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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This suit seeks to compel a religious hospital to take actions that are prohibited by the tenets of its faith. The organization representing Respondent has characterized Catholic hospitals as a "threat" based on their refusal to allow "a range of reproductive health services, including contraception, sterilization, many infertility treatments, and abortion." ACLU, *Health Care Denied*, bit.ly/2Stt5GC. Consistent with that dismissive view of the hospitals' religious beliefs, plaintiffs across the country have brought suits seeking to compel religious hospitals to allow or provide procedures that are contrary to their faith. *See* Pet. 31-35. Yet the California courts have held that the First Amendment provides *no protection whatsoever* to religious healthcare providers that face coercion to violate their beliefs. The constitutional questions presented by this case are a matter of profound and increasing importance, and Respondent does not argue otherwise.

Instead, Respondent's primary argument is that the decision below is insufficiently final. But the Court of Appeal's decision is as final as it will ever be on the federal constitutional questions. The court conclusively rejected Mercy's First Amendment arguments on the ground that the state's interests in healthcare "access" will *always* outweigh any burdens on religion, no matter how severe. This Court has routinely found jurisdiction under §1257 in cases arising in a similar posture, especially where—as here—the petitioner seeks to vindicate First Amendment rights.

On the merits, Respondent doubles down on the California courts' holding that *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), forecloses any free exercise defense to an Unruh Act suit. But this Court has never interpreted *Smith* that expansively. Just last month, this Court reiterated that free exercise arguments would "merit careful consideration" if suits under an anti-discrimination statute intruded upon "the promise of the free exercise of religion enshrined in our Constitution." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1753-54 (2020). According to the California courts, however, the Free Exercise Clause provides exactly *zero* protection even if an Unruh Act suit would impose a severe burden on religious practice or exercise. This Court's intervention is imperative to ensure that the Free Exercise Clause—as well as the First Amendment's protections against coerced expression and association—provide robust protections to religious healthcare institutions that face coercion to act contrary to their faith.

I. Respondent's jurisdictional and prudential arguments lack merit.

Respondent's jurisdictional and prudential objections to certiorari all rest on the same flawed premise: that the constitutional issues presented here "were not decided in the court of appeal" and "remain[] to be addressed once Dignity Health makes a record and the facts are developed." BIO 13-14, 17. To the contrary, the Court of Appeal unequivocally rejected Mercy's First Amendment arguments on the merits, and that holding is as final as it will ever be.

Mercy argued below that Respondent's suit should be dismissed because it was "barred" by the constitutional "guarantees of religious freedom and freedom of expression." Pet.App.14. But the Court of Appeal disagreed, holding that even "*to the extent there is any compulsion*," Mercy's constitutional arguments had been "soundly rejected" in earlier California cases holding that "any burden the Unruh Act places on the exercise of religion is justified by California's compelling interest in ensuring full and equal access to medical treatment…." Pet.App.15 (citing *North Coast Women's Care v. Superior Ct.*, 189 P.3d 959, 966-67 (Cal. 2008)). The Court of Appeal also rejected Mercy's compelled expression arguments on the ground that "simple obedience to a law" does not entail coerced speech or expression. Pet.App.15-16. Although the Court of Appeal remanded for additional proceedings on various state-law issues, the court's opinion is clear that Mercy's federal constitutional arguments have been conclusively rejected on the merits.

This Court accordingly has jurisdiction under §1257. Because the Court of Appeal unequivocally rejected Mercy's First Amendment arguments, the federal issue "has been finally determined by the state courts for purposes of the state litigation." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). And a ruling in favor of Mercy on those issues would be "preclusive of any further litigation on the relevant cause of action" because it would require dismissal of Respondent's suit, which seeks to compel Mercy to allow medical procedures that violate its faith. *Id.*

Moreover, "the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). Especially given the ongoing litigation campaign against religious healthcare providers that decline to perform certain procedures that contravene their faith, *see* Pet. 31-35, the "possible limits the First Amendment places on" such suits "should not remain in doubt." *Fort Wayne Books,* 489 U.S. at 56.[1]

This Court has routinely found jurisdiction under §1257 in cases arising in a similar posture. For example, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 (1974), the Court found jurisdiction to review a state court's rejection of a newspaper's First Amendment arguments even though the case had been remanded for further proceedings in state court. The Court emphasized that it would be "intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Id.* n.6; *see also Fort Wayne Books*, 489 U.S. at 55-56 (finding jurisdiction to review state court's refusal to dismiss suit on First Amendment grounds); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-79 (1988) (finding jurisdiction to review state court's rejection of federal preemption defense

[1] Earlier this month, yet another Catholic hospital was sued for refusing to perform elective sterilizations that violate the Religious Directives. *See* Complaint, *Hammons v. Univ. of Md. Med. Sys.*, No. 1:20-cv-2088 (D. Md. July 16, 2020).

notwithstanding remand); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (same).[2]

Respondent's prudential objections to certiorari fare no better. In particular, Respondent repeatedly suggests (at 16-19) that the Religious Directives are not properly at issue here because they are "beyond the four corners of the complaint" and "the Directives and their role in Mr. Minton's treatment have not been tested." To the contrary, the Religious Directives were front and center at each stage of this litigation.

As the Superior Court explained, "[a]lthough Mr. Minton's complaint is silent about the reason why his request for a hysterectomy at Mercy ... was denied, *both sides agree that the reason was* [*Mercy's*] *interpretation of the* [*Religious Directives*]." Pet.App.26 (emphasis added). The court thus "treated those arguments as properly raised on this demurrer," *id.*, and took judicial notice of the Religious Directives (without objection), *see* Pet.App.5 n.2. Indeed, Respondent expressly conceded below that Mercy's "decision to cancel his scheduled surgery arose from its interpretation of the [Religious Directives] promulgated by the U.S. Conference of Catholic Bishops…." ROA.100; *see also* Respondent's Supp. App. 38-39 (complaint quoting Mercy press release stating that "it is our practice not to provide sterilization services … in accordance with the [Religious Directives]").

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[2] Respondent asserts (at 14, 16, 18, 21-23) that "no federal question will need to be reached" if Mercy wins on state-law grounds on remand. But that is always true in cases that fall under the fourth *Cox* exception.

Respondent (at 2, 14, 17, 19) repeatedly cites language from the Court of Appeal's decision stating that "reliance on the Directives as a defense to Minton's claim … is not suitable for resolution by demurrer." Pet. App. 10. But those citations are taken out of context, as that section of the opinion was not addressing the *constitutional* issues presented in this Petition; it was instead addressing a distinct question of *state law* about whether Respondent had adequately pled intentional discrimination based on transgender status. Later in its opinion, the Court of Appeal categorically rejected Mercy's free exercise arguments even "to the extent there is any compulsion" to violate its religious beliefs. Pet.App.15.

Respondent further suggests (at 18) that this case would benefit from discovery on matters such as "the [Religious] Directives and their role in Mr. Minton's treatment." But Respondent's apparent desire to use civil discovery to probe into Mercy's religious beliefs makes this Court's intervention more imperative, not less.

It is well established that courts must "refrain from trolling through a person's or institution's religious beliefs," as any such inquiry "is not only unnecessary but also offensive." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.); *see also* Catholic Med. Ass'n Amicus Br. 13-14. When religious institutions assert that their "challenged actions were mandated by their religious creeds," the "very process of inquiry leading to findings and conclusions" may "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). After all, "'[r]eligious beliefs need

not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.'" *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (quoting *Thomas v. Review Bd. of Ind. Emp't Security Div.*, 450 U.S. 707 (1981). In direct contravention of these precedents, the decision below would subject a religious hospital to full-blown discovery and trial proceedings to probe into its beliefs any time it is sued for declining to allow a procedure on religious grounds.

At bottom, Respondent does not—and cannot—dispute that the requested surgery would have violated the Religious Directives' prohibition on elective sterilization in the absence of a "present and serious pathology." ROA.218. No amount of additional litigation, discovery, or inquiry into Mercy's beliefs will change the fact that Respondent is seeking a court order that would *override* the Directives and compel Mercy to allow medical procedures that are prohibited by the Catholic Church's authoritative teachings. *See* Respondent's Supp. App. 44-45 (seeking "an order enjoining Defendant … from … preventing doctors from performing hysterectomy procedures in its hospitals on the basis of a diagnosis of gender dysphoria"). The important constitutional issues implicated by this suit were conclusively resolved by the Court of Appeal and are squarely presented for this Court's review.[3]

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[3] Respondent's suggestion (at 15, 21, 23) that the state court might order some "alternative" accommodation is a red herring, as Respondent's complaint requests no such relief. Respondent seeks a declaration that Mercy violated the Unruh Act by not allowing the hysterectomy *at its facilities*, and an

II. The California courts misconstrued the First Amendment by categorically rejecting Mercy's Free Exercise and Free Association arguments.

On the merits, Respondent argues (at 23-27) that, because the Unruh Act is "neutral and generally applicable," that is the end of the matter as far as the Free Exercise Clause is concerned. But this Court has repeatedly rejected that maximalist interpretation of *Smith*.

Just last month, this Court acknowledged that certain applications of anti-discrimination laws could "require some employers to violate their religious convictions." *Bostock*, 140 S. Ct. at 1753. The Court emphasized that it was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution" since "that guarantee lies at the heart of our pluralistic society." *Id.* at 1754. And the Court reiterated that free exercise claims raised by religious institutions would "merit careful consideration." *Id.* Under Respondent's view of the Free Exercise Clause, however, any such arguments would not "merit careful consideration" at all; they would instead be rejected at the starting gate as long as the law at issue was "generally applicable."

Respondent (at 24) cites *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727-28 (2018), for the proposition that "religious objections do not permit businesses to evade []

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injunction ordering Mercy to allow such procedures "*in its hospitals*." Respondent's Supp. App. 44-45 (emphasis added). Respondent's complaint seeks coercion, not accommodation.

nondiscrimination requirements." But *Masterpiece* hardly endorsed that sweeping proposition. To the contrary, the Court emphasized the need for a "proper reconciliation" between government protection for the rights of those who may suffer discrimination and the "right of all persons to exercise fundamental freedoms under the First Amendment." *Id.* at 1723; *see also id.* at 1724 (noting "delicate question[s]" about interplay of free exercise and anti-discrimination principles). Far from engaging in a "proper reconciliation" of the interests at stake, the California courts have instead held categorically (citing *Smith*) that religious institutions' free exercise rights will *never* prevail in the face of an Unruh Act claim, no matter how severe the burden on religious practice or exercise. Pet.App.14-15; *North Coast*, 189 P.3d at 966-67.

Respondent (at 25-26) attempts to distinguish *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), on the ground that *Trinity Lutheran* involved the exclusion of religious entities from a public benefit program rather than the application of an anti-discrimination law to a religious institution. But the Court's *reasoning* is highly instructive here. The Court reiterated that free exercise rights are not limited to matters such as "the way [a religion] worships" or its unique "view of the Gospel." 137 S. Ct. at 2022. The Court expressed grave constitutional concerns about policies that would force a religious entity to "disavow its religious character" in order to participate in public life. *Id.* And the Court again rejected the notion that "any application of a valid and neutral law of general applicability is necessarily

constitutional under the Free Exercise Clause." *Id.* at 2021 n.2.

Respondent (at 26-27) also misconstrues the church autonomy doctrine, suggesting that this line of cases is limited to the "ministerial exception." But, to the contrary, this doctrine broadly protects against state interference in church decisions that affect "matters 'of faith and doctrine.'" *Our Lady of Guadealupe Sch. v. Morrissey-Beru*, 140 S. Ct. 2049, 2060 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189-90 (2012) (government may not interfere in "the faith and mission of the church itself").[4]

That is exactly the type of interference that Respondent seeks through this suit. Catholic healthcare "expresses the healing ministry of Christ" through everything a hospital does. ROA.199. Ordering a Catholic hospital to allow procedures that violate the Directives would thus interfere with its faith and mission every bit as much as regulating the Church's selection of priests. *See* Pet. 19-21; *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (expressing concern about forcing a church to engage in activities that would "contradict the church's tenets and lead the congregation away from the faith"); Catholic Health Ass'n Amicus Br. 16-17 (church autonomy doctrine forbids courts from "assessing how a religious

[4] Contrary to Respondent's suggestion (at 25) that there is "no support" for religious institutions receiving additional protections under the Free Exercise Clause, *Hosanna-Tabor* reiterates that the First Amendment "gives special solicitude to the rights of religious organizations." 565 U.S. at 189; *see also* Pet. 18-19, 22-23.

organization should apply its fundamental tenets to its actions"); Center for Constitutional Jurisprudence Amicus Br. 7-9 (healthcare is a "recognized ministry of the Catholic Church").

For similar reasons, forcing Mercy to allow procedures that are prohibited by its faith would entail unconstitutional coerced speech and expression. *See* Pet. 23-27. Respondent seeks to analogize this case to *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), in which this Court upheld a statute requiring law schools to grant access to military recruiters as a condition of receiving federal funds. But the Court expressly distinguished that law from a situation in which "the complaining speaker's *own message was affected* by the speech it was forced to accommodate." *Id.* at 49 (emphasis added). That is precisely the case here. In light of Church teachings that "Catholic health care expresses the healing ministry of Christ," ROA.199, all care that is provided at a Catholic hospital is "inherently expressive[]," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). And, just as in *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), forcing a Catholic hospital to allow certain procedures would severely impair the Church's ability to *convey the message* that such procedures are wrong.

III. At a minimum, the Court should hold this petition pending resolution of *Fulton v. City of Philadelphia*.

Due to the importance of the questions presented, the Court should grant certiorari outright to clarify the application of free exercise and free association principles in the context of religiously

affiliated healthcare. At a minimum, however, the Court should hold this petition pending its decision in *Fulton v. City of Philadelphia*, No. 19-123, which may provide additional guidance on these issues, including the ongoing validity of *Smith*. *See* Pet. 35-38.

Respondent argues (at 30) that the Court of Appeal "did not rely on *Smith* in overruling Dignity Health's demurrer." But the Court of Appeal did rely heavily on the California Supreme Court's decision in *North Coast*, *see* Pet.App.15, which cited *Smith* for the proposition that "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." 189 P.3d at 966. *Smith* was central to the decision below.

Finally, Respondent asserts (at 30-31) that even if this Court overturns *Smith*, it would not affect the outcome here because the Unruh Act *categorically* "satisfies strict scrutiny" by "further[ing] California's compelling interest in ensuring that all of its residents have full and equal access to the market." But that is not how strict scrutiny works. *See* Pet. 29-30; Catholic Medical Ass'n Amicus Br. 3-7. Courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). In all events, if this Court decides in *Fulton* to overrule or narrow *Smith*, the decision would likely provide additional guidance about the legal standard that applies in free exercise

cases, including the proper analysis of state interests and narrow tailoring.

CONCLUSION

The Court should grant certiorari or, alternatively, hold this petition pending the disposition of *Fulton*.

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