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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

EVAN MINTON, Plaintiff, v. DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY SAN JUAN MEDICAL CENTER, Defendant.	Case No. CGC 17-558259 **PLAINTIFF EVAN MINTON'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT DIGNITY HEALTH'S DEMURRERS TO FIRST AMENDED COMPLAINT** Hearing Date: November 17, 2017 Hearing Time: 9:30 a.m. Dept.: 302

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INTRODUCTION

Plaintiff Evan Minton brings suit against Defendant Dignity Health for refusing to provide him medical care because of his gender identity. Dignity Health, doing business as Mercy San Juan Medical Center ("MSJMC"), refused to allow Mr. Minton, a transgender man, to undergo a hysterectomy, a medical service it routinely provides to cisgender (*i.e.*, non-transgender) women. That Mr. Minton was ultimately able to receive treatment elsewhere—after Mr. Minton, his physician, his then-attorney, and numerous others expended effort to make it happen—does nothing to absolve Dignity Health of liability for its discriminatory decision to deny him "full and equal" access to medical treatment at MSJMC.

In its demurrers, Dignity Health continues to misconstrue Mr. Minton's allegations. First, Mr. Minton does not—and has never—alleged that Dignity Health discriminated against him because of a medical condition; rather, Mr. Minton alleges that Dignity Health discriminated against him because of sex, which the Unruh Civil Rights Act explicitly defines to include gender identity. Dignity Health routinely hosts hysterectomies for cisgender women at MSJMC but refused to allow Mr. Minton's surgeon to perform his hysterectomy there because he is a transgender man seeking the surgery as part of his gender transition. That disparate treatment constitutes discrimination on the basis of gender identity. Second, Defendant's characterization of its actions as proactively ensuring Mr. Minton received the care he needed outside of MSJMC misrepresents the allegations in both the amended Complaint and the original Complaint. In reality, Dignity Health abruptly canceled Mr. Minton's hysterectomy after learning he is transgender and did not affirmatively act to provide him the "full and equal accommodations" guaranteed under law. Cal. Civ. Code § 51(b). Mr. Minton received his surgery at Methodist Hospital only after Dignity Health sustained political pressure and unflattering media attention as a result of the procedure's cancellation at MSJMC. The cancellation caused both dignitary and practical harms to Mr. Minton, and neither those harms nor the Unruh Act violation here were cured by provision of the surgery at a different facility across town.

Dignity Health also invokes religious doctrine in an unavailing attempt to justify its discriminatory treatment of Mr. Minton. Under California law, Dignity Health does not have a right to use religion to discriminate. Specifically, Dignity Health does not have a free exercise right to harm

transgender patients like Mr. Minton by prohibiting doctors from performing hysterectomies on those patients simply because they are transgender. Nor does enforcing the requirements of the Unruh Act against Dignity Health impermissibly involve the Court in matters of church governance.

Mr. Minton has pled facts sufficient to state a cognizable claim of sex discrimination in violation of the Unruh Civil Rights Act. The Court should therefore overrule Defendant's demurrers.

FACTS

Mr. Minton is a transgender man. First Amended Verified Complaint for Declaratory and Injunctive Relief and Statutory Damages ("First Amended Complaint" or "FAC") ¶ 9. His gender identity—the gender he knows himself to be—is male, although he was assigned the sex of female at birth. *Id.* ¶¶ 9, 11. Like many transgender people, Mr. Minton has been diagnosed with gender dysphoria, meaning distress caused by the incongruence between his gender identity and the sex he was assigned at birth. *Id.* ¶¶ 12, 17; Request for Judicial Notice ("RJN") Ex. 1, at 5. Mr. Minton's gender identity thus is inextricably intertwined with his gender dysphoria diagnosis.

As part of his treatment for gender dysphoria, and as part of a multi-step process of increasing the alignment between his body and his male gender identity, Mr. Minton sought to undergo a hysterectomy. FAC ¶¶ 17-18; *see also* RJN, Ex. 1, at 54-57 (listing hysterectomy/ovariectomy as one of the treatments medically necessary to address gender dysphoria in some transgender men). Mr. Minton's physician, Dr. Lindsey Dawson, was ready and willing to perform the surgery at MSJMC—where she routinely performs hysterectomies for cisgender female patients, FAC ¶¶ 20, 40—on August 30, 2016. However, Dignity Health abruptly cancelled the procedure one day before it was scheduled to take place after Mr. Minton mentioned to an MSJMC nurse that he is transgender.[1] *Id.* ¶¶ 21-22. MSJMC's president, Brian Ivie, told Dr. Dawson that the surgery had been cancelled because of the

[1] Dignity Health states, without any support, that it was "unsurprising" that MSJMC refused to allow Mr. Minton's hysterectomy to proceed. Dem. at 6. This is not an accurate depiction of Mr. Minton's experience. The surgery had been planned for some time, and it was only *the day before* Mr. Minton's hysterectomy was scheduled to take place that Dignity Health informed Dr. Dawson the surgery could not go forward. Moreover, hysterectomies are routinely performed at MSJMC. FAC ¶¶ 20, 40.

"indication" it was intended to address,[2] and also told Dr. Dawson that "she would *never* be allowed to perform a hysterectomy on Mr. Minton at MSJMC." *Id.* ¶¶ 23-24 (emphasis added). When Mr. Minton was informed of the cancellation of his surgery, he was so "shocked, hurt, and distraught" that he sank to the ground and then collapsed entirely. *Id.* ¶ 25.

Contrary to Dignity Health's assertions in its demurrer brief, Dignity Health did not proactively ensure that Mr. Minton received his medically necessary care. Dignity Health contends that it affirmatively "rescheduled" Mr. Minton's surgery, Dem. at 1, and that the President of MSJMC, Mr. Ivie, "quickly offered" Methodist Hospital as an alternative venue for the surgery, *id.* at 2, but these are blatant mischaracterizations of the allegations in both the original Complaint and the FAC. There are no allegations in the original Complaint that Dignity Health or Mr. Ivie "quickly" did anything except cancel the surgery.[3] As the FAC explains, it took the combined efforts of Mr. Minton, Dr. Dawson, Jenni Gomez (a Legal Aid attorney), Dave Jones (the California Insurance Commissioner), and a number of state legislators, legislative staff members, and Sacramento-area lobbyists, as well as media coverage, to raise awareness of Mr. Minton's cancellation, negotiate an alternative venue for the surgery, secure emergency admitting privileges for Dr. Dawson, sort out insurance coverage issues, and ensure Mr. Minton received his hysterectomy—on the other side of town and several days after it had been scheduled. *See* FAC ¶¶ 29-37. Indeed, Dignity Health's contemporaneous public statement confirms that "[w]hen a service is not offered [by a Dignity Health hospital] *the patient's physician* makes arrangements for the care of his/her patient at a facility that does provide the needed service." *Id.* ¶ 31 (emphasis added). A reasonable reading of the FAC thus shows that Dignity Health refused Mr. Minton full and equal access to its facilities and pushed the responsibility of ensuring that Mr. Minton received medically necessary care onto Mr. Minton, his physician, and others, in violation of the Unruh

[2] Notably, Mr. Minton's medical file already reflected his diagnosis of gender identity disorder (an outdated term for gender dysphoria), but it was not until after Mr. Minton informed the MSJMC nurse that he is transgender that the surgery was cancelled. FAC ¶¶ 21-22, 24.

[3] Significantly, Dr. Dawson initiated the conversation with Mr. Ivie in which the prospect of Mr. Minton's surgery taking place at Methodist Hospital first arose. FAC ¶ 23.

Act.[4] As a result of Dignity Health's discriminatory cancellation of the procedure at MSJMC, Mr. Minton not only was forced to make a longer trip to Methodist Hospital, *id.* ¶ 42, but also suffered the dignitary harm of having been denied full and equal access to medical treatment at MSJMC, which continued to impact him even after his surgery had been completed. *Id.* ¶ 41.

LEGAL STANDARD

Because Mr. Minton has alleged facts that are "sufficient to state a cause of action," his First Amended Complaint must survive Defendant's demurrer. *See C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 872 (2012). In evaluating a demurrer, courts deem "all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party." *Rodas v. Spiegel*, 87 Cal. App. 4th 513, 517 (2001). "The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded." *Id.* "[I]f it appears that the plaintiff is entitled to any relief against the defendant, the complaint will be held good." *Cmty. Cause v. Boatwright*, 124 Cal. App. 3d 888, 896 (1981).

ARGUMENT

I. PLAINTIFF HAS SUFFICIENTLY AND CONSISTENTLY PLED AN UNRUH ACT SEX DISCRIMINATION CLAIM.

In his First Amended Complaint—as in his original Complaint—Mr. Minton alleges he was denied health care based on his gender identity as a transgender man, in violation of the Unruh Act

[4] Dignity Health's argument that the First Amended Complaint is a "sham pleading" that "embellishes" the facts of this case is unsupportable. *See* Dem. at 2-6. There are no "inconsistencies" or "contradictions" between the First Amended Complaint and the original Complaint. *Id.* at 5. The First Amended Complaint clarifies key facts—and corrects the mischaracterizations of the allegations in the Complaint made by Dignity Health in its first demurrer. Indeed, it is *Dignity Health* who continues to "embellish" and obscure the facts of this case. For example, Dignity Health repeatedly insists that Mr. Ivie "quickly" suggested or offered an alternative facility for Mr. Minton's surgery, but Mr. Minton has never alleged that Mr. Ivie "quickly" took any action. Dem. at 2, 5. Similarly, Dignity Health's claim that Mr. Minton removed the allegations that had been in paragraph 24 of the original Complaint is flatly incorrect. *See* Dem. at 6. Those allegations still appear in the First Amended Complaint, in addition to others that clarify the timeline of events and explain the extensive effort undertaken by Mr. Minton, Dr. Dawson, and other people to ensure he received the care he needed. *See* FAC ¶¶ 29-38. The arguments in Dignity Health's demurrer underscore why amendments to Mr. Minton's allegations were necessary: to clarify the record and ensure that Dignity Health would not further mischaracterize the key facts of this case.

prohibition on sex discrimination. *See* FAC ¶¶ 1-4, 24, 25, 26, 41, 43; Compl. ¶¶ 1, 2, 4, 5, 26, 27.

Defendant erroneously claims that Mr. Minton has "re-cast his allegations of gender dysphoria discrimination" as sex discrimination. Dem. at 11. Defendant contends that the decision to cancel Mr. Minton's hysterectomy "was not based on the fact that [he] is transgender, but on the fact that procedure was intended to address gender dysphoria." Dem. at 5 (internal quotation marks omitted). But Defendant makes a distinction without difference—denying Mr. Minton care because he is transgender and because he needed a specific treatment related to being transgender are functionally the same.[5]

Simply put, Defendant misunderstands gender dysphoria. Mr. Minton suffers from gender dysphoria *because* he is transgender. *See* RJN, Ex. 1, 5-6. Refusing to treat gender dysphoria is, by definition, sex discrimination against transgender people. The medical diagnosis of gender dysphoria is relevant to Mr. Minton's claim of discrimination because it was the medical reason he needed a hysterectomy, but he has pled sex discrimination, not medical condition discrimination.

Mr. Minton amended his complaint in accordance with the Court's order to "allege sufficient facts to avoid a demurrer," by both clarifying ambiguous facts and adding facts that further elaborate on what happened between the original cancellation and his procedure. Order Sustaining Dignity Health's Demurrer to Verified Complaint at 2. The facts Mr. Minton alleges in the First Amended Complaint are consistent with those alleged in the original Complaint, despite Defendant's claims otherwise. Further, Mr. Minton did not "attempt[] to revise the explanation provided by Dignity Health for cancelling his hysterectomy at Mercy," as Defendant alleges. Dem. at 11. Defendant misreads paragraph 24 of the First Amended Complaint, which simply explains that MSJMC knew of Mr. Minton's gender dysphoria at the time when Mr. Ivie informed Dr. Dawson the surgery had been cancelled because of the "indication" motivating it. Taking these material facts as true, and drawing reasonable inferences

[5] Dignity Health's protestations that it is willing to treat transgender people at MSJMC for conditions other than gender dysphoria does nothing to address the injuries Mr. Minton sustained as a result of MSJMC's denial of the specific sex-linked treatment he needed, or to absolve Dignity Health of Unruh Act liability. *See generally, e.g.*, *Elane Photography, LLC, v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (finding photography studio violated state statute analogous to Unruh Act by refusing to take commitment ceremony photographs for same-sex couple and noting "if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers").

therefrom as is appropriate at this stage of the case, Mr. Minton has sufficiently alleged sex discrimination in violation of the Unruh Act.

Mr. Minton clarifying facts regarding Dignity Health's discrimination in the FAC does not begin to approximate sham pleading. "The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process . . . The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." *Hahn v. Mirda*, 147 Cal. App. 4th 740, 751 (2007); *see also Leasequip, Inc. v. Dapeer*, 103 Cal. App. 4th 394, 404 n.6 (2002) (finding second amended complaint not a sham when the allegations in the second amended complaint "amplified, but did not contradict" those in the first amended complaint). Mr. Minton's FAC contains factual clarifications and amplifications, for which he was given leave to amend.

Mr. Minton has also consistently alleged individual disparate treatment under the Unruh Act as a transgender man. California courts have upheld Unruh Act claims challenging facially neutral policies that in fact treated protected class members differently than other individuals. *See Hankins v. El Torito Restaurants*, 63 Cal. App. 4th 510, 518 (1998) (upholding an Unruh Act disability discrimination claim against a restaurant for its facially neutral policy that functioned to prevent patrons with physical disabilities from accessing a restroom). Although Defendant's practices also have a disparate impact on transgender people in the aggregate, this is not the basis of Mr. Minton's claim. *See Harris v. Capital Growth Inv'rs XIV*, 52 Cal. 3d 1142, 1175 (1991), *superseded on other grounds by* Civil Code 51(f) (noting that evidence of disparate impact on a protected group "may be probative of intentional discrimination in some cases"); *see also Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1046 (1986), *aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) ("Unruh Act is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice") .

II. *NORTH COAST* DOES NOT ABSOLVE DEFENDANT OF LIABILITY.

Defendant describes *North Coast* as "controlling authority," Dem. at 8, and indeed it is for the proposition that "the rights of religious freedom and free speech" do not "exempt a medical clinic's physicians from complying with the Unruh Civil Rights Act's prohibition against discrimination based

on a person's sexual orientation." *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, 44 Cal. 4th 1145, 1150 (2008). However, the "rule" that Defendant describes—that facilities can avoid liability under the Unruh Act if patients receive treatment from a physician lacking the objecting health care providers' religious objections—is dicta that does not qualify as binding authority and does not control here. Further, the denial of care that Mr. Minton endured is distinguishable from the facts in *North Coast*, indicating that Dignity Health cannot avoid being subject to liability in this matter.

California Supreme Court dicta is not automatically binding on the lower courts. Notably, Defendant does not contest that the language for the "rule" cited was not material to issues before the court in *North Coast*, Dem. at 9, which was conducting a purely legal analysis as to whether the defendants there could claim an affirmative defense to the Unruh Act as a matter of law. Within the context of the court's determination that the Unruh Act could pass a strict scrutiny analysis,[6] it mentioned that patients could legally be treated by other physicians within the same facility who did not have religious objections to a course of treatment, in order to illustrate that "there are no less restrictive means [than enforcement of the Unruh Act] for the state to achieve" its "compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation." *N. Coast*, 44 Cal. 4th at 1158-59. Although illustrative, whether a patient could have in fact been treated by a North Coast physician without religious objections to conducting the procedure "was not critical to the resolution of" *North Coast*, where the defendant clinic had been unable to identify a physician on its staff who was willing and licensed to provide the treatment at issue, so "the court's pronouncements thereon are dicta and not binding upon the lower courts." *Evans v. City of Bakersfield*, 22 Cal. App. 4th 321, 328 (1994); *see also Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1005-06 (2011) ("To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised." (internal quotation marks omitted)).

To determine whether the California Supreme Court's statements are binding, even when its analysis was not relevant to the material facts of a particular case, courts look to whether a specific statement was "responsive to an argument raised by counsel and probably intended for guidance of the

[6] As detailed *infra* at Section III.B, the *North Coast* court did not hold that the strict scrutiny test applied, but rather that "this case presents no need for us to determine the appropriate test." 44 Cal. 4th at 1158.

court and attorneys upon a new hearing." *United Steelworkers of Am. v. Bd. of Educ.*, 162 Cal. App. 3d 823, 834 (1984). First, Defendant states, without offering any proof, that the language was "responsive to arguments raised by counsel." Dem. at 8. The *North Coast* court did not describe its example as culled from the parties' arguments, but merely offered it to illustrate that the Unruh Act is the least restrictive means for the state to further its interest in achieving full and equal access to medical treatment.[7] Second, Defendant states that the language was "intended for guidance of the Court and attorneys," Dem. at 8-9, but whether a statement is considered authority is determined by whether the court was speaking directly to the lower courts that would hear the case on remand (and would need to reconsider the facts), not whether the language was intended as guidance generally. *Estate of Hilton v. Conrad N. Hilton Foundation*, 44 Cal. App. 4th 890, 919 (1996) ("Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and *deliberately made pronouncements thereon intended for guidance of the lower court upon further proceedings*." (quoting *Cty. of Fresno v. Superior Court*, 82 Cal. App. 3d 191, 194 (1978)) (emphasis added)). The *North Coast* court reversed the judgment of the Court of Appeal as a matter of law, 44 Cal. 4th at 1162, and thus the statement was not "intended for guidance of the court and attorneys upon a new hearing," because there would be no further proceedings as to whether there was a religious exemption to the Unruh Act itself. Accordingly, the language that Defendant relies on in the *North Coast* opinion is not binding authority because it was not material to the disposition, responsive to the parties' arguments, nor intended as guidance for a lower court.

Further, to the extent that the dicta in *North Coast* is at all persuasive, *see United Steelworkers*, 162 Cal. App. 3d at 835, the facts at issue there were entirely distinguishable from the situation that Mr. Minton faced. Unlike in *North Coast*, here no physician ever raised a personal religious objection to

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[7] In *North Coast* briefing, plaintiff suggested that defendants could "select[] at least one member of their medical staff" to perform procedures "for all patients equally," as proof that the Unruh Act did not create an impermissible burden on religious freedom. RJN, Ex. 2, at 19. Defendants did not address plaintiff's suggestion directly, and instead claimed that the Unruh Act needed to permit physicians to arrange for referrals of patients where they had religious objections to the treatment. RJN, Ex. 3, at 50. To the extent *North Coast* articulated a "rule" in response to one line of argument from plaintiff's brief, as is discussed below, the Supreme Court was still not instructing the lower court. Further, the purported "rule" is not applicable to the facts of this case, as discussed below.

performing Mr. Minton's hysterectomy. Throughout the relevant time period, Dr. Dawson was ready and willing to perform the procedure, and thus Mr. Minton was already being treated by a "physician lacking [Dignity Health's] religious objections." *N. Coast*, 44 Cal. 4th at 1159; FAC ¶¶ 19, 20, 39. Rather, a medical institution—MSJMC—barred Dr. Dawson from *ever* performing the hysterectomy for Mr. Minton within its walls, causing Mr. Minton severe dignitary harm and forcing him to scramble to seek treatment elsewhere. FAC ¶¶ 23, 25, 41-42. Because Dignity Health's actions forced Mr. Minton to undergo the hysterectomy at Methodist Hospital, he was subject to additional costs, delays, and dignitary harms that he would not have endured if the procedure had taken place at MSJMC as scheduled. FAC ¶¶ 26, 37, 41-42. These facts are not comparable to the circumstances hypothesized in *North Coast*, in which non-objecting physicians *at the same medical clinic* would treat the patient. 44 Cal. 4th at 1159. The *North Coast* court did not consider whether the additional costs and challenges inherent in a transfer to a different medical facility would likewise avoid a conflict with the Unruh Act's antidiscrimination provisions.

Finally, Mr. Minton and Dr. Dawson had to call out affirmatively Dignity Health's discrimination and had to work to secure an alternative venue for Mr. Minton's hysterectomy. FAC ¶¶ 27-37; *see Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 168 (2007) (noting that Unruh Act, unlike other California statutes, does not require aggrieved person to give violator notice and opportunity to cure before liability attaches). *North Coast* put the burden on those with the religious objection to "avoid such a conflict by *ensuring* that every patient . . . receives 'full and equal' access" to medical treatment. 44 Cal. 4th at 1159 (emphasis added). Here, in contrast, Dignity Health cancelled Mr. Minton's surgery without affirmatively acting to ensure that he would receive the treatment he required. FAC ¶ 22.[8]

[8] Defendants argue, without explanation, that the distinctions between the cases hurt Mr. Minton's claim. First, they state that the defendants in *North Coast* conceded sex discrimination, Dem. at 10, which they did not, as the motivation was contested between the parties. 44 Cal. 4th at 1160-61. Second, *North Coast* did not involve "a medical procedure performed by a different doctor in the same medical practice," Dem. at 10, as the patient was ultimately treated by a different doctor at a different facility. 44 Cal. 4th at 1152. This fact only helps Mr. Minton. The facts of *North Coast* concerned care at a *different* facility, whereas the hypothetical offered in dicta suggested a defendant clinic might avoid liability if a patient were treated by another doctor at the *same facility,* suggesting the court did not

This Court may choose to consider the reasoning in *North Coast*, but that court did not opine on the harms associated with referring a patient to a different facility for treatment. Further, to say that *North Coast* only requires that a patient ultimately get treatment, regardless of where, or when, or how such arrangements are made, is effectively to say that the Unruh Act's protections are meaningless for anyone whose need for services is urgent enough that they pursue and obtain emergency accommodations elsewhere after a covered entity asserts a religious motive for rejecting them.

III. DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO DISCRIMINATE AGAINST PATIENTS BY PROHIBITING DOCTORS FROM PERFORMING GENDER-AFFIRMING SURGERIES.

The allegations in the First Amended Complaint fall far short of "clearly disclos[ing]" that constitutional protections bar Mr. Minton's claims. *Stella v. Asset Mgmt. Consultants, Inc.*, 8 Cal. App. 5th 181, 191 (2017). Accordingly, Defendant's demurrers should not be sustained on the basis of its purported constitutional defenses.

A. California Law Requires Religiously Affiliated Hospitals To Comply With The Unruh Act.

Defendant first argues that the California Supreme Court permits private religious hospitals to refuse to perform procedures they believe to be prohibited by religious doctrine. *See* Dem. at 14. Not so. The California Supreme Court has twice held that religiously affiliated healthcare entities must comply with California statutes mandating equitable, nondiscriminatory access to healthcare—such as the Unruh Act—in spite of any religious objections to doing so. *See N. Coast*, 44 Cal. 4th at 1158 (holding that physicians could not deny same-sex couples access to fertility procedures under the Unruh Act on religious objection grounds); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 564–65 (2004) (holding that Catholic Charities had to comply with a state law requiring employers to include contraceptive coverage in their prescription drug plans, because "any exemption from the [law] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits"). As detailed *supra* at Section II, Defendant's citation to non-binding dicta in *North Coast* is unavailing, and even in dicta the *North Coast* court did not approve the conduct at issue here.

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believe sending a patient elsewhere precluded liability.

B. Federal and State Constitutional Protections for Free Exercise and Free Speech Do Not Bar Mr. Minton's Claims.

Defendant next argues that the relief Mr. Minton seeks would force it to violate Catholic teachings. *See* Dem. at 14-15. But "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." *N. Coast*, 44 Cal. 4th at 1155. Defendant cannot dispute that the Unruh Act is a neutral law of general applicability, so its constitutional arguments must fail.

As a threshold matter, Defendant is wrong that strict scrutiny is the appropriate standard to apply to its free exercise defense. *See* Dem. at 14. Rather, the general rule is that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Catholic Charities*, 32 Cal. 4th at 549; *see also id.* at 565 ("We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.").[9]

Even if strict scrutiny *were* the appropriate test, the California Supreme Court has held that state statutes aimed at preventing discrimination, such as the Unruh Act, survive even strict scrutiny under the California Constitution. *See N. Coast*, 44 Cal. 4th at 1158 ("The [Unruh] Act furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal."); *see also Catholic Charities*, 32 Cal. 4th at 564–66. As described *supra* at Section II, the *North Coast* court's reference in dicta to possible strategies a medical practice group might have used to address individual physicians' religious objections in no way suggested that the Unruh Act failed strict scrutiny. *See N. Coast*, 44 Cal. 4th at 1158. Rather, that court held that even if compliance with the Unruh Act's prohibition on sexual

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[9] Defendant argues that the California Supreme Court "[p]resumptively appl[ied]" strict scrutiny in *North Coast*, but the court did no such thing. *See N. Coast*, 44 Cal. 4th at 1158 ("[T]his case presents no need for us to determine the appropriate test.").

orientation discrimination would substantially burden physicians' religious beliefs, "that burden is insufficient to allow them to engage in such discrimination." *Id.*

Defendant also argues that the relief Mr. Minton seeks would burden its freedom of expression by forcing it to violate certain ethical and religious directives of the Catholic Church ("ERDs"). *See* Dem. at 14-15. For example, Defendant argues that, if the relief sought in the First Amended Complaint were granted, MSJMC would be compelled to violate certain ERDs "prohibit[ing] direct sterilization." *Id.* at 15. But hysterectomy "is an inherently sterilizing procedure, regardless of the reason for which it is performed," FAC ¶ 15, and MSJMC regularly permits physicians to perform hysterectomies for cisgender patients, *id.* ¶ 20. Thus, the only reasonable inference to be drawn from the First Amended Complaint is that MSJMC prohibited Dr. Dawson from ever performing a hysterectomy for Mr. Minton because of discriminatory animus, and not because of any religious directive.

Nor do the cases Defendant cites support its contention that the relief sought would unconstitutionally compel speech. *See* Dem. at 14-15. The *North Coast* court specifically rejected this argument, holding that "simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose," because "[s]uch a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." *N. Coast*, 44 Cal. 4th at 1157. Well-settled Supreme Court doctrine instructs that purportedly compelled conduct must possess sufficient communicative elements to merit First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (noting this inquiry depends on whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it"); *see also Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 696 (2010) (refusing First Amendment protection for a student group excluding gay members, because "[e]ven if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, where the State does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."). Unsurprisingly, Defendant does not cite any cases to support the proposition that the federal or state

constitutions treat denying healthcare services as a protectable expression of speech or faith—nor could it. Simply obeying the law is not an unconstitutional burden to bear. *See N. Coast*, 44 Cal. 4th at 1157.

The relief Mr. Minton seeks also does not infringe on Defendant's freedom of expressive association. Defendant cites a series of cases involving membership in (*i.e.*, association with) private organizations. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (plaintiff denied membership in Boy Scouts of America); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995) (plaintiff denied right to march in privately organized parade); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (addressing "a religious organization's freedom to select its own ministers"). Even if a hospital association like Defendant were deemed to be an expressive enterprise (though that is far from clear), a patient's transactional relationship with Defendant for the limited purpose of obtaining medical care—as opposed to becoming part of the organization itself—does not infringe on Defendant's freedom of expressive association. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (noting "critical" distinction between outsiders engaging with an entity for a limited purpose, in contrast to becoming members of an entity's expressive association). Mr. Minton does not allege that Defendant refused him membership or some other associative interest. Instead, he simply seeks access to medical care at MSJMC.

Courts across the country have rejected claims of compelled expressive conduct or forced association when private entities refuse to provide goods and services on the basis of religious beliefs. *See, e.g., Gifford v. McCarthy*, 23 N.Y.S.3d 422, 432 (N.Y. App. Div. 2016) ("[T]here is no real likelihood that the Giffords would be perceived as endorsing the values or lifestyle of the individuals renting their facilities as opposed to merely complying with anti-discrimination laws."). For example, in *Gifford*, the court held that, "[l]ike all other owners of public accommodations who provide services to the general public, the Giffords must comply with the statutory mandate prohibiting discrimination against customers on the basis of sexual orientation or any other protected characteristic." 23 NY.S.3d at 43. Under those circumstances, as here, there is "no real likelihood" that the Giffords would be perceived as endorsing the values or lifestyle of the individuals who use their facilities. *Id.*; *see also Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), *cert. granted sub nom.*

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 2722428 (U.S. June 26, 2017) ("[T]he act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it."); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 557 (Wash. 2017) ("The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding."), *petition for cert. filed,* No. 17-108 (U.S. July 14, 2017). Similarly, the decision to allow hospital facilities, where a diverse range of patients receive a diverse range of health care services, to be used to perform a hysterectomy for a transgender patient does not inherently express a message about gender-affirming surgeries.

Mr. Minton does not seek to burden unconstitutionally any religious or expressive rights. Rather, he asks only that Defendant comply with what the law requires of all business establishments serving the general public: full and equal access to medical treatment irrespective of gender identity.

C. The Church Autonomy Doctrine Does Not Apply Here.

Defendant also unsuccessfully invokes the church autonomy doctrine. The doctrine, rooted in the federal Establishment Clause, provides "constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes." *Gen. Council on Fin. & Admin. of the United Methodist Church v. Super. Ct. of Cal.*, 439 U.S. 1369, 1372-73 (1978). In *Catholic Charities*, the California Supreme Court rejected the proposition that the church autonomy doctrine prevents courts from applying state legislation to religiously affiliated entities. 32 Cal. 4th at 542-43 (holding that law requiring Catholic Charities to provide contraception coverage to its employees "does not implicate internal church governance" and does not "require [courts] to decide any religious questions," but only requires them to "apply the usual rules for assessing whether state-imposed burdens on religious exercise are constitutional").

Applying the Unruh Act to Dignity Health in this case does not implicate the church autonomy doctrine because no religious questions or church governance issues need be resolved. Defendant's single citation to *Means v. U.S. Conference of Catholic Bishops*, No. 1:15-CV-353, 2015 WL 3970046 (W.D. Mich. June 30, 2015), *aff'd* 836 F.3d 643, is inapposite. In that case, a Michigan federal district

court refused to examine whether the Church sponsors of a Catholic healthcare system could be held liable for the imposition of the ERDs on a Catholic hospital. *Id.* at *13-14. The court noted that while "[it] must defer to religious institutions in their articulation of church doctrine and policy," the plaintiff would still have recourse to a civil lawsuit against the *hospital* because "the Court's consideration of the legal duty of a physician to provide adequate medical care is not a matter of church doctrine." *Id.* Here, Mr. Minton's case is against a hospital for denying him care, not against any religious sponsor of such hospital for imposing the ERDs; thus, the church autonomy doctrine does not apply.

CONCLUSION

For the foregoing reasons, the Court should overrule Defendant's demurrers to the First Amended Complaint.

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