No. A153662

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

EVAN MINTON,

Plaintiff-Appellant,

vs.

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

Defendant-Respondent.

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

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A153662

Superior Court Case Number: 17-558259

Case Name: *Minton v. Dignity Health, d/b/a Mercy San Juan Medical Center*

Please check the applicable box:

☒ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☐ Interested Entities or Parties are Listed Below:

/s/ *Lindsey Barnhart*
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SUMMARY OF THE ARGUMENT

California's Unruh Civil Rights Act promises that all those within the jurisdiction of the state are "free and equal" and "entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). Despite the clarity of this law—and its specification that persons cannot be denied full and equal access based on their gender identity—Respondent Dignity Health denied Appellant Evan Minton access to Mercy San Juan Medical Center ("MSJMC") because Mr. Minton is transgender. After learning that Mr. Minton is transgender, Respondent refused to permit Mr. Minton's physician to perform a scheduled and medically necessary hysterectomy procedure at MSJMC, even though the physician regularly performs hysterectomies for cisgender patients at that hospital. Mr. Minton was devastated by the cancellation and sustained both practical and dignitary harms as a result of it.

The trial court acknowledged that Respondent's denial of access was motivated by Mr. Minton's gender identity, but it nonetheless erroneously sustained Respondent's demurrer. The trial court improperly treated as fact representations Respondent made in its briefing regarding the timing and impetus for the eventual rescheduling of the surgery at a different hospital, which Mr. Minton has not yet had any opportunity to disprove through discovery, and which, even if true, would not alter the fact that Respondent

engaged in illegal discrimination at the moment it cancelled Mr. Minton's scheduled procedure because of his gender identity. 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 Respondent of liability for its discriminatory conduct. Nor does Respondent's religious affiliation exempt it from complying with the requirements of the Unruh Act, as the California Supreme Court has made clear. The trial court's exclusive reliance on dicta from *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008) to reach a contrary conclusion was erroneous and unsupported by the *North Coast* holding.

California courts have long recognized the central importance of the Unruh Act in preventing discrimination in access to business establishments. Indeed, in *North Coast*, the California Supreme Court concluded that the Unruh Act satisfied the highest form of constitutional scrutiny. 44 Cal. 4th at 1158–59. This case asks this Court to affirm that the Unruh Act not only prevents businesses from turning away individuals based on their protected characteristics, but demands "equal treatment of patrons in all aspects of the business." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 30 (1985). The Court should therefore reverse the trial court's order sustaining Respondent's demurrer and permit Mr. Minton the opportunity to prove his well-pleaded claim.

STATEMENT OF THE CASE

A. Factual Background

Mr. Minton is a transgender man. Record on Appeal ("ROA") at 150. His gender identity—the gender he knows himself to be—is male, although he was assigned the sex of female at birth. *Id.* at 150–51. 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.* at 151–53, 121. Mr. Minton's gender identity thus is inextricably intertwined with his gender dysphoria diagnosis.

Mr. Minton sought to undergo a hysterectomy as part of his treatment for gender dysphoria, a multi-step process of increasing the alignment between his body and his male gender identity. ROA at 152–53; *see also id.* at 123–26 (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 on August 30, 2016. ROA at 153–54. Because she has admitting privileges at Respondent's MSJMC hospital, and because MSJMC is conveniently located near Mr. Minton's home, Dr. Dawson scheduled an appointment to do the hysterectomy

there.[1] Dr. Dawson routinely performs hysterectomies for cisgender (*i.e.*, non-transgender) female patients at MSJMC, as do other physicians. ROA at 153, 157.

Respondent, however, prevented Mr. Minton's doctor from performing a hysterectomy on Mr. Minton after learning of his gender identity. On August 29, 2016—one day before the hysterectomy was scheduled—Respondent abruptly cancelled the procedure after Mr. Minton mentioned to an MSJMC nurse that he is transgender. ROA at 153–54. MSJMC's president, Brian Ivie, told Dr. Dawson that the surgery had been cancelled because of the "indication" it was intended to address, and also told Dr. Dawson that "she would *never* be allowed to perform a hysterectomy on Mr. Minton at MSJMC." ROA at 154 (emphasis added). Taking as true these facts as alleged in the operative complaint, the trial court correctly determined in its order that Respondent's "refusal to have the procedure performed at MSJMC was substantially motivated by Mr. Minton's gender identity." ROA at 431.

Respondent's discriminatory denial of full and equal access to medical care caused substantial harm to Mr. Minton. When Mr. Minton

[1] MSJMC is one of 31 hospitals throughout California that Respondent Dignity Health owns and operates. ROA at 150–51. One of the five largest health systems in the United States, Respondent in 2014 reported a staff of more than 49,000 people and total annual revenue in excess of $10 billion. *Id.*

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. ROA at 154. Because he was also scheduled to undergo another surgery after a specified interval of recovery from the hysterectomy, the cancellation of his hysterectomy jeopardized Mr. Minton's overall course of medical treatment for gender transition, causing him significant distress. *Id.* Mr. Minton was eventually able to complete his hysterectomy at a different hospital and at a later date. *Id*. As a result of Respondent's discriminatory cancellation of the procedure at MSJMC, Mr. Minton not only was forced to make a longer trip to an unfamiliar hospital, ROA at 157, 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 elsewhere. *Id.*

Respondent blatantly mischaracterized its actions in briefing before the trial court, contending that it affirmatively "rescheduled" Mr. Minton's surgery, ROA at 170–71, and that the then-President of MSJMC, Mr. Ivie, "quickly offered" Methodist Hospital as an alternative venue for the surgery, *id.* at 170. There are no allegations in the operative complaint that Respondent or Mr. Ivie "quickly" did anything—except cancel the surgery. It was Dr. Dawson who initiated communication with MSJMC management seeking to reschedule the surgery. ROA at 154. And it was Mr. Minton and Dr. Dawson who elicited media coverage of the incident

and who enlisted the assistance of Jenni Gomez (a Legal Aid attorney), Dave Jones (the California Insurance Commissioner), as well as a number of state legislators, legislative staff members, and Sacramento-area lobbyists in order to communicate the urgency of Mr. Minton's need for immediate surgical care to Respondent.

Only after Dr. Dawson managed to negotiate an alternative venue for the surgery, secure emergency admitting privileges for herself there, and sort out insurance coverage issues, was Mr. Minton able to receive his hysterectomy—on the other side of town and several days after it had been scheduled, at a hospital whose layout, equipment, and support staff were unfamiliar to Dr. Dawson. ROA at 155–57. Respondent's contemporaneous public statement 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" confirms that Respondent unlawfully abdicated its own responsibility for providing full and equal access to medical care to Mr. Minton himself, his physician, and others, in violation of the Unruh Act. ROA at 155.

Based on these allegations, Mr. Minton seeks relief under the Unruh Act in the form of an order enjoining Respondent from further discrimination on the basis of gender identity and statutory damages.

B. Procedural History

Mr. Minton filed his verified complaint for declaratory and injunctive relief and statutory damages on April 19, 2017. ROA at 6. Respondent filed a demurrer on July 3, 2017. *Id.* at 71. After the presiding judge issued a tentative ruling overruling the demurrer, Respondent filed a peremptory challenge. *Id.* at 144. Following reassignment, Respondent's demurrer was sustained with leave to amend on August 30, 2017. *Id.* at 146.

Mr. Minton filed the operative First Amended Verified Complaint ("FAC") on September 19, 2017, ROA at 148, to which Respondent demurred on October 23, 2017. *Id.* at 162. On November 17, 2017, the trial court heard argument and issued an order sustaining the demurrer without leave to amend. *Id.* at 430. The court entered a judgment of dismissal on January 9, 2018. *Id.* at 437. Mr. Minton timely filed a notice of appeal on January 31, 2018. *Id.* at 443.

STATEMENT OF APPEALABILITY

Mr. Minton appeals the trial court's final judgment of dismissal after an order sustaining a demurrer. ROA at 433.

STANDARD OF REVIEW

A ruling sustaining a demurrer without leave to amend is reviewed de novo. *Fox v. JAMDAT Mobile, Inc.*, 185 Cal. App. 4th 1068, 1078 (2010). The reviewing court gives the complaint a reasonable interpretation

and treats the demurrer as admitting all material facts properly pleaded. *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985); *Buckaloo v. Johnson*, 14 Cal. 3d 815, 828 (1975). It is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. *Barquis v. Merchants Collection Ass'n.*, 7 Cal. 3d 94, 103 (1972). A demurrer "accepts as true all well pleaded facts and those facts of which the court can take judicial notice but not deductions, contentions, or conclusions of law or fact." *Fox*, 185 Cal. App. 4th at 1078. "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts." *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113–14 (2007) (quoting *Ramsden v. Western Union*, 71 Cal. App. 3d 873, 879 (1977)).

ARGUMENT

I. Mr. Minton Has Sufficiently And Consistently Pled A Valid Unruh Act Claim For Discrimination.

Respondent's refusal to provide medical care to Mr. Minton because of his gender identity was a clear violation of the Unruh Act's requirement that all Californians be provided "full and equal" access to treatment.

A. The Unruh Act mandates equal access to establishments, as well as equal treatment in the conditions of that access.

The Unruh Act mandates that all persons "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments," regardless of their sex or other status, Civ. Code

§ 51(b), defining "sex" to "include[] a person's gender identity and gender expression." *Id.* § 51(e)(5). The trial court erred by holding that, when Respondent suddenly cancelled Mr. Minton's hysterectomy appointment, it provided him with full and equal access to the procedure. The court's determination distorts the "full and equal" standard long recognized by California courts and disregards the tangible harms resulting from the cancellation that Mr. Minton alleged in the operative complaint.

"The Legislature's desire to banish [discrimination] from California's community life has led [the California Supreme Court] to interpret the [Unruh] Act's coverage 'in the broadest sense reasonably possible.'" *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 75–76 (1985) (quoting *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468 (1962)), *as modified on denial of reh'g* (Dec. 19, 1985). Accordingly, the Unruh Act's protections extend beyond prohibiting businesses from turning away individuals based on their protected characteristics; the Act is "concern[ed] not only with access to business establishments, but with equal treatment of patrons in all aspects of the business." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 29 (1985) (emphasis added); *see also Starkman v. Mann Theatres Corp.*, 227 Cal. App. 3d 1491, 1496 (1991). In other words, "the scope of the Unruh Act is not narrowly limited to practices which totally exclude classes or individuals from business establishments"

or other "exclusionary practices," and instead covers the treatment of those individuals by such businesses. *Koire*, 40 Cal. 3d at 30.[2]

Examples from cases applying the Unruh Act illustrate that a variety of unequal conditions and resulting harms have been found to violate the Act's "full and equal" treatment standard. In *Koire*, the California Court of Appeal favorably cites a case in which an African-American diner was seated at an establishment, but was "not accorded the same accommodations," as one employee placed her food order among the dirty dishes on the counter and another employee struck her and threw a cup of coffee on her. *Id.* (quoting *Hutson v. The Owl Drug Co.* 79 Cal. App. 390, 393 (1926)). An establishment's mistreatment need not reach that level of aggression to qualify as a denial of full and equal treatment and could result from the denial of a "courtesy." *Jackson v. Superior Court*, 30 Cal. App. 4th 936, 941 (1994) (finding Unruh Act violation where bank refused to permit African-American investment advisor to accompany clients and assist them with their banking business). For instance, a photographer at a

[2] Although the trial court did not rule on these grounds, Mr. Minton has also consistently alleged individual disparate treatment under the Unruh Act as a transgender man. The Unruh Act permits claims based on disparate treatment, where facially neutral policies in fact treated protected class members differently than other individuals. *See Harris v. Capital Growth Inv'rs XIV*, 52 Cal. 3d 1142, 1175 (1991) (noting that evidence of disparate impact on a protected group "may be probative of intentional discrimination in some cases"); *Hankins v. El Torito Restaurants*, 63 Cal. App. 4th 510, 518 (1998).

high school reunion who refused to include a photograph of plaintiff and his same-sex partner in the reunion yearbook violated the Unruh Act. *Engel v. Worthington*, 60 Cal. App. 4th 628, 630 (1997). Likewise, disabled individuals have successfully pled Unruh Act violations when they gain access to facilities, but on different terms than other patrons. *See Stevens v. Optimum Health Inst.-San Diego*, 810 F. Supp. 2d 1074, 1089–90 (S.D. Cal. 2011) (finding Unruh Act violation by facility that denied blind plaintiff entry alone and required her to have a "sighted companion to accompany her" at additional cost); *see also Boemio v. Love's Rest.*, 954 F. Supp. 204, 208 (S.D. Cal. 1997).

B. Minton did not receive "full and equal" treatment from Respondent.

There are numerous allegations in the FAC that state a cognizable claim of sex discrimination in violation of the Unruh Act due to the unequal conditions Mr. Minton was subjected to by Respondent. Although Respondent routinely permits physicians to perform hysterectomies for cisgender patents at MSJMC, Respondent blocked Mr. Minton from accessing the same medical care because he is transgender. That was a denial of "full and equal" treatment.

1. The trial court erred in construing any access to surgery as full and equal access.

The trial court mistakenly held that Respondent provided Mr. Minton "full and equal" access to a hysterectomy because it did not prevent

his physician from performing the procedure—three days later—at a non-Catholic hospital in Respondent's network. ROA at 431. A "plaintiff need not show that it was *impossible* to access the facility or service at issue" to show that the Unruh Act was violated. *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1051 (N.D. Cal. 2012) (citing *Botosan v. Paul McNally Realty*, 216 F.3d 827, 834–35 (9th Cir. 2000)). As the court observed in *Boemio*: "The standard cannot be 'is access achievable in some manner.' We must focus on the *equality* of access." 954 F. Supp. at 208 (emphasis added); *see also Suttles v. Hollywood Turf Club*, 45 Cal. App. 2d 283, 286 (1941) (racetrack violated predecessor statute to Unruh Act by excluding African-Americans from its clubhouse, even though they were allowed to access grandstand areas); *Jones v. Kehrlein*, 49 Cal. App. 646, 647 (1920) (movie theater engaged in illegal discrimination by requiring customers of color to sit in a particular area); *Elane Photography, LLC, v. Willock*, 309 P.3d 53, 62 (N.M. 2013) (finding photography studio violated state statute analogous to Unruh Act for 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"). The California Supreme Court's *North Coast* decision—on which the trial court exclusively relied—does not compel a contrary result; rather, that case makes clear that religiously affiliated healthcare entities such as Respondent must comply

with the strictures of the Unruh Act despite any religious objections. 44 Cal. 4th 1145, 1157 (2008); *see infra* at II.BII.B.

2. Mr. Minton sustained harms as a result of Respondent's denying him full and equal access.

The contrast is striking between the treatment that Mr. Minton would have received had his original appointment been honored and the conditions under which Mr. Minton eventually underwent surgery. The hospital where Mr. Minton ultimately had to undergo the procedure was farther away from Mr. Minton's home and outside the scope of his surgeon's usual practice—Dr. Dawson had to obtain emergency surgical privileges at the new hospital and was unfamiliar with the operating room and staff there. ROA at 156–57. Additionally, the implication of the trial court's order is that Respondent proactively ensured that Mr. Minton would still receive his medically necessary care, but that is incorrect and unsupported by the pleadings. The pleadings do not indicate any affirmative action was taken by Respondent at the time the surgery was cancelled to accommodate Mr. Minton; in fact, it was days before Mr. Minton knew that he would be able to access the care he needed. ROA at 157. Moreover, Respondent's rejection of any responsibility to accommodate Mr. Minton is confirmed by the company's contemporaneous public statement 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." ROA at 155 (emphasis added).

It is enough to establish an Unruh Act violation that the conditions under which Mr. Minton eventually accessed treatment were unequal. "The plain language of the Unruh Act mandates equal provision of advantages, privileges and services in business establishments in this state." *Koire*, 40 Cal. 3d at 38. Even assuming that Respondent affirmatively "accommodated" Mr. Minton, which it did not, he was subjected to several days of anxious waiting, was required to travel across town, and underwent surgery in a forum with which his surgeon was unfamiliar. ROA at 156–57. Further, to end the inquiry with the fact that Mr. Minton ultimately obtained medical care is to trivialize the profound dignitary harm that he experienced when he was denied care by Respondent. Respondent's treatment of Mr. Minton "smacks of the separate but equal mentality, whose validity California courts have been rejecting for 70 years now." Nov. 17, 2017 Hearing Tr., 8:7–8:14. From the moment MSJMC cancelled his appointment with no alternative plan in place, Mr. Minton was denied full and equal access to necessary medical care, and the lengths he then went to, in order to obtain that care, further illustrate the disparate, unequal conditions he was subjected to by Respondent.

During that time of uncertainty, Mr. Minton bore numerous costs due to the time and effort he devoted to rescheduling his appointment. Mr.

Minton was forced to scramble to ensure he could access his necessary medical treatment: he contacted media outlets and participated in interviews, he obtained assistance from an attorney, and he reached out to politically connected individuals to advocate on his behalf. ROA at 155–56. It is no defense that, "with additional time, patience, and jockeying," Mr. Minton was able to secure medical treatment at an alternative facility. *Boemio*, 954 F. Supp. at 208. Mr. Minton, his physician, and others, would not have had to invest considerable resources in pressuring Respondent and searching for treatment alternatives had MSJMC not cancelled his procedure because he is transgender.

Crucially, the knowledge that he had been denied full and equal access to necessary medical care by Respondent based on his identity has caused Mr. Minton to suffer dignitary harm that continues to afflict him. Upon learning that his surgery was cancelled, Mr. Minton was "so shocked, hurt, and distraught . . . that he recalls sinking to the ground and then collapsing entirely." ROA at 154. Mr. Minton was "devastated" to learn the hospital was refusing him care because he is transgender. *Id.* The refusal caused him "great anxiety and grief," in part because of the tight schedule associated with proceeding along the prescribed series of steps in his gender transition. *Id.* Experiencing discriminatory treatment made him feel "downtrodden" and "deeply hurt." *Id.* at 157.

Preventing the stigma and dignitary harm that Mr. Minton suffered goes to the very purpose of anti-discrimination provisions like the Unruh Act. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding state public accommodations act "protects the State's citizenry from a number of serious social and personal harms" such as the "stigmatizing injury, and the denial of equal opportunities that accompanies" discrimination); *Heart of Atl. Motel v. United States*, 379 U.S. 241, 250 (1964) (noting denial of equal access to public accommodations causes "deprivation of personal dignity"). Allowing Respondent to refuse equal treatment to patients like Mr. Minton because they are transgender would result in a "stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018); *see also Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 434 (Ariz. Ct. App. 2018), *petition for review filed* (Ariz. July 9, 2018).

C. Respondent discriminated against Mr. Minton on the basis of sex.

The trial court concluded, as this Court should as well, that MSJMC's refusal to treat Mr. Minton was "substantially motivated by Mr. Minton's gender identity." ROA at 431. Mr. Minton's scheduled hysterectomy was cancelled immediately after he disclosed that he is

transgender. *Id.* at 153–54. Further, Respondent communicated to him that his gender identity was the reason his surgery was cancelled and could not take place at MSJMC. *Id.* at 154. Mr. Minton was seeking specific treatment related to being transgender, and he was turned away as a result. Refusing to treat someone because he is transgender is sex discrimination in violation of the Unruh Act.

II. Neither the United States Nor the California Constitutions Grant Religiously Affiliated Entities A Right To Discriminate In Violation of the Unruh Act.

Despite acknowledging that Respondent's discriminatory treatment of Mr. Minton was motivated by his gender identity, and despite the wealth of authority holding that such unequal treatment violates the Unruh Act, the trial court nevertheless sustained the demurrer, relying exclusively on dicta in *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008). This ruling ignores the California Supreme Court's clear direction—including in *North Coast* itself—that religiously affiliated healthcare entities must comply with California statutes mandating equitable, nondiscriminatory access to healthcare. Compliance is required with such statutes, including the Unruh Act, regardless of any religious objections. The California Supreme Court's dicta in *North Coast* is not to the contrary and does not support the trial court's ruling sustaining Respondent's demurrer.

A. Religiously affiliated healthcare entities are not exempt from the Unruh Act.

The Unruh Act applies to all California businesses open to the general public, and religiously-affiliated hospitals are no exception. In *North Coast*, for example, the California Supreme Court held that physicians could not assert religious objections as a valid defense to Unruh Act claims for denying same-sex couples access to fertility procedures. 44 Cal. 4th 1145, 1158 (2008). Similarly, in *Catholic Charities of Sacramento, Inc. v. Superior Court*, the California Supreme Court held that Catholic Charities must comply with a state law requiring employers to include contraceptives 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." 32 Cal. 4th 527, 564–65 (2004).

Religious objections do not provide entities such as Respondent with a "get-out-of-jail-free" card with respect to the Unruh Act. Simply put, "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" protected characteristics. *N. Coast*, 44 Cal. 4th at 1150.

Moreover, the Unruh Act represents a "neutral and generally applicable public accommodations law" of the kind the U.S. Supreme Court

earlier this year acknowledged as valid and enforceable, even when such laws protect LGBT people and constrain the actions of those whose religion motivates them to engage in anti-LGBT discrimination.

> Nevertheless, while . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.5 (1968) (per curiam); *see also Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

Masterpiece, 138 S. Ct. at 1727; *see also Smith v. Fair Emp't & Housing Council*, 12 Cal. 4th 1143, 1161–62 (1996) (retracing caselaw regarding the propriety of governments enforcing generally applicable laws over regulated entities' religious objections).

The *Masterpiece* court went on to note that a member of the clergy who objected to marriage by same-sex couples could not constitutionally be compelled to perform such weddings, but the court made clear that this applied only to wedding ceremonies themselves:

> Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might

> refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

138 S. Ct. at 1727. Thus, the *Masterpiece* decision affirmed that preventing the type of stigma and psychic pain that Mr. Minton experienced is among the core purposes of civil rights statutes like the Unruh Act and among the reasons the law does not allow people of faith to use their religion as a license to discriminate.

B. The California Supreme Court's Decision in *North Coast* Supports A Denial of the Demurrer.

The lower court entirely based its ruling on the dicta in *North Coast*, but the case neither supports the ruling nor should be relied on as grounds for such a ruling. The Supreme Court's one-line hypothetical in that case regarding the possibility that a doctors' office may be able to accommodate the religious views of one physician by allowing a patient to be treated by a different physician is not applicable in this case. Nor is that dicta binding authority on this Court or the lower court.

1. The *North Coast* Dicta Does Not Apply to the Facts Here.

The *North Coast* case holds that the appropriate "balance" between religious liberty and individual civil rights does not entail allowing religious preference to justify harmful discrimination against members of

minority groups. Here, the application of that holding should have resulted in the denial of Respondent's demurrer.

In the situation that gave rise to the *North Coast* case, plaintiff Guadalupe Benitez sought fertility treatment in 1999 at North Coast Women's Care Medical Group, a private medical practice in Oceanside. Ms. Benitez identified as a lesbian and was living with a female partner. 44 Cal. 4th at 1150. The physician she initially consulted with, Dr. Christine Brody, refused to perform intrauterine insemination ("IUI") on Ms. Benitez, citing her personal religious objections to facilitating pregnancy for unmarried women. *Id.* at 1151. One of Dr. Brody's partners in the practice, Dr. Douglas Fenton, shared her religious objection and subsequently also refused to perform the medical procedure Ms. Benitez needed. *Id.* at 1152. Ms. Benitez filed a lawsuit challenging these refusals as sexual orientation and/or marital status discrimination, naming as defendants the North Coast clinic itself as well as Drs. Brody and Fenton individually. *Id.* All of the defendants cited First Amendment freedoms of religious exercise and free expression among their affirmative defenses. *Id.* at 1153.

After extensive litigation, the California Supreme Court held in 2008 that the federal and state constitutional free exercise clauses did not exempt the defendants from complying with the Unruh Act. It further noted:

> To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act's antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physicians' employer. Or, because they incur liability under the Act if they infringe upon the right to the "full and equal" services of North Coast's medical practice (Civ. Code, § 51, subd. (b); *see id.* §§ 51, subd. (a), 52, subd. (a)), defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives "full and equal" access to that medical procedure though a North Coast physician lacking defendants' religious objections.

44 Cal. 4th at 1159. In the dicta at issue here, the *North Coast* Court thus suggested that a defendant health care institution may not be liable for discrimination under the Unruh Act if it accommodates an employee's religious objections, so long as it provides all patients full and equal access to the treatments they sought, consistent with that statute's central mandate.

Respondent improperly construes the above passage from *North Coast* as bolstering its own self-serving claim to have afforded Mr. Minton full and equal access to its services by not preventing Mr. Minton's doctor from ultimately performing a hysterectomy on Mr. Minton in one of Respondent's non-Catholic hospitals. But it was Respondent's actions in preventing Mr. Minton's doctor from performing a hysterectomy because Mr. Minton is a transgender man that denied him full and equal access in violation of the Unruh Act. This denial caused him both practical harms

and significant, painful dignitary harms, as discussed in section I *supra*. There is nothing in *North Coast*'s holding or its dicta that justifies Respondent's denial of full and equal access to Mr. Minton.

The *North Coast* dicta suggests only that a healthcare provider might be able to avoid running afoul of the Unruh Act by making sure procedures subject to religious objection are either not provided to any patient or consistently available to all patients from an individual health care provider who does not personally object. Neither contingency occurred here. Dr. Dawson was ready and willing to perform a hysterectomy on Mr. Minton, much like she has done previously and subsequently for many other patients at MSJMC. Thus Mr. Minton was already being treated by a "physician lacking [Respondent's] religious objections." *N. Coast*, 44 Cal. 4th at 1159. Indeed, Mr. Minton's hysterectomy was cancelled—the day before it was scheduled to occur—because of objections from the hospital itself, not his personal physician. This factual distinction is essential, in that a healthcare provider may be able to make a medical procedure "consistently available" to patients even when certain staff object to those procedures, thereby satisfying the Unruh Act's mandate of full and equal access. But there is nothing in the *North Coast* dicta that suggests the religious objection of an entire hospital would be able to function in the same way. As Mr. Minton experienced, rejection from the hospital itself

necessarily involves both practical and dignitary harm, something the *North Coast* dicta simply does not contemplate.

In addition, the present case differs from the *North Coast* hypothetical in that what Mr. Minton experienced was a cancellation of his procedure. At the time of the cancellation, Mr. Minton did not know whether he would be able to reschedule his necessary medical care at all. ROA at 154, 157. The fact that Mr. Minton's doctor was able to reschedule his surgery at a different hospital, after much effort on Mr. Minton's part and with no help from Respondent, *id.* at 155–57, does not change the fact that Mr. Minton was denied the procedure at MSJMC. Indeed, as a matter of law, Respondent violated the Unruh Act at the moment MSJMC cancelled Mr. Minton's surgery appointment. As the California Supreme Court has recognized, the Unruh Act does not require an aggrieved individual to give the discriminating party notice and an opportunity to cure the violation before liability attaches. *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 168 (2007).

Respondent now contends that it "rescheduled" Mr. Minton's procedure of its own accord, but that claim is irrelevant here both because (1) any "rescheduling" would not have provided Mr. Minton "full and equal access" to the surgical procedure he sought at MSJMC, where doctors regularly perform the same procedure for cisgender women, and (2) the fact of the affirmative "rescheduling" is disputed. For the purposes of

evaluating a demurrer, the allegations in Mr. Minton's operative complaint must be presumed true. *See Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 966–67 (1992). In his First Amended Complaint, Mr. Minton alleges that his doctor was able to schedule a hysterectomy for him at one of Respondent's non-Catholic hospitals because of the significant pressure he put on Respondent, through his physician and other intermediaries, to help him find another option in the devastating aftermath of the cancellation of his surgery date at MSJMC. ROA at 155–57. Nothing in *North Coast* shifts the burden to individuals like Mr. Minton to avoid or mitigate the severe harms of discriminatory conduct by entities like Respondent.

2. The *North Coast* Dicta Is Not Binding Authority.

Even if the *North Coast* dicta the lower court relied on were applicable to the facts of Mr. Minton's case, which it is not, neither this Court nor the lower court is bound by that dicta. California Supreme Court dicta is not automatically binding on the lower courts; for dicta to be binding, it must be critical to the resolution of the case, as well as responsive to counsel's arguments and intended as guidance for lower courts. *See United Steelworkers of Am. v. Bd. of Educ.*, 162 Cal. App. 3d 823, 834–35 (1984); *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." (quoting *Gogri v. Jack in the Box Inc.*, 166

Cal. App. 4th 255, 272 (2008))). The single, hypothetical sentence at issue in *North Coast* does not meet either requirement, and the lower court did not find otherwise.

First, the *North Coast* Court 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. Specifically, the court was evaluating whether the Unruh Act could pass a strict scrutiny analysis. To that end, the court observed that patients could 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. Whether a patient could have in fact been treated by a North Coast physician without religious objections to conducting the particular procedure was not relevant to the material facts, as the defendant clinic had been unable to identify a physician on its staff who was willing and licensed to provide the treatment at issue. *Id.* at 1152. Since this hypothetical scenario "was not critical to the resolution of" *North Coast*, "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*, 195 Cal. App. 4th at 1005–06.

Further, the *North Coast* dicta is not binding because it was not "responsive to an argument raised by counsel and probably intended for guidance of the court and attorneys upon a new hearing." *United Steelworkers*, 162 Cal. App. 3d at 834. The *North Coast* court did not describe its hypothetical as extracted 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.[3] Additionally, even if the dicta could be useful as guidance generally, there is no suggestion that the court was speaking directly to the lower courts that would hear the case on remand (and would need to reconsider the facts), which is the bar for such guidance to be considered authority. *Estate of Hilton*, 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.

[3] At only one point in the *North Coast* briefing does plaintiff suggest 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. Request for Judicial Notice ("RJN"), Ex. 2, at 19. Defendants did not even address plaintiff's suggestion directly, instead claiming that the Unruh Act must permit referrals by physicians where they have religious objections to particular treatments. RJN, Ex. 3, at 50. There is no indication that the *North Coast* court was responding to *one line of argument* from plaintiff's brief—an argument that defendants did not address.

App. 3d 191, 194 (1978)) (emphasis added)). Indeed, the *North Coast* court reversed the judgment of the Court of Appeal as a matter of law, 44 Cal. 4th at 1162, requiring no further proceedings as to whether there was a religious exemption to the Unruh Act itself, and eliminating the necessity for a lower court to consider the issue on remand. Accordingly, the dicta in the *North Coast* opinion is not binding authority, as it was not material to the disposition, responsive to the parties' arguments, or intended as guidance for a lower court.

CONCLUSION

Respondent deliberately denied plaintiff Evan Minton full and equal access to medical care because he is transgender. The facts Mr. Minton pled in the operative complaint state a valid claim of sex discrimination in violation of the Unruh Act, differ from the story Respondent told in its trial court briefing, and do not align with the *North Coast* dicta on which the trial court relied in deciding to grant the demurrer. Accordingly, the trial court's ruling should be reversed, and the demurrer overruled.

DATED: November 5, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the text of this brief contains 6625 words, including footnotes. In making this certification, I have relied upon the word count of Microsoft Word, used to prepare the brief.

DATED: November 5, 2018

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