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 IN OPPOSITION

Christine Haskett
Lindsey Barnhart
Morgan E. Lewis
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105

Elizabeth O. Gill
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Amanda C. Goad
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-9500
agoad@aclusocal.org

Attorneys for Respondent

(*Counsel continued on inside cover*)

Louise Melling
Rose A. Saxe
James D. Esseks
Lindsey Kaley
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Daniel Mach
David D. Cole
American Civil Liberties
Union Foundation
915 15th Street, NW
Washington, DC 20005

QUESTIONS PRESENTED:

1. Is the denial of a demurrer, a nonfinal order under California law, subject to this Court's review on a petition for certiorari, particularly where the lower court's decision did not resolve the critical factual issues upon which the petition is based?

2. Do the free exercise, free speech, or free association guarantees of the First Amendment require dismissal at the pleading stage of a complaint alleging that a hospital intentionally discriminated against a transgender patient when it refused to allow his doctor to perform a hysterectomy procedure that it routinely allows doctors to perform on nontransgender individuals?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

INTRODUCTION

Dignity Health seeks this Court's intervention at the pleading stage, requesting review of the denial of a demurrer, before any factual development of the allegations in Evan Minton's complaint, and before any of Dignity Health's contrary factual assertions can even be considered, much less tested. This procedural posture is sufficient to deny certiorari, for two reasons. First, the Court lacks jurisdiction, because the denial of a demurrer is not a final order, and none of the exceptions to the rule barring review of state court nonfinal orders applies here. And second, even if jurisdiction existed, Dignity Health's petition rests on factual assertions that are not yet part of the record, making this case an inappropriate vehicle to resolve the questions Dignity Health presents.

The explicit premise of the petition for certiorari is that Dignity Health turned Mr. Minton away not because he was transgender, as his complaint alleges, but based on "the Ethical and Religious Directives that govern Catholic health care institutions." Pet. i. Accordingly, the petition maintains that the decision below "compel[s] a religiously affiliated hospital to allow—and thereby endorse and be associated with—medical procedures that violate its longstanding deeply held religious beliefs." *Id.*

Dignity Health's characterization of the case, however, misrepresents the nature of Mr. Minton's claim. Mr. Minton does not allege impermissible discrimination because he was denied a hysterectomy based on neutral religious directives. Rather, he

alleges he was intentionally discriminated against because he is transgender. He alleges that he was denied the same procedure that Dignity Health permits many other nontransgender patients to undergo, at the same facility, in a host of other, comparable circumstances. At the demurrer stage, those allegations must be accepted as true.

Dignity Health's petition does not contend that it has a constitutional right to discriminate against patients because they are transgender, as Mr. Minton alleged; it instead insists that it does not discriminate against transgender patients. That is a factual dispute that cannot be resolved at this stage of the case.

Accordingly, the California Court of Appeal decided this dispute "on narrower grounds" than the petition pretends. Pet. App. 2. It merely held that Mr. Minton had pleaded sufficient facts to support an inference that Dignity Health intentionally discriminated against him because he is transgender, and in doing so denied him the "full and equal" access to medical care that California law requires. Pet. App. 13. Dignity Health's contrary assertions, it reasoned, turned on facts that *could not be considered*, much less resolved, on demurrer. The court below therefore declined to address whether the Ethical and Religious Directives for Catholic Health Care Services ("Directives")—which prohibit "direct sterilization"—were applied in a discriminatory way, because their application in this case cannot be considered on demurrer.

The court of appeal expressly left open for summary judgment or trial Dignity Health's contentions that it did not violate the Unruh Civil Rights Act when it cancelled Mr. Minton's hysterectomy, either because it did not intentionally discriminate against him based on his gender identity, or because its offer of an alternative location for his surgical procedure meant that Mr. Minton was not denied the "full and equal" access that state law requires. If, after development of the factual record, Dignity Health prevails on either state-law-based argument, there will be no need to address any constitutional questions.

Because the central arguments in the petition—which rely on Dignity Health's characterization of the facts, not Mr. Minton's well-pleaded allegations—have not been properly presented to or finally decided by California's courts, the petition does not meet statutory requirements for this Court to exercise jurisdiction. For similar reasons, even if there were jurisdiction, this case is an inappropriate vehicle for addressing the constitutional issues Dignity Health raises. Resolution of those questions, and indeed whether this case requires their resolution at all, will depend on the development of facts regarding Dignity Health's policies and practices as well as its specific dealings with Mr. Minton. At the demurrer stage, Dignity Health's version of the relevant, disputed facts is not in the record.

In any event, Dignity Health does not argue that the decision below, which holds only that the First Amendment does not categorically preclude a claim that a religiously affiliated hospital's decision to

intentionally deny services to a patient *because* he is transgender violates a public accommodations law, conflicts with any other decision of a state supreme court or federal court of appeals.

The Court should deny certiorari.

STATEMENT OF THE CASE

This case arises from the decision of Mercy San Juan Medical Center ("Medical Center"), a Sacramento-area hospital owned by Dignity Health, to bar a surgeon from performing a hysterectomy on Evan Minton, a transgender man who sought the procedure as a medically necessary step in his gender transition. This appeal arises from a demurrer to the amended complaint, so the record is limited to the allegations of that complaint, which must be accepted as true. *Buller v. Sutter Health*, 160 Cal. App. 4th 981, 985-86 (2008).

As alleged in the complaint, Dignity Health regularly permits surgeons—including Mr. Minton's surgeon, Dr. Lindsey Dawson—to perform hysterectomies at the Medical Center. Supp. App. 36 ¶ 20. Dr. Dawson therefore scheduled Mr. Minton's hysterectomy to be performed there. But after Mr. Minton informed hospital staff that he was transgender, the hospital administrators informed Dr. Dawson that she would not be permitted to perform Mr. Minton's hysterectomy. *Id.* ¶¶ 21-22. The Medical Center's president, Brian Ivie, informed Dr. Dawson that she would "never" be allowed to perform a hysterectomy on Mr. Minton at the Medical Center because it was scheduled as part of a course of treatment for gender dysphoria, as opposed to any

other medical diagnosis. *Id.* ¶¶ 23-24. Gender dysphoria is "a medical condition unique to individuals whose gender identity does not conform to the sex they were assigned at birth," *id.* at 43 ¶ 48, and Mr. Minton's hysterectomy was medically necessary to treat his gender dysphoria. *Id.* at 35 ¶ 18. Yet Dignity Health refused to permit Mr. Minton to obtain this medically necessary care at the Medical Center, despite routinely allowing surgeons to perform hysterectomies for nontransgender patients there, including for "chronic pelvic pain and uterine fibroids." *Id.* at 42 ¶ 40.

When the Medical Center initially informed Dr. Dawson that it had unilaterally cancelled Mr. Minton's procedure, it offered no other arrangement. Only after Dr. Dawson and Mr. Minton undertook significant efforts to bring media and political attention to Dignity Health's actions, and after Mr. Minton's attorney contacted the Medical Center, did Mr. Ivie offer an alternative location for the hysterectomy, at a Methodist hospital also owned by Dignity Health. *Id.* at 38-41 ¶¶ 28-35. Mr. Minton was able to get the hysterectomy three days later, but experienced "great anxiety and grief" at being initially turned away for a time-sensitive procedure because he was transgender. *Id.* at 37 ¶ 26; *see also id.* at 42 ¶ 41.

Mr. Minton sued Dignity Health for violating the Unruh Civil Rights Act, California's public accommodations law. Specifically, Mr. Minton alleged that Dignity Health intentionally denied him "full and equal access" to the Medical Center because he is transgender. *Id.* at 43-44 ¶¶ 44-53; *see also* Cal. Civil Code § 51.

Dignity Health demurred, arguing that (1) it did not discriminate against Mr. Minton because of his transgender status, but merely applied a neutral and religiously based policy, the Directives promulgated by the United States Conference of Catholic Bishops, to disallow his surgery; (2) it did not deny Mr. Minton "full and equal" access to care because he later was able to obtain the hysterectomy at a different hospital also owned by Dignity Health but not subject to the Directives; and (3) compelling it to allow Dr. Dawson to perform the procedure at the Medical Center in violation of the Directives would contravene Dignity Health's federal and state free exercise, free speech, and free association rights. ROA 162-184.[1]

The trial court sustained Dignity Health's demurrer as to the amended complaint on state law grounds. Pet. App. 21. The court assumed, based on the allegations in the complaint, that Dignity Health's decision to cancel Mr. Minton's procedure was substantially motivated by his gender identity. *Id.* at 22. But it concluded that because Mr. Minton ultimately obtained his hysterectomy three days later, he had not been deprived of "full and equal access" to the care at issue, and therefore had not alleged a violation of the Unruh Act. *Id.* at 21-22. Because the trial court concluded that Dignity Health had not violated the Unruh Act, it did not address Dignity Health's constitutional defenses. *Id.* at 20-22.

The California Court of Appeal reversed. It acknowledged that "the parties and several amici

---

[1] "ROA" citations refer to the Record on Appeal before the California Court of Appeal.

curiae regard the action as presenting a fundamental conflict between plaintiff's right to full and equal access to medical care and the hospital's right to observe its religious principles," but concluded "that the present appeal may be resolved on narrower grounds." *Id.* at 2. Emphasizing that all allegations of the complaint must be accepted as true at the demurrer stage, it concluded that Mr. Minton had alleged sufficient facts to support an inference that Dignity Health intentionally discriminated against him because of his gender identity in violation of the Unruh Act. In particular, the court noted that he had alleged that hysterectomies for nontransgender patients were routinely performed in the Medical Center, and that the Medical Center cancelled his appointment and barred his surgery only after learning that he was transgender. *Id.* at 3-4. The court found that "[d]enying a procedure as treatment for a condition that affects only transgender persons [gender dysphoria] supports an inference that Dignity Health discriminated against Minton based on his gender identity." *Id.* at 10.

The court rejected each of the arguments Dignity Health made in support of affirming the demurrer. First, it addressed Dignity Health's claim that it had not actually discriminated against Mr. Minton because he was transgender, but had merely applied neutral religious Directives barring "[d]irect sterilization . . . ,whether permanent or temporary." Pet. App. 9. The court of appeal acknowledged that neutral practices that merely have a disparate impact on a protected group do not violate the Unruh Act. *Id.* at 8-9. But it concluded that "while Dignity Health may be able to assert reliance on the Directives as a

defense to Minton's claim, the matter is not suitable for resolution by demurrer" because none of those facts appear in the complaint. *Id.* at 10. Moreover, if Dignity Health sought to defend on summary judgment or at trial by citing its reliance on the Directives, the court noted, "Minton may attempt to establish that the hospital applied the Directives in a discriminatory manner." *Id.* At the demurrer stage, however, because Dignity Health's invocation of the Directives was "contrary to the allegations in the complaint," the defense was "not susceptible to resolution by demurrer." *Id.* at 10-11.

Dignity Health argued in addition that, even if its actions were motivated by Mr. Minton's gender identity, it did not violate the Unruh Act because, by providing an alternative location for the surgery, it did not deny him "full and equal access" to medical care. The court of appeal held that, on the allegations of the complaint, Dignity Health initially denied Mr. Minton any service at all, and only offered an alternative in response to subsequent media and political pressure. *Id.* at 13. While this belated offer may have "substantially reduced the impact of the initial denial of access," the court reasoned, it "did not undo the fact that the initial withholding of facilities was absolute, unqualified by an explanation that equivalent facilities would be provided at an alternative location." *Id.* "[I]t cannot constitute full equality under the Unruh Act to cancel [Mr. Minton's] procedure for a discriminatory purpose, wait to see if his doctor complains, and only then attempt to reschedule the procedure at a different hospital." *Id.* at 14.

The court also rejected Dignity Health's free exercise and free speech arguments, emphasizing that "upholding Minton's claim does not compel Dignity Health to violate its religious principles if it can provide all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions." *Id.* at 15. But to the extent that Dignity Health had discriminated against Mr. Minton because of his gender identity, and had not provided a comparable service elsewhere, the court concluded that its free exercise claim failed because the state has a compelling interest in barring such discrimination, and the prohibition was narrowly tailored to serve that end. It cited this Court's dictate in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018), that 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." Pet. App. 15. And it held that requiring a hospital to allow a doctor to perform a medical procedure did not compel speech in violation of the First Amendment. *Id.* at 15-16.

The California Supreme Court summarily denied Dignity Health's petition for review. *Id.* at 19.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review the decision below because it is a nonfinal judgment, and the federal questions Dignity Health raises in the Petition were properly not addressed below.

This Court lacks jurisdiction to hear this petition both because the decision below is a nonfinal judgment and because the federal claims that Dignity Health seeks to present here were appropriately not resolved in the state courts, as they rest on evidence the court cannot consider at the demurrer stage.

This Court's jurisdiction over state court decisions is governed by 28 U.S.C. § 1257(a), which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

The Court has interpreted this statute to require both that the decision to be reviewed is a "final decision," and that the federal questions to be reviewed have been properly presented to or addressed by the highest state court. Neither requirement is met here.

A. There has been no "final judgment" by the California courts on the federal questions presented by Dignity Health.

This Court's appellate jurisdiction to review state court decisions is limited to "final judgments . . . rendered by the highest court of a State." 28 U.S.C. § 1257(a); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003) ("Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a final judgment or decree."). This statutory dictate serves important purposes of federalism by minimizing premature federal intervention in state legal processes. It also ensures that this Court does not unnecessarily reach constitutional questions when cases may yet be resolved on state law grounds.

Dignity Health concedes, as it must, that this is a nonfinal judgment. Pet. 5. As this Court has stated, "[o]rdinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment." *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 382 (1953); *see also Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 551 (1963) (stating that "ordinarily the overruling of a demurrer is not a final judgment"); *cf. Nike*, 539 U.S. at 654-60 (dismissing writ of certiorari as improvidently granted where petitioner relied on First Amendment defense but facts central to the defense had not been developed at demurrer stage). Further, this case does not fit any of the four narrow categories of cases this Court has identified that may

be treated as final under Section 1257(a) "without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 477 (1975). Indeed, Dignity Health does not even assert that any of the first three exceptions applies, and invokes only the fourth.

The first exception applies where, despite the existence of further state proceedings, "the federal issue is conclusive or the outcome of further proceedings preordained" with only "mechanical entry of judgment" remaining. *Cox*, 420 U.S. at 479; *Pope*, 345 U.S. at 382. That is plainly not the case here, where Dignity Health's defenses that it merely applied neutral religious Directives, and that it provided an adequate alternative location, have not been developed or adjudicated.

The second exception applies where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. This exception does not apply because the decision below expressly rested "on narrower grounds," and did not address, much less resolve, the constitutional issue Dignity Health seeks to raise here: namely, whether state law can compel it to contravene its allegedly neutral religious Directives. *See id.*; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989). The courts below have not yet even considered the Directives or their role in the events alleged.

The third exception governs "where the federal claim has been finally decided, with further

proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. That is not the case here, as Dignity Health will be able to pursue its First Amendment claims once the Directives and their role in the dispute are properly presented and adjudicated. All the court below held was that the Directives could not be considered on a demurrer. *See* Pet. App. 15.

The only exception Dignity Health claims is applicable here is the fourth one, but it cannot satisfy that exception's requirements either. Pet. 5; *Cox,* 420 U.S. at 482-83. This exception requires three showings, all of which must be satisfied: that (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on nonfederal grounds," (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (3) "refusal immediately to review the state-court decision might seriously erode federal policy." *Nike,* 539 U.S. at 658-59 (Stevens, J., concurring) (quoting *Cox*, 420 U.S. at 482-83) (internal quotation marks omitted); *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-56 (1989) (discussing federal policy implications under *Cox* of a facial challenge to the validity of Indiana's RICO statute).

This case fails all three prongs. First, the federal issues Dignity Health seeks to raise here were not decided in the court of appeal, because, as the court explained, the Directives and their application—including the question whether they were neutrally

applied—were not properly before it on demurrer. Pet. App. 10. Second, reversing the state court on the question presented would not be "preclusive of any further litigation," because there is no "state court" decision "on the federal issue" to be "revers[ed]" here. *Id.* at 5. The courts below have not yet adjudicated whether Dignity Health's denial of medically necessary care was in fact motivated by the Directives, whether the Directives were neutrally applied, or whether the denial was motivated by gender identity discrimination, much less whether enforcing the Unruh Act against Dignity Health in some still-unknown circumstances violates the First Amendment. Third, allowing Mr. Minton's discrimination suit to proceed to discovery when the complaint's allegations supported an inference of impermissible discrimination, while acknowledging that upon further factual development Dignity Health may avoid any liability whatsoever, does not "seriously erode federal policy" such that it would be "intolerable to leave unanswered" the questions Dignity Health seeks to resolve prematurely here. *Cox*, 420 U.S. at 483-85 (quoting *Miami Herald Publ'g v. Tornillo,* 418 U.S. 241, 247 n.6 (1974)). In short, if Dignity Health's rendition of the facts is borne out, and if it is nonetheless found liable, any constitutional questions can be fully and fairly adjudicated at that point. But it is possible that no Unruh Act violation will be found, in which case no federal question will need to be reached.

Dignity Health's contentions regarding its provision of an alternative location for Mr. Minton's surgery further underscore the nonfinal character of the judgment below. Dignity Health's petition

suggests that the court of appeal ruled that the offer of an alternative location was insufficient to afford "full and equal" treatment to Mr. Minton. Pet. 13, 28-30. But the court instead held that, on the allegations of the complaint, it violates state law to deny treatment because of transgender status *without offering an alternative location*, and to make such an offer only *after* an initial cancellation that was "absolute." Pet. App. 11-16. Dignity Health does not contend that the court of appeal's holding that one must offer such an alternative in the first place violates its religious commitments. And to the extent it disputes the facts concerning the timing of the offer of this alternative, that issue remains open for adjudication once Dignity Health presents its version of the facts.

The final judgment rule is a statutory constraint imposed by Congress on this Court's jurisdiction. It is therefore important to keep the exceptions to the rule strictly circumscribed. An expansive construction of the exceptions would swallow the rule and would contradict the statute's plain meaning. *See Flynt v. Ohio*, 451 U.S. 619, 622-23 (1981) (where petitioner sought to raise First Amendment defense to obscenity prosecution, resolution "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review."). And as noted above, the "final judgment" rule serves important federalism interests and avoids unnecessary constitutional adjudication.

Here, the state courts have not reached a final judgment on the federal questions presented by Dignity Health; they have declined to address them because they are premature. Indeed, it is unclear whether these federal questions will *ever* need to be decided, because the state courts have not even reached a final judgment on the *state law* defenses raised by Dignity Health. If Dignity Health can show that it did not discriminate against Mr. Minton because he is transgender, or that it provided him with an alternative that constituted "full and equal" access, it may prevail under the Unruh Act. Accordingly, granting review is barred by the final judgment rule, without which "litigants would be free to come [to the Supreme Court] and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope*, 345 U.S. at 381–82.

B. The federal questions on which Dignity Health seeks review have not been properly presented to the state courts because they rest on evidence outside the courts' purview at the demurrer stage.

The predicate for Dignity Health's petition is that it turned away Mr. Minton based on the neutral application of its religious Directives. Dignity Health references the Directives more than twenty times in its petition, including in the Questions Presented, the Statement of the Case, and the Reasons for Granting the Petition. Dignity Health simply denies Mr. Minton's allegation that it turned him away because

he is transgender, asserting that it "does not discriminate against any category of patients, including transgender individuals." Pet. 1.

But the question whether it violates the First Amendment to require Dignity Health to provide services that contravene its religious Directives is not properly presented here because, as the court of appeal explained, the role those Directives played in Mr. Minton's denial of treatment is beyond the four corners of the complaint, and therefore cannot be resolved on demurrer. Pet. App. 10. Even if the Directives could be treated as in play at this stage, there is still the question whether they were neutrally, or discriminatorily, applied. For that reason, the court below did not address the issue; it remains to be addressed once Dignity Health makes a record and the facts are developed.

With limited exceptions, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Supreme Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). A petitioner has not properly raised a federal question where the question was not raised in accordance with a state's laws of civil procedure. *Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981).

The California Court of Appeal was not properly presented with the federal questions on which Dignity Health now seeks review. Addressing these questions would have required the court below to assume facts not included in Mr. Minton's complaint, which California courts cannot do on demurrer. *See, e.g.,*

ABF Capital Corp. v. Berglass, 130 Cal. App. 4th 825, 833–34 (2005) (citing *Moore v. Conliffe*, 7 Cal. 4th 634, 638 (1994); *Montclair Parkowners Ass'n v. City of Montclair*, 76 Cal. App. 4th 784, 790 (1999)) ("When considering a demurrer, the trial court must accept as true all material facts pleaded in the complaint and those arising by reasonable implication."). As explained by the court of appeal, the question whether Dignity Health canceled Mr. Minton's surgery because of its religious beliefs, as expressed in the Directives, "is not suitable for resolution by demurrer," and so could not have been addressed by the ruling below. Pet. App. 10.

Accordingly, both because the judgment below is not final, and because the factual predicate for Dignity Health's questions presented is not properly before the Court, this Court lacks jurisdiction, and the petition should be denied on that ground alone.

II. The decision below is a poor vehicle for resolution of the federal questions Dignity Health seeks to raise.

For many of the same reasons that the Court lacks jurisdiction, this case would be a poor vehicle even if jurisdiction existed. Dignity Health's petition rests on the premise that California law has compelled it to provide hysterectomies in violation of neutrally applied religious Directives. But as noted above, the Directives and their role in Mr. Minton's treatment have not been tested and are not properly before the Court. And once the facts are developed, this case could well be resolved on state law grounds, making any constitutional questions unnecessary to reach. In

any event, should the constitutional questions Dignity Health seeks to present ever need to be addressed in this case, they are best resolved on the basis of a factual record, which is entirely lacking here.

A. The factual predicates for Dignity Health's petition are not in the record on review of a decision on a demurrer.

The petition rests on the claim that the California Court of Appeal decision "compel[s] a religiously affiliated hospital to allow medical procedures that violate its longstanding, deeply held religious beliefs," Pet. i. But the court of appeal required nothing of the sort. It held only that the complaint alleged sufficient facts to support an inference of intentional gender-identity discrimination, and Dignity Health does not assert a religious belief in such discrimination. The court below explicitly noted that the issue of the application of the religious Directives could not be adjudicated on a demurrer because it is beyond the allegations of the complaint. Pet. App. 10-11 ("Dignity Health's contention that its action was motivated by adherence to neutral Directives . . . contrary to the allegations in the complaint, is not susceptible to resolution by demurrer.").[2] For that same reason, the

---

[2] The First Amended Complaint does not even mention the Directives except in a quote from an after-the-fact Dignity Health press release. Supp. App. 38-39 ¶ 31. While the superior court took judicial notice of the *existence* of the Directives, Pet. App. 22 and ROA 432, the question of what role the Directives actually played in Dignity Health's decision to cancel Mr. Minton's surgery has not been factually developed, much less decided by the state courts.

decision below in no way requires Dignity Health to violate the Directives. Because the Directives are not properly before the Court, this case is a poor vehicle to address their import.

The sole holding of the court of appeal—that allegations that the hospital intentionally discriminated against a patient because he is transgender state a claim under the Unruh Act—is not a holding against which Dignity Health seeks to present a First Amendment defense. Dignity Health does not claim it has a religiously based right to intentionally discriminate against patients because they are transgender. On the contrary, it contends that it does not discriminate on that basis. *See* Pet. 8 ("Mercy provides compassionate care to all *persons* without discrimination"); *id.* at 7 ("Mercy welcomes transgender patients in its facilities every day and offers those patients any procedure or service that is not prohibited by Catholic religious doctrine."). But it is beyond dispute that Dignity Health cannot prevail on a demurrer simply by denying the well-pleaded factual allegations in Mr. Minton's complaint. Accordingly, this case is a poor vehicle for deciding the scope of First Amendment defenses to discrimination claims.[3]

Dignity Health also argues that it provided Mr. Minton "full and equal" access to care by rescheduling his surgery at a different hospital. *See* Pet. 2, 9-10.

---

[3] In fact, the court of appeal made clear that neutral practices having merely a "disparate impact" on protected groups do *not* violate the Unruh Act. Pet. App. 8-9. But it held that on demurrer, it could not determine whether the Directives were in fact neutral, and neutrally applied. *Id.*

But that argument is likewise contradicted by the complaint, which alleges that Dignity Health's initial denial of Mr. Minton's hysterectomy offered no alternative, and that the other hospital became available only after Mr. Minton had brought media and political pressure to bear. The court of appeal held that Mr. Minton's allegation supported a claim that Dignity Health's initial denial violated the Unruh Act. Pet. App. 12-14. But it noted that "upholding Minton's claim does not compel Dignity Health to violate its religious principles if it can provide all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions." *Id.* at 15; *id.* at 2 (decision did not "determin[e] the right of Dignity Health to provide its services in such cases at alternative facilities, as it claims to have done here").

The challenged decision therefore does not address, much less settle, the constitutional questions Dignity Health seeks to raise here. As the court of appeal made clear, Dignity Health will have a full opportunity to attempt to show that it did not violate state law and to raise its constitutional and any other defenses at summary judgment or trial.

B. Resolution of the constitutional questions Dignity Health raises may be unnecessary to final disposition of this case.

At this point in the case, it is not clear whether the federal questions Dignity Health raises will *ever* need to be decided in this case. As the court of appeal noted, Dignity Health remains free to introduce evidence regarding its Directives, their application, and

Dignity Health's alleged offer of a substitute location for Mr. Minton's surgery. The court also explained that, depending on how those factual issues are resolved, there may be no Unruh Act violation. If so, there would be no need to address the constitutional questions Dignity Health seeks to raise now.

"It is a well-established principle that constitutional questions should not be decided unnecessarily." *Hudgens v. N.L.R.B.*, 424 U.S. 507, 531 (1976); *see also Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) ("[courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable") (citations and internal quotation marks omitted); *Camreta v. Greene*, 563 U.S. 692, 705 (2011) ("[A] longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (citations and internal quotation marks omitted); *Adams v. Robertson*, 520 U.S. 83, 90-91 (1997) (discussing Court's interests in avoiding "unnecessary adjudication" of constitutional questions as well as "promoting the creation of an adequate factual and legal record"). Accordingly, this Court should not agree to evaluate Dignity Health's constitutional defenses at this early stage of litigation, when their consideration may not ever prove necessary.

Moreover, resolution of any constitutional questions should await a full record. Their resolution might well be different if the courts below conclude that Dignity Health turned Mr. Minton away because he is transgender, as alleged, or based on a set of neutral religious Directives, as Dignity Health

contends. The constitutional questions might also be affected by how the Directives were applied, and the chronology and details regarding Dignity Health's offer of an alternative location for the surgery. Until those facts are developed, this case is not an appropriate vehicle to resolve the questions Dignity Health prematurely raises.

III. There is no conflict among the circuits or state high courts, and the decision below is correct.

Dignity Health does not argue that the decision below creates a conflict in the federal circuits or with other state high courts. Instead, it argues that the decision presents important federal questions, and that the decision is at odds with various Supreme Court precedents. But the cases it cites are all clearly inapposite, and the decision below correctly concluded that applying a neutral and generally applicable nondiscrimination law to a religious entity that has intentionally discriminated against a patient because he is transgender does not violate the First Amendment.

The Unruh Act is a neutral law of general applicability that neither targets religious activity, nor requires Dignity Health to express any state-mandated message. This Court has never accepted the argument that an evenly applied, neutral nondiscrimination law violates the First Amendment, and has stated that discriminatory conduct by business entities "has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (internal quotation

marks omitted); *see also Newman v. Piggie Park Enters., Inc.,* 390 U.S. 400, 402 n.5 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–60 (1964). At this juncture, the court of appeal has held only that the First Amendment does not give a religiously affiliated hospital general license to discriminate intentionally against patients because they are transgender. That decision is fully consistent with this Court's precedents.

A. Application of the Unruh Act here does not violate Dignity Health's free exercise rights.

The court of appeal correctly held that a neutral and generally applicable antidiscrimination law does not violate the Free Exercise Clause merely because it is applied to a religiously affiliated business. As this Court explained in *Employment Div. v. Smith*, 494 U.S. 872 (1990), "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [their] religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted). And in *Masterpiece Cakeshop*, the Court reaffirmed that religious objections do not permit businesses to evade such nondiscrimination requirements. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727-28.

Dignity Health does not contest that the Unruh Act is both neutral and generally applicable, nor does it argue that the Unruh Act targets religiously affiliated businesses or treats them differently from secular businesses. Instead, Dignity Health seeks a

broad categorical exemption from a public accommodations law of general applicability. Nothing in this Court's precedents supports such an extraordinary exemption.

Dignity Health argues that the doctrine governing neutral and generally applicable laws announced in *Smith* should not apply because the burden it suffers is "severe" and inherent to the relief Mr. Minton seeks, not merely "incidental." Pet. 28, 21. *Smith's* reference to neutral laws that "incidentally" burden religion did not, however, turn on the size of the burden, but rather on whether the statute in question is targeted at religion, thereby imposing a "direct" burden, or is neutral as to religion, and therefore has only the "incidental" effect of burdening religion. The Unruh Act, like the drug-use law in *Smith*, affects religion only incidentally, not directly.

Dignity Health also suggests that *Smith* may apply differently to individuals and institutions. But there is no support for that proposition in *Smith* itself or its progeny. Institutions, like individuals, are obligated to abide by neutral and generally applicable laws.

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), is also plainly distinguishable. There, a state policy "categorically disqualif[ied]" churches and other religious entities from participating in a state program subsidizing installation of safe playground surfaces. *Id.* at 2017. This Court held that the program violated the First Amendment because it excluded churches from a public benefit solely because of their religious status.

Id. at 2021; *see also Espinoza v. Montana Dep't of Revenue,* No. 18-1195, __S. Ct. __, 2020 U.S. LEXIS 3518, slip op. at 6-7, 12 (June 30, 2020) (Roberts, J.) (finding free exercise violation where state scholarship program excluded religious schools because of their "status"). Here, by contrast, Dignity Health does not seek the *same* treatment as other public accommodations, but a special *exemption* from a generally applicable law. As the Court explained in *Trinity Lutheran*, "when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion." *Id.* at 2020. The Unruh Act plainly fits that description.

The ministerial exception cases are even further afield. They concern the authority of a church to choose its own leaders as a matter of church governance; they have nothing to do with a right to discriminate against members of the public as customers. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (distinguishing permissible "government regulation of only outward physical acts" as in *Smith* from ministerial exception cases that "concern[] government interference with an internal church decision that affects the faith and mission of the church itself"); *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267, slip op. at 10-11 (July 8, 2020) (Alito, J.) (ministerial exception "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission, … [including] the selection of individuals who play

certain key roles"); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) ("the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*").

For similar reasons, this case has no resemblance to clergy members being forced to perform a religious ritual that is contrary to their faith. *Masterpiece Cakeshop, Ltd.,* 138 S. Ct. at 1727. Indeed, as the Court warned in *Masterpiece Cakeshop*, *Ltd.* "if that exception were not confined, then a long list of persons who provide goods and services" might refuse to do so for same-sex couples or, as here, transgender individuals, "thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.*

B. The court of appeal correctly held that application of the Unruh Act here does not violate Dignity Health's free speech or free association rights.

The court of appeal also correctly held that requiring Dignity Health not to deny "full and equal" access to health services on the basis of gender identity, without more, does not violate Dignity Health's free speech or free association rights. Here, too, there is no conflict in the circuits, and the decision below is correct.

Dignity Health argues that requiring it not to discriminate against Mr. Minton, by allowing his surgeon to perform a hysterectomy that it routinely

permits other doctors to perform, would compel it to speak. But affording a private doctor access to a hospital to perform a medical procedure does not constitute speech under any conceivable definition of the term. And in any event, the Unruh Act is a regulation of business conduct without regard to what that conduct communicates, and therefore even if it incidentally regulated speech, it would at most be subject to intermediate scrutiny, which it clearly survives.

This Court has uniformly rejected businesses' free speech challenges to laws barring discrimination, even where those businesses dealt in expressive goods or services. *See, e.g.*, *Hishon*, 467 U.S. at 78. Public accommodation laws do not "target speech or discriminate on the basis of its content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995). And just as it did not violate law schools' First Amendment rights of speech or association to require them to permit nondiscriminatory access to military recruiters, despite the schools' disagreement with the military's hiring policies, so, too, requiring Dignity Health to provide nondiscriminatory access to a doctor to perform a procedure the hospital permits for nontransgender patients does not violate its First Amendment rights. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

Dignity Health's reliance on *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), is misplaced. In *NIFLA*, the challenged law required licensed clinics to "provide a government-drafted script about the availability of state-sponsored services." *Id.* at 2371. The Unruh Act, by contrast, does not require Dignity Health to say anything, much less to read a particular script; the statute merely requires it to provide "full and equal" access to the services it voluntarily chooses to provide to the public, without discriminating on the basis of gender identity. The Act regulates Dignity Health's conduct, not its speech, and does not "compel[] individuals to speak a particular message" or to "alter[] the content of [their] speech." *Id.* (internal quotation marks omitted).

Hurley is also plainly distinguishable. That case involved a "peculiar" application of a public accommodation law to a privately organized parade that this Court emphasized was "inherent[ly] expressive[]." 515 U.S. at 568, 572. The application was impermissible because, instead of regulating business conduct with only an incidental effect on expression, it regulated nothing *but* expression—the content of the private parade sponsor's speech. *Id.* at 573. In fact, as noted above, *Hurley* itself insisted that the standard application of public accommodation laws to the business conduct involved here is constitutional. *Id.* at 578.

Nothing in this Court's jurisprudence calls into question the limited holding of the court of appeal that applying a neutral and generally applicable law prohibiting intentional discrimination to a religiously

affiliated business does not, without more, violate the First Amendment.

IV. There is no reason to hold this petition for resolution of *Fulton v. City of Philadelphia*.

There is no reason to hold this petition until the Court has decided *Fulton v. City of Philadelphia*, No. 19-123, as Dignity Health urges. First, as elaborated above, the preliminary posture of this dispute renders it not reviewable at this stage. *Supra* Section I. And even if the case were reviewable, it provides an inappropriate vehicle to resolve the questions Dignity Health presents, because they rest on facts not yet in the record and wholly untested. *Supra* Section II. These grounds for denying certiorari do not turn in any way on the issues to be considered in *Fulton*.

Dignity Health nonetheless contends that this case should be held pending disposition of *Fulton* because the result in both cases depends on the Court's interpretation of *Employment Division v. Smith*. Pet. 2-4, 18-23. But the California Court of Appeal did not rely on *Smith* in overruling Dignity Health's demurrer. *Cf.* Pet. App. 8-16. Rather, it merely held the First Amendment does not bar assessment of whether the hospital turned Mr. Minton away for being transgender in violation of state law. *Id.* 14-16. Allowing this case to move forward to determine whether or not state law was violated does not infringe Dignity Health's First Amendment rights under any standard. And even if the California courts ultimately do find that Dignity Health violated the Unruh Act, and if Dignity Health can show that its

First Amendment rights are implicated by that finding, the Unruh Act satisfies strict scrutiny because its ban on intentional discrimination by businesses that choose to serve the public is narrowly tailored to further California's compelling interest in ensuring that all of its residents have full and equal access to the market, including the market for health care. Thus, even if this Court should elect to revisit the *Smith* standard in *Fulton* and to apply some version of strict scrutiny, it would not affect the outcome here. Moreover, the *Fulton* case may be resolved without disrupting the holding of *Smith*. *See* Brief for Petitioners at 22-30, *Fulton v. City of Philadelphia*, No. 19-123 (May 27, 2020) (arguing "*Smith* never should have applied to this case").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Amanda C. Goad
Counsel of Record
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-9500
agoad@aclusocal.org

David D. Cole
Daniel Mach
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Lindsey Kaley
Rose A. Saxe
James D. Esseks
Louise Melling
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Christine Haskett
Lindsey Barnhart
Morgan E. Lewis
COVINGTON & BURLING
LLP
Salesforce Tower
415 Mission Street,
Suite 5400
San Francisco, CA 94105

Elizabeth O. Gill
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Counsel for Plaintiff-Respondent Evan Minton

SUPPLEMENTAL APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

EVAN MINTON Plaintiff, v. DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY SAN JUAN MEDICAL CENTER Defendant.	Case No. CGC 17-558259

FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND STATUTORY DAMAGES

INTRODUCTION

1. Plaintiff Evan Minton ("Plaintiff" or "Mr. Minton") sought and was denied access to medical services by Defendant Dignity Health, doing business as Mercy San Juan Medical Center ("Defendant" or "MSJMC"), because he is transgender. MSJMC's denial to Mr. Minton of medical services that it regularly provides to non-transgender patients is sex discrimination and violates the Unruh Civil Rights Act, Cal. Civ. Code § 51.

2. As part of the medical treatment stemming from his diagnosis of gender dysphoria, Mr. Minton's surgeon, Dr. Dawson, scheduled a hysterectomy for Mr. Minton at MSJMC on August 30, 2016. Dr. Dawson regularly performs hysterectomies at MSJMC, and in fact she had another hysterectomy scheduled for a cisgender (non-transgender) patient immediately following Mr. Minton's scheduled procedure. In a conversation two days before the scheduled procedure, however, Mr. Minton notified MSJMC personnel that he is transgender. The next day, Dr. Dawson was informed that she would not be permitted to perform Mr. Minton's hysterectomy at MSJMC—either the following day or any day.

3. According to MSJMC personnel, Dr. Dawson was prevented from performing Mr. Minton's hysterectomy at MSJMC because he is a transgender man who sought the hysterectomy as treatment for his diagnosed gender dysphoria. Gender dysphoria is a serious medical condition resulting from the feeling of incongruence between one's gender identity and

one's sex assigned at birth, as experienced by transgender individuals.

4. Because Defendant routinely allows Dr. Dawson and other physicians to perform hysterectomies for cisgender patients at MSJMC to treat medical indications other than gender dysphoria, Defendant's refusal to allow Dr. Dawson to perform Mr. Minton's hysterectomy at MSJMC constitutes discrimination against Mr. Minton because of his gender identity.

5. Defendant's discrimination violates California's Unruh Civil Rights Act, which broadly prohibits business establishments from discriminating in the provision of goods and services to the general public. The Unruh Act prohibits discrimination based on sex, which is explicitly defined to include gender identity. Cal. Civ. Code § 5l(b). Refusing Mr. Minton hysterectomy care because he is a transgender man seeking the procedure as treatment for gender dysphoria therefore violates California law.

6. Mr. Minton seeks a declaratory judgment that Defendant violates California law by prohibiting doctors from performing hysterectomies for transgender patients with gender dysphoria while permitting doctors to perform hysterectomies for cisgender patients without gender dysphoria. In addition, Mr. Minton seeks an injunction requiring Defendant to allow doctors to perform the same procedures on transgender patients with gender dysphoria that they are permitted to perform on cisgender patients without gender dysphoria. Finally, Mr. Minton seeks statutory damages under the Unruh Civil Rights Act, Cal. Civ. Code § 52(a).

JURISDICTION AND VENUE

7. This Court has jurisdiction under article VI, section 10, of the California Constitution and California Code of Civil Procedure §§ 410.10, 525-26, 1060, and 1085.

8. Venue in this court is proper because this is an action against a nonprofit corporation, Dignity Health, which has its principal place of business in the City and County of San Francisco, at 185 Berry Street, Suite 300, San Francisco, CA 94107.[1] Civ. Code § 395.5.

THE PARTIES

Plaintiff Evan Minton

9. Plaintiff Evan Minton resides in Orangevale, California, a suburb of Sacramento. Mr. Minton is a transgender man, which means that he was assigned the sex of female at birth, but his gender identity is male and he identifies as a man.

Defendant Dignity Health

10. Dignity Health is registered as a 501(c)(3) tax-exempt nonprofit corporation. According to its website, Dignity Health is the fifth-largest health system in the country, owning and operating a

[1] Dignity Health describes itself as "a California nonprofit public benefit corporation headquartered in San Francisco," 2014 Form 990, Part III, Line 4a, and lists a San Francisco address for the company. Dignity Health's most recent Statement of Information, filed with the California Secretary of State on October 7, 2016, lists the corporation's "Principal Office Address" as 185 Berry Street, Suite 300, San Francisco, CA 94017.

large network of hospitals.[2] Also according to its website, Dignity Health is the largest hospital provider in California, with 31 hospitals in the state[3]. In 2014, Dignity Health's federal tax form 990 listed revenue of over $10 billion and employment of 49,907 people. In Sacramento County, Dignity Health does business as Mercy San Juan Medical Center. MSJMC is located in Carmichael.

STATEMENT OF FACTS

Gender Dysphoria Diagnosis and Treatment

11. "Gender identity" is a well-established medical concept, referring to one's sense of belonging to a particular gender. Typically, people who are designated female at birth based on their external anatomy identify as girls or women, and people who are designated male at birth based on their external anatomy identify as boys or men. For a transgender individual, however, gender identity differs from the sex assigned to that person at birth. Transgender men typically are men who were assigned "female" at birth, but have a male gender identity.

12. The medical diagnosis for the feeling of incongruence between one's gender identity and one's sex assigned at birth, and the resulting distress caused by that incongruence, is "gender dysphoria" (previously known as "gender identity disorder"). Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International

---

[2] http://www.dignityhealth.org/ cm/ content/pages/ about-us.asp
[3] *Id.*

Classification of Diseases (ICD-10).[4] The criteria for diagnosing gender dysphoria are set forth in the DSM-V (302.85).

13. The widely accepted standards of care for treating gender dysphoria are published by the World Professional Association for Transgender Health ("WPATH"). The WPATH Standards of Care have been recognized as the authoritative standards of care by leading medical organizations, the U.S. Department of Health and Human Services, and federal courts.

14. Under the WPATH standards, treatment for gender dysphoria may require medical steps to affirm one's gender identity and help an individual transition from living as one gender to another. This treatment, often referred to as transition-related care, may include hormone therapy, surgery (sometimes called "sex reassignment surgery" or "gender affirming surgery"), and other medical services that align individuals' bodies with their gender identities. The exact medical treatment varies based on the individualized needs of the person.

15. Hysterectomy is surgery to remove a patient's uterus and is performed to treat a number of

---

[4] *Gender Dysphoria*, American Psychiatric Association (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf ("For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her . . . Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.").

health conditions, including uterine fibroids, endometriosis, pelvic support problems, abnormal uterine bleeding, chronic pelvic pain, and gynecological cancer.[5] A patient can no longer become pregnant after undergoing a hysterectomy.[6] Thus, hysterectomy is an inherently sterilizing procedure, regardless of the reason for which it is performed. According to the U.S. Department of Health and Human Services, hysterectomy is the second most common surgery, after a Cesarean section, among women in the United States.[7]

16. Transgender men often pursue hysterectomy as a gender-affirming surgical treatment for gender dysphoria. The United States Transgender Discrimination Survey in 2015, which surveyed almost 28,000 transgender people, found that 14% of transgender men surveyed had undergone a hysterectomy, and 57% wanted to undergo a hysterectomy.[8] According to every major medical organization and the overwhelming consensus among medical experts, treatments for gender dysphoria, including surgical procedures such as hysterectomy, are effective and safe.

---

[5] *Hysterectomy,* American College of Obstetricians and Gynecologists (March 2015), http://www.acog.org/Patients/FAQs/Hysterectomy#what.

[6] *Id.*

[7] *Hysterectomy,* Office on Women's Health, U.S. Dept. of Health & Human Services (2014), https://www.womenshealth.gov/publications/our-publications/fact-sheet/hysterectomy.html#n.

[8] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Ana, M. (2016). *The Report of the 2015 U.S. Transgender Survey.* Washington, DC: National Center for Transgender Equality. http://www.transequality.org/sites/default/files/docs/usts/USTS%20Fu11%20Report%20-%20FINAL%201.6.17.pdf.

Mr. Minton's Gender Dysphoria and Treatment

17. Mr. Minton first began to identify as male and take social steps such as trying out different male names and asking friends and family to call him by male pronouns in 2011. He was subsequently diagnosed with gender dysphoria. Pursuant to this diagnosis and on the recommendation of his treating physicians, Mr. Minton began to take additional steps to continue his transition shortly after receiving the diagnosis. He began hormone replacement therapy in April of 2012 and had a bilateral mastectomy in July of 2014. Mr. Minton legally changed his name by way of court order in December 2014, and he legally changed the gender shown on his driver's license in 2015.

18. By August 2016, Mr. Minton and his treating physicians had a plan for a series of medical procedures that would result in a phalloplasty, or the surgical creation of a penis.[9] The first of these planned steps was a complete hysterectomy, or removal of his uterus, fallopian tubes, and ovaries. In Mr. Minton's case, hysterectomy was medically necessary care to treat his diagnosis of gender dysphoria. This was the professional opinion of Mr. Minton's hysterectomy surgeon and two mental health professionals who assessed Mr. Minton during his transition.

---

[9] "Phalloplasty in transgender men involves the creation of a penis using any one of a number of procedures." *Phalloplasty and metaoidioplasty - overview and postoperative considerations*, Center of Excellence in Transgender Health, http://www.trans health.ucsf.edu/tcoe?page=guidelines- phalloplasty.

Defendant's Discrimination Against Mr. Minton on the Basis of his Gender Identity

19. After consulting further with his primary care physician and obstetrician/ gynecologist, Dr. Lindsey Dawson, Mr. Minton scheduled his hysterectomy with Dr. Dawson at MSJMC for August 30, 2016.

20. Dr. Dawson has been practicing as a board-certified obstetrician/gynecologist for 11 years and has had admitting privileges at MSJMC since 2010. Dr. Dawson regularly performs about 1-2 hysterectomies per month at MSJMC.

21. Two days prior to Mr. Minton's scheduled surgery, on August 28, 2016, a pre-operation nurse called Mr. Minton to prepare him for the surgery. During that conversation, Mr. Minton mentioned that he is transgender.

22. The next morning, a day before Mr. Minton's scheduled procedure, Dr. Dawson received a call from MSJMC's surgery department notifying her that Mr. Minton's hysterectomy had been cancelled.

23. Dr. Dawson promptly contacted MSJMC to inquire about and protest the cancellation of Mr. Minton's surgery. She initiated a telephone call to MSJMC nurse manager Andrea Markham. Dr. Dawson also spoke by phone that same day with MSJMC's president, Brian Ivie. Mr. Ivie informed Dr. Dawson that she would never be allowed to perform a hysterectomy on Mr. Minton at MSJMC.

24. Mr. Ivie further informed Dr. Dawson that MSJMC would not allow the hysterectomy to proceed because of the "indication" it was intended to

address. Mr. Minton's medical file reflected an "indication" of gender dysphoria, under that condition's former name of "gender identity disorder," and Mr. Minton had further informed the MSJMC nurse the previous day that he was a transgender man undergoing the procedure in conjunction with gender transition.

25. That same day, in the early afternoon of August 29, Dr. Dawson called Mr. Minton and informed him that Dignity Health had cancelled his surgery. When Mr. Minton asked why, Dr. Dawson explained her understanding that the hospital had canceled his hysterectomy because he was transgender. Mr. Minton was so shocked, hurt, and distraught at hearing this news that he recalls sinking to the ground and then collapsing entirely.

26. Dignity Health's refusal to allow Dr. Dawson to perform Mr. Minton's hysterectomy at MSJMC on August 30, 2016 caused Mr. Minton great anxiety and grief. He was devastated at learning that he was being denied medically necessary care at MSJMC because he was transgender and needed the care for the purpose of gender transition.

27. In addition, Mr. Minton had no time to spare, as he needed to undergo his hysterectomy three months before his phalloplasty, which was scheduled for November 23rd. Mr. Minton had already experienced numerous delays in accessing medical care he needed for his gender transition, including battles over insurance coverage and scheduling his phalloplasty. As a result, the timing of his hysterectomy was particularly sensitive.

28. During the same telephone call on August 29, Dr. Dawson also informed Mr. Minton that she had been and would continue advocating for him with Dignity Health to push back against the discriminatory cancellation decision.

29. After he heard from Dr. Dawson that his procedure had been cancelled, Mr. Minton invested considerable effort in putting pressure on Dignity Health to let him complete his surgery as soon as possible.

30. In the afternoon of August 29, Mr. Minton participated in a recorded interview with local television station KCRA about the cancellation of his surgery. On information and belief, KCRA aired a story about Mr. Minton's experience of discrimination on its August 29 late evening newscast. Mr. Minton subsequently spoke with several other media outlets, including the *Sacramento Bee* and local television stations Fox 40 and ABC 10, each of which ran a story about Mr. Minton's experience of discrimination.

31. In response to media inquiries, Dignity Health issued a public statement regarding Mr. Minton's situation. As published on the KCRA website on Tuesday, August 30, the statement read:

> *At Dignity Health Mercy San Juan Medical Center, the services we provide are available to all members of the communities we serve without discrimination. Because of privacy laws, we are not able to discuss specifics of patients' care. In general, it is our practice not to provide sterilization services*

> *at Dignity Health's Catholic facilities in accordance with the Ethical and Religious Directives for Catholic Health Care Services (ERDs) and the medical staff bylaws.*
>
> *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. When a service is not offered the patient's physician makes arrangements for the care of his/her patient at a facility that does provide the needed service.*[10]

32. Also on the afternoon of August 29, Mr. Minton contacted Jenni Gomez, an attorney with Legal Services of Northern California who had been assisting him with other health care-related legal issues. On information and belief, Ms. Gomez called MSJMC on the afternoon of August 29 to challenge the hospital's discriminatory cancellation of Mr. Minton's surgery, and had multiple conversations with hospital officials about this issue in the course of the week.

33. Also in the afternoon and evening of August 29, Mr. Minton reached out to politically-

---

[10] *Carmichael faith-based hospital denies transgender man hysterectomy,* KCRA3 (Aug. 30, 2016, 8:50am), http://www.kcra.com/article/carmichael-faith-based-hospital-denies-transgender-man-hysterectomy/6430342 (last visited Sept. 14, 2017).

connected people he knew from his previous work as an aide to California legislators to ask for their assistance in pressuring Dignity Health to reverse the cancellation of his surgery. For example, Mr. Minton connected with staff members of California Insurance Commissioner Dave Jones. On information and belief, Mr. Jones spoke by telephone with Wade Rose, Vice President of External & Government Relations for Dignity Health, to ask that Mr. Minton be permitted to access the care he needed. Also on information and belief, over the ensuing hours and days, several state legislators, legislative staff members, and Sacramento-area lobbyists contacted Dignity Health to advocate for Mr. Minton and/or made public statements of support for him and his need for surgery.

34. On Tuesday, August 30, Dr. Dawson met with Mr. Ivie in person at MSJMC. She also participated in interviews with multiple media outlets about Mr. Minton's situation.

35. During this flurry of advocacy on Mr. Minton's behalf, Dr. Dawson and others discussed with Mr. Ivie and other Dignity Health officials the possibility that Dr. Dawson could perform Mr. Minton's surgery at Methodist Hospital, a non-Catholic Dignity Health hospital also located in the Sacramento metropolitan area. However, it was not immediately clear that this was a viable option. Dr. Dawson did not have surgical privileges at Methodist Hospital. Even if she could get emergency privileges at Methodist Hospital, Dr. Dawson would have to work in an unfamiliar operating room there and with an unfamiliar team of nurses, surgical technicians, and other support staff. Methodist Hospital is located

about 30 minutes' drive away from MSJMC, such that Dr. Dawson and the other physician who would be assisting her during Mr. Minton's procedure could not easily fit a surgery at Methodist Hospital into a workday filled with other commitments at MSJMC and their nearby office. Finally, Mr. Minton had health insurance coverage through Blue Shield of California, and it was unclear whether Methodist Hospital was within his plan's coverage network.

36. Dr. Dawson and Mr. Minton communicated on Tuesday, August 30 and concluded that attempting to make the surgery happen at Methodist Hospital was the best remaining option for Mr. Minton because it provided the best chance for him to complete his hysterectomy promptly.

37 On information and belief, Dr. Dawson then invested a significant amount of time in securing emergency surgical privileges at Methodist Hospital, while Ms. Gomez also invested a significant amount of time in helping Mr. Minton access the surgery he needed and resolve remaining issues.

38. On Thursday, September 1, paperwork regarding emergency surgical privileges for Dr. Dawson at Methodist Hospital was fully executed.

39. Dr. Dawson performed Mr. Minton's hysterectomy at Methodist Hospital on Friday, September 2.

40. Dr. Dawson routinely performs hysterectomies for her patients, and in fact performed another hysterectomy at MSJMC for a cisgender patient on August 30, 2016, the same day that Mr. Minton's surgery had originally been scheduled. Other physicians who practice at MSJMC also

regularly perform hysterectomies at the hospital for cisgender patients who have not been diagnosed with gender dysphoria, for indications such as chronic pelvic pain and uterine fibroids.

41. During the period of uncertainty when he was not sure if he would be able to undergo his hysterectomy at all, as well as when he was not sure if he would be able to undergo his hysterectomy at Methodist Hospital, Mr. Minton was painfully aware that he had been denied full and equal access to the operating room and related facilities of MSJMC as a direct result of his disclosure to MSJMC staff on August 28 that he is a transgender man. Mr. Minton suffered—and continued to suffer, even after his surgery was rescheduled at Methodist Hospital—the dignitary harm of having been denied full and equal access to medical treatment by MSJMC. Mr. Minton told friends that he felt "downtrodden" and deeply hurt by this discriminatory treatment.

42. In addition, Methodist Hospital is located much farther away than MSJMC from the family home in Orangevale where Mr. Minton was planning to recuperate after his hysterectomy. Thus, moving the procedure increased the time and travel burden on Mr. Minton and his mother who drove him home after surgery.

43. If Defendant is not enjoined from preventing doctors from performing hysterectomy procedures for transgender patients with gender dysphoria in its hospitals, Mr. Minton and others similarly situated—*i.e.,* transgender individuals who suffer from gender dysphoria—will be unlawfully denied access to medical treatment at hospitals run by the largest hospital provider in California.

FIRST CAUSE OF ACTION
(Violation of The Unruh Act, Civ. Code § 51(b))

44. Plaintiff incorporates by reference the allegations of the above paragraphs as though fully set forth herein.

45. The Unruh Act prohibits discrimination on the basis of sex in all business establishments. Specifically, it guarantees that Californians are entitled to the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" regardless of their sex. Civ. Code § 51(b).

46. The Unruh Act defines "sex" to include a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. Civ. Code § 51(e)(5).

47. Discrimination against an individual on the basis of his or her gender identity is discrimination on the basis of "sex" under the Unruh Act.

48. Defendant prevented Dr. Dawson from performing Mr. Minton's hysterectomy at MSJMC to treat his diagnosis of gender dysphoria, a medical condition unique to individuals whose gender identity does not conform to the sex they were assigned at birth and thus usually experienced by transgender people.

49. Defendant does not prohibit physicians at its hospitals from treating cisgender people with other diagnoses with hysterectomy.

50. By preventing Dr. Dawson from performing Mr. Minton's hysterectomy, Defendant

discriminated against Mr. Minton on the basis of his gender identity as a transgender man.

51. Defendant's preventing Dr. Dawson from performing Mr. Minton's hysterectomy at MSJMC is sex discrimination in violation of California Civil Code § 51(b).

52. Mr. Minton was denied full and equal access to Defendant's facilities and services in violation of California Civil Code § 51(b) because he was barred from undergoing a medically necessary hysterectomy at MSJMC.

53. Defendant's discriminatory practices caused Plaintiff considerable harm. Therefore, Mr. Minton seeks injunctive relief and statutory damages under the Unruh Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Enter a declaratory judgment stating that Defendant's preventing Mr. Minton's physician from performing his hysterectomy at MSJMC violated the Unruh Act, Civil Code § 51(b).

B. Enter an order for statutory damages of $4,000 under the Unruh Act, Civil Code § 52(a).

C. Enter an order enjoining Defendant, its agents, employees, successors, and all others acting in concert with them, from (1) discriminating on the basis of gender identity or expression, transgender status, and/or diagnosis of gender dysphoria in the provision of health care services, treatment, and facilities; and (2) preventing doctors from performing

hysterectomy procedures in its hospitals on the basis of a diagnosis of gender dysphoria.

D. Enter an order requiring Defendant to pay Plaintiff's attorneys' fees and costs under Civil Code § 52.l(h), Civil Code § 52(a), Code of Civil Procedure § 1021.5, and any other applicable statutes.

E. Grant Plaintiff any further relief the Court deems just and proper.

Dated: September 19, 2017

Respectfully Submitted,

By:___ */s/ Christine Saunders Haskett*_____

CHRISTINE SAUNDERS HASKETT (SBN 188053)
LINDSEY BARNHART (SBN 294995)
THEODORE KARCH (SBN 312518)
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: chaskett@cov.com

AMANDA C. GOAD (SBN 297131)
RUTH DAWSON (SBN 290628)
MELISSA GOODMAN (SBN 289464)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
Telephone: (213) 977-9500 x258
Facsimile: (213) 977-5297
Email: agoad@aclusocal.org

ELIZABETH O. GILL (SBN 218311)
CHRISTINE P. SUN (SBN 218701)
ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Email: egill@aclunc.org

DAVID LOY (SBN 229235)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 232-2121
Facsimile: (619) 232-0036
Email: davidloy@aclusandiego.org
Attorneys for Plaintiff Evan Minton

VERIFICATION

I, Evan Minton, have read paragraphs 9, 17-19, 21, 24-29, 30-33, 36, 39, and 41-42 of this Verified Complaint for Declaratory and Injunctive Relief and Statutory Damages in the matter of *Minton v. Dignity Health*. The facts within these paragraphs are within my own personal knowledge and I know them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 19, 2017 /s/ Evan Minton
Evan Minton