No. 19-1135

In the

Supreme Court of the United States

DIGNITY HEALTH, DBA MERCY SAN JUAN MEDICAL CENTER,

Petitioner,

v.

EVA MINTON,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of Free Exercise of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 565 U.S. 171 (2012), this Court ruled that *both* the Free Exercise Clause *and* the Establishment Clause prohibit the government from interfering with a religious group's decision to fire one of its ministers. *Id*. at 181. The issue presented in this case concerns a far greater intrusion into the workings of an ecclesial organization. Rather than simply interfering with hiring and firing of individual ministers, the California court here ruled that state law regulates the content and practice of ministry.

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

The Free Exercise Clause protects a right to practice one's religion. This right extends beyond mere worship. The founders understood this right to protect individuals in the performance of their duties to God. Petitioner in this case seeks to exercise those rights as a healing ministry of the Catholic Church. However, the California law at issue, as interpreted by the California courts, requires this ministry either to violate the strictures of Church doctrine directly or to do so indirectly by assisting respondent in obtaining the Church-prohibited sterilization at another facility. This law interferes with the faith and doctrine of the Catholic Church and its healing ministry. This Court should grant review to determine whether the Ministry Exception recognized in *Hosanna-Tabor* also protects the content and practice of ministry

REASONS FOR GRANTING THE WRIT

I. The Religion Clauses, and thus the Ministerial Exception, Protect More than Simply Worship.

A. The Free Exercise Was Understood as Requiring Accommodation of Religious Actions from Generally Applicable Laws.

The Free Exercise Clause, as understood by the Founders, was meant to protect both religious conduct and belief. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488 (1990). At the time of the founding, belief in God also meant that one believed that he or she owed a duty to God that extended beyond worship. Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 B.Y.U.L. Rev. 163, 170 (1993).

Examples of this understanding are found in the 1776 Virginia Declaration of Rights and the Oath Clause of the 1787 Constitution.

In the debate over the Virginia Declaration of Rights, James Madison argued that religion included the "duty we owe our Creator." Based on Madison's arguments, the thrust of the Virginia Declaration shifted from guarantying "tolerance" to instead recognizing a right "free exercise of religion." *City of Boerne v. Flores*, 521 U.S. 507, 556 (1997) (O'Connor, J., joined by Breyer, J., dissenting). The founders expected religion to govern *conduct* in civil society. Mercy Otis Warren, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION at 12 (1808) (Liberty Fund 1988).

The Oath Clause of the 1787 Constitution also shows that the Framers and Ratifiers expected citizens to carry their religion into their civic life. Mere private belief was not enough. Civil institutions relied on citizens acting on their beliefs.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or* affirmation, to support this Constitution.

U.S. Const., Art. VI.

Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or* Affirmation:--'I do solemnly swear (or affirm) ….'" U.S. Const. Art. II, §1.

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. Matthew 5:34-37, THE NEW OXFORD STUDY BIBLE, (Michael D. Coogan, ed.) (Oxford 2007) at New Testament 15; James 5:12, THE NEW OXFORD STUDY BIBLE, *supra*, New Testament at 392. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. *See Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion.

Thus, this provision was an important addition to preserve religious liberty. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the 1787 Constitution was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. James Iredell, Debate in North Carolina Ratifying Convention, reprinted in 5 THE FOUNDER'S CONSTITUTION (Phillip Kurland and Ralph Lerner, eds.) (Univ of Chicago Press (1987)) at 89; Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, et al. eds.) (Univ. of Virginia Press (2009)) at 125. Only those individuals that adhered to this religious belief system were allowed to swear an oath. James Iredell, Debate in North Carolina Rati-

fying Convention, *supra*. *See United States v. Kennedy*, 26 F. Cas. 761 (D. Ill. 1843); *In re Williams*, 29 F. Cas. 1334, 1340 (E.D. Penn. 1839); *In re Bryan's Case*, 1 Cranch C.C. 151; 4 F. Cas. 506 (D.C. Cir. 1804).

The oath was an explicitly religious requirement and the exception provided for affirmations was to accommodate those who believed their religion prohibited them from "swearing an oath," but who still believe in an after-life that includes judgment. This requirement of an oath relied on an understanding that citizens would act, in their civic lives, consistently with their religious beliefs. Indeed, the Oath Clause presumed a constitutional requirement that individuals entering government service would affirmatively "exercise" their religion by swearing an oath. Yet, those whose religion prohibited the swearing of oaths would be excluded from public office under the new Constitution if there was no exception to the Oath Clause.

The Constitution, however, resolved this concern by permitting public office holders to swear an oath or give an affirmation. This provision was specifically targeted at the religious sects "conscientiously scrupulous" of swearing oaths. In the words of Justice Scalia, it exemplified "the best of our traditions." *Kiryas Joel*, 512 U.S. at 744 (Scalia, J., dissenting). This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in

the instances the founding generation expected government compulsion to come into conflict with religious belief.

This exception for "affirmations" included in the Oath Clause is significant for what it tells us about the scope of religious liberty that the Framers sought to protect with both the 1787 Constitution and the First Amendment. The accommodation did not simply welcome Quakers and Mennonites into state and federal government offices. It demonstrated recognition that an oath requirement would put members of these sects in a position of choosing whether to forgo government service or to violate the fundamental tenets of their religion. The Framers chose to protect people of faith from government compulsion to violate their religion.

The Oath Clauses contained *specific* exceptions to protect the known religious dissenters at the time of the Framing. Does that mean that the failure to include other specific exemptions is evidence that the Framers only meant to protect Quakers and Mennonites (trusting to the political process to protect other Christian sects)? There is no evidence to support that theory. Indeed, one argument supporting the call for a bill of rights was predicated on the need for a more general protection of religious liberty. "It is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as part of the national compact." Federal Farmer, Letters to the Republican, November 8, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 235.

The issue in this case is whether the Religion Clauses of the First Amendment preserved for the ages and secured to the millions unborn the right to act according to their faith.

B. Hospitals are a Ministry of the Catholic Church.

Care for the sick has been a part of the Christian faith since its founding. Jesus commanded his followers to "cure the sick." Luke 10:9, THE NEW OXFORD STUDY BIBLE, *supra* at New Testament 117; Matthew 10:8, THE NEW OXFORD STUDY BIBLE, *supra* at New Testament 21. Jesus used the story of the "Good Samaritan" to teach His followers how to care for their neighbors – even those who do not believe as they do. Luke 10: 29-37, THE NEW OXFORD STUDY BIBLE, *supra* at New Testament 117.

Hospitals, as a ministry, have been a part of the Catholic tradition for over one and a half millennia. While the actual location and date of the first Catholic hospital is up for debate, there is a consensus that it was founded sometime in the fourth century.[2] During the middle ages, emperor Charlemagne ensured that each monastery and cathedral had a hospital attached to it.[3] Furthermore, in North America, the tradition of Catholic healthcare started as early as 1727 "when 12 French Ursuline sisters arrived in the city [of New

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[2] James Joseph Walsh, *Hospitals*, THE CATHOLIC ENCYCLOPEDIA, Vol 7, (New York: Robert Appleton Company, 1910). (last visited Apr. 6, 2020), http://www.newadvent.org/cathen/07480a.htm.

[3] *Id.*

Orleans] to become nurses, teachers and servants of the poor and orphans."[4]

The healing ministry is not unique to the Catholic Church. Other non-Catholic Christian denominations operate hospitals as well. For example, a nation-wide Seventh-day Adventist-operated hospital network, "Adventist Heath" prominently displays on its website that its health care professionals are "inspired by [their] belief in the loving and healing power of Jesus Christ."[5]

As a Catholic non-profit hospital, Mercy Hospital has a religious mission, is bound by the *Ethical and Religious Directives for Catholic Health Care Services*, and must follow the Religious Directives issued by the United States Conference of Catholic Bishops. *Minton v. Dignity Health*, 39 Cal. App. 5th 1155, 1159, 252 Cal. Rptr. 3d 616, 620 (2019). Those directives require Catholic hospitals to "protect and preserve … bodily and functional integrity."[6] Mercy Hospital can only perform the requested surgery (sterilization) if it is to,

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[4] Richard M. Haughian, *The Identity of Catholic Health Care Institutions*, Dolenium Hominum No. 52 Year XVII- No. 1, 2003, 31 (2002), http://www.humandevelopment.va/content/dam/ sviluppoumano/pubblicazioni-documenti/archivio/salute/dolentium-hominum-en-1-72/DH_52_En.pdf (last visited April 15, 2020).

[5] About Adventist Heath, https://www.adventisthealth.org/about-us/ (last visited Apr. 12, 2020).

[6] United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 5th ed., USCCB, 20 (Nov. 17, 2009), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf (last visited April 15, 2020).

"maintain the health or life of the person when no other morally permissible means is available."[7]

The petitioner in this case is a recognized ministry of the Catholic Church. This Court should grant review to determine the extent to which the State of California may interfere with that ministry.

II. The Court Should Grant Review to Extend the Protections of the Ministerial Exception to the Actual Ministry, and Not Just to those Who Run the Ministry.

Underlying the issue in *Hosanna-Tabor* of whether the Church should have the freedom to select its own ministers was the question of whether government could interfere with "faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. That is precisely the question presented by this case. The hospital declined to allow its facilities to be used for a surgery that violated the teachings of the Church. The court below views this as discrimination under state law. But religious institutions will, by their very nature, "discriminate" in what they will and will not do.

Religion is in the business of seeking ultimate truths. Not all will agree with what each religion identifies as "truth," and the Free Exercise Clause protects against government compulsion to adhere to any one particular religious belief or faith. *Lee v. Wiseman*, 505 U.S. 577, 621 (1992) (Souter, J., concurring) *citing Employment Division v. Smith*, 494 U.S. 872, 877 (1990). But no one sought to force respondent to adhere to the teachings of the Catholic faith. Instead, the California court ruled that California state

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[7] *Id.*

law requires the Catholic church to either change its teaching or to assist the respondent in obtaining the church-prohibited sterilization at some other hospital. Such a requirement interferes with matters of "faith and doctrine" of the church. *See Kedroff v. Saint Nicholas Cathedroal of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *Watson v. Jones*, 13 Wall. 679, 727 (1872).

Review is warranted because the state law at issue interferes with the Catholic Church's "right to shape its own faith and mission." *See Hosanna-Tabor*, 565 U.S. at 188. That California may disagree with the Church's faith and mission is irrelevant. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. at1721-22. Imposing civil liability to compel the Church to abandon religious doctrine in favor of state doctrine puts the state in "the unacceptable 'business of evaluating the relative merits of differing religious claims'" (quoting *United States v. Lee,* 455 U.S. 252, 263 n. 2 (1982)). *Employment Division v. Smith*, 494 U.S. at 887. Such evaluations are not permissible, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id*. Therefore, the "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id*.; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

California's disagreement with Catholic doctrine is plainly irrelevant here. *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). The state simply may not interfere with the ministry of the church. Religiously-grounded conduct

is protected by the Free Exercise Clause; the State must demonstrate a compelling interest to overcome that fundamental liberty. *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). Forcing the Church to alter or ignore its doctrine is not narrowly tailored to support a compelling interest. *Thomas*, 450 U.S. at 718; *Wisconsin*, 406 U.S. at 221.

This Court should grant review to hold that the ministerial exception prohibits states from interfering with the ministry of a religious body.

CONCLUSION

The Free Exercise Clause protects more than the content of worship services conducted behind church or temple doors once a week. The Religion Clauses were meant to protect the actual practice or "exercise" of religion. That includes here the healing ministry of Mercy San Juan Medical Center. The state has no business interfering with how the church conducts its healing ministry through Mercy. The Court should grant review to hold that the Ministerial Exception recognized in *Hosanna-Tabor* protects more than ministry leadership. It should protect also the content and practice of ministry.

April 2020 Respectfully submitted,

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