NO. 19-1135

IN THE
Supreme Court of the United States

DIGNITY HEALTH D/B/A MERCY SAN JUAN MEDICAL CENTER,

Petitioner,

v.

EVAN MINTON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF OF AMICI CURIAE CATHOLIC MEDICAL ASSOCIATION AND THE NATIONAL CATHOLIC BIOETHICS CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Catholic Medical Association is the largest association of Catholic individuals in healthcare. With over 2,000 physicians and hundreds of allied health members nationwide, the Association and its members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including protecting conscience rights and religious freedoms for every person and religious entity. The issues presented in this case and others like it will significantly impact Catholic hospitals throughout the country as they confront potential conflicts between the demands of a small minority of patients, the hospitals' obligation to follow the Catholic Church's Ethical and Religious Directives, and their commitment to offering principled, life-affirming healthcare to the millions of Americans who seek out conscience-driven, religious healthcare providers.

The National Catholic Bioethics Center is a nationally and internationally recognized educational institute committed to applying the moral teachings of the Catholic Church to ethical issues arising in healthcare and the life sciences. Through its individual and corporate memberships, it represents thousands of healthcare providers, sponsors, and recipients of healthcare who are impacted by regulatory policies that prevent providers from offering care consistent with the best interests of the patient, patient consent, and religious liberty.

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[1] No party other than the amici and their counsel authored any part of this brief or gave money to fund its preparation or submission. Counsel for both parties were timely notified of this filing as required by Supreme Court Rule 37.2, and both parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The California Court of Appeal held that Dignity Health could be held liable for allowing Mercy, one of its Catholic hospitals, to follow the Catholic Church's Ethical and Religious Directives. The Court should grant the petition and reverse for three reasons.

First, California does not have a compelling state interest in forcing religious hospitals to perform elective sterilizations in violation of their religious beliefs and their Church's teachings. In recent years, courts have been prone to define state interests in the broadest terms possible to justify trampling on First Amendment freedoms. This Court should grant the petition and put an end to that dangerous practice.

Second, the Court should make clear that courts must abstain from disputes over ecclesiastical matters like those here. Religious organizations must be free to "decide for themselves" issues of "faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This dispute is inextricably intertwined with the Catholic Church's tenets for Catholic hospitals, and civil courts may not pass judgment on them.

Third, federal law preempts any possible claim under California's Unruh Act. The federal Church Amendment prohibits "any court or any public official or other public authority" from requiring a healthcare entity to "make its facilities available for the performance of any sterilization procedure . . . if the performance of such procedure . . . in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. 300a-7(b). Those are precisely the circumstances present here, and they warrant summary reversal.

ARGUMENT

I. As applied below, California's Unruh Act cannot survive strict scrutiny.

A. Properly defined, no compelling state interest justifies forcing Mercy to violate patient-neutral, religious ethical rules.

This Court recently granted certiorari to determine whether *Employment Division* v. *Smith* should be "revisited" and "reconsidered." Pet. for Writ of Cert. at i, 18, *Fulton* v. *City of Philadelphia*, No. 19-123 (cert. granted Feb. 24, 2020). Like the petitioner here, amici agree with the petitioner in *Fulton* that "the Court that decided *Smith* could not have envisioned that *Smith* would be used" to allow governments to shutter century-old ministries over disagreements about issues of faith. Pet. for Writ of Cert. at 36–37 (quoting *Fulton* Pet. at 31–32).

But merely "revisiting" *Smith* may not be enough to keep these ministries open in states and localities where government officials are determined to close them—and where courts are quick to bless those efforts. This case proves it. The California Court of Appeal held that the state supreme court had already "soundly rejected" Mercy's arguments by holding "that any burden the Unruh Act places on the exercise of religion is justified by California's compelling interest in ensuring full and equal access to medical treatment for all its residents, and that there are no less restrictive means available for the state to achieve that goal." App.15. Full stop. No additional analysis required.

"Strict scrutiny must not be strict in theory but feeble in fact." *Fisher* v. *Univ. of Texas at Austin*, 570 U.S. 297, 314 (2013). But if the state's interest in "ensuring full and equal access to medical treatment" is sufficient to trump "any burden . . . on the exercise of religion," then laws like California's that trample on religious providers' free-exercise rights will survive every time. And "strict" scrutiny will continue to be anything but.

That is especially obvious here considering that the full scope of the alleged denial of "full and equal access" was a mere three-day delay in performing the procedure, which Minton's own doctor performed at a different, non-Catholic hospital also operated by Dignity Health. Pet. at 10. To the court below, cancelling the surgery for any duration undermined California's "compelling interest in ensuring full and equal access to medical treatment," and Dignity Health's act of "remedying [the alleged injury] after it [had] occurred" made no difference. App.14–15.

Similarly in *Fulton*, the Third Circuit rejected Catholic Social Services' arguments under the state's Religious Freedom Protection Act by holding that, "even if CSS could show a substantial burden on its religious exercise as defined by the RFPA, the City's actions appear[ed] to survive strict scrutiny." *Fulton* v. *City of Philadelphia*, 922 F.3d 140, 164 (3d Cir. 2019). This was true despite that "no same-sex couples [had] ever—so far as the record reflect[ed]—approached [CSS] seeking to become foster parents." *Ibid.* To the Third Circuit, the absence of actual harm to same-sex couples was "not surprising" and "beside the point." *Ibid.*

Just last year, a federal district court in New York was equally quick to dismiss a Christian adoption agency's claim that the state had violated its First Amendment rights by forcing it to place children with same-sex and unmarried couples or shut down. In *New Hope Family Services, Inc.* v. *Poole*, the district court held that "the state's compelling interest in prohibiting the discrimination at issue [t]here far exceed[ed] any harm to New Hope's expressive association." 387 F. Supp. 3d 194, 219–20 (N.D.N.Y. 2019). And that was true even though New Hope referred same-sex and unmarried couples to other providers and, as a result, had "never denied an unmarried couple or same-sex couple's application." *Id.* at 204.[2]

Each of these cases demonstrates a simple truth: requiring courts to apply strict scrutiny to all free-exercise claims will not offer meaningful protection to religious providers like Mercy, CSS, and New Hope if that analysis remains "strict in theory but feeble in fact." *Fisher* 570 U.S. at 314. An analysis that simply accepts every government justification to force individuals and organizations to violate their religious beliefs is just as bad—if not worse—than a regime where religious interests always lose under *Smith*.

The Court should grant the petition here and make clear that "strict" means "strict." Or the Court should make the same clear in *Fulton* and, as the petitioner suggests, hold the petition here pending the Court's decision there. Pet. at 35–38.

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[2] Counsel for amici represent New Hope in its appeal to the Second Circuit Court of Appeals. *New Hope Family Services, Inc.* v. *Poole*, No. 19-1715. That appeal has been fully briefed and argued but not yet decided at the time of this filing.

Specifically, this Court should remedy what appear to be the primary problems infecting lower courts' First-Amendment analyses: courts are labeling government interests as "compelling" far too quickly, and they are defining those interests at levels of generality that are far too high.

As several commentators have noted, the Court's current caselaw "suggests there is no bright-line standard for resolving what a compelling state interest looks like—no definitive criterion, no operational definition." Matthew D. Bunker, et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 364 (2011). As a result, "no doubt at least in part due to the rudderless nature of the inquiry, compelling interests seem to be proliferating." *Id.* at 365. Courts continue to "add new interests to the list in a casual, off-hand manner suggesting . . . almost any significant government interest is sufficiently compelling to satisfy strict scrutiny." Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law,* 21 LOY. L.A. L. REV. 449, 475 (1988).

"Aside from [elevating] interests that seem less than compelling, courts also frequently describe compelling interests at a level of abstraction that tends to overstate the interest actually present in the case at hand." Bunker, et al., at 369. This approach allows courts to "frame broad compelling interests that are only marginally related to the actual interest in the case." *Ibid.* "Strict scrutiny is not only not fatal, it isn't even strict when such techniques become commonplace." *Id.* at 372.

For example, by defining the interests here in the broadest terms, the court below readily determined that Dignity Health's "initial withholding of facilities" for Minton's procedure, "albeit for a relatively short period of time," nonetheless undermined California's "compelling interest in ensuring full and equal access to medical treatment for all its residents." App.13–15.

Likewise in *Fulton*, the "compelling interest" the Third Circuit identified was "*not* in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do." 922 F.3d at 164. It made no difference that shutting down CSS's foster-care ministry would "not increase the number of foster agencies willing to work with same-sex couples," *ibid.*, while decreasing the number of children placed. Nor did it matter whether allowing CSS to stay open would discourage same-sex couples from becoming foster parents. *Ibid.* The "mere existence of CSS's discriminatory policy [was] enough to offend the City's compelling interest in anti-discrimination." *Ibid.* Stating the interest in such broad terms, agencies like CSS don't stand a chance.

The results would be quite different if courts defined state interests in terms of the narrower harms alleged. Here that would mean deciding whether forcing a Catholic hospital to perform an elective hysterectomy in violation of its religious beliefs—rather than allowing the patient to be transferred to a non-Catholic hospital for the same surgery by the same doctor three days later—is the least restrictive means of ensuring timely access to medical care free from invidious discrimination. California would fail that test; this Court should say so.

B. The Catholic Church's Ethical and Religious Directives prohibit elective sterilizations and are patient neutral.

Transferring Minton's procedure to one of Dignity Health's non-Catholic hospitals did not undermine the State's interest in ensuring timely access to medical care free from invidious discrimination. Minton was still able to have the procedure. It was elective, so a three-day delay was not untimely. And Dignity Health was motivated by its respect for Mercy's religious beliefs—not animus toward Minton—so no invidious discrimination occurred.

"[A]s a Catholic hospital, Mercy is bound to follow its facially neutral 'Ethical and Religious Directives for Catholic Health Care Services' (the Directives) issued by the United States Conference of Catholic Bishops." App.4–5. Those Directives are based on "the Church's teaching on medical and moral matters" as applied "to the ever-changing circumstances of health care and its delivery." USCCB, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 3 (5th ed. 2009), https://perma.cc/JF47-7357. The Directives "reaffirm the Church's commitment to health care ministry" and the "distinctive Catholic identity" of that ministry. *Ibid.*

That "distinctive Catholic identity" requires "ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person" and "authoritative guidance" on moral issues facing "Catholic health care today." *Id.* at 4. By supplying those standards and guidance, the Directives "promote and protect the truths of the Catholic faith as those truths are brought to bear on concrete issues in health care." *Id.* at 4–5.

As relevant here, Directive 53 says that "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution." *Id.* at 27. "Procedures that induce sterility are permitted [only] when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Ibid.*

For that position, the Directives cite the Church's teaching that a hysterectomy may be performed only to "counter an immediate serious threat to the life or health of the mother." Congregation for the Doctrine of the Faith, *Responses to Questions Proposed Concerning "Uterine Isolation" and Related Matters* (July 31, 1993), https://perma.cc/M5Y4-JAZT. In those circumstances, the procedure "has a directly therapeutic character, even though it may be foreseen that permanent sterility will result." *Ibid.* "The removal of the organ has as its aim, therefore, the curtailing of a serious present danger to the woman independent of a possible future pregnancy." *Ibid.*

Hysterectomies for other reasons, though, "fall into the moral category of direct sterilization," which the Catholic Church "absolutely forbid[s]." *Ibid.* Any "contrary opinion . . . cannot be regarded as valid and may not be followed in Catholic hospitals." *Ibid.* Indeed, Directive 5 requires all Catholic healthcare providers to "adopt [the] 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, *supra*, at 12.

Importantly, the Directives do not discriminate based on sex, gender, gender dysphoria, gender identity, or gender expression—even assuming broad definitions of those terms. Directive 53 prohibits *all* forms of "[d]irect sterilization of either men or women." *Id.* at 27. Only sterilization necessary to counter an immediate and serious threat to the health or life of the patient is permitted because the Church does not consider sterilization under those circumstances to be "direct." *Responses to Questions*, *supra*.

To the Catholic Church and thus to Mercy, it makes no difference whether Minton is a man or a woman. Nor does it matter whether Minton believed a hysterectomy was necessary or for what reason Minton wanted the procedure. The Catholic Church and the Directives prohibited it because Minton's health and life were not immediately and seriously threatened. That ends the analysis from the Church's perspective. And for the reasons that follow, it should have ended the lower court's analysis, too.

II. The ecclesiastical abstention doctrine shields religious hospitals from state interference with their faith and mission.

Even if *Smith* survives the Court's upcoming decision in *Fulton*, amici agree that nothing in *Smith* "remotely suggests that a state may coerce a *religious institution* into allowing its facilities to be used for activities that run counter to its beliefs." Pet. at 3. It is simply *not* the case "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017).

Instead, this Court has distinguished between cases involving "government regulation of only outward physical acts," like *Smith*, and cases involving government interference with a religious entity's "faith and mission," like this one. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 190 (2012). More specifically, under the ecclesiastical abstention doctrine—sometimes called the church-autonomy doctrine—this Court has been careful to preserve "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, [the] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. That doctrine is deeply rooted in this Court's caselaw and firmly founded on the First Amendment, and the Court should grant the petition here because the court erred by disregarding it below.

This Court's first opinion addressing a civil court's jurisdiction over matters involving religious organizations is *Watson* v. *Jones*, 80 U.S. 679 (1871). That case involved a schism between a local Presbyterian Church and the Church's national General Assembly regarding slavery and the ownership and use of church property. *Id.* at 684–700. The Church ultimately resolved the dispute internally through a series of hierarchical ecclesiastical tribunals knows as Church Sessions (the local churches), Presbyteries, Synods, and a General Assembly (the highest governing authority). *Id.* at 681. But certain members filed a lawsuit in state court, and that lawsuit eventually reached the Kentucky Court of Appeals. *Id.* at 685–87.

That court then overruled the Presbyterian General Assembly's decision, holding that certain ruling elders of the local church were not elders and did not need to be recognized as such by the congregation. *Id.* at 699–700. This Court reversed, articulating the rule of law recognized as the basis for the ecclesiastical abstention doctrine:

> [W]here a subject-matter of dispute [is] strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, . . . [i]t may be said . . . that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it [to decide the case] . . . .

Id. at 733.

This Court has since expanded the doctrine to limit every branch of government. Applied to the judiciary, the doctrine prevents courts from resolving ecclesiastical disputes. *Ibid.* Applied to the legislative and executive branches, the doctrine forbids prohibiting or burdening the free exercise of religion through state interference with "matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Accordingly, while a court may hear a suit if it turns on secular standards without reference to religious doctrine, it *may not* scrutinize religious doctrines to assess the merits of a legal position. *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004).

Here, the Catholic Church's Ethical and Religious Directives state the Church's moral and religious principles on healthcare issues. Yet Minton's lawsuit requires courts to interpret and evaluate the Directives' prudence and their application here, and the California Court of Appeal expressly opened the door to that sort of inquiry on remand. App.10.

For example, the Court of Appeal said that Dignity Health's decision to deny Minton access—at least at Mercy—to "a procedure as treatment for a condition that affects only transgender persons supports an inference that Dignity Health discriminated against Minton based on his gender identity." *Ibid.* "This is true," continued the court, "even if the denial was pursuant to a facially neutral policy." *Ibid.*

In other words, the lower court believed that Minton might be able to show that Dignity Health's and Mercy's reliance on Catholic teachings was pretextual—a cover for discriminatory intent. "Such an argument cannot be heard by [the courts] without impermissible entanglement with religious doctrine." *Rweyemamu* v. *Cote*, 520 F.3d 198, 209 (2d Cir. 2008). See also *Hosanna-Tabor*, 565 U.S. at 194–95 (rejecting the argument that a church's reason for firing a teacher "was pretextual" by explaining that the argument "misses the point of the ministerial exception," which is to "ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone") (cleaned up) (quoting *Kedroff*, 344 U.S. at 119). Allowing "civil courts to engage in the pretext inquiry . . . would dangerously undermine the religious autonomy" religious organizations are due. *Id.* at 205–06 (Alito, J., concurring).

Here, deciding whether "Dignity Health discriminated against Minton based on his gender identity" despite its reliance on a "facially neutral" religious policy would require courts to answer several other impermissible questions. For example, does the Church consider Minton and women with life-threatening conditions to be similarly situated? Under what circumstances will the Church allow and deny a hysterectomy? Is the Church's teaching regarding sterilization motivated by discriminatory beliefs about gender or gender identity? Or is it motivated by the Church's beliefs and teachings about life, procreation, and human dignity? See, *e.g.*, Paul VI, Pope, *Humanae Vitae* (Encyclical Letter on the Regulation of Birth), July 25, 1968, https://perma.cc/72W2-23TQ.

These questions show how applying the Directives to Minton's claim is inextricably intertwined with the Catholic Church's religious teachings. And while courts can address claims of discrimination, the Constitution forbids them from determining whether applying the Directives here was merely pretextual. That determination necessarily involves inquiry into the Directives and Church doctrine. It is not the role of the courts—in California or in any forum—to mandate the policy and structural reform to Catholic hospitals that Minton seeks. That policy-setting role resides with the Catholic Church alone.

A federal district court reached that conclusion in a highly analogous context in *Means* v. *United States Conference of Catholic Bishops*, 2015 WL 3970046 (W.D. Mich. 2015), aff'd on other grounds, 836 F.3d 643 (6th Cir. 2016). There, the plaintiff alleged that a Catholic hospital negligently failed to discuss with her the option of terminating her pregnancy. *Id.* at *2. The lawsuit thus implicated the Ethical and Religious Directives' ban on "direct abortions." *Id.* at *13.

Undeterred, the plaintiff argued the ecclesiastical abstention doctrine did not apply because she was not asking the court to rule on the Directives' validity—but "whether the imposition of the Directives" on her hospital "caused her harm." *Ibid.* The analysis "would be the same," she argued, regardless of whether the Directives were imposed "from religious or secular motivations." *Ibid.* The court emphatically rejected that characterization of the issues. *Ibid.*

The plaintiff's claim "oversimplifie[d]" the "text and theological underpinnings" of the Directives, as well as their application "in hospital settings." *Ibid.* Assessing the claim "would require a nuanced discussion about how a 'direct abortion' is defined in Catholic doctrine." *Ibid.* That analysis would raise multiple doctrinal questions. *Ibid.* And those "questions demonstrate[d] how the application of the Directives [is] inextricably intertwined with the Catholic Church's religious tenets." *Ibid.* Trying to answer them would "necessarily involve[] inquiry into the [Directives] themselves, and thus into Church doctrine." *Ibid.* Thus, resolving the plaintiff's claim "would impermissibly intrude upon ecclesiastical matters." *Id.* at *14. So the court dismissed it. *Ibid.*

The same is true here. Deciding whether Dignity Health's decision "supports an inference" that it discriminated based on Minton's gender identity, even "pursuant to a facially neutral policy" based on the Directives, App.10, "necessarily involves inquiry into the [Directives] themselves, and thus into Church doctrine," *Means*, 2015 WL 3970046 at *13. That inquiry "would impermissibly intrude upon ecclesiastical matters." *Id.* at *14. Thus, the courts should have abstained and dismissed with prejudice.

"It is not up to the [courts] to mandate the larger structural and policy reform to Catholic hospitals that [Minton] seeks; that issue is left to the Church and its tribunals." *Ibid.* This Court should grant the petition and reverse to reaffirm that religious organizations like the Catholic Church and hospitals like Mercy remain "free from state interference" in "matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116.

III. The federal Church Amendment preempts the claim that patients can force religious hospitals to perform elective sterilizations.

Finally, the lower court erred because the federal Church Amendment prohibits Minton's lawsuit. That Amendment makes clear that even a government "grant, contract, loan, or loan guarantee . . . does not authorize any court or any public official or other public authority to require" a healthcare entity to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. 300a-7(b).

What is more, the Amendment states that no court or public official may require the healthcare entity to "provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel." *Ibid.*

Here, Minton is asking this Court to do precisely what § 300a-7 prohibits: force a Catholic hospital in the Dignity Health system to perform sterilization procedures contrary to the hospital's religious beliefs. Those beliefs are undisputed, as they are embodied in the Ethical and Religious Directives that Dignity Health must allow Mercy to follow in order to call itself a "Catholic" hospital. It also cannot be disputed (particularly without getting into the Church's ecclesiastical teachings on the subject) that the Directives forbid a Catholic hospital from performing a hysterectomy in the circumstances presented here.

"The Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Arizona* v. *United States*, 567 U.S. 387, 399 (2012) (citing U.S. Const., art. VI, cl. 2). Preemption occurs when a federal law contains an express preemption provision, regulates an entire field, or conflicts with state law. *Ibid.* That third category "includes cases where compliance with both federal and state regulations is a physical impossibility" and cases "where the challenged state law stands as an obstacle" to Congress's "full purposes and objectives." *Id.* at 399–400 (cleaned up).

Here, the California Court of Appeal applied California's Unruh Civil Rights Act to force Dignity Health, Mercy, and other California religious entities to perform procedures that violate their religious beliefs. That application of the state statute impedes Congress from accomplishing its objective—through the Church Amendment—of protecting religious healthcare institutions from courts and public officials who would force them to violate their religious beliefs. See also *Watkins* v. *Mercy Med. Ctr.*, 364 F. Supp. 799, 803 (D. Idaho 1973), aff'd on other grounds, 520 F.2d 894 (9th Cir. 1975), (holding that a doctor who wanted to perform sterilizations could not "force Mercy Medical Center to allow him to perform them in its hospital," and that to "hold otherwise would violate the religious rights of the hospital").

In this case, the conflict could not be clearer: by applying the Act against Dignity Health, the California Court of Appeal approved precisely what the Church Amendment prohibits. Such an egregious error is grounds for summary reversal. On that basis, this Court should grant the petition—adding an additional question presented if needed to reach the issue—and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held pending the disposition of *Fulton* v. *City of Philadelphia*.

Respectfully submitted,

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APRIL 2020