CHRISTINE SAUNDERS HASKETT (SBN 188053)
MICHAEL S. GREENBERG (SBN 99727)
RAINA BHATT (SBN 319435)
MAJID WAHEED (SBN 332893)
COVINGTON & BURLING LLP
Salesforce Tower, 415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
Email: chaskett@cov.com; mgreenberg@cov.com;
rbhatt@cov.com; mwaheed@cov.com

DIANE RAMIREZ (SBN 316752)
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Floor 35
Los Angeles, CA 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4818
Email: dramirez@cov.com

Attorneys for Petitioners
Additional Counsel on Next Page

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

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH

Petitioners,

v.

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

Respondents.

Case No. CGC 15-549626

PETITIONERS' POST-HEARING OPENING BRIEF

Date: September 20, 2021
Time: 2:00 p.m.
Dep't: 505

Attorneys for Petitioners, continued

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

MINOUCHE KANDEL (SBN 157098)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5266
Facsimile: (213) 201-7871
Email: mkandel@aclusocal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. Introduction

Health & Safety Code Section 1258 manifests California's commitment to reproductive freedom—the freedom of a patient to determine what is in her best reproductive interests in conjunction with her doctor. It requires equal access to tubal ligations, unfettered by the provider's moral views and nonmedical requirements: if a hospital chooses to provide any tubal ligations, it then is prohibited from denying patients access to tubal ligations for nonmedical reasons. Respondent[1] chooses to provide tubal ligations in its California licensed hospitals, so it is prohibited from imposing nonmedical criteria on any woman's right to obtain one. It may not deny tubal ligations unless there is a medical reason the procedure is contraindicated. It may not pick and choose which patients may have tubal ligations by imposing a special committee review process that is not imposed on any other similar procedure, and that Respondent admits considers nonmedical criteria. And Respondent cannot deny tubal ligations for religious reasons. Nor do Respondent's religious beliefs insulate it from this neutral and generally applicable licensing requirement.

In its summary judgment rulings, the Court set forth the applicable case law and the legal standards that govern this proceeding, including with respect to Petitioners' statutory claims and Respondent's argument that religious freedom principles afford its Catholic hospitals license to violate Section 1258. The Court rejected Respondent's legal arguments. And, despite Respondent's oft-repeated claim that the Supreme Court's decision in *Fulton v. Philadelphia* would fundamentally change the legal landscape set out in this Court's orders, *Fulton* did no such thing. On the contrary, *Fulton* confirmed that *Employment Division v. Smith* remains the law of the land, and that neutral, generally applicable laws are constitutional, even if they impose some burden on religious people and institutions. Section 1258 is a neutral statute, generally

[1] References to "Respondent" mean Dignity Health, the defendant in this action. References to "Respondent's hospitals" means the six Dignity Health Catholic hospitals at issue in this litigation: Mercy Medical Center Redding, Mercy Medical Center Mt. Shasta, and St. Elizabeth Community Hospital (collectively, the "North State" hospitals) and Mercy San Juan Medical Center, Mercy Hospital of Folsom, and Mercy General Hospital (collectively, the "Sacramento" hospitals).

applicable to all licensed hospitals that perform sterilization operations for contraceptive purposes, without exception. This Court was, and remains, right on the governing legal standards.

This Court's summary judgment rulings identified two triable issues of fact that required resolution through the live writ hearing: (1) "whether Dignity Health 'permits sterilization operations for contraceptive purposes' at its Catholic hospitals as the quoted phrase is used in section 1258;" and (2) "whether Dignity Health requires its patients seeking postpartum tubal ligations to meet one or more 'special nonmedical qualifications' as the quoted phrase is used in section 1258." (Pet'r Ex. 2, Order Denying Resp's Mot. for Summ. J. at 2.[2])

Through testimony at the writ hearing, Petitioners demonstrated unequivocally, including through the words of Respondent's own witnesses, both that Respondent's hospitals permit postpartum tubal ligations for contraceptive purposes, and that these hospitals require patients seeking postpartum tubal ligations to meet one or more special nonmedical qualifications that are not imposed on other procedures. The facts, now proven through a contested live hearing, and evaluated in light of the relevant statutory and case authorities, entitle Petitioners to the order they have long sought in order to ensure equal access to reproductive healthcare: The Court should issue a writ of mandate requiring Respondent to comply with Section 1258.

II. Argument

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

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

Respondent's hospitals—like all other health facilities licensed in the State of California—are subject to range of licensing provisions, as well as other state regulatory regimes.

[2] For the Court's convenience, particularly given the size of the appendices the parties filed prior to the writ hearing, Petitioners are filing concurrently with this brief a supplemental appendix that includes only exhibits that Petitioners cite in this brief. For consistency and to facilitate the Court's review, this brief and supplemental appendix have maintained the same exhibits numbers for all documents previously filed in the earlier appendices. Any citations to exhibits that have not been previously filed by Petitioners, e.g. the transcript from the writ hearing, are newly numbered.

See Health & Safety Code, Div. 2 (Licensing Provisions), Ch. 2 (Health Facilities). Although Respondent's hospitals may have a long affiliation with the Catholic Church, they are nonetheless health care facilities, and thus are required to operate within the legal structures imposed on all California health facilities. Health & Safety Code § 1253 (no organization shall operate a health facility in the state without first obtaining a license).

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

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

Respondent has never pointed to any words in Section 1258, and there are none, that could possibly be read to limit its reach to only *some* health facilities. Nor does Section 1258 contain any sort of process to permit health facilities to request an exemption from its requirements, or for authorities to grant an exemption *sua sponte*. Section 1258 is utterly neutral in its application, and inclusive of all health facilities that permit sterilization operations for contraceptive purposes, without any exceptions, discretionary or otherwise.

As described in the legislative history, the "primary" and "central" issues the Legislature intended to address in enacting Section 1258 and comparable provisions were "whether or not an individual having attained the age of majority has the right to obtain a sterilization if he so desires without encountering obstacles from the hospital or clinic . . . " and "whether sterilization is a matter between the individual and his physician or whether a hospital or clinic has a right to

impose an arbitrary standard of its own." (Pet'r Ex. 1, California Assembly Committee on Health Analysis of Senate Bill No. 1358 at 27-28 ("Legislative History")).[3]

Prior to the passage of Section 1258, it was common for hospitals to determine when a patient could receive "voluntary sterilization" by imposing nonmedical obstacles such as (but not limited to) the "120 Rule," a method under which the patient's age was multiplied by the number of children the patient already had: if that number equaled 120 or more, the patient was permitted to undergo the procedure. While directed primarily towards ensuring that patients could access sterilization without barriers imposed by hospitals and other health facilities, the Legislature was careful in Section 1258 not to require all hospitals and health facilities to provide voluntary sterilizations. As explained in the bill analysis, "[t]he bill is limited to institutions that permit sterilizations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (Pet'r Ex. 1, Legislative History at 27). Thus, in enacting Section 1258, the Legislature struck a balance: it required equality of access to sterilization procedures in institutions that provide any such procedures, but it did not require any institution to provide them.

The legislative record contains evidence that the California Legislature contemplated the bill's potential impact on religiously-affiliated institutions when it enacted Section 1258. First, the record contains a letter from California's Department of Public Health ("DPH") submitted to the bill's author, Senator Beilenson, expressing the department's "concern[] with the possible effect [S.B 1358] might have on hospitals operated by religious groups." (Pet'r Ex. 1, Legislative History at 31). After DPH submitted its letter, a bill analysis explained that "[t]he bill is limited to institutions that permit sterilizations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (Pet'r Ex. 1, Legislative

[3] SB 1358 added Health & Safety Code sections 1459 (pertaining to sterilizations in county hospitals; 32128.10 (pertaining to sterilizations in hospitals established by the Board of Directors); and what became section 1232 (pertaining to sterilizations in clinics). The staff analysis of SB 1872, which enacted Health & Safety code section 1258, explains that SB 1872 would reinstate the prohibitions of SB 1358 that applied to general hospitals/"health facilities" that were inadvertently deleted by the enactment of SB 414. (Resp't Ex. 29, Staff Analysis of Senate Bill No. 1872, at 1-2).

History at 27). Next, the legislative record contains a letter from the Pro Life Council of California urging its membership to write to the Governor asking for a veto of S.B. 1358. The letter characterizes S.B. 1358 as one of four "immoral" bills passed by the Legislature, and described it as "requir[ing] any hospital that performs sterilizations to perform this operation on anyone who wants it." (Pet'r Ex. 1, Legislative History at 41).

Both the submission from DPH and the letter from the Pro Life Council indicate that the Legislature was well aware before enacting Section 1258 of the possible effect on religiously-affiliated hospitals—and understood the possibility that some such hospitals might choose to alter their practices concerning sterilization operations. But the legislative "fix" to this was to permit health facilities to opt out of performing sterilization operations for contraceptive purposes—tubal ligations being explicitly recognized by the Legislature as such a procedure (Pet'r Ex. 1, Legislative History at 27)—altogether.[4]

2. **Respondent Permits Sterilization Operations for Contraceptive Purposes to Be Performed in its Catholic Hospitals.**

Based on the evidence submitted at the writ hearing, orally and through documents, it is beyond any reasonable dispute, and certainly has been proven by a preponderance of the evidence, that Respondent's hospitals "permit sterilization operations for contraceptive purposes to be performed" in their hospitals. Respondent concedes that tubal ligations are performed at its hospitals, and the overwhelming evidence through experts, medical literature and Respondent's own lay witnesses proved that the procedure has a contraceptive purpose, and indeed that that is its *only* purpose.

The Court's summary judgment order explained that the question of whether a tubal ligation is contraceptive cannot be determined by the subjective views of either the health facility or the patient; rather, it must ultimately be "based on an objective standard grounded in medical

[4] Respondent now argues that Catholic hospitals would have objected to the bill if they knew it would prevent them from performing tubal ligations they deemed religiously required. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 25:5–26:5). However, the much more obvious interpretation of Catholic hospital silence on the bill is that no Catholic hospitals in 1972 were arguing that they were religiously obligated to perform some tubal ligations.

literature on sterilization operations." (Pet'r Ex. 2, Order Denying Resp's Mot. for Summ. J. at 2.). Thus, the testimony of Petitioner's medical expert, Dr. Jackson, is the most relevant evidence presented heard by the Court on this issue. Dr. Jackson is the Division Chief for the Department of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital ("SFGH") at the University of California, San Francisco ("UCSF"), and is the Department's Vice Chair for Clinical Services at SFGH. She is also a Professor in the Department of Obstetrics, Gynecology & Reproductive Science, and in the Department of Epidemiology & Biostatistics at UCSF School of Medicine. She is a board certified OBGYN who has performed hundreds of tubal ligations, and she currently sits on The American College of Obstetricians and Gynecologists (ACOG) committee named Practice Bulletins—Obstetrics.

Dr. Jackson's testimony was clear: postpartum tubal ligation is *always* done for a contraceptive purpose since, by definition, its only goal is to render the patient incapable of becoming pregnant.

> Q: Is there ever -- my apologies -- is there ever a purpose for tubal ligation other than contraception?
>
> Jackson: A tubal ligation can only provide contraception. That is its sole intent, that's the only thing it can do.

Pet'r Ex. 40, Writ Hearing 5/17 Tr. 76:23–77:1.

Dr. Jackson's expert medical testimony is grounded in, and uniformly backed by, the medical literature. Medical textbooks describe tubal ligation as a "method of accomplishing surgical sterilization." (Declaration of Rebecca Jackson ("Jackson Dec.") ¶ 5(a)). And as described in the American Journal of Obstetric Gynecology:

> By 1988 tubal sterilization had become the most prevalent method of contraception among married and formerly married women in the United States, and by 1990 more U.S. women had undergone tubal sterilization than were using oral contraceptives or any other single method of contraception.

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

Indeed, Dr. Jackson's expert testimony was uncontroverted by *any* medical expert at the hearing. Respondent designated an expert in this case, Dr. Shields, but notably he did not appear at the writ hearing, and Respondent also offered the Court no testimony from him (or any expert) through declaration or deposition. That is not surprising since at his deposition, parts of which Petitioners placed in evidence, Dr. Shields admitted that that the purpose of a tubal ligation is contraceptive:

> Q: What is tubal ligation?
>
> Dr. Shields: Tubal ligation is a term that's applied to many methods that disrupt the continuity of the fallopian tube, as a form of contraception, or prevention of further pregnancies.

(Pet'r Ex. 42, Transcript of Laurence Shields Deposition ("Shields Dep.") at 39:18–22).

Not only did both Petitioners' and Respondent's medical experts agree that tubal ligations are an inherently contraceptive procedure, so too did Dr. Van Kirk, Chief of Surgery at Mercy Medical Center Redding ("MMCR"), one of the Respondent hospitals. He testified by declaration:

> Tubal ligation refers to closing off the fallopian tubes, so that egg cannot move down the fallopian tube into the uterus, which means that sperm cannot reach the egg. Tubal ligation is one of the most commonly used forms of birth control. It has a number of advantages. It does not require individualized acts, such as daily

[5] *See also* Jackson Dec. ¶ 5(c), citing and quoting Braaten et al., *Overview of female permanent contraception*, UpToDate (last updated June 4, 2020) ("Female permanent contraception (also referred to as sterilization and tubal ligation) can be performed using several different procedures and techniques that prevent pregnancy by occluding or removing the fallopian tubes. It is indicated for women who are certain they have completed childbearing and do not wish to use a reversible contraceptive method or consider vasectomy of their male partner . . . The only indication for female permanent contraception is the patient's preference to have a permanent method of contraception for pregnancy prevention."); Jackson Dec. ¶ 5(f), citing and quoting California Department of Healthcare Services, Family PACT: *Tubal Ligation* ("Tubal Ligation, also called 'getting your tubes tied,' is a surgery that prevents pregnancy. It closes the tubes that carry eggs from the ovaries to the uterus. Since the eggs have nowhere to go, your body will just absorb them. If sperm can't get to an egg, you can't get pregnant. Tubal Ligation is meant to be a permanent form of birth control.").

> use of contraceptives. It takes immediate effect and provides permanent contraception. It is safe and effective, with a very high success rate.

(Pet'r Ex. 7, 2015 Declaration of Samuel Van Kirk at ¶ 6).

Even Respondent's own website describes the purpose of a tubal ligation as contraceptive, i.e., as a "surgical procedure for women who wish to prevent pregnancy permanently," and notes "You may choose to have a tubal ligation if: You do not want children in the future." (Pet'r Ex. 28).

As for whether there is some purported additional, non-contraceptive, purpose in the subjective "mind" of Respondent's hospitals when they approve a tubal ligation, Dr. Jackson explained that—unlike other sterilization operations such as a hysterectomy, which may be performed to treat an existing medical problem such as ovarian cancer but have a secondary effect of sterilization—tubal ligations do not treat any current medical problems:

> Jackson: So there is no cure or alleviation of anything present that a tubal ligation achieves. There is no -- unlike, for example, an appendectomy where you're removing the appendix because it is diseased, and that is why you are doing it. When you tie the tubes or remove a segment of the tubes, the tubes are, in fact, completely normal and functional. So you are not curing or alleviating any sort of disease or pathology by tying the tubes, or removing the tubes or occluding the tubes.
>
> Q: And Dr. Jackson, medically, what type of procedure that induced sterility could have the direct effect to cure or alleviate a present pathology?
>
> Jackson: An example would be a hysterectomy, which could be done because someone has bleeding or someone has pain. And because we're removing her uterus, we are, in fact, rendering her sterile as well.

(Pet'r Ex. 40, Writ Hearing 5/17 Tr. 74:4–13; 75:8–14). A hysterectomy is therapeutic because it is not performed to avoid a future pregnancy; it is performed to address a medical problem that requires removal of the uterus. Tubal ligations are performed only to avoid a future pregnancy, whether because of a desire not to have more children or to prevent potential harms from a future pregnancy. Hence, tubal ligations are always performed for contraceptive purposes.

Bolstering Dr. Jackson's expert testimony and the medical literature on this point is the testimony of Respondent's Dr. James De Soto, formerly the Vice President of Medical Affairs

for Dignity Health in the North State Service Area, and whose current title is Chief Medical Officer at Mercy Medical Center, Redding. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 63:22–26). Petitioners called Dr. De Soto as an adverse lay witness at the writ hearing. His admissions on Respondent's behalf on this point are both detailed and telling, as he expressly conceded in a series of questions and answers that tubal ligations are contraceptive procedures and are not performed to cure or alleviate any current medical problem:

> Q: A tubal ligation is a procedure to interrupt the continuity of the fallopian tubes; correct?
>
> De Soto: Correct.
>
> Q: A tubal ligation prevents future pregnancy; correct?
>
> De Soto: Yes. It's intended to prevent a future pregnancy. It does have a failure rate, but it's quite low.
>
> Q: A tubal ligation cannot alleviate congestive heart disease; right?
>
> De Soto: Correct.
>
> Q: A tubal ligation cannot alleviate a uterine infection; correct?
>
> De Soto: Correct.
>
> Q: A tubal ligation cannot alleviate chorioamnionitis; correct?
>
> De Soto: Correct.
>
> Q: A tubal ligation cannot alleviate a pathologically thin uterine scarring; correct?
>
> De Soto: Correct.
>
> Q: A tubal ligation does not alleviate any present pathology where there is no future pregnancy; correct?
>
> De Soto: Correct.
>
> Q: A tubal ligation has no impact on the current pregnancy; correct?
>
> De Soto: Correct.
>
> Q: There are other contraceptive procedures and products that also reduce the risks in connection with future pregnancies; correct?
>
> De Soto: Yes.

> Q: A tubal ligation, therefore, is never medically necessary; correct?
>
> De Soto: It is never medically necessary to treat pathology in the current pregnancy.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 68:14–69:19). And Sister O'Keeffe, the theological representative on certain of the committees also agreed that one is not curing a pathology when one performs a tubal ligation:

> Q: You previously testified that you are not curing a pathology when you do a tubal ligation; right?
>
> O'Keeffe: That's right.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 8:13–15).

Indeed, the very existence of the tubal ligation review committees indicate that Respondent's hospitals well understand the difference between what the Legislature deemed "therapeutic" sterilization procedures (i.e., "of or relating to the treatment of disease or disorders by remedial agents or methods," Merriam-Webster Dictionary, Online Ed. (last visited Aug. 5, 2021) and "voluntary" sterilizations (as characterized in the legislative history of Section 1258, which explicitly includes tubal ligations)). (Pet'r Ex. 1, Legislative History at 27). The tubal ligation review committees exist only to review requests for tubal ligations—or voluntary sterilizations. Other procedures with a sterilizing effect—therapeutic sterilizations, such as hysterectomies—are not reviewed by a committee, even though they are regularly performed in Respondent's hospitals.

> Q: The Review Committee does not review other types of requests for sterilization besides tubal ligation; correct?
>
> O'Keeffe: That's correct.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 9:12–15; *see also* Pet'r Ex. 17, Transcript of Brenda O'Keeffe Deposition, Vol. 1 ("O'Keeffe Dep. Vol. 1") at 24:1–16; Pet'r Ex. 10, Transcript of James De Soto Deposition ("De Soto Dep.") at 26:6–8).

In light of the above evidence, there can be no doubt that Petitioners have proven, well beyond the requisite preponderance standard, that the objective, medical purpose for *every* tubal

ligation is contraceptive. That a hospital declares that *its* purported purpose is not contraceptive can only be subjective, and therefore irrelevant to the application of Section 1258.

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

The evidence presented at the hearing also proved beyond a preponderance that Respondent's hospitals "require the individual upon whom such a sterilization operation is to be performed to meet . . . special nonmedical qualifications, which are not imposed on individuals seeking other types of operations in the health facility."

The statute very clearly prohibits *any* special nonmedical qualifications. Yet, As detailed below, Respondent's hospitals impose numerous nonmedical qualifications on patients seeking tubal ligations, including: (1) requiring the patient to make a request to and obtain permission from a special review committee the hospitals set up only for tubal ligations, and in which the nonmedical, religious member of the committee makes the final decision; (2) application of the hospitals' religiously based Sterilization Policies to obtain the procedure; (3) application of the hospitals' interpretation of the Catholic Ethical and Religious Directives to obtain the procedure; and (4) submission of request the forms developed by the religious (rather than medical) member of the special tubal ligation review committees which ask for nonmedical information, including but not limited to "age," which is an expressly prohibited qualification under Section 1258. Indeed, Respondent's witnesses admitted that the committees make nonmedical decisions in order to qualify, or not qualify, a woman for a postpartum tubal ligation.

Contrary to the intent of the Legislature in enacting Section 1258, to locate decision-making over tubal ligation between the doctor and the patient, Respondent's hospitals require doctors who have *already determined that a postpartum tubal ligation is medically indicated, and as to which there are no medical contraindications counseling against the procedure*, to still overcome many nonmedical hurdles to perform postpartum tubal ligations. And ultimately, the decision as to whether a patient can obtain a tubal ligation at Respondent hospitals is made by a religious figure who determines whether performing the procedure on that particular patient is

morally acceptable to the hospital (a decision framed as being in the "best interests" of the patient), thereby substituting the hospital's religious view of what is in the patient's "best interest" for the medical determination of the doctor and what the patient determines is in her own best interest. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 12:27–13:2) ("Q: And what you believe is in the patient's best interest might be different from what the patient believes; correct? O'Keeffe: It could be, absolutely.").

a) **The Special Tubal Ligation Review Committees Are a Prohibited "Special Nonmedical Qualification."**

A patient cannot obtain a postpartum tubal ligation at Respondent's hospitals without first obtaining the approval of a special, standing tubal ligation review committee. The testimony at the hearing was clear, and it was undisputed: the tubal ligation review committee procedure is imposed on all, *but only*, patients seeking tubal ligations. For example, Dr. De Soto testified that doctors at the North State hospitals are informed that before performing a postpartum tubal ligation that they need to seek permission from the tubal ligation review committee. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 119:5–121:13; *see also* Pet'r Ex. 18, Transcript of Michael Cox PMK Deposition ("Cox PMK Dep.") at 19:11–20:10; Ex. 17, O'Keeffe Dep. Vol. 1 at 28:20–29:24.). The evidence is undisputed that no tubal ligation is permitted without the doctor's request first passing through the committee (Pet'r Ex. 18, Cox PMK Dep. at 19:11–20:10; Ex. 17, O'Keeffe Dep. Vol. 1 at 28:20–29:24), and that no similar regular committee review procedure is imposed on patients seeking any other operation or procedure performed at Respondent's hospitals. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 64:15–24). Indeed, the review committee qualification procedure is *not even imposed on patients seeking other types of sterilization operations*—such as hysterectomies. Sister O'Keeffe testified:

> Q: The Review Committee does not review other types of requests for sterilization besides tubal ligation; correct?
>
> O'Keeffe: That's correct.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 9:12–15).

Dr. Jackson testified that the imposition of a committee approval process on tubal ligations is not medical practice. She described the medical process followed by which a patient receives a tubal ligation: A doctor speaks with the patient about the risks and benefits, and if the patient provides consent, the doctor proceeds with the procedure. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 66:3–67:2). There are no reviews or committees nor further need to explain the reasoning behind the decision jointly made by the doctor and her patient. Dr. Jackson testified that the only time she has seen a postpartum tubal ligation be subject to a review committee is at Respondent's hospitals. (*Id.* at 67:3–6). Review committees, unlike the sort found at Respondent's hospitals, are utilized in medical practice ad hoc, only where there is a complicated procedure, like a complex transplant, or if special equipment is needed for a particularly difficult operation. (*Id.* at 67:13–20). By contrast, postpartum tubal ligations are a simple procedure that take the obstetrician at most a few minutes to complete. (*Id.* at 64:3–7).

The fact that Respondent's Catholic hospitals have instituted tubal ligation review committees that decide on nonmedical grounds whether patients can obtain tubal ligation, and only for requests for tubal ligation, establishes on its own that Respondent has imposed "special nonmedical qualifications" on patients seeking sterilization operations for contraceptive purposes that are "not imposed on individuals seeking other types of operations in the health facility" in violation of Section 1258.

b) **The Committees Consider Expressly Prohibited "Special Nonmedical Qualifications" When Reviewing Requests for Tubal Ligations.**

The facts revealed at the writ hearing about the actual workings of the committees, and the criteria they use to decide whether to permit a patient to obtain a postpartum tubal ligation, further demonstrate that Respondent's hospitals impose special nonmedical qualifications on patients seeking tubal ligations. [6]

[6] For example, when the North State tubal ligation review committee concludes that a request for tubal ligation is not morally acceptable, it sends a letter to the patient stating that their particular request does not meet the requirements of the hospital's religious directives. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 94:1–19.). The letters do not provide a medical reason for refusing to allow the procedure. (Pet'r Ex. 22.1, MMCR000584).

For example, Respondent's witness Sister O'Keeffe, who has ultimate control over the decision-making process of the tubal ligation review committee in the North State hospitals, freely admitted that the review committee considers nonmedical criteria:

> Q: When reviewing a request for a tubal ligation, the review committee considers nonmedical criteria; correct?
>
> O'Keeffe: Yes.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 14:4–7).

Sister O'Keeffe testified that the nonmedical criteria include the number of C-sections, age, gravida, para, and whether the patient has health insurance. (*Id.* at 14:8–24). Sister O'Keeffe also affirmed at the hearing what she previously stated in a sworn declaration: the review committee individually applies religious criteria—which are inherently nonmedical—to each patient seeking postpartum tubal ligation at one of its hospitals. (*Id.* at 33:9–11; Declaration of Sister Brenda O'Keeffe ("O'Keeffe Dec.") at ¶ 24).

Respondent's hospitals' consideration of nonmedical criteria is further embodied in the request forms doctors are required to submit to the special tubal ligation review committees. Indeed, for the North State review committees, Sister O'Keeffe, rather than a doctor, developed the form. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 65:21–27.) And all of the forms expressly require information that falls within the prohibited considerations under Section 1258. First, and foremost, doctors are *required* to state the "age" of the woman requesting the procedure. (Pet'r Ex. 19, MMCR000569; MMCR000574), even though Section 1258 expressly states that "age" is one of the prohibited nonmedical considerations. *See also* Section II.A.3 (c) below, detailing explaining further the committee's impermissible use of age.

The form also asks for "gravida" (the number of prior pregnancies) and "para" (the number of prior live births), two facts that afford the committee insight into how many children the woman already has. Yet Section 1258 also expressly prohibits consideration of the number of natural children the woman has. Given the history of using a patient's age and number of children to exclude them from accessing tubal ligation via the 120 Rule, and the goal of Section 1258 to prohibit not only the 120 Rule but any such nonmedical qualifications, Section 1258

expressly declares as "prohibited nonmedical qualifications" a patient's "age, marital status, and number of natural children."

On top of all of this, as noted earlier, it is the nonmedical member of the committees who has the final say in whether any given patient can obtain a tubal ligation. As Dr. De Soto, the sole doctor on the North State hospitals' tubal ligation review committee, testified, it is not him but rather Sister O'Keeffe, who is the final decision-maker on that committee:

> Q: In fact, the final review to approve or deny a tubal ligation is made by Sister O'Keeffe; correct?
>
> De Soto: The final approval is made after a discernment process between I and Sister [O'Keeffe], but [Sister O'Keeffe] has the ultimate say.

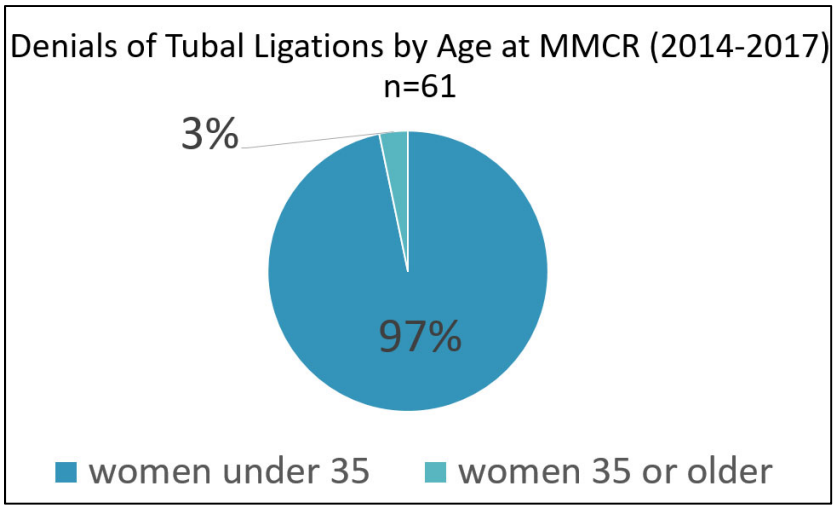
(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 68:8–12). Dr. De Soto also admitted that the decision of the medical committee "is not a medical decision." (*Id*. at 68:4–7). Similarly, Dr. Reyes, the doctor member of the tubal ligation review committee at the Sacramento hospitals, testified: "ultimately, the VP of Mission Integration [Mr. Cox, who is not a doctor] has the decision." (Pet'r Ex. 3, Transcript of Carolyn Reyes PMK Deposition at 31:10–13).

For all of Respondent's hospitals' tubal ligation review committees, the qualification decision is ultimately based on an assessment of the patient's moral qualification for the procedure, as determined by the religious committee member's case-by-case application of the hospitals' religious policies. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 60:12–17). Both the Sterilization Policies and the Ethical and Religious Directives that Respondent hospitals claim they apply in the tubal ligation review committees to assess the moral qualifications for the procedure are not medical qualifications, but religious ones. (Pet'r. Ex. 16, Declaration of Bishop Jamie Soto at ¶ 5; O'Keeffe Dec. at ¶ 13.). Sister O'Keeffe testified that, in making its decision, the committee is "always look[ing] at how we can make sure that we're abiding by our Ethical and Religious Directives, our core values, our mission . . . it's our goal to make the best decision that we know how for our patient at that time in keeping [with] who we are as a Catholic facility and in keeping with our ethical and moral teachings at the Catholic Church." (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 12:3–9).

Based on the evidence, there can be There is no dispute that Respondent hospitals require their patients to meet religious qualifications. Nor can there can be any dispute that Catholic moral teaching and spiritual care—including any assessment about what is "best" for the patient and her family from a religious or "moral" perspective—are not medical criteria or qualifications. Rather, these are special nonmedical qualifications that Respondent is imposing on access to tubal ligations, which the Statute prohibits.

c) **Despite the Legislature Expressly Listing "[A]ge" as a Prohibited Qualification, Respondent Nonetheless Considers It.**

The testimony at the writ hearing about the decision-making process provided further evidence that the tubal ligation review committees impermissibly consider age—a statutorily prohibited consideration. That Respondent's tubal ligation committees base their decisions on age is not only shown by the requirement that age be provided on the request form, it is graphically demonstrated by the difference in approvals versus rejections for patients of different ages. A review of 490 tubal ligation request forms for North State and Sacramento Area hospitals from 2014 to 2017 reveals the stark difference in denials based on the age of the requesting patient. The following pie chart, which simply collates into a graphical format the information already in the record, speaks volumes:



Ninety-seven percent of the women who were denied tubal ligations by Respondent were under the age of 35. Rebecca Chamorro was 33 years old when she requested her tubal ligation. If she

had been just two years older, the chance that her request would have been denied would have dropped to almost nothing.

Beyond the data, Respondent admits that it considers "advanced maternal age" and it is clear from the record that it also considers "very young age." Both considerations violate the Statute. (Pet'r Ex. 2, Order Denying Resp.'s Mot. for Summ. J. at 2). First, Respondent claims that it considers "advanced maternal age," defined as 35 or more years old and pregnant,[7] as a risk factor for future mortality and morbidity should the patient become pregnant again. (Pet'r Ex. 41, Writ Hearing 5/18 Tr. 97:10–12). But not only does the Statute prohibit any considerations of age (whether younger or older), from a medical perspective, "there's no relevance to the age as [a doctor is] deciding about a tubal ligation for a patient." (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 70:21–22). According Dr. Jackson's unrebutted expert testimony, whether a patient is 30 or 40 makes no difference; if both patients express the desire for a tubal ligation, both should receive the procedure. (*Id.* at 70:17–19).

Second, several tubal ligation request forms have hand-written notations that say "very young age."[8] Dr. De Soto testified:

> Q: And if we can go back to the form. The annotations on the form are yours; correct?
>
> De Soto: Yes.
>
> Q: And in your handwriting, it says, "very young age," on the request; correct?
>
> De Soto: Yes.
>
> Q: You made this notation because Sister Brenda asks you to note when the woman is of very young age; correct?
>
> De Soto: Correct.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 78:8–17). This testimony, that "very young age" is notated because of Sister O'Keeffe's request, is telling. Accompanying the form that had the notation

[7] Pet'r Ex. 40, Writ Hearing 5/17 Tr. 70:12–13.

[8] Pet'r Ex. 22.1, MMCR000788; MMCR000789; MMCR000648; and MMCR000649.

"very young age" was a review committee letter that stated in part: "*Because of her very young age (22)*, we are admitting your request to perform a tubal ligation at the time of Ms. [Redacted]'s Caesarean Section only if there is definitive and pathological thinning of the uterine segment at the time of surgery." (Pet'r Ex. 22.1, MMCR000648) (emphasis in original; subsequent emphasis omitted).

Respondent seeks to evade the Statute's express prohibition against considering age and number of children by claiming that the tubal ligation review committees ask these questions to capture information that would allow them to assess the risk to the patient of carrying a future pregnancy. But, even if that were true (and it is not), the Legislature could not have been more clear in Section 1258 that age and number of children, quite specifically, are among those qualifications that are prohibited nonmedical qualifications.

d) Consideration of Insurance or Socioeconomic Conditions are Other "Special Nonmedical Qualification" Imposed on Requests for Tubal Ligations.

Finally, the testimony at the writ hearing provided additional, indisputable evidence that the decision-making process of the tubal ligation review committees include consideration of other nonmedical factors. For example, Sister O'Keeffe testified that insurance is a nonmedical factor that the review committee considers:

> Q: And whether or not a patient has insurance is also a non-medical factor that is taken into account by the review committee; correct?
>
> O'Keeffe: Yes.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 14:21–24.) Indeed, the request forms submitted to the committee ask whether the patient's insurance would cover their delivery at a non-Catholic hospital, and the tubal ligation review committee has refused to grant at least one tubal ligation on that ground. (Pet'r Ex. 19, MMCR000569; MMCR000574; Pet'r Ex. 18, Cox PMK Dep. 30:18–25; 73:19–75:18). Denying a patient a tubal ligation based not on her ability to pay (or lack of ability), but instead on her ability to have her delivery and therefore postpartum tubal ligation *at another hospital* is, in addition to the other prohibited qualifications such as age and religious beliefs, inherently nonmedical.

Sister O'Keeffe also explicitly named "socioeconomic pieces" as one of the nonmedical factors she takes into consideration. Pet'r Ex. 41, Writ Hearing 5/18 Tr. 32:17–22. She implied that she is more likely to approve a tubal ligation for poor women:

> …sometimes we don't have a really great medical necessity, but taking everything into account, we look in the eyes of compassion and how we minister to those patients at that time. There are women who really have...their own issues and own complexities, and their own challenges in life. Some of our patients are extremely poor, some are not, but we have to take it case-by-case."

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 29:23–30:3).[9]

4. Section 1258 Does Not Permit Hospitals To Impose Purported Use Medical Criteria As A Requirement To Grant Rather Than Deny Tubal Ligations.

Respondent contends that even though its hospitals' tubal ligation review committees are designed to determine which patients meet religious qualifications for obtaining tubal ligations, it can escape the mandate of Section 1258 by arguing that its committees are considering "requirements relating to the physical or mental condition of the individual," which is permitted by Section 1258. This argument fails for two reasons: (1) even if Respondent were considering some medical qualifications, its use of *any* nonmedical qualification violates the statute, and it has conceded the use of many; and (2) the intent of the statute makes clear that consideration of requirements relating to physical or mental conditions was not meant to *limit* tubal ligations to *only* patients who have certain medical conditions.

Respondent takes the second part of Section 1258 out of context to argue that because its committees inquire into *some* information that its witnesses (erroneously) consider to be relevant to the potential future risk to the woman of a potential future medical problem should she become pregnant, it is in compliance with the Statute. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 49:10–18) The Statute's provision that permits "requirements relating to the physical or mental condition of the individual" was meant to allow health facilities to consider when the physical or

[9] Permitting sterilization for low-income women that would not be offered to other women has troubling echoes of prior eugenics movements which encourage sterilization for low income women, women of color, and incarcerated women. *See* Ex. 11 to Jackson Dec., ACOG, *Sterilization of Women: Ethical Issues and Considerations, Committee Opinion No. 695* (Apr. 2017).

mental condition of a patient might be a basis to *deny* a tubal ligation. The Legislature in the second paragraph of Section 1258 was simply ensuring that the existing medical considerations for a tubal ligation—consent and lack of contraindication—could continue. (*See* Pet'r Ex. 1, Legislative History at 30 ("requirements as to the individual's physical or mental condition *may continue* to apply in determining whether the operation should be performed.") (emphasis added)); *see also Cal. Med. Ass'n v. Lackner*, 124 Cal. App. 3d 28, 38, (1981) (recognizing that consent is a "mental condition" for purposes of the Statute).

Respondent turns the intent behind the second part of Section 1258 on its head and argues that certain medical conditions may be required before a tubal ligation will be permitted. This does not accord with the legislative history, and it does violence to the basic purpose of the statute, as Respondent's interpretation would restrict rather than enhance access to tubal ligations, even where there is no "physical or mental condition" to deny the procedure. The statute must be read in its entirety. *See Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal. App. 5th 360, 397 (2020) (providing that in interpreting a statute, the language "must be construed in the context of the statute as a whole") (citation omitted). When done so, it is clear Section 1258 was meant to remove any obstacles to individuals receiving voluntary sterilizations. Section 1258 does not permit Respondent to add obstacles by limited limit tubal ligations to only those patients it deems to have a "medical necessity"—based on its religious views.

a) Tubal Ligations Are Never "Required by Some Medical Condition."

Respondent tries to convert tubal ligations into the kind of "therapeutic" procedures the Legislature deemed exempt from Section 1258, by claiming its hospitals only perform them when they deem them to be a "medical necessity." (*See e.g.*, O'Keeffe Dec. ¶ 25; Pet'r Ex. 41, Writ Hearing 5/18 Tr. 10:3–11; 26:10–27:10; 35:1–15). [10] But the legislative history of Section

[10] To the extent that Respondent argues that by limiting its tubal ligations to patients who have "medical necessity" it is not providing sterilizations for contraceptive purposes, section II.A.2 above demonstrates how tubal ligations are always for contraceptive purposes, even when they are done to avoid a potential medical complication from a future pregnancy.

1258 makes clear that the Legislature understood what the expert medical testimony shows, which is that tubal ligations are always "voluntary," not "required by some medical condition":

> Sterilization operations fall into two categories – therapeutic (required by some medical condition and voluntary for contraceptive purposes. Recently, as a result of improved medical techniques, both vasectomies and tubal ligations have become increasingly popular as a means of birth control. The operations are legal in California and in all other states, and the number of voluntary sterilizations has increased dramatically over the past.

Pet'r Ex. 1, Legislative History at 27).

As detailed above, even Respondent's own witnesses testified that a tubal ligation does not alleviate any "present pathologies," and is never medically necessary to treat any underlying condition. As Dr. De Soto testified:

> Q: A tubal ligation, therefore, is never medically necessary; correct?
>
> De Soto: It is never medically necessary to treat pathology in the current pregnancy."

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 8:13–15, 69:16–19).

Moreover, Respondent's use of the term "medical necessity" with respect to the review committee's decision-making process is inconsistent with Respondent's use of the term in other contexts, demonstrating that the definition it offers the Court for purposes of tubal ligations is simply a made-up concept applied only to that procedure, thus evidencing yet another prohibited nonmedical qualification.

> Q: So medical necessity, as that phrase is used, in connection with the review process for tubal ligations, postpartum tubal ligations approvals, has a different meaning than it does in any other way that it's used at the North State hospitals?
>
> De Soto: Yes.

(*Id.* at 122:2–7). In the context of pregnancy, complications may arise that put the pregnant person at a higher risk in carrying the pregnancy, but there is no reliable metric for determining which pregnancies will develop such complications.[11] And by contrast to sterilization operations

[11] Dr. Jackson indicated as much during her expert testimony:

that are performed to treat existing medical conditions—such as hysterectomies—tubal ligations are only ever performed to prevent future pregnancy, not to treat an existing condition.

As the Court itself noted, perhaps the strongest indication that the tubal ligation committee's decisions are not governed by so-called "medical necessity" is the presence of Sister O'Keeffe on the committee:

> The Court: I'm having difficulty understanding what your role is. If the sole determinant is medical necessity and medical necessity is done by Dr. Do Soto, how is that you – your input effects [sic] approval or disapproval of tubal ligation application?
>
> Sister O'Keeffe: I think my input has to do with -- it's not what we do necessarily. Sometimes it's important in how we do it, to make sure that we have integrity in the process, and that we're looking at all aspects of it, and that we do have -- we do the best we can for the patient at that time.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 45: 5–46:2). Sister O'Keeffe's response in no way suggested that she was there to make medical decisions; rather, it confirmed that nonmedical qualifications, or in her words "pastoral," considerations were imposed on the process. (*See id.*).

b) Respondent Does Not Consider Medical Conditions Relevant to Whether a Tubal Ligation Should be Performed.

While Section 1258 permits requirements relating to the physical or mental condition of the individual (to determine whether the procedure is contraindicated), the "medical" information that the tubal ligation review committee says it takes into consideration is not the kind of

---

> "Q: And can you predict a patient's future risk of pregnancy complications?
>
> Jackson: Not well. so certainly, we have -- as physicians, we have an idea of certain things make you -- make your risk higher for complications in the future. We've tried -- I don't mean me personally. we as in other medical researchers -- to develop, like, a risk prediction model where you put in certain risk factors, and it spits out a percent of the chance that a patient might have a complication. But those research studies have not been able to develop a model to predict future risk. So it's quite an inexact science. So we have a general idea, but nothing very specific."

(Pet'r Ex. 40, Writ Hearing 5/17 Tr. 83:7–20).

information a doctor would need in order to determine whether to perform a tubal ligation. (Jackson Dec. ¶ 5(j); Jackson Dec. Ex. 1 ¶ 62). The only medical indication for a tubal ligation is the patient's desire to have one—and her consent. (*Id.*). As Dr. Jackson testified, "the only reason to do a tubal ligation is when a patient decides that she wants a tubal ligation, and she meets those qualifications, that she understands it's permanent. She understands there are other options. And…she can give consent for the procedure. But…whether or not she's had any children or whether she's had many children, it doesn't matter." (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 69:27–70:6). Prior to seeking to perform a tubal ligation, a doctor has already obtained the patient's informed consent, by separate requirement of state law. (*See* Cal. Code Regs. tit. 22, § 51305.1).

There are only limited circumstances in which there is medical indication *against* a tubal ligation (or where a tubal ligation would be contraindicated). (Jackson Dec. ¶ 5(e); Ex. 1 ¶ 62) (providing that generally no medical conditions restrict a person's eligibility for sterilization except for allergies or hypersensitivities to the materials used to complete the procedure). Respondent's hospitals are not reviewing medical indications *against* tubal ligations in their tubal ligation review committees. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 69:3–71:2). Indeed, by seeking permission from the hospital to perform a tubal ligation on a patient, the doctor has already determined that there are no "physical or mental conditions" that, from a medical perspective, render the tubal ligation is not medically contraindicated for that patient. (Jackson Dec. Ex. 1 ¶ 62). This accords with the legislative intent of Section 1258, which sought to return the decision about whether to perform a tubal ligation to the patient and her doctor. (Pet'r Ex. 1, Legislative History at 27–28).

Even if the statute permitted Respondent to limit tubal ligations to instances in which a patient was at risk of harm from carrying a future pregnancy (which it does not), the evidence is also clear that the tubal ligation review committees are not trying, as they now claim, to assess "increased risk of maternal morbidity and mortality." (Sept. 30, 2020 Declaration of James De Soto at ¶ 12.). The tubal ligation request forms do not expressly ask for information relevant to trying to determine whether a future pregnancy presents a potential future medical risk, nor do its

hospitals have policies stating that they are reviewing tubal ligation requests for such risk factors. (Pet'r Ex. 19, MMCR000569; MMCR000574; Pet'r Ex. 17, O'Keeffe Dep. Vol. 1 at 19:24–20:4; 20:15–21; 21:6–10; 37:3–9; 38:15–23; Pet'r Ex. 3, Reyes PMK Dep. at 25:21–26:1). And doctors practicing at the hospitals are not trained or even informed by the hospitals that they should provide that information. (Pet'r Ex. 11, Transcript of Samuel Van Kirk Deposition at 57:6–20; Declaration of Jodie Magee at ¶ 5).

Instead, the tubal ligation committee request forms expressly ask for information such as gravidity and parity, which refer to the number of pregnancies and births, respectively, which Dr. Jackson testified are "not in the least" relevant to the risk of carrying a future pregnancy. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 69:22–27). The evidence also shows that the tubal ligation review committees also review requests in a cursory way, often without even examining the patient's underlying medical records:

> Q: Dr. De Soto, you don't investigate the patient's medical records; right?
>
> De Soto: Correct.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 74:24–26);

> Q: As a member of the review committee, you personally do not review the medical records of the patient who is seeking a tubal ligation, correct?
>
> O'Keeffe: Correct.

(Pet'r Ex. 41, Writ Hearing 5/18 Tr. 14:25–28; *see also* Pet'r Ex. 17, O'Keeffe Dep. Vol. 1 at 35:5–7; Pet'r Ex. 3, Reyes PMK Dep. at 28:10–19).

Moreover, the review committees appear consistently to grant tubal ligation requests on the basis of criteria that do not demonstrate "significant risk" of maternal morbidity and mortality, such as two C-sections, while denying tubal ligations requests for patients who do have such risk, such as patients who are morbidly obese. (Jackson Dec. at Ex. 1 ¶ 68).[12]

---

[12] As Petitioner's noted in previous briefing, "the following patients all sought tubal ligations at the Sacramento hospitals:

Based on the testimony elicited at the hearing, and included in the written record, Petitioners have shown that (1) Respondent's hospitals perform tubal ligations for contraceptive purposes, and (2) they require patients to meet "special nonmedical qualifications" to undergo that procedure. Thus, Respondent's hospitals have repeatedly violated Section 1258, they continue to do so, and they will undoubtedly persist in violating the law in the future, absent the grant of Petitioners' requested relief in this writ proceeding.

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

Respondent claims that the Court is powerless to require its hospitals to comply with the Statute because it has a religious freedom right to pick and choose which patients are able to obtain tubal ligation in its hospitals, based on a case-by-case determination of which patients meet certain religious qualifications. Respondent's religious freedom argument are no different now than they were when the Court rejected them in its summary judgment order, and they should be rejected again under California and federal law, including under the most recent United States Supreme Court precedents.

Respondent's Catholic hospitals—like all other hospitals—are subject to numerous licensing provisions as health facilities licensed by the State of California. (*See* Health & Safety Code, Div. 2 (Licensing Provisions), Ch. 2 (Health Facilities)). Neither the federal nor the state constitution confer any right on the religious hospitals to refuse to comply with neutral and

---

• Patient A, Id # 270359, had had three previous C-sections and a body mass index ("BMI") of 40, indicating obesity. The tubal ligation review committee granted her request. (AF ¶ 65).
• Patient B, Id # 310876, had had three previous C-Sections, and was obese. The tubal ligation review committee initially denied her request, and then approved it (on the basis of the same notations about the number of C-sections and the obesity). (AF ¶ 65).
• Patient C, Id # 354598, had had two previous C-sections and a BMI of almost 38, indicating obesity. The tubal ligation review committee granted her request. (AF ¶ 65).
• Patient D, Id# 376682, had had three previous C-sections, and a BMI of over 55, indicating morbid obesity. The tubal ligation review committee denied her request. (AF ¶ 65).

The doctor who sits on the tubal ligation review committee at the Sacramento hospitals could not explain the inconsistency of the grants and denials to tubal ligation requests for these patients, saying only for Patients B and Patient D that from the doctor's perspective, the patients should have been able to undergo tubal ligations. (AF ¶ 65)." (Pet'r Ex. 43, Pet'rs' Opp. to Resp't's Mot. for Summ. J. at 9–10.)

generally applicable state statutes based on religious doctrine, as this Court correctly concluded in denying Respondent's summary judgment motion. (*See* Pet'r Ex. 2, Order Denying Resp't's Mot. for Summ. J. at 3:12-14 ("I also reject Dignity Health's arguments that the free exercise clauses of the United States and California Constitutions bar application of section 1258 to Dignity Health's Catholic hospitals.")).

Section 1258 is a neutral and generally applicable state law with no exceptions. Under prevailing United States Supreme Court and California Supreme Court precedent, religious institutions do not have a religious freedom right under the First Amendment to refuse to comply with neutral and generally applicable state laws. *See N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 44 Cal. 4th 1145, 1155 (2008); *see also Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

For more than a year now, Respondent has been urging the Court to delay the writ hearing in this case, arguing that the legal standards set out in *Smith* were "teetering" and predicting that in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021), the Supreme Court would reverse *Smith*. *Fulton* did no such thing, and only reinforced the correctness of this Court's summary judgment ruling. Petitioners thus urge the Court to once again reject Respondent's religious freedom arguments.

1. Religious Institutions Do Not Have A Constitutional Right To Exemption From Neutral and Generally Applicable State Laws.

The California Supreme Court has ruled that the governing law for California courts with respect to the federal free exercise clause and neutral and generally applicable state laws is *Smith*, 494 U.S. 872. *Cath. Charities of Sacramento, Inc. v. Super. Ct.*, 32 Cal. 4th 527, 547–49 (2004). Applying *Smith* to a religious-affiliated institution, the California Supreme Court held: "[A] religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with the law is contrary to the objector's religious beliefs." *N. Coast*, 44 Cal. 4th at 1155 (emphasis in original).

Similarly, the California Supreme Court found that neutral, generally applicable state statutes also did not violate institutional free exercise rights under the state constitution. *See*

Cath. Charities, 32 Cal. 4th at 561-62; *N. Coast*, 44 Cal. 4th at 1158. Inasmuch as Respondent's refusal to comply with Section 1258 creates direct harm for third parties, the California Supreme Court has emphasized that no case has recognized a religious exemption to a neutral and generally applicable state law in such circumstances:

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

Cath. Charities, 32 Cal. 4th at 565.

a) **Section 1258 Is A Neutral and Generally Applicable State Law**

In assessing neutrality, the United States Supreme Court has pointed to the following factors: "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). For general applicability, "[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. 1868 at 1877 (quoting *Smith*, 494 U.S. at 884).

Section 1258 is both a neutral and generally applicable state statute. The law is neutral on its face, and the legislative history supports that interpretation. Section 1258 is a healthcare facility licensing statute enacted to ensure that patients could access "voluntary" sterilization operations without nonmedical barriers imposed by the health facilities. The statute, by its express terms, applies to *all* health facilities that "permit sterilization [such as tubal ligation] operations for contraceptive purposes." The Statute does not have any individualized exceptions for health facilities. In fact, the language that is now codified in Section 1258 was originally enacted in a bill that also applied to range of other entities, such as clinics. (Resp't Ex. 29, Staff Analysis of Senate Bill No. 1872, at 2). The plain intent of the Legislature was to ensure equal access to tubal ligations across the board in California, without exception.

Nor are religious hospitals treated any differently than secular hospitals. *Cf. Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Importantly, however, Section 1258 does not require that any health facility provide tubal ligations. Section 1258 applies only to health facilities that choose to provide sterilization operations for contraceptive purposes.

b) Section 1258 Does Not Unconstitutionally Burden Respondent's Religious Beliefs.

Enforcing Section 1258 does not substantially burden Respondent's religious beliefs nor would such a burden be unconstitutional. As discussed above, there is nothing in Section 1258 that prevents the Respondent's hospitals from choosing not to provide tubal ligations (or providing them in compliance with the law). Respondent argues, however, that it has a religious interest in selectively providing tubal ligations.

Respondent's characterization of its religious interest in performing some tubal ligations is not supported by the facts. The plain language of the Ethical and Religious Directives ("ERDs") and Respondent's hospitals' Sterilization Policies that Respondent says govern its tubal ligation decision-making, prohibit *all* tubal ligations. For example, ERD No. 53 contains the following prohibition: "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their *direct* effect is the *cure or alleviation* of a *present* and *serious pathology* and a simpler treatment is not available." (O'Keeffe Dec. at ¶ 10 & Resp't Ex. 11 (emphasis added)). As evidenced by uncontroverted expert testimony, tubal ligation does not cure or alleviate any present and serious pathology and is instead purely contraceptive. (Pet'r Ex. 40, Writ Hearing 5/17 Tr. 74:1–13). Indeed, Respondent's witness Sister O'Keeffe admitted, consistent with Dr. Jackson's testimony, that tubal ligations do not cure pathology. (Pet'r Ex. 41, Writ Hearing 5/18, Tr. 8: 13–15).

Respondent's hospitals' Sterilization Policies recognize that tubal ligations are a procedure that induces sterility for the purpose of contraception, and expressly prohibits all tubal ligations. For example, MMCR's Sterilization Policy provides that "tubal ligation or other procedures that induce sterility for the purpose of contraception are not acceptable in Catholic

moral teaching *even when performed with the intent of avoiding further medical problems associated with a future pregnancy*." (Pet'r Ex. 14, MMCR Sterilization Policy at MMCR000167) (emphasis added). Respondent's witnesses even confirmed that the tubal ligation review committees contemplate precisely what MMCR's Sterilization Policy prohibits: possible medical problems associated with a future pregnancy. (*See e.g.*, Pet'r Ex. 41, Writ Hearing 5/18 Tr. 8:16–21). Respondent's expert also testified at his deposition that he knew of Catholic hospitals that do not provide any tubal ligations. (Pet'r Ex. 13, Shields Dep. at 150:19–22).

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

The Court in *Catholic Charities* specifically addressed the argument Respondent makes here—that providing "all or none" would equally violate its religious beliefs. In *Catholic Charities*, Catholic Charities argued that the core mandate of the state statute at issue in that case—that employers who provided prescription coverage to employees include coverage for contraceptives—put it in an untenable position. Catholic Charities claimed that providing contraception coverage violated its religious beliefs, but the alternative, not providing any prescription coverage to its employees, also violated its religious beliefs. 32 Cal. 4th at 539. The Court nonetheless held that Catholic Charities did not have a federal or state free exercise right to violate the law, and that the law "does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church." *Id.* at 542.

Here too, Section 1258 implicates the relationship between the state-licensed Catholic hospitals and their patients, most of whom as well do not belong to the Catholic Church, and Respondent does not have a federal or state free exercise right to violate the Statute.

2. The Narrow Holding In *Fulton* Does Not Change the Outcome.

Respondent repeatedly sought stays and delays in this case, on the basis of arguments that *Fulton* would directly address their religious freedom argument and overturn the *Smith* decision—on which this Court (partially) based its summary judgment ruling denying their religious free exercise claim. However, *Fulton*'s narrow holding does not apply in this case, given that there are no discretionary exceptions to Section 1258. Moreover, the United States Supreme Court specifically upheld *Smith*, confirming that it is still controlling law in this case.

In *Fulton*, the City of Philadelphia terminated its contract with Catholic Social Services (CSS), a private foster agency that refused to certify adoptions for unmarried and same-sex couples. The City further insisted on a non-discrimination requirement for any future contracts. *See* 141 S. Ct. at 1874-75. The question presented was whether the City's actions violated the federal Free Exercise Clause. After finding that the City's actions burdened CSS's religious practice, the Court asked whether, under *Smith*, the City's policies were "neutral and generally applicable." *Id.* at 1876-77. The Court found that discretionary exceptions in the contract indicated that the City's policies were not generally applicable, and thus found that the City's actions violated the Free Exercise Clause.

The Supreme Court's decision in *Fulton* in no way altered, however, "[t]he general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi*, 508 U.S. at 531 (citing *Smith*, 494 U.S. 872). *Fulton* instead confirms the correctness of this Court's prior decision on the Free Exercise issue, as the Supreme Court specifically declined to overrule *Smith*. *See* 141 S. Ct. at 1876-77. In other words, the case before this Court must still be decided under the principles and standards set forth in *Smith*, so there is no reason to revisit this Court's prior ruling on the religious freedom issues.

3. While The Court Need Not Reach This Issue, Section 1258 Would Survive Strict Scrutiny.

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

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

Federal courts have also found that protecting equitable access to reproductive health services furthers a compelling public interest. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767-68 (1994) ("State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422, 1430 (S.D. Cal. 1994) (Congress has compelling interest in "prohibiting the use of force and threats of force and physical obstruction of facilities providing reproductive health services."). Section 1258 likewise seeks to further the compelling public

interest in providing patients with access to the reproductive health service of sterilization, free from arbitrary, nonmedical conditions.

III. CONCLUSION

Petitioners have slogged through a long and difficult road over many years to reach the point where the Court has before it, after a contested hearing, all of the facts necessary to resolve this dispute. Based on the testimony and documents presented at the hearing, under the applicable legal standards, Petitioners urge the Court to rule that Respondent hospitals have been violating Section 1258 and to issue an order mandating that requiring Respondent hospitals to comply with the Statute.

DATED: August 6, 2021

COVINGTON & BURLING LLP

By: */s/ Christine Saunders Haskett*
CHRISTINE SAUNDERS HASKETT

ACLU FOUNDATION OF NORTHERN CALIFORNIA

By: */s/ Elizabeth O. Gill*
ELIZABETH O. GILL

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By: */s/ Minouche Kandel*
MINOUCHE KANDEL

Attorneys for Petitioners REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH