MANATT, PHELPS & PHILLIPS, LLP
BARRY S. LANDSBERG (Bar No. CA 117284)
HARVEY L. ROCHMAN (Bar No. CA 162751)
CRAIG S. RUTENBERG (Bar No. CA 205309)
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224

Attorneys for Defendant
DIGNITY HEALTH including dba
MERCY SAN JUAN
MEDICAL CENTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

EVAN MINTON,

Plaintiff,

vs.

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

Defendants.

Case No. CGC 17-558259

DEFENDANT DIGNITY HEALTH'S REPLY BRIEF IN SUPPORT OF DEMURRER TO VERIFIED COMPLAINT

Date: August 15, 2017
Time: 9:30 a.m.
Dept.: 302

Hearing Reservation No. 07030726-08

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	MINTON FAILS TO PLEAD A VIOLATION OF THE UNRUH ACT	3
	A. Minton Alleges Medical Condition Discrimination (Not Sex Discrimination) That Is Not Actionable Under the Unruh Act	3
	B. Allegations of Disparate Impact Do Not State a Claim Under the Unruh Act	4
	C. Minton Fails to Allege Intentional Discrimination	5
	D. North Coast Establishes That Dignity Health Did Not Violate the Unruh Act	7
	E. The Relief Sought by Minton Would Violate Mercy's Constitutional Rights to Free Exercise and Expression of Religion	8
	F. The State and Federal Constitutions Bar Minton's Claim	8
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Aubry v. Tri-City Hosp. Dist.,
2 Cal.4th 962 (1992) 3

Boy Scouts of Amer. v. Dale,
530 U.S. 640 (2000) 3, 9, 10

Carter v. CB Richard Ellis, Inc.,
122 Cal.App.4th 1313 (2004) 4

Catholic Charities of Sacramento v. Sup. Ct.,
32 Cal.4th 527 (2004) 2, 8, 9

Craig v. Masterpiece Cakeshop, Inc.,
370 P.3d 272 (Colo. App. 2015), *cert. granted,* 2017 WL 2722428 (U.S. June 26, 2017) 8

E.E.O.C. v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 10

Employment Div., Oregon Dept. of Human Resources v. Smith,
494 U.S. 872 (1990) 8, 9

Greater Los Angeles Agency on Deafness, Inc. v. CNN,
742 F.3d 414 (9th Cir. 2014) 4, 5

Hankins v El Torito Restaurants,
63 Cal.App.4th 510 (1998) 4, 5

Harris v. Capital Growth Investors XIV,
52 Cal.3d 1142 (1991) 1, 4, 5, 6

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,
565 U.S. 171 (2012) 10

Howe v. Bank of Am. N.A.,
179 Cal. App. 4th 1443 (2009) 5

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 10

Knoell v. Petrovich,
76 Cal.App.4th 164 (1999) 3

Lazar v. Hertz Corp.,
69 Cal. App. 4th 1494 (1999) 7

Means v. U.S. Conference of Catholic Bishops,
2015 WL 3970046 (W.D. Mich. June 30, 2015), *aff'd* 836 F.3d 643 (6th Cir. 2016) 6

National Fed'n of Blind v. Target Corp.,
582 F.Supp.2d 1185 (N.D. Cal. 2007) 5

TABLE OF AUTHORITIES
(continued)

Page

North Coast Women's Care Med. Grp. v. Sup. Court,
44 Cal.4th 1145 (2008) 2, 7, 8, 9

O'Conner v. Village Green Owners Assn.,
33 Cal.3d 790 (1983) 7

Overall v. Ascension,
23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) 9

Semler v. General Elec. Cap. Corp.,
195 Cal. App. 4th 1380 (2011) 7

STATUTES

Civ. Code § 51(c) 1, 4

Civ. Code § 51(e)(3) 1

Government Code § 12926(i) 1

Unruh Act. ..... passim

OTHER AUTHORITIES

CACI No. 3060 5

Cal. Const., art. I, § 2 2

Cal. Const., art. I, § 4 2

https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied 2

https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values 9

https://www.rbbinc.com/Images/Projects/MSJMC_Master_Plan_And_New_Inpatient_Tower/Mercy_San_Juan_Medical_Center_01.jpg 9

I. INTRODUCTION

Minton's opposition to Mercy San Juan Medical Center's ("Mercy") demurrer fails to establish that Minton has stated a claim for intentional sex discrimination under the Unruh Act.

First, Minton cannot avoid the admissions in his verified complaint that his claim for discrimination is based upon the medical condition of gender dysphoria. Minton alleges point blank that Mercy refused to permit his hysterectomy "because it was scheduled as part of a course of treatment for gender dysphoria" (Complaint, ¶ 22), "a serious medical condition" (Complaint, ¶ 12). That claim is not actionable under the Unruh Act, which prohibits discrimination based upon some medical conditions, but not gender dysphoria. Civ. Code § 51(e)(3) (limiting medical condition discrimination to "medical conditions" as defined in Government Code §12926(i). Minton does not dispute this.

Minton's opposition misrepresents the Complaint and labels these express allegations of *medical condition* discrimination as "sex" discrimination. But neither labels nor argument control. Having pled that Mercy based its decision on Minton's medical condition (an independent claim under the Unruh Act), Minton cannot allege discrimination based upon his gender identity. Indeed, the Complaint allegations were not inadvertent: Minton does not(and cannot) allege that Mercy in fact discriminated against him because he is a transgender person. Minton admits that he was denied a hysterectomy because Mercy does not perform such operations to *treat gender dysphoria.* Minton cannot allege that Mercy denied him a hysterectomy for a medical condition for which the hospital allows hysterectomies or that Mercy denied him any other treatment.

Second, Minton fails to establish that he has alleged *intentional* discrimination as required under the Unruh Act. Minton concedes that Mercy's decision to deny the hysterectomy arises from its interpretation of the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"). (Opp. 8:5-7.) The ERDs are rules for all Catholic health care institutions that Minton admits "do not explicitly reference transgender people . . .." (Opp. 8:8-9.) Thus, consistent with Mercy's admitted focus on medical condition rather than sex, the hospital's policy is facially neutral. *See* Civ. Code § 51(c) (Unruh Act does not apply to facially neutral policies); *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1149 (1991) (same). At most, Mercy's alleged policy has a disparate impact on transgender people because some transgender people suffer from gender dysphoria and a subgroup of

that subgroup may seek a hysterectomy.[1] Plainly, a policy based upon religious doctrine that prohibits a hysterectomy to treat gender dysphoria, but does not refuse service to transgender people for other ailments or injuries, does not constitute intentional discrimination based upon transgender status.

Likewise, Minton's admission that Dignity Health ensured Minton received a hysterectomy at a nearby Dignity Health hospital within 72 hours confirms that Dignity Health did not intentionally discriminate on the basis of Minton's gender identity. Dignity Health reasonably sought to follow well-known rules laid down by the United States Conference of Catholic Bishops ("USCCB") and to comply with the ERDs, which bind Mercy, a Catholic hospital.

Third, while Minton dismisses Mercy's guaranteed constitutional rights, there is no doubt that the state and federal constitutions protect Catholic hospitals from being forced to use their facilities to perform procedures that violate basic tenets of Catholicism. ERD 5 provides that all Catholic health care services must adopt the ERDs as policy and requires adherence to them as a condition for medical privileges. ERDs 29 and 53, covering the duty to "protect and preserve" "bodily and functional integrity" and the prohibition on direct sterilization, are central tenets of the Catholic religion that have as their purpose the affirmation of the "dignity of the human person." (RJN, Ex. 2 at 4, 29 and 53). Medical procedures that are not permitted are judged morally wrong by the Church and it constitutes a sin to permit them.[2] That is harm enough.

Minton admits that Mercy's denial of the hysterectomy "arose from its interpretation of the ERDs," which is both an exercise of Mercy's religious freedom and an expression of Catholicism, and is therefore at the core of Mercy's constitutional rights and is protected by state and federal constitutions. Compelling Mercy to permit an act forbidden by its sincerely held religious beliefs violates these rights. Cal. Const., art. I, §§ 2 and 4; U.S. Const., 1st Am.

State laws that burden these freedoms have been repeatedly subjected to strict scrutiny. *Catholic Charities of Sacramento v. Sup. Ct.,* 32 Cal.4th 527, 562 (2004); *North Coast Women's Care Med. Grp. v. Sup. Court,* 44 Cal.4th 1145, 11598-59 (2008). Compelling Mercy to provide gender transition

---

[1] Minton's Verified Complaint alleges that 43% of transgender people reported that they did not even want a hysterectomy "someday" in the future. (Complaint, ¶ 16).

[2] Minton improperly dismisses the harm that Mercy would suffer arising from violating the ERDs, though his counsel knows the dire consequences confronting a Catholic hospital that refuses to comply with the ERDs. *See* https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied at p. 7.

surgery to treat gender dysphoria would significantly burden its ability to promote the "right and duty to protect and preserve their bodily and functional integrity," and is therefore impermissible under the First Amendment. *See Boy Scouts of Amer. v. Dale*, 530 U.S. 640, 654 (2000). Here, the requested relief fails the application of strict scrutiny (or any level of scrutiny) because of the substantial interference with Mercy's constitutional rights and limited inconvenience to Minton, who promptly received the same service he sought at a local Dignity Health non-Catholic hospital. Accordingly, the Court should sustain the demurrer without leave to amend.

II. MINTON FAILS TO PLEAD A VIOLATION OF THE UNRUH ACT.

A. Minton Alleges Medical Condition Discrimination (Not Sex Discrimination) That Is Not Actionable Under the Unruh Act.

Minton alleged discrimination based upon a medical condition, not sex. His verified vomplaint is filled with these allegations. Minton expressly alleged that "gender dysphoria" is a "medical condition." (Complaint, ¶ 12.) Minton also alleged that Mercy's president stated that Mercy "would not allow the hysterectomy to proceed *because* it was scheduled as part of a course of treatment for gender dysphoria, as opposed to any other medical diagnosis." (*Id.* at ¶ 22 (emphasis added).) Minton further alleged that if Mercy was not enjoined "from preventing doctors from performing hysterectomy procedures for patients with gender dysphoria in hospitals," Minton and others similarly situated will be unlawfully denied access to treatment. (*Id.* at ¶ 27.) Finally, Minton seeks a declaratory judgment that Mercy "violates California law by prohibiting doctors from performing hysterectomies for patients with gender dysphoria while permitting doctors to perform hysterectomies for patients with gender dysphoria." (*Id.* at ¶ 6.)

Minton misrepresents and tries to avoid his own allegations by simply labeling them as "sex" discrimination. (Opp., 7:16-18.) However, Minton's label is a legal conclusion that must be disregarded, while the allegations of his verified complaint are incontrovertible judicial admissions. *Aubry v. Tri-City Hosp. Dist.*, 2 Cal.4th 962, 967 (1992); *Knoell v. Petrovich*, 76 Cal.App.4th 164, 168 (1999). Nor can Minton avoid the impact of his admissions by declaring that "refusing to treat gender dysphoria is, by definition, sex discrimination against transgender people." (Opp. 7:25-8:1.) That too is a legal conclusion that must be ignored.

The conclusion is also clearly false in several respects. *First*, Minton has not alleged, and he cannot allege, that Dignity Health refuses to treat gender dysphoria as a general matter. He complains only that it refuses to perform a hysterectomy as a treatment for gender dysphoria. *Second*, Minton has not alleged intentional discrimination, the only form of discrimination made actionable by the Unruh Act. Refusing to treat gender dysphoria has at most a disparate impact on the subset of transgender people who want a hysterectomy to treat gender dysphoria. The policy does not even have a disparate impact on the many transgender people who have no desire for a hysterectomy.[3] *Third*, where, as here, Minton has admitted that Mercy's decision to deny the procedure was because of its religious convictions, which include a duty to protect the integrity of the human body and prohibit direct sterilization, the policy is not even related to the sexuality of the patient.

B. Allegations of Disparate Impact Do Not State a Claim Under the Unruh Act.

Minton implicitly admits that his complaint alleges only disparate impact discrimination by relying on *Hankins v El Torito Restaurants*, 63 Cal.App.4th 510 (1998). Minton cites *Hankins* for the proposition that California courts have upheld disparate impact claims under the Unruh Act. (Opp. at 8:11-15.) However, the California Supreme Court has made clear that only intentional discrimination is prohibited by the Unruh Act.

In *Harris,* the California Supreme Court expressly refused to extend the disparate impact test to claims under the Unruh Act. "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test . . . to a general discrimination-in-public-accommodations statute like the Unruh Act." *Harris*, 52 Cal.3d at 1149. "By its nature, an adverse impact claim challenges a standard that is applicable alike to all such purposes," and thus is not prohibited by the Unruh Act. *Id.* at 1172; Civ. Code § 51(c).

Hankins, on which Minton relies for a contrary point, has been questioned, criticized, and not followed on that issue. *See Greater Los Angeles Agency on Deafness, Inc. v. CNN*, 742 F.3d 414, 426-

[3] The fact that many transgender people have no interest in a hysterectomy (admitted by Minton) would raise significant doubts as to the viability of any disparate impact claim. *See Carter v. CB Richard Ellis, Inc.*, 122 Cal.App.4th 1313, 1321-23 (2004) (rejecting disparate impact theory where employer decision adversely impacted administrative managers, who were mostly women over 40; "Women were not affected as a group. Persons over 40 were not affected as a group. Rather, administrative managers were affected as a group. . . . And the law does not prohibit discrimination against administrative managers.").

27 (9th Cir. 2014) ("*Hankins* does nothing to alter the California Supreme Court's clear statement . . . that the Unruh Act requires a showing of *willful, affirmative misconduct to establish intentional discrimination*") (emphasis added); *National Fed'n of Blind v. Target Corp.*, 582 F.Supp.2d 1185, 1206 (N.D. Cal. 2007) ("[*Hankins*] is far from clear on the nature of the intent showing required by the Unruh Act"). In addition, *Hankins* rejected the defendant's contention that it had a facially neutral policy prohibiting access to employee restrooms, holding that the policy was to provide restrooms to patrons that were not physically disabled but to deny restroom access to physically disabled patrons even though there was an available restroom. *Hankins*, 63 Cal.App.4th at 518; *see Greater Los Angeles Agency,* 742 F.3d at 426-27 (no Unruh Act violation where CNN failed to provide closed captioning *for anyone*). Minton's opposition fails to distinguish these on point authorities that contradict his contentions.

Even if a disparate impact claim were allowed, the plaintiff is still required to plead and prove the absence of a "substantial business justification for the challenged practice." *Harris*, 52 Cal.3d at 1172. The fact that Mercy is a Catholic hospital, bound to follow the ERDs, easily satisfies that requirement.

C. Minton Fails to Allege Intentional Discrimination.

Harris reaffirmed that an Unruh Act plaintiff must "plead and prove a case of *intentional* discrimination to recover under the Act." *Harris,* 52 Cal. 3d at 1149 (emphasis added). "[T]he Unruh Act does not entirely prohibit businesses from drawing distinctions on the basis of the protected classifications or personal characteristics; rather, '[t]he objective of the Act is to prohibit businesses from engaging in *unreasonable, arbitrary or invidious* discrimination." *Howe v. Bank of Am. N.A.*, 179 Cal. App. 4th 1443, 1450 (2009) (emphasis in original) (requirement to provide Social Security number to open a credit card account did not discriminate based upon national origin); *see also* CACI No. 3060 (Unruh Act violation requires proof that "substantial motivating reason" for defendant's conduct was the plaintiff's protected class).

Here, Minton's admissions establish that he has not pled a claim of unreasonable, arbitrary or invidious discrimination.[4] Minton admits that his transgender status was not the basis of Mercy's

[4] Instead, Minton's point is that Mercy's policy based on the ERDs has a disparate impact on transgender men because some may want a hysterectomy. Indeed, Minton pleads the existence of statistical evidence supporting that conclusion. (Complaint, ¶ 16). This is the essence of a disparate impact claim that does not allege arbitrary and intentional discrimination on the basis of sex and therefore is not actionable under Unruh Act.

decision to deny the procedure. Minton pleads that the procedure was denied because Mercy does not permit a hysterectomy to treat gender dysphoria, a medical condition. And he further admits that this decision arises from the ERDs, which "do not explicitly reference transgender people." (Opp. 8:7-8.) The ERDs and Mercy's implementation of the ERDs in the form of an alleged policy not to permit a hysterectomy to treat gender dysphoria are thus facially neutral policies that do not intentionally and arbitrarily discriminate against transgender people.[5] The reason for denying Minton's requested procedure had nothing to do with discrimination; the procedure was denied because Mercy is a Catholic hospital. Dignity Health permitted the procedure at one of its hospitals, thereby unequivocally demonstrating that it does not intentionally discriminate against transgender people or prohibit physicians from performing hysterectomies to treat gender dysphoria. Dignity Health exercised its reasonable administrative prerogative to reschedule Minton's surgery at a hospital that was not barred by the ERDs from performing the procedure.

Minton asserts that the purported "denial of service" is a "per se" violation and that the Court cannot examine "subsequent events or religious doctrine" to analyze Minton's allegations of intentional discrimination. (Opp. 5:21-22; 9:14-15; 10:21-24.) But of course the Court can (and must) consider Minton's own allegations and admissions in determining whether he has alleged intentional discrimination. Here, the allegations Minton misleadingly labels as "subsequent events" establish that there was no denial of service at all; thus, they are highly relevant. Dignity Health, the only defendant, simply rescheduled Minton's surgery at a hospital that was not barred from performing the procedure due to its required adherence to Catholic doctrine.[6] For example, courts routinely consider facts and circumstances beyond an initial denial of services to determine whether they constitute intentional discrimination or if "legitimate business interests" justify restrictive policies. *See, e.g., Harris*, 52 Cal.3d at 1162 (minimum income requirement imposed by landlord did not violate Unruh Act);

---

[5] For example, ERD 29 prohibits the removal of properly functioning organs and the amputation of healthy limbs and ERD 53 prohibits direct sterilization as to all people. Inquiry into the ERDs would also excessively entangle the Court in Catholic religious doctrine and impermissibly intrude on matters of church governance. *Means v. U.S. Conference of Catholic Bishops,* 2015 WL 3970046, at *12 (W.D. Mich. June 30, 2015), *aff'd* 836 F.3d 643 (6th Cir. 2016). In *Means*, the plaintiff claimed that the sponsors of a Catholic healthcare system acted negligently by adopting the ERDs as hospital policy. *Id.* at *3. Noting that the "application of the [ERDs]" is "inextricably intertwined with the Catholic Church's religious tenets," the court dismissed the action because the court would be required to interpret the ERDs to determine whether their application constituted negligence. *Id.* at *13. Minton's claim is no different.

[6] There is an important public interest in preserving a hospital's ability to make managerial and policy determinations. *See* Dem at 8, n. 15.

O'Conner v. Village Green Owners Assn., 33 Cal.3d 790, 794 (1983); *Semler v. General Elec. Cap. Corp.*, 195 Cal. App. 4th 1380, 1401 (2011) (lender-investor may exclude convicted felon as member of limited liability company); *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1502 (1999) (refusal to rent cars to persons under the age of 25 not a violation of the Unruh Act).

D. *North Coast* Establishes That Dignity Health Did Not Violate the Unruh Act.

As discussed in Mercy's demurrers, the California Supreme Court held that application of the Unruh Act to require the North Coast medical group to perform an artificial insemination procedure over the religious objections of certain individual physicians (but not all of them) survived strict scrutiny because the medical group could avoid liability under the Unruh Act by "ensur[ing] that every patient [receive the procedure] through a North Coast physician lacking defendants' religious objections." *North Coast,* 44 Cal.4th at 1159. In other words, if the medical group ensured that there was a physician available to perform the procedure, it would be in compliance with the Unruh Act. This statement was not *dicta.* As Justice Baxter noted in his concurring opinion, the availability of this option was the reason the required constitutional balancing came out as it did. *North Coast*, 44 Cal.4th at 1162 (Baxter, J. concurring) (noting that the balance favored application of the Unruh Act because, "as the majority indicates," the medical provider could avoid liability by ensuring that patients received the procedure through a physician lacking the defendant's religious objection). Here, that is what Dignity Health did. It arranged for another health care provider, a non-Catholic hospital within the Dignity Health system, to perform the hysterectomy.

North Coast does not even remotely stand for the proposition that denial of services is *per se* illegal discrimination regardless of the circumstances. (Opp. 10:20-24.) To the contrary, as discussed above, *North Coast* instructs that a health care provider's ability to provide services without sacrificing its religious convictions is an essential factor in determining whether enforcement of the Unruh Act is the least restrictive means of ensuring the state's interest in full and equal access to medical care. *North Coast,* 44 Cal.4th at 1159. Minton admits he received the treatment he needed but in a different Dignity Health hospital. Not only is this the equivalent of the specific compliance method suggested by the Supreme Court, it establishes that forcing Mercy to perform the procedure is not the least restrictive

means to ensure full and equal medical treatment.[7]

E. The Relief Sought by Minton Would Violate Mercy's Constitutional Rights to Free Exercise and Expression of Religion.

Minton's statement that his allegations do not disclose that constitutional protections bar his claim is not correct. (Opp. at 12:3-4.) As Minton admits, Mercy refused to permit a hysterectomy as a treatment for gender dysphoria because it was guided by the ERDs, which are promulgated by the USCCB. The ERDs are an expression of the Catholic faith as it applies to Catholic health services such as Mercy. Accordingly, Complaint clearly discloses that the relief Minton seeks would directly conflict with Mercy's constitutional rights.

F. The State and Federal Constitutions Bar Minton's Claim.

Minton cites no case in which a Catholic hospital was compelled to perform medical procedures prohibited by Catholic religious doctrine. Nor does any such case exist. Forcing a religious hospital to perform such procedures would violate its constitutional rights. Minton's assertion that the California Supreme Court has twice held that religiously affiliated health care entities must comply with statutes mandating nondiscriminatory access to health care is false. (Opp. at 12:16-17.) Neither *North Coast* nor *Catholic Charities* involved a religiously affiliated healthcare entity. The medical group at issue in *North Coast* merely included certain physicians with religious convictions, and Catholic Charities is a social service provider, not a "healthcare entity."

Minton suggests that there is no constitutional objection to a neutral and valid law of general applicability. This is wrong as applied to the California Constitution, which guarantees freedom of religion, and the federal constitution's protection of freedom of expression. Even as a general matter of federal constitutional law, it is subject to serious question, given the U.S. Supreme Court's grant of certiorari in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), *cert. granted,* 2017 WL 2722428 (U.S. June 26, 2017).

First, the California Supreme Court has refused to apply the U.S. Supreme Court's holding regarding neutral laws of general application in *Employment Div., Oregon Dept. of Human Resources v.*

[7] Minton's attempt to distinguish *North Coast* because Dr. Dawson (Minton's physician) was willing to perform the hysterectomy procedure is obviously irrelevant because the issue is Mercy's religious objection, not Dr. Dawson's objection. As an aside, the complaint never alleges that Dr. Dawson had privileges to admit patients only at Mercy and not at a secular hospital. If she indeed had admitting privileges elsewhere, then she needlessly forced a dispute with a Catholic hospital which she either knew or suspected would not be able to treat her patient.

Smith, 494 U.S. 872, 877-882 (1990) to claims under the California Constitution. *Catholic Charities*, 32 Cal.4th at 559-61; *North Coast*, 44 Cal.4th at 1159-60. While the California Supreme Court has not finally concluded that strict scrutiny applies to such claims, it has in fact applied strict scrutiny following pre-*Smith* federal case law. *Catholic Charities*, 32 Cal.4th at 559-61; *North Coast*, 44 Cal.4th at 1159-60. Thus, contrary to Minton's suggestion, unless this Court were to make new law, strict scrutiny applies to any claim that application of the Unruh Act infringes Mercy's constitutional rights. This means the application of a balancing test that Minton's claims cannot survive. Either Mercy's conduct is not a violation of the Unruh Act (for the reasons described in *North Coast*), or the constitutional balance favors Mercy. Rescheduling Minton's hysterectomy to take place at a non-Catholic hospital within 72 hours is a minor inconvenience outweighed by the very heavy burden placed on a Catholic hospital of being forced to violate its governing religious doctrine.

Second, the U.S. Supreme Court has not applied the *Smith* rule to cases involving expressive association such as *Dale*. If the First Amendment protects the Boy Scouts' rights to exclude gay scoutmasters, it certainly protects the rights of the Catholic Church to decline to provide medical procedures that conflict with Catholic doctrine in accordance with the ERDs. Contrary to Minton's statement, the Catholic Church (including its apostolate Catholic hospitals) is an expressive association. Indeed, the ERDs specifically provide that "Catholic health care expresses the healing ministry of Christ," that the Catholic health care ministry is "rooted in a commitment to promote and defend human dignity," and that "the biblical mandate to care for the poor requires" Catholic health care institutions "to express this in concrete action at all levels of Catholic health care." (RJN, Ex. 2 at 8, 10.)[8] ERD 5, requiring all Catholic health care services to adopt the ERDs as policy, and ERD 29 and 53, obliging Catholic hospitals to preserve the functional integrity of the human body and prohibit direct sterilization, inform Catholic health care providers how they must express the healing ministry of Christ. (RJN, Ex. 2 at 20, 27.)

Thus, forcing Mercy to perform prohibited medical procedures contrary to Catholic doctrine

[8] Mercy, is listed in the OCD, and is an official part of the Catholic Church. See Dem at 5, n. 9; Request for Judicial Notice ("RJN") Ex. 1.) *Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (citation omitted). Dignity Health's mission is to "further[] the healing ministry of Jesus." https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values . Mercy's edifice is adorned with a large cross. *See* https://www.rbbinc.com/Images/Projects/MSJMC_Master_Plan_And_New_Inpatient_Tower/Mercy_San_Juan_Medical_Center_01.jpg

would directly interfere with the expression of Catholic health services and severely burden Catholic health care's ability to express its particular message about human dignity. As in *Dale*, such a burden cannot be justified even in the face of a compelling state interest. *Dale,* 530 U.S. at 659 (refusing to apply intermediate scrutiny); *see Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 189 (2012) (acknowledging that a Court order compelling Catholic Church to ordain women would violate First Amendment); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (Massachusetts' public accommodations law could not be applied to force parade organizers to admit openly gay parade unit because it posed an impermissible burden on constitutional rights).

This is fundamentally different from the issue raised in the line of cases Minton cites on page 16 of his opposition, which involve individuals engaged in for-profit commercial enterprise who stand accused of some violation of public accommodation laws arising from their refusal to provide a service based upon their stated adherence to religious beliefs. The Supreme Court will soon address the First Amendment rights in such cases. But that is immaterial to this case, which involves the Catholic Church itself. *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996)("First Amendment jurisprudence [provides that] the Free Exercise Clause guarantees a church's freedom to decide how it will govern itself, what it will teach . . . it does not guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application"). The right of any organization, whether the Boy Scouts or the Catholic Church, to control its message is an entirely different question from the private business practices of their members or adherents.

III. CONCLUSION.

Minton's claim fails as a matter of law for multiple reasons and is incurably defective. The Court should sustain Dignity Health's demurrer without leave to amend.

Dated: August 8, 2017

MANATT, PHELPS & PHILLIPS, LLP

By: _____
Craig S. Rutenberg
Attorneys for Defendant
DIGNITY HEALTH

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I electronically filed the foregoing:

DEFENDANT DIGNITY HEALTH'S REPLY BRIEF IN SUPPORT OF DEMURRER TO VERIFIED COMPLAINT

with the Clerk of the Court using the First Legal system which sent notification of such filing to the following:

Christine Saunders Haskett, Esq.
Theodore Karch, Esq.
Covington & Burling LLP
One Front Street
San Francisco, CA 94111
chaskett@cov.com
tkarch@cov.com

Elizabeth O. Gill, Esq.
ACLU Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
egill@aclunc.org

Ruth Dawson, Esq.
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
rdawson@aclusocal.org

Craig Rutenberg