPONDENT DIGNITY HEALTH'S RESPONSE TO PETITIONERS' POST-HEARING BRIEF

Hearing Date: September 20, 2021
Time: 2:00 p.m.
Dept.: 505

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II. INTRODUCTION.

Since well before the live witness hearing, Dignity Health has pointed to the irreconcilable conflict between Petitioners' interpretation of Health and Safety Code section 1258 ("Section 1258") and the interpretation and conduct of the California Department of Public Health ("CDPH") and the Attorney General. Dignity Health has also addressed constitutional avoidance, excessive entanglement, church autonomy, the unconstitutional conditions doctrine, Petitioners' lack of neutrality, the fact that Section 1258 is not a generally applicable law that could survive rigorous strict scrutiny review, the lack of public benefit in Petitioners' requested relief that would shut down any access to post-partum tubal ligations, and Petitioners' unclean hands evidenced by their statewide campaign to ensure that the Attorney General compelled the Catholic Hospitals to continue providing tubal ligations at the current level of service. Petitioners' arguments and two-faced approaches in this Court and in other venues are antithetical to the issuance of any writ, which cannot issue unless it advances the public interest.

Petitioners have ignored all of these arguments, thereby signaling that they have no response. The Court should deny the Petition because the Catholic Hospitals' sterilization request and review process does not violate Section 1258, a facially neutral statute that does not purport to infringe or burden First Amendment rights. Alternatively, if the Court were to adopt Petitioners' interpretation of Section 1258, the statute would be subject to rigorous, evidence-based strict scrutiny under the First Amendment of the U.S. Constitution because would be a licensing law that burdens the free exercise of religion. *See, e.g., Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981) ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"). And, strict scrutiny would also apply because, under Petitioners' interpretation, Section 1258 would neither be neutral or generally applicable under the binding precedents of the U.S. Supreme Court including *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Section 1258 could not survive strict scrutiny because, as interpreted by Petitioners, the statute is not neutral, it is not generally applicable, and it is being used to target religion.

In 2016, the Court was on the precipice of dismissing this entire case, when it dismissed all of Petitioners' discrimination claims, leaving only a single cause of action for violation of the Unfair Competition Law that "borrowed" Section 1258. That single cause of action (which the Court later found should be a traditional writ of mandamus) survived demurrer in 2016 because Petitioners told the Court that they would prove the Dignity Health's Catholic Hospitals violated Section 1258 by relying on the Ethical and Religious Directives for Catholic Health Care Services (ERDs) when deciding whether to allow postpartum tubal ligations and, as part the application of the ERDs, including by considering "advanced maternal age" and "grand multiparity" when making faith-based decisions about the provision of such services. (Resp. Appx., Vol. IV, Ex. 93 6:15-20.)

The Court subsequently found that there was a triable dispute regarding whether the Catholic Hospitals made determinations regarding tubal ligations based upon a "patient's age, marital status or number of children." (Court Order, April 30, 2020.) Importantly, despite nearly constant invitations from Petitioners to do so, this Court has never indicated that it would consider, much less find, that the Catholic Hospitals violated Section 1258 by exercising their Catholic faith. Thus, in this case, interpretation of Section 1258 turns on three phrases in the statute: (1) "special nonmedical qualifications"; (2) "Nothing in this section shall prohibit requirements relating to the physical or mental condition of the individual . . ."; and (3) "contraceptive purposes". There is no evidence that the Catholic Hospitals consider the factors prohibited by Section 1258—age, number of children, or marital status—or have ever employed anything like an age/parity stipulation.

The remaining questions are whether, properly interpreted, Section 1258 prohibits the free exercise of religion and whether the statute prohibits the Catholic Hospitals from considering "advanced maternal age" in connection with their faith-based pastoral sterilization review process. As the Court has already acknowledged, when properly construed giving consideration to principles of agency deference and constitutional avoidance, the Court must reject Petitioners' interpretation of Section 1258. Moreover, the evidence fails to establish a violation of Section 1258, and even if the statute were subject to Petitioners' interpretation, that interpretation fails

strict scrutiny.

A. Agency Deference and the Doctrine of Constitutional Avoidance Demand a Neutral Interpretation of Section 1258.

From all indications, the Court hoped to avoid the stark constitutional issues presented by Petitioners' claim. However, that is not possible in a case that has always been about trying to get this Court to hold that the exercise of religion violates the law, which this Court cannot do. The proper approach to statutory construction of a "borrowed" licensing law is not a battle between the litigants regarding who can offer the "best" interpretation of Section 1258. This case is about how CDPH interprets and enforces Section 1258, whether Section 1258 can reasonably be interpreted more than one way, and whether the law permits Petitioners or the Court to control which interpretation CDPH adopts. It cannot be otherwise, when the Petitioners are borrowing a state licensing law overseen by an executive agency.

Faced with a statute that the Court has already acknowledged may reasonably be interpreted in multiple ways, principles of agency deference give CDPH the exclusive power to choose among reasonable interpretations. *Robinson v. City of Yucaipa*, 28 Cal. App. 4th 1506, 1516 (1994) ("The administrative agency's construction of the law need not be the only reasonable interpretation") (citations omitted); *see also California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist*., 62 Cal. 4th 369, 381 (2015). The fact that Petitioners' interpretation might also be reasonable, or even "better" in the view of the Court, is irrelevant. Petitioners can only prevail if their interpretation is the only possible interpretation of Section 1258.

Moreover, principles of agency deference strongly weigh in favor of upholding a reasonable and neutral interpretation consistent with the manner in which the applicable government enforcement authority has interpreted the statute for decades. Petitioners' alternative position would undermine the existing licenses of faith-based hospitals throughout California, is contrary to the requirements of the California Attorney General, would infringe on church autonomy, would require and countenance improper trolling through the good faith and sincerely held religious beliefs of Sisters of Mercy and other people of faith, and would place the statute (at the very least) at risk of being unconstitutional. None of this would preserve the ability of people

in small cities such as Redding to obtain procedures at Catholic hospitals. There is no question which construction should and must be adopted.

Section 1258 is also ill-suited to challenge by a petition for writ of mandamus.[1] Petitioners must establish a clear, present, and ministerial duty on the part of the Catholic Hospitals to act one, and only one, particular way. *Bullis Charter School v. Los Altos School Dist.*, 200 Cal. App. 4th 1022, 1035 (2011). But, even if Petitioners' interpretation of Section 1258 were reasonable (it is not), it is not the only reasonable interpretation of Section 1258, and CDPH's discretion to choose a reasonable alternative interpretation is not a ministerial duty. *Unnamed Physicians v. Board of Trustees of Saint Agnes Med. Ctr.,* 93 Cal. App. 4th 607, 618 (2001) ("Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment."). Petitioners advance an interpretation contrary to that used by CDPH when it comes to the licensing of the Catholic Hospitals. There can be no clear, ministerial duty to comply with the law if there is more than one way to interpret and implement it.

A neutral interpretation of Section 1258 is also compelled by the doctrine of constitutional avoidance, which Petitioners ignore. Neutrality demands that when the Legislature passes a facially neutral statute like Section 1258, CDPH (or the private party acting like the licensing agency) must adopt a neutral interpretation absent an "affirmative intention of the [legislature] clearly expressed." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-02 (1979). The Court has already acknowledged there is no "affirmative intention" of the Legislature to burden religion to be found in the statute.[2] The doctrine of constitutional avoidance requires agencies like CDPH, as well as the Court, to avoid constructions that unconstitutionally burden religion in the first place. Since there has never been a dispute about whether Petitioners' interpretation burdens the Catholic Hospitals' free exercise of religion, and reasonable alternative interpretations exist, CDPH appropriately has not adopted the construction proposed by

[1] Petitioners' claim would fare no better under the Unfair Competition Law. The fatal defect is that Petitioners' are not borrowing the law but trying to change it.

[2] "The Court: So the answer is 'no'? You haven't seen anything that refers to—specifically to Catholic hospital decision-making or any other religious entity's decision-making?
Ms. Kandel: Not in the legislative history, Your Honor."

Petitioners.

Petitioners failed to present evidence that requires adoption of their interpretation of Section 1258. Applying these principles, there is no reason for the Court to look for a different interpretation of "special nonmedical qualifications" than the one advanced by California's Department of Health Services (CDPH's predecessor) in *California Medical Association v. Lackner,* 124 Cal. App. 3d 28 (1981) ("*Lackner*"). In *Lackner*, the agency was called upon to defend its interpretation of "special nonmedical qualifications,"[3] the issue was briefed, and the Court of Appeal agreed with the agency that the term "unambiguously" referred to socio-economic aspects of the patient. There is no evidence that CDPH has sought to change its interpretation of "special nonmedical qualifications", nor is there any legal requirement that it do so after the Court of Appeal found such interpretation "unambiguous", and therefore reasonable.[4]

At minimum, *Lackner* reflects judicial approval that interpreting "special nonmedical qualifications" as referring to socio-economic qualifications of the patient is a reasonable interpretation of the statute. The fact that Section 1258 did not include "the faith of the provider" as one of the prohibited "special" nonmedical qualifications was not accidental, as eliminating providers' conscience rights was never contemplated or mentioned by the Legislature, or by the parties in *Lackner.* Petitioners have never concealed the fact that their real claim hinges on the Court finding that the ERDs violate California law and that the Catholic Hospitals violate the ERDs. Yet as historian Rebecca J. Kluchin notes, while activists succeeded in their challenges to social restraints like age/parity stipulations and spousal consent requirements, providers' religious freedom rights prevailed in each and every case in which they were challenged.[5] (Resp. Appx. Vol. XI, Ex. 139, p. 147.)

Moreover, the Court has already found that it is "reasonable" to interpret Section 1258 as

[3] Dignity Health has submitted the Opening Brief, Respondent's Brief, and Reply Brief filed in *Lackner* as Respondent's Exhibits 136-138, and has also filed a Request for Judicial Notice.

[4] Thus, that is also the interpretation that Petitioners must borrow since Section 1258 has no private right of action.

[5] Rebecca J. Kluchin, *Fit to Be Tied: Sterilization and Reproductive Rights in America 1950-1980* at 185 cited by both Petitioners and Dignity Health throughout the case. As Kluchin notes, all of the efforts to challenge conscience clause policies failed and free exercise prevailed. (Resp. Appx., Vol. XI, Ex. 139, p. 146, citing *Taylor v. St. Vincent's Hosp*., 523 F.2d 75, 77 (9th Cir. 1975); *Watkins v. Mercy Med. Ctr*., 364 F. Supp. 799, 803 (D. Idaho 1973), aff'd, 520 F.2d 894 (9th Cir. 1975); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974).)

focused on the *purpose* of the Catholic Hospitals in allowing the procedures. (Resp. Appx., Vol. II, Ex. 22, 26:3-9.) The statute plainly refers only to the licensee hospital's purpose. That would also be consistent with the Catholic Hospitals' five decades of uninterrupted licensure and, as a reasonable interpretation, could not be changed through a mandamus proceeding.

Furthermore, it is undisputed that Petitioners seek to interfere with a religious decision-making process. For instance, the Catholic Hospitals only consider advanced maternal age as a medical risk factor within the larger context of a religious decision-making process guided by an interpretation of the ERDs, which is not prohibited by Section 1258 and is protected by the First Amendment. Petitioners never explain the legal basis for inviting the Court or CDPH to become entangled in a constitutionally protected religious decision-making process to address a single aspect of a statute that they find objectionable. It is no different than the other church autonomy decisions where the plaintiff alleges that his or her termination was based upon consideration of something prohibited by Title VII; the Court cannot separate the religious decision-making from whatever aspect about the decision the plaintiff is complaining about. The process itself is protected. Without such commonsense avoidance of constitutional entanglement there would be no such thing as church autonomy, a doctrine that the U.S. Supreme Court has been applying recently with increasing vigor, which has been applied in cases against faith-based hospitals, and which Petitioners ignore.

B. **Petitioners Failed to Establish a Violation of Section 1258.**

It is only through this lens that the Court can properly view the evidence. Not only have Petitioners failed to prove that CDPH or the Court must adopt their construction of Section 1258, but Petitioners failed to prove that the Catholic Hospitals improperly considered at least one the alleged special non-medical qualifications—"advanced maternal age," "grand multiparity," age, marital status or number of children in a manner prohibited by Section 1258 as reasonably interpreted by CDPH.

- Marital Status: there was no evidence at all that the Catholic Hospitals considered marital status.
- Grand Multiparity: the evidence showed that the Catholic Hospitals considered

"grand multiparity" but the evidence also clearly established that "grand multiparity" is a medical term related to a physical condition of an individual who has had five pregnancies develop to the point of fetal viability, regardless of whether the baby survives. (Resp. Appx. Vol. II, Ex. 35 (De Soto Depo.), 112:2-7.) Therefore, consideration of grand multiparity is expressly permitted by the second paragraph of Section 1258.

- Number of Children: there was no evidence that the Catholic Hospitals considered the number of children that an individual had. Moreover, given the definition of grand multiparity, the Court cannot (as Petitioners' suggest) infer consideration of number of actual children.
- Advanced Maternal Age: the evidence showed that the Catholic Hospitals considered advanced maternal age in their pastoral review process, but also showed that advanced maternal age is a medical term that relates to the physical condition of an individual who will be over the age of 35 when scheduled to give birth. Indeed, the evidence showed that the International Classification of Diseases includes coding for advanced maternal age which categorizes advanced maternal age within the zone of high risk pregnancies that require additional supervision. (Resp. Appx., Vol. X, Ex. 134, 100:7-12.)
- Age: the evidence did not show that the Catholic Hospitals considered age outside of its faith-based consideration of advanced maternal age. The Court has occasionally suggested that it might interpret the statute as prohibiting the consideration of age even in the context of advanced maternal age. However, the statute's exclusion for requirements related to the physical condition of the individual as well as the decision in *Lackner*, which held that age requirements related to an individual's mental condition were permitted by Section 1258 preclude any such determination.

Thus, in sum, the evidence overwhelmingly supported the Catholic Hospital's contention throughout this litigation that they did not impose prohibited special non-medical qualifications in

violation of Section 1258. For this reason alone, judgment should be entered against Petitioners and in favor of Respondent because Petitioners have failed to prove that Respondent has violated a clear, present, and ministerial duty on the part of the Catholic Hospitals under Section 1258.

Petitioners' interpretation is driven by their targeting of religion—a desire for a specific result. Petitioners have always contended and their petition repeatedly alleges that the faith-based review process maintained by the Catholic Hospitals, which includes consideration ERDs and "religiously based" sterilization policies, itself constitutes a prohibited special non-medical qualification. (Pet. Post-Hearing Br., 15:9-20.) For good reason, the Court has never indicated that Petitioners could state a claim based upon such allegations and did not identify such claims as a basis to allow the claim to proceed at the Demurrer, MJOP or Summary Judgment stages of the case. Section 1258 is limited to "special" non-medical conditions placed on individuals, not on institution-wide religious rules such as the ERDs, and which are not encompassed within Section 1258's exceptions for requirements relating to the "physical or mental condition of the individual".

Nor does Petitioners' interpretation make sense in light of the options available to CDPH and the constraints imposed upon it. First, religion is not, and has never been, a "special" nonmedical qualification. Second, *Lackner* makes it clear that Section 1258 does not preclude ethical processes that relate to the physical or mental condition of the individual. *Lackner,* 124 Cal. App. 3d at 37-38 (holding that imposition of extensive review and qualification processes including express age requirements, filling out forms, patient certifications and lengthy waiting periods were permitted by 1258's exception for requirements related to mental conditions). Moreover, because this argument would deny the Catholic Hospitals the rights of other hospitals simply by virtue of being faith-based hospitals that exercise the Catholic religion it would directly violate basic constitutional rules and principles discussed below.

Petitioners contend that the exceptions in Section 1258 for requirements related to the physical or mental condition of the individual only permits the consideration of the physical or mental condition where those conditions establish "medical reasons" to deny a tubal ligation, thereby imposing a strictly secular and medical paradigm at odds with faith-based considerations.

(Pet. Post-Hearing Br., 23:23-24:1.) The statutory language says no such thing and, although Petitioners cite *Lackner* for this claim, *Lackner* in fact dictates the opposite conclusion. *Lackner* held that the mental condition exception was fully sufficient to justify the imposition an ethical regime of express age and informed consent requirements that have nothing to do with the medical reasons to have or not have a tubal ligation. At bottom, Petitioners' argument simply attempts to get this Court to sign on to their claim that religious processes have no legitimate place in the acute care hospital setting. Their Petition alleges this over and over again. This is nothing less than Petitioners' deep seated contempt for religion and their attempt to weaponize a neutral state licensing law to target the free exercise of religion. Neither the statute itself nor the First Amendment permit this.

Finally, there is no there evidence that the Catholic Hospitals consider age as a nonmedical factor in request for sterilization review process. Based upon the plain language of the statute, the Catholic Hospitals may lawfully consider a patient's "advanced maternal age", which is recognized in the undisputed medical literature associated with an increased medical risk of uterine rupture an increased maternal mortality. (Resp. Appx. Vol. X, Ex. 133, 118:14-20; 120:20-121:4; *id.*, Ex. 134, 97:10-12; 98:5-12; 99:11-100-4; Resp. Exs. 71, 72, 74.) CDPH plainly retains both the discretion and the expertise to distinguish between prohibited uses of age and advanced maternal age, and it would harm the public if it could not.

C. **Petitioners' Interpretation of Section 1258 Burdens the Catholic Hospitals' First Amendment Rights and Fails Strict Scrutiny.**

The strained effort required to adopt Petitioners' interpretation of Section 1258 in a manner that burdens the Catholic Hospitals' First Amendment rights has always been an exercise in futility because the result is the application of rigorous strict scrutiny that Petitioners cannot hope to satisfy. "[I]t is the rare in which a State demonstrates that a provision passes strict scrutiny". *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (internal quotation marks omitted); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their

'religious status.'" (quotation omitted). If Petitioners' interpretation of Section 1258 were correct, it would invoke the unconstitutional conditions doctrine, the interpretation would make Section 1258 not generally applicable, and the interpretation would have been based upon improper hostility towards religion that CDPH does not share or agree with, and which is contrary to the Attorney General's insistence in binding conditions imposed upon the Catholic Hospitals that they continue the very practices that Petitioners say are unlawful.

The unbroken line of victories for religious freedom and First Amendment rights at the Supreme Court since *Employment Div. v. Smith,* 494 U.S. 872 (1990), hardly supports Petitioners' argument that *Smith* should apply to what everyone agrees is a hospital licensing law. Notwithstanding the fact that Petitioners' post-hearing brief admits that Section 1258 is a licensing law four more times (Pet. Post-Hearing Br., 5:12-13; 6:21-22; 29:15-18; 31:20-22), they still cling to *Smith* and refuse to address the case law relevant to licensing laws to which *Smith* has no application. However, the unconstitutional conditions doctrine prevents the State from granting hospital licenses on the condition that the individual to give up or refrain from exercising a constitutional right. *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 457 (2015); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The Court can only conclude that Petitioners concede that the unconstitutional conditions doctrine requires the application of strict scrutiny to an alleged violation of Section 1258.

Even if Section 1258 were not a licensing law, Petitioners' reliance on *Smith* remains misplaced. As *Fulton* confirmed, very few laws are neutral and generally applicable, and Section 1258—at least as interpreted by Petitioners—is not one of them. Petitioners continue to ignore the lessons of recent Supreme Court authority, all of which has been highly protective of free exercise of religion. The Court itself has not once relied upon *Smith*. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). *Tandon v. Newsom*, 141 S.Ct. 1294 (2021). *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Time and time again, the government has asserted that its law is neutral and generally applicable, and time and time again the Supreme Court has rejected the assertion. This

case is no different.

Not only does Petitioners' weaponizing of Section 1258 make it a targeting law, but the Supreme Court's recent decisions are significant in a case where it is undisputed that the statute in question has exceptions. *Fulton*, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith* "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"); *Tandon*, 141 S.Ct. at 1296 (citing *Roman Cath. Diocese*, 141 S. Ct. at 66; *Masterpiece Cakeshop*, 138 S. Ct. at 1730-32 (state prosecuted religious objections but not secular objections). Section 1258 includes exceptions for secular considerations and therefore must include exceptions for free exercise or withstand strict scrutiny.

Moreover, Petitioners never explain how Section 1258 could be read to burden free exercise while permitting other secular obstacles to remain in place. A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. But Petitioners' own evidence and expert testimony establish that Petitioners' interpretation makes Section 1258 a law that *prohibits religious conduct* (applying religious rules to sterilization requests) *while permitting secular conduct* (allowing non-religious exceptions) that undermine the government's alleged interest in enhancing access to sterilization procedures. This is exactly what the Supreme Court prohibits with its decisions in *Tandon* and *Fulton*. Having made exceptions such as the mental condition exception, which permits the application of secular ethical constraints on who may obtain a tubal ligation, Section cannot be interpreted to prohibit similar non-secular ethical constraints.

Petitioners have never attempted to satisfy strict scrutiny, and their Post-Hearing Opening Brief continues along that path. The law is clear that when government asserts a generalized compelling interest, the law fails strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006). "Rather than rely on 'broadly formulated interests,' *courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants*.'" *Gonzales*, 546 U.S. at 431-32 (emphasis added). Here, if Petitioners' interpretation of Section 1258 were correct, Petitioners would need to show why the

State cannot grant an exception from the statute to accommodate the religious free exercise rights of the Catholic Hospitals when the statute itself says and contemplates that "exceptions" are permissible. Petitioners have *never* addressed the salient question "not whether the [government] has a compelling interest in enforcing its [] policies generally, but whether it has such an interest in denying an exception to" Dignity Health. *Fulton*, 141 S. Ct. at 1881.

Petitioners do not have a *shred of evidence* to support a serious strict scrutiny inquiry, and now they even admit that they have misrepresented the State's compelling interest throughout much of the proceedings. The State's compelling interest is not determined by Petitioners' personal reproductive politics, but by what the State actually says and does. The Catholic Hospitals are licensed by the State, and the Attorney General has ordered them to continue providing the same level of services that they have been providing for years as a matter of state "policy" that is codified in state regulation (*see* 11 Cal Code Reg. § 999.5(f)(8)(C))[6]—which necessarily includes the provision of certain sterilizations when deemed medically and ethically appropriate. The State has made its compelling interest loud and clear; Petitioners are not listening.[7] Instead, Petitioners continue to pretend they know the State's interests better than the State does and that meaningful "strict scrutiny" does not apply.

This case represents an unprecedented attack on religion, violating the foundational principle of constitutional avoidance. Petitioners hijacked Section 1258 and have held the Catholic Hospitals hostage in prohibited entanglement for six years. The State of California effectively balanced the right of access to sterilization with the right to be free of coercive sterilization, the rights of physicians, and the First Amendment rights of religious health facilities. Petitioners have been advancing only their own narrow interests, not the public interest as determined by state regulators, and now beg the Court to meddle with an issue that has far

[6] Specifically, this regulation provides that "[i]t is the *policy of the Attorney General*, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services, including but not limited to emergency room services. The Attorney General shall retain complete discretion to determine whether this policy shall be applied in any specific transaction under review." (emphasis added).

[7] Petitioners plainly *were* listening and attuned to the State's compelling interest when their counsel successfully urged the Attorney General to require the Catholic Hospitals to continue providing post-partum tubal ligations as exceptions to the ERDs for at least five years after the ministry affiliation that created CommonSpirit Health.

reaching consequences that they don't even begin to deal with. The Court should deny the Petition and enter judgment in favor of Dignity Health.

III. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO MINISTERIAL DUTY AT ISSUE IN THIS CASE.

To prevail on their single claim for mandamus, Petitioners must establish a clear, present, and ministerial duty on the part of the Catholic Hospitals to act one, and only one, particular way that has been violated *Bullis Charter School v. Los Altos School Dist.*, 200 Cal. App. 4th 1022, 1035 (2011).[8] The Catholic Hospitals have discretion to adopt any sterilization policy and procedure lawful under Section 1258. A section 1085 writ does not lie when, as here, the respondent has discretion to choose among reasonable interpretations of the statute and is not compelled to act in the way Petitioners contend by a clear and ministerial duty. *See Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265 (2003) ("Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test."); *Unnamed Physicians v. Board of Trustees of Saint Agnes Med. Ctr.,* 93 Cal. App. 4th 607, 618 (2001) ("Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. Thus, a petition for writ of mandamus under Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character.").

Petitioners failed to prove a violation of a clear and present ministerial duty under Section 1258 (or that the statute has been violated in any manner) and thus are not entitled to mandamus relief. As discussed below, alternative, neutral and reasonable interpretations of Section 1258 exist, and CDPH has adopted one of those alternatives.

IV. CDPH INTERPRETS SECTION 1258 REASONABLY AND NEUTRALLY.

When the State or a State agency is charged with interpreting and enforcing a statute, it may elect to enforce any neutral, reasonable interpretation of the statute it determines is appropriate. "[T]he administrative agency's interpretation of the applicable law is given great

[8] The standard would be no different if Petitioners filed their Petition against CDPH.

deference by the reviewing court. The administrative agency's construction of the law need not be the only reasonable interpretation." *Robinson*, 28 Cal. App. 4th at 1516; *see also In re Vaccine Cases*, 134 Cal. App. 4th 438, 452 (2005); *Sternberg v. California State Bd. of Pharmacy*, 239 Cal. App. 4th 1159, 1168 (2015).

Petitioners arrived at their interpretation of Section 1258 by ignoring all of the constraints on statutory interpretation applicable to the government, which must not only balance the interests of advocates for access and against coercive sterilization, but also the rights of providers. CDPH must act neutrally, subject to the doctrine of constitutional avoidance and the unconstitutional conditions doctrine, while remaining mindful of the case law that compels it to grant exemptions absent a compelling interest not to do so.

Even assuming for the purposes of argument that Petitioners' interpretation of Section 1258 is even "reasonable" (it is not), the law does not permit Petitioners to force the government to switch from one reasonable interpretation of a statute to another. And, as this Court has already acknowledged, at least one "reasonable" alternative interpretation of Section 1258 exists, consistent with the Catholic Hospitals' continuous licensure and the Attorney General's Conditions of Consent. For instance, in a discussion regarding the phrase "contraceptive purpose," the Court said this:

> [T]he interpretation that Dignity Health ascribes to 1258, that when 1258 refers to – let me get the statute in front of me. For purposes it should be understood that it is the health facility's purposes, which are at issue, novel issue of California law. *I think that it is a reasonable interpretation* but not the best one. (Resp. Appx., Vol. II, Ex. 22, Tr. 26:3-9 (emphasis added).)

This discussion confirmed that "contraceptive purposes," and, therefore, Section 1258, is subject to more than one *reasonable* interpretation.[9] And, in this case, reasonable and neutral trumps Petitioners' targeting, period. Furthermore, *Lackner* establishes that is reasonable for CDPH to interpret "special nonmedical qualification" as limited to socio-economic factors. *Lackner*, 124 Cal. App. 3d at 32, 37. It is also reasonable for CDPH, as an expert agency, to distinguish between "age" when used in an age/parity stipulation, and advanced maternal age, a

[9] As Petitioners concede, when CDPH asked Senator Beilenson about the potential effect on religious hospitals, CDPH was told "the bill is limited to institutions that permit sterilizations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (Pet. Ex. 1 at 72; Pet. Post-Hearing Br., 8:16-9:1.)

recognized medical risk factor. And, as *Lackner* also establishes, it is reasonable for CDPH and the Court to interpret the exceptions for requirements "relating to" the physical or mental condition of the individual broadly as allowing hospitals establish ethical processes (whether secular or faith-based) which limit access to tubal ligations.

The undisputed evidence also establishes that CDPH does not share Petitioners' view that its reasonable interpretations should be abandoned. Petitioners have shunned the CDPH's confounding interpretation and enforcement of Section 1258 and they pretend they do not exist. But their one surviving claim in this case for six years has been one in which they are borrowing a state licensing law overseen and enforced by an executive agency that does not agree with them. Yet, Petitioners have no offered no evidence on this conflict and deliberately avoided third party discovery of the CDPH.

Because the alternative, neutral and reasonable interpretations of Section 1258 have been found to be reasonable, Petitioners' alternative interpretation is no more than an irrelevant curiosity. The search for a "best" interpretation is misguided, as it deprives the agency of its discretion to select among the reasonable interpretations, which is not a ministerial duty.

A. **CDPH Has Discretion to Choose Among the Reasonable, Neutral Interpretations of Section 1258.**

As Dignity Health has previously briefed, the case law relating to agency enforcement of licensing and regulatory laws compels denial of this petition. While the Court exercises independent judgment in the construction of the statute, it "accords great weight and respect to the administrative construction." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998). The extent of agency deference is "situational" and determined by a range of "complex factors" broadly categorized as those that indicate that the agency has a comparative advantage over the courts and those that show that the agency's interpretation is probably correct. *Id.* Agencies are presumed to have a comparative advantage to the courts when "the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion."

Moreover, "[t]he administrative agency's construction of the law need not be the only

reasonable interpretation." *Robinson v. City of Yucaipa*, 28 Cal. App. 4th 1506, 1516 (1994) (citations omitted); *see also In re Vaccine Cases*, 134 Cal. App. 4th 438, 452 (2005) ("[T]he agency's construction need not be the only reasonable one in order to gain judicial approval."). "As the agency charged with administering and enforcing the [] statutes, [CDPH's] interpretation [] is entitled to deference unless it is clearly erroneous." *Sternberg v. California State Bd. of Pharmacy*, 239 Cal. App. 4th 1159, 1168 (2015).

Further "[w]hen an administrative interpretation is [] long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." *Whitcomb Hotel v. California Emp. Comm'n*, 24 Cal. 2d 753, 757 (1944). Moreover, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." *Moore v. California State Bd. of Acct.*, 2 Cal. 4th 999, 1017–18 (1992).[10]

CDPH is required to interpret and enforce Section 1258 in connection with the licensure of each of the Catholic Hospitals every two years, and the Catholic Hospitals have enjoyed uninterrupted licensure as long as both the hospital and the statute have existed. (Strumwasser Decl., ¶¶ 3, 16-17.) CDPH issues a license only upon "*upon verification of compliance with the licensing requirements*." 22 Cal. Code Regs, § 70117(a) (emphasis added); Health & Safety Code § 1277 ("No license shall be issued by the department *unless it finds* that . . . that the health facility is operated in the manner required by this chapter and by the rules and regulations adopted hereunder.") (emphasis added).[11]

CDPH also interpreted Section 1258 in connection with promulgating informed consent regulations and defending them in *Lackner*. As CDPH has already litigated the reasonableness of

[10] On the other hand, if, instead of Petitioners, it was CDPH seeking to change its long-standing interpretation of Section 1258, all of the *Yamaha* factors related to deference would weigh against a sudden change in policy. Any investigation regarding the basis for the sudden change would reveal improper targeting. And, having already identified a reasonable, neutral interpretation, the *Catholic Bishop* decision (discussed *infra*)would prohibit CDPH from adopting an alternative interpretation that burdens religion, especially because Section 1258 is a licensing law.

[11]The *Lackner* decision cites this statute (124 Cal. App. 3d at 36 and n.8)) and even the CMA in *Lackner* acknowledged this. (OB, 12:23-26.)

its interpretation to final judgment, this Court must afford the greatest levels of deference that interpretation. Moreover, there is substantial evidence that CDPH has a comparative advantage in interpreting Section 1258, as well as the fact that the interpretation is entwined with issues of fact, policy, and discretion, all of which were litigated in *Lackner*. The very fact that this Court has struggled to construe Section 1258 in the face of *Lackner*, and has proposed that it must be interpreted by resort to medical literature (contrary to CDPH's interpretation), along with the policy issues considered by CDPH and the Court of Appeal that Petitioners ignore, are strong indications that CDPH—the expert agency—has a comparative interpretive advantage over this Court. Moreover, CDPH adopted its interpretation more than forty years ago, it is reflected in the sterilization guidelines adopted to effectuate the statute, and it has withstood judicial review. The Legislature is presumed to be aware of CDPH's practices, and there is no evidence it has disagreed with CDPH's interpretation or has undertaken to legislate otherwise.

Petitioners have ignored the legal standard requiring deference to the agency from the outset, hoping the Court will endorse their different gloss on the statute. But they are borrowing a state agency licensing law and so it is essential for the Court to examine how the agency interprets and administers the statute that is committed to its enforcement. At the end of the day, Petitioners are simply relitigating the issues decided in *Lackner*, where a similar physician lobbying group (CMA) advanced the same broad interpretation of Section 1258 against CDPH *and lost* because the Court found that there was no requirement that the statute be read so broadly, CDPH's interpretation was "reasonable," supported by the evidence, and not "arbitrary or capricious." *Lackner*, 124 Cal. App. 3d at 41.[12] The Court of Appeal did not consider whether CMA might offer a better interpretation, or allow CMA to pretend that it knew the State's interests better than the State. The Court of Appeal recognized the plaintiffs there, no different from Petitioners here, were self-interested parties representing private interests. Nothing is different here. Suing the wrong party, rather than the agency and its director, does not change the analysis or result.

[12] Long ago this Court denied a motion by the CMA to intervene in this case. CMA never appealed that final, appealable ruling.

B. **The Doctrine of Constitutional Avoidance Demands That the State Adopt an Interpretation That Avoids Excessive Entanglement With Religion.**

The doctrine of constitutional avoidance is a separate limitation on the power of the Legislature, CDPH, and the Court to construe a statute in a manner that burdens constitutional rights. *Catholic Bishop of Chicago*, 440 U.S. at 502, provides a tutorial on what constitutional avoidance looks like. CDPH is required to eschew any interpretation of Section 1258 that poses "significant risk that the First Amendment will be infringed."[13] *Id.* If one interpretation would so much as burden religion, and a reasonable alternative is available, the latter must be the "best" interpretation under the doctrine of constitutional avoidance. That Section 1258 is a licensing law, subject to the unconstitutional conditions doctrine, is another reason why the doctrine of constitutional avoidance is important, and why the neutral interpretation adopted by CDPH is correct.

Petitioners have never disputed that the State must be neutral. However, Petitioners have never factored neutrality into their argument. Neutrality demands that when the Legislature passes a facially neutral statute like Section 1258, CDPH (or Petitioners here, who purport to stand in CDPH's shoes) must adopt a neutral interpretation absent an "affirmative intention of the [Legislature] clearly expressed." *Catholic Bishop*, 440 U.S. at 501-02. As this Court recognized at the live witness hearing, there is no affirmatively expressed intention of the Legislature that Section 1258 applies to faith-based hospitals or conscience rights in general. (Resp. Appx. , Vol. X, Ex. 133, 8:18-9:21.) That is another reason why Petitioners' interpretation cannot be correct.

In *Catholic Bishop,* the Supreme Court was asked to determine whether the National Labor Relations Act ("NLRA") extended to teachers in church-operated schools. *Id.* at 504. Like Section 1258, the NLRA is broadly worded statute, which neither expressly includes nor excludes private religious schools. *Id.* at 499. The NLRB interpreted the statute to confer

[13] "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). As discussed herein, Petitioners' interpretation of Section 1258 unlawfully conditions a hospital license upon conforming behavior, creating a "substantial" infringement of the Catholic Hospitals' First Amendment rights.

jurisdiction over religious schools, while the schools opposed such jurisdiction on the grounds that the enforcement of the NLRA against them burdened their First Amendment rights. It would be no different had CDPH adopted Petitioners' interpretation of Section 1258 in 1972 and the Catholic Hospitals had alleged that such interpretation burdened their First Amendment rights.

The Supreme Court started with first principles: "The First Amendment, of course, is a limitation on the power of Congress." *Id.* at 499.[14] Accordingly, "if we were to conclude that the Act granted the challenged jurisdiction over [religious school] teachers we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment." *Id.* at 499. In other words, any construction that burdens religion must be rejected in favor of a reasonable neutral construction simply for the purpose of avoiding a strict scrutiny inquiry.

Additionally, the NLRB argued that extending jurisdiction would pose no entanglement concerns because the Board would only "resolve only factual issues such as whether an anti-union animus motivated an employer's action." *Id.* at 502. However, the Supreme Court saw right through the argument, noting that "[t]he resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.*" *Id.* at 501-02 (emphasis added). The proper construction of the facially neutral and ambiguous NLRA was that it did not extend to private religious schools, because if it did it would lead to a series of proceedings about whether the application was constitutional. *Id.* at 501-02. The prohibited inquiry into motive is materially the same as the inquiry regarding contraceptive purpose that has consumed the last six years in this case. The proper interpretation of the facially neutral Section 1258 is one that avoids conferring jurisdiction over an indisputably faith-based decision-making process that leads to intrusive six year inquiries like this one.[15]

[14] The Fourteenth Amendment extends the First Amendment protections of religion to California and CDPH. *Baba v. Bd. of Supervisors*, 124 Cal. App. 4th 504, 512 (2004).

[15] Just as in *Catholic Bishop*, the record here, reflecting a years-long prohibited examination of the defendant's

Petitioners want the Court (and CDPH) to adopt an interpretation of Section 1258 forbidden by the doctrine of constitutional avoidance. But in substance CDPH is no different from the NLRB in *Catholic Bishop*, and Section 1258 no different from the NLRA in that case. The same limitations that apply to Congress with respect to the First Amendment apply to the California Legislature and California courts. When CDPH (and the Court) must interpret and enforce a statute, it too must start with the same first principles that controlled in *Catholic Bishop*.[16]

For purposes of constitutional avoidance, there is no material difference between a factual inquiry about whether anti-union animus motivates a Catholic employer's action or about whether the Catholic Hospitals have a "contraceptive purpose" or apply prohibited "special" nonmedical qualifications, where such inquiry here is entangled with the ERDs and the Catholic Hospitals' Catholic identity itself. It's all pretext to conceal what Petitioners say at least nineteen times in their Petition: they want the Court to make the prohibited finding that the Catholic Hospitals' "sterilization policies reflecting the ERDs … violat[e] … California Health Safety Code §1258."[17] (Amended Verified Petition for Writ of Mandate ¶ 67; *see also id.* ¶¶ 2, 4, 5, 6, 7, 11

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constitutionally protected beliefs and mission, proves the entanglement problem. *See Catholic Bishop*, 440 U.S. at 501-02. Even the Court could not resist asking questions at trial violate the doctrine. (Resp. Appx., Vol X, Ex. 134, 111:18-112:11.) The fact that the Court sustained Dignity Health's objection hardly cures the problem. The forum for the inquiry never should have been provided.

[16] "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. State of Ark.*, 393 U.S. 97, 103–04 (1968).

[17] Petitioners did this at the demurrer hearing, mixing language from the ERDs into their claim. Even then, Petitioners conceded that the type of review performed by the Catholic Hospitals is "medical" and "present and serious pathology" is a phrase from the ERDs not a statute such that Petitioners' interpretation would be relevant. Entertaining Petitioners' complaint that a religious decision-making process "is not what we say it is" is abhorrent, and the six year inquiry to challenge it is exactly the inquiry prohibited by *Catholic Bishop.*

MS. GILL: So what they're saying, as a matter of fact, actually makes no sense. They're saying we don't allow tubal ligations for contraceptive purposes unless it's curing a *present pathology*. That, as a matter of fact, is simply never the case. So *what they're doing in practice is just very different from what they claim their religious directives require*.

THE COURT: I really don't understand that. *If a woman potentially can be harmed by having a pregnancy in the future, having a sterilization procedure so she won't be pregnant in the future is a medical issue, isn't it*?

MS. GILL: *Well, sure, it's medical, but it's not what defendants say it is, which is what's stated in the tentative. That it's directed to cure or alleviate a currently pathology*.

THE COURT: Why?

MS. GILL: Because it's contraceptive. To prevent a future pregnancy is contraceptive.

THE COURT: I'm not sure that I'm going to rule based on that, what sounds to me like, extreme parsing of words. (Resp. Appx., Vol. XI, Ex. 141, 16:8-25 (emphasis added)). It is *medical* and it is much worse than parsing of

14, 20, 21, 36, 47, 49, 50, 51, 52, 53, 54, 56; Resp. Appx. Vol. X, Ex. 134, 23:6-15.) But they are forbidden from litigating their political disputes with Catholic doctrine, there is nothing that requires CDPH to interpret the statute according to their view, and it is forbidden from doing so. Pitting Sister O'Keefe's statements against secular medical literature in order to determine contraceptive purpose is the same as the prohibited inquiry regarding a Catholic school's suspected anti-union motives.

The evidence establishes that CDPH has faithfully interpreted Section 1258 within the constitutional limits imposed upon the State, and balanced the rights of all interested parties. Given a facially neutral statute, and zero evidence of legislative intent to burden or restrict free exercise, both CDPH and the Court must reject any interpretation that "presents a significant risk that the First Amendment will be infringed." *Catholic Bishop*, 440 U.S. at 502 It is entirely appropriate that CDPH never adopted Petitioners' interpretation, and before this Court invited a trial focused on whether the Catholic Hospitals might violate Petitioners' interpretation, Petitioners should have been forced to prove that the State had no choice but to use their interpretation. Petitioners could not and did not ever establish that prerequisite because the Court had found the statute subject to alternative reasonable interpretations.

C. CDPH Litigated Its Interpretation of Section 1258 in *Lackner*.

1. Section 1258 Reflects a Legislative Effort to Address an "Irreconcilable" Conflict.

As Petitioners acknowledge, when Section 1258 was enacted, California faced at least two distinct problems: "women deemed unworthy of procreating, such as low income women, women of color, and incarcerated women, were sterilized without their consent," while at the same time "white middle class women were denied tubal ligations based on their age or family size, to enforce gendered roles as mothers and homemakers." (Pet. Opening Br., 22:6-23:2; Pet. May 5, 2021 Br., 8:2-11.) Because these groups defined and prioritized the issues related to reproductive freedom differently, governments were left to balance "irreconcilable conflicts," which Petitioners entirely ignore. Petitioners contend that the passage of Section 1258 solved both

words; Petitioners entire case is this prohibited, unconstitutional inquiry.

problems, but that is a narrow and incorrect one-sided view of a two-sided issue. Though the passage of Section 1258 successfully removed the socio-economic access restrictions it was intended to remove, it did nothing to protect vulnerable women from coercive sterilization.[18] To protect these women, CDPH was required to balance many competing interests, interpret Section 1258, promulgate regulations that did not violate Section 1258, and defend those regulations through litigation to final judgment in *Lackner.*

Kluchin explains that divisions of race and class "influenced [women's] ideas of reproductive freedom. White women across class, free of medical racism, struggled to gain access to sterilization and to overturn age/parity, spousal consent, and conscience clause policies. *This led many to define reproductive freedom as access to reproductive health services and some to use the courts to transform their personal reproductive politics into public policy*. Poor women, especially women of color, found themselves the targets of coercive sterilization practices . . . [and] tended to view coercive sterilization within the larger struggles for racial equality and economic justice. As such, *[poor women and women of color] advanced a broader definition of reproductive freedom than white women did . . . .*"[19] (Resp. Appx., Vol. XI, Ex. 139, p. 184 (emphasis added).) This latter group of women *favored restrictions, even nonmedical restrictions*, that would stop coercive sterilization.

Considering the nature of the factions' division, it is not surprising that access restrictions were the first to be targeted. In 1970, the American College of Obstetricians and Gynecologists ("ACOG") removed the last of its recommended restrictions on sterilization, and in 1971 several public interest groups, including the ACLU, joined together to launch Operation Lawsuit, "a series of lawsuits filed by white women who wanted voluntary sterilization but who failed to meet the criteria established by some hospitals' policies like the 120 rule." (*Id.* at pp. 114-119.)

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[18] It is unclear how Petitioners conclude that the statute's permission for hospitals not to provide contraceptive sterilization procedures at all could strike a balance between those who wanted unrestricted access and those opposed to coerced sterilization that resulted in "equality of access." (Pet. Opening Brief, 23:3-14.) Under the statue, a hospital that permitted contraceptive procedures could not apply the 120-point rule as a qualifier, but nothing in Section 1258 stopped the hospital from permitting coercive sterilization. As discussed below, the absence of equality of access is what led to the *Lackner* lawsuit.

[19] CMA told the Court of Appeal the same thing in *Lackner*. (Resp. Appx., Vol. XI, Ex. 136, 3:10-5:22.) Petitioners' expert, Dr. Rebecca Jackson, agrees too. (Jackson Decl., ¶ 5.)

Operation Lawsuit and age-parity stipulations were covered in *Good Housekeeping*, which in 1972 was the equivalent of "going viral." (*Id.* at p. 128.) It was at this time, with the spotlight on hospital-imposed age/parity stipulations that still remained pervasive at hospitals across the country and that were the specific target of lawsuits nationwide, that the Legislature adopted Section 1258 in 1972.

2. CDPH Interprets Section 1258.

To describe the passage of Section 1258 alone as furthering the compelling interest of "equitable access" would be to subscribe to a privileged view of the statute. The removal of age/parity stipulations and spousal consent did nothing to aid the plight of women vulnerable to coercive sterilization. They advocated for the *imposition* of restrictions to prevent such abusive sterilization practices. Thus, in the wake of Section 1258's passage, a diverse coalition of feminists of color proposed sterilization guidelines, including waiting periods and consent forms, to combat this sterilization abuse. (Resp. Appx., Vol. XI, Ex. 139, p. 186.)[20]

As Kluchin observes, it became clear that "no single policy could support the reproductive rights of all women because no single definition of reproductive rights existed." (*Id.* at pp. 185-86.) The factions were not aligned, and they were not fighting for equitable access.[21] Each favored its interests over the others'. Thus, California policymakers were now trapped in the "irreconcilable conflict" described by Kluchin. "In order to protect one group of women from forced sterilization, policy makers had to restrict another group of women's access to the procedure. If policy makers chose not to implement guidelines [like waiting periods] in order to maintain the second group of women's right to sterilization on demand, then they continued to allow the first group of women to be at risk for sterilization abuse."[22] (*Id.* at p. 185)

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[20] In California, their cause gained notoriety, particularly in connection with *Madrigal v. Quilligan*, a class action lawsuit brought by Latina victims of involuntary sterilization. (Resp. Appx., Vol. XI, Ex. 139, pp. 198-203.) The court ultimately ruled for the hospital and physicians, sparking further outrage.

[21] Access to a postpartum tubal ligation following a caesarean section at the Catholic Hospitals truly is equitable and Petitioners still are not satisfied. From the point of view of public interest standing, it is important to note that the faction of activists arguing that Section 1258 broadly prohibited all nonmedical factors has always been willing to let other women suffer. Whether it was coerced sterilization, or the women in the North State and Sacramento area who will be deprived of the option of a postpartum tubal ligation. Petitioners would rather no one receive a tubal ligation if Chamorro cannot have one, regardless of the medical risk factors faced by future patients. As Judge Goldsmith observed long ago, the State does not have to leave its common sense at the door.

[22] The Court should note how popular "equitable access" was when California had it and who opposed it. As Dignity

In 1976, CDPH (led by its Director Dr. Jerome Lackner) proposed sterilization informed consent regulations under its license enforcement authority, Health & Safety Code § 1250, *et seq*., applicable to *all* patients seeking sterilization. The sterilization guidelines, which still exist as applicable only to Medicaid patients, could never have come into existence unless CDPH interpreted Section 1258 in manner to permit them to be promulgated, and which was ultimately upheld by the Court of Appeal.[23] *Lackner*, 124 Cal. App. 3d at 32, 37.

The guidelines (and eventual regulations) were strongly opposed by CMA, a physician advocacy group like Petitioner PRH, which argued, like PRH, that the regulations interfered with physicians' ability to practice medicine,[24] as well as by California NOW and others who share Petitioners' opposition to all nonmedical restrictions, regardless of the detriment to others.[25] (Resp. Appx., Vol. XI, Ex. 139, pp. 200-01) Like Petitioners, opponents asserted that Section 1258 made contraceptive sterilization operations "freely available." (Resp. Appx., Vol. XI, Ex. 136, 5:15-22; 8:1-2)

The CMA complained that restrictions applicable to private pay patients were "noxious" and "paternalism." CMA asserted that no less than five different aspects of the regulations, including the mandatory waiting periods, were "nonmedical qualifications" prohibited by Section 1258. (*Id.* at 16:5-14.) CMA complained that the regulations exceeded CDPH's statutory

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Health has previously noted, equitable access is not what Petitioners think it is. Equitable access invariably means erecting barriers that do not exist for some, as much as it means removing barriers for others. Equitable access is waiting periods for everyone, regardless of whether they result in a nonmedical delay for certain women. As reflected by *Lackner*, as soon as the State imposed regulations that had the effect of making access more equitable, those, like Petitioners, who wanted unrestricted access sued because equitable access was less favorable to them than unrestricted access.

[23] California's guidelines applicable to private pay patients, which included waiting periods, existed until 1980 when the federal government demanded that California conform its regulations to federal law, which required California to repeal the regulations applicable to private pay or insured patients. (Resp. Appx., Vol. XI, Ex. 139, p. 202.) When the federal guidelines went into effect in 1981, over the continued objection of activists demanding restrictions on abusive providers, "California bore the distinction of being the only state to have to weaken its guidelines to accommodate new federal policy." *Id.* at 203.

[24] However, at that point the evidence was overwhelming that, left unregulated, physicians would coerce poor patients into involuntary sterilization whether they were male or female, insured or Medi-Cal, poor minorities, or otherwise. *See Lackner*, 124 Cal. App. 3d at 42 n.19.

[25] As Kluchin notes, Planned Parenthood, NOW, and NARAL all opposed restrictions aimed at ending coercive sterilization at state and federal levels, "privileging" their concerns about access over the concerns of others. (Resp. Appx., Vol. XI, Ex. 139, p. 193; *see also* pp. 201, 204-05) *See, e.g., Lackner*, 124 Cal. App. 3d at 41 ("CMA advances the extraordinary thesis that the hospital regulations are not 'reasonably necessary' because a patient sterilized without his or her informed consent can recover damages for negligence . . . . The merit in the principle by which recovery for an injury is exalted over prevention of an injury wholly escapes us").

authority to regulate sterilization procedures, and that, if imposed, would allow CDPH "to control any area of physician practice" such that it could tell a female patient to get "her breasts lifted, her gallbladder removed, or her uterus out." (*Id.* at 11:13-18.) CMA argued that the regulations "apply to all patients . . . includ[ing] persons of varying levels of sophistication and education with differing psychological and physiological needs." (*Id.* at 7:17-22.)

Of particular relevance here, CMA argued that the regulations "violate an existing controlling statute [Section 1258] which prohibits imposing non-medical qualifications on patients seeking sterilization procedures." (*Id.* at 15:17-23.) CMA asked the Court to adopt the "ordinary meaning of the term 'special nonmedical qualification.'" (*Id.* at 16:32-17:2.) Moreover, CMA complained that if the exception for considering the patient's "mental condition" were so broad as to permit the nonmedical regulations, then CDPH (or any health facility) could "prescribe an infinite number of requirements."[26] (*Id.* at 16:21-31.)

CDPH responded: [27]

> The regulations do not impose nonmedical qualifications prohibited by Section 1258. This is a fact best understood in light of past restrictive hospital regulations on voluntary sterilizations.
>
> In many hospitals, a doctor with a patient with a tubal ligation must submit an evaluation of the case to a committee of physicians. Hospital committees have rejected applications because of age, total number of pregnancies, not enough living children, possible improvement of economic level and possible death of a living child. [ACOG] has recommended socio-economic sterilization on an age/parity (number of children) ratio. It was this type of nonmedical qualification imposing arbitrary restrictions on free choice which led to the enactment of Section 1258. "Selected 1972 California Legislation," 4 Pacific Law Journal, pp. 679, 680.

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[26] This complaint is similar to Petitioners' complaint of a "pseudo-medical" approach, and purports to quibble that the factors the Catholic Hospitals consider are not medical factors; but there is no evidence to support Petitioners' argument, which collapses into a complaint that the Catholic Hospitals follow Catholic doctrine. (Pet. Opening Br., 27:19-20; 28:27-28:2.)

[27] "The Court: [Section 1258] Does use the word any, but it also uses the word special. Is there any indication as to what special meant?
Ms. Kandel: No, Your Honor. There's zero indication that special was limited to secular non-medical qualifications as opposed to religious non-medical qualifications.
The Court: So you would essentially read the word special out of 1258, and have it interpreted as any non-medical qualification?
Ms. Kandel: I think they were highlighting that institutions could not be imposing non-medical qualifications and special just highlighted again that these are not related to medical.
The Court: Okay. Somewhat like a belt and suspenders.
Ms. Kandel: Yes. (Resp. Appx., Vol. X, Ex. 133, 15:1-1.)

> The nonmedical qualifications specifically identified by Health and Safety Code section 1258—age, marital status, and number of natural children—reflect legislative concern over restrictive regulations governing voluntary sterilizations based on social, rather than medical considerations. (Resp. Appx., Vol. XI, Ex. 137 at 14.)

As discussed in more detail below, the *Lackner* court agreed with CDPH.

3. CDPH Enforces Section 1258.

It goes without saying that absence of evidence that CDPH enforces Section 1258 the way Petitioners want it enforced is not the same thing as absence of evidence of enforcement. The licensing laws and regulations Dignity Health has cited make it clear that a hospital cannot be licensed or relicensed *unless* the agency *finds* the hospital to be compliance with Section 1258, among other laws. Health & Safety Code § 1277; 22 Cal. Code Regs, § 70117(a). It was Petitioners' burden to establish that CDPH interprets and enforces Section 1258 differently, yet they did nothing. The evidence before this Court establishes that CDPH interprets Section 1258 in a manner that allows it to eliminate age/parity stipulations, spousal consent, and coercive sterilization—all of which were major problems at the time of enactment. But there is no evidence that these issues were ever a problem at the Catholic Hospitals and, based upon the evidence, they are no longer a problem at any California hospital. That is enforcement of the statute consistent with a neutral and reasonable interpretation of Section 1258, and consistent with the State's articulation of its own compelling interests. Section 1258 obviously does not compel an interpretation that *requires* the State to burden free exercise in a manner that would result in fewer sterilization procedures.

V. THE EVIDENCE ESTABLISHES THAT THE CATHOLIC HOSPITALS DO NOT VIOLATE SECTION 1258.

A. The Evidence Establishes That the Catholic Hospitals Do Not Consider Prohibited "Special" Nonmedical Qualifications.

1. CDPH Reasonably Interprets "Special Nonmedical Qualifications" as Socio-Economic Factors.

When CMA sued Lackner, CDPH and the Attorney General were required to brief questions regarding the interpretation of Section 1258, and the Court of Appeal was required to determine whether the informed consent "regulations [were] consistent with the legislative

concerns of section 1258 regarding sterilization operations." *Lackner*, 124 Cal. App. 3d at 39.

As described above, CDPH has always interpreted "special nonmedical qualifications" to be limited to socio-economic considerations, such as the age/parity stipulation that ACOG supported for so long. The Court of Appeal agreed. "The 'nonmedical qualifications' named in the statute—age, marital status, number of children—*unambiguously* imply that the evil in mind is the use of socio-economic factors to determine whether or not to permit an individual to be sterilized." *Lackner*, 124 Cal. App. 3d at 37 (emphasis added).

It is not an accident that Section 1258's prohibition on the consideration of "special" nonmedical factors expressly identifies age, number of natural children, and marital status, as those factors address two of the three primary complaints of those who prioritized the removal of restrictions—age/parity, spousal consent, and conscience clause policies. (Resp. Appx. Vol. XI Ex. 139, p. 184) By eliminating consideration of age, number of children, and marital status, Section 1258 effectively ended age/parity stipulations and spousal consent restrictions.[28] It is worth noting that Section 1258 closely followed ACOG's own abandonment of age/parity stipulation guidelines, and forty years later, ACOG still acknowledges that patients must seek referrals to other institutions if they seek procedures prohibited by the protected conscience rights of the hospital. (Resp. Appx., Vol VI, Ex. 119, pp. e1-e2, e6.)

Lackner establishes judicial approval that such a construction of "special nonmedical qualifications' was reasonable, if not exclusive. Moreover, this interpretation has stood for 40 years without contradiction. The Legislature is presumably aware of a published decision of the Court of Appeal from 1981 and has not taken contrary action in the 40 years that followed *Lackner*. *See Moore v. California State Bd. of Acct.,* 2 Cal. 4th 999, 1017–18 (1992); *Whitcomb*, 24 Cal. 2d at 757; *Conrad v. Med. Bd. of California*, 48 Cal. App. 4th 1038 (1996), citing *People ex rel. State Bd. of Med. Examiners v. Pac. Health Corp*., 12 Cal. 2d 156, 160-61 (1938).

Having obtained judicial approval of an interpretation of Section 1258 that excludes religion from the category of "special" nonmedical qualifications, there is no basis for the

[28] It is no accident that conscience of the provider was not listed as a "special nonmedical qualification", nor is it an accident that all efforts to impair those conscience rights have failed to date.

suggestion that CDPH must change its interpretation nor is there evidence that it has.[29] Indeed, CDPH may well believe it is bound by *Lackner*. *See Capen v. Shewry*, 155 Cal. App. 4th 378, 390 (2007) ("since an administrative agency is mandated to follow the judicial interpretation of a statute, once that occurs there is no interpretive ambiguity for the agency to resolve"). Regardless, CDPH has continuously licensed the Catholic Hospitals, and the Attorney General has imposed the Conditions of Consent that require the Catholic Hospital to provide tubal ligations as exceptions to the ERDs, consistent with state "policy" embodied in a regulation. See n. 6 *supra*. All of this underlines the State's reasonable interpretation of Section 1258, at odds with Petitioners' claims.

2. The Catholic Hospitals' Religious Decision-Making Is Not a Special Nonmedical Qualification.

There is no support for Petitioners' interpretative leap from a prohibition on consideration of "special nonmedical qualifications" like the patient's "age, marital status, and number of natural children" to a prohibition on the Catholic Hospitals' free exercise of religion. (Pet. Post-Hearing Br., 20:1-6.) Petitioners have never pointed to any words in Section 1258 that indicate that the health facility's free exercise rights are "special nonmedical qualifications," and there is nothing in the legislative history to support such a claim. As Dignity Health has previously noted, the statute would have been struck down decades ago as unconstitutional if it meant this.

Petitioners acknowledge that it would be perfectly appropriate to turn away patients based upon hospital-wide policies, like prohibiting non-emergency services based on inability to pay, which is plainly a permitted nonmedical qualification. (*Id.* at 22:25-26.) The Catholic Hospitals' Catholicism is no different. So even if the Catholic Hospitals' Catholicism were considered a nonmedical factor, it is plainly not a *special* nonmedical qualification that applied uniquely to particular patients, such as Ms. Chamorro, and not to other patients.

Nearly all of the "special nonmedical qualifications" identified by Petitioners, including application of the "religiously-based sterilization policies" or application of the ERDs, relate to the Catholic Hospitals' faith and are not qualifications *or characteristics of the patient* like the

[29] Had Petitioners filed their mandamus claim against CDPH, it too would fail because the State does not have a ministerial duty to adopt Petitioners' interpretation of Section 1258.

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other factors identified in Section 1258. The ERDs are not moral qualifications that a patient or "individual" is required to meet, as the statute specifies. The ERDs are *institution-wide* rules imposed on the Catholic Hospitals, which are required to comply with them. The Sterilization Policy and ERDs never prevented Ms. Chamorro from going elsewhere; they absolutely prohibited the Catholic Hospitals from tolerating the procedure she requested for contraceptive purposes.

Much of the evidentiary hearing reflected Petitioners' case-long confusion about the Catholic Hospitals' sterilization review process. For instance, in the context of the sterilization review process, "medical necessity" is the shorthand for describing why a tubal ligation may be permitted notwithstanding ERD 53's prohibition on direct sterilization.[30] "Medical necessity" reflects the judgment of the respective review committee, considering Catholic doctrine and the medical factors provided by the patient's physician, that the procedure will "cure or alleviate a present and serious pathology" *as that term is used in the ERDs.*[31] As Sister O'Keefe testified, "The religious result [of the review of medical information] is that it's—it—we're not doing it for contraceptive reasons only. We're doing it because there is an underlying pathology that is there that the sterilization will take care of."[32] (Resp. Appx. Vol. X, Ex. 134, 54:11-122; *see also* 43:7-44:3; 52:13-53:9.) The "medical indications" are any and all medical risk factors that would support a determination of medical necessity. (Resp. Appx. Vol. X, Ex. 134, 91:13-18.)

Petitioners have never understood "medical necessity" or "medical indications" in the context of the Catholic Hospitals' sterilization review and request process. This is a purely religious inquiry; the Catholic Hospitals have never contended that "medical necessity" has any relevance to Section 1258, which does not facially require or prohibit "medical necessity." Petitioners offered no evidence that even a single physician was confused by any of these aspects

[30] ERD 53 provides, "Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available."

[31] The fact that there is no secular way to measure "medical necessity"—a religious inquiry— does not support the proposition that it is "a made up concept" or that it is prohibited by Section 1258; rather, this is the very point of Dignity Health's entanglement argument. Calling this faith-based decision-making "made up" is just another of the countless instances of Petitioners' extreme hostility to religion and its quest to have the Court memorialize that hostility in its ruling on the writ petition.

[32] As used in connection with the sterilization request review process, "medical necessity" is "focused on risk factors [for maternal morbidity and mortality] in the future." (Resp. Appx. Vol. X, Ex. 134, 121:14-122:7.)

of the Catholic Hospitals' decision-making process,[33] which refutes Petitioners' claim that the Catholic Hospitals do not "expressly ask" for information regarding "increased maternal morbidity and mortality" (Pet. Post-Hearing Br., 27:23-27). Such factors are what the committee's inquiry is about. The evidence establishes that Dr. Van Kirk was perfectly aware of the rules—both MMCR's and ACOG's—but just refused to follow them. (*See* Resp. Post Hearing Brief, 23:1-24:3.)

Similarly, Petitioners continue to misunderstand and misrepresent the sterilization review committee. It is undisputed that *no procedure* may be performed within a Catholic Hospital that violates Catholic faith and doctrine. *All patients and procedures* are subject to this limitation. The evidence establishes that tubal ligation is the only procedure performed with any regularity at the Catholic Hospitals that requires examination of the delicate and complex moral issues addressed in the ERDs.

It is entirely unsurprising that the "tubal ligation review committee" only exists for patients seeking tubal ligations. It is also unsurprising, and irrelevant, that Dr. Jackson has never encountered a similar committee in her practice, which has been exclusively limited to secular hospitals. However, Dr. Jackson readily conceded that ethics committees are used at secular hospitals for the same purpose: review of complex, moral issues. (Resp. Appx. Vol. X, Ex. 133, 108:12-109:14). Under Petitioners' view, the Catholic Hospitals would be in a better legal position if they left the review to an ad hoc process, rather than a more formalized one designed to respond most expeditiously to physicians' requests, which is nonsensical.

Regardless, the structure of the committee is irrelevant because it does not rely on prohibited "special" nonmedical factors to deny a request for sterilization. When CDPH briefed the issue in *Lackner*, it focused on the impermissible socio-economic factors hospitals had considered in "rejecting" applications for sterilizations. (Resp. Appx. Vol. XI, Ex. 137, at 14.) The evidence is undisputed that every request for sterilization that the Catholic Hospitals reject is

[33] The only physician PRH identified who did not testify at the hearing is the same physician whose own refusal to follow the hospital's rules regarding the ERDs resulted in the *Minton* litigation. The evidence establishes that all physicians, including Dr. Van Kirk, are trained when they agree to join the Catholic Hospitals' respective medical staffs and agree to comply with the ERDs. (Resp. Appx. Vol. X, Ex. 134, 88:2-89:20; Resp. Exs. 18 and 19.)

rejected for the same reason: the ERDs, which are not a "special" nonmedical qualification. (Pet. Ex. 22 *et seq*.) Section 1258 has no application to a committee that considers medical risk factors as pertinent to the inquiry of whether *to allow* the procedure.

3. Section 1258 Does Not Require a Predictive Model.

Petitioners act as if the kind of risk analysis performed by the Catholic Hospitals, based upon review of medical factors indicative of increased risk of maternal morbidity and mortality, is without precedent because there "is no reliable metric for determining which pregnancies will develop [] complications." (Pet. Post-Hearing Br., 25:23-25.) This argument is not supported by Section 1258 or common sense. The world has spent the past two years in risk deterrent and mitigation mode despite the fact that it cannot be predicted with certainty who will become infected with COVID-19. The exceptions for medical considerations does not require the review committee to make predictions, which are not required from a pastoral application that seeks to determine whether sufficient medical risk exists to allow the procedures when considered in connection with the ERDs.

Fertility services are a multi-billion dollar industry *with no guarantees*, but no one accuses fertility doctors of practicing a pseudo-science because they cannot guarantee pregnancy. This is no different from wearing masks to prevent the transmission of COVID-19 or cigarette packs bearing cancer warnings; there is no guarantee that these diseases will occur without these precautions. But it would make no more sense for Chamorro to shun a mask in a large indoor crowd because there is no way to confirm that she will become infected than it would to "throw[] away your umbrella in a rainstorm because you are not getting wet." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsberg, J., dissenting).

The fact that uterine rupture cannot be predicted with certainty does not invalidate numerous studies that have identified a statistically significant increased risk of uterine rupture correlated to certain factors, like advanced maternal age and uterine scars. The suggestion that the absence of a predictive model is a reason to ignore known risk factors is the same backwards logic used by interests groups advancing their own interests to the detriment of others. *See, e.g., Lackner*, 124 Cal. App. 3d at 41. Just like when CMA ignored the mental condition exception

with respect to the sterilization guidelines, Petitioners' argument that Section 1258 requires the Catholic Hospitals to ignore the physical condition exception is contrary to CDPH's interpretation, absurd, and, if adopted, would harm the public.

B. The Evidence Establishes That the Catholic Hospitals' Religious Decision-Making Process Only Considers the Physical or Mental Condition of the Patient.

1. Section 1258 Unqualifiedly Permits Health Facilities to Impose "Requirements Related to the Physical or Mental Condition of the Individual."

Section 1258 provides: "[n]othing in this section shall prohibit requirements relating to the physical or mental condition of the individual . . . ." The Catholic Hospitals have never asserted that these exceptions[34] *require* a review of medical factors to permit a procedure, but simply that such a review is not prohibited by the statute. There is nothing evident from the text of the statute or the legislative history to support Petitioners' contention that the statute must be read to permit consideration solely of counterindications for the procedure.[35] (Pet. Post-Hearing Br., 23:19-24:7; 26:16-27:2.) This is more semantic games. Whether the informed consent procedures are described as conditions imposed to determine a patient's capacity to consent to a procedure so that it may proceed, or to determine incapacity so that the procedure may not go forward, it's the same thing. The legislative history cited by Petitioners merely confirms that "requirements as to the individual's physical or mental condition may continue to apply in determining whether the operation should be performed." (Pet. Ex. 1 at 30.)

The fact that CMA and CDPH disagreed in *Lackner* about whether the regulations blanketly imposed on all patients seeking sterilization procedures were "paternalistic" and

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[34] Even Petitioners call them "exceptions." (Pet. 5/5/21, p. 14 n.2.)

[35] Petitioners' citation to the Legislature's distinction between therapeutic and voluntary contraception is of no help, and there is nothing more in the legislative history regarding this distinction. (25:3-5.) According to Petitioners, the Catholic Hospitals' views on contraception depart from the secular medical standard and thus are arbitrary. That is more targeting of the Catholic Hospitals. Petitioners also contend that Section 1258 is supposed to eliminate arbitrary obstacles to contraceptive procedures. But Petitioners also concede that the hospitals can lawfully prohibit all tubal ligations based upon their religious beliefs, which does nothing to eliminate arbitrary obstacles. As the Catholic Hospitals' evidence makes clear, tubal ligations are only permitted when medical risk factors are present that establish an increased risk to the mother and never for contraceptive purposes. At the beginning and end of the day (starting with the Complaint and ending with Petitioners' briefs), Petitioners admit that they are complaining about a religious decision, so neither Petitioners nor the Court have any basis to judge or second-guess whether that decision is right or wrong or factually accurate compared to Petitioners' preferred standard.

"nonmedical", or relevant to the mental condition exception, is an important part of the interpretive puzzle. The exception is broader than even what can be determined by resort to medical literature. The current, lawfully imposed waiting periods applicable to only those who receive government assistance, do not meet the standard set by the Court in its summary judgment order. (Court's April 30, 2020 Order, 2:13-14.) The Court cannot impose a standard of interpretation inconsistent with that used by CDPH and upheld in *Lackner.*

Lackner demonstrates that the exceptions for physical and mental condition are broadly interpreted, which is why the Court should not substitute Petitioners' judgment for that of the expert agency. The CMA made the same complaints that Petitioners make here that interpreting Section 1258 broadly would create loopholes that swallowed the rule. That never happened, and agency deference trumps Monday morning quarterbacking.[36]

2. The Catholic Hospitals Consider Only Medical Risk Factors.

There is no evidence that the Catholic Hospitals consider a patient's marital status, or number of children, or that they have ever used anything like the 120-point rule or otherwise used age as a socio-economic consideration.[37]

Contrary to Petitioners' unsupported assertion, the undisputed evidence establishes that the number of prior C-sections, advanced maternal age, gravida, and para are all medical factors, which relate to a patient's risk of future uterine rupture.[38] (Pet. Post Hearing Br.,18:7-8; Resp.

[36] Moreover, to this day Petitioners agree with CMA that a mandatory days-long waiting period imposed on a healthy woman with full capacity to make her own decisions is medically indefensible as relevant to the mental or physical condition of that patient.[36] That such waiting periods are imposed only upon poor women makes waiting periods even less defensible as a mental condition requirement. ACOG agrees. (Resp. Ex. 119, pp. e4-e5 ("Sterilization consent form barriers are estimated to be the direct cause of 24–44% of unfulfilled requests . . . . [T]he current system may place an unreasonable burden on patients who request sterilization . . . .").

[37] Petitioners create another new limitation, which does not exist on the face of Section 1258, when they contend that the Catholic Hospitals cannot consider any medical qualifications that "afford the committee insight into how many children the woman already has." (Pet. Post-Hearing Br., 18:23-28.) Petitioners make this strawman, bootstrapping argument notwithstanding the fact that there has never been any evidence that the Catholic Hospitals consider how many children any patient has.

[38] Petitioners have raised other factors as well. There is no evidence that the North State Hospitals ever considered a patient's medical insurance in connection with the sterilization review process. (5/18 31:10-32:4.) The only evidence Petitioners ever cited was a single case at one of the Sacramento Hospitals, where the patient's physician had privileges at a non-Catholic hospital where the patient delivered her baby. Essentially, in that case the physician's patient was never a patient of the hospital. Similarly, Petitioners continue to argue that the Catholic Hospitals do not consider obesity, based upon two cases in which requests were denied, notwithstanding numerous instances in which requests were granted.

Appx. Vol. X, Ex. 133, 111:17-112:11; 115:2-8; 118:14-20; 120:20-121:4; see also Resp. Appx. Vol. X, Ex. 134, 84:20-85:17, 96:22-26, 97:10-98:12, 99:11-100:20, 100:5-12; 97:10-12; Resp. Ex. 71, 72, 74; McGrath Decl., ¶ 45, Ex. 66, ¶¶ 64, 65, and 68.) Petitioners raise quibbles regarding obesity and heart disease, but no one disputes these are medical risk factors, and the broad exception gives the Court no reason to individually adjudicate a patient's risk for uterine rupture.[39]

In fact, as Dr. De Soto testified the entire review process is driven by medical information provided by the patient's physician, who provides "all the information" about "any risk factor [the physician] believe[s] is a risk factor in future pregnancies for the mother." (Resp. Appx. Vol. X, Ex. 134, 118:27-120:19.) As Sister O'Keeffe testified, the Committee performs a case-by-case review of each request, looking "at what is documented by the physician" to determine whether to approve the request. (Resp. Appx., Vol. II, Ex. 33, at 22:13-23, 32:22-23:7, 74:6-16; Ex. 32, at 145:12-146:1.) Obviously, the physician's role is to document medical facts about his or her patient.

So, we return to the question posed at the demurrer hearing: Are "age" as a "special nonmedical qualification" and "advanced maternal age" the same thing under Section 1258? The lawful and reasonable interpretation of Section 1258 adopted by CDPH permits—indeed, demands—that CDPH recognize they are two completely different things.

"Age" is described as a "special nonmedical qualification" in the statute. However, Dignity Health has submitted undisputed evidence that "advanced maternal age"—unlike the generic "age"—is a medical risk factor for maternal morbidity and mortality in the medical literature. (Resp. Appx. Vol. X, Ex. 133, 118:14-20; 120:20-121:4; *id.*, Ex. 134, 97:10-12; 98:5-12; 99:11-100-4; Resp. Exs. 71, 72, 74.) This makes it a lawful consideration under Section 1258's second paragraph, which permits review regardless whether the Court applies "an objective standard grounded in medical literature on sterilization operations," or CDPH's standard, which focuses on "medical considerations," advanced maternal age meets the "physical

[39] Petitioners also identified two responses to requests that referred to the patient's young age. However, those requests were granted and they represent two out of over 400 requests.

condition" exception.[40] Refusing to distinguish between "age" and "advanced maternal age" makes no sense given the evidence before this Court concerning the consideration of advanced maternal age, a medical risk factor.

Section 1258 recognizes that age is also relevant to determining the age of majority and notes that it does not affect any such relevant law. The informed consent regulations that led to *Lackner* require a patient to be 18 years old (an age consideration) at the time of consent. 22 Cal. Code Regs., § 70707.1(a)(1). Obviously, CDPH recognizes a difference between age as related to the mental condition of the patient in giving informed consent, and age as a prohibited "special nonmedical qualification." So there is no reason for CDPH not to make a distinction when the question is whether advanced maternal age is a legitimate medical consideration, in light of the express exception allowing "physical condition" "requirements". The public relies upon agencies—and their expertise—to make precisely such distinctions; it is the entire point of agency deference. The Court will find copious, undisputed evidence in the record that advanced maternal age is a risk factor recognized in medical literature, though nothing in the record that supports lawfully imposed mandatory waiting periods on women based upon their ability to pay. (Resp. Appx. Vol. X, Ex. 133, 118:14-20; 120:20-121:4; *id.*, Ex. 134, 97:10-12; 98:5-12; 99:11-100-4; Resp. Exs. 71, 72, 74.)

Thus, contrary to being an effort to "evade" any prohibition in Section 1258, it is *more* reasonable to interpret Section 1258 in a manner that permits consideration of advanced maternal age, which is recognized as a medical risk factor in medical literature, even as the law prohibits consideration of age as used in the 120-point rule, for which medical literature lends no support. The reality is that such distinctions are drawn all the time in other contexts. *See, e.g., Cornell v. Berkeley Tennis Club*, 18 Cal. App. 5th 908, 929 (2017) (weight discrimination claim under ADA and FEHA exists if obesity has a "physiological cause" (as opposed to, for example, socio-economic). There is no evidence that CDPH, an expert agency, cannot tell the difference between

[40] As noted elsewhere, there is zero medical literature supporting the imposition of waiting periods on Medicare patients as relevant to the mental capacity of those patients. Nonetheless, such nonmedical restrictions remain lawfully imposed in California. Accordingly, California adopted regulations based upon a different interpretation of Section 1258, which have been upheld by the Court of Appeal. The Court cannot apply a standard dependent on resort to medical literature.

advanced maternal age and an age/parity stipulation, and no legislative intent that it should be prohibited from doing so.[41]

Rather than following its own standard, the Court must, again, give "great weight" to CDPH's construction that was upheld in *Lackner*, which is reflected by the Catholic Hospitals uninterrupted licensure acknowledging the distinction between age/parity stipulations and advanced maternal age, and which re-licensure continued repeatedly, through the pendency of this litigation. The Court cannot find that it would be *unreasonable* for CDPH to make this distinction.

A more review of the evidence reveals that the Catholic Hospitals do not use "age" in a prohibited way. Petitioners misrepresent their "age" pie chart.[42] A more thorough attempt to review statistical evidence would begin including all six Catholic Hospitals and recognizing that they allowed 433 of the 526 total requests, or just over 82% of all requests. (Pet. App. Ex. 22; Resp. Appx Vol. XI, Ex. 140.) Of the 433 requests allowed by the Catholic Hospitals, 265 (or over 61%) were for women who had not yet reached advanced maternal age (34 years old or younger). *Id.* Of the 92 requests denied by the Catholic Hospitals, six were on behalf of women 35 years old or older. *Id.* The evidence does not support Petitioners' claim that that the Catholic Hospitals use age in a manner prohibited by *Lackner* or CDPH.

Finally, it is undisputed that the Catholic Hospitals only consider advanced maternal age as a medical risk factor within the larger context of a religious decision-making process guided by an interpretation of the ERDs. Petitioners never explain the legal basis for piercing a constitutionally protected religious decision-making process to address a single aspect of the statute that they find objectionable. Indeed, there is no authority for the proposition; otherwise

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[41] As Dignity Health has previously argued, these considerations strongly favor abstention. The same result would be accomplished by denying the Petition and letting Petitioners take up their arguments with the State. *See Alvarado v Selma Convalescent Hospital*, 153 Cal. App. 4th 1292, 1306, n.5 (2007) (affirming dismissal of claim against nursing homes for alleged understaffing of facilities, finding that "[t]he [CDPH] has the power, expertise and statutory mandate to regulate and enforce [Health and Safety Code] section 1276.5, and [n]othing in this opinion is intended to preclude plaintiff from pursuing appropriate writ relief pursuant to the Code of Civil Procedure to compel the [CDPH] to … enforce the requirement" that nursing homes provide a certain number of nurse hours per patient per day).

[42] Petitioners' purported statistical evidence is unsupported by an expert declaration, which the Court should require, considering that Petitioners confuse correlation with causation. Moreover, Petitioners apparently excluded the results from two of the six Catholic Hospitals, which further skews their results. Petitioners do not explain the omission.

there would be no such thing as the ministerial exception or church autonomy.[43]

C. The Evidence Establishes That the Catholic Hospitals Do Not Perform Operations for Contraceptive Purposes as a Matter of Faith.

Section 1258's prohibition on consideration of "special" socio-economic factors does not extend to the faith and conscience rights of the health facility. It is undisputed that ERD 53 prohibits "direct sterilization," or sterilization for contraceptive purposes,[44] and permits procedures that "induce sterility . . . when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Id.* It is further undisputed that the Catholic Hospitals are required to, and do, comply with the ERDs. And it is undisputed that the interpretation and application of the ERDs are matters of faith; the ERDs are not a statute to be interpreted by CDPH, Petitioners, or the Court.

When enacting Section 1258, the Legislature clearly wrote and intended the question to turn on the health facility's "purpose," but the text gives no indication the Legislature was inviting a searching inquiry regarding a Catholic health facility's obvious *lack* of a contraceptive purpose. (Pet. Post-Hearing Br., 8:10-12; Pet. Ex. 1 at 72.) Senator Beilenson told CDPH that "the bill is limited to institutions that permit sterilizations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (*Id.*; Pet. Post-Hearing Br., 8:16-9:1.)[45] The Catholic Hospitals have made it clear from day one that they do not allow operations for "contraceptive purposes" as a matter of faith and in adherence to the ERDs.

The Court has already found that Section 1258 can be "reasonably" interpreted to focus upon the health facility's purpose. The Catholic Hospitals' witnesses provided extensive evidence showing that in those cases where a tubal ligation is allowed, it is *never* for a contraceptive purpose. (Resp. Appx. Vol. X, Ex. 134, 26:10-27:10; 27:22-28:24.) The Catholic

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[43] Every minister plaintiff would win if he or she could somehow untangle the allegedly prohibited consideration. It is the entire process that is protected. For example, *Guadalupe* held that the establishment clause prohibited an inquiry into whether the plaintiff's breast cancer was relevant to the school's religious decision. *Guadalupe,* 140 S. Ct. at 2059. That is indistinguishable from an inquiry focused on age within a religious decision.

[44] Petitioners confuse political objections to sterilization policy with unwaivable First Amendment rights. (Pet. Post-Hearing Br., 9:1-5.) While there is no evidence one way or another regarding the position of Catholic hospitals in 1972, the clearest inference is that the Catholic Hospitals would not have objected because they never perform any procedure for contraceptive purposes. *Compare* Petitioners' Post-Hearing Brief n.4.

[45] Notice how Senator Beilenson also agrees that it is the "institution's"/facility's purpose that controls, just as the statute provides and which this Court found was a reasonable interpretation.

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Hospitals simply do not and cannot function that way. Rather, the Catholic Hospitals' purpose in permitting a tubal ligation in an individual case is *always* to protect the health of the patient. (Resp. Appx., Vol. II, Ex. 33 (O'Keeffe Depo. Vol. 2), 178:4-12; ¶ 13, Ex. 32 (O'Keeffe Depo. Vol. 1), 43:12-18; Resp. Appx. Vol. X, Ex. 134, 26:23-27:21.)

The Court should accept at face value Sister O'Keeffe's good faith statements of the Catholic Hospitals' purpose. *See* Section II(A), *infra*.[46] Petitioners' inquiry devoted to disproving Sister O'Keefe was an unconstitutional attack on the religiosity of the Catholic Hospitals and prohibited "trolling" of the Catholic Hospitals' faith.[47] *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

Finally, Petitioners purport to refute the Catholic Hospitals lack of contraceptive purpose by arguing that tubal ligations "do not treat any current medical problems." (Pet. Post-Hearing Br., 12:8-14:10.) This misplaced argument is about whether the Catholic Hospitals comply with the ERDs, which is not the business of any court, and just another example of the impropriety of this proceeding. The sterilization request and review process unquestionably is a matter of faith; the Catholic Hospitals' purpose is not determined by some ex post review of medical records by Dr. Jackson. (Resp. Appx. Ev., Vol. III, , Ex. 58 (Jackson Depo.), 81:19-82:6; 109:15-109:4; 111:12-112:19; 184:6-185:23; 229:15-23.)

Ultimately, Petitioners spend pages complaining that the Catholic Hospitals do not meet some secular standard, while admitting that they are improperly applying that standard to a religious decision-making process. (Pet. Post-Hearing Br., 14:27-15:2). Petitioners concede that the Catholic Hospitals' sterilization request and review process is not a "medical" decision-making process that results in a "medical decision" (*Id.*, 19:3-15). It is this religious decision-

[46] Petitioners purport to rebut Sister O'Keeffe's testimony that the Catholic Hospitals lack a contraceptive purpose by citing Dr. Jackson's disagreement. (Pet. Post-Hearing Br., 12:8-10.) Other than to establish her disqualifying bias, it could not matter less whether Dr. Jackson respects the Catholic Hospitals' faith and religious beliefs; this is exactly what *Catholic Bishop* instructs courts to avoid altogether.

[47] Finally, Sister O'Keeffe clarified any ambiguity in her earlier testimony and testified with no uncertainty that the Catholic Hospitals do not consider socio-economic, nonmedical criteria. (Resp. Appx. Vol. X, Ex. 134, 49:8-15.) She did the same about insurance, stating unequivocally that it is in no way part of the decision as to whether or not a tubal ligation is allowed. (Resp. Appx., Vol. X, Ex. 134, 31:10-32:4.) Misrepresenting the record of the clergy-administrator's testimony is just another example of why the doctrine of constitutional avoidance is so important. It show the extreme impropriety of a proceeding that is supposed to take a religious institution's good faith representations about its faith and mission at face value.

making process that cannot be interfered with as part of a licensing scheme. *See Thomas*, 450 U.S. at 714 ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). Petitioners' incoherence reaches its apex when they argue that no weight should be given to the hospital's "subjective 'mind,'" while suggesting that Section 1258 should be interpreted as containing a carve-out for religious hospitals that object to performing procedures for contraceptive purposes. (*See, e.g.,* Pet. Post-Hearing Br., 8:8-23.) This argument concedes that "contraceptive purpose" may be interpreted to focus solely on the health facility's purpose, as that is the only way that such a carve-out could work.[48]

Unlike Petitioners, CDPH does not interpret Section 1258 as a square peg to fit in a round hole. CDPH and the Court are entitled, and required, to rely upon the Catholic Hospitals' good faith statements that they do not "permit sterilizations for contraceptive purposes" as a matter of faith. *See Catholic Bishop*, 440 U.S. at 501-02. No searching inquiry was required for this universally known and judicially noticeable point; indeed, the inquiry was unconstitutional.

VI. SECTION 1258 CANNOT BE ENFORCED IN A MANNER THAT VIOLATES THE CATHOLIC HOSPITALS' CONSTITUTIONAL RIGHTS.

Despite the fact that it is undisputed that Petitioners' interpretation of Section 1258 burdens the Catholic Hospitals' free exercise rights, Petitioners have, for the most part, stopped addressing the constitutional issues implicated by their case.[49] For example, Dignity Health has been citing *Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049 (2020), since the Supreme Court decided it in July 2020. Petitioners have not addressed it or attempted to distinguish it; they pretend it does not exist.

A. Petitioners' Interpretation of Section 1258 violates the Establishment Clause.

1. Petitioners Ignore the Relevant Law.

Petitioners contend that although the Catholic Hospitals "may have a long affiliation with

[48] As discussed in Section III(B), *infra,* there is no legislative history that supports the suggestion that the Legislature intended to carve out the preferred views of only certain religions, and if there was, then Section 1258 is plainly an unconstitutional violation of the Establishment Clause for favoring one religion over another.

[49] Petitioners continue to cite the same half-dozen irrelevant cases they have cited for years, which Dignity Health has already distinguished. (Respondent's Reply Brief filed May 5, 2021, 30:11-31:1.)

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the Catholic Church, they are nonetheless health care facilities, and thus are required to operate within the legal strictures imposed on all California health facilities." (Pet. Post-Hearing Br., 7:1-4) This assertion goes hand-in-hand with Petitioners' refusal to acknowledge that the United States Supreme Court has meaningfully addressed the Establishment Clause several times since the California Supreme Court decided *Catholic Charities* nearly two decades ago. Petitioners dismiss the Catholic Hospitals' Catholicism as irrelevant, demanding they operate just like secular hospitals, as if the distinction between secular and religious institutions was not well recognized. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020) (recognizing their "autonomy with respect to internal management decisions that are essential to the institution's central mission"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) ("the text of the First Amendment itself [] gives special solicitude to the rights of religious organizations).

The fact that secular hospitals share some characteristics with the Catholic Hospitals "cannot render the actions of the latter any less religious." *Univ. of Great Falls v. N.L.R.B*., 278 F.3d 1335, 1346 (D.C. Cir. 2002). The Catholic Hospitals are religious institutions–official parts of the Catholic Church–which are afforded "special solicitude" under the First Amendment. *Hosanna-Tabor*, 565 U.S. at 189. Petitioners ignored Dignity Health's point-by-point explanation of how subsequent United States Supreme Court decisions have whittled *Catholic Charities* to a decision limited to its facts.[50] (Respondent's Response to Petitioner's Opening Brief, filed 5/5/21, 25:17-31:1.) In *Catholic Charities*, Catholic Charities sued the State because Catholic Charities believed that the government's interpretation of the statute was unconstitutional. On the other hand, Dignity Health has never had to sue the State because the

[50] There is little doubt as to how the State's argument in *Catholic Charities* would fare before today's U.S. Supreme Court. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) (recognizing contraceptive mandate as applied to *for profit* corporation violated its free exercise rights). If the *Catholic Charities* court were applying meaningful strict scrutiny, it would have come to the same conclusion as to Catholic Charities, like the Catholic Hospitals, an official part of the Catholic Church. What is left of *Catholic Charities*' free exercise analysis is in the crosshairs of a petition for certiorari pending before the Supreme Court, which cites *Catholic Charities* regarding the split in authority regarding whether the State can engage in a religious gerrymander. One of the questions presented is whether a statute, like the one in *Catholic Charities*, which expressly grants an exception to a narrowly defined group of religious employers (and conversely burdens another subset of religious employers), is actually neutral and generally applicable. *See Roman Catholic Diocese of Albany v. Lacewell,* Case No. 20-1501 at https://www.supremecourt.gov/docket/docketfiles/html/public/20-1501.html.

State has never sought to impose an interpretation of Section 1258 that burdens the Catholic Hospitals' free exercise rights. Moreover, in *Catholic Charities*, it was actually the State defining and defending its compelling interests. Here, Petitioners are third-party interlopers who advance an interpretation and compelling interest of Section 1258 that has been rejected by the State and is contrary to its expressed interests.

Petitioners have suggested that Section 1258 should be interpreted as containing a carve-out for religious hospitals that object to performing procedures for contraceptive purposes, as if that would be constitutional. (*See, e.g.,* Pet. Post-Hearing Br., 8:10-23.) Aside from the absence of any legislative history to support such a proposition, such interpretation would be plainly unlawful. As explained in Dignity Health's prior briefing, the State cannot create a carve-out only for those religious hospitals whose views may, fortuitously, align with the State's. Not only is that an exception to Section 1258, warranting additional exceptions,[51] but it is a prohibited preference of certain religious views over others in connection with granting a government benefit. Petitioners' interpretation of Section 1258 violates "[t]he clearest command of the Establishment Clause[:] one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 2021 WL 1387787, at *29 (E.D. Mich. Apr. 13, 2021) ("the government cannot establish an official government religion like the Church of England, [and] it also cannot treat religious groups disfavorably, and in a way establish a church of secularism").

2. Petitioners' Arguments Are an Affront to the State's Obligation to Avoid Excessive Entanglement.

The flipside to constitutional avoidance is excessive entanglement, and there could be no better proof of excessive entanglement than six years of litigation that should have been constitutionally avoided. Inquiry into whether the Catholic Hospitals perform procedures for "contraceptive purposes"—an inquiry demanded not by CDPH but by a private party—is and always has been an improper infringement of the Catholic Hospitals' First Amendment rights. It

[51] *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see* Section IV(C), *infra.*

makes perfect sense that CDPH would reject Petitioners' approach; Petitioners' skeptical, intrusive inquiry is precisely the prohibited "trolling through [an] institution's religious beliefs" that the State is supposed to avoid. *Mitchell v. Helms*, 530 U.S. at 828.

Catholic Bishop also explains why the doctrine of constitutional avoidance is so important. Without it, the State will dress up its prohibited inquiries as secular ones and create prohibited excessive entanglement as happened here. *Catholic Bishop*, 440 U.S. at 502. The Supreme Court observed that it was clear from the record of the very cases at issue that the NLRB's action would go well beyond resolving factual issues:[52]

> [I]n those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions*.

Id. at 502 (emphasis added).

This principle applies here. Since the inception of this case, the Catholic Hospitals have stated, through Sister O'Keefe, a "clergy-administrator," that their sterilization review and request process is mandated by their pastoral application of the ERDs and essential to their mission. Petitioners claim that violates California law.[53] There was never any way to resolve that question

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[52] The Supreme Court cited the Court of Appeal opinion, which it affirmed regarding the obvious entanglement problems. *Id.* at 502. The problems that the Court of Appeal identified are the same problems that have been present throughout this case; all that needs to be changed are the parties and the subject:

> The Board concedes that "disputes in parochial schools may well involve issues of religious doctrine," but asserts that its only concern in deciding disputes would be focused on the commission of unfair labor practices which are inherently unrelated to differences of religious interpretation. The Board further contends that even if it were to intrude into doctrinal matters, inadvertently or otherwise, the remedy would be, not to strip it of its general jurisdiction to adjudicate underlying unfair practice disputes, but simply to require it to decide its case without regard to the merits of the alleged doctrinal issues. We have difficulty in following the Board's rhetoric. We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

Cath. Bishop of Chicago v. N.L.R.B., 559 F.2d 1112, 1125 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

[53] The Court is not supposed to entertain suits that ask it to "judicially decid[e] which activities of a religious

without cross-examining Dignity Health's clergy-administrators about their mission, which is what happened here, over and over again.

There is no evidence that Sister O'Keeffe (or any of Dignity Health's witnesses) lacked sincere religious beliefs and good faith, but that did not allow her to escape repeated and improper cross-examination over Dignity Health's objections over a period of years. The Court itself asked questions about the Catholic Hospitals' "purpose," as if it could be measured, and as if the answer to the question was not what Sister O'Keeffe said the first time: the Catholic Hospitals adhere to ERD 53, which prohibits all procedures "that induce sterility for the purpose of contraception." (Resp. Appx., Vol. X, Ex. 134, 111:11-112:11; O'Keeffe Decl., 1/2/16, ¶ 13.)

As evidenced by the record in this case, it is, was, and always has been impossible to adjudicate a claim that the Catholic Hospitals violate Section 1258 without questioning their faith, their faith-based practices regarding contraception, and their mission. For that reason, this entire proceeding has been an infringement upon the rights guaranteed by the Religion Clauses. And, worse, Petitioners are not even the State, and should not have been permitted to create this entanglement. Petitioners' questioning of the Catholic Hospitals' religious character, and purported disputes with the Catholic Hospitals' good faith assertion that the sterilization request and review process is mandated by their religious mission, are wholly inappropriate.

For example, Petitioners assert that "the words of Respondent's own witnesses," which included a nun compelled to testify, supposedly prove that the Catholic Hospitals "permit tubal ligations for contraceptive purposes." (Pet. Post-Hearing Br., 9:14-17; 6:10-12.) Petitioners even argue that the Catholic Hospitals violate the ERDs. (*Id.*, 32:11-15.) This text makes it plain that Petitioners want the Court to question and adjudicate how Catholic the Catholic Hospitals are. If CDPH made this wildly inappropriate argument, the unconstitutional entanglement would

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organization were religious and which were secular." *Univ. of Great Falls*, 278 F.3d at 1342; *see also Presiding Bishop v. Amos,* 483 U.S. 327, 336 (1987) (upholding an exemption in Title VII of the Civil Rights Act as applied to the firing of a janitor by a church-owned gymnasium, and noting "[t]he line is hardly a bright one . . . an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission"). "The inquiry into the recipient's religious views"—required by a focus on whether the Catholic Hospitals comply with Petitioners' interpretation of Section 1258—"is not only unnecessary but also offensive." *Mitchell v. Helms*, 530 U.S. at 828.

be stark. It is no less problematic coming from Petitioners standing in CDPH's shoes.

The suggestion that the state apparatus, this Court, should be employed to investigate whether Catholic Hospitals' adherence to the ERDs "violates" the law, or whether they permit procedures for "contraceptive purposes" through resort to "medical literature" and secular experts predisposed against Catholic health care, is contrary to law. Petitioners, and their expert Dr. Jackson, are all foundationally incompetent to interpret ERD No. 53, and the fact that other Catholic hospitals do not perform any tubal ligations is irrelevant.[54] *See Thomas*, 450 U.S. at 715–16 ("the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect").

The problem is more acute when Petitioners suggest that the Court should favor the testimony of their secular expert, Dr. Jackson, who admitted she has no experience or expertise regarding Catholic hospitals and who is an avowed antagonist of Catholic health care[55], over the testimony of MMCR's Vice President of Mission Integration, Sister O'Keeffe. Whether a tubal ligation can cure or alleviate a present and serious pathology is a purely religious determination of a religious question. Petitioners and the Court were required to accept the Catholic Hospitals' testimony *on its face* the first time.[56] Petitioners do not get to second-guess the Catholic Hospitals' sincerely held religious beliefs and interest in their sterilization request and review policy or the fact that they do not perform sterilization operations for contraceptive purposes. (Pet. Post-Hearing Br., 32:11-23.) The fact that Petitioners continue to argue as if their views are relevant only proves that this case targets the Catholic Hospitals and that the Court should have abstained from resolving this claim. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Means v. U.S. Conference of Catholic Bishops,* 2015 WL 3970046, at *12 (W.D. Mich. June 30, 2015)

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[54] The ACLU's views on whether Jews who eat pork are entitled to protection of their First Amendment right to observe the Sabbath is equally irrelevant. The Court should reject the entire offensive, and inappropriate argument.

[55] Dr. Jackson signed onto a petition protesting the planned affiliation University of California-San Francisco Hospital with Dignity Health to provide hospital services to UC patients at Dignity Health hospitals. (Resp. Appx., Vol. IV, Ex. 99.)

[56] Petitioners' use of Dr. Jackson in this case is akin to the State calling a chemist as an expert witness to disprove transubstantiation. Other than highlighting the extreme impropriety of Dr. Jackson's testimony, what difference would make if Dr. Jackson testified that, according to science, wine cannot become the blood of Christ? It certainly would have no bearing on the Catholicism of the Catholic Hospitals. Her testimony here was irrelevant, improper, and offensive, and should be ignored entirely.

(IRS relies on the OCD to determine whether an entity is part of the Catholic Church), *aff'd*, 836 F.3d 643 (6th Cir. 2016); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d, 223, 225 (6th Circ. 2007) (applying church autonomy to a faith-based hospital, finding that an entity is a "'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics"), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171 (2012). The State does not have to engage in excessive entanglement, and neither Petitioners nor the Court can compel them do so.

3. Petitioners' Interpretation of Section 1258 Would Impermissibly Interfere With the Internal Management Decisions Essential to the Catholic Hospitals' Mission.

As set forth in *Guadalupe,* the church autonomy doctrine recognizes that religious institutions enjoy "autonomy with respect to [their] internal management decisions that are essential to the institution's central mission." *Guadalupe*, 140 S. Ct. at 2060. There is no dispute that the Catholic Hospitals are religious institutions, and, as discussed above, the Court determines what constitutes when a decision is central to the religious institutions' central mission based upon the sincerely held beliefs and good faith statements of people like Sister O'Keefe because it is improper for CDPH or the Court to go "trolling through the beliefs of the [Catholic Hospitals], making determinations about [their] religious mission, and that mission's centrality to the 'primary purpose' of the [hospitals]." *Univ. of Great Falls*, 278 F.3d at 1342. Petitioners have ignored *Guadalupe* and the other cases cited by Dignity Health for over a year, apparently conceding that these cases, too, foreclose their claim.

B. **The Unconstitutional Conditions Doctrine Applies to All Licensing Laws, Including Section 1258.**

Dignity Health explained in detail how licensing laws that burden free exercise are subject to strict scrutiny, and thus *Smith* does not apply to this case. (Request for Revisitation filed April 19, 2021, 8:12-28; Resp. Brief filed May 5, 2021, 31:2-34:1; Post-Hearing Brief filed August 6, 1021, 12:1-14:14, 31:5-33:18.) It was a primary argument in Dignity Health's prior briefs. It has received reduced focus in this final brief *only* because Petitioners have ignored it wholesale.

Petitioners again concede that Section 1258 is a licensing law, and have never disputed the legal consequences. (Pet. Post Hearing Br., 5:12-13; 6:21-22; 29:15-18; 31:20-22.) If Section 1258 is a licensing law subject to Petitioners' interpretation, then the unconstitutional conditions doctrine applies and strict scrutiny is required. And the tenuous status of *Smith* has nothing to do with this analysis as the case law condemning the imposition of conditions on a religious entity's forswearing its First Amendment rights is completely different. Having ignored this primary argument altogether, the Court may deny the petition for this reason alone.

"[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program" *Thomas*, 450 U.S. at 716; *see also* cases cited in Dignity Health's Post-Hearing Brief, 31-33.) Section 1258, if applied as Petitioners urge, conditions a benefit—a hospital license—upon a hospital's surrender of First Amendment rights and is therefore subject to strict scrutiny.

C. **Section 1258 Is Not Neutral or Generally Applicable.**

The Court must deny the Petition because Petitioners argue only that Section 1258 is a neutral and generally applicable law, and the overwhelming evidence establishes that, in Petitioners' hands, Section 1258 is neither.

As discussed below, in Dignity Health's prior briefing and summarized below, the Supreme Court has increasingly narrowed what "neutral and generally applicable" means, starting with *Hosanna-Tabor* and culminating with *Fulton*. *Hosanna-Tabor*, 565 U.S. at 190 (distinguishing *Smith* because it "involved government regulation of only outward physical acts"); *Fulton,* 141 S. Ct. at 1877 ("law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Tandon,* 141 S. Ct. at 1296 ("government regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise"); *Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2277 (2020) (citing *Sherbert* and holding "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct"); *Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Sherbert*).

The problem is particularly acute when the statute, like Section 1258, contains exceptions; the presence of exceptions affects general applicability, while the failure to extend those exemptions to religious activity affects neutrality. *Tandon,* 141 S. Ct. 1294 at 196 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. at1730-32 (state prosecuted religious objections but not secular objections).

1. Section 1258 Is Not Neutral as Interpreted by Petitioners.

"The potential for political divisiveness based on differences in religious views is a factor in judging the constitutionality of state action." *Feminist Women's Health Ctr., Inc. v. Philibosian,* 157 Cal. App. 3d 1076, 1091 (1984) ("The appearance of support by the state, of one side of this controversy [abortion] over the other, is improper political entanglement."). The contention that a licensing statute about contraception could be used in a manner that interferes with the Catholic Hospitals' free exercise rights, while also being neutral, fails the straight face test. *See Fulton*, 141 S. Ct. at 1877 ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs . . . ."). There is a mountain of evidence in this case that establishes that Petitioners' interpretation substantially burdens the Catholic Hospitals' free exercise rights, and it is judicially noticeable that contraception is a subject fraught with strong political debate and deep rooted religious meaning for the Catholic faith.

Petitioners' argument, based entirely upon facial neutrality, is the same one that was rejected in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-538 (1993), which recognized that it can be the particular interpretation of a law that is not neutral. *Id.* ("The city claims that this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general."). After all, "the effect of a law in its real operation is strong evidence of its object."[57] *Church of Lukumi*, 508 U.S. at 535.

Just like *Church of Lukumi*, the problem here is that Petitioners have taken a facially

[57] Again, it must be noted that CDPH has acted consistently as if the effect of Section 1258 was to eliminate the use of prohibited socio-economic factors, such as those used in the 120-point rule repeatedly identified in the legislative history. This interpretation is entirely consistent with *Lackner* and entirely reasonable.

neutral statute and tried to weaponize it into a prohibited targeting law by rejecting all reasonable neutral interpretations. Essential to Petitioners' argument is that the Legislature equated the Catholic Hospitals' religious decision-making with the 120-point rule and found them both "arbitrary."[58] However, as Petitioners concede, there is no evidence that the State considered the Catholic Hospitals' religious decision-making, let alone determined it was "arbitrary." *See* footnote 2, *supra.* Misrepresenting the legislative history is, itself, more evidence of religious targeting. But even assuming *arguendo* that the legislative history supported Petitioners' interpretation, it would defeat their claims. If the legislative history actually did reflect that the Legislature "contemplated the bill's potential impact on religiously-affiliated institutions when it enacted Section 1258," and the result of that "contemplation" was that the Legislature labeled all of those free exercise concerns "arbitrary," that would be sufficient evidence of hostility to religion to warrant strict scrutiny under a long line of Supreme Court cases that post-date *Smith. See Fulton,* 141 S. Ct. at 1877;[59] *Masterpiece Cakeshop,* 138 S. Ct. at 1729; *Church of Lukumi*, 508 U.S. at 533; Pet. Post Hearing Br., 8:16-21.)

2. Section 1258 Is Not Generally Applicable.

"[T]he defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Church of Lukumi*, 508 U.S. at 557. Petitioners' construction of Section 1258 renders it not generally applicable and further reveals their hostility toward religion.[60] No one, including Petitioners, is enforcing Section 1258 as if it made sterilization operations "freely available." Dr. Jackson conceded that there are numerous arbitrary nonmedical obstacles to postpartum tubal ligations besides the religious

[58] Petitioners assert that Section 1258 was *intended* to "eliminat[e] arbitrary and *moral* judgment as to who is worthy of a tubal ligation." (Resp. Appx. Vol. X, Ex. 133, 20:13-16; Pet. Br., 32:20-22 ("the Legislature passed the law to prohibit *exactly* the kind of arbitrary, nonmedical standards that Respondent's Catholic Hospitals currently impose") (emphasis in original).) It is hard to imagine a more blatant attempt to weaponize a statute to target religion than this.

[59] *See also Fulton*, 141 S. Ct. at 1919–20 (Alito, J., concurring) ("The city council labeled CSS's policy 'discrimination that occurs under the guise of religious freedom.' (Citations.) The mayor had said that the Archbishop's actions were not 'Christian,' and he once called on the Pope 'to kick some ass here.' (Citations). In addition, the commissioner of the Department of Human Services (DHS), who serves at the mayor's pleasure, disparaged CSS's policy as out of date and out of touch with Pope Francis's teachings.").

[60] https://www.aclu.org/blog/reproductive-freedom/religion-and-reproductive-rights/federal-government-must-stop-catholic/; https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied.

directives that govern Catholic hospitals.

Petitioners have never confronted the undisputed evidence that establishes that their interpretation of Section 1258 would prohibit religious exercise while leaving most of the arbitrary, nonmedical obstacles to contraceptive sterilization in place. (Pet. Ex. 10, p. 1; *see also* Resp. Appx., Vol. VI, Ex. 119.) Dr. Jackson agreed that a "huge population" does not obtain tubal ligation procedures at secular hospitals due to nonmedical "administrative barriers." (Resp. Appx. Vol. X, Ex. 133, 124:14-125:18.) Dr. Jackson further confirmed that even in non-Catholic facilities, patients cannot get desired sterilization operations due to various nonmedical reasons, including lack of coverage by the patient's insurance plan, lack of physician or facility availability, and Medicaid consent forms—all nonmedical barriers to access. (Resp. Appx. Vol. X, Ex. 133, 122:3-123:4.) ACOG agrees that "equitable access" would require changing far more than attacking just the Catholic Hospitals. (Resp. Appx. Vol. VI, Ex. 119, pp. e4-e5 ("Sterilization policies and forms should be modified in order to create a fair and equitable access for individuals regardless of insurance type") (emphasis added).) However, there is no evidence Petitioners are doing anything about them. And Dr. Jackson agreed that Petitioners' interpretation of Section 1258 to penalize the Catholic Hospitals for relying on the ERDs would *not* address any of these nonmedical barriers to access.[61] (Resp. Appx. Vol. X, Ex. 133, 126:15-26.)

Section 1258 is also not generally applicable because it includes exceptions. *Tandon,* 141 S.Ct. at 1296; *InterVarsity Christian Fellowship*, 2021 WL 1387787, at *24. No special exemption process is necessary because there are multiple exceptions built into the statute. First, all hospitals that do not perform "sterilization operations for contraceptive purposes" are exempt from the statute. Thus, religious hospitals whose views conform to the State's secular standard regarding contraception are granted licenses, but (under Petitioners' interpretation) the Catholic Hospitals would be refused unless they surrendered their First Amendment rights. Effectively, the State would grant exceptions for the religious beliefs of some institutions, but not others like

[61] This, too, confirms Petitioners' targeting of religion. Despite Section 1258's sweeping compelling interests, the only targets of this lawsuit are the Catholic Hospitals.

the Catholic Hospitals.

Section 1258 also has an exception for the consideration of medical and physical factors. The Legislature made clear that there was an absolute exception to the category of "special nonmedical factors" for two secular considerations. Accordingly, unless the free exercise of religion is also treated as an exception, then strict scrutiny applies because the law treats secular considerations more favorably than religious exercise. Otherwise, this plainly violates the First Amendment.[62] *Tandon,* 141 S. Ct. at 1296.

Additionally, other than in certain, specific emergency medical conditions, the sterilization informed consent regulations applicable to Medi-Cal patients requires them to be at least 21 years old and wait at least 30 days after written consent, while everyone else is required to be only 18 years old and wait as little as 72 hours. 22 Cal. Code Regs. § 70707.1(a)(4)(C); 22 Cal. Code Regs. § 51305.1(a)(6). The additional restrictions imposed on Medi-Cal patients are imposed for purely socio-economic reasons, they are unsupported by any medical literature or medical consideration, and should therefore be prohibited by Section 1258. However, California has made a secular exception to Section 1258 and has imposed the restriction in order to comply with federal law and obtain federal funding for those procedures. Petitioners' interpretation would require the State to reject federal funding and the restrictions that go with it. However, California permits this secular exception to Section 1258, and therefore a religious exception would be required. *Tandon,* 141 S. Ct. at 1296.

Petitioners' own evidence and expert testimony establish that Petitioners' interpretation makes Section 1258 a law that *prohibits religious conduct* (applying religious rules to sterilization requests) *while permitting secular conduct* (allowing non-religious exceptions) while at the same

[62] Additionally, Petitioners neglect to mention that they or their counsel could have filed complaints with the CDPH, which has broad authority to investigate and take enforcement action against any provider that has violated state licensing requirements. *See* https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ComplaintInvestigationProcess.aspx#ComplaintDefinition. Doubtless CDPH also could decline to take such action because it determines that the provider has not violated the statute because, among other reasons, the law does not apply to that facility's operations. In substance, this is no different than selective exemption system in *Fulton* that demanded strict scrutiny – even though there was no evidence in *Fulton* that the Commissioner of Philadelphia's foster placement program had ever made an exemption determination. The mere possibility of such an exemption was sufficient to trigger strict scrutiny. As far as the record here reveals, neither Petitioners nor their counsel ever lodged a complaint with CDPH.

time failing to remove all "arbitrary" barriers. (Pet. Ex. 10, p. 1; *see also* Resp. Appx., Vol. VI, Ex. 119.) This is exactly what the Supreme Court prohibits with its decisions in *Tandon* and *Fulton*. The government does not have a compelling interest in religious targeting. *Church of Lukumi*, 508 U.S. at 546–47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited.'").

D. **Petitioners Have Failed to Present Any Evidence That Section 1258, as Interpreted by Petitioners, Satisfies Strict Scrutiny.**

Having thrown in the towel on the subjects of unconstitutional conditions doctrine, targeting, and general inapplicability, Petitioners concede strict scrutiny as well by again failing to address any of the arguments that Dignity Health has made on this subject over a series of briefs.[63] Dignity Health will not repeat them here, and instead responds to the few of Petitioners' meritless arguments that are remotely on the subject.

For much of the case, Petitioners have argued that Section 1258 advances the compelling interest of providing "equitable access" to healthcare, however, they now concede that Section 1258 was "directed primarily towards ensuring that patients could access sterilization without barriers imposed by hospitals . . . ." (*See* Pet. Post-Hearing Br., 8:7-8; 24:16-18; *but see* Pet. Op. Br., 31:27-32:10; Pet. Post-Hearing Br., 35:7-20; *compare* Supplemental Opening Brief in Support of MSJ filed 8/23/19, 29:21-22.) History reveals these to be irreconcilable goals.

Moreover, the uncontroverted evidence establishes that the State agrees that its compelling interest is advanced by maintaining the status quo. (Resp. Appx., Vol. VI, Ex. 117 at 48; Strumwasser Decl., ¶¶ 16-17, 23-25; Ex. 8; Resp. Appx., Vol II, Ex. 24, at pp. 2-7.) But the purpose of the statute has always been well known. The State believes that the compelling

[63] At the same time, Petitioners cite the same cases they have always cited, which Dignity Health has already distinguished. (Respondent's Reply Brief filed 5/5/21, 30:11-31:1.) Petitioners do not respond to those arguments either.

interest advanced by Section 1258 is the eradication of restrictions like the 120-point rule and the imposition of other similar socio-economic qualifications. Petitioners have never cited any authority for the proposition that they can simply decide the State should pursue another compelling interest.

Petitioners' cursory "strict scrutiny" argument purports to advance multiple purported compelling interests without scrutinizing among them, and without regard to the State's interpretation and conduct. With Section 1258, the State removed the obstacles it can constitutionally remove, like the 120-point rule or other socio-economic factors, without purporting to create entanglements. When compelling interests conflict, the secondary interests fall aside in favor of the primary goal. *See People v. Gutierrez*, 58 Cal. 4th 1354, 1369 (2014) (interpretation must further the "general purpose" of the statute).

The State loses the strict scrutiny test when it purports to advance such broad interests as "equitable access." "Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Gonzales*, 546 U.S. at 431-32; *see also Fulton*, 141 S. Ct. at 1881 (city required to grant exemption to religious organization notwithstanding state's compelling interest in "equal treatment" of prospective foster parents and foster children); *see also Mast v. Fillmore Cty., Minnesota*, 2021 WL 2742817, at *2 (U.S. July 2, 2021) (citing *Fulton*; county required to grant Amish exemption from septic tank requirement notwithstanding county's general interest in sanitation regulations) (Gorsuch, J., concurring); *Church of Lukumi,* 508 U.S. at 543 (animal slaughter and disposal statutes unconstitutional notwithstanding government interest in protecting the public health and preventing cruelty to animals); *Wisconsin v. Yoder,* 406 U.S. 205, 213, 221, 236 (1972) (Amish children exempt from compulsory school attendance law notwithstanding State's "paramount" interest in education).

As discussed above, the State eliminates the obstacles it can constitutionally eliminate, and when it reaches the point of diminishing returns, it does not pursue self-defeating opposing interests. Section 1258 was plainly focused on eliminating the consideration of socio-economic factors in the determination whether to permit a sterilization operation. As the Catholic Hospitals

may lawfully prohibit all sterilization operations, the compelling interests of Section 1258 are ill-served by prohibiting the Catholic Hospitals from allowing some tubal ligations after a faith-based decision-making process based upon medical and physical considerations.

There is no evidence that CDPH or the Attorney General are unaware of the law. There is, however, ample evidence in the record establishing CDPH's enforcement of Section 1258 and its related regulations in a manner that furthers its compelling interests in eliminating both age/parity stipulations and coercive sterilization, while at the same time respecting the First Amendment rights of health facilities required by the doctrine of constitutional avoidance discussed in Section III, *infra*. There is no evidence in the record the Catholic Hospitals ever employed age/parity stipulations or engaged in coercive sterilization, or that either is a problem today in any California hospital. That is enforcement of the statute, not in the manner Petitioners think the statute should be interpreted and enforced, but in service of the State's compelling interests.

Petitioners cannot make up a compelling interest out of whole cloth. Thus, Petitioners effort to identify the State's compelling interest in Section 1258 by reference to other cases involving other statutes is a frivolous exercise. The State has lots of compelling interests, advanced by different statutes, so the fact a court found a particular compelling interest advanced by another statute is irrelevant. And *North Coast* did not hold that the State has a compelling interest in "equitable access to health care." The Supreme Court held that the Unruh Act "furthers California's compelling interest in ensuring full and equal access to medical treatment *irrespective of sexual orientation*." *North Coast Women's Care Med. Grp., Inc. v. Superior Ct.*, 44 Cal. 4th 1145, 1158 (2008) (emphasis added). Neither the Unruh Act nor sexual orientation discrimination are at issue here, so it makes no difference what compelling interest the Unruh Act serves, or what compelling interest was furthered in any of the other cases cited by Petitioners, none of which involved Section 1258.[64]

[64] Interpreting Section 1258 as Petitioners contend in order to require the Catholic Hospitals to either allow tubal ligations on demand or prohibit them altogether would result in less women obtaining what Petitioners contend is the standard of care, which is contrary to the public policy of promoting safe access. *See Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 767 (1994) ("State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."); *Council for Life Coal. v. Reno*, 856 F. Supp.

VII. CONCLUSION.

Petitioners' "personal reproductive politics" do not represent the State or the public interest. In contrast, the CDPH and California's Attorney General do speak and act in the State's public interest and Petitioners' arguments have nothing in common with those State actors. Coupled with their wholesale refusal to confront the dispositive law, Petitioners concede that their position is legally indefensible and constitutionally offensive in multiple ways. They are asking the Court to construe a hospital licensing law in a manner that violates the Catholic Hospitals' free exercise of religion and forces them to forsake their First Amendment rights as a condition of keeping their licenses to operate. That is targeting of religion. Decades of case law, all studiously ignored by Petitioners, disallow this. Petitioners are so transfixed with targeting the Catholic Hospitals that they are actually quite fine with disserving the public interest, the touchstone for writ relief, by seeking a ruling that might end access to post-partum tubal ligations altogether at the Catholic Hospitals, or even restrict the medical risk factors considered by them, which the State has clearly determined would not serve its compelling interests. The Court should deny the Petition and enter judgment in favor of Dignity Health.

Dated: September 13, 2021

MANATT, PHELPS & PHILLIPS, LLP

By: */s/ Barry S. Landsberg*
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1422, 1430 (S.D. Cal. 1994). The plaintiffs in these cases did not file suit seeking to make it more difficult to obtain care. Unlike Petitioners, they sought to increase – not decrease – access to care.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, I electronically filed the foregoing:

RESPONDENT DIGNITY HEALTH'S RESPONSE TO PETITIONERS' POST-HEARING BRIEF

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