No. A153662

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

EVAN MINTON,

Plaintiff-Appellant,

v.

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT EVAN MINTON

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April 19, 2019

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR	COURT OF APPEAL CASE NUMBER: A153662
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 271713 NAME: Laura E. Miller FIRM NAME: DURIE TANGRI LLP STREET ADDRESS: 217 Leidesdorff Street CITY: San Francisco STATE: CA ZIP CODE: 94111 TELEPHONE NO.: 415-362-6666 FAX NO.: 415-236-6300 E-MAIL ADDRESS: lmiller@durietangri.com ATTORNEY FOR (name): Amicus California Medical Association	SUPERIOR COURT CASE NUMBER: 17-558259
APPELLANT/ PETITIONER: Evan Minton RESPONDENT/ REAL PARTY IN INTEREST: Dignity Health, d/b/a Mercy San Juan Medical Center	

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(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: California Medical Association

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

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[ ] Continued on attachment 2.

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Date: April 19, 2019

Laura E. Miller
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA MEDICAL ASSOCIATION

Amicus Curiae California Medical Association ("CMA") respectfully requests leave to file the attached *amicus curiae* brief is support of plaintiff-appellant Evan Minton pursuant to California Rules of Court 8.200(c)(2).

There are no disclosures to be made under California Rules of Court 8.200(c)(3).

I. INTERESTS OF AMICUS CURIAE APPLICANT

CMA is a non-profit, incorporated professional association for physicians with approximately 45,000 members throughout the state of California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA and its physician members consistently advocate for laws and policies that preserve and protect the physician-patient relationship, the ability of physicians to exercise medical judgment free from lay interference, and to provide care that is in the best interest of their patients and in accordance with the patient's wishes.

II. PURPOSE OF THE AMICUS CURIAE BRIEF

CMA agrees with Mr. Minton's arguments that the superior court committed numerous errors in sustaining the demurrer to Mr. Minton's

First Amended Complaint ("FAC"), including by relying on mischaracterizations and extraneous information not alleged in the FAC. CMA writes separately because it believes its proposed amicus curiae brief can assist the Court by providing the broader and practical context to the issues of this case. As a professional association dedicated to fostering comprehensive, high quality health care, CMA has a direct interest in the outcome in this case.

Respondent Mercy San Juan Medical Center is owned by Dignity Health, a national health care conglomerate and the single largest provider of hospitals in California. CMA's proposed amicus brief will assist the Court by offering insight into how Dignity Health's use of the Catholic Church's Ethical and Religious Directives for Catholic Health Care Services (the "ERDs") adversely impacts patient access to care and discriminates against transgender patients. As non-medical criteria, the ERDs interfere with physician clinical decision making, medical staff self-governance, and threaten California's longstanding policies prohibiting the lay practice of medicine. The imposition of ERDS by Catholic hospitals is all the more concerning given the growing presence of Catholic health systems in California—particularly troublesome in rural areas where patients do not have access to alternative facilities.

III. CONCLUSION

For the foregoing reasons, CMA respectfully requests that the Court accept and file the attached amicus curiae brief.

Respectfully submitted,

DATED: April 17, 2019

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AMICUS CURIAE BRIEF

I. INTRODUCTION

The California Medical Association ("CMA"), on behalf of its 45,000 physician members, submits this amicus brief because of the case's potentially significant impact on physicians' ability to adequately treat transgender individuals, and on transgender individuals' access to health care in the state of California. CMA can assist the Court in considering the broader context of its decision in this case and the ability of patients to receive care throughout the state.

This case involves Respondent Mercy San Juan Medical Center's ("MSJMC") and its parent company, Dignity Health's, refusal on non-medical grounds to allow a physician to perform a hysterectomy on her transgender patient. Appellant, Evan Minton, alleges that Dignity Health violated California's Unruh Civil Rights Act, Civil Code §§51 *et seq.*, when his surgery was abruptly cancelled after MSJMC discovered he was transgender. Respondents argue that its decision to cancel Mr. Minton's surgery was based on the adherence to the Ethical and Religious Directives for Catholic Health Care Services ("ERDs")—criteria promulgated by the U.S. Conference of Catholic Bishops having neither regard for nor basis in scientific and medical evidence—prohibiting sterilization[1] and not because

[1] Ethical and Religious Directives for Catholic Health Care Services

Mr. Minton is transgender. Relying on dicta from *North Coast Women's Care Med. Grp. v. Superior Court*, 44 Cal. 4th 1145 (2008), Dignity Health argues that because Mr. Minton's physician, Dr. Lindsey Dawson,[2] was able to obtain temporary privileges and perform the surgery a few days later at another nearby Dignity-owned hospital that is not bound to follow the ERDs, Mr. Minton was afforded "full and equal" access to all services. (Resp. Br. at 34-41). Dignity Health also argues that the provisions of the Unruh Act are superseded by the hospital's First Amendment rights of free exercise of religion and freedom of expression. (*Id.* at 41-54).

The superior court erred by dismissing Mr. Minton's claims based solely on a finding that MSJMC allegedly took actions to refer Mr. Minton to another hospital. CMA takes no position on the parties' disputed facts regarding the efforts to find an alternative location and believes that in considering the demurrer, the superior court correctly assumed "that

("ERD") 53 reads, "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. 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." *Ethical and Religious Directives for Catholic Health Care Services*, United States Conference of Catholic Bishops (6th ed. June 2018), available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf.

[2] Dr. Dawson is a CMA member.

Dignity Health's refusal to have the procedures performed at MSJMC was substantially motivated by Mr. Minton's gender identity."[3]

CMA submits this amicus brief because it wishes to impress upon the Court the potential negative outcomes on access to care if Dignity Health can assert its religious identity to discriminate against certain types of patients, deny comprehensive care that is deemed medically necessary by the physician and in the best interest of the patient, and exert lay interference with the physician's medical judgment. At stake for CMA is the proper interpretation and application of law that would deter, rather than encourage, discrimination in the provision of health care and interference with the rights of patients to access needed health care recommended by their physicians. Dignity Health is one of California's largest health systems, including 31 hospitals in California, 19 of which are Catholic.[4] Affirming the superior court's order sustaining Dignity Health's demurrer may encourage the kind of systemic discrimination prohibited by the Unruh Civil Rights Act, threaten the quality and accessibility of health care for the approximately 218,000 transgender individuals living in California, and perpetuate invidious discrimination long faced by the transgender

[3] November 17, 2017 Superior Court Order.

[4] https://www.dignityhealth.org/about-us/our-organization/mission-vision-and-values

community.[5]

The superior court's order sustaining MSJMC's demurrer should be overturned and Mr. Minton's claims allowed to proceed. To do otherwise would provide California's largest hospital system with an unlawful and unreasonable basis to refuse health care to California's hundreds of thousands of transgender individuals. CMA urges the Court to protect the sacrosanct physician-patient relationship and the ability of physicians to provide the best care possible for their patients.

II. INTEREST OF AMICUS CURIAE

The California Medical Association ("CMA") is a non-profit, incorporated professional association for physicians with approximately 45,000 members throughout the state of California, that works to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA members practice at Dignity Health hospitals throughout California.

CMA believes in the ethical imperative to provide quality care in a manner which understands and values diversity and is committed to the legal obligation to refrain from discrimination based upon personal characteristics such as sex, race, religion, national origin, and sexual

[5] https://doctorsatkaisertpmg.com/2018/11/09/transgender-health-delivering-full-spectrum-care/

orientation. Moreover, CMA provides valuable context on balancing the rights of patients to access needed health care with the rights of physicians to exercise their conscience and the broader effects of the Court's decision in this case.

CMA policy supports "that gender affirming treatments and procedures be defined by medical providers directly providing care to the individuals seeking gender-related care" and "the requirement for health insurance and plans to cover gender affirming treatments and procedures for transgender and gender nonconforming individuals [be] evidence based and medically necessary as determined by the patient's treating physician."[6]

III. DISCUSSION

A. Dignity Health's Non-Medical, Religious Directives Interfere With The Patient-Physician Relationship And The Ability Of Physicians To Provide Comprehensive Care To Their Patients

1. Non-medical religious directives are a lay interference in the practice of medicine

Dignity Health is one of the largest health systems in the United States with 400 care sites, including 39 hospitals nationwide.[7] It runs 19 hospitals in California as Catholic hospitals, including MSJMC. While all

[6] CMA Policy 103-19, California Medical Association (2019).

[7] https://www.dignityhealth.org/about-us/our-organization/mission-vision-and-values

of Dignity Health's care centers adhere to its Statement of Common Values,[8] Dignity Health's Catholic care centers must abide by the ERDS. The ERDs present "a theological basis for the Catholic health care ministry"[9] and govern the way health care is delivered in Dignity Health's Catholic hospitals, including MSJMC.

Dignity Health's requirement that its physicians and medical staff apply non-medical criteria imposes a burden on the practice of medicine in the state of California and on physicians' ability to treat transgender patients. The ERDs are neither evidence-based nor grounded in medical science, nor do they purport to be. Nonetheless, through Dignity Health, these criteria are imposed on thousands of physicians and patients in California's largest hospital system, including those associated with MSJMC. As non-medical criteria, the ERDs substitute religious doctrine for the standard of care for the patient in violation of California's long-standing bar on the corporate practice of medicine and medical staff self-

[8] Dignity Health, *Statement of Common Values*, available at https://www.dignityhealth.org/north-state/-/media/cm/media/documents/PDFs/Statement-of-Common-Values.ashx

[9] *Ethical and Religious Directives for Catholic Health Care Services*, United States Conference of Catholic Bishops (6th ed. June 2018), 4, available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf

governance laws which were put into place to ensure that lay corporations did not adversely affect clinical care.[10] Decisions as to whether a particular procedure is prohibited or allowed under the ERDs are made by a religious figure, rather than by the medical staff or the patient's physician.[11] As such, Dignity Health's imposition of the ERDs on all physicians who provide care in their facilities, regardless of whether the physician holds the same beliefs, violates the policy underlying laws prohibiting the corporate practice of medicine and preservation of medical staff governance by impeding a physician's clinical judgment and unduly interfering with a physician's relationship with his or her patient—a fact exacerbated by the Dignity Health's large role in health care within California.

2. The growing presence of Catholic health systems in California raises concerns regarding access to comprehensive care, particularly in rural areas

[10] California has a well-established bar against the corporate practice of medicine, which helps safeguard physicians' legally recognized interest against undue interference in the care of their patients. Bus. & Prof. Code. §§ 2052, 2400; *California Medical Ass'n v. Regents of Univ. of California* 79 Cal. App. 4th 542, 550 (2000) (stating "purpose of section 2400 [is] . . . to protect the professional independence of physicians"). California law also recognizes that medical staff members have a right to self-governance, which includes the right to determine issues affecting the quality of care at a hospital. *See* Bus. & Prof. Code §§ 2282, 2282.5.

[11] https://www.chausa.org/publications/health-progress/article/september-october-2012/canon-law---dispensations-provide-for-flexibility-in-church-law.

By some estimates, Catholic health systems now control one in every six hospital beds in the United States, and the number of U.S. hospitals with a Catholic affiliation has increased by 22 percent since 2001.[12] This is a result of recent mergers of Catholic health systems with each other, as well as secular institutions.[13] According to recent reports, roughly 30 secular institutions have merged or affiliated with Catholic systems in recent years. Three out of the ten largest hospital systems in the United States are Catholic owned—including Dignity Health, the fifth largest hospital provider in the country.[14] Dignity Health's physician network is made up of 1,400 physicians who are either employed by Dignity Health or in its foundation practice model, with an estimated

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[12] Lori Uttley and Christing Khaikin, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report* MergerWatch (2016), available at http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=H%2Bg7sawTMhFgu%2BEKbKrbYidGfOs%3D.

[13] *See* Recent merger of Dignity Health and Catholic Health Initiatives to form the largest nonprofit hospital system by revenue. CommonSpirit Health, as it is now known, would have 140 hospitals, 150,000 employees, and more than 700 care sites across 21 states and is worth $29 billion in revenue. Alex Kacik, Catholic Health Initiatives, Dignity Health combine to form CommonSpirit Health, Modern Health care (February 1, 2019), available at https://www.modernhealthcare.com/article/20190201/NEWS/190209994/catholic-health-initiatives-dignity-health-combine-to-form-commonspirit-health.

[14] *Id.*

additional 6,000 doctors that are affiliated with Dignity Health in some way, such as maintaining privileges at its hospitals.[15] Dignity Health requires all physicians providing care in their Catholic hospitals to adhere to ERDs.[16]

In California, Dignity Health is ***the*** largest hospital provider in the state, enforcing the ERDs in 19 Catholic hospitals.[17] While CMA recognizes the role Dignity Health plays in the provision of health care to Californians, particularly to the Medi-Cal population and in underserved rural areas, CMA is concerned that vulnerable populations that are served by Dignity Health are not being provided with comprehensive health care and its growing market share is making it difficult for physicians in these areas to provide the necessary services to their patients. With respect to

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[15] https://www.hcinnovationgroup.com/population-health-management/article/13029722/at-dignity-health-a-datadriven-population-health-strategy-is-yielding-promising-results.

[16] ERD 5 reads "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel. *Ethical and Religious Directives for Catholic Health Care Services*, United States Conference of Catholic Bishops (6th ed. June 2018), available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf.

[17] https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/nonprofithosp/dignity-chi-siskiyou-health-impact-report.pdf?.

reproductive health care that is also limited by the ERDs, in a national survey, 52 percent of obstetricians and gynecologists working in Catholic institutions reported a conflict with the institution over religiously-based policies.[18]

The consequences of imposing ERDs on physicians and their patients are significant. In this case, MSJMC not only subjected Mr. Minton to acute dignitary harm by denying him health care on the basis of his gender identity—a distressingly widespread form of discrimination toward the transgender community (*see* Subsection III(B) below)—but it also directly interfered with the doctor-patient relationship between Dr. Dawson and Mr. Minton, disrupting Dr. Dawson's ability to treat her patient. As alleged in Mr. Minton's First Amended Complaint, Dr. Dawson and Mr. Minton had to secure a new facility willing to accommodate Mr. Minton's hysterectomy, secure emergency admitting privileges for Dr. Dawson to perform the surgery there, and manage all insurance coverage issues. (FAC ¶35).

Dr. Dawson was forced to find a work-around to provide medically necessary care for her patient and was ultimately able to perform Mr. Minton's hysterectomy; albeit in an unfamiliar environment and with

[18] Debra B. Stulberg, Annie M. Dude, & Urma Dahlquist et al. *Obstetrician-Gynecologists, Religious Institutions, and Conflicts Regarding Patient Care Policies*, 207 Am. J. Obstet. Gynecol. 73. E1-73.E5 (2012).

unfamiliar staffing. (FAC ¶37). However, not all patients and physicians will be able to secure alternative care, or do so in a way that does not adversely affect or unduly prolong a patient's course of treatment. In many parts of rural California, a Dignity Health Catholic hospital or Dignity affiliated care site is the only hospital or care site within a hundred miles.[19] For some of these patients seeking gender affirming care or reproductive health care, there are limited options for alternative care, if any at all. In particular, for transgender individuals in areas mostly served by a Dignity-affiliated provider, the Court should consider what alternatives are sufficient to provide "full and equal" access to medical procedures and whether time-consuming and burdensome workarounds exempt Dignity Health from laws protecting patient from discrimination. Application of anti-discrimination laws should not depend on the fortune or fortitude of patients and their physicians; in other words, Dignity Health should not be able to benefit from Dr. Dawson's and Mr. Minton's persistence in securing the care Mr. Minton needed.

[19] Mercy Medical Center Mt. Shasta located in Mount Shasta, CA, for example, is a Catholic Dignity Health hospital that is designated a certified Critical Access Hospital by the Centers for Medicare and Medicaid Services and is located nearly 100 miles from the nearest hospital system. *See* https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/nonprofithosp/dignity-chi-siskiyou-health-impact-report.pdf?.

3. National efforts to broaden conscience protections also threaten access to reproductive health care and transgender care to patients in areas serviced by Catholic hospitals

In addition, recent efforts by the U.S. Department for Health and Human Services (HHS) are compromising access to comprehensive care under the guise of religious freedom by giving entities and corporations the ability to deny patients care based on the "personal beliefs" of its owners and administrators. These efforts include broadening the applicability of religious and moral exemptions to corporate entities to allow them to limit access to coverage for contraceptives, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), and expanding and broadening the applicability of conscience protections for health care providers. Notably, HHS published its proposed rule "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" which enshrines in regulations, overly broad applications of existing conscience protection laws to negatively affect access to care, encourage discrimination in health care, and undermine the ability of states to enforce their own conscience protection and anti-discrimination laws.[20]

[20] *See CMA Comments on Proposed Protections for Conscience Rights and Religious Freedom*, California Medical Association (March 30, 2018), available at https://www.cmadocs.org/newsroom/news/view/ArticleID/21368/t/CMA-comments-on-proposed-protections-for-conscience-rights-and-religious-freedom.

While CMA is a strong advocate for the conscience rights of individual physicians, physicians have an "ethical responsibility to place patients' welfare above the physicians' own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their welfare."[21] Further, while CMA supports physicians acting or refraining from acting in accordance with their conscience, it cannot be at the expense of their professional obligations to patients—including respect for basic civil liberties and an obligation not to discriminate against certain individuals.[22] CMA policy has always sought to balance the rights of patients to access needed health care with the rights of individual physicians to exercise their conscience.

Here, Dignity Health seeks to impose their discriminatory practice under the guise of a conscience objection. These practices are imposed upon physicians who may be affiliated with Dignity Health not for shared religious and moral values, but because a Dignity Health facility is the main hospital facility in their region. Given the aggressive expansion of religious rights in the provision of health care, it is more important than ever that California ensure that the religious rights of health care providers do not

[21] AMA Code of Medical Ethics 1.1.1 *Patient-Physician Relationships*, available at www.ama-assn.org).

[22] *See* AMA Code of Ethics 1.1.7 *Physician Exercise of Conscience*.

result in discriminatory practices against historically subjugated patient populations.

B. Allowing MSJMC To Discriminate Against Transgender Individuals Carries A Significant Negative Impact On Transgender Health Care

1. The ERDs are being arbitrarily applied to discriminate against transgender patients

MSMJC's and its parent company Dignity Health's use of ERDs to unilaterally cancel Mr. Minton's hysterectomy is discriminatory against transgender individuals unto itself. While Dignity Health claims in its briefing that the application of the ERDs are a "facially neutral policy," and thus not subject to the Unruh Act, the superior court based its ruling on the assumed fact that Dignity Health's refusal to have the procedure performed at MSJMC was "substantially motivated by Mr. Minton's gender identity."[23] As MSJMC claims in its briefing, treating Mr. Minton, a transgender man, implicates ERDs 29 and 52. (Resp. Br. at 52). ERD 29 provides that MSJMC may act only "to protect and preserve [a patient's] bodily and functional integrity", and ERD 52 prohibits contraception, including hysterectomies. *Id.*

However, the Conference of Catholic Bishops who promulgate the ERDs have publicly taken the position that it does not recognize

[23] November 17, 2018 Order.

transgender people or the propriety of gender-affirming care. In comments submitted to HHS on the ACA's non-discrimination provision, the Conference of Catholic Bishops stated that "sex change" is biologically impossible and "that medical and surgical interventions that attempt to alter one's sex are, in fact detrimental to patients. Such interventions are not properly viewed as health care because they do not cure or prevent disease or illness. Rather they reject a person's nature at birth as male or female."[24] While Dignity Health posits its strict adherence to the ERDs, in reality, how the ERDs are interpreted and applied varies considerably from facility to facility and diocese to diocese.[25] In other words, its use of the ERDs to deny medical treatment is arbitrary, leading to confusion among physicians as to when a procedure is theologically justified. This is in part because the U.S. Conference of Catholic Bishops "has no authority to enforce the ERDs." *Means v. U.S. Conf. of Catholic Bishops*, No. 1:15-CV-353, 2015 WL 3970046, at *3 (W.D. Mich. Jun. 30, 2015). Instead, "[i]ndividual bishops exercise authority under Canon Law to bind all Catholic health care

[24] U.S. Conference of Catholic Bishops, et al. Comment Letter on Department of Health and Human Services Proposed Rule on Nondiscrimination in Health Programs and Activities (November 6, 2015), 9-10, available at http://www.usccb.org/_cs_upload/about/general-counsel/rulemaking/192062_1.pdf.

[25] *See, e.g.*, Katie Hafner, *As Catholic Hospitals Expand, So Do Limits on Some Procedures*, The New York Times (August 10, 2018), available at facially neutral policy.

institutions located within their diocese to the ERDs as particular law within the diocese." *Id.*

Of relevance in this case, ERD 53 reads, "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. 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."[26] They further designate direct sterilization as "intrinsically evil" and of "the most pressing concerns." *Id.* Further, ERD 29 imposes a "duty to protect and preserve [all persons'] bodily and functional integrity." *Id.*

However, with regard to gender affirming surgery such as the hysterectomy sought by Mr. Minton in this case, there are differences in opinion even among Catholic health care ethicists as to whether this treatment is prohibited by ERD 53 as a "direct sterilization" or whether it falls within exception in ERD 53 where the sterility is merely a side effect of treating the "present and serious pathology" of gender dysphoria. In her article, *Transgender Persons and Catholic Health care*, Carol Bayley, Ph.D., Vice President, Ethics & Justice Education at Dignity Health, takes

[26] U.S. Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (6th ed. June 2018), available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf.

the position that treatments, including surgery, used to treat gender dysphoria may have the unintended but foreseen consequence of sterility, "but this is a side effect of treating an all-pervasive birth defect [of a pathological condition in which the sex and gender of the person do not match], and not an intentional contraceptive sterilization."[27] Bayley further goes on to state that "Catholic health care institutions should be cautious about developing practices that could violate their own policies of non-discrimination, particularly in light of the federal government's recognition of transgender individuals as members of a protected class."[28]

Bayley's position is in stark contrast to that taken by John A. DiCamillo, Ph.D., a staff ethicist at the National Catholic Bioethics Center who states that "gender-transitioning interventions can never be morally sound, because they reject the proper understanding of the person" and involves "the denial of one's personal identity, the encouragement of false beliefs and disordered desires, and even such extreme measures as hormonal and surgical mutilations of a healthy body."[29] DiCamillo goes on

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[27] Carol Bayley, Ph.D., *Transgender Persons and Catholic Health care*, Catholic Health Association (2016), available at https://www.chausa.org/docs/default-source/hceusa/transgender-persons-and-catholic-health care.pdf?sfvrsn=2.

[28] *Id.*

[29] John A. DiCamillo, Gender Transitioning and Catholic Health Care, The National Catholic Bioethics Quarterly (Summer 2017), available at

to state that no Catholic provider should carry out gender affirming care and that Catholic facilities should not implement gender-affirming protocols such as transgender access to bathrooms, and staff training on using a patient's preferred gender pronoun.[30] His position is that due to the intrinsic immorality of gender affirmation, Catholic health care providers cannot be coerced to provide such care.[31]

Thus, depending on the diocese, what is prohibited in one Catholic hospital may be routinely performed in another Catholic hospital depending on who is heading the diocese in which the hospital is located and whether a dispensation has been granted to allow for flexibility and exceptions to ecclesiastical law.[32] This contributes to the arbitrary application of the ERDs and confusion on the part of patients and their physicians as to what the hospital's policies are with regard to certain procedures, which unjustifiably forces physicians to deviate from the standard of care to accommodate the ERDs.

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https://www.ncbcenter.org/files/3915/1248/9483/Gender_Transitioning_and_Catholic_Health_Care-DiCamillo.pdf.

[30] *Id.*

[31] *Id.*

[32] https://www.chausa.org/publications/health-progress/article/september-october-2012/canon-law---dispensations-provide-for-flexibility-in-church-law.

2. Dignity Health's use of ERDs perpetuates invidious discrimination against transgender individuals in the health sector

The practical import of Dignity Health's reliance on the ERDs—and the Catholic Church's position on transgender patient and gender-affirming care more generally—is two-fold. First, Dignity Health's Catholic hospitals refuse to treat transgender individuals for any conditions related to the individual's transgender identity. Second, the governing body of California's largest hospital system denies a transgender individual's gender identity altogether. Denying the existence of a person's gender identity is not, as MSJMC argues, a merely "incidental" consequence of a so-called "neutral" policy. (Resp. Br. at 36). It is intentional discrimination on the basis of gender in violation of the Unruh Civil Rights Act. Cal Civ. Code § 51(b).[33]

Transgender people have long faced stigma, rejection, discrimination, and violence—including among health care service providers like Dignity Health. According to a 2014 nationwide study by

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[33] The Unruh Civil Rights Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civil Code § 51(b).

the Williams Institute of UCLA, 60 percent of transgender or gender-nonconforming people reported that a doctor or health care provider refused to treat them. *Id.* According to the same study, 41 percent of transgender or gender-nonconforming people attempt suicide, "which vastly exceeds the 4.6 percent of the overall U.S. population who report a lifetime suicide attempt, and is also higher than the 10-20 percent of lesbian, gay and bisexual adults who report ever attempting suicide."[34] Among survey respondents who reported attempting suicide, more than half of them reported that they either postponed or did not seek medical treatment when they were ill or injured, or otherwise did not seek medical check-ups or preventative care, because they experienced disrespect or discrimination from a health care provider. *Id.* at 12.

This discrimination is made all the more invidious when considering the health care needs of transgender individuals. Many transgender individuals need access to a wide range of medical treatments and procedures related to their status as transgender or gender nonconforming individuals. Kaiser Permanente ("Kaiser"), a California-based health care company, for example, has stated that, in order to adequately meet transgender individuals' health care needs, Kaiser offers a comprehensive

[34] https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf.

gender health and case management program that "integrates primary care, behavioral health, endocrinology, dermatology, gynecology and multiple surgical subspecialities, including gender-affirming surgical services and genital reconstructive surgeries."[35] Similarly, in this case, Dr. Dawson, in conjunction with Mr. Minton's other treating physicians, diagnosed Mr. Minton with gender dysphoria, and planned an intensive course of gender-affirming surgeries that would result in a phalloplasty, or surgical creation of a penis. (FAC ¶ 18). The series of prescribed medical procedures began with a complete hysterectomy, or the removal of Mr. Minton's uterus, fallopian tubes, and ovaries. *Id.* The entire course of treatment can be both intensive and long term, and is often prolonged due to battles with insurance companies for coverage, which Mr. Minton himself experienced. (FAC ¶ 27).

MSJMC's sudden, unilateral cancellation of Mr. Minton's hysterectomy underscores how difficult it is for transgender individuals to receive their prescribed course of treatment. It is also discrimination based on gender. The superior court correctly found that the FAC alleged that MSJMC's refusal to treat Mr. Minton was substantially motivated by Mr. Minton's gender identity. That finding should not be disturbed on appeal.

[35] https://doctorsatkaisertpmg.com/2018/11/09/transgender-health-delivering-full-spectrum-care/.

Hysterectomies are a service that MSJMC provides to other individuals. (FAC ¶ 20). Dr. Dawson performed one to two hysterectomies on other patients each month at MSJMC. (*Id.* ¶ 20). MSJMC discriminates when it denies the same treatment to transgender individuals, as it did in Mr. Minton's case, and makes physicians like Dr. Dawson become the unwitting participants in this discrimination in the process. Accordingly, Mr. Minton's lawsuit against MSJMC for this intentional discrimination should be reinstated.

C. Referring A Patient To Another Hospital Does Not Constitute "Full and Equal Access" Under The Unruh Act

The superior court erred in dismissing Mr. Minton's claim based on a finding that Mr. Minton alleged that he had "full and equal access to the procedure" because of allegations showing that "Dignity Health's conduct permitt[ed] Mr. Minton to receive a hysterectomy at one of its hospitals other than" MSJMC. This holding is wrong as a matter of both law and policy. As a preliminary matter, the superior court was required to rely solely on the allegations within Mr. Minton's FAC. Nothing in the FAC demonstrates that MSJMC played any role in securing Mr. Minton's hysterectomy after the hospital unilaterally canceled his procedure. Rather, the FAC makes clear that Dr. Dawson and Mr. Minton made all necessary arrangements. That Dr. Dawson was able to secure privileges at another hospital and schedule and perform Mr. Minton's hysterectomy was not the

result of any action by Dignity Health; rather, it was the medical staff and professional staff at the alternate facility that accommodated Dr. Lawson. Therefore, the superior court erroneously relied on facts outside the pleadings that were contrary to the FAC to find that MSJMC accommodated Mr. Minton.

Even assuming MSJMC referred Mr. Minton to a different hospital for his hysterectomy (which was not pled in Mr. Minton's FAC, and which neither MSJMC nor its parent company did), this action does not constitute "full and equal access" to MSJMC as required by the Unruh Civil Rights Act. Relying exclusively on dicta in *North Coast*,[36] the superior court found that Mr. Minton's treatment at another hospital that was also owned by the Dignity Health conglomerate satisfied his right to full and equal access to MSJMC. This holding is erroneous for two reasons.

First, there are factual issues as to whether Mr. Minton received

[36] CMA's involvement in *North Coast Women's Medical Group v. Superior Court,* 137 Cal. App. 4th 781 (2006), does not contradict its position here. CMA submitted and then withdrew an amicus brief submitted to the court of appeal. CMA sought to file an alternative brief to clarify that CMA "does not condone the invidious discrimination by physicians [or any health care provider]" and "does not support a religious exemption to statutes prohibiting invidious discrimination." *See* Wyatt Buchanan, CMA pulls legal brief supporting gay bias/but court rejects medical association substitute statement," San Francisco Chron. (September 21, 2005), available at https://www.sfgate.com/bayarea/article/CALIFORNIA-CMA-pulls-legal-brief-supporting-gay-2568009.php (last visited Apr. 12, 2019). The clarifications of CMA's amicus brief are entirely consistent with CMA's position in this case.

equal treatment at the other hospital, which cannot be resolved on demurrer. The California Supreme Court has made clear that the Unruh Civil Rights Act is concerned "not only with access to business establishments, but with ***equal treatment*** of all patrons in all aspects of the business." *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 29 (1985) (emphasis added). Mr. Minton adequately alleged that MSJMC did not provide him with full and equal access to the hospital by unilaterally canceling his procedure, thereby exposing both Mr. Minton and Dr. Lawson to additional risks and costs over and above those already associated with a complete hysterectomy. (*See* FAC ¶41). These risks include performing surgery in an unfamiliar setting with unfamiliar staff, and actual and potential delays in the treatment owing to the distance to and availability of an alternative venue. MSJMC's actions also introduced additional costs and variables, including securing admitting privileges to the venue and making sure there was insurance coverage. None of this is mere "inconvenience," as MSJMC contends. Rather, Dignity Health raised significant obstacles that Mr. Minton and his physician were able to work-around, including obstacles that had that potential to impact the quality and safety of the medical care that Dr. Lawson was able to provide. Even then, others in this situation may not have been as fortunate as to obtain a work-around.

Second, the superior court's holding creates a vast exception to "full and equal access" to a "business establishment" that threatens the

enforceability of the Unruh Civil Rights Act, particularly in the health care sector. In effect, the court's ruling allows one business establishment to discriminate against a person by referring them to another business altogether, so long as they are owned by the same corporate parent. Such an expansive exception is not recognized by the law, and threatens to substantially undermine the Unruh Civil Rights Act itself—especially when considered in the context of the sheer size of the Dignity Health hospital conglomerate within California. This exception would allow Dignity Health to systematically exclude transgender individuals from treatment at all 19 of its Catholic hospitals in the state—exactly the sort of discrimination that the Unruh Act was designed to prevent.

Nor does *North Coast* create such an expansive definition of "equal access" in the dicta erroneously relied on by the superior court or otherwise. In that case, the plaintiff, a lesbian who sought infertility treatment at North Coast, sued three defendants, the medical practice and two physicians within the practice, for violation of her civil rights after they referred her to a doctor outside of North Coast's practice to perform an intrauterine insemination procedure. The superior court granted the plaintiff's motion for summary adjudication dismissing the three defendants' affirmative defense that their First Amendment rights of religious freedom and free speech precluded her claims under the Unruh Civil Rights Act (among others). *Benitez v. North Coast Women's Medical Grp., Inc.*, No.

GIC770165, 2004 WL 5047112 (Cal. Sup. Ct. Oct. 28, 2004). With respect to the corporate defendant, the superior court dismissed its affirmative defense based on alleged First Amendment rights because "it is a secular, for-profit corporation." *Id.* It further reasoned that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or statutory right." *Id.* (citing *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004)).

Although the North Coast practice joined the two physician defendants in filing a writ seeking immediate appellate review of the dismissal of its First Amendment affirmative defense, the court of appeal exercised its discretion by granting review only as to the dismissal of the two physician defendants' First Amendment affirmative defense. *North Coast Women's Care Medical Grp.*, 137 Cal. App. 4th 781 (2006). Thus, as the California Supreme Court stated at the outset of its decision, the issue presented on appeal was whether "the rights of religious freedom and free speech . . . *exempt* a medical clinic's ***physicians*** from complying with the Unruh Civil Rights Act's prohibition against discrimination based on person's sexual orientation." *North Coast Women's Care Medical Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145 (2008) (emphasis added). In other words, the First Amendment freedoms of the defendant ***medical practice*** were not at issue, much less considered, by the California Supreme Court in

North Coast.[37]

The California Supreme Court has long held that non-profit hospitals, like MSJMC, are subject to the Unruh's prohibition of discrimination. *O'Connor v. Village Green Owners Ass'n.*, 33 Cal. 3d 790 (1983) (noting that "hospitals are often nonprofit organizations and they are clearly business establishments to the extent that they employ a vast array of persons, care for an extensive physical plant and charge substantial fees to those who use the facilities"). For the reasons stated in Mr. Minton's briefing, that is so even where the non-profit hospital has a religious affiliation, and MSJMC is most certainly not a church subject to church governance doctrine. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 558 (2004) (requiring that Catholic affiliated non-profit had to comply with the Women's Contraception Equality Act after applying *Employment Div., Ore Dept. of Human Res. v. Smith,* 494 U.S. 872 (1990)); *see also see, e.g., Masterpiece Cakeshop, Ltd.*

[37] The dicta from *North Coast,* while erroneously relied on by superior court in this case, underscores this point. In passing, the court posed two choices for the two physician defendants—that the "physicians can simply refuse to perform the IUI medical procedure at issue here for any patient ***of North Coast, the physicians' employer***. Or, . . . defendant physicians can avoid such a conflict [with the Unruh Civil Rights Act] by ensuring that every patient requiring IUI receives 'full and equal' access to that medical procedure through ***a North Coast physician*** lacking defendants' religious objections"—that is, from ***within*** North Coast's medical practice. *Id.* (emphasis added).

v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (religious "objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law").

MSJMC intentionally discriminated against Mr. Minton by canceling Mr. Minton's procedure upon learning he was transgender, thereby denying him access to a hospital, and forcing him to undergo surgery elsewhere only through his and his physician's own efforts. Mr. Minton's case should be allowed to proceed against MSJMC.

IV. CONCLUSION

The Court should find that the superior court erred in sustaining the demurrer to Mr. Minton's Unruh Civil Rights Act claim, and reinstate his case.

Respectfully submitted,

DATED: April 17, 2019

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached Application For Leave To File Amicus Curiae Brief And Amicus Curiae Brief Of The California Medical Association In Support Of Plaintiff-Appellant Evan Minton is proportionally spaced, has a typeface of 13 points or more, and contains 6,387 words, excluding the cover, the certificate of interested entities or persons, the tables, verification, the signature block, and this certificate. Counsel relies on the word count of the word processing program used to prepare this brief.

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PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On April 19, 2019, I served the following documents in the manner described below:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT EVAN MINTON

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jcotton@durietangri.com to the email addresses set forth below.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

☒ (BY SERVING VIA TRUEFILING) I filed and e-served such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 19, 2019, at San Francisco, California.

Janelle Cotton