No. 19-1135

In The
Supreme Court of the United States

DIGNITY HEALTH dba
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 *AMICUS CURIAE* OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Jewish Coalition for Religious Liberty (JCRL) is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL aims to foster cooperation between Jewish and other faith communities in an American public square in which all are free to thrive. JCRL is devoted to ensuring that First Amendment jurisprudence enables the flourishing of religious viewpoints and practices in the United States.

Amicus has an acute interest in ensuring that religious organizations remain free to provide medical care and comfort to people in need in a way that is consistent with the organizations' principles. The ability of religious groups to provide such care is often driven (or even mandated) by their religious convictions, the ability to provide these otherwise lawful services without being coerced into overstepping their religious teachings is a matter of fundamental religious liberty and is crucial to the ability of religious institutions to carry out their missions.

Amicus urge the Court to grant the petition for certiorari and reverse the decisions of the California Court of Appeal, which departs from this Court's

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties were timely notified and have consented to the filing of this brief.

holding in *Burwell v. Hobby Lobby Stores, Inc.*, that "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" 573 U.S. 682, 710 (2014) (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

SUMMARY OF ARGUMENT

The decision below threatens to inject the government into religious affairs in dangerous and unprecedented ways. The California Court of Appeal instructed trial courts to make factual determinations regarding the validity of practices based on religious adherents' admittedly sincere beliefs. *Minton v. Dignity Health*, 252 Cal. Rptr. 3d 616, 622-23 (Ct. App. 2019), *review denied* (Dec. 18, 2019). This Court should grant *certiorari* to reiterate that such determinations are prohibited by the First Amendment. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("it hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a] conscience-based objection is legitimate or illegitimate").

As this Court noted, "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *United States v. Ballard*, 322 U.S. 78, 86 (1944). Once a court accepts that a law

restricts a sincerely held religious belief, the government bears a burden of justifying its regulations under the exacting strict scrutiny standard.

The lower court appears to have held that where a sincerely held religious belief has a disparate impact on a protected class, the practice of that belief supported an inference of intentional invidious discrimination. *Minton*, 252 Cal. Rptr. at 1153. This standard would place a wide range of undisputedly sincere religious practices under the judicial microscope with the eye towards punishing those whose religious practices do not meet with the approval of the majority.

If such theological inquiries were permitted, they would pose a particular threat to religious minorities whose practices courts are less likely to understand. Courts are not likely to require significant proof to accept claims about well-known Christian practices such as communion or baptism. However, they may be entirely unaware of Jewish practices including the prohibition on wearing a garment made from wool and linen. It is such relatively unknown practices that will be most vulnerable if courts are allowed to subject their validity to judicial inquiry.

The lower court also misapplied strict scrutiny in such a way that would transform the highest standard in constitutional law into a mere paper tiger. The court accepted that that the Unruh Civil Rights Act, Cal. Civ. Code § 51, satisfied strict scrutiny because it was aimed at battling discrimination. However, the mere claim that a law is intended to further a compelling

government interest is insufficient to satisfy strict scrutiny. When attempting to enforce such a law in the face of a sincere religious objection, the state must also show that the enforcement is the least restrictive way to actually advance its compelling interest. In this case, the lower court erroneously failed to even consider that second requirement. States cannot meet the rigorous requirement of strict scrutiny by merely repeating an anti-discrimination rationale.

The lower court's errors are particularly troubling based on the facts of this case. The court allowed the government to intrude on a religious group's theologically mandated charitable activities. The American legal system has historically supported charitable activities. Not only would the lower court's decision allow the government to undermine the autonomy of religious minorities, it would risk depriving America of the substantial benefits provided by religious charities. This court should grant certiorari to safeguard religious minorities and their charitable activities.

I. THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONTRARY TO THIS COURT'S PRECEDENTS.

The analysis employed by the California Court of Appeal suffers from two fundamental flaws. First, the California courts obliged a Catholic charitable institution to subject the content and applicability of its religious beliefs to a trial in a civil court—a practice that has been condemned by this Court for decades if not

centuries. Second, the California Court of Appeal's truncated strict scrutiny analysis appears to suggest that because the legislation's purpose is to eliminate discrimination that *ipso facto* satisfies the Constitutional standard. This approach is directly contrary to this Court's analysis in *Masterpiece Cakeshop*.

A. Civil courts may not examine religious beliefs for their veracity or consistency.

California courts held that religious liberty defenses to a claim of intentional discrimination are not resolvable on a demurer. *See Minton*, 252 Cal. Rptr. 3d at 622-23. Instead, the Court required Dignity Health to *prove* the validity of its religious objections at trial. *Id.* at 622. The Court required such proof at trial despite the fact that at no point did anyone question the sincerity of Dignity Health's beliefs. Requiring religious entities to prove their faith at trial went out of favor with the Inquisition. This Court should not permit California to impose such a requirement in defiance of this Court's precedents.

This Court has consistently held that inquiry into religious beliefs is beyond judiciary's remit. *See United States v. Ballard*, 322 U.S. 78, 87 (1944) (prohibiting judicial inquiry into the truth, validity, or reasonableness of a claimant's religious beliefs). Attempts "to delve into the consistency of [one]'s religious beliefs" has also been repudiated by this Court as "unjustifiable." *In re Anastaplo*, 366 U.S. 82, 86 (1961). This is for good reasons. "Religious experiences which are as real

as life to some may be incomprehensible to others." *Ballard*, 322 U.S. at 87. If courts were permitted to demand proof of internal consistency of a religious dogma and to subject to penalties those religious practices that may have a "disparate impact" on certain classes of people, "little indeed would be left of religious freedom." *Id.*

The California Court of Appeal held that the plaintiff could bring forth "[e]vidence of disparate impact" of Dignity Health's policies "because such evidence may be probative of intentional discrimination in some cases." *Minton*, 252 Cal. Rptr. 3d at 622 (quoting *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1229 (Cal. 2005)). But that cannot be correct. As an initial matter, by definition, religious practices have a disparate impact—practitioners of whatever religious faith are commanded to do certain acts and prohibited from doing other acts. For instance, the Catholic Church prohibits the ordination of women, while Orthodox Judaism places limits the ability of the descendants of priests to marry divorcees or converts. *See* Leviticus 21:6–8. Such commandments and prohibitions will necessarily have a disparate impact on individuals. Yet, it is these very requirements and prohibitions that make each religion distinct and take it beyond the general humanistic belief that one must be a good person. It therefore follows that, absent a compelling government interest and the selection of the least restrictive means to accomplish that interest, protecting freedom of religion necessarily involves protecting people's ability to refuse to participate in activities that their faith

prohibits, even if such activities may have disparate impact on protected classes of people. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Furthermore, requiring people of faith to prove that their beliefs are applied in a neutral manner presents particular dangers to the practitioners of minority faiths, for the public at large is likely to be less familiar with tenets of those faiths and may view the explanations with particular suspicion. *See Ballard*, 322 U.S. at 87 (noting that "[t]he religious views espoused by respondents [followers of the I AM religious movement] might seem incredible, if not preposterous, to most people.").

For example, the treatment of sterilization in Judaism illustrates why the California Court of Appeal's approach is so problematic. The very first commandment in the Torah is the divine command to "be fruitful and multiply." Genesis 1:28. Some rabbinical authorities, however, have interpreted the commandment to be the duty of a man rather than a woman. Mishna Yevamot 6:6 ("A man is commanded to procreate but a woman is not."). From that, it followed that operations that would prevent a man from fathering children are categorically impermissible. *See* Deuteronomy 23:2. Thus, vasectomies, orchiectomies, penectomies are forbidden. *See* Babylonian Talmud, Tractate Shabbat 110b. At the same time, because the commandment to "be fruitful and multiple" imposes no obligation on women, medical interventions (including surgeries) that would preclude a woman from begetting a child

are not prohibited.[2] *See* Shaul Weinreb, M.D., *Tubal Ligation and the Prohibition of Sirus*, J. Halacha & Contemp. Soc'y, vol. XL (2000), https://bit.ly/2V1FNwi. These beliefs, in secular parlance, are on their face "discriminatory" and have a "disparate impact." The decision below would require adherents to these views to defend their "righteousness" and suffer legal consequences if a jury at trial concluded that the disparate impact of adhering to these beliefs is evidence of actionable discrimination. Yet, this is precisely what the *Ballard* Court prohibited. "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." 322 U.S. at 87 (internal quotations omitted).

Absent any evidence that the asserted religious claims lack sincerity, the State is not permitted to use its legal machinery to demand any adherent of any religion to "to answer to [any] man for the verity of his religious views." *Id.* As the Eleventh Circuit recently reminded us, "[a] secular, civil court is a poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to

[2] At the same time, a general prohibition against mutilation of the body, *see* Deuteronomy 14:1, may prohibit sterilization operations on women as well.

justify through reason." *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015).

In short, this case is not a dispute about proper litigation procedures in California state courts—a matter that would of little interest to this Court. Rather, this case is about the State's ability to put on trial religious beliefs that it may disapprove of and to subject practitioners of those beliefs to civil penalties, unless these practitioners are able to convince a jury that their beliefs and practices are not "discriminatory." This Court rejected such intrusion in *Ballard*, before *Ballard*, *see*, *e.g.*, *Watson v. Jones*, 80 U.S. 679 (1871), and after *Ballard*. *See Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1976) ("where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts . . . must accept [the] decisions [of the religious authorities] as binding on them, in their application to the religious issues of doctrine or polity before them."). It should not deviate from that course now.

B. Strict scrutiny requires the courts to consider whether there are less restrictive means for the state to achieve even compelling purposes.

The decision below suffers from a fundamental failure to conduct a proper strict scrutiny analysis. All parties, the court below, and the *amicus* recognize that

strict scrutiny is the proper standard by which to judge the application of the Unruh Act to the petitioner. *See Minton*, 252 Cal. Rptr. 3d at 624-25.

It has been well established that in order to satisfy strict scrutiny a challenged statute must show that it is enacted in pursuance of a compelling government interest *and* that said interest is being pursued by least restrictive means. *See*, *e.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). It is beyond peradventure that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). But the existence of a governmental interest, no matter how compelling reveals nothing with respect to the second prong of a strict scrutiny analysis. In other words, the interest in combating the evils of invidious discrimination, though compelling, cannot alone justify any and all actions the government may wish to undertake in the name of eradicating this scourge. A compelling interest is not a blank check to impinge on other fundamental rights. Rather, when government takes action that abridges a fundamental right, it must show that the action is narrowly tailored to addressing the compelling problem. The California Court of Appeal ignored this latter prong of the analysis.

It is undisputed that Minton "receiv[ed] the procedure he desired from the physician he selected to perform that procedure," but that he did so "three days later than he had planned and at a different hospital

than he desired." *Minton*, 252 Cal. Rptr. 3d at 623. It is equally undisputed that Dignity Health referred Minton out of its Catholic hospital to one of its other, but non-Catholic hospitals. Oddly, the California Court of Appeal was unimpressed by this prompt referral, and instead held that the violation of the Unruh Act occurred at the *instant* when "when [Dignity Health] cancelled the scheduled procedure at Mercy and Mercy's president told [Minton's physician] that she would never be allowed to perform Minton's hysterectomy at Mercy." *Id.* at 623-24. In other words, the California Court of Appeal appears to have held that the state's interest in combatting invidious discrimination and ensuring "full and equal access" to medical treatment is enough to require every healthcare entity to perform every medical procedure in-house. The facts of this case themselves show that this is not the narrowest means of achieving California's goals. It bears repeating—Minton received the procedure he desired and it was performed by the doctor that Minton himself chose at a hospital *owned by the entity that supposedly denied him access to care*. Simply put, California's interest in stamping out invidious discrimination and providing its citizens with "full and equal access" to healthcare was in every respect met through a referral. And therefore, requiring Dignity Health to perform a particular procedure at a *Catholic* hospital rather than another hospital that does not have the same religious objections to the procedure in question, by definition cannot be narrow tailed means of achieving a compelling governmental interest.

In many respects this case is similar to *Hobby Lobby Stores*.[3] In *Hobby Lobby* this Court accepted the argument that "the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling," but nonetheless rejected the challenged regulation on the grounds that the method chosen to pursue the stated interest was not the least restrictive means to attain the stated goal. Key to the Court's conclusion was the fact that in that case the Government "itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." 573 U.S. at 730. So too here. In this case, Minton has himself demonstrated that California's interest in ensuring that he has "full and equal access" to healthcare was met through the referral to a different hospital. This fact alone should have been enough to conclude that to the extent the Unruh Act requires a healthcare entity to perform all medical procedures in-house, it fails strict scrutiny when applied to institutions who have religious objections to performing certain procedures. California Court of Appeal's failure to undertake this analysis deprived Dignity Health of its rights under the Free Exercise Clause. This Court should grant certiorari and reverse the judgment below in order to safeguard these rights not

[3] Although *Hobby Lobby* was decided under the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb *et seq.*, the strict scrutiny analysis under that statute is the same as the Constitutional strict scrutiny analysis. *See* 573 U.S. at 726; 42 U.S.C. § 2000bb(b)(1).

just for the petitioner but for religious organizations nationwide.

II. THE FIRST AMENDMENT GRANTS RELIGIOUS GROUPS THE RIGHT TO CHOOSE, WITHOUT GOVERNMENTAL INTERFERENCE, WHAT CHARITABLE SERVICES THEY WILL PROVIDE.

This Court has long held that when a state seeks to compel religious entities to engage in conduct antithetical to their religious beliefs and at the same time undermines the entities' expressive association, the state must satisfy the exacting standard of strict scrutiny. *See Smith*, 494 U.S. at 882; *Lukumi Babalu Aye*, 508 U.S. at 566 (Souter, J., concurring in part). This rule is deeply rooted in the history of religious charitable orders and the constitution's special solicitude for works that such societies provide. *See Smith v. Bd. of Pensions of the Methodist Church, Inc., in Missouri*, 54 F. Supp. 224, 233 (E.D. Mo. 1944) ("[T]he law favors and nourishes charity. . . .") (internal citations omitted); *In re Turner's Estate*, 28 Pa. D. & C.2d 251, 255 (Pa. Orph. 1962) (noting that "there is a[ ] strong tendency historically for each religious group to establish and maintain charitable institutions [including hospitals] under its own supervision to serve not only the needs of its own members, but those of the general public, as well."). That a particular charitable organization chooses to perform only some type of charity or benefit only some types of individuals is merely a reflection of its constitutionally protected views as to which human

conditions it can best alleviate and which acts are best left for others. *See*, *e.g.*, *Trustees of Kentucky Female Orphan Sch. v. City of Louisville*, 36 S.W. 921, 923 (Ky. 1896).

It is a long-established principle that "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014) (quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). Applying this principle, this Court has concluded that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within" the protections of the Free Exercise Clause. *Id.*

A fortiori, charitable practices, *i.e.*, practices that are engaged with not for profit but to alleviate suffering and affliction enjoy the Clause's protections. Indeed, the very basis of this Court's decision in *Hobby Lobby* was the recognition that the corporations that challenged the contraceptive mandate had "religious reasons for providing health-insurance coverage for their employees." *Id.* at 721. This Court noted that even when nothing in the law compelled the corporations "to provide insurance . . . they nevertheless did so . . . in part because their religious beliefs govern their relations with their employees." *Id.* Yet, the decision to provide health insurance did not give the government free hand to insist that the corporations forsake their religious scruples with respect to certain contraceptives in

order to continue providing this benefit to their employees.

Surely, *charitable* institutions are no less entitled to constitutional protections than for-profit corporations. In fact, though the Court's decision in *Hobby Lobby* was not unanimous, *all* justices and litigants agreed that a religious charitable institution would certainly be exempt from a mandate that contravened the religious principles on which the charity was founded. *See id.*, at 710-12; 738 (Kennedy, J., concurring); 752 (Ginsburg, J., dissenting) ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.").

The decision below, if allowed to stand, would upset the uniform and centuries-long understanding of the role and the right of private religious entities to carry forward their mission by both word and deed.

A. Provision of charitable services, including healthcare, plays a vital role in fulfilling some groups' religious obligations.

The practice of charity is an integral component of many religions. *See*, *e.g.*, *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 544 (D.D.C. 1994) ("[T]he concept of acts of charity as an essential part of religious worship is a central tenet of all major religions."). However, it is of particular importance to minority religious communities—not because these communities are more compassionate or

religious, but because religious minorities may have specific needs that the larger minority might not be aware of. For example, many Jews consider it an important obligation to ensure that poor Jews have sufficient food and ritual objects to observe Jewish holidays. Members of other faiths may not be sensitive to such needs.

In the Jewish tradition and theology, the concept of *tzedakah* is central to and the key obligation of Jewish life. Although often translated as "charity," *tzedakah* is both a broader and deeper concept. In fact, the literal translation of the word is "righteousness" or "justice." Jewish law obligates adherents to lead a just and righteous life with charity being part and parcel of such a life. In fact, the Sages have referred to *tzedakah* as "equal in value to all the other *mitzvot* [commandments] combined." Mishna Pe'ah 1:1. To put it another way, "material support for those in need is not a matter of 'charity'—a term that implies generosity beyond what may be expected—but a requirement." MyJewishLearning.com, *Tzedakah 101*, https://bit.ly/3ddChHq. What this also means is that when one practices *tzedakah*, it is insufficient to merely provide material support to the needy; rather, "[a]s in most areas of life, here too Jewish tradition makes practical demands and specifies expectations." *Id.* A few examples will illustrate how observant Jews practice *tzedakah*, and why the decision of the California Court of Appeal threatens the Jewish community's religious liberty fulfill this religious obligation.

One way Jewish community has practiced *tzedakah* for centuries is through the creation of *chevrei* (sing: *chevra*) *kadisha*. Literally translated "*chevra kadisha*" means a "holy society," but it is usually rendered into English as a burial society. The *chevrei kadisha* are composed of volunteers who help the family of the deceased make all necessary preparations to ensure a proper funeral. These services include guarding the body from the moment of death until burial, the ritual cleansing of the body and subsequent dressing for burial.

As with many other aspects of Jewish religious life, death and burial comes with its own laws and religious obligations. For example, Jewish law body requires that a body be interred without any coffin, covered only in a simple shroud (though given the public health concerns a simple coffin is permitted). Under Jewish law, the body must be interred in the ground, and burial in mausoleums or vaults is categorically prohibited. There is also a general prohibition on viewing of the body except by the close relatives of the deceased. Perhaps the most widely known injunction with respect to Jewish burial customs is one against cremation. Jewish law requires a dead body must be buried. In fact, even if the deceased willed cremation, his wishes must be ignored and the prohibition against cremation is so severe that according to at least some authorities, one is forbidden to mourn (or "sit *shiva*") for one who had himself cremated. In short, Jewish death and burial is just as steeped in religious laws and customs as are other aspects of Jewish life. It is

these customs that the *chevrot kadisha* help the mourners fulfill.

Initially, these societies were "pacts among a given group of Jews to bury one another when any of the members died. As time went by, these evolved and became institutionalized as non-profit organizations, with the express purpose of providing all local Jews, not only members, with a proper burial according to Jewish law." Elon Gilad, *The History of Jewish Burial Rites*, Haaretz.com (Apr. 21, 2015), https://bit.ly/3a1cHn3. Quite often, such services are provided for free of charge, especially for those who cannot afford to pay the costs of the burial. Given the historical isolation of Jewish communities from the general population (often as a result of anti-Semitic laws that required Jews to live in a ghetto, wear special clothing, engage only in particular professions, etc.), it is not surprising that the *chevrot* tended only to the needs of the full members of the Jewish community. (After all, if someone left that community, that person likely became a Christian, and was taken care of by that community). Furthermore, in those times, a member of the Jewish community almost necessarily meant a follower of *Orthodox* Judaism.[4] Thus, though a particular member may have been more or less observant than his neighbor, overall

[4] Indeed, it would have been strange to even qualify a particular strand of Judaism as "Orthodox" as opposed to something else, because although there were certainly differences in particular traditions, other strands of Judaism did not come into being until well into the 19th century.

the religious practices within the community remained fairly uniform.

Today, when the Jewish community exists not apart from but as part of the wider community (both in the United States and elsewhere) individual practices and observances are significantly more divergent. For example, intermarriage rate among Jews has, by some estimates, exceeded 50%. Yet, oftentimes, individuals (or couples) who do not subscribe to the practices of Orthodox Judaism, nonetheless prefer to keep some traditions such as, for example, circumcision, wedding ceremonies, *bar* and *bat mitzvah* celebrations, and services for the deceased. At the same time, these individuals may wish to engage in these traditions on their own terms. It is of course their right to do so, but the question is whether they can demand that third party charitable organizations help them fulfill those desires. Thus, some Jews now prefer cremation rather than burial. Others may prefer to be buried in something other than plain coffins. Others still, may prefer an open casket burial or embalming. These choices may be entirely understandable, especially when a family is trying to accommodate divergent religious traditions of the surviving relatives, and no one can be faulted or judged over these decisions, which are extraordinarily personal in nature.

It should also be noted that despite this strong prohibition on cremation, recent rulings by rabbinical authorities hold that while on one hand "Judaism normally deems cremation a 'desecration,'" on the other, because "[t]he highest honor that a person who isn't

alive can achieve is to help the living," cremation of individuals who died in the midst of the COVID-19 epidemic should be viewed "in the context of saving a life [and] seen as 'a mitzvah that the deceased is doing posthumously.' " What this illustrates is that religious obligations imposed on *chevra kadisha* are not necessarily static, but are situation-dependent. Thus, a *chevra* may (at least according to some rabbinical authorities) be religiously *obligated* to cremate some people (*e.g.*, those who died from or in the midst of an epidemic) and yet also be *obligated* not to provide the same service to people who did not die in these circumstances. Yet under California court's analysis, such behavior would be prohibited. Instead, under the rule adopted below, California courts would require a *chevra* to accommodate personal preferences of whomever is seeking its services.

However, requiring a *chevra kadisha* to fulfill the entire menu of these choices simply because it has consented to conduct similar rites on other individuals means requiring it to potentially engage in practices categorically prohibited by Jewish law and ones that may constitute a grave sin. For instance, cremation (at least absent threat to the life or health of the still living) is considered by some to be abandonment of the *entirety* of Jewish law. A *chevra* required to so act would be placed in an untenable position—either give up the practice of aiding people at what is perhaps the time of their greatest need, or do so in contravention to the demands that the Jewish law imposes on the treatment of bodies. In a case of a pandemic, a *chevra* could

be forced to choose whether to cremate individuals in order to protect those still alive, or—for fear that doing so once would obligate it to continue doing it even in the absence of a public health emergency—would be required to commit another sin of abandoning the dead body altogether. In essence then, the only way a religious nonprofit like a *chevra kadisha* would be able to comply with the rule laid down by the California Court of Appeal is to stop being a religious organization at all. Simply put, requiring a religious charitable organization to forsake its religious obligations in order to continue to operate is tantamount to insisting that a charitable organization cannot be religious. The upshot is that in *either* case a *chevra kadisha* would be prevented from practicing *tzedakah*, *i.e.*, living the life as righteousness and justice requires. Such an outcome would be particularly detrimental to religious minorities, because at least some of the *chevrot* would simply cease to provide services of any kind rather than willfully violating Torah's commandments. This would deprive observant Jewish communities of the opportunity to engage persons familiar with Jewish customs to bury their dead. Worse still, while the well-off in the religious communities may be better positioned to find a way to deal with this problem (*e.g.*, by flying in someone from outside the jurisdiction who is able to conduct a proper ceremony), the poor will be left with no recourse. In other words, in the name of equality of treatment, the decision of the California Court of Appeal, if upheld, threatens the religious and personal liberty of the religious minorities, subjecting the poor to a particularly heavy burden. Our society which was

founded on the claims to religious freedom does not require such an outcome, and our Constitution which explicitly guarantees the freedom to practice one's religion does not permit it.

B. The decision of the California Court of Appeal affects ability of individuals to be free from government coercion with respect to their religious practices.

As this Court recognized, "[a] corporation is simply a form of organization used by human beings to achieve desired ends." *Hobby Lobby*, 573 U.S. at 706. The legal form that individuals use is of little import. What matters is that the law protects *individuals'* ability to live their lives in accordance with the commandments of their faith. *See id*. at 706-07 ("When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

As discussed in the preceding subsection, Jewish law commands *people* to practice *tzedakah*, *i.e.*, live their life righteously, justly, and charitably. Although the overrepresentation of Jews in the field of medicine is subject to numerous Jewish jokes, there is a Talmudic basis for this fact. The Talmud teaches that "whoever saves a life, it is as if he saves the world entire." Talmud, Sanhedrin 37a. It is no surprise that Maimonides—one of the greatest rabbis and expositors of Jewish law—was also a noted physician. To be sure, many Jews are drawn to medicine for the same reasons many

non-Jews are, *i.e.*, interest in the field, intellectual and emotional fulfillment, prestige, financial security, etc. But just as certainly, many Jews are drawn to the field based on their commitment to fulfilling the commandments of the Torah.

When observant Jews practice medicine, they are, as is every other licensed physician, bound to maintain the standard of care with respect to every patient, Jew and non-Jew alike, who comes through the door. At the same time, these observant Jewish physicians must practice their craft in a way that does not transgress their religious obligations. As a result, some religious Jewish doctors forgo participating in certain procedures. For example, some observant Jews will not participate in an elective abortion as at least some Jewish theologians have viewed "murder of an unborn child . . . as a crime." Rabbi Joseph B. Soloveitchik, The Emergence of Ethical Man 28 (2005). For these reasons, observant Jews may well practice obstetrics and gynecology and even perform medically necessary abortions but decline to participate in the elective variety. If these doctors were required to provide elective abortion despite the religious prohibition on doing so, some may start practicing or choose a different subspecialty. In either case, the community at large, and the Orthodox Jewish community (which has a particular interest in seeing doctors that are part of the community and understanding of its precepts and standards) in particular will be ill-served. Yet, this is the reality that the decision of the California Court of Appeals creates.

By way of another example, perhaps particularly salient to the present case is a Jewish prohibition on sterilization of men. Thus, vasectomies, orchiectomies, penectomies are forbidden. These procedures can be performed to save someone's life (*e.g.*, removal of a testis in case of testicular tumor), but may not be performed for the purposes of sterilization or body alteration. A physician who wishes to observe Jewish religious law would almost certainly perform *any* procedure that is necessary to save the life of the patient, even if the procedure would otherwise be categorically prohibited. But the same doctor would be religiously prohibited from performing the same procedure for other than life-preserving purposes. Insisting that such a physician disregard his religious scruples is tantamount to excluding observant Jews from the practice of medicine or at least some of the specialties in that field, and to condemn the observant Jewish community to the world where they are unable to seek treatment from physicians who form part of that community.

To be sure, the California Court of Appeal appeared to recognize that individual physicians can decline to participate in procedures that are contrary to their personal religious beliefs. *Minton*, 252 Cal. Rptr. 3d at 623 (citing *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959, 969 (Cal. 2008). However, this is a distinction without a difference. Many (if not most) medical practitioners in this country have organized as a corporate entity of one type or another. These entities, however, are just alter egos of the

practicing physicians. *See Hobby Lobby*, 573 U.S. at 717-19. The decision of the California Court of Appeal, if allowed to stand, would be a sword against both corporate entities and individual physicians. In this case, as in *Hobby Lobby* and *Masterpiece Cakeshop*, protection of individuals' religious freedom necessarily requires protection of religious freedom of religiously affiliated charitable entities.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for *certiorari* and reverse the judgment of the California Court of Appeal.

Respectfully submitted,

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