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SUPERIOR COURT OF 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,

Respondent.

Case No. CGC 15-549626

Hon. Harold E. Kahn

RESPONDENT DIGNITY HEALTH'S POST-HEARING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

Hearing Date: September 20, 2021
Time: 2:00 p.m.
Dept.: 505

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I. INTRODUCTION

The Court should deny the Petition because the Catholic Hospitals' sterilization request and review process does not violate the plain text of Health and Safety Code section 1258 ("Section 1258"), a facially neutral statute that does not purport to infringe or burden First Amendment rights. Alternatively, even if the Court were to adopt Petitioners' interpretation of Section 1258, it would be subject to strict scrutiny because it is a licensing law, it is not neutral, and it is not generally applicable. But Petitioners have never seriously tried to meet the exacting strict scrutiny standard and cannot do so. Furthermore, the relief Petitioners seek is not in the public interest. For all of these reasons, the Court should deny the Petition in its entirety.

The procedural history and current posture of this case make it unique, and are relevant to understanding how the Court should approach Petitioners' remaining claim. The case began with Petitioner Rebecca Chamorro's individual claims alleging discrimination, and her request that the Court enter a preliminary injunction requiring Mercy Medical Center Redding ("MMCR") to allow her physician to perform a post-partum tubal ligation for contraceptive purposes. When that failed, and the Court dismissed the discrimination claims, what ultimately was left is Petitioners' mandamus claim that the Catholic Hospitals' sterilization request and review process violates Section 1258, a licensing statute that is administered by state government. That is a fundamentally different claim than what Petitioners started with, which has significant consequences for how the Court interprets Section 1258.

There are fundamental differences between the claim Petitioners wanted to bring and the claim they have. One difference, discussed more below, is that Section 1258 is not a discrimination or public accommodation law; rather, it is a licensing law, and all licensing laws that burden First Amendment rights are subject to strict scrutiny, period. Another difference is that Section 1258 provides no private right of action, as this Court ruled in 2016. Section 1258 is interpreted and enforced by the California Department of Public Health ("CDPH"). If CDPH finds a violation of Section 1258, then a hospital cannot be licensed. Health & Saf. Code § 1279. However, CDPH and its predecessors have neutrally interpreted and enforced Section 1258 for the nearly fifty years since it was passed by the Legislature, as evidenced by the fact

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that the Catholic Hospitals have been continuously licensed. Additionally, the Attorney General has imposed the Conditions of Consent, which require the Catholic Hospitals to continue to provide postpartum tubal ligations at the same level of service that they do today. He did so as a matter of state policy that is codified in regulations that require him to force hospitals to continue providing services as a condition to approving affiliation or merger transactions between non-profit hospital systems. Based upon their continuous licensure and the Conditions of Consent, it is undisputed that the State wants and has ordered the status quo to continue, and as far as the State is concerned, the Catholic Hospitals are lawfully operating and not violating Section 1258.

Petitioners remaining claim is not that the Catholic Hospitals violate Section 1258 as the State currently interprets the law, but that the State should interpret the law differently and in a manner under which the Catholic Hospitals could not obtain a license if they continued their sterilization review and request process. When a private party believes that the State interprets the law incorrectly when implementing a licensing scheme—whether its hospitals, attorneys, drivers, or other licensees—the proper claim is against the licensing authority not against the licensee. According to Petitioners, it was an abuse of CDPH's discretion to license the Catholic Hospitals because, allegedly, the Catholic Hospitals' sterilization request and review process violates Section 1258. But Petitioners did not sue the State as they should have (or even seek relevant discovery to their claim), but rather they sued the licensees, who are just doing what the State told them to do. Thus, although Petitioners purport to stand in the State's shoes to bring this claim, Petitioners and the State do not share the same interpretation of Section 1258. Petitioners want to this Court enforce an interpretation under which the Catholic Hospitals do not get licensed unless they conform their conduct and surrender their free exercise rights. The State of California, which has authority to enforce Section 1258 and has exercised that authority, plainly does not share this view. Petitioners have ignored the disconnect between what they contend should be the State's position, and the State's actual interpretation of Section 1258, for years as if it is immaterial rather than an insurmountable obstacle to their claim.[1]

[1] Historically, the ACLU sues the government for infringing the constitutional rights of private parties. When the ACLU pretends to be the government and tries to *change* the law in a way that infringes the constitutional rights of religious institutions, it should set off alarm bells to the Court, which must view such efforts with extreme

Had Petitioners sued the proper party, the State could have explained how it interprets and enforces Section 1258, including how its interpretation must be guided by the principles of neutrality, the unconstitutional conditions doctrine, constitutional avoidance, and case law, all of which compel the State to prefer a reasonable, neutral interpretation over any interpretation that burdens religious free exercise. Petitioners also would have been confronted by the legal principle that private parties cannot force the government to select a particular interpretation of a statute when more than one reasonable interpretation exists. Instead, by suing the licensee, Petitioners have attempted to deprive the Court of the State's view, and deprive the State of defending its interpretation and enforcement of Section 1258 and its compelling interests, which are reflected in the Conditions of Consent. Petitioners cannot escape the high standard that applies to a claim that the government must change its interpretation of Section 1258 simply by suing the wrong party.

To force the State to change its approach, Petitioners would have to prevail on a mandamus claim against the State alleging that it has incorrectly interpreted and enforced Section 1258. Petitioners would have to establish a clear, present, and ministerial duty on the part of the State to interpret and enforce Section 1258 one, and only one, particular way. *Bullis Charter School v. Los Altos School Dist.*, 200 Cal. App. 4th 1022, 1035 (2011); Code Civ. Proc. § 1085. But if a statute, like Section 1258, is subject to more than one reasonable interpretation, then no ministerial duty to adopt any one of the interpretations can exist. The State has discretion to select any one of them, regardless of whether private parties believe it is the "best" interpretation, and that interpretation is entitled to deference so long as it is reasonable and not "clearly erroneous." *See Sternberg v. California State Bd. of Pharmacy*, 239 Cal. App. 4th 1159, 1168 (2015); *see also Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998). That is what happened here. Just as this Court and the court in *California Med. Assn. v. Lackner*, 124 Cal. App. 3d 28 (1981), identified reasonable, neutral interpretations of Section 1258, so too has the State. To prevail here, it is not enough for Petitioners merely to demonstrate that their interpretation of Section 1258 is "better" than the State's according to Petitioners' own

skepticism.

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yardstick; rather, they must show there is no neutral interpretation that exists as a matter of law to justify the uninterrupted licensure of the Catholic Hospitals.[2] This is impossible, and Petitioners cannot avoid that standard by pretending the State is irrelevant.

Petitioners have never remotely established that CDPH's neutral interpretation of Section 1258 is "clearly erroneous", but even if they did, Petitioners interpretation of Section 1258 would be subject to multiple constitutional obstacles, all avoided by the reasonable, neutral interpretation employed by the State. Interpreting Section 1258 in a manner that burdens Free Exercise raises a host of entanglement problems, and runs afoul of the Establishment Clause and church autonomy principles. *See* Section IV(A). Under Petitioners interpretation, only secular hospitals and religious hospitals that conform their views of contraception to the State's views can obtain a hospital license. The First Amendment has always prohibited this, well before even the torrent of recent Supreme Court decisions that have protected religious freedoms in every ruling.

Moreover, Petitioners claim would be subject to strict scrutiny for three separate reasons: Section 1258 is a licensing law, it is not neutral, and it is not generally applicable. The unconstitutional conditions doctrine prevents the State from granting hospital licenses on the condition that the individual to give up or refrain from exercising a constitutional right. *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 457 (2015); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Licensing statutes that burden free exercise are subject to strict scrutiny.

Moreover, Petitioners and their counsel are attempting to rewrite a statute and stand in the shoes of the government to promote their longstanding effort to openly target Dignity Health and Catholic health care.[3] That is prohibited targeting of religion, no less than if the government

[2] The live witness hearing, which focused exclusively on whether the Catholic Hospitals violate Section 1258 under *Petitioners'* interpretation, completely skipped this vital threshold inquiry.

[3] https://www.aclu.org/blog/reproductive-freedom/religion-and-reproductive-rights/federal-government-must-stop-catholic/ ("The Federal Government Must Stop Catholic Hospitals From Harming More Women"); https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied. A careful read of the Petition reveals repeatedly that the foundation of Petitioners' claim is that the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"), to which the Catholic Hospitals are required to adhere, are a prohibited "nonmedical qualification" on a woman's asserted right to obtain sterilizations on demand, or for convenience only. The Petition decries the ERDs as the heart of the matter not fewer than 19 times, and it asks the

were doing so.[4] Petitioners' demonstrably wrong characterization of Section 1258 as an anti-discrimination law invites constitutionally prohibited *dissimilar* treatment of the Catholic Hospitals and secular hospitals when the State makes licensing decisions under Section 1258. *Tandon v. Newsom*, 141 S.Ct. 1294 (2021).

Government actors also fail to act neutrally or with general application "whenever they treat any comparable secular activity more favorably than religious exercise" whether by carving out exceptions only for secular considerations or interpreting a statute through only a secular lens. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith* "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"); *Tandon,* 141 S. Ct. 1294 at 196 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-32 (state prosecuted religious objections but not secular objections). Notably, *Fulton* was a unanimous opinion protecting religious liberty; not a single justice lifted a pen to defend the government's intolerance of religious principles or to defend the decision in *Employment Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990).[5]

Court to declare that the Catholic Hospitals' "sterilization policies reflecting the ERDs … violat[e] … California Health Safety Code §1258." Amended Verified Petition for Writ of Mandate ¶ 67; *see also id.* ¶¶ 2, 4, 5, 6, 7, 11 14, 20, 21, 36, 47, 49, 50, 51, 52, 53, 54, and 56; Resp. Appx. Vol. X, Ex. 134, 23:6-15. There is no avoiding Petitioners' central claim that the Catholic hospitals are in violation of a California licensing statute *because they are Catholic Hospitals that adhere to the ERDs*, the tenets of their faith.

[4] The conflict between the "compelling interest" alleged by the Petitioners, and the State's actual compelling interest as advanced through its own interpretation of the statute and its own actions, also means that Petitioners cannot establish that they seek relief that would benefit the public, a prima facie requirement for any writ of mandate to issue. *See Rivera v. Div. of Indus. Welfare*, 265 Cal. App. 2d 576, 592 (1968) ("issuance of the writ is not a matter of right, but involves a consideration of its effect in promoting justice; likely public detriment warrants denial of relief"). Maintaining the current level of services at the Catholic Hospitals for the benefit of the public was so important to Petitioners that they successfully urged California's Attorney General to make it a Condition of Consent. Petitioners have no evidence that an order from this Court resulting in the Catholic Hospitals being unable to provide any sterilizations would benefit the public, directly contrary to their position before the Attorney General. Indeed, the change in hospital policy that Petitioners now want is so significant that the Attorney General would have to require an impact study to be conducted before consenting to such a change. Petitioners' approach has been to co-opt the law for its own purposes, untethered to the reality that they are merely borrowing a state hospital licensing law administered by the CDPH and enforced by the CDPH in a completely hostile way to Petitioners' position in this litigation.

[5] *Tandon* and *Fulton* have considerably narrowed *Smith* and its tenuous survival as "precedent" is only of academic interest here. On the last day of the Supreme Court's 2020 Term, the Court "rescheduled" the certiorari petition in *Dignity Health v Minton*, No 19-1135, which petition asks the Court to revisit *Smith*. Notably, the Supreme Court denied certiorari in the other two cases that it had been holding for the *Fulton* decision, thus signifying that it has other plans for *Minton*. *See generally* https://www.deseret.com/faith/2021/7/6/22559340/religion-at-the-supreme-

Section 1258 includes exceptions for secular considerations and therefore must include free exercise. The title of the section includes the word "***exceptions***." Health & Saf. Code § 1258 ("Sterilization for contraceptive purposes; prohibition against nonmedical qualifications; ***exceptions***") (emphasis added). Clearly, the Legislature understood the language of Section 1258 to provide for exceptions and the second paragraph clearly does so: "Nothing in this section shall prohibit requirements relating to the physical or mental condition of the individual." Health & Saf. Code § 1258; *see also Lackner*, 124 Cal. App. 3d at 37 ("These provisions make sterilization operations a subject of statutory concern and suggest that *the exception for 'requirements relating ... to the physical or mental condition'* preserves these matters for regulation by the department") (emphasis added). Accordingly, unless the free exercise of religion is also treated as an exception, then strict scrutiny applies because the law treats secular considerations more favorably than religious exercise. *Tandon,* 141 S.Ct. at 1296; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("the effect of a law in its real operation is strong evidence of its object").[6]

A law also "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. According to Petitioners, Section 1258 promotes the compelling state interest of "access to sterilization operations for contraceptive purposes, free of arbitrary, nonmedical obstacles." (*See* Pet. Reply, 26:12-14; Pet. Op. Br., 31:21-32:1; Pet. Reply, 26:1-2; Respondent Dignity Health's Appendix of Supplemental Evidence In Support Of Post-Hearing Brief In Opposition To Petition For Writ Of Mandate ("Resp. Appx. Vol. X"), Ex. 133, 23:20-22.) But Petitioners' own evidence and expert testimony establish that Petitioners' interpretation makes Section 1258 a law that *prohibits religious conduct* (applying religious rules to sterilization requests) *while permitting secular conduct* (allowing non-religious exceptions).

court-what-happened-2021-and-whats-coming-next-fulton-tandon-carson-makin.

[6] *Tandon* truly is the death-knell for Petitioners' claim. Even if Petitioners interpretation of Section 1258 were correct, the State would have no choice but to grant an exception to the Catholic Hospitals or to trigger a rigorous strict scrutiny that it would lose because Section 1258 facially includes secular exceptions. Petitioners have no claim against the State for granting a constitutionally mandated exception to the Catholic Hospitals, and no claim against the Catholic Hospitals for receiving one. That is simply extreme religious intolerance.

This is exactly what the Supreme Court prohibits with its decisions in *Tandon* and *Fulton*.

Moreover, the generalized compelling interests Petitioners describe cannot survive strict scrutiny. According to Petitioners, Section 1258 is essentially an equal access or anti-discrimination law, like the Unruh Act, that promotes the compelling state interest of "access to sterilization operations for contraceptive purposes, free of arbitrary, nonmedical obstacles."[7] However, "[T]he First Amendment demands a more precise analysis." *Fulton*, 141 S. Ct. at 1881 (city required to grant exemption notwithstanding compelling interest in "equal treatment of prospective foster parents and foster children) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006)). "Rather than rely on 'broadly formulated interests,' *courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants*.'" *Gonzales*, 546 U.S. at 431-32 (emphasis added). Here, if Petitioners' interpretation of Section 1258 were correct, Petitioners would need to show why the State cannot grant an exception from the statute to accommodate the religious free exercise rights of the Catholic Hospitals when the statute itself says and contemplates that "exceptions" are permissible. Petitioners have *never* addressed the salient question "not whether the [government] has a compelling interest in enforcing its [] policies generally, but whether it has such an interest in denying an exception to" Dignity Health. *Fulton*, 141 S. Ct. at 1881.

For the last several years of this litigation, it is the Catholic Hospitals alone that have represented California's *actual* compelling interests of expanded access in rural communities and avoiding pointless interference with religion, and that have advocated for the continued performance of some post-partum tubal ligation procedures following a review process guided by the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"). However, if Petitioners were to prevail upon the Court to impose their interpretation of Section 1258, these post-partum tubal ligations will likely be unavailable to all patients at the Catholic Hospitals. The Court has spent years searching for the "best" interpretation of Section 1258. However, the fact that numerous neutral and reasonable interpretations of Section 1258 exist is all that is required for the Court to deny the Petition. There is no evidence that would establish that the

[7] *See* Pet. Reply, 26:12-14; Pet. Op. Br., 31:21-32:1; Pet. Reply, 26:1-2; Resp. Appx. Vol. X, Ex. 133, 23:20-22.

State's neutral interpretation and enforcement of Section 1258 is "clearly erroneous." And, even if it were, Section 1258 still does not withstand strict scrutiny. There is no basis for the Court to interfere, under the guise of interpreting a licensing statute, with the faith-based decision making process of a Catholic Hospital. The Court should deny the Petition.

II. PETITIONERS CANNOT SUPPLANT THE STATE'S NEUTRAL INTERPRETATION OF SECTION 1258 WITH A RELIGIOUSLY HOSTILE INTERPRETATION BECAUSE THE STATE HAS DISCRETION TO ADOPT ANY OF THE MULTIPLE REASONABLE AND NEUTRAL INTERPRETATIONS OF SECTION 1258 THAT EXIST.

As shown below, Petitioners' claim fails because the Catholic Hospitals are not violating Section 1258, as the CDPH has consistently interpreted it for 50 years. And even if CDPH were wrong and Petitioners were right, then Petitioners' claim still fails because the law as interpreted by Petitioners fails the applicable strict scrutiny standard of review. However, before even reaching these arguments, it is important to understand the standard applicable when the Petitioner is borrowing a law interpreted and enforced by the State, while at the same time arguing that the State has been interpreting and enforcing the law incorrectly.

A. The State Has Consistently Interpreted and Enforced Section 1258 in a Neutral Manner For Nearly Fifty Years.

As a starting point, Section 1258 is a licensing statute that appears in Division 2, Article 2 of the Health and Safety Code, "Licensing Provisions," and is enforced by CDPH through its district offices as well as by the district attorney. Health & Saf. Code §§ 1290, 1293; Cal. Code Regs., tit. 22, § 70135(a); *Lackner*, 124 Cal. App. 3d at 37 (citing Section 1258 for the proposition that "the Legislature has placed at least a portion of the subject of sterilization operations within the hospital licensing statutes");[8] *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1306 (2007) ("DHS has the power, expertise and statutory mandate to regulate and enforce" health facility licensing regulations).

Here, CDPH is the sole agency with licensing authority for acute care health facilities and has the expertise to do so. "With [its] administrative authority to license and inspect

[8] *Lackner* warrants close examination as the only decision that interprets and applies Section 1258. The Court does not need to find that *Lackner* provides the "best" interpretation of Section 1258. However, the Court would have to find *Lackner*'s interpretation of Section 1258 "clearly erroneous" to dismiss its reasonable interpretation of Section 1258, which avoids constitutional conflict, in favor of Petitioners' interpretation.

facilities, issue citations, and impose civil penalties, the [CDPH] serves as 'the primary enforcer of standards of care'" for licensed health facilities in the State. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 384 (2020); *Lackner*, 124 Cal. App. 3d at 35 ("The Department of Health Services has licensing power over various health facilities including hospitals. It is given general and specific regulatory authority to carry out its hospital licensing duties and powers and to fulfill the intent of the licensing laws.") (citations omitted). The fact that the CDPH has repeatedly licensed the Catholic Hospitals, and that they have never been cited by the neutral governmental regulatory authority for violating one of the license requirements, is not a mistake or benign neglect. Rather, it is strong evidence that Petitioners' non-neutral interpretation of Section 1258 is wrong.

CDPH is required to inspect every health facility to which it has issued a license, including general acute care hospitals ("GACH") such as the Catholic Hospitals. Health & Saf. Code § 1279(a) ("Every health facility for which a license or special permit has been issued shall be periodically inspected by the department, or by another governmental entity under contract with the department."); Cal. Code Regs., tit. 22, § 70101. Such inspections are conducted to determine compliance with state law, including Section 1258. Health & Saf. Code § 1279 ("Notwithstanding any other law, the department shall inspect the facility for compliance with provisions of state law and regulations during a state periodic inspection or at the same time as a federal periodic inspection, including, but not limited to, an inspection required under this section.").

CDPH will only renew a GACH license if the GACH "has been found in substantial compliance with statutory requirements, regulations, or standards during the preceding license period." Health & Saf. Code § 1267(b); Cal. Code Regs., tit. 22, § 70117(c)(1). Thus, every time a GACH is licensed, CDPH makes an individualized inquiry to determine statutory compliance.[9] The evidence proffered before and at the hearing establishes that the Catholic

[9] Additionally, Respondent's Catholic hospitals are subject to intensive regulation at the federal and state levels to ensure that they meet applicable patient care standards, and no state or federal regulator has ever cited Dignity Health's Catholic hospitals for falling below those standards. *See* Respondent Dignity Health's Trial Brief, at 44:16-50:12; Strumwasser Decl., ¶¶ 16-23. There is zero evidence before the Court of any legislated standard of care applicable to all health facilities, let alone the Catholic Hospitals, that mandates tubal ligations on the demand

Hospitals have never been cited by the CDPH for a violation of Section 1258 or denied a license because they transgressed the statute. Declaration of Todd Strumwasser, M.D. In Support Of Respondent's Opening Brief ("Strumwasser Decl.") ¶ 16.

Section 1258 was adopted to eliminate the 120-point rule, and the evidentiary record here establishes that the 120-point rule has been eradicated. It is undisputed that California has neutrally interpreted and enforced Section 1258 for fifty years. CDPH has never characterized the Catholic Hospitals' religious decision-making as "arbitrary", and there is no evidence that the Catholic Hospitals have transgressed the 120-point rule. Moreover, at the ACLU's and PRH's behest, the Attorney General imposed the Conditions of Consent, which require the Catholic Hospitals to continue providing the subject services at the same level and as "exceptions to the ERDs." (Resp. Ex. 24.) In other words, the ACLU and PRH advocated that the Catholic Hospitals continue the very conduct that Petitioners allege is a violation of the hospital licensing law, and the State of California required the Catholic Hospitals to do so. Why? Because given a choice between (i) permitting no sterilization procedures and (ii) continuing the status quo by permitting some sterilization procedures, the status quo is plainly in the public interest.

B. Petitioners Cannot Compel the State to Adopt a Particular Interpretation of Section 1258 Where Multiple, Reasonable Interpretations of Section 1258 Exist.

Although Petitioners have no private right of action against the Catholic Hospitals for alleged violations of Section 1258, Petitioners could have sued the State and alleged that CDPH improperly interpreted Section 1258 and licensed the Catholic Hospitals. If Petitioners were to have brought their claim against the licensor State, instead of the licensee, Petitioners would be required to establish that the State had a clear, present, and ministerial duty to interpret and enforce Section 1258 in the manner they suggest. *Bullis*, 200 Cal. App. 4th at 1035; Code Civ. Proc. § 1085. "A ministerial act is an act that a public officer is required to perform *in a prescribed manner in obedience to the mandate* of legal authority *and without regard to his own*

of patients. The fact that the process that Dr. Jackson knows from her practice at secular hospitals is different from the process at Catholic Hospitals at which she never practiced just means they are different. (Resp. Appx. Vol. X, Ex. 133, 65:18-66:15.)

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judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exist." *Carrancho v. California Air Resources Bd*., 111 Cal. App. 4th 1255, 1267 (2003). "Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. Thus, a petition for writ of mandamus under Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character." *Unnamed Physicians v. Board of Trustees of Saint Agnes Med. Ctr.,* 93 Cal. App. 4th 607, 618 (2001); *California Corr. Supervisors Org., Inc. v. Dep't of Corr*., 96 Cal. App. 4th 824, 827, (2002) ("Where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, *beyond the bounds of reason or in derogation of the applicable legal standards*") (emphasis added).

But, it is not uncommon, as is the case here, for a statute to be susceptible to more than one reasonable interpretation. Two years ago, this Court found that the phrase "sterilization operations for contraceptive purposes" could reasonably be interpreted to focus upon the health facility's purpose in performing a sterilization, which is entirely consistent with the State's approach since the law was enacted. McGrath Decl., ¶ 2, Ex. 22, at 26:6-9. The Court of Appeal in *Lackner* also had little difficulty finding a reasonable interpretation of Section 1258 that avoided constitutional entanglement. *Lackner*, 124 Cal. App. 3d at 37 ("The 'nonmedical qualifications' named in the statute—age, marital status, number of children—unambiguously imply that the evil in mind is the *use of socio-economic factors* to determine whether or not to permit an individual to be sterilized.") (emphasis added).[10] The existence of these reasonable alternative interpretations of Section 1258 ends Petitioners' case. It is impossible for Petitioners to prevail on a mandamus claim asserting a clear and present ministerial duty exists to enforce a singular correct interpretation of Section 1258, where at least two reasonable and neutral alternatives exist. And, if Petitioners could not compel the State to adopt their interpretation through mandamus, they cannot ask the Court to do any differently here.

[10] As Sister O'Keeffe testified, "We don't look at [socioeconomic conditions] in terms of the review committee for sterilization." (Resp. Appx. Vol. X, Ex. 134, 49:8-15.)

C. In Light of the Principle of State Neutrality, the Unconstitutional Conditions Doctrine, the Doctrine of Constitutional Avoidance, and the Fact that Section 1258 Facially Permits "Exceptions", CDPH's Neutral Interpretation of Section 1258 Must Be Given Strong Deference Over a Religiously Hostile Interpretation.

When the State or a State agency is charged with interpreting and enforcing a statute, it may elect to enforce any neutral, reasonable interpretation of Section 1258 it desires. "[T]he administrative agency's interpretation of the applicable law is given great deference by the reviewing court. The administrative agency's construction of the law need not be the only reasonable interpretation."[11] *Robinson v. City of Yucaipa*, 28 Cal. App. 4th 1506, 1516 (1994) (citations omitted); *see also California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist*., 62 Cal. 4th 369, 381 (2015) ("we take into account the agency's interpretation when we independently construe the statute, and afford the agency's interpretation the deference that is appropriate under the circumstances"); *In re Vaccine Cases*, 134 Cal. App. 4th 438, 452 (2005) ("[T]he agency's construction need not be the only reasonable one in order to gain judicial approval."). The agency's "application of the law will be upheld unless it is arbitrary, capricious, lacks any rational basis." *Robinson*, 28 Cal. App. 4th at 1516. Similarly, when a plaintiff challenges an agency's interpretation directly, the agency's interpretation will be upheld unless it is "clearly erroneous." *See Sternberg v. California State Bd. of Pharmacy*, 239 Cal. App. 4th 1159, 1168 (2015); *see also California Taxpayers Assn. v. Franchise Tax Bd*., 190 Cal. App. 4th 1139, 1152 (2010); *Yamaha*, 19 Cal. 4th at 12.

Of course, not all proposed interpretations of a statute are reasonable. The State is constrained by multiple doctrines that prohibit the State from interpreting a statute in a manner that burdens First Amendment rights. First, government neutrality is demanded by the First

[11] In deciding how much weight to give the agency's interpretation, courts consider the agency's specialized knowledge and expertise, particularly when the statute is technical or complex, as is the case here. *See Yamaha,* 19 Cal. 4th at 13; *California Med. Ass'n v. Lackner*, 124 Cal. App. 3d at 38 ("an examination of the hospital licensing statutes reveals a robust regulatory scheme"). Further, evidence that the agency adopted a contemporaneous interpretation of the statute consistent with legislative enactment of the statute in question, and "has consistently maintained the interpretation in question," warrants increased deference. *San Diegans for Open Gov't v. City of San Diego*, 31 Cal. App. 5th 349, 375 (2018); *Valley Baptist Church v. City of San Rafael*, 61 Cal. App. 5th 401, 426 (2021) ("Even more persuasive is the fact that the [State Board of Equalization] has consistently maintained its position with respect to the constitutional provisions here at issue for four decades.").

Amendment.[12] Second, the doctrine of constitutional avoidance compels the State to avoid conflict with the Constitution and requires the Court to adopt a reasonable interpretation of Section 1258 that does not clash with the Constitution. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent"); *People v. Gutierrez*, 58 Cal. 4th 1354, 1373 (2014) ("[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable"). Third, as discussed in more detail in Section IV(B), *infra*, the unconstitutional conditions doctrine prohibits the State from conditioning a hospital license on the surrender of First Amendment rights. Fourth, as discussed in more detail in Section IV(C)(2), even if the State adopted Petitioners' interpretation, because Section 1258 includes express secular exceptions, the State would is required to grant the Catholic Hospitals an exception for their free exercise rights or else trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1877; *Tandon,* 141 S. Ct. 1294 at 196; *Roman Cath. Diocese*, 141 S. Ct. at 66; *Smith*, 494 U.S. at 883-84. There is no authority for the proposition that the State is required to elect a losing strict scrutiny battle over granting an exception.

These four principles converge to compel the State to adopt a neutral interpretation of Section 1258 that will avoid religious entanglement and not subject the Catholic Hospitals' free exercise rights to scrutiny as part of a hospital licensing scheme. Here, the CDPH's consistent interpretation of Section 1258 over 50 years as not implicating religion—and thereby permitting

[12] "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. State of Ark.*, 393 U.S. 97, 103–04 (1968). Effectively, the First Amendment prohibits the government from declaring that any religious practice or belief is "arbitrary" as a basis for regulation.

the State to issue licenses to the Catholic Hospitals just like it does to any hospital found to be in compliance with Section 1258—provides this Court with an obvious neutral interpretation that does not conflict with the Constitution and which, therefore, must be upheld over Petitioners' unconstitutional interpretation. Not only does the government have no obligation to share Petitioners' view that the Catholic Hospitals' free exercise rights are "arbitrary", but it has an obligation to reject such thinking. In fact, it is bizarre to suggest that an interpretation of Section 1258 that ignores all these fundamental constitutional constraints is reasonable, let alone better, than a neutral interpretation.

That Petitioners sued the Catholic Hospitals rather than the State does not change the law applicable to their claim. Petitioners cannot simply substitute their preferred interpretation of Section 1258 for the State's neutral interpretation before first establishing that it would be "clearly erroneous" for the State to have adopted a neutral interpretation of the statute in the first place. Because it is undisputed that multiple, reasonable and neutral interpretations of Section 1258 exist, the Court must reject Petitioners' alternative interpretation.

III. THE EVIDENCE ESTABLISHES THAT THE CATHOLIC HOSPITALS' STERILIZATION POLICIES AND REVIEW PROCESS DO NOT VIOLATE SECTION 1258.

The undisputed evidence establishes that since 1972, when the Legislature enacted Section 1258, CDPH has never interpreted Section 1258 in a manner that would create a constitutional conflict. Perhaps it applied common sense, recognizing that Section 1258 applies only to health facilities that perform contraceptive sterilizations and that as the Catholic Hospitals do not perform *any* procedures for contraceptive purposes, Section 1258 does not apply.[13] Perhaps it acknowledged that Section 1258 prohibits only "special nonmedical

[13] It is hardly unreasonable for the State to accept the Catholic Hospitals' religious beliefs and practices, and unlike Petitioners here, not to troll through the religious beliefs of a religious institution with the end result being that a nun is called to testify about interpretation and application of the ERDs. *They are not supposed to do that.* "[I]t is well established, in numerous other contexts, that courts should refrain from trolling through a person's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Thus, courts are prohibited from inquiring into the orthodoxy of adherence of religiously affiliated entities. *See, e.g., N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (declaring NLRB practice of examining whether a school is "completely religious" or merely "religiously associated" was a prohibited intrusion); *University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1340 (D.C. Cir. 2002) ("the very inquiry . . . into the University's religious character" is unconstitutional).

qualifications" of patients, and the Catholic Hospitals' Catholic identity is not that. Perhaps it acknowledged that at Catholic Hospitals, all patients receive the same pastoral care subject to the ERDs and patients seeking tubal ligation procedures are no different from any other patient. Perhaps it reasonably interpreted "sterilization operations for contraceptive purposes" to refer to the health facility's purpose, as the statutory language commands. Perhaps it recognized that the sterilization review process only considers permitted medical and physical characteristics of the "individual" or patient, as the statute repeatedly provides. Perhaps it recognized, as did Judge Goldsmith, that is much better to have a labor and delivery ward in Redding, California than no such services at all. McGrath Decl., ¶ 3, Ex. 23, at 23:21-23.[14] Or perhaps CDPH determined that even if Section 1258 reached to burden free exercise, enforcing it that way would be unconstitutional, warranting an exception for the Catholic Hospitals as "exceptions" are expressly provided for in the statute.

Ultimately, it does not matter how CDPH arrived at its neutral interpretation.[15] What matters is that the doctrine of constitutional avoidance demands that the Court look for and adopt such other statutory bases for interpreting the statute rather than allow Petitioners to weaponize Section 1258 to penalize Catholic hospitals. There is zero authority for the proposition that the best interpretation of a statute is one that takes a facially neutral statute and weaponizes it into an anti-religion targeting law. The Court should never reach the constitutional questions because the best interpretation of Section 1258, consistent with its legislative history and text and the mandates of government neutrality in imposing licensing schemes, avoids such questions.

As a threshold matter, the evidence establishes that the Catholic Hospitals' review of the "physical or mental condition" of the patient fully complies with the text of the statute. Second, the evidence establishes that the Catholic Hospitals do not perform "sterilization operations for contraceptive purposes" as a matter of Catholic faith and doctrine.

In contrast, the evidence establishes that Petitioners' interpretation of Section 1258

[14] *See also* McGrath Decl., 3, Ex. 23 at 32:14-18 ("Well, look, I have blinders on if I ignore the essence of this lawsuit. I can't do that. I can't leave my common sense at the door").

[15] Petitioners' targeting affected even their discovery. Notwithstanding their burden, in six years of litigation they never bothered to ask the State, "How do you interpret and enforce Section 1258?" But they took a nun's deposition three times.

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remains a square peg in a round hole. Despite the numerous constitutional problems with their interpretation, Petitioners are forcing the issue because the attack on Catholicism is the point of their lawsuit. The Court cannot analyze compliance with Section 1258 through a lens that prefers secular views, but even if it were to do so, all it would see are the myriad secular obstacles to equitable access to postpartum tubal ligations completely ignored by the statute and that would not be remediated by the relief Petitioners seek, which is only one of the numerous reasons discussed below that, on Petitioners' interpretation and application, Section 1258 cannot survive strict scrutiny.

A. The Catholic Hospitals Do Not Require Patients to Meet Special Nonmedical Qualifications.

The second paragraph of Section 1258 provides "[n]othing in this section shall prohibit requirements relating to the physical or mental condition of the individual . . . ." The Catholic Hospitals' sterilization review process permissibly focuses on the individuals' physical conditions.

As Dr. De Soto explained at the hearing, in undergoing the sterilization review process, the patient's physician provides "all the information" about "any risk factor [the physician] believe[s] is a risk factor in future pregnancies for the mother." (Resp. Appx. Vol. X, Ex. 134, 118:27-120:19.) Dr. De Soto testified that his role is to "bring the risk factors that the doctor gave us and discuss them in the discernment process as to how serious a risk factors they are and where we land in the—in the continuum of risk, ranging from being pregnant in and of itself is a risk factor. Obviously not. That wouldn't be enough for us to approve a sterilization, ranging up to a woman who's forty years old with three previous sections and a history of uterine rupture and insulin dependent diabetes. Well, obvious a very serious risk to the mother, and we live and make our decisions mainly in between those two extremes." (Resp. Appx. Vol. X, Ex. 134, 93:6-19.) As Sister O'Keeffe testified, the Committee performs a case-by-case review of each request, looking "at what is documented by the physician" to determine whether to approve the request. (McGrath Decl., ¶ 13, Ex. 33, at 22:13-23, 32:22-23:7, 74:6-16; ¶ 13, Ex. 32, at 145:12-146:1.) If the Committee denies a request, the physician receives a letter explaining the denial,

asking for any additional information about the patient's condition that has not already been provided, and stating that the Request may be resubmitted. (McGrath Decl., ¶ 13, Ex. 33, at 40:5-18).

Consistent with the plain meaning of the statute, the undisputed evidence establishes that the Catholic Hospitals consider medical risk factors and may grant a sterilization request when, taken together, the medical risk factors correlate to an increased risk of maternal morbidity and mortality as supported by the medical literature. When sufficient medical risk factors are present, in the view of the ERDs as interpreted by Sister O'Keeffe, a requested procedure may be medically necessary to protect the patient, rather than for contraceptive purposes. "The religious result [of the review of medical information] is that it's—it—we're not doing it for contraceptive reasons only. We're doing it because there is an underlying pathology that is there that the sterilization will take care of."[16] (Resp. Appx. Vol. X, Ex. 134, 54:11-122; *see also* 43:7-44:3; 52:13-53:9.)

Dr. Jackson conceded that the factors considered by the Catholic Hospital are all "physical" and medical conditions, and certainly CDPH could reasonably conclude the same. McGrath Decl., ¶ 45, Ex. 66, ¶¶ 55, 70, 71. For instance, para and gravida are medical terms; neither represents the number of children a patient has. (Resp. Appx. Vol. X, Ex. 133, 111:17-112:11.) Uterine rupture poses a risk for maternal morbidity and mortality. The Catholic Hospitals consider the risk of uterine rupture because "when it occurs, is often catastrophic for both mother and the baby. It's certainly hemorrhage, hysterectomy risk, and even death." (Resp. Appx. Vol. X, Ex. 134, 94:24-95:3.) "Clearly, a c-section increases the risk" of uterine rupture. (Resp. Appx. Vol. X, Ex. 133, 115:2-8; see also Resp. Appx. Vol. X, Ex. 134, 96:22-26; 97:13-98:4; Resp. Ex. 72.) Acute chorioamnionitis,[17] preeclampsia, diabetes, and obesity are all medical conditions. (Resp. Appx. Vol. X, Ex. 133, 114:16.) A thin uterine segment is a subjective description of the physical condition of the patient's uterus. (Resp. Appx. Vol. X, Ex.

[16] As used in connection with the sterilization request review process, "medical necessity" is "focused on risk factors [for maternal morbidity and mortality] in the future." (Resp. Appx. Vol. X, Ex. 134, 121:14-122:7.)

[17] Acute chorioamnionitis is an inter-uterine infection that "can retard proper healing and increase the risk of uterine rupture." (Resp. Appx. Vol. X, Ex. 134, 97:5-9.)

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133, 114:17-25.) A thin uterine scar may be determined by visualization and palpitation at the time of delivery. (Resp. Appx. Vol. X, Ex. 134, 95:18-96:10.)

Advanced maternal age also is a medical diagnosis. (Resp. Appx. Vol. X, Ex. 134, 100:5-12.) And the risk of maternal morbidity and mortality increases with the risk of advanced maternal age, and advanced maternal age may make carrying a future pregnancy riskier. Even the American College of Obstetricians and Gynecologists ("ACOG") says so. (Resp. Appx. Vol. X, Ex. 133, 118:14-20; 120:20-121:4; *id.*, Ex. 134, 97:10-12; 98:5-12; 99:11-100-4; Resp. Exs. 71, 72, 74.) The review committee "looks at the age in conjunction with the date of birth to determine whether the patient will be thirty-five years of age or older at the time of delivery and that is the only reason we look at age." (Resp. Appx. Vol. X, Ex. 134, 77:8-21.) It is not unreasonable for CDPH to distinguish between age, as used in the 120-point rule, and "advanced maternal age" as a medically recognized risk factor for pregnancy complications including maternal morbidity and mortality.

As Dr. Jackson testified, and as confirmed by the undisputed medical literature, there is a well-recognized consensus that certain medical and physical conditions, especially when present together, correlate to an increased risk of maternal morbidity and mortality. (Resp. Appx. Vol. X, Ex. 133, 84:20-85:17; Pet. Br., 20:1-12, 29:3-17; McGrath Decl., ¶ 45, Ex. 66, ¶¶ 64, 65, and 68.) Combined, uterine scars and advanced maternal age pose an even greater risk. (Resp. Appx. Vol. X, Ex. 134, 100:13-20; Resp. Ex. 72, pp. 8-9.)

Dr. Jackson's testimony that the medical factors that the Catholic Hospitals consider are, from a purely secular medical viewpoint, irrelevant to whether a tubal ligation may be performed, attacks a straw man. (Resp. Appx. Vol. X, Ex. 133, 69:22-71:2; 89:16-90:2). Neither the text of the statute nor the evidence supports Petitioners' assertion that the sole inquiry permitted by Section 1258 is whether, from a secular viewpoint, a physician could perform the procedure. It is irrelevant that, according to Dr. Jackson, the only medical indication for a tubal ligation is that the patient desires one, because the Legislature expressly permits consideration of "Requirements relating to the physical [] condition of the individual."[18] (Resp.

[18] It's not a complete surprise that Dr. Jackson's focus would be misdirected, as her report ignored the entire second

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Appx. Vol. X, Ex. 133, 71:24-27.) In fact, Dr. Jackson's apparent refusal to consider factors well within the scope of the statute renders her testimony suspect and suggests that she too has an axe to grind that is not reflective of legislative intent. The Catholic Hospitals require the presence of recognized risk factors for future morbidity and mortality based upon a review of the patient's medical records and physical condition, which is consistent with the text of the statute. Regardless, Section 1258 does not provide a forum for Petitioners to quibble regarding the significance of medical factors; Section 1258 permits them without qualification. There is no requirement that these factors be the best possible factors, the most predictive of anything, or the factors that Dr. Jackson would from a secular world view where Catholic hospitals are beyond her expertise.[19]

The live witness hearing did nothing to advance Petitioners' claim that the Catholic Hospitals consider prohibited special nonmedical factors or act arbitrarily. Petitioners have tried to make weight of the fact that the request form asks about the patient's insurance. However, all Petitioners found was one case, years ago, where insurance appears to have been considered in evaluating whether to authorize a tubal ligation,[20] and two other cases Petitioners assert were treated inconsistently.[21] There is no evidence of any pattern of considering prohibited special nonmedical factors, let alone examples of the Catholic Hospitals ignoring serious medical risk factors like heart disease, as Petitioners baselessly contend.[22]

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paragraph of Section 1258. (Resp. Appx. Vol. X, Ex. 133, 91:18-92:7.) The fact that Dr. Jackson did not change her opinion after considering the exceptions that the Legislature wrote into the statute impeaches her credibility rather than supports it.

[19] According to such logic, no one should wear a mask to prevent the transmission of COVID-19 because, while we understand the clear, correlated risk between failing to wear a mask and contracting COVID-19 upon exposure, there is no predictive model that would guarantee it. The argument makes no sense from the perspective of common sense and public health, which is the purpose of the hospital licensing statutes.

[20] The patient's physician had privileges at a non-Catholic hospital that accepted the patient's insurance, and she delivered there.

[21] Although Petitioners note elsewhere that the Sacramento Hospitals review each patient's medical records, Petitioners' superficial analysis of these two patients ignores them. At her deposition, Dr. Reyes was not asked to review the medical records in connection with her testimony regarding the alleged inconsistency.

[22] A review of just a few of the hundreds of records reveals that Requests were granted for patients whose medical history included a range of cardiac problems, deep vein thrombosis/leiden disease/gestational diabetes, hypertension, prior uterine rupture, renal disease/HIV, preeclampsia, complications arising from obesity, and many other conditions. (Pet. Ex. 22 (MMCR001056-570; MMCR00678-79; MMCR001060-61; MMCR000652-53; MMCR000685-87; MMCR000912-913; MMCR00613-14; MMCR00692-65; MMCR001178-79; MMCR00902-903; MMCR001042-43)).

B. The Catholic Hospitals' Exercise of First Amendment Rights Is Not a Prohibited "Special Nonmedical Qualification."

The Catholic Hospitals do not violate Section 1258 because their free exercise of First Amendment rights does not implicate the statute's prohibition on "special nonmedical qualifications" as conditions of sterilization. As Dr. De Soto testified, most of the physicians in the North State area in which the Catholic Hospitals operate believe that "everyone—doctor, and institutions like hospitals—should be able to exercise their freedom of religion." (Resp. Appx. Vol. X, Ex. 134, 117:12-118:23.)

As the Court recognized, Petitioners flatly ignore the word "special" in Section 1258 and they read it out of the statute. (Resp. Appx. Vol. X, Ex. 133, 15:21-16:9.) To ignore that word is to ignore the whole point of Section 1258. The Legislature passed Section 1258 to eradicate one specific "special" nonmedical qualification, unique to sterilization procedures—the 120-point rule that many hospitals had been applying.[23] Section 1258 does not say, and does not require, that hospitals may not apply "*any*" nonmedical qualification. For example, the statute does not require hospitals to provide sterilization operations for contraceptive purposes regardless of the patient's ability to pay, plainly a "nonmedical qualification."[24] What makes a nonmedical qualification "special," and therefore prohibited under Section 1258, is that it is imposed only on patients seeking sterilization operations for contraceptive purposes and not on patients seeking other procedures. That was the situation with the 120-point rule. Thus, Section 1258 reflects the Legislature's recognition, not of a difference between medical and nonmedical qualifications, but between nonmedical qualifications and "special" nonmedical qualifications, like the 120-point rule. There is no evidence that the Legislature intended to treat a religious health care facility's faith as a "special" nonmedical qualification like the 120-point rule. Indeed, the Legislature could not have so intended without inviting a constitutional challenge

[23] There can be no doubt that the 120-point rule was the Legislature's singular focus. If the Legislature was concerned about the application of arbitrary standards and religious criteria in health care, why would it limit its focus only to sterilization operations for contraceptive purposes? And, if Section 1258 was intended to singularly focus upon Catholic health facilities' faith-based views on contraception, it only makes the law more venal and constitutionally infirm.

[24] As discussed in Section IV(D), *infra,* because Section 1258 addresses only "special" nonmedical qualifications, it cannot be the vehicle to further unstated broad and generalized special interests such as "equitable access" and elimination of whatever Petitioners characterize as "arbitrary" denials of health care. That is not its purpose.

that would have invalidated the statute decades ago.

The thrust of Petitioners' argument is that the Catholic Hospitals "appl[y] religious criteria—which are inherently nonmedical—to each patient seeking postpartum tubal ligations . . . ." (Pet. Br., 6:22-24.) But the Catholic Hospitals' faith is an institutional matter and is not a characteristic of the "individual," as are all of the other factors enumerated in Section 1258 (age, marital status, number of natural children).[25] The Catholic Hospitals' protected free exercise rights arise not from characteristics of individual patients seeking sterilization, but from doctrinal characteristics of the licensed *health facility*. As Sister O'Keefe testified, the sterilization review process has a religious purpose. (Resp. Appx. Vol. X, Ex. 134, 53:7-17.) All patients at a Catholic Hospital must meet the qualification that they do not seek prohibited treatment. Just like ethics committees in secular hospitals, the review committee reviews the ethically and morally complex question of whether a request for sterilization can be granted based upon the prohibition on direct sterilization in ERD 53. (Resp. Appx. Vol. X, Ex. 133, 108:12-109:14). "We go through a discernment process to determine, are there risk factors there enough under the policy and the [ERDs] to determine whether the sole purpose for this is contraception—sorry—the sole purpose for the tubal sterilization procedure is contraception or whether there are some factors that would mitigate risk factors in a future pregnancy for the mother." (Resp. Appx. Vol. X, Ex. 134, 92:6-18.)

Nor is there support for Petitioners' contention that the review committee itself is a "special nonmedical qualification." The review committee, again, is not a characteristic of the patient. All services for all patients in the Catholic Hospitals must be in accordance with the ERDs. As Sister O'Keeffe testified, ERD 53 requires the Catholic Hospitals to consider the unique medical conditions or factors presented by each patient submitting a request for sterilization (Resp. Appx. Vol. X, Ex. 134, 7:24-8:4); the committee is simply the mechanism by which the Catholic Hospitals review the requests to determine whether the procedure can be

[25] Under the doctrine of ejusdem generis, the statute should be interpreted to extend only to factors similar in nature to the listed terms—"the kinds of things that are listed in [the] series." *Armin v. Riverside Comm. Hosp.*, 5 Cal. App. 5th 810, 834 (2016). The Catholic Hospitals' "religious criteria" are characteristics of the licensee hospital, not of the patient, and are not similar in any way to the enumerated prohibited factors.

permitted consistent with the ERDs.[26] (Resp. Appx. Vol. X, Ex. 134, 120:22-121:8.) Whether at a secular hospital or a Catholic hospital, a procedure that is subject to review by formal committee is merely a reflection of whether the procedure raises close ethical or moral questions at the facility, as a tubal ligation does at a Catholic hospital. As Dr. Jackson testified, secular hospitals use ethics committees to address ethically and morally complex issues, as well.

Petitioners rely heavily on Dr. Jackson, but she made clear that, regardless of applicable standards or rules, she plays by her own. Despite Petitioners' and Dr. Jackson's heavy reliance on ACOG,[27] Dr. Jackson disagrees with ACOG's recommendation that women seeking maternity care at Catholic facilities should seek referrals to institutions that perform the procedure when requested. Resp. Ex. 119, pp. e1-e2, e6. She also admitted that she does not follow the Medical Staff bylaws at the hospitals where she has medical staff membership and privileges. (Resp. Appx. Vol. X, Ex. 133, 106:27-107:28.). Dr. Jackson is not a hospital licensing expert. (Resp. Appx. Vol. X, Ex. 13396:11-19.) Dr. Jackson has no experience working at Catholic Hospitals, and she admits that she is not an expert on Catholicism, Catholic health care, or the ERDs. (*Id.* 96:20-98:7; 100:15-17, 100:23-101:13; Depo 34:4-21.) Dr. Jackson did not study Catholic health care or the practices at other Catholic hospitals in connection with rendering her opinion.[28] (98:14-26.) She is another advocate for secular medical care, not an expert on anything relating to the Catholic Hospitals' compliance with Section 1258.

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[26] Not only is there nothing in Section 1258 that indicates that a faith-based review process or any review process violates the statute, but Section 1258's prohibition of consideration of *some* factors necessarily assumes that some review process exists. According to Petitioners, the supposed "accepted medical practice" is to perform a postpartum tubal ligation if requested by a patient. Respondent's Ex. 66 (Dr. Jackson Report, ¶¶ 29 and 31; Resp. Appx. Vol. X, Ex. 133, 64:13-14). But Section 1258 is not a standard of care statute and, in any event, there is no one, single "standard of care" regarding tubal ligations that applies across all medical contexts and equally to individual providers and institutions. Petitioners' argument otherwise discriminates against fully compliant Catholic Hospitals. Further, Dr. Jackson did not even understand how the review committees worked. (Resp. Appx. Vol. X, Ex. 133, 77:19-78:10.)

[27] As evidenced by the fact that ACOG has abandoned its call to have tubal ligations deemed "urgent," in favor of a plea that they be treated as "nonelective," the ACOG opinions, themselves, stand for little more than aspirational thought and wishful thinking with no force or effect as applied to institutions, especially religious ones. *Compare* Resp. Ex. 104 at p. 3 and Ex. 119 at p. e1; Resp. Appx. Vol. X, Ex. 133, 128:18-27.

[28] Dr. Jackson has also acknowledged that Catholic hospitals follow a different standard of care from secular hospital regarding reproductive health. Resp. Ex. 107 (Stulberg, Jackson and Freedman, "Referrals for Services Prohibited In Catholic Health Care Facilities," *Perspectives on Sexual and Reproductive Health*, Vol. 48, No. 3 (Sept. 2016)).

What the evidence does establish is that this case is really about a period of time when Chamorro's obstetrician, Dr. Samuel Van Kirk, refused to follow the Catholic Hospitals' well-known rules, to the detriment and confusion of his patients. Since Dr. De Soto joined MMCR in 1986, Dr. Van Kirk was the first physician to raise an issue; the "vast majority" of physicians understand and "go along" with the sterilization review process. (*Id.*) At the time MMCR reviewed and denied Chamorro's request for sterilization, Chamorro was not receiving care from MMCR and had not even been to the hospital in the decade before her delivery. (Chamorro Depo., 8:6-15.) Dr. Van Kirk, the sole provider of Chamorro's pregnancy-related care (until delivery), ignored the MMCR Medical Staff Bylaws and Rules and Regulations, which provide that all services at the hospital must conform to the ERDs. (Resp. Appx. Vol. X, Ex. 134, 88:2-89:20; Resp. Exs. 18 and 19.) And he ignored the opinions from the ACOG, the "leading professional society of obstetricians and gynecologists," which has, for years, instructed physicians like Dr. Van Kirk:

> Patients who are receiving maternity care at religiously affiliated hospitals, or from clinicians with religious objections, should be informed early in prenatal care of any restrictive policies or personal objections and should be referred to a practitioner or hospital that will be able to accommodate her request.

(Pet., ¶ 30; Resp. Exs. 119, p. e6; Ex. 104, p. 3.)[29] But there is no evidence that Dr. Van Kirk informed Chamorro early in her prenatal care of MMCR's restrictions, or referred her to a hospital that could accommodate her. Although MMCR responded to Dr. Van Kirk's request on Chamorro's behalf in three days, it took Dr. Van Kirk nearly a month to inform Chamorro of the denial, and even then he did not explain that MMCR is a Catholic Hospital that does not perform sterilization operations for contraceptive purposes. (9/29/20 Chamorro Decl., ¶ 8.) Instead, he referred her to the ACLU. By the time Chamorro learned of MMCR's policy, it was October 2015; Chamorro was due to deliver in four months, and expected to deliver early, and all Dr. Van Kirk had done was refer her to the ACLU. (*Id.*, ¶¶ 4-8; Cham Depo, 35:17-36:5.) This is hardly a fact pattern that supports relief of any sort in this equitable proceeding, much less the

[29] As the ACOG Opinions (Resp. Exs. 105 and 119) make clear, the alleged medical standard of care is applicable to physicians, not institutions.

sweeping declaration Petitioners seek that the Catholic Hospitals are in violation of a state licensing law. Indeed, throughout this period, Chamorro was not even a patient at the hospital and had not visited the hospital in more than a decade. (McGrath Decl., ¶ 40, Ex. 61, 8:6-15.)

C. The Catholic Hospitals Do Not Permit Tubal Ligations "for Contraceptive Purposes."

It is undisputed that the ERDs are promulgated by the United States Conference of Catholic Bishops. Petition, ¶ 6 It is further undisputed that ERD 53 prohibits "direct sterilization," or sterilization for contraceptive purposes, and permits procedures that "induce sterility . . . when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Id.* The Catholic Hospitals are required to, and do, comply with the ERDs, which are interpreted and applied by the Catholic Hospitals but enforced by the Bishop, not by the Petitioners or the Court.[30] It is undisputed that the interpretation and application of the ERDs is a matter of faith; the ERDs are not a statute to be interpreted by CDPH. Nor are they to be interpreted by Dr. Jackson, whose advocacy-laden opinions are, at best, irrelevant. [31]

Notwithstanding the Catholic Hospitals' objection that the hearing itself was prohibited excessive entanglement with religion, the Catholic Hospitals' witnesses provided extensive evidence showing that in those cases where a tubal ligation is allowed, it is *never* for a contraceptive purpose. (Resp. Appx. Vol. X, Ex. 134, 26:10-27:10; 27:22-28:24.) The Hospitals' purpose in permitting a tubal ligation in an individual case is *always* to protect the health of the patient. McGrath Decl., ¶ 12, Ex. 33 (O'Keeffe Depo. Vol. 2), 178:4-12; ¶ 13, Ex. 32 (O'Keeffe Depo. Vol. 1), 43:12-18; Resp. Appx. Vol. X, Ex. 134, 26:23-27:21.) That is why the patient's physician is required to attest in writing to the "medical indications" for the request

[30] *Guadalupe*, 140 S. Ct. at 2063 ("In considering the circumstances of any given case, courts must take care to avoid 'resolving underlying controversies over religious doctrine.'"); *Means*, 2015 WL 3970046, at *12.

[31] Dr. Jackson signed a petition in 2019 urging the UCSF to not proceed with an affiliation transaction that would have enabled patients of UC physicians to receive care at Dignity Health's Catholic Hospitals. (McGrath Decl., ¶ 78, Ex. 99.) That made her an avowed antagonist of Catholic Hospitals, the opposite of a credible and detached expert witness in a case that examines whether the Catholic Hospitals are complying with state law. She also admitted that the MMCR Sterilization Review Committee's review process involves consideration of "the ERDs and/or the hospitals' sterilization policies," which "reflects religious or moral based decision making." (McGrath Decl., ¶ 46, Ex. 66, ¶ 49.) As Dr. Jackson has acknowledged, Catholic hospitals follow a different standard of care. Supplemental McGrath Decl., ¶ 8, Ex. 107.

for sterilization and the information is considered by the review committee. As Dr. De Soto testified, "What we are asking for, the doctor to put forth any medical history that she or he believes would potentially affect the health of the mother in a future pregnancy." (Resp. Appx. Vol. X, Ex. 134, 91:13-18.)

The focus on the health facility's purpose in permitting a tubal ligation makes sense, because it is the *health facility* that is being licensed in accordance with Section 1258 and "permitting" or not permitting the category of procedures. The Court already found that this is a reasonable interpretation from the plain text of the statute. It would also be reasonable for CDPH to interpret "purpose" in accordance with its dictionary definition,[32] and only the hospital's intent can possibly be relevant to a law that determines whether the State can issue a license to operate to the hospital.[33]

IV. SECTION 1258 CANNOT BE ENFORCED IN A MANNER THAT VIOLATES THE CATHOLIC HOSPITALS' CONSTITUTIONAL RIGHTS.

When Petitioners "borrow" the statute as the basis for their claim, the claim is subject to the same defenses that might be asserted if the State attempted to enforce the statute directly. *See Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 180–81 (2000) (claims under UCL subject to same defenses as underlying law); *People v. Duz-Mor Diagnostic Lab., Inc.*, 68 Cal. App. 4th 654, 673 (1998) (same). The Court need go no further to deny the Petition than to interpret the statute as the Catholic Hospitals have argued above. But if the Court were to determine that the only reasonable interpretation of Section 1258 is one that would burden the Catholic Hospitals' free exercise rights, then it must find Section 1258 unconstitutional as applied to the Catholic Hospitals.

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[32] "Purpose" means "something set up as an object or end to be attained: intention." https://www.merriam-webster.com/dictionary/.

[33] Dr. Jackson's testimony focused instead upon the contraceptive *effect* of the procedure. (Resp. Appx. Vol. X, Ex. 133, 76:9-14 ("Tubal ligation which has the sole *effect* of contraception") (emphasis added).) Dr. Jackson did not know the Catholic Hospitals' *purpose*, and she offered her opinion that tubal ligations are for contraceptive purposes solely from a secular medical viewpoint. (Resp. Appx. Vol. X, Ex. 133, 132:23-134:21.) Dr. Jackson has no background in Catholic healthcare and admitted that she "can't know what [the Hospitals'] intent is." *Id.* And Dr. Jackson further recognized that patients may have many different reasons for seeking contraceptive supplies or procedures. McGrath Decl., ¶ 45, Ex. 66, ¶¶ 33-35; *id.*, ¶ 37, Ex. 58, 35:22-24; 112:1-19; 229:2-23. Even after reviewing hundreds of Requests, Petitioners have no evidence regarding any patient's purpose in seeking a tubal ligation—other than Chamorro, whose request was denied and therefore no procedure was performed.

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A. Application of Section 1258 to the Catholic Hospitals Would Violate the Establishment Clause and Church Autonomy Doctrine By Interfering With the Internal Decisions of a Religious Institution Regarding Faith and Doctrine, Create Excessive Government Entanglement With Religion.

1. Petitioners' Interpretation of Section 1258 Violates the Establishment Clause

Petitioners interpretation that under Section 1258, the state may only license hospitals that permit all tubal ligations requested by a patient or prohibit them altogether, and cannot license Catholic Hospitals because of their faith-based views on contraception, runs afoul of the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). But that is exactly what an "all or none" licensing scheme would do.[34] Only those religious hospitals willing to conform to the State's preferred world view could obtain hospital licenses. "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion." *Id.* at 103–04; *see also InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 2021 WL 1387787, at *29 (E.D. Mich. Apr. 13, 2021) ("the government cannot establish an official government religion like the Church of England, [and] it also cannot treat religious groups disfavorably, and in a way establish a church of secularism").

2. Petitioners' Interpretation of Section 1258 Would Impermissibly Interfere With the Internal Management Decisions Essential to the Catholic Hospitals' Mission.

Moreover, the church autonomy doctrine requires that the Court decline to interpret Section 1258 to interfere with internal management decisions and ecclesiastical matters, as Petitioners urge. The church autonomy doctrine recognizes that religious institutions enjoy "autonomy with respect to [their] internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). *Guadalupe* makes clear that the church autonomy doctrine protects all religious institutions, and the evidence establishes that the Catholic Hospitals are religious institutions.

[34] Petitioners' view of Section 1258 would make it no different from a facially neutral statute that prohibits teaching evolution. *See, e.g., Epperson v. State of Ark.,* 393 U.S. 97 (1968) (holding statute that prohibited teaching evolution unconstitutional under the Establishment Clause as promoting the views of one particular sect).

Guadalupe, 140 S. Ct. at 2060; *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (conc. opn. of Brennan, J.) ("Determining that certain activities are in furtherance of an organization's religious mission . . . is [] a means by which a religious community defines itself."). In reality, governments rarely if ever encroach upon religious health care, triggering a church autonomy analysis, because such efforts are plainly unconstitutional. *Guadalupe*, 140 S. Ct. at 2060 ("any attempt by government to dictate or even to influence [internal religious matters] would constitute one of the central attributes of an establishment of religion"). More common is legislation like the Church Amendment, the Coates Snowe Amendment, the Weldon Amendment, and even the Religious Freedom Restoration Act, which expressly protect the conscience rights of faith-based providers from legislation that might even be perceived to be coercive. *See, e.g.,* 42 U.S.C. § 300a-7, *et seq.*; 42 U.S.C. § 238n; 42 U.S.C. §20000bb, *et seq.*

Church autonomy applies to claims that involve issues of faith at Catholic-controlled hospitals governed by the ERDs. For instance, in another case where the ACLU challenged the ERDs, the court found that the church autonomy doctrine required abstention from a plaintiff's claim that a Catholic hospital "did not provide the standard of medical care because it is a Catholic hospital that adheres to Defendant USCCB's Ethical and Religious Directives . . . ." *Means*, 2015 WL 3970046, at *2, *13 ("the Court cannot determine whether the establishment of the ERDs constitute negligence because it necessarily involves inquiry into the ERDs themselves, and thus into Church doctrine"). In another case against a faith-based hospital, the court applied church autonomy to prevent adjudication over whether the hospital's decision to discharge a physician from its residency program violated the Americans with Disabilities Act. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d, 223, 225 (6th Circ. 2007) (an entity is a "'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics"), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171 (2012).

a. The Catholic Hospitals are Religious Institutions.

As established by the governing documents of Dignity Health and CommonSpirit Health,

the Catholic Hospitals are part of the Catholic Church, which exist to carry out the healing ministry of Jesus.[35] That is their purpose. For example, Article III of Dignity Health's Amended and Restated Bylaws, entitled "Healing Ministry," provides that Dignity Health is committed to the healing ministry of Jesus, shall follow and express the mission and values of the healing ministry in all of its operations, and shall operate in conformity with the ERDs.[36]

Further, courts have routinely applied the church autonomy doctrine's ministerial exception to religious hospitals in the employment context, thereby recognizing that they are religious institutions. *See Penn v. New York Methodist Hosp.*, 884 F.3d 416, 424–25 (2d Cir. 2018); *see also Hollins v. Methodist Healthcare, Inc.*, 474 F.3d at 225 ("in order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue . . . . [T]he exception has been applied to claims against religiously affiliated schools, corporations, and hospitals by courts ruling that they come within the meaning of a 'religious institution'"),; *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310–11 (4th Cir. 2004) ("Pursuant to [its] mission, the Hebrew Home maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident's doorpost. Although we do not have to decide the full reach of the phrase 'religious institution,' we hold that the phrase includes an entity such as the Hebrew Home."); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) ("It cannot seriously be claimed that a church-affiliated hospital providing this sort of ministry to its patients is not an institution with substantial religious character.") (citations omitted). Here, not only do the Catholic Hospitals have Catholic names inspired by the Sisters of Mercy, but they share the healing ministry of Jesus through the delivery of pastoral care as

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[35] The Catholic Hospitals are listed in the Official Catholic Directory. Petition, ¶¶ 51-54; Declaration of Sr. Brenda O'Keeffe (filed with Respondent Dignity Health's Appendix In Support Of Trial Brief, Vol. I) ("O'Keeffe Decl."), ¶ 9, Ex. 10; McGrath Decl.,¶ 13, Ex. 33, at 25:3-4. *See Means v. U.S. Conference of Catholic Bishops,* 2015 WL 3970046, at *7 (W.D. Mich. June 30, 2015) (IRS relies on the OCD to determine whether an entity is part of the Catholic Church), *aff'd*, 836 F.3d 643 (6th Cir. 2016); *Overall v Ascension*, 23 F.Supp. 3d 816, 831 (E.D. Mich. 2014) ("the Official Catholic Directory listing [of the defendant Catholic hospitals is] a public declaration by the Roman Catholic Church that an organization is associated with the Church").

[36] "Ethical and Religious Directives. *In striving to fulfill its healing ministry, this Corporation shall operate in conformity with the Ethical and Religious Directives for Catholic Health Care Services, as approved and amended from time to time by the United States Conference of Catholic Bishops.*" *Id*., § 3.3 (emphasis added).

their mission. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (religious character of institution established by "not only its Christian name, but its mission of Christian ministry and teaching").

b. The Sterilization Request Decision-Making Process is an Internal Management Decision Essential to the Catholic Hospitals' Mission.

The evidence establishes that adherence to the ERDs and the delivery of pastoral care are internal management decisions that are essential to their central mission. (Resp. Appx. Vol. X, Ex. 134, 29:15-31:9.) As Sister O'Keeffe testified, "Every [patient] encounter has the potential to be a sacred encounter . . . ." (Resp. Appx. Vol. X, Ex. 134, 18:27-21:21). "We have to live by our [faith-based] values, and they're not just words on the wall or on the sheet of paper, but how do we live." (Resp. Appx. Vol. X, Ex. 134, 33:9-16.) As such, it is undisputed that the Catholic Hospitals' pastoral care reflects internal management decisions essential to their mission.[37] (Resp. Appx. Vol. X, Ex. 134, 11:12-12:9; 22:1-23:5; 23:20-25 ("I believe that our healing ministry is to heal and to restore health, not just to deal with them purely medical diagnosis but to provide whole person care, body, mind, and spirit.").) Part of that pastoral care in furtherance of the healing ministry includes the case-by-case review of each request, looking "at what is documented by the physician" to determine whether to approve the request. (McGrath Decl., ¶ 13, Ex. 33, at 22:13-23, 32:22-23:7, 74:6-16; ¶ 13, Ex. 32, at 145:12-146:1.)

3. As Evidenced By This Case, Including Years of Discovery and a Trial Involving a Nun as a Witness Testifying About Pastoral Care and the Absence of a Catholic Hospitals' Contraceptive Purpose, Petitioners' Interpretation of Section 1258 Fosters an Excessive Entanglement With Religion.

Petitioners' interpretation of Section 1258 also implicates the prohibition on a government's excessive entanglement in religion. *See, e.g., Kedroff v. St. Nicholas Cathedral of*

[37] O'Keeffe Decl., ¶ 10, Ex. 11, p. 10 ("Directed to spiritual needs that are often appreciated more deeply during times of illness, pastoral care is an integral part of Catholic health care. Pastoral care encompasses the full range of spiritual services, including a listening presence; help in dealing with powerlessness, pain, and alienation; and assistance in recognizing and responding to God's will with greater joy and peace."). It is undisputed that adherence to the ERDs, as well as interpretation of the ERDs in the delivery of pastoral care, is what defines Catholic healthcare. (Resp. Appx. Vol. X, Ex. 134, 18:27-21:21 ("Every [patient] encounter has the potential to be a sacred encounter . . . .").) Dr. Jackson admits that the decision of the review committee is a religious decision, not a medical decision. (Resp. Appx. Vol. X, Ex. 133, 104:6-105:1; *see also* Resp. Appx. Vol. X, Ex. 134, 68:4-12.)

Russian Orthodox Church in N. Am., 344 U.S. 94, 116, (1952) ("freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"). Prohibited "entanglement may be substantive—where the government is placed in the position of deciding between competing religious views—or procedural—where the state and church are pitted against one another in a protracted legal battle. [Citation] Therefore, courts typically consider the character of the claim, the nature of the remedy, and the presence or absence of a 'direct conflict between the ... secular prohibition and the proffered religious doctrine.'" *Petruska v. Gannon Univ*., 462 F.3d 294, 311 (3d Cir. 2006); *see also Sumner v. Simpson Univ*., 27 Cal. App. 5th 577, 591 (2018) (citing *Petruska*).

Petitioners' interpretation of Section 1258 raises substantive entanglement problems, as it would have the State prefer one set of competing religious views—those that conform to an "all or nothing" view regarding whether all tubal ligations are for contraceptive purposes—over any other. Moreover, it is undisputed that when a request for sterilization is permitted or denied, the decision is based upon what is permitted and prohibited by the ERDs. (Resp. Appx. Vol. X, Ex. 134, 36:16-25.) Enforcing Section 1258 as Petitioners desire would also raise a myriad of procedural entanglement problems as demonstrated by this very case. *See Means*, 2015 WL 3970046, at *2, *13. Given the alternative of multiple, neutral and reasonable alternatives, the State simply has no obligation to adopt a different interpretation of Section 1258 that would foster exactly the kind of entanglement with religion caused by this very case.

As *Fulton* again made clear, only the undisputed sincerity of the Catholic Hospitals' religious beliefs is relevant; the existence of contrary viewpoints is not.[38] *See Kelly v. Methodist Hosp. of S. Cal*., 22 Cal. 4th 1108, 1123 (2000); *see also Frazee v. Illinois Dep't of Employment Sec*., 489 U.S. 829, 834 (1989); *Thomas v. Review Bd*., 450 U.S. 707, 714 (1981). In *Fulton*, the Supreme Court accepted Catholic Social Services' claim that its free exercise rights would be burdened, over the City's objections, simply because the religious institution asserted a good

[38] In this regard, neither the existence of competing religious viewpoints nor Petitioners' understanding of the Catholic Hospital's religious decision-making process (or lack thereof) is relevant.

faith burden. *Fulton*, 141 S. Ct. at 1876 ("CSS believes that certification is tantamount to endorsement. And 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'). Purporting to test those beliefs, as Petitioners have done here, is absolutely prohibited by the First Amendment.

B. All Licensing Laws that Burden Free Exercise are Subject to Strict Scrutiny Under the Unconstitutional Conditions Doctrine.

Petitioners' interpretation of Section 1258 as a law that sweepingly prohibits the Catholic Hospitals' exercise of First Amendment rights runs afoul of the unconstitutional conditions doctrine. A licensing statute cannot be enforced in a manner that requires a faith-based licensee to surrender its constitutional rights to participate in public life, unless the statute withstands rigorous strict scrutiny under state and federal law. As discussed below, Petitioners cannot possibly show that their interpretation of Section 1258 meets strict scrutiny. There is zero evidence to support such a conclusion and Petitioners don't even pretend otherwise.

"[T]he unconstitutional conditions doctrine imposes special restrictions upon the government's otherwise broad authority to condition the grant of a privilege or benefit when a proposed condition requires the individual to give up or refrain from exercising a constitutional right." *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 457 (2015); *see also Thomas*, 450 U.S. at 716 ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Satellite Broad. & Commc'ns Ass'n of Am. v. F.C.C.*, 146 F. Supp. 2d 803, 830 (E.D. Va.) ("regulators creating licenses must observe the standard rule that government regulation may not favor one viewpoint over another"), *review denied, order aff'd*, 275 F.3d 337 (4th Cir. 2001). The Free Exercise Clause ensures that religious institutions will not be forced to "disavow [their] religious character" in order to participate in public life. *Trinity Lutheran Church of Columbia, Inc. v.*

Comer, 137 S. Ct. 2012, 2022 (2017); *see also McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (explaining that free exercise is impaired if government encourages "abandonment" of religious principles even if the law "does not directly prohibit religious activity").

Thus, states do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (*NIFLA*); *see also Fulton*, 141 S. Ct. at 1925-26 ("The power that the City asserts is essentially the power to deny CSS a license to continue to perform work that it has carried out for decades and that religious groups have performed since time immemorial.") (Alito, J., concurring). As the Supreme Court reaffirmed in *Trinity Lutheran*, "*it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege*." *Trinity Lutheran*, 137 S. Ct. at 2022 (emphasis added) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) ("a State 'punishe[s] the free exercise of religion' by disqualifying the religious from government aid as Montana did here"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (conferral of a benefit (*i.e.,* license) may not be "conditioned on the surrender of a constitutional right"); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943) (unconstitutional license tax); *Department of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) (holding Bingo Act, which permitted charities to raise funds through Bingo, unconstitutional because it restricted the charities' ability to use their funds in violation of the First Amendment); *Country Mill Farms, LLC v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1053 (W.D. Mich. 2017) (denying motion to dismiss where "Plaintiffs [allege that they] must give up their religiously-motivated conduct in order to obtain a vendor license"); *Committee To Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 265-66 (1981) ("[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege"); *Parrish v. Civil Serv. Comm'n of Alameda Cty*., 66 Cal. 2d 260, 271 (1967).

Section 1258, if applied as Petitioners urge, conditions a benefit—a hospital license—

upon a hospital's surrender of First Amendment rights and is therefore unconstitutional. Saying that Section 1258 requires that a health facility perform all tubal ligations or no tubal ligations is the same as saying that California will license only secular hospitals and a subset of religious hospitals whose faith conforms to an all-or-nothing rule on sterilization. But that leaves out the Catholic Hospitals, at least, and thus is plainly unconstitutional. *Everson v. Bd. of Ed. of Ewing Twp*., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, *or prefer one religion over another*") (emphasis added). The State must (and does) tolerate faith-based health care in an otherwise diverse health care system that embraces both secular hospitals and religious hospitals regardless of their views on contraception. A hospital license cannot be conditioned upon a faith-based hospital's agreement to perform procedures against its religious beliefs, or its agreement not to perform otherwise lawful procedures with patient consent, which would also violate its protected beliefs. *See Trinity Lutheran,* 137 S. Ct. at 2022 (government cannot deny "benefits" to a church applicant for funding by conditioning participation on "disavow[ing] [its] religious character"). The state would not be able to enforce such an unconstitutional restriction; Petitioners' claim, which borrows Section 1258, is subject to the same limitations applicable to a government enforcement action.

C. <u>As Interpreted By Petitioners, Section 1258 Is Not a Neutral Law of General Applicability and Is Subject to Strict Scrutiny for This Reason as Well.</u>

Petitioners' case hinges on the false assertions that Section 1258 should be interpreted like a neutral and general public accommodation law of general applicability, and that therefore *Smith* applies subjecting the statute only to rational basis scrutiny. (Pet. Reply 5/5/21, 29:9.)

First, Section 1258 is not a public accommodation law. This Court dismissed Petitioners' Unruh Act claim in 2016. Section 1258 provides no right to the general public, and the licensing of acute care health facilities is no more a public accommodation than the certification of foster care parents, which the Court in *Fulton* declared was not a public accommodation.[39] *See Fulton*,

[39] Moreover, the Catholic Hospitals' free exercise rights plainly cannot be burdened by a public accommodation law either. It is well recognized that there is a fundamental distinction between the protected Catholic views regarding

141. S. Ct. at 1080 (rejecting the City of Philadelphia's effort to mischaracterize its foster care placement program as a "public accommodation" law, a key reason that caused the Court not to revisit *Smith* in *Fulton*, despite the uniform expressions of doubt in *Fulton* that *Smith* remains good law).[40]

Second, as interpreted by Petitioners, Section 1258 is neither neutral nor generally applicable, and therefore would be entitled to the strict scrutiny applicable to state laws that discriminate against religion. As discussed below, the Supreme Court has increasingly narrowed what "neutral and generally applicable" means, starting with *Hosanna-Tabor* and culminating with *Fulton*. *Hosanna-Tabor*, 565 U.S. at 190 (distinguishing *Smith* because it "involved government regulation of only outward physical acts"); *Fulton,* 141 S. Ct. at 1877 ("law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Tandon,* 141 S. Ct. at 1296 ("government regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise"); *Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2277 (2020) (citing *Sherbert* and holding "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct"); *Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Sherbert*). *Smith* is of no help to Petitioners here.

1. Petitioners Cannot Target Catholic Health Care, Weaponize Section 1258, and Still Claim "Neutrality."

If Section 1258 prohibits application of religious criteria, as Petitioners assert, then it is not neutral. "Government fails to act neutrally when it proceeds in a manner intolerant of

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the sanctity of human life and contraception and prohibited discrimination. *Compare*, *e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) ("discrimination on the basis of race [is] odious in all aspects" and "[r]acial bias is distinct in a pragmatic sense") *with Masterpiece*, 138 S. Ct. at 1727 ("[T]he religious and philosophical objections to gay marriage are protected views") and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

[40] In contrast, the certiorari petition in *Minton* focuses on a public accommodations law, the Unruh Act. Dignity Health pointed out this major distinction in the first paragraph of its supplemental brief following the *Fulton* decision. *See* https://www.supremecourt.gov/DocketPDF/19/19-1135/182188/20210621141741770_Minton%20supplemental%20brief.pdf.

religious beliefs . . . ." *Fulton*, 141 S. Ct. at 1877; *see also Church of Lukumi*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral").[41] Additionally, improper targeting of religion may be determined by reference to the statements and conduct of those seeking to interpret and enforce the law. *Church of Lukumi*, 508 U.S. at 537-38 ("The city claims that this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general."). Petitioners do not get the benefit of the low standard of scrutiny that applies to neutral laws while they act with religiously hostile intent.

The ACLU has not kept its targeted campaign against Catholic health care a secret. Its website says, "The Federal Government Must Stop Catholic Hospitals From Harming More Women."[42] The ACLU published a report about Catholic healthcare called "Health Care Denied," arguing that by adhering to the ERDs, Catholic hospitals deny essential health services.[43] And it is the ACLU and Petitioners that are offering an interpretation of Section 1258 that departs from five decades of government neutrality. Targeting of the Catholic Hospitals is the point of their case. Strict scrutiny applies.

The ACLU and PRH make no secret of their belief that Catholic health care harms women. Petitioners assert that Section 1258 was *intended* to "elimat[e] arbitrary and *moral* judgment as to who is worthy of a tubal ligation." (Resp. Appx. Vol. X, Ex. 133, 20:13-16; Pet. Br., 32:20-22 ("the Legislature passed the law to prohibit *exactly* the kind of arbitrary, nonmedical standards that Respondent's Catholic Hospitals currently impose") (emphasis in original).) Since the evidence establishes that Petitioners' suit targets the Catholic Hospitals' exercise of religion, and Petitioners think the legislative history of Section 1258 reflects an intent

[41] As discussed in Section IV(C)(2), *infra,* while the presence of exceptions affects general applicability, if the government fails to extend those exemptions to religious activity, then the government has failed to act neutrally as well. *Tandon,* 141 S. Ct. 1294 at 196 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020)); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-32 (2018) (state prosecuted religious objections but not secular objections).

[42] https://www.aclu.org/blog/reproductive-freedom/religion-and-reproductive-rights/federal-government-must-stop-catholic/.

[43] https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied.

to target, then necessarily strict scrutiny applies. Indeed, by conditioning a license upon conforming beliefs, Petitioners' insistence that Section 1258 is an equal access law itself demands dissimilar treatment of Catholic hospitals from secular hospitals operating under the same law. If the government cannot hide behind the neutral window dressing of its own laws, Petitioners cannot hide their targeting behind the State's historical neutrality by claiming *Smith* applies. *Church of Lukumi*, 508 U.S. at 535 ("the effect of a law in its real operation is strong evidence of its object"). Petitioners cannot demand that this Court adopt a religiously hostile interpretation of Section 1258 that the Legislature did not intend, and the State has never adopted, while hiding behind its neutral language. *See, e.g., Masterpiece Cakeshop,,* 138 S. Ct. at 1729 (searching neutrality inquiry included review of record for statements evidencing lack of neutrality that had not been briefed by the parties).

2. Section 1258 Is Not Generally Applicable Because It Allows the State to Make Exceptions.

"A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing ' 'a mechanism for individualized exemptions.'' " *Fulton*, 141 S. Ct. at 1877 (quoting *Smith* "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). The Legislature expressly stated that Section 1258 is a statute with exceptions and incorporated express exceptions for consideration of secular factors -- physical and mental condition. . Health & Safety Code 1258 ("Sterilization for contraceptive purposes; prohibition against nonmedical qualifications; ***exceptions***") (emphasis added). Moreover, the entire hospital licensing scheme is based on a hospital-by-hospital individualized inquiry. Section 1258 specifically invites the government to consider individual reasons for a hospital's purpose and conduct and provides a mechanism for doing so.

Accordingly, unless the free exercise of religion is also treated as an exception, then strict scrutiny applies because the law treats secular considerations more favorably than religious exercise. *Tandon,* 141 S.Ct. at 1296; *Church of Lukumi*, 508 U.S. at 535 ("the effect of a law in its real operation is strong evidence of its object"); *InterVarsity Christian Fellowship/USA v. Bd.*

of Governors of Wayne State Univ., 2021 WL 1387787, at *24 (E.D. Mich. Apr. 13, 2021) ("Defendants cannot constitutionally permit secular groups to discriminate and limit leadership positions based on secular categories . . . while preventing religious groups from engaging in activity that is the same except for its focus on religion"). That is both a neutrality and general applicability problem. Similarly, if the Court interprets Section 1258 as limiting hospital purposes to the secular perspective of the medical literature, rather than the purpose of a Catholic health facility that adheres to the ERDs, then Section 1258 is not neutral and strict scrutiny applies.

A law also "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. According to Petitioners, Section 1258 promotes the compelling state interest of "access to sterilization operations for contraceptive purposes, free of arbitrary, nonmedical obstacles." (*See* Pet. Reply, 26:12-14; Pet. Op. Br., 31:21-32:1; Pet. Reply, 26:1-2; Resp. Appx. Vol. X, Ex. 133, 23:20-22.) But Petitioners' own evidence and expert testimony establish that Petitioners' interpretation makes Section 1258 a law that *prohibits religious conduct* (applying religious rules to sterilization requests) *while permitting secular conduct* (allowing non-religious exceptions). This is exactly what the Supreme Court prohibits with its decisions in *Tandon* and *Fulton*.

According to ACOG, only 50% of women who request postpartum sterilization during prenatal contraception counseling actually receive the procedure. (Pet. Ex. 10, p. 1; *see also* Resp. Ex. 119 (39-57% of women who request postpartum sterilization undergo the procedure)). ACOG identified, and Dr. Jackson confirmed, that this discrepancy is based on numerous arbitrary, nonmedical obstacles that are not remotely addressed by Section 1258. Practitioner bias, including by those who refuse to operate on obese patients for nonmedical reasons, results in unperformed procedures. (Resp. Ex. 119, pp. e2-e3.) Physicians may decline to perform procedures for reasons of faith and conscience. *Id.* Between 10-33% of unfilled requests for contraceptive sterilization are the result of lack of operating room space or unavailability of anesthesia personnel. *Id.* at e4. Failure to meet Medicaid's sterilization consent form timing

requirements "are estimated to be the direct cause of 24-44% of unfulfilled requests, which itself creates a "two-tiered system of access."[44] *Id.* at e4-e5. In other words, the undisputed evidence establishes that Petitioners' interpretation of Section 1258 would prohibit religious exercise while leaving most of the arbitrary, nonmedical obstacles to contraceptive sterilization in place. Under *Tandon* and *Fulton*, such a law is subject to strict scrutiny.

D. Petitioners Have Failed to Present Any Evidence That Section 1258, as Interpreted by Petitioners, Satisfies Strict Scrutiny.

1. Petitioners' Interpretation of Section 1258 Is Subject to "the Most Rigorous of Scrutiny."

All licensing laws and "law[s] burdening religious practice that [are] not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546; *Fulton,* 141 S. Ct. at 1881; see *also San Diego Cty. Water Auth. v. Metro. Water Dist. of S. California*, 12 Cal. App. 5th 1124, 1159 (2017) (proponent of law bears "a heavy burden" in justifying imposing conditions on constitutional rights as part of a licensing or benefits law); *Trinity Lutheran*, 137 S. Ct. at 2019 and 2024 (conditions that impose a penalty on the free exercise of religion guaranteed by the United States Constitution are subject to the "most rigorous scrutiny"). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of Lukumi*, 508 U.S. at 546. And, when the government grants exemptions, it "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Fulton*, 141 S. Ct. at 1877. "A government policy can survive strict scrutiny only if it advances 'interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881. "That standard 'is not watered down'; it 'really means what it says.'" *Tandon*, 141 S.Ct. at 1298; *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least

[44] To achieve equitable access, California would have to impose Medicaid's consent and 30-day waiting period requirements on all patients seeking sterilization operations for contraceptive purposes, which would invariably lead to fewer procedures being performed in the name of equity and lawsuits from affected patients. Although Dr. Jackson suggested that the state should eliminate the Medicaid requirements for Medicaid patients, California is of course powerless to eliminate federal law. If Section 1258 cannot prohibit Medicaid's consent form and waiting period requirements, which plainly are nonmedical qualifications, it certainly cannot also prohibit free exercise.

restrictive means of achieving some compelling state interest."). Petitioners must establish that the State has a compelling interest in "*denying* an exception" to Dignity Health. *Fulton,* 141 S. Ct. at 1881.

Following *NIFLA, Tandon,* and *Fulton*, California courts have been forced to apply the exacting strict scrutiny demanded by Supreme Court precedent. *See Taking Offense v. State of California,* -- Cal. App. 5th --, 2021 WL 3013112 (Cal. App., 3rd Dist., July 16, 2021). In *Taking Offense*, the court struct down on First Amendment grounds a state law that criminalized the willful mis-gendering of residents of California's nursing homes. *Id.* at *8-10. The court held that the statute was a facially improper content-based restriction that was subject to exacting strict scrutiny, and the state could not show that the law was narrowly tailored or that less restrictive alternatives were considered in lieu of criminalizing speech. *See Taking Offense*, 2021 WL 3013112, at *12 ("the Attorney General has not shown that criminalizing occasional, off-hand, or isolated instances of misgendering, that need not occur in the resident's presence and need not have a harassing or discriminatory effect on the resident's treatment or access to care, is necessary to advance that goal").

2. Petitioners Have Failed to Establish the State's Compelling Interest.

a. The State's Compelling Interest Is Determined by the State, Not Petitioners.

Petitioners have variously asserted that, under their interpretation, Section 1258 furthers the government's compelling interests in "equitable access to health care" and preventing "arbitrary denials of reproductive healthcare."[45] (Pet. Br. 31:27-28; Resp. Appx. Vol. X, Ex. 133, 20:5-7; 23:20-22.) But apart from the fact that Section 1258 is a hospital licensing statute and not an equal access law, where is the evidence of these interests? Petitioners are not the government; they do not get to simply make up the government's "compelling interest" from

[45] As a threshold matter, Section 1258 cannot promote "equitable access" or the elimination of "arbitrary" denials if it permits health facilities to prohibit sterilization operations altogether *for any reason*. Similarly, Section 1258's limited application also shows that it cannot be a "standard of care" statute. Petitioners contend the standard of care is to perform postpartum tubal ligations for all patients who desire them, another attack on the Catholic Hospitals for functioning below an imagined singular standard of care, but which is not advanced by Section 1258. (Pet. Op. Br., 10/7/20, 14:18-19.)

whole cloth.

The State of California has made clear it does not ascribe such generalized interests to Section 1258. The undisputed evidence establishes that the State has interpreted Section 1258 in a manner to advance more precisely defined compelling interests, and has properly rejected the interpretation supported by generalized interests advanced by Petitioners. California's interest in an interpretation that does not burden free exercise, or in granting an exception to the Catholic Hospitals if it does, is evidenced by the undisputed evidence that: (1) the State has never sought to interfere with the Catholic Hospitals' sterilization review committees' free exercise rights; (2) the California Attorney General's Conditions of Consent require that the Catholic Hospitals continue to provide services at this level and as exceptions to the ERDs; and (3) the ACLU and PRH demanded that these requirements be imposed because "[Dignity Health] hospitals provide a vital source of care for the low income populations . . . . As the state's largest provider of Medi-Cal services, [Dignity Health] is critical to the state's social safety net." (Resp. Ex. 24.)

The State of California's conduct over fifty years makes clear that it either does not agree with any part of Petitioners' interpretation of Section 1258, or that it has acted appropriately under the state and federal constitutions in recognizing that the statute cannot be enforced in the way asserted by Petitioners. As reflected in the legislative history focused upon the 120-point rule, Section 1258 was enacted to serve the compelling interests of eliminating it, thereby increasing access by eliminating that constraint, and it has succeeded in achieving those goals. On the other hand, the legislative history also reflects an intent to exempt from Section 1258 hospitals and clinics that prohibit sterilization operations for contraceptive purposes as a matter of policy.[46]

The Conditions of Consent are further evidence of the State's compelling interests. Under the statutory scheme, the Attorney General is empowered to make a unilateral written

[46] Pet. Ex. 1, Staff Analysis of Senate Bill No. 1358, as amended May 1, 1972: "As a matter of internal administration, some hospitals and clinics have imposed certain non-medical criteria (usually as to age and number of children) as qualifications for voluntary sterilizations. The most common standard in this regard have been the so-called '120-point' system . . . . SB1358 would prohibit the imposition of *such* non-medical standards where they are not imposed for other types of operations. . . . The bill is limited to institutions that permit sterilizations for contraceptive purposes so that it would not affect hospitals and clinics which do not permit such operations as matter of policy." (Emphasis added).

decision to consent to, give conditional consent to, or not consent to a proposed transaction. *See* Corp. Code §§ 5920-21. The statute is explicit that such decisions are within the discretion of the Attorney General. Corp. Code § 5923. Any conditions imposed on a transaction are an administrative *decision*, not some "agreement" with the applicant. Corp. Code §§ 5920-22; *see also* Cal. Code Regs., tit. 11, § 999.5 (e)(3), (f).

Indeed, the continuation of hospital services before a transaction is approved is codified California state policy: "It is the policy of the Attorney General, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services." Cal. Code Regs., tit. 11, § 999.5(f)(8)(C). If the applicant finds the conditions unacceptable, its options are to abandon the transaction or to file a writ of mandate petition against the Attorney General. The Conditions of Consent include the very conditions that the ACLU lobbied to have imposed *because doing so is a public benefit* that furthers California law and "policy" and the State's compelling interests.[47]

b. Section 1258 Is Woefully Underinclusive to Achieve the So-Called Compelling Interests Identified by Petitioners.

"Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi*, 508 U.S. at 546–47; *InterVarsity Christian Fellowship*, 2021 WL 1387787, at *27 ("courts have repeatedly stuck down government rules or policies that treat religious activities differently than secular activities, despite the activities having similar effects on the public interest the government policy is purportedly serving to

[47] *See* Resp. Ex. 9; Ex. 24, September 27, 2018 letter from ACLU, PRH, and other special interest groups to Wendi A. Horwitz, Deputy Attorney General: "[Dignity Health] hospitals provide a vital source of care for the low-income populations in the surrounding areas, particularly individuals and families with Medi-Cal or Medicare coverage. As the state's largest provider of Medi-Cal services, [Dignity Health] is *critical* to the state's social safety net." (Emphasis added).

protect. Such policies are not generally applicable"). Petitioners' interpretation of Section 1258 renders it an underinclusive law, and the government never has a compelling interest in burdening religion with an underinclusive law.

Petitioners contend that the statute is intended "to stop the use of non-medical criteria for women seeking tubal ligations." (Resp. Appx. Vol. X, Ex. 133, 21:23-26.) Petitioners' own evidence establishes that Section 1258 is woefully underinclusive to serve this generalized interest. *See InterVarsity Christian Fellowship*, 2021 WL 1387787, at *27 ("courts have repeatedly stuck down government rules or policies that treat religious activities differently than secular activities, despite the activities having similar effects on the public interest the government policy is purportedly serving to protect. Such policies are not generally applicable"). It certainly does not come close to addressing the myriad nonmedical factors that the State would have to address if the word "special" is read out of the statute and all nonmedical factors are to be barred. The undisputed evidence, fueled by Dr. Jackson, establishes that most of the barriers to "equitable access" to sterilization operations for contraceptive purposes, or reasons for "arbitrary denial" of such services, are entirely secular and unaffected by Section 1258. Dr. Jackson agreed that this is a "huge population" that does not obtain tubal ligation procedures at secular hospitals due to nonmedical "administrative barriers." (Resp. Appx. Vol. X, Ex. 133, 124:14-125:18) Dr. Jackson further confirmed that even in non-Catholic facilities, patients cannot get desired sterilization operations due to various nonmedical reasons, including lack of coverage by the patient's insurance plan, lack of physician or facility availability, and Medicaid consent forms—all barriers to access. (Resp. Appx. Vol. X, Ex. 133, 122:3-123:4.) And Dr. Jackson agreed that Petitioners' interpretation of Section 1258 to penalize the Catholic Hospitals for relying on the ERDs would *not* address any of these barriers to access.[48] (Resp. Appx. Vol. X, Ex. 133, 126:15-26.)

If the State of California wanted to create equitable access to postpartum sterilization operations for contraceptive purposes, it would not only have to address the issues identified

[48] This, too, confirms Petitioners' targeting of religion. Despite Section 1258's sweeping compelling interests, the only targets of this lawsuit are the Catholic Hospitals.

above, but also geographic, ethnic, and financial barriers. This would require an entirely different statute. The State would likely have to erect barriers that do not currently exist to level the playing field. This would also be unconstitutional, and, without irony, the ACLU and PRH would likely be the first to complain about the encroachment on women's constitutional rights in the name of equality. *See Committee To Defend Reproductive Rights*, 29 Cal. 3d at 262. The undisputed evidence establishes that Petitioners' interpretation of Section 1258 would prohibit religious exercise while leaving most of the arbitrary, nonmedical obstacles to contraceptive sterilization in place. That's pure religious targeting; the government never has a compelling interest in such a misadventure.

3. The State Has No Compelling Interest in Denying an Exemption to Section 1258 (as Interpreted by Petitioners) to Catholic Hospitals.

Petitioners' attempt to identify a generalized compelling state interest is merely the beginning of the strict scrutiny inquiry. Time and time again, governments have argued that the First Amendment must yield to generalized compelling interests, like "equitable access," only for the Supreme Court to hold that the law fails real strict scrutiny. *Fulton*, 141 S. Ct. at 1881 (city required to grant exemption to religious organization notwithstanding state's compelling interest in "equal treatment" of prospective foster parents and foster children) (citing *Gonzales*, 546 U.S. at 431-32, holding that use of controlled substances in religious ceremony was protected notwithstanding compelling interest to prevent harms of drug use); *see also Mast v. Fillmore Cty., Minnesota*, 2021 WL 2742817, at *2 (U.S. July 2, 2021) (citing *Fulton*; county required to grant Amish exemption from septic tank requirement notwithstanding county's general interest in sanitation regulations) (Gorsuch, J., concurring); *Church of Lukumi,* 508 U.S. at 543 (animal slaughter and disposal statutes unconstitutional notwithstanding government interest in protecting the public health and preventing cruelty to animals); *Wisconsin v. Yoder,* 406 U.S. 205, 213, 221, 236 (1972) (Amish children exempt from compulsory school attendance law notwithstanding State's "paramount" interest in education).

That is because "[c]ontext matters in applying the compelling interest test"; "strict scrutiny does take 'relevant differences' into account—indeed, that is its fundamental purpose."

Gonzales, 546 U.S. at 431-32. "Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Id.* Thus, the relevant question is not simply whether California has a compelling interest in preventing "arbitrary" denials, but whether it would have a compelling interest in denying an exemption to the Catholic Hospitals that would allow them to perform some tubal ligation procedures that could otherwise lawfully be prohibited. *Fulton,* 141 S. Ct. at 1881; *see also Mast,* 2021 WL 2742817, at *2; *Gonzales,* 546 U.S. at 431. It is impossible for Petitioners to satisfy this standard.

There is no compelling interest for the result sought by Petitioners. Enforcing Section 1258, as interpreted by Petitioners and without an exemption for the Catholic Hospitals, would make no sense and would contrary to the public interest. Access would remain inequitable, because hospitals would remain free to apply a host of nonmedical criteria, and more procedures would be denied because Catholic hospitals would be unable to perform any. Moreover, according to Petitioners' view, the right not to perform sterilization operations for contraceptive purposes is itself a religious carve-out. Thus, having made an exception for some views, the State must make an exception for the Catholic Hospitals.

Infringing the Catholic Hospitals' free exercise rights is not reasonably related to the public policy behind the licensing of acute care hospitals.[49] The purpose of licensing statutes, generally, is to protect the health and safety of the public. Pet. Br. 31:27-28; *Yanke v. State Dep't of Pub. Health*, 162 Cal. App. 2d 600, 604 (1958). As evidenced by the Catholic Hospitals' decades of uninterrupted licensure, the Attorney General's Conditions of Consent, and the absence of any evidence of sanction or penalty for any violations, the Catholic Hospitals pose no threat to the public health and the Conditions actually advance state "policy" to require continuation of the same services that a hospital provided before affiliating or merging with

[49] Under California law, Petitioners must establish: (1) that the conditions imposed in order to obtain a benefit (here, a license) from the state reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit. *See Committee to Defend*, 29 Cal. 3d at 265-66 ("[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege");

another hospital system. Cal. Code Regs., tit. 11, § 999.5(f)(8)(C). (Resp. Ex. 117 at 48; Strumwasser Decl., ¶¶ 16-17, 23-25; Ex. 8; McGrath Decl., ¶ 4, Ex. 24, at pp. 2-7.) Furthermore, the unconstitutional conditions doctrine stands for the proposition that a licensing law cannot promote "equitable access" at the expense of First Amendment rights because the desired engineered result is always subsidiary to the purpose of the licensing scheme.

There are, however, narrowly drawn alternative means that do not coerce violations of the Catholic Hospitals' constitutional rights, and that correlate more closely with the purposes contemplated by granting a hospital license. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest . . . ." *Tandon*, 141 S.Ct. at 1296; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2394 (2020). The most obvious less restrictive measure is to interpret Section 1258 to permit Catholic Hospitals to perform sterilizations when permitted for medical reasons that do not run afoul of the ERDs, and rejecting Petitioners' weaponized interpretation of Section 1258. This is consistent with the Attorney General's Conditions of Consent, the only direct evidence of the State's pursuit of its compelling interest. Not to mention, even while this litigation was going on, Dr. Van Kirk advertised that he could provide "Permanent Sterilization" in his office, which would not involve Catholic Hospitals at all: "we can 'tie tubes' in the office, without an incision, and without going to sleep." (Resp. Ex. 128 (Ex. 31 thereto).) Furthermore, ACOG's standards, which Dr. Van Kirk ignored, are another less restrictive alternative. According to ACOG, the woman's physician has a duty to inform his or her patient of all options and facility-based religious limitations, before she ever becomes a patient at a Catholic hospital, so that she may make an informed decision about where she chooses to deliver her baby.

Whether the effort is to regulate abortion or sterilization, state benefit and licensing laws cannot be used to coerce the surrender of protected constitutional rights. Here, the Catholic Hospitals' constitutional religious liberty interests have been protected by the United States Constitution since 1791 and by the California Constitution since it was ratified in 1879. U.S. Const. amend. I; Cal. Const. art. I, § 4. The evidence establishes that the Catholic Hospitals

have been in full compliance with state and federal regulatory requirements for decades; there is no evidence that the Catholic Hospitals pose a threat to the public health and welfare or that the state views them as doing so. California's Attorney General has even ordered the Catholic Hospitals to continue to provide postpartum tubal ligations as exceptions to the ERDs; that is, pursuant to the Catholic Hospitals' faith-based review process. Counsel for these Petitioners urged the Attorney General to impose this requirement on Dignity Health as a binding commitment and condition for his consent to its ministry affiliation with another Catholic health system. Thus, there are myriad ways to accomplish the purpose of the hospital licensing scheme that do not infringe upon the Catholic Hospitals' free exercise rights.

V. PETITIONERS SEEK RELIEF THAT IS INEQUITABLE AND WILL HARM THE PUBLIC.

Interpreting Section 1258 to foreclose the Catholic Hospitals' pastoral application of their respective sterilization policies would not serve the public interest. Before it became inconvenient, Petitioners were quite concerned about women who are unable to obtain postpartum tubal ligations and are at a higher risk for adverse pregnancy outcomes, including maternal mortality. (Pet. Br. 15:13-16; McGrath Decl., ¶ 45, Ex. 66, ¶ 27.) Petitioners began this litigation asserting that "Patients are Harmed When Their Doctors Are Prevented from Performing Postpartum Tubal Ligation." (Complaint filed 12/28/15, 8:8.) However, they now attempt to conclude the litigation by acknowledging that, if they prevail, the services available to the community will be reduced and Petitioners will be the ones responsible for harming patients. Petition, ¶ 10-11; McGrath Decl., ¶ 76, Ex. 96, ¶ 28; Petitioners' Second MSJ Opp. Filed Oct. 23, 2019, 38:4-6 ("a victory for the challengers may entail a reduction of the services offered overall"). Petitioners believe they have the luxury to casually disregard the public impact because they are not the government. They do not. An order that directly or indirectly forces the Catholic Hospitals to abandon their pastoral application of the ERDs in connection with the consideration of all relevant medical factors would, in addition to abridging the Catholic Hospitals' First Amendment free exercise rights, result in a reduction of the availability of postpartum tubal ligations, which is not in the public interest as expressed in the Attorney

General's Conditions of Consent. Indeed, it would confound the "policy" expressed in an on-point regulation to require "the continuation at the hospital of existing levels of essential healthcare services." Cal. Code Regs.. tit. 11, § 999.5(f)(8)(C).

Petitioners have no qualms about dispensing with the requirements of neutrality and disserving the public interest. When asked point blank if they understood that, as a result of this litigation, the Catholic Hospitals might prohibit all tubal ligations, Chamorro responded that she never thought about it and PRH's President, Jodi Magee, said that PRH did not care. Supplemental McGrath Decl., ¶ 15, Ex. 114, at 48:10-50:17; ¶ 16, Ex. 115, at 39:22-47:23); ¶ 7, Ex. 106, at 74:20-78:3.[50] As far as Petitioners are concerned, "a victory for the challengers may entail a reduction of the services offered overall." But it is another leap entirely to argue that it is "clearly erroneous" for the State of California to choose a different path, as would be required to entitle Petitioners to writ relief or for that matter that this Court can (or should) ignore direct negative impact of an order forcing the Catholic Hospitals to prohibit all tubal ligations.

Not surprisingly, outside of this courtroom, the ACLU and PRH both have rejected the suggestion that less is more. The ACLU's Ruth Dawson testified at a public hearing, while she was counsel of record for Petitioners, imploring the Attorney General to, at a minimum, "ensure that all reproductive services . . . that are currently being provided at each Dignity Health facility, ***including those provided as exceptions to the ERDs***, be maintained and not discontinued after the merger." McGrath Declaration, ¶ 3, Ex. 24 (emphasis added). Ms. Dawson later signed on to a letter to the California Attorney General sent by the ACLU, PRH, and others imploring the Attorney General to require that Dignity Health's Catholic Hospitals *maintain their sterilization review processes undisturbed*. The ACLU (through Ms. Dawson) and PRH wrote to the Attorney General:

> Many of the DH hospitals are located in the state's more rural areas. In some instances, these hospitals may be among the only available health providers in the area. Timely and adequate access to all health services is critical*, and this is particularly the case when it comes to reproductive health services and other essential health services.* ***The Attorney General should ensure that the***

[50] Ms. Magee testified, "If that is the outcome, that is the outcome." (Supplemental McGrath Decl., ¶ 16, Ex. 115, at 39:11-47:20; 41:11-20.) Ms. Magee reaffirmed her testimony about PRH's interests in her September 30, 2020 declaration. (Magee Decl., ¶ 6; Supplemental McGrath Decl., ¶ 15, Ex. 114, at 13:13-15:14, 38:9-21.)

> ***conditions on any merger [of Dignity Health] require that DH hospitals maintain at least the levels and types of reproductive health services and essential health services currently*** provided *for a minimum of fifteen years post-merger*.[51]

Petitioners are estopped from claiming the public interest is any different from what they told the Attorney General. Consistent with the ACLU's and PRH's request, the Attorney General required, among other things, that Dignity Health's Catholic hospitals "*maintain and provide* women's healthcare services including women's reproductive services at current licensure and designation with the *current types and/or levels of service*" for five years from the closing date of the transaction. (*Id*., p. 3 (emphasis added); Strumwasser Decl., ¶ 23, Ex. 8.) The Attorney General's approval states that the conditions are "legally binding" on Dignity Health. (McGrath Decl., ¶ 49, Ex. 69, p. 1.) But the Catholic Hospitals cannot maintain and provide postpartum tubal ligations at the "current levels of service" if Petitioners and the Court interfere with their free exercise rights, which is the basis for delivery of the current level of service.

VI. CONCLUSION.

In this case, special interest groups masquerade as the government in order to impose unconstitutional conditions on a faith-based entity's right to provide fully licensed health services and to participate in public life. The First Amendment has prohibited this for decades, even without the most recent Supreme Court decisions that are obviously quite protective of religious freedoms. The Court should deny the Petition in its entirety.

Dated: August 6, 2021

MANATT, PHELPS & PHILLIPS, LLP

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[51] McGrath Decl., ¶ 4, Ex. 24 (https://healthlaw.org/wp-content/uploads/2018/11/Coalition-Letter-Dignity-CHI-Merger-Sept.-2018.pdf (emphasis added); Ex. 91 (ACLU FAQ and Guide to Providing Public Comments); https://www.aclusocal.org/en/ensure-health-care-access-all-californians. The video is available here: https://www.youtube.com/watch?v=0tC3sSWgM_w&feature=youtu.be.

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I electronically filed the foregoing:

RESPONDENT DIGNITY HEALTH'S POST-HEARING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

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