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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH

Petitioners,

v.

DIGNITY HEALTH; DIGNITY HEALTH d/b/a MERCY MEDICAL CENTER REDDING

Respondents.

Case No. CGC 15-549626

PETITIONERS' OPENING BRIEF, HEARING ON PETITION FOR WRIT OF MANDATE

The Honorable Harold E. Kahn
Petition Filed: November 9, 2020
Hearing Time: 9:30 a.m.
Department: 505

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I. INTRODUCTION

In denying Respondent's Motion for Summary Judgment, this Court identified two triable issues of fact: (1) "whether Dignity Health 'permits sterilization operations for contraceptive purposes' at its Catholic hospitals as the quoted phrase is used in [Health and Safety Code] section 1258;" and (2) "whether Dignity Health requires its patients seeking postpartum tubal ligations to meet one or more 'special nonmedical qualifications' as the quoted phrase is used in section 1258." (Ex. 2, Order Denying Resp's Mot. for Summ. J. at 2.) At the hearing, Petitioners will demonstrate both that Respondent's Catholic hospitals permit postpartum tubal ligations for contraceptive purposes and that these hospitals require patients seeking postpartum tubal ligations to meet one or more special nonmedical qualifications.

Indeed, Respondent not only admits that its Catholic hospitals permit postpartum tubal ligations, but it claims that when it permits them it is in order to prevent future pregnancy (e.g., to protect the patient from the risks of carrying a future pregnancy, by preventing future pregnancy). That is the textbook definition of a procedure done for contraceptive purposes. As the doctor who sits on the tubal ligation committee for the Sacramento hospitals conceded in his deposition, contraception is "[a] mechanism to prevent future pregnancy." (Ex. 3, Transcript of Carolyn Reyes PMK Deposition 69:18–19 ("Reyes PMK Tr.").) This is fully supported by the medical literature, which recognizes that tubal ligation is a method of contraception. (Declaration of Rebecca Jackson ("Jackson Dec") ¶ 5(e) (quoting the Centers for Disease Control: "Tubal sterilization for women and vasectomy for men are permanent, safe, and highly effective methods of contraception.").)

Respondent also admits that it individually applies religious criteria—which are inherently nonmedical—to each patient seeking postpartum tubal ligation at one of its Catholic hospitals. (Declaration of Sister Brenda O'Keeffe ¶ 24 ("O'Keeffe Dec").) Patients seeking postpartum tubal ligations at these hospitals are required to get permission from special tubal ligation review committees, which do not exist for other operations at the hospitals—even other sterilization operations. The tubal ligation review committees are comprised of a religious figure—often a nun—and medical staff, but the religious figure can

make decisions even when the medical staff is not available. The forms doctors must fill out to submit to the tubal ligation committees prominently ask for nonmedical factors such as the patient's age, her "para," or number of pregnancies that have reached viable gestational age, and her health insurance. The tubal ligation committees sometimes also look at a patient's medical history, but as Petitioner's expert Dr. Rebecca Jackson, the Division Chief for the Department of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital at the University of California, San Francisco, will testify at the hearing, these committees are not making medical decisions. (Jackson Dec ¶ 5(c) (quoting a widely used clinical resource: "The only indication for female permanent contraception is the patient's preference to have a permanent method of contraception for pregnancy prevention."). Dr. Jackson will also testify that the committees are not even doing what they now say they are doing in terms of assessing the risk to the patient of carrying a future pregnancy. Finally, the doctors who sit on these committees also admit that the ultimate decision of whether to permit a patient to undergo a postpartum tubal ligation in Respondent's Catholic hospitals is not medical.

Over the course of this litigation, Respondent has argued that it has a religious freedom right to refuse to allow tubal ligation in its Catholic hospitals entirely, which would not violate Section 1258. Because Respondent is permitting some tubal ligation in its Catholic hospitals, however, Respondent now argues that it has a religious freedom right to do exactly what Section 1258 prohibits: pick and choose which patients it allows to access tubal ligation, based on special nonmedical criteria not imposed on patients seeking other operations at the hospitals. As the Court correctly held in denying Respondent's summary judgment motion, however, the free exercise clauses of the U.S. and California Constitutions do not bar application of Section 1258 to Respondent's Catholic hospitals, even assuming Respondent does have a religious freedom interest in permitting some tubal ligations.

The Court should therefore grant the relief Petitioners seek and issue a writ of mandate pursuant to Code of Civil Procedure Section 1085 ordering Respondent to comply with Health and Safety Code Section 1258.

II. FACTUAL BACKGROUND

A. Petitioner Rebecca Chamorro.

When Petitioner Rebecca Chamorro was pregnant with her third child, she and her obstetrician, Dr. Van Kirk, agreed that it made sense for her to undergo a tubal ligation immediately following her scheduled C-section. (Declaration of Rebecca Chamorro ¶¶ 3-5 ("Chamorro Dec")). During both of Ms. Chamorro's previous pregnancies, she had to undergo extended periods of bed rest in order to avoid premature labor. (*Id.* ¶ 11). As she testified, "I think that may have been one of the reasons [I wanted to have a tubal ligation]. At the end of pregnancy it scared me to death to think that I had come so far in a pregnancy. And the potential of this little person popping out of me before they were ready is very scary." (Ex. 5, Deposition Testimony of Rebecca Chamorro at 20:17-21 ("Chamorro Dep.").

Ms. Chamorro's C-section was scheduled at Mercy Medical Center Redding ("MMCR"), which is the only hospital with a labor and delivery unit in Redding, CA, where Ms. Chamorro lives. (Chamorro Dec ¶ 3.) Dr. Van Kirk determined that there were no medical or other relevant issues preventing Ms. Chamorro from undergoing a tubal ligation (Ex. 6, Declaration of Dr. Samuel Van Kirk ISO Pls' Opp. To Resp's Mot for J. on the Pleadings ¶ 18), and he was ready and willing to perform the procedure at the time of her C-section, which is the time when, medically, such a procedure is best done; it would take him only a few minutes and would not require any additional equipment. (Ex. 7, Declaration of Dr. Samuel Van Kirk ISO Ex Parte Application for TRO & OSC ¶¶ 9, 27.) MMCR does not dispute any of these facts, and it has never contended that there were any medical reasons, or medically based qualifications, that Ms. Chamorro lacked when she decided to have a tubal ligation.

Nonetheless—and by contrast to other procedures Dr. Van Kirk regularly performs at MMCR—he was required to seek permission from MMCR's tubal ligation review committee in order to perform a postpartum tubal ligation on Ms. Chamorro. Dr. Van Kirk submitted the tubal ligation request on September 15, 2015. (Chamorro Dec ¶3.) As a practicing obstetrician at MMCR, Dr. Van Kirk has submitted numerous requests to perform postpartum tubal ligation contraceptive procedures many of which have been granted and many of which have

been denied. (Ex. 7, Declaration of Dr. Samuel Van Kirk ISO Ex Parte Application for TRO & OSC ¶ 17.) Based on this experience—and the lack of clarity as to how decisions are made by the committee—Dr. Van Kirk submits a modified version of MMCR's "Request for Sterilization Form," which, in addition to the information MMCR requests, notes that if the request is denied, he would appreciate an explanation from the review committee as to why it was denied. (Ex. 7, Declaration of Dr. Samuel Van Kirk ISO Ex Parte Application for TRO & OSC, ¶ 60.) This makes sense since, as a medical professional making medical decisions, Dr. Van Kirk wants to know whether, and what, specific medical reasons drove any decision to deny him permission to perform a tubal ligation procedure.

On September 18, 2015, Dr. Van Kirk received a denial with respect to Ms. Chamorro's request, stating that the request: "does not meet the requirement of Mercy's current sterilization policy or the Ethical and religious directives for Catholic Health Services." (Ex. 8, CHAMORRO 0000024.) MMCR did not provide any additional explanation of its denial. MMCR also did not identify a single, medical criteria that the committee considered or applied in making its decision. After receiving the denial, Ms. Chamorro called her insurance company to find out what her options were. (Chamorro Dec ¶ 9.) The insurance company informed her that there were two hospitals in her insurance plan where she could give birth and have her tubal ligation performed—the closest of which was 70 miles away. (Chamorro Dec ¶ 9.) If Ms. Chamorro had chosen to give birth at one of these hospitals, she would have had to do so alone—or pay for her husband and then 3-year old and 7-year old sons to stay at hotel—and she would have had to find a new obstetrician, as Dr. Van Kirk did not have admitting privileges at either of the other two hospitals. (Chamorro Dec ¶¶ 10-11.) And in order to switch doctors, Ms. Chamorro would have had to relocate for an even longer period of time in order to establish care as an obstetric patient. (Chamorro Dec ¶ 11.) As Ms. Chamorro provided the sole income for her family, she could not miss more time from work and therefore did not have any feasible alternative to giving birth at MMCR. (Chamorro Dec ¶¶ 11-12.)

When Respondent refused to permit Ms. Chamorro to obtain a tubal ligation while she was in the hospital giving birth, she lost, permanently, the opportunity to minimize the number of invasive procedures to which she might be subjected—with attendant increased medical risks, as postpartum tubals are more safe—with the end result that she has never received a tubal ligation. (Chamorro Dec ¶ 13.) As she testified: "the idea of recovery and undergoing mastitis twice and my second C-section with three kids, the idea of undergoing another invasive surgery after that changed my mind. I did not want to undergo and I do not want undergo an invasive surgery right now for the primary reason being tubal ligation." (Ex. 5, Chamorro Dep. 24:4-9). Because Ms. Chamorro was unable to obtain a postpartum tubal ligation at MMCR, she and her husband were forced to spend money on other less desirable and less effective forms of birth control. (Chamorro Dec ¶ 13.)

After a legal letter failed to change MMCR's position, Ms. Chamorro filed this action.

B. Dr. Van Kirk.

Ms. Chamorro's experience with MMCR's nonmedical decision making for tubal ligations lies in stark contrast to that of another of Dr. Van Kirk's patients, Rachel Miller. Like Ms. Chamorro, Ms. Miller was scheduled to deliver her second child via C-section at MMCR in 2015, and she had decided in consultation with Dr. Van Kirk that it made sense for her to undergo a postpartum tubal ligation at that time. Also, like Ms. Chamorro, MMCR initially denied Dr. Van Kirk's request using identical language: the request: "does not meet the requirement of Mercy's current sterilization policy or the Ethical and religious directives for Catholic Health Services." (Ex. 9, MMCR000551-553.) However, Dr. De Soto—the medical member of MMCR's tubal ligation review committee—has testified that after the ACLU wrote a letter to MMCR on Ms. Miller's behalf, he went looking for a "way we can avoid litigation in this whole thing." (Ex. 10, Transcript of James De Soto 6/21/2017 Deposition 40:9-10 ("De Soto Dep.").). As part of this effort, Dr. De Soto reviewed Ms. Miller's medical files and identified that she had been diagnosed with Chorioamnionitis in her first pregnancy. (Ex. 10, De Soto Dep. 39:23-40:23.) Although a diagnosis of Chorioamnionitis—a low risk, often preventable, and often non-reoccurring infection—in a previous pregnancy in no way

impacted Ms. Miller's current pregnancy or presented any risk to future pregnancies, and was not a present or serious medical condition that had to be alleviated, the tubal ligation review committee reversed field and permitted Dr. Van Kirk to perform Ms. Miller's tubal ligation. (Ex. 6, Declaration of Dr. Samuel Van Kirk ISO Pls' Opp. To Resp's Mot for J. on the Pleadings, ¶ 13.)

As Dr. Van Kirk—as well as Ms. Chamorro—experienced, MMCR's practice of denying tubal ligations for some patients, but permitting them for others (including those similarly situated medically), directly and arbitrarily interferes with the doctor-patient relationship. Dr. Van Kirk testified that he has never understood "the process" by which MMCR's tubal ligation review committee makes decisions. (Ex. 11, Transcript Samuel Van Kirk Deposition 57:6-20 ("Van Kirk Dep.").) Although MMCR's sterilization request forms purport to ask doctors for "medical indications," as a matter of sound medical practice, the only medical indication for a tubal ligation is a patient's desire to have one. (Jackson Dec. ¶ 5(c) & Ex. 1, ¶¶ 9, 61). Notably, the forms do not ask for any medical contraindications—or reasons a patient may not be able to undergo a tubal ligation. (Jackson Dec. ¶ 5(f) ("In general, no medical conditions absolutely restrict a person's eligibility for sterilization (with the exception of known allergy or hypersensitivity to any materials used to complete the sterilization method).").) Asked directly why he was supporting the Petitioners in this litigation when it would be "worse" for his patients if MMCR stopped allowing tubal ligations altogether, Dr. Van Kirk explained that he is "a physician trying to care of each individual patient" and that "yes," he considers this litigation worth pursuing, even if it results in an outcome in which MMCR does not allow any tubal ligations. (Ex. 11, Van Kirk Dep. 74:20-78:3).

C. Petitioner Physicians for Reproductive Health.

Ms. Chamorro is joined in this case by Physicians for Reproductive Health ("PRH"), a national nonprofit 501(c)(3) organization comprised of member physicians dedicated to comprehensive reproductive healthcare. (Declaration of Jodi Magee, ¶ 2 ("Magee Dec.").). "PRH works to unite the medical community and concerned supporters in improving access to comprehensive reproductive healthcare, including contraception and abortion, especially to

meet the health care needs to economically disadvantaged patients." (Magee Dec. ¶ 3.) To achieve this end, PRH works "to support doctors in making medical decisions based on standards of care and best practices." (Magee Dec. ¶ 4.) Starting from the premise that "women should be the moral decision-makers for their healthcare," it is the position of PRH that "doctors and patients should be making that decision based on this individual patient's needs and care and health." (Magee Dec. ¶ 4.)

Yet PRH members who have admitting privileges at Respondent Catholic hospitals in California (just like Dr. Van Kirk) have been both permitted to perform tubal ligations for some patients and denied authorization to perform tubal ligations on other patients. (Magee Dec. ¶ 5.) And, also like Dr. Van Kirk, PRH doctors do not understand why some tubal ligations are permitted and why some are denied. (Magee Dec. ¶ 5.) As Dr. Dawson—a PRH member who performs C-sections at Mercy San Juan Medical Center—attested, "[d]espite Mercy San Juan Medical Center's sterilization ban, I have been permitted to perform some tubal ligations at the time of cesarean. . . . I am not aware of the criteria used by Respondent to determine whether to grant or deny a tubal ligation request." (Ex. 12, Declaration of Dr. Lindsey Dawson ISO Petitioners' Opp to Resp's Mot. for Prot. Order, ¶¶ 7-12.)

"PRH agrees with the purpose of Health and Safety Code Section 1258, which is to make sterilization a decision between a patient and her physician, free of arbitrary standards and obstacles imposed by hospitals and clinics." (Magee Dec. ¶ 6.) Fundamentally, PRH is a Petitioner in this case on behalf of its member doctors "because we believe religious interference in medical care is unwarranted. We believe that the Dignity Health system throughout California interferes in the decision making process between a woman and her physician on whether to obtain a tubal ligation." (Magee Dec. ¶ 6.)

D. Tubal Ligations Are Only, and Always, Performed for Contraceptive Purposes.

At the hearing, Petitioners will introduce evidence establishing that tubal ligations are only, and always, performed for contraceptive purposes. This evidence will come through the expert testimony of Dr. Jackson, as well as through medical literature, which uniformly supports Dr. Jackson's testimony.

1. Dr. Jackson's Expert Testimony Regarding Tubal Ligations and Their Contraceptive Purpose.

As Dr. Jackson testified early in a report, and will testify live at the hearing, tubal ligation, familiarly known as getting one's tubes tied, is safe, effective, and one of the most common methods of birth control. (Jackson Dec ¶¶5(a),(d),(e) & Ex. 1 ¶ 14.) Tubal ligations are always contraceptive in nature and purpose, as the only reason to receive one is to prevent future pregnancy. (Jackson Dec ¶¶5(a),(d),(e) & Ex. 1 ¶¶ 9, 32 ("Medically, the only possible purpose of a tubal ligation is contraceptive. Contraceptive means a method or device that serves to prevent pregnancy.").) The tubal ligation procedure directly and precisely operates to close off the fallopian tubes, which then prevents the egg—released from the patient's ovaries—from moving down the fallopian tube into the uterus, thereby preventing sperm from reaching the egg. (Jackson Dec Ex. 1 ¶ 16.) This is different from other procedures such as a hysterectomy, which are performed to treat current conditions or diseases such as cancer, but which incidentally result in sterilization. (Jackson Dec Ex. 1 ¶ 53.)

Further, Dr. Jackson has testified and will testify that patients who request tubal ligation have different, personal motivations for wanting this form of permanent contraception. (Jackson Dec Ex. 1 ¶ 33.) But regardless of a patient's personal motivation for requesting a tubal ligation, "the only medical purpose of a tubal ligation is inherently contraceptive, i.e., complete sterilization." (Jackson Dec Ex. 1 ¶ 36.) Similarly, this Court has already rejected Respondent's arguments that its Catholic hospitals' purpose in permitting some tubal ligations are not contraceptive. (Order Denying Resp's Mot. for Summ. J. 2:10-14 ("The proper construction of section 1258 requires that the determination of whether an operation is 'for contraceptive purposes' is made by looking at all the facts and circumstances pertaining to the operation, and not solely on the viewpoint of either the health facility or the patient or her physician, based on an objective standard grounded in medical literature on sterilization operations.").)

2. The Medical Literature Uniformly Supports Dr. Jackson's Testimony that Tubal Ligations Are Performed for Contraceptive Purposes.

As set forth in her declaration, Dr. Jackson has surveyed medical literature, which uniformly recognizes tubal ligation as a form of permanent contraception. A medical textbook describes tubal ligations as "a relatively easy and direct method of accomplishing surgical sterilization." (Jackson Dec ¶ 5(a) & Ex. 3.) The California Department of Healthcare Services describes tubal ligation as "a surgery that prevents pregnancy. It closes the tubes that carry eggs from the ovaries to the uterus. Since the eggs have nowhere to go, your body will just absorb them. If sperm can't get to an egg, you can't get pregnant. Tubal Ligation is meant to be a permanent form of birth control." (Jackson Dec ¶ 5(f) & Ex. 7.) And the federal Centers for Disease Control state "[t]ubal sterilization for women and vasectomy for men are permanent, safe, and highly effective methods of contraception." (Jackson Dec ¶ 5(e) & Ex. 6.)

Medical journals and other clinical resources similarly describe tubal ligation as inherently contraceptive. (Jackson Dec ¶ 5 & Exs. 3-5, 8-11.) For example, John Hopkins describes tubal ligation as "[t]ubal ligation is surgical procedure to prevent pregnancy. It has commonly been called 'getting your tubes tied.' It is also called a female sterilization. Tubal ligation is permanent birth control." (Jackson Dec ¶ 5(h) & Ex. 9.)

E. Performing Postpartum Tubal Ligations Immediately Following Delivery Is the Medical Standard of Care.

For pregnant women who decide to receive a tubal ligation after they give birth, the medical standard of care is to receive the procedure immediately following delivery. (Jackson Dec ¶ 5(i) & Ex. 10, Ex. 1 ¶ 31.) This is known as a postpartum tubal ligation, which is one of the most effective forms of female sterilization. (Jackson Dec ¶ 5(i) & Ex. 10, Ex. 1 ¶¶ 21, 31.) At the time of delivery, the uterus is enlarged, allowing easier access to the fallopian tubes. (Jackson Dec Ex. 1 ¶ 20.) In addition, for women giving birth via C-section, the tubal ligation can be done quickly—in just a few minutes—with no additional incision to access the abdomen and no need for additional anesthesia. (Jackson Dec Ex. 1 ¶ 22.) By contrast, if a woman does not receive a postpartum tubal ligation at the time of delivery, she must wait

until her uterus has returned to its normal size before having the procedure, which can take approximately six weeks. (Jackson Dec Ex. 1 ¶ 24.) These later tubal ligations, known as interval tubal ligations, are laparoscopic procedures, which are both less safe than postpartum tubal ligations, because of the risks associated with the laparoscopic surgery and the additional anesthesia, and less effective. (Jackson Dec Ex. 1 ¶ 25.)

In addition to the benefits of not having to incur the risks associated with a second procedure, postpartum tubal ligation has the practical advantage of ensuring that a woman receives her desired form of contraception before she leaves the hospital. (Jackson Dec Ex. 1 ¶ 23.) Some women may find it difficult to overcome the logistical hurdles involved in obtaining a tubal ligation following discharge from the hospital while also caring for a newborn. (Jackson Dec Ex. 1 ¶ 26.) An interval tubal ligation would require additional time off work for one to two pre-operative appointments, the surgery itself, and a post-operative appointment. (Jackson Dec Ex. 1 ¶ 26.) Indeed, women who have been unable to receive postpartum tubal ligations are at a higher risk for unintended pregnancy, and unintended pregnancy is associated with poorer maternal/fetal outcomes than planned pregnancies, including low birth weight, infant mortality, and maternal mortality. (Jackson Dec Ex. 1 ¶ 27.) Approximately half of all unintended pregnancies end in abortion. (Jackson Dec Ex. 1 ¶ 27.). And pregnancies spaced too closely together can have adverse effects on the woman and the baby. (Jackson Dec Ex. 1 ¶ 27.)

All of these benefits taken together have led the leading professional society of obstetricians and gynecologists, the American Congress of Obstetricians and Gynecologists, to recommend immediate postpartum tubal ligation for patients who want one, classifying it as an "urgent surgical procedure": "Given the consequences of a missed procedure and the limited time frame in which it may be performed, postpartum sterilization should be considered an urgent surgical procedure." (Jackson Dec ¶ 59(i) & Ex. 10.)

F. Tubal Ligation Practice at Respondent's Catholic hospitals.

Respondent admits that its Catholic hospitals permit doctors to perform some postpartum tubal ligations. (Declaration of Todd Strumwasser, M.D., ¶ 25 ("Strumwasser

Dec"); Declaration of James De Soto M.D., ¶ 20 ("De Soto Dec").) Respondent also admits that the decision whether to permit a patient to undergo a tubal ligation turns on its Catholic hospitals' individualized (Petitioners say, and will show, arbitrary) exceptions to religious directives—namely, the Ethical and Religious Directives for Catholic Healthcare Services promulgated by the U.S. Conference of Catholic Bishops (the "ERDs"). (O'Keefe Dec. ¶ 24; Ex. 13; Deposition of Laurence Shields, MD, ("Shields Dep") 99:3-6 and Ex. 4 to Deposition.)

1. The Tubal Ligation Review Committees.

Respondent's Catholic hospitals utilize a nearly identical process for deciding whether to permit patients to undergo tubal ligations. (Ex. 14, MMCR000167; MMCR000554; MMCR000565; MMCR000566; MMCR000568; MMCR000570; Ex. 15, Transcript of Sister Brenda O'Keeffe PMK Deposition 17:9–23; 18:9–14; 18:21–19:6 ("O'Keeffe PMK Tr."); Ex. 16, Respondent's Bishop Soto Decl. ISO Respondent's Mot. for Summ. J. 5; Ex. 17, O'Keeffe Vol. 1 24:19–26:8.) While not formalized in any written policies, the practice at all of the hospitals is to require physicians seeking permission to perform a postpartum tubal ligation on any particular patient to submit a form provided by the hospitals to a standing review committee. (Ex. 18, Transcript of Michael Cox PMK Deposition 19:11–20:10 ("Cox PMK Tr."); Ex. 17, O'Keeffe Vol. 1 Tr. 28:20–29:24). The tubal ligation review committee for each set of hospitals—the North State hospitals and the Sacramento hospitals—comprises at least one "medical" member and one "theological" member. (Ex. 17, O'Keeffe Vol. 1 Tr. 18:19–19:23; Ex. 18, Cox PMK Tr. 20:8–10). The tubal ligation review committees review each individual doctor request and make a case-by-case determination based on information the doctor has submitted about the patient as to whether to permit the doctor to perform the tubal ligation on that patient. (Ex. 17, O'Keeffe Vol. 1 Tr. 32:15–33:11).

For both the North State and Sacramento hospitals, the form that doctors must fill out seeks the following information: (i) the patient's name; (ii) "gravida," or the number of times the patient has been pregnant; (iii) "para," or number of times the patient's pregnancies have progressed to the point of fetal viability; (iv) number of previous C-sections; (v) "Medical

Indication"; (vi) age; and (vii) insurance information. (Ex. 19, MMCR000569; MMCR000574; Ex. 3, Reyes PMK 16:2–19:1; Ex. 18, Cox PMK Tr. 27:3–29:12). The information requested includes the two key data points underpinning the 120 Rule that concerned the Legislature in enacting Section 1258 (as discussed below), namely, age and number of pregnancies. The Sacramento hospitals request the patient's medical records, while the North State hospitals do not even bother to do that. (Ex. 19, MMCR000569; MMCR000574; Ex. 18, Cox PMK Tr. 29:20–30:8). The forms do not specify what "medical indication" means or what medical information might be considered. (Ex. 19, MMCR000569; MMCR000574). Nor do the doctors receive any information that specifies any "medical indication" that led to the grant or the denial. (Ex. 11, Van Kirk Dep. Ex. 11, 57:6-20.)

The tubal ligation review committees do not have formal names, and there are no hospital policies documenting the role of the committees or precisely what criteria they consider in their decisions. (Ex. 17, O'Keeffe Vol. 1 Tr. 19:24–20:4; 20:15–21; 21:6–10; 37:3–9; 38:15–23; Ex. 3, Reyes PMK Tr. 25:21–26:1). The tubal ligation review committee for the North State hospitals makes its decisions on the basis of the one-page form filled out by the doctor, and the tubal ligation review committee for the Sacramento hospitals makes its decisions in approximately ten minutes. (Ex. 17, O'Keeffe Vol. 1 Tr. 35:5–7. Ex. 3, Reyes PMK Tr. 28:10–19). The committees only review requests for tubal ligation.[1] (Ex. 18, Cox PMK Tr. 21:3–9; 23:16–20; 55:19–56:7; 57:19–58:3; Ex. 20, Transcript of James De Soto PMK Deposition 47:20–24 ("De Soto PMK Tr."); 16:23–17–2; Ex. 10, De Soto Tr. 26:6–8; Ex. 3, Reyes PMK Tr. 37:11–15; 37:21–24; Ex. 17, O'Keeffe Vol. 1 Tr. 19:12–14; 24:1–16; Ex. 14, MMCR000554.). Indeed, tubal ligations are the only operations for which Respondent imposes any preapproval requirement by any standing review committee. (Ex. 3, Reyes PMK Tr. 37:21–24; Ex. 17, O'Keeffe Vol. 1 Tr. 24:1–16; Ex. 10, De Soto Tr. 26:6–8.).

[1] It is Petitioners' understanding that the Catholic hospitals do not permit any other form of tubal ligation other than postpartum tubal ligation immediately following C-sections.

The doctor members of the tubal ligation review committees at both the North State and Sacramento hospitals, who would be the only members qualified to make decisions based on medical criteria, nonetheless have testified in this proceeding that ultimately the "theological" member of the committee makes the decision—not the doctor. As Dr. De Soto, the doctor member of the tubal ligation review committee at the North State hospitals, testified:

> Q. · And then who looks at those factors and determines whether to deny or approve the request?
>
> A. · It's ultimately a committee decision, but, ultimately, it's the mission services person who can make the decision.
>
> Q. · Is that a medical decision?
>
> A. · No, the medical decisions are all made by the doctors.

(Ex. 20, De Soto PMK Tr. 25:8-15). Similarly, Dr. Reyes, the doctor member of the tubal ligation review committee at the Sacramento hospitals, testified: "ultimately, the VP of Mission Integration [Mr. Cox, who is not a doctor] has the decision." (Ex. 3, Reyes PMK 31:10–13). These testimonial exchanges are clear admissions by Respondent's own witnesses that the decision whether to permit a tubal ligation in Respondent's Catholic hospitals is not a medical decision based on medical criteria.

With respect to the rationale for granting or denying individual doctor requests for postpartum tubal ligations, Sister O'Keeffe, the theological member of the North State hospitals' tubal ligation review committee, testified that: "above all," the decision comes down to "is this what is right for this patient and this family at this moment in time." (Ex. 17, O'Keeffe Vol. 1 Tr. 37:3–38:5) (*see also* O'Keeffe Dec., ¶ 24 ("Ultimately, my responsibility to ensure that the Committee's decision is within the ERDs and Catholic moral teaching and right for a particular patient."). Indeed, Sister O'Keeffe, a non-physician, admits that she alone has made decisions, without input from Dr. De Soto and in Dr. De Soto's absence, whether to grant a physician authorization to perform a tubal ligation. (Ex. 21, O'Keeffe Vol. 2 Tr. 130:16–18; 132:21–25). Mr. Cox, the theological member of Sacramento hospitals' tubal ligation review committee, testified that he looks to "the moral and ethical theological aspects of each case."

(Ex. 18, Cox PMK Tr. 35:2–21; 34:16–17; 35:2–6).[2] Thus, both the doctors and theological members of the tubal ligation review committees concede they are not making medical decisions.

2. The Records of the Tubal Ligation Review Committees Further Demonstrate That Their Decisions Are Not Medical.

Beyond the testimony of the tubal ligation review committee members themselves that the committee decisions are not medical, the documentary evidence made available to Petitioners demonstrates that the committees are not making medical decisions, much less decisions about the "medical necessity" or "medical risks" of certain tubal ligations. Based on Dr. Jackson's expertise, and her review of the deposition and documentary evidence in the case, Dr. Jackson will testify at the writ hearing that the decisions by the Respondent hospitals to grant or deny doctors' requests to perform tubal ligations are not medical nor are they based on "medical necessity." (Jackson Decl., Ex. 1 at ¶ 49).

As Dr. Jackson explains and the medical literature confirms: "The only reason to perform a postpartum tubal ligation is the patient's desire to have one." ((Jackson Decl., Ex. 1 at ¶¶ 9, 61). Given that postpartum tubal ligations are safe, effective, and common, and they take only a few minutes for a doctor to perform immediately following a C-section, the accepted medical practice is that the treating doctor is the sole decisionmaker when evaluating whether the doctor should perform a postpartum tubal ligation on a patient who seeks one. (Jackson Decl., Ex. 1 at ¶ 57). And Dr. Jackson further explains: "there are only limited circumstances in which a doctor is unable to perform a postpartum tubal ligation immediately following a C-Section." (Jackson Decl., Ex. 1 at ¶ 57). The medical information that the tubal ligation review committees collect from doctors, however, is not limited to the circumstances in which a doctor would be unable to perform a tubal. (Jackson Decl., Ex. 1 at ¶¶ 62–71).

[2] The Sacramento hospitals also consider patients' insurance, such that if a patient's insurance covers her delivery at a regional, non-Catholic hospital, the Sacramento hospitals would typically deny the doctor's request to perform a postpartum tubal ligation. (Ex. 19, MMCR000569; MMCR000574; Ex. 18, Cox PMK Tr. 30:18–31:5; 73:19–75:18).

Aside from the fact that it is not medically appropriate to assess the risk to the patient of carrying a future pregnancy in determining whether to perform a tubal ligation, Dr. Jackson will testify that the medical information that the tubal ligation review committees consider "do not from a medical perspective accurately assess the risk to the patient of carrying a future pregnancy." (Jackson Dec Exs. 1 ¶ 64.) All pregnancies are risky, and "[t]here is no prediction model available for doctors to assess the riskiness to a patient of carrying a future pregnancy." (Jackson Dec Exs. 1 ¶ 65.) Moreover, information that the tubal ligation review committees give great weight to—such as the number of previous C-sections—is not the kind of information that would indicate a higher level of risk in carrying a future pregnancy. (Jackson Dec Exs. 1 ¶ 68.) And information that the tubal ligation review committees do not seek out—such as heart disease—is indicative of a higher level of risk in carrying a future pregnancy. (Jackson Dec Exs. 1 ¶ 68.)

The inconsistency in the way in which the tubal ligation review committees take into account medical information about a patient is further demonstrated by comparing specific instances in which patients whose doctors submitted identical medical information were treated differently in terms of their ability to obtain tubal ligations. For example, the following patients all sought tubal ligations at the Sacramento hospitals:

- Patient A had had three previous C-sections and a body mass index ("BMI") of 40, indicating obesity. The tubal ligation review committee granted her request. (Ex. 3, Reyes PMK Tr., at Ex. 2.)
- Patient B had had three previous C-Sections, and was obese. The tubal ligation review committee initially denied her request, and then approved it (on the basis of the same notations about the number of C-sections and the obesity). (Ex. 3, Reyes PMK Tr., at Ex. 3.)
- Patient C had had two previous C-sections and a BMI of almost 38, indicating obesity. The tubal ligation review committee granted her request. (Ex. 3, Reyes PMK Tr., at Ex. 4.)
- Patient D's request had had three previous C-sections, and a BMI of over 55, indicating morbid obesity. The tubal ligation review committee denied her request. (Ex. 3, Reyes PMK Tr., at Ex. 5.)

The doctor who sits on the tubal ligation review committee at the Sacramento hospitals could not explain the inconsistency of the grants and denials to tubal ligation requests for these

patients, saying only for Patients B and Patient D that from the doctor's perspective, the patients should have been able to undergo tubal ligations. (Ex. 3, Reyes PMK Tr., 45:19–46:6; 49:16–22; 52:13–22; 51:6–20; 54:9–19).

III. ARGUMENT

A. Respondent's Catholic Hospitals Violate Health and Safety Code Section 1258.

This hearing will address the factual issues bearing on Respondent's repeated and continuing violations of Health and Safety Code Section 1258.

1. Respondent's Catholic Hospitals Are Subject to California's Hospital Licensing Requirements, Including Health and Safety Code Section 1258.

Respondent's Catholic hospitals—like all other health facilities licensed in the State of California—are subject to range of licensing provisions, as well as other state regulatory regimes. Although Respondent's Catholic hospitals may have had a long affiliation with the Catholic Church, they are nonetheless health care facilities, and thus are required to operate within the legal structures imposed on all California health facilities. In fact, Respondent is the largest hospital provider in California and the fifth largest health system in the nation. (Ex. 23, Printout of the webpage, https://www.dignityhealth.org/about-us).

Health and Safety Code Section 1258 ("Section 1258" or the "Statute") provides in full:

> No health facility which permits sterilization operations for contraceptive purposes to be performed therein, nor the medical staff of such health facility, shall require the individual upon whom such a sterilization operation is to be performed to meet any special nonmedical qualifications, which are not imposed on individuals seeking other types of operations in the health facility. Such prohibited nonmedical qualifications shall include, but not be limited to, age, marital status, and number of natural children.
>
> Nothing in this section shall prohibit requirements relating to the physical or mental condition of the individual or affect the right of the attending physician to counsel or advise his patient as to whether or not sterilization is appropriate.

Health & Safety Code, § 1258. As described in its legislative history, the "primary" and "central" issues the Legislature intended to address in enacting Section 1258 were "whether or not an individual having attained the age of majority has the right to obtain a sterilization if he

so desires without encountering obstacles from the hospital or clinic . . . " and "whether sterilization is a matter between the individual and his physician or whether a hospital or clinic has a right to impose an arbitrary standard of its own." (Ex. 1, California Assembly Committee on Health Analysis of Senate Bill No. 1358 at 27-28 ("Legislative History for Health and Safety Code Section 1258")).

Prior to the passage of Section 1258, it was common for hospitals to determine when a patient could receive "voluntary sterilization" by imposing nonmedically based obstacles such as (but not limited to) the "120 Rule," a method under which the patient's age was multiplied by the number of children the patient already had: if that number equaled 120 or more, the patient was permitted to undergo the procedure. As Rebecca M. Kluchin observes in *Fit to Be Tied: Sterilization and Reproductive Rights in America 1950-1980,* 21-22 (New Brunswick, Rutgers University Press 2009), the 120 Rule was instituted at a time when physicians debated what "constituted a compelling reason for sterilization among generally healthy patients." *Id.* Journal articles at the time argued that women "who had undergone three or more cesarean sections" in addition to "women diagnosed with multiparity (or many children)" should be eligible for tubal ligations. *Id.* And Kluchin notes that, generally, [a]ge/parity restrictions functioned as a form of social control, as a means of pushing the "'fit' women . . . into the home and into their 'rightful' roles as full-time mothers and wives." *Id.*

This history is also reflected in the medical literature, which recognizes that: "Although sterilization is among the most straightforward surgical procedures an obstetrician–gynecologist performs, it is enormously complex when considered from a historical, sociological, or ethical perspective. Sterilization practices have embodied a problematic tension, in which some women who desired fertility were sterilized without their knowledge or consent, and other women who wanted sterilization to limit their family size lacked access to it. An ethical approach to the provision of sterilization must, therefore, promote access for women who wish to use sterilization as a method of contraception, but at the same time safeguard against coercive or otherwise unjust uses." (Jackson Dec. ¶ 5(j) (citing American

College of Obstetricians and Gynecologists, *Sterilization of Women: Ethical Issues and Considerations*, Committee Opinion No. 695 (Apr. 2017) (Reaffirmed 2020).)

While primarily directed towards ensuring that patients could access sterilization without barriers imposed by hospitals, Section 1258 was careful not to require all hospitals to provide voluntary sterilizations. As explained in the bill analysis, "[t]he bill is limited to institutions that permit sterilizations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (Ex. 1, Legislative History for Health and Safety Code Section 1258 at 27). Thus, in enacting Section 1258, the Legislature struck a balance: it required equality of access to sterilization procedures in institutions that provide any such procedures, but it did not require all institutions to provide them. "The primary issue involved is whether or not an individual having attained the age of majority has the right to obtain a sterilization if he so desires without encountering obstacles from the hospital or clinic *which performs such operations*." (Ex. 1, Legislative History for Health and Safety Code Section 1258 at 28).

2. Respondent's Catholic Hospitals Permit Sterilization Operations for Contraceptive Purposes To Be Performed in their Hospitals.

Respondent's Catholic hospitals are "permit[ing] sterilization operations for contraceptive purposes to be performed" in their hospitals. Respondent does not dispute that tubal ligations are performed at its Catholic hospitals, and there can also be no serious dispute as to whether tubal ligations are always performed for contraceptive purposes. As shown above in Section II. E above, Dr. Jackson will so testify at the hearing, and will also demonstrate that the medical literature is clear on this point: postpartum tubal ligation is always performed to provide a method of permanent contraception to the patient. (Jackson Dec ¶ 5.) Medical textbooks describe tubal ligation as a "method of accomplishing surgical sterilization." (Jackson Dec ¶ 5(a).) And as described in the American Journal of Obstetric Gynecology:

> By 1988 tubal sterilization had become the most prevalent method of contraception among married and formerly married women in the United States, and by 1990 more U.S. women had undergone

> tubal sterilization than were using oral contraceptives or any other single method of contraception.

(Jackson Dec. ¶ 5(b).) Even the federal Centers for Disease Control describes tubal ligation as follows: "Tubal sterilization for women and vasectomy for men are permanent, safe, and highly effective methods of contraception." (Jackson Dec. ¶ 5(e).)

By contrast to procedures like hysterectomies (the removal of the uterus), which are typically performed with the medical purpose of treating diseases such as cancer and only incidentally have a sterilizing effect, tubal ligations are always performed for the purpose of preventing future pregnancy, i.e., for contraceptive purposes. Respondent claims that it is performing tubal ligations where "there is an increased risk of maternal morbidity and mortality" should the patient become pregnant. (De Soto Dec. ¶ 12.) Even if that were accurate—which Dr. Jackson will testify at the hearing it is not (Jackson Dec., Ex. 1 ¶ 64)—it would still demonstrate that the factual purpose for which Respondent's Catholic hospitals permit tubal ligation is contraceptive in that tubal ligation prevents the purported risk of maternal morbidity and mortality by *preventing future pregnancy*.

Indeed, the design of the tubal ligation review committees indicates that Respondent's Catholic hospitals well understand the difference between therapeutic (i.e., "of or relating to the treatment of disease or disorders by remedial agents or method," Merriam-Webster Dictionary, Online Ed. (last visited Oct. 6, 2020)) and voluntary sterilizations (as characterized in the legislative history of Section 1258). The tubal ligation review committees exist only to review requests for tubal ligations—or voluntary sterilizations; other procedures with a sterilizing effect—therapeutic sterilizations, such as hysterectomies—are not reviewed by a committee, even though they are regularly performed in Respondent's Catholic hospitals.

3. Respondent's Catholic Hospitals Require Individuals Upon Whom Sterilization Operations for Contraceptive Purposes Are To Be Performed To Meet Special Nonmedical Qualifications Not Imposed on Individuals Seeking Other Types of Operations.

Respondent's Catholic hospitals further "require the individual upon whom such a sterilization operation is to be performed to meet . . . special nonmedical qualifications, which

are not imposed on individuals seeking other types of operations in the health facility." As described above, Respondent's Catholic hospitals each have a special tubal ligation review committee that exists solely to decide whether individual requests for tubal ligation accord with the hospital's interpretation of the religious directives and its related sterilization policy. For both the North State and Sacramento hospitals, the sterilization policy was initially formulated with and approved by the regional Catholic Bishop—Bishop Soto. (Ex. 16, Bishop Soto Dec. ¶ 5; O'Keeffe Dec., ¶ 13.) The procedure by which both sets of hospitals then claim they implemented the policy was to set up the tubal ligation review committees. (Ex. 18, Cox PMK Tr. 19:11–20:10; Ex. 17, O'Keeffe Vol. 1 Tr. 28:20–29:24.) Doctors at the North State and Sacramento hospitals are informed that before performing a tubal ligation, they need to seek permission from the tubal ligation review committee. (O'Keefe Dec. ¶ 18.)

Said another way, what the tubal ligation review committees require is that doctors who have *already determined that a procedure is medically indicated, and as to which there are no medical contraindications counseling against the procedure*, must still seek permission to perform the procedure from a religious figure who will determine whether the procedure is morally acceptable to the hospital, thereby substituting the hospital's religious morality for the determination of the doctor and the patient. In their case-by-case assessment of whether individual request for tubal ligation are morally acceptable to Respondent's Catholic hospitals, the tubal ligation review committees impose inherently nonmedical, religious qualifications on patients seeking tubal ligation. And when the North State tubal ligation review committee concludes that a request for tubal ligation is not morally acceptable, they send letters to the patients seeking the tubal ligation, informing them that their particular request for a tubal ligation does not meet the requirements of the hospital's religious directives. (Ex. 24, Denial Letter, MMCR001086).

a) The Very Existence of The Committees for Only Tubal Ligations Is Itself a Prohibited "Special Nonmedical Qualification."

The very existence of the tubal ligation review committees is a "special nonmedical qualification" imposed on the inherently contraceptive tubal ligations. There is no dispute of

fact that the tubal ligation review committee procedure is imposed on patients seeking tubal ligations, and that no similar regular committee review procedure is imposed on patients seeking any other operation or procedure performed at Respondent's hospitals. (Ex. 3, Reyes PMK Tr. 37:21-24; Ex. 17, O'Keeffe Vol. 1 Tr. 24:1–16; Ex. 10, De Soto Tr. 26:6–8.) Indeed, the review committee procedure is not imposed on patients *seeking other types of sterilization operations*—such as hysterectomies. Thus, the fact that Respondent's Catholic hospitals have instituted tubal ligation review committees that decide the moral acceptability of each request for tubal ligation and only tubal ligation establishes on its own that Respondent has imposed "special nonmedical qualifications" on patients seeking sterilization operations for contraceptive purposes that are "not imposed on individuals seeking other types of operations in the health facility" in violation of Section 1258.

b) The Committees Impose Additional, Expressly Prohibited "Special Nonmedical Qualifications" on Tubal Ligations.

Beyond the existence of the tubal ligation review committees, the criteria that the committees take into consideration in permitting some patients to undergo postpartum tubal ligations, and rejecting other applications, is also nonmedical, and thus by definition a prohibited "special nonmedical qualification." The very nature of the forms that doctors are required to submit to the committees establish this fact: they prominently seek information about patients' age and number of live births. (Ex. 19, MMCR000569; MMCR000574.) Given the history of using a patient's age and number of children to exclude them from accessing tubal ligation via the 120 Rule, Section 1258 expressly recognizes as "prohibited nonmedical qualifications" a patient's "age, marital status, and number of natural children."

Although Respondent's witnesses now claim that the tubal ligation review committees are looking for medical information that would allow them to assess the risk to the patient of carrying a future pregnancy—an assessment that is neither medically appropriate nor actually performed by the committees when they assess whether to permit a tubal ligation, as discussed below—the forms do not ask for that medical information, and doctors practicing at

the hospitals are not trained or even informed by the hospitals that they should provide that information. (Ex. 11, Van Kirk Dep. 57:6-20; Magee Dec. ¶ 5.)

In addition, as Dr. Jackson will testify based on her review of the tubal ligation request forms, requests to perform tubal ligations are more likely to be granted for older patients at Respondent's Catholic hospitals. (Jackson Dec Ex. 1 ¶ 70.)

c) Consideration of Insurance Is Another "Special Nonmedical Qualification" Imposed on Tubal Ligations.

As further evidence that the decision-making process of the tubal ligation review committees are nonmedical, the Sacramento hospitals collect information about whether patients' insurance would cover their delivery at another non-Catholic hospital, and the tubal ligation review committee has refused permission for at least one tubal ligation on that ground. (Ex. 19, MMCR000569; MMCR000574; Ex. 18, Cox PMK Tr. 30:18–31:5; 73:19–75:18.) Denying a patient a tubal ligation based not on her lack of ability to pay, but instead on her ability to have her delivery and therefore postpartum tubal ligation *at another hospital* is, in addition to the religious criteria being imposed, inherently nonmedical. As with the tubal ligation review committees themselves, there is no other operation at the Sacramento hospitals that would be denied based on a patient's insurance allowing the operation to be performed at another hospital. (Ex. 18, Cox PMK Tr. 64:22–65:2.)

4. Section 1258 Does Not Permit a Pseudo-Medical Approach To Determine When a Tubal Ligation Should Be Permitted.

Respondent contends that even though its Catholic hospitals' tubal ligation review committees are designed to apply the inherently nonmedical religious directives to the individual requests of patients seeking tubal ligation, the fact that the forms inquire into some medical information about the patients somehow converts the religious nature of the committees into a medical decision-making process in which the committees are making decisions about the "medical necessity" of performing tubal ligations on patients. (O'Keeffe Dec. ¶ 25.) The committees are doing no such thing.

First, none of the decisions being made by the tubal ligation review committees can truly be medical, because doctors do not make the ultimate decision. As the doctor members of the North State and Sacramento tubal ligation review committees testified, the theological members of the committees, Sister O'Keeffe and Mr. Cox—neither of whom are doctors—are the final decisionmakers for the committees. (Ex. 20, De Soto PMK Tr. 25:8–15; Ex. 18, Cox PMK Tr. 35:2–21; 34:16–17;35:2–6; Ex. 3, Reyes PMK Tr. 31:10–13). That alone proves the nonmedical nature of the review committees' decisions. If the hospitals were engaged in simply granting medical exceptions to an across-the-board policy to deny tubal ligations, or were determining whether the patient was physically or mentally capable of undergoing a tubal ligation, then doctors would necessarily make the determination—not nuns or other religious figures.

Second, the "medical" information that the tubal ligation review committees take into consideration is not the kind of information a doctor would need in order to determine whether to perform a tubal ligation. The only medical indication *for* a tubal ligation is the patient's desire to have one—or her consent. (Jackson Dec ¶ 5(c), Ex. 4 & Ex. 1 ¶ 62.) There are only limited circumstances in which there is medical indication *against* a tubal ligation (or where a tubal ligation would be contraindicated). (Jackson Dec ¶ 5(e), Ex. 6 & Ex. 1 ¶ 62.) Prior to seeking to perform a tubal ligation, a doctor has already obtained the patient's informed consent, by separate requirement of state law. Cal. Code Regs. tit. 22, § 51305.1. Also, by seeking permission to perform a tubal ligation on a patient, the doctor has already determined that the tubal ligation is not medically contraindicated for the patient. (Jackson Dec Ex. 1 ¶ 62.) This accords with the legislative intent of Section 1258, which sought to return the decision about whether to perform a tubal ligation to the patient and her doctor. (Ex. 1, Legislative History for Health and Safety Code Section 1258 at 27-28.)

In fact, even though it is medically inappropriate for a doctor or hospital to make any medical assessment regarding tubal ligation other than assessing contraindications for the tubal ligation operation itself, Respondent's Catholic hospitals are not even looking at the "medical risk factors" they say they are looking at—those associated with "increased risk of

maternal morbidity and mortality." (De Soto Dec., ¶ 12.). As discussed above, the evidence demonstrates that the tubal ligation review committees are making religious decisions, not medical ones. As also discussed above, there is no medical reason to evaluate maternal morbidity/mortality from the prospect of a future pregnancy in determining whether to perform a tubal ligation, and there is no reliable way to do so. (Jackson Dec Ex. 1 ¶¶ 56-59.) Even beyond these facts, however, the tubal ligation review committees are not actually assessing the risk of maternal morbidity/mortality: they do not specifically seek information about the risk factors for maternal morbidity/mortality from a future pregnancy on their sterilization request forms, nor do they have policies stating that they are reviewing tubal ligation requests for such risk factors (Ex. 19, MMCR000569; MMCR000574; Ex. 17, O'Keeffe Vol. 1 Tr. 19:24–20:4; 20:15–21; 21:6–10; 37:3–9; 38:15–23; Ex. 3, Reyes PMK Tr. 25:21–26:1); they review tubal ligation requests in a cursory way, often without even examining the patient's underlying medical records (Ex. 17, O'Keeffe Vol. 1 Tr. 35:5–7; Ex. 3, Reyes PMK Tr. 28:10–19); and they appear consistently to grant tubal ligation requests on the basis of criteria that does not demonstrate "significant risk" of maternal morbidity/mortality, such as two C-sections, while denying tubal ligations requests for patients who do have such risk, such as patients who are morbidly obese (Jackson Dec Ex. 1 ¶ 68).

At bottom, based on the evidence, Petitioners will prove that (1) Respondent's Catholic hospitals perform tubal ligations for contraceptive purposes, and (2) they require patients to meet "special nonmedical qualifications" to undergo that procedure. Thus, Respondent's hospitals have repeatedly violated Section 1258, they continue to do so, and they will undoubtedly persist in violating the law in the future, absent the grant of Petitioners' requested relief in this writ proceeding.

B. Respondent Does Not Have a Religious Freedom Right To Violate California's Health Facility Licensing Requirements.

While Respondent began its defense of this case trying to argue that the tubal ligation review committees were basing their decisions on allowable medical criteria, and we expect to see that argument again in the writ hearing, the Court may note that Respondent's tactics

tacked sharply during the summary judgment process, as Respondent began to focus primarily on its purported right to flaunt Section 1258 on the grounds that it has a religious freedom right to perform some tubal ligations. Yet the religious affiliation of Respondent's Catholic hospitals does not allow them to engage in very practice—picking and choosing which particular patients are able to under tubal ligation—that Section 1258 was specifically enacted to prohibit.

Respondent's Catholic hospitals—like all other hospitals—are subject to numerous licensing provisions as health facilities licensed by the State of California. *See* Health and Safety Code, Div. 2 (Licensing Provisions), Ch. 2 (Health Facilities). Neither the federal nor the state constitution confer any right on the Catholic hospitals to refuse to comply with neutral and generally applicable state statutes based on religious doctrine, as this Court correctly concluded in denying Respondent's summary judgment motion. (Ex. 2, Order Denying Resp's Mot. for Summ. J. at 3:12-14 ("I also reject Dignity Health's arguments that the free exercise clauses of the United States and California Constitutions bar application of section 1258 to Dignity Health's Catholic hospitals.").)

1. Religious Institutions Do Not Have a Right To Violate Neutral and Generally Applicable State Laws such as Section 1258.

Both the U.S. Supreme Court and the California Supreme Court have recognized that neither religious institutions nor individuals have some unfettered religious freedom right to refuse to comply with neutral and generally applicable state laws.

With respect to the federal free exercise clause, the California Supreme Court has recognized that the governing law with respect to neutral and generally applicable state laws is *Employment Div. v. Smith*, 494 U.S. 872 (1990). The California Supreme Court has further recognized that *Smith* applies to both institutions and individuals, concluding: "[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 the law is contrary to the objector's religious beliefs." *North Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Super. Ct.*, 44 Cal. 4th 1145, 1155 (2008) (emphasis in original).

Similarly, the Court in *Catholic Charities* and *North Coast* found that neutral generally applicable state statutes also did not violate institutional or individual free exercise rights under the state constitution. *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 32 Cal. 4th 527, 561-62 (2004); *North Coast*, 44 Cal. 4th at 1158. Indeed, inasmuch as Respondent's refusal to comply with Section 1258 creates direct harm for third parties, the California Supreme Court has emphasized that no case has recognized a religious exemption to a neutral and generally applicable state law in such circumstances:

> We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.

Catholic Charities, 32 Cal. 4th at 565.

Likewise, in *Smith v. Fair Emp't & Hous. Comm'n*, the California Supreme Court found that a landlord could not refuse to rent to unmarried couples, in violation of the state's fair housing law, based on her religious beliefs, due in part to the "serious impact" on the rights of prospective tenants to have equal access to rental units and be free from discrimination. 12 Cal. 4th 1143, 1170 (1996); *see also United States v. Lee*, 455 U.S. 252, 261 (1982) (Government not required to exempt Amish employers from Social Security Tax, as such an exemption would harm non-Amish employees working for the employer and impose the Amish faith on them).

2. Section 1258 Survives Even Strict Scrutiny, as Equitable Access to Health care Is a Compelling State Interest.

Although the California Supreme Court has yet to determine "the appropriate standard of review for [religious exemption challenges] under the state Constitution's guarantee of free exercise of religion," *North Coast*, 44 Cal. 4th at 1158, and Petitioners reserve all rights with respect to the appropriate standard, this Court correctly concluded in denying Respondent's summary judgment motion that Section 1258 would survive even strict scrutiny. (Ex. 2, Order Denying Resp's Mot. for Summ. J. at 3:18-21.)

California courts have repeatedly held that protecting the public health through equitable access to health care is a compelling state interest in the context of state free exercise

claims. *North Coast*, 44 Cal. 4th at 1158; *Walker v. Super. Ct.*, 47 Cal.3d 112, 138-39 (1988) *reh'g denied, cert. denied* 491 U.S. 905 (1989) (holding California Constitution did not bar criminal prosecution of Christian Scientist who, because of religious beliefs, failed to obtain medical treatment for child, because of State's compelling interest in assuring provision of medical care to gravely ill children); *Brown v. Smith*, 24 Cal. App. 5th 1135, 1145-46 (2018) (holding that state laws requiring mandatory immunization for schoolchildren did not violate free exercise clause of state constitution; preventing the spread of disease was compelling interest). The same analysis applies to Section 1258, which is a neutral and generally applicable hospital licensing regulation that similarly seeks to ensure equal access to sterilization operations free of arbitrary, nonmedical obstacles.

Federal courts have also found that protecting equitable access to reproductive health services furthers a compelling public interest. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) ("State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (Congress has compelling interest in "prohibiting the use of force and threats of force and physical obstruction of facilities providing reproductive health services."). Section 1258 likewise seeks to further the compelling public interest in providing patients with access to the reproductive health service of sterilization, free from arbitrary, nonmedical conditions.

Indeed, the legislative history of Section 1258 demonstrates that the Legislature passed the law to prohibit *exactly* the kind of arbitrary, nonmedical standards that Respondent's Catholic Hospitals currently impose. (Ex. 1, Legislative History for Health and Safety Code Section 1258 at 28) (the "primary" and "central" issues the Legislature intended to address in enacting Section 1258 were "whether or not an individual having attained the age of majority has the right to obtain a sterilization if he so desires without encountering obstacles from the hospital or clinic . . . " and "whether sterilization is a matter between the individual and his physician or whether a hospital or clinic has a right to impose an arbitrary standard of its

own."). Permitting Respondent to impose exactly the same kind of arbitrary, nonmedical standards prohibited by Section 1258 would violate the very purpose of the law.

3. Statutes that Require "All or No" Access to Services Do Not Violate Religious Freedom Rights.

Enforcing Section 1258 against Respondents will not substantially burden their religious beliefs nor would such a burden be unconstitutional. As discussed above, there is nothing in Section 1258 that would prevent the Catholic hospitals from refusing entirely to provide tubal ligations. Respondent now argues, however, that it has a religious interest in selectively providing (for nonmedical reasons) tubal ligations.

Respondent's new characterization of its religious interest in performing some tubal ligations is not supported by the facts. As Respondent's expert testified, many Catholic hospitals do not perform any tubal ligations. (Ex. 13, Shields Dep., 150:19-22; and Ex. 4.) And based on the plain language of the Ethical and Religious Directives and the Catholic hospitals' sterilization policies that Respondent says govern here, ***all*** tubal ligations are prohibited. For example, Religious Directive No. 53 contains the following prohibition: "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. 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." (O'Keeffe Dec., ¶ 10 & Ex. 11) But by its nature, as reflected by both expert testimony and medical literature, tubal ligation does *not* cure or alleviate any present and serious pathology. (Jackson Dec., Ex. 1, ¶ 53.)

In addition, Respondent's Catholic hospitals have nearly identical "sterilization policies," which purport to reflect Religious Directive No. 53. In relevant part, these policies provide: "Procedures whose sole, *immediate* effect is to render the generative faculty incapable of procreation are contrary to Catholic moral teaching. Therefore, *tubal ligation or other procedures that induce sterility for the purpose of contraception are not acceptable in Catholic moral teaching even when performed with the intent of avoiding further medical problems associated with a*

future pregnancy." (Ex. 14, MMCR000167, MMCR000554, MMCR000565, MMCR000566, MMCR000568, MMCR000570 (emphasis added).)

Nonetheless, even if Respondent had demonstrated a religious interest in performing only some tubal ligations, that interest would not lead to the conclusion that Section 1258 was unconstitutional as applied to Respondent. The California Supreme Court has ruled on two separate occasions that when the selective provision of a good or service violates state law, entities that have religious objections to providing such good or service can offer "all or none." *North Coast*, 44 Cal. 4th at 1159; *Catholic Charities*, 32 Cal. 4th at 564-65. The Court in *North Coast* found that physicians who had religious objections to performing a reproductive procedure could avoid violating a state anti-discrimination statute by refusing to provide the procedure to anyone. *North Coast*, 44 Cal. 4th at 1159.

The Court in *Catholic Charities* specifically addressed the argument made by Respondent here—that providing "all or none" would equally violate its religious beliefs. In *Catholic Charities*, Catholic Charities argued that the core mandate of the state statute at issue in that case—that employers who provided prescription coverage to employees include coverage for contraceptives—put it in an untenable position: Catholic Charities claimed that providing contraception coverage violated its religious beliefs, but the alternative, not providing any prescription coverage to its employees, also violated its religious beliefs. 32 Cal.4th at 540. The Court nonetheless held that Catholic Charities did not have a federal or state free exercise right to violate the law, and that the law "does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church." *Id.* at 543. Here too, Section 1258 implicates the relationship between the state-licensed Catholic hospitals and their patients, most of whom as well do not belong to the Catholic Church.

By choosing to operate hospitals, Respondent must comply with the licensing requirements that apply to all health care facilities. As the Court in *Catholic Charities* stated:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of

> conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Catholic Charities, 32 Cal. 4th at 565, citing *United States v. Lee*, 455 U.S. 252, 261 (1982). Simply because Section 1258 may conflict with Respondent's religious beliefs does not "mean the Legislature has decided a religious question." *Catholic Charities*, 32 Cal. 4th at 543-43.

IV. CONCLUSION

By permitting some postpartum tubal ligations—sterilization operations that are always performed for contraceptive purposes—in its Catholic hospitals and requiring patients to meet special nonmedical qualifications to obtain those operations, Respondent is violating Health and Safety Code Section 1258. Section 1258 is a neutral and generally applicable statute that serves a narrowly tailored compelling public interest, and requiring Respondent to comply with the law would not violate Respondent's constitutional religious freedom rights. The Court should therefore grant the relief Petitioners seek and issue a writ of mandate requiring Respondent to comply with Section 1258.

DATED: October 7, 2020

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