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 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

Respondents

Case No. CGC 15-549626

PETITIONERS' POST-HEARING RESPONSE 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

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I. Introduction

Respondent's opening Post-Hearing Brief recycles virtually every legal argument Respondent has previously made in this case and that this Court has already rejected. So, in an effort to overcome the futility of this exercise, Respondent now steps through the looking glass to imagine an entirely different lawsuit that it claims Petitioners should have filed, then goes down the ensuing rabbit holes created by this fictional suit. Respondent argues erroneously, and after six years of litigation and a live writ hearing, that Petitioners sued the wrong party, that Petitioners purport to stand in the shoes of the State, and that the Court should pretend the State is the defendant and that Petitioners are challenging some fictional State actions rather than Respondent's actual policies and practices.

Respondent's new tactic, however, has failed to establish any legitimate factual or legal defense to Petitioners' claim. As demonstrated in Petitioners' Opening Post-Hearing Brief, Petitioners have proven everything necessary for the issuance of a writ of mandate requiring Respondent's hospitals, like all other California health facilities, to comply with Health & Safety Code Section 1258, a neutral statute that applies equally, without exception, to every health care facility in the State.

The relevant facts are proven well beyond a preponderance of the evidence:

(1) The California Legislature enacted Section 1258 to ensure that no health facility in the State that allows any contraceptive sterilization procedures to be performed at the facility—whether the facility is private or public, secular or religious, small or large, urban or rural—can impose on any patient seeking such a procedure any special nonmedical barrier that is not imposed on other types of procedures. The words of the Statute are unambiguous: if sterilization operations for contraceptive purposes are allowed at the facility, then imposing any nonmedical qualification on patients seeking such a procedure violates Section 1258. And the Statute expressly states, thus precluding any discretion or debate, that the "age" of the patient (whether young, old or somewhere in between) and the "number of natural children" are prohibited special nonmedical qualifications.

(2) Tubal ligation is a contraceptive procedure. The undisputed, overwhelming medical literature, the testimony of Dr. Jackson (the only expert witness at the hearing, and so unrefuted), the admissions of Respondent's own former expert (whose testimony Petitioners introduced via deposition because Respondent dropped him after his deposition), the testimony of Dr. De Soto (Chief Medical

Officer at Mercy Medical Center, Redding), and even Respondent's own explanation of tubal ligation on its website, prove that the purpose of a tubal ligation is always to prevent a future pregnancy. The procedure is always voluntary and not therapeutic (in contrast to a hysterectomy, which is performed to treat underlying conditions, not for the purpose of preventing future pregnancy). Tubal ligation never cures or alleviates any present medical condition.

(3) Respondent admits that its hospitals that are the subject of this petition allow some postpartum tubal ligations to be performed at their facilities.

(4) Respondent's hospitals impose a number of special nonmedical qualifications on patients seeking postpartum tubal ligations, i.e., qualifications that are not imposed on patients seeking other procedures. These include:

a. Requiring the patient to obtain approval from a standing sterilization review committee that considers only tubal ligation requests, when, as admitted by Respondent's witnesses, no other procedure requires jumping through such a hoop;

b. Having the religious figure on the committee (e.g., Sister O'Keeffe) make the ultimate decision whether a patient may have a tubal ligation, proving that the committee's decisions are nonmedical. (Indeed, both Sister O'Keeffe and Dr. De Soto conceded the decision is not a medical decision but rather a moral or religious one.);

c. Imposing on patients the specific Ethical and Religious Directives that are applicable to tubal ligations, as well as the hospitals' Sterilization Policies, both of which are religious, not medical, qualifications; and

d. Basing the committee's decisions on nonmedical criteria required by the tubal ligation committee's request form (which the religious figure developed), including (i) age, which is expressly and unequivocally prohibited by Section 1258 (and the evidence showed that 97% of the denials concerned women under age 35), (ii) number of natural children (information Respondent obtains by requiring the patient to state "gravida" (the number of prior pregnancies) and "para" (the number of prior live births)), and (iii) socioeconomic criteria such as insurance and ability to go to

another hospital.

While Respondent tries, ineffectually, to muddy the waters with respect to these facts, its central argument remains "religious freedom": yet none of Respondent's religious freedom arguments are any more valid today than when the Court previously rejected them. These are arguments based on the First Amendment; the doctrines of constitutional avoidance, church autonomy, and excessive entanglement with religion, unconvincingly asserting that Section 1258 is not a neutral statute and "*Smith* is dead," and so on; the Court has heard it all before and correctly rejected those arguments. It should reject them again.

What is left to decide are the fact issues. The Court's summary judgment order left open only two factual questions for which the live writ hearing was held: (1) whether Respondent's hospitals allow sterilization procedures for contraceptive purposes, and (2) if so, whether they impose on patients seeking such procedures any special nonmedical qualifications to obtain the procedure. As explained above, and as is more fully discussed in Petitioners' Opening Post-Hearing Brief and below, both fact questions have now been answered, decisively, in the affirmative.

Petitioners agree that Catholic hospitals should not be treated any worse than any secular hospital; but their religious affiliation does not entitle them to pick and choose which neutral licensing provisions with which to comply. Laws like Section 1258 that apply equally and neutrally to all health facilities, and which provide for no individualized exceptions, are constitutional under both the California and federal constitutions. Petitioners respectfully request that the Court issue a writ requiring Respondent's hospitals to comply with Health & Safety Code Section 1258.

II. The Court Should Reject Respondent's Attempt to Reframe this Case By Contending that Petitioners Should Have Sued the State to Challenge State Actions and Fictional Statutory Interpretations.

This Court and the parties have devoted vast amounts of time and resources for six years to reach the point when the Court has before it all the evidence required to resolve the two remaining fact issues relevant to Petitioners' claims. Now, Respondent has the temerity to open its brief with (and ground many of its other arguments on) the erroneous assertion, made for the first time, that Petitioners sued "the wrong party," and that this writ proceeding should have been brought against "the State" (by which

it apparently means the California Department of Public Health ("CDPH")). Thus, says Respondent, the Court should pretend that Petitioners sued the State and are challenging CDPH's conduct (and the State's fictional statutory interpretation) rather than resolving Petitioners' actual claim against Respondent as stated in the Petition, which challenges Respondent's conduct and policies because they violate Section 1258.

At no previous time in this case, including in its Answer to the Writ Petition, did Respondent contend, or raise as an affirmative defense, that it was not the proper defendant in this writ proceeding, nor that Petitioners instead had to sue CDPH (or any other arm of "the State"). And at no time did Respondent seek to add "the State" (or any State agency) to this litigation. Respondent also cites no authority to support this new argument, which is not surprising since Respondent's position is contrary to the law. *See, e.g.*, *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609, 619-24 (2012) (action by private individuals against nursing home for violation of licensing requirements appropriate, even when CDPH had not taken action and was not a defendant); *Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 788-89 (N.D. Cal. 2011) (in a case that did not include CDPH as a party: "that the CDPH may enforce [the nursing home licensing statute] does not preclude residents from doing so").

More troubling, earlier in this case, Respondent successfully argued the opposite of its current position. On January 10, 2017, Respondent filed a Motion for Judgment on the Pleadings, seeking to rid itself of Petitioners' UCL claim. In that motion, Respondent argued that a UCL claim grounded on Respondent's underlying violations of Section 1258 was improper, that Petitioners were challenging the hospital's quasi-legislative policies regarding sterilizations, and that the law therefore *required* Petitioners to proceed by way of a writ of mandate against Respondent (Jan. 10, 2017, Resp't Mem. of P&A in Supp. of Mot. for J. on Pleadings at 12-13):

> [C]ase law establishes that rule-making decisions of a hospital board are analogous to those of state agencies. As such, challenges to those decisions must be pursued in the same procedural manner as is required for challenging quasi-legislative state agency action -- a petition for writ of mandamus.

Respondent pressed that point again in its reply brief, arguing that "[p]laintiffs' challenge to hospital policy must be pursued through a petition for a writ of mandate . . . ." (Feb. 2, 2017 Resp't Reply Br. in Supp. of Mot. for J. on Pleadings at 3). Its argument was adopted by the Court, which

directed Petitioners to restyle their complaint against Respondent with respect to Section 1258 as a writ proceeding (Feb. 9, 2017 Order Granting Resp't Mot. for J. on Pleadings at 2):

> All of Dignity's substantive arguments are rejected except its argument that the proper procedure for plaintiffs' claim [that Respondent violated Section 1258] is a writ of mandate.
>
> * * * * *
>
> Because plaintiffs are challenging the legality of Dignity's quasi-legislative policies, case law establishes that plaintiffs' remaining claim should be styled as one for writ of mandate.

If ever a situation cried out for application of judicial estoppel, this is it. In *Aguilar v. Lerner*, 32 Cal.4th 974, 986-987 (2004), the Supreme Court laid out the principles governing judicial estoppel:

> "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. Application of the doctrine is discretionary. The doctrine applies when: '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (citations omitted).

That is exactly what happened here: (1) the same party, Respondent, has taken two positions—first arguing that Petitioners must proceed against it for violations of Section 1258 by a writ of mandate, and now claiming that Petitioners' writ of mandate was filed against the "wrong party" and should have been filed against "the State;" (2) the positions were taken in the same judicial proceeding; (3) the Court adopted Respondent's first position (*see* order cited above); (4) the two positions are totally inconsistent; and (5) there is no suggestion, let alone factual basis, for Respondent and its team of experienced lawyers to argue that Respondent took the first position as a result of ignorance or mistake, let alone as the result of some fraud by Petitioners or anyone else. The Court should dismiss Respondent's argument that it is the "wrong party" defendant in this writ proceeding and decline to follow Respondent down the rabbit holes created by this erroneous premise.[1]

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[1] Another of Respondent's recycled arguments is that Section 1258 does not provide a private right of action. *See* Respondent's demurrer to Petitioners' initial (pre-writ of mandate) pleadings. (May 4, 2016

A. At the Court's Specific Direction, Petitioners Filed this Writ Proceeding Against the Correct Party, to Challenge Respondent's Hospital Policies and Practices that Violate Section 1258.

Respondent uses the erroneous assertion that this writ proceeding should have been brought against the State as a springboard to launch a number of additional arguments that blatantly mischaracterize Petitioners' claim and their positions. For example, Respondent asserts that Petitioners "purport to stand in the State's shoes to bring this claim" (Aug. 6, 2021 Resp't Post-Hr'g Br. (hereinafter "Resp't Br.") at 2) and that Petitioners are really challenging "the State's actual interpretation of Section 1258." (*Id.*) Respondent also argues that Petitioners have "attempted to deprive the Court of the State's view" or "deprive the State of defending its interpretation and enforcement of Section 1258." (Resp't Br. at 3).

None of this is true. Petitioners have never purported to stand in the State's shoes (a paradoxical argument that is contrary to Respondent's other argument that the Court should pretend Petitioners have sued the State); rather, they properly stand in their own shoes (Rebecca Chamorro as an affected individual; Physicians for Reproductive Health on behalf of its affected members), and the Court has repeatedly ruled that, as such, they have standing to pursue this writ proceeding. (Aug. 1, 2016 Order re Dems. at 5-6; Feb. 9, 2017 Order Granting Resp't Mot. for J. on Pleadings at 2; April 30, 2020 Order Denying Resp't Dignity Health's Mot. for Summ. J. at 3). Indeed, there is no one more affected by Respondent's failure to comply with Section 1258 than the patients who are denied postpartum tubal ligations and the doctors who are prevented from providing their patients with this essential care.

Since the start of this writ proceeding, it has been clear, and Respondent has agreed,[2] that

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Resp't Dems. to First Am. Compl. at 2). The Court agreed but ruled that Petitioners could assert that claim as a UCL claim. (Aug. 1, 2016 Order re Dems. at 5-6). Respondent's subsequent Motion for Judgment on the Pleadings on the UCL claim noted that the Court had ruled there was no private right of action under Section 1258, argued that a UCL claim was also improper, and that the proper procedural vehicle for Petitioners to challenge Respondent's policies and procedures was through this writ proceeding, and the Court agreed. (Feb. 9, 2017 Order Granting Resp't Mot. for J. on Pleadings at 2). Thus, the private right of action issue has been fully addressed and ruled upon, and is irrelevant to the propriety of this writ proceeding.

[2] Respondent has previously agreed that the fact Petitioners are challenging *hospital policy* is not in dispute. (*See* Feb. 2, 2017 Resp't Reply Br. in Supp. of Mot. for J. on Pleadings at 8.) For the first time

Petitioners are challenging Respondent's hospitals' sterilization policies and practices as being in violation of Section 1258. There is no need for Petitioners to file and prevail on a writ against the State because Petitioners are not challenging the State's purported interpretation or enforcement of Section 1258. Nor do Petitioners seek any form of relief against the State. Petitioners seek relief only against Respondent,[3] and the Court has already determined that it is capable of making a determination of whether Respondent has violated Section 1258.

B. The State Has Never Interpreted Section 1258

Respondent's attempt to manufacture what it mislabels the State's "actual interpretation" of Section 1258, and then to argue that the Court must give great deference to that fictional interpretation, fails. The State has not interpreted Section 1258 in any manner. Even Respondent's discussion of the hypothetical State interpretation says seven times, that "perhaps" the State thought this or that or the other thing (Resp't. Br. at 14-15), showing that the State has not, in fact, offered a discernable interpretation.

The fact that the California Department of Public Health ("CDPH") has inspected and licensed Respondent's hospitals does not constitute an "interpretation" of Section 1258, and Respondent does not cite a single case holding any such thing. Respondent also does not cite any evidence showing that: (a) before, during, or after any inspection, CDPH considered, let alone interpreted, Section 1258; or (b) while inspecting the hospitals, CDPH ever focused on Respondent's policies and practices with regard to sterilization in general or tubal ligations in particular; or (c) CDPH considered at all whether Respondent's sterilization policies and practices complied with Section 1258.

Respondent cites several cases about deference to a State agency's interpretation of a statute, but there is no State interpretation of Section 1258 to receive deference. As the owner of private hospitals,

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in the six-year history of this writ proceeding, Respondent erroneously claims that Petitioners are challenging *the State's interpretation of Section 1258*.

[3] Petitioners are requesting that this Court issue a writ of mandate ordering Respondent to comply with the Statute *by adopting a compliant policy regarding granting tubal ligations to its patients*, and/or issue an order to show cause ordering Respondent to comply with the Statute. (*See* Mar. 1, 2017 Verified Am. Pet. for Writ of Mandate at 17).

Respondent is able to adopt its own sterilization policies, but is not entitled to any "deference" in terms of how it interprets state law. And because Petitioners are not seeking any relief against the State (*i.e.* CDPH), Respondent's arguments and case citations regarding the discretionary versus ministerial duties of the State, the State's discretion to select an interpretation, and deference owed to the State or State agencies, are irrelevant and inapposite.[4]

C. There is Only One Reasonable Interpretation of Section 1258: Whether a Sterilization Operation Has a "Contraceptive Purpose," Is Determined Objectively and Grounded in Medical Facts and Literature.

The Court correctly ruled in its summary judgment order that whether a "sterilization operation" has a "contraceptive purpose" within the meaning of the Statute cannot be based on the subjective view of the hospital (or the patient), but instead must be determined objectively, by the nature of the procedure, grounded in medical facts and literature. The interpretation the Court set forth in its Order on the subjective/objective question is the only *reasonable* interpretation.[5]

First, the Legislature did not include the word "subjective" in the language of Section 1258. And Respondent cannot insert the word "subjective," or that concept or test, into the Statute now. *See Sternberg*, 239 Cal. App. 4th at 1168 (party could not insert the words "knowingly" or "intentionally" into a licensing statute to require an express knowledge requirement in order for a licensing discipline to apply to him). Indeed, if the Statute were vague, which it is not, the legislative history makes clear that the very purpose of the Statute was to return the decision-making process for contraception procedures like tubal ligation to the patient, in consultation with her doctor, without the health facility having any right to impose its own moral judgment or any other nonmedical barriers to access. Moreover, regardless of the hospital's supposed subjective reason for allowing some tubal ligations, it is undeniable

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[4] Nor would the cases that Respondent cites in support of this argument apply in any event. *Bullis,* for example, dealt with whether a school district, in its quasi-legislative role as an arm of the State, had discretion to implement a statute in a way that was contrary to the statute's intent. *Bullis Charter Sch. v. Los Altos Sch. Dist*., 200 Cal. App. 4th 1022, 1064 (2011). *Sternberg* and *Yamaha* similarly address deference to state agency interpretations of statutes or rules when the legislature has vested them with the authority to interpret or enforce. *Sternberg v. Cal. State Bd. of Pharmacy*, 239 Cal. App. 4th 1159, 1168 (2015), *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 10 (1998).

[5] Petitioners acknowledge that the Court suggested at one point that there might be another potential interpretation, but it ultimately rejected ruled that that the "proper construction" of the Statute must be based on the objective purpose of the medical procedure.

that the objective, medical purpose of any tubal ligation is to prevent a pregnancy, *i.e.*, a contraceptive purpose. That is, even if a hospital asserts that it allows some tubal ligations to avoid potential problems in a potential future pregnancy, it is achieving that goal *by preventing pregnancy*, which is the definition of contraception. That the facility may have some subjective "justification" or "reason" for allowing the contraceptive procedure cannot change the fact that the "purpose" of the procedure is contraceptive. Surely the Legislature did not intend Section 1258 to include a gaping "subjective" hole allowing health facilities to redefine the nature and purpose of a sterilization procedure based on the reasons it allows the contraceptive procedure, or it would have said so expressly (and the law would become ineffective). *See Torres v. Parkhouse Tire Service, Inc*., 26 Cal.4th 995, 1003 (2001) ("we must select a [statutory] construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.").

Second, Respondent is wrong in asserting that the Court of Appeal in *California Medical Association v. Lackner*, 124 Cal. App. 3d 28 (1981), identified more than one reasonable, neutral interpretation of Section 1258. (Resp't Br. at 3). *Lackner* involved a complaint, not a writ of mandamus, brought by the California Medical Association and individual physicians against CDPH. The plaintiffs argued that CDPH's two regulations establishing procedures for securing informed consent for human sterilization exceeded the regulatory powers of CDPH over hospitals. The Court of Appeal found that CDPH's interpretation of its legislative mandate to carry out its hospital licensing duties, an interpretation that allowed it to promulgate regulations affecting sterilization procedures, was reasonable and upheld the hospital regulations. *Lackner*, 124 Cal. App. 3d at 34–35.

Respondent misinterprets *Lackner's* reasoning and incorrectly concludes that "the Court of Appeal…had little difficulty finding a reasonable interpretation of Section 1258 that avoided constitutional entanglement." (Resp't Br. at 11.) The Court of Appeal did not interpret Section 1258, did not discuss whether the statute had more than one reasonable interpretation, and did not address any questions involving constitutional law. The Court was concerned with the scope of CDPH's legislative mandate and whether that allowed it to promulgate regulations affecting sterilization procedures. It certainly did not address, let alone hold, that Section 1258 could be interpreted to create a subjective test

regarding the purpose of a tubal ligation or any other sterilization operation.

Finally, in its Order directing Petitioners to refile their claim as a writ proceeding against Respondent, the Court made clear that it is fully capable of making its own independent determination of the Statute and whether Respondent is violating it:

> There is no basis to abstain. This court is capable of making a determination whether Dignity violated section 1258, an issue which does not involve the type of technical or specialized knowledge and experience or consideration of complex economic policies which warrants abstention.

(Feb. 9, 2017 Order Granting Resp't Mot. for J. on Pleadings at 2). The Court was right; there is nothing complicated about the words of Section 1258. Understanding them does not require technical or specialized knowledge and experience that would potentially implicate deference to CDPH, even if CDPH had actually provided an interpretation for the Court to consider, which it has not.[6] And the law affords no discretion to CDPH or any other State agency or official to add, by rule-making or otherwise, any religious, moral, secular, or other exception to the Statute. Nor does the Statute afford any State actor the discretion to exempt any particular facility, or type of facility, from compliance.[7]

III. The Evidence Overwhelmingly Establishes That Respondent's Hospitals Violate Health and Safety Code Section 1258.

The Court's summary judgment order resolved the relevant legal issues, leaving only two narrow factual disputes to be resolved at the writ hearing. Yet, Respondent's nearly 50-page post-hearing opening brief is devoted almost entirely to rehashing settled legal issues, offering only cursory arguments about the two key factual issues. (Resp't. Br. at 14–25). That is not surprising, as the evidence presented at the writ hearing overwhelmingly supports Petitioners and demonstrates that Respondent's hospitals have been violating Section 1258 and, absent the Court granting the writ, will continue to do so.

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[6] There is no need for any expert to explain what "for contraceptive purposes" means in the Statute. The only expert at the hearing was Petitioners' medical expert, who was there simply to explain, objectively and medically, that tubal ligations are always for contraceptive purposes.

[7] Respondent's suggestion that because the title of Section 1258 includes the word "exceptions" it is not neutral for purposes of constitutional law is facile, as discussed more fully in Section IV.B.

A. Tubal Ligations are Performed for a Contraceptive Purpose.

As noted above, The Court ruled in its Summary Judgment Order that the answer to the factual question of whether Respondent allows any "sterilization operations for contraceptive purposes" at its hospitals must be "based on an objective standard grounded in medical literature on sterilization operations." (Apr. 30, 2020, Order Den. Resp't Mot. for Summ. J. at 2.) Accordingly, that is the evidence that Petitioners submitted. Respondent has failed to refute that evidence. Instead, Respondent tries other tactics to get around these facts, none of which supports a finding in its favor.

Respondent's first tactic is to argue the following: the ERDs prohibit any sterilization procedure for contraceptive purposes, its Catholic Hospitals are required to comply with the ERDs, so, ipso facto, the tubal ligations Respondent permits must not be for contraceptive purposes. (*See* Resp't Br. at 24). But that circular argument proves nothing, and it is precisely the position the Court rejected in ruling that there was a fact dispute requiring a hearing.

Next, Respondent points to Sister O'Keeffe's testimony, arguing that the Hospitals' purpose is to protect the patient from potential health issues that might arise in the event of a future pregnancy. (*Id.*) But it is undeniable that the "purpose" of performing the tubal ligation is to prevent a future pregnancy, which is contraceptive. And, aside from not being a doctor or medical expert who can opine on the objective, medical purpose of a tubal ligation, Sister O'Keeffe consistently opined on the subjective nonmedical, considerations that she and the review committee purportedly use to justify their decision to grant some tubal ligation requests. (*See, e.g.*, Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 21:18–21, 29:20–26, 109:12-15). The non-medical factors she considers are nothing more than subjective "justifications" for the hospitals to allow tubal ligations when they deem it morally appropriate to do so; they do not speak to the "purpose" of the procedure, which always is contraceptive. (*See* Pet'rs Post-Hr'g Opening Br. (hereinafter "Pet'rs Br.") at 9–15, 24–26).[8]

[8] Respondent's argument that the Statute permits consideration of the hospital's subjective justification for allowing some tubal ligations—which Respondent improperly seeks to transform in to the "purpose" of the procedure—misconstrues the Statute and the Court's summary judgment order. Far from ruling that Respondent's subjective statement of the purpose of a tubal ligation is relevant, the Court rejected Respondent's argument, and then explicitly ruled that the answer must be determined from all of the facts and circumstances, "based on an objective standard grounded in medical literature." (Apr. 30, 2020, Order Den. Resp't Mot. for Summ. J. at 2.)

Petitioners' evidence—including the testimony of Dr. Jackson, the sole medical expert, the medical literature, the admissions of Dr. DeSoto (Chief Medical Officer at Mercy Medical Center, Redding), and even Respondent's own explanation of tubal ligation on its website, as discussed in great detail in Petitioners' Opening Post-Hearing Brief at 9–15—proves beyond a preponderance of the evidence that that the purpose of a tubal ligation is always contraceptive. The Court should therefore rule that Respondent's hospitals "permit sterilization operations for contraceptive purposes to be performed" in their hospitals.

B. Respondent Imposes Prohibited Special Nonmedical Qualifications on Requests for Tubal Ligations.

Respondent also fails to refute Petitioners' evidence that the hospitals impose "special nonmedical qualifications" on tubal ligations. First, it is impossible for Respondent to overcome the conceded fact that its hospitals demand to know and do consider the "age" of the patient, a qualification that is expressly and absolutely prohibited by Section 1258. And, as shown in Petitioners' Opening Post-Hearing Brief, Respondent's committees also consider the "number of natural children" (by demanding to know the number of pregnancies and live births), another expressly prohibited factor. Finally, Respondent's witnesses admitted that the committee decision, ultimately made by the religious figure, is nonmedical. (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 68:4–12).

Rather than taking these facts head on, Respondent argues that Petitioners' interpretation of "special nonmedical qualifications" effectively reads "special" out of the statute. (Resp't Br. at 20). Not true. As Respondent concedes on the very same page of its brief, what makes a qualification "special" is that "it is imposed only on patients seeking sterilization operations for contraceptive purposes and not on patients seeking other procedures." By Respondent's own definition, then, Petitioners have shown that Respondent's hospitals impose such qualifications on tubal ligations. Respondent admits that no other procedure requires the patient to jump through the hoop of a special committee to obtain approval.

Respondent also argues that there is no evidence that its hospitals have a pattern of considering prohibited special nonmedical factors. (See Resp't Br. at 16–19). But as a legal matter, Section 1258 does not allow hospitals to impose prohibited nonmedical qualifications so long as there is no "pattern"

to their violations. That is not what the Statute says; rather, it applies to each and every patient and violation. Respondent's argument also overlooks the overwhelming evidence from Petitioner's witnesses, and the admissions by Respondent's witnesses, that socioeconomic conditions, age, and religious criteria, among others, are all considered by the review committee, that the review committee's decisions are not medical, and that, in fact, there is a pattern, i.e., that nearly every patient who is granted a tubal ligation is 35 years old or more.

1. Age

Although Respondent's Sterilization Request Form requires the patient's age, Respondent argues that the committee does not really consider age itself, but rather whether the patient has the purported "medical condition" of Advanced Maternal Age.[9] That is nothing but a word game: Respondent considers "age." And the Statute does not say a hospital can consider age so long as it is age over 35.

Respondent tries to bolster its argument that it is permitted to use "age" despite the express language of the Statute by claiming that Dr. Jackson supported its position that age is a relevant medical factor in deciding whether to allow a tubal ligation. Leaving aside that neither Dr. Jackson nor Respondent can override the express terms of Section 1258, in fact, during Respondent's examination of Dr. Jackson, she specifically rejected Respondent's framing of Advanced Medical Age as a medical diagnosis or as a relevant medical factor:

> Q: And you understand advanced maternal age is a recognized medical diagnosis; is that correct?
>
> A: It's a term. *It's not a diagnosis*.

(Pet'rs Ex. 40, Writ Hr'g 5/17 Tr. 118:21–23) (emphasis added).[10] Dr. Jackson explained, again from an

[9] Respondent cites *Lackner*, 124 Cal. App. 3d at 37 for the proposition that the prohibited qualifications "named in the statute—age, marital status, number of children—unambiguously imply that the evil in mind is the use of socioeconomic factors to determine whether or not to permit an individual to be sterilized." (Resp't Br. at 11). Respondent misses the irony that it explicitly considers two of the prohibited factors: age and number of children.

[10] Respondents cite to Dr. De Soto's testimony as support for its contention that Advanced Maternal Age is a medical diagnosis, but it does not support its argument. Aside from the fact that Dr. De Soto was

objective, medical perspective, that Advanced Maternal Age, defined as being 35 years or older, is not a medical condition that makes pregnancies riskier; rather, "other conditions like high-blood pressure, diabetes, et cetera,… make pregnancies more complicated," (*Id.* at 120:20–121:1), and these conditions become more likely with older age.

Notably, the section of the sterilization review committee request form (for both North State and Sacramento hospitals) where a doctor can list "Medical Indications" does not even ask specifically about any of the actual medical conditions that Respondent now says it is considering, but it does ask about age (young or old) prominently at the top of the form, outside of the "Medical Indications" section. The testimony also proved that the religious member of the committee insists on knowing the age of the patient, regardless of whether the patient is young or old. (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 78:5–17). As explained in Petitioners' Opening Post-Hearing Brief at 20-21, several tubal ligation request forms in evidence have hand-written notations saying "very young age" which was specifically considered by the committee. Moreover, as noted earlier, the evidence showed that nearly every denied tubal ligation involved a woman under 35 years old. (Pet'rs Ex. 40, Writ Hr'g 5/17 Tr. 19:1-8; Pet'rs Br. at 20).

2. Number of Natural Children

While the sterilization request forms for both the North State and Sacramento hospitals do not include a box titled "number of natural children," they nonetheless insist on the answers to two questions plainly aimed at obtaining that information. They demand that doctors provide information regarding their patients' "para," which refers to the number of births, and "gravida," which refers to the number of pregnancies. (Pet'rs Ex. 40, Writ Hr'g 5/17 Tr. 111:17–112:7; Pet'rs Ex. 19 MMCR000569). Each of those alone, and certainly both together, give the committees information about the patient's number of children, an expressly prohibited qualification.

3. Review Committees and Religious Qualifications

Respondent's special review committees and the application by the committees of religious criteria also constitute special, nonmedical qualifications. Respondent argues that the existence of a

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not presented as an expert witness, he later testified that the committee also considers age below 35 years, not only Advanced Maternal Age. (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 78:8-17).

committee is not a "special nonmedical qualification," because the committee is "not a characteristic of the patient." (Resp't Br. at 21). It is certainly novel to argue that the Statute prohibits only nonmedical qualifications that concern an inherent patient characteristic, but that the imposition of other nonmedical qualifications and barriers that are more general, but still only apply to patients seeking sterilization operations, are permissible. There is no basis for any such distinction in Section 1258 nor in its legislative history. Moreover, this argument is inconsistent with Respondent's own definition of a "special nonmedical qualification," which it describes as those that are "imposed only on patients seeking sterilization operations for contraceptive purposes and not on patients seeking other procedures." (*Id.* at 20). Dr. De Soto testified that there are no other operations performed on a regular basis that must be pre-approved by a standing review committee at Respondent's Mercy Medical Center Redding Hospital. (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 64:15–24). Sister O'Keefe concurred. (*Id.* at 9:12–15). Similarly, at Respondent's Sacramento hospitals, tubal ligations are the only operations for which Respondent imposes any preapproval requirement by any standing review committee. (Pet'rs Ex. 3, Reyes PMK Tr. 37:21–24). Finally, there is no dispute that the hospitals' religious Sterilization Policies, and the ERDs that address sterilization and contraception, both of which are plainly nonmedical, by definition are imposed only on requests for sterilization procedures.

4. Socioeconomic Qualifications

As explained in Petitioners' Opening Post-Hearing Brief, Respondent also takes into consideration availability of insurance, another non-medical factor. (*See* Pet'rs Br. at 22–23; Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 14:21–24). Indeed, Sister O'Keefe, who sits on the Review Committee at the North State hospitals, explicitly admitted that the committee also considers "socioeconomic factors." (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 14:14–24).

C. Respondent's "Medical Necessity" Argument Is Contrary to the Medical Evidence and Cannot Justify Violating Section 1258

Respondent argues, erroneously, that all of the factors it considers are "physical or mental condition[s] of the individual" that may be considered under the Statute, and that it uses each of those factors to assess the purported risk of maternal morbidity and mortality, or, in the alternative, they constitute a faith-based consideration. (*See* Resp't Br. at 16–23). First, this argument undermines itself

by admitting that Respondent uses the factors as faith-based qualifications (which plainly are not medical), and also pointedly ignores, again, the fact that the Legislature declared that age and number of natural children are "special nonmedical qualifications."

Moreover, Respondent's "medical necessity" justification for those patients that it allows to have a tubal ligation misconstrues the Statute and is unsupported, as objective medical fact, by the relevant evidence. With respect to the Statute, as explained in Petitioners' Post-Hearing Opening Brief, the part of Section 1258 that permits "requirements relating to the physical or mental to condition of the individual" cannot be read as Respondent reads it, *i.e.*, a loophole allowing any health facility to impose on any patient any qualification, obstacle or barrier it wants, so long as it can say that it is considering some physical or mental condition of the patient. If that were true, a facility could declare that patient X can have a tubal ligation only if she is six feet tall, or has an IQ of 150, and yet be in compliance with the Statute. That sentence was included simply to ensure that the Statute did not require a facility to perform a tubal ligation even when it was medically contraindicated. (Pet'rs Br. at 23–24). In other words, the Legislature was merely ensuring that the existing medical considerations for a tubal ligation—consent and lack of contraindication—could continue, so that a facility would not be violating Section 1258 if it were to deny a tubal ligation because, for example, the patient had a heart condition that made doing the surgery too risky.

With respect to the evidence regarding Respondent's "medical necessity" argument, Respondent asserts that Dr. Jackson's testimony supports its position that a handful of medical conditions that pose a risk for maternal morbidity and mortality in future pregnancies are permissibly reviewed by the sterilization review committees in determining whether a patient is permitted to undergo a tubal ligation under the Statute. (Resp't Br. at 17). Not so. Dr. Jackson's testimony was clear that risks associated with medical conditions related entirely to *future* pregnancies are "medically irrelevant" to whether a patient should be able to undergo a tubal ligation. (Pet'rs Ex. 40, Writ Hr'g 5/17 Tr. 83:26–84:7). Indeed, as Dr. Jackson pointed out during her testimony, if a patient is already getting a Caesarean section, there are no other medical contraindications to consider. (*Id.* at 64:13–65:1).

As for the term "medical necessity," Dr. De Soto admits that the definition the North State sterilization review committee employs is based on a hypothetical future situation—the patient may

never become pregnant again. (Pet'rs Ex. 41, Writ Hr'g 5/18 Tr. 121:12–22). He also admits that the definition it uses as a justification for doing some tubal ligations is unique and not applied to any other procedure at Respondent's North State Hospitals. To add to the confusion, Dr. De Soto was unable to explain the origin of this one-of-a-kind definition; all he could say was that it started before his time and he continued to use it. (*Id.* at 122:8–21).

To summarize, Respondent's claim that it is complying with Section 1258 through its proffered view of "medical necessity" is internally inconsistent, lacks a discernible foundation, and is not permitted by the words and intent of Section 1258.

IV. Respondent Does Not Have a Religious Freedom Right to Violate California's Neutral, Generally Applicable, Health Facility Licensing Requirements.

Neither the federal nor the state constitution confer any right on religiously-affiliated hospitals to refuse to comply with neutral and generally applicable state statutes based on religious doctrine, as this Court correctly concluded in its summary judgment order. (*See* Pet'rs Ex. 2, April 30, 2020 Order Den. Resp't Mot. for Summ. J. at 3 ("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.")). *See also N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 44 Cal. 4th 1145, 1155 (2008); *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877-881 (1990).

A. Enforcing Neutral Licensing and Medical Criteria Does Not Discriminate Against Religion

Respondent claims that the Court's enforcing of a neutral licensing statute applicable to all hospitals in the state would violate the Establishment Clause. Respondent equates medical criteria with secular criteria to argue that enforcing neutral, medically based laws discriminates against religion. Under Respondent's logic, a religiously-affiliated hospital would be able to avoid all medical licensing requirements by claiming they violate their faith. For example, a religiously-affiliated skilled nursing facility that believed that infections are the result of evil deeds and not bacteria could claim that Health & Safety Code § 1255.9, requiring Infection Preventionists, violated the Establishment Clause. Hospitals affiliated with religions that do not recognize marriage for same sex couples might refuse to permit same sex spouses the accommodation rights provided to family or next of kin of deceased

patients under Health & Safety Code § 1254.4. A hospital affiliated with a religion that supports husbands physically chastising or punishing their wives could claim that Health & Safety Code § 1259.5, requiring hospitals to develop policies around spousal abuse, violates the Establishment Clause.

Health & Safety Code Section 1258 does not prefer one religion over another. Unlike the Arkansas statute forbidding the teaching of evolution struck down by *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968), Health & Safety Code Section 1258 was not enacted to codify "a particular religious doctrine." As the Supreme Court noted in *Epperson*, the test is: "(W)hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson*, 393 U.S. at 107, citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 222 (1963).

By contrast, the legislative history of section 1258 makes clear that it was not enacted with the purpose or primary effect of "the advancement or inhibition of religion." The State does not have a preferred world view in implementing a licensing statute meant to replace subjective moral judgment with medical science. Nor does section 1258 explicitly favor certain religions over others, as did the Minnesota statute found to violate the Establishment Clause in *Larson v. Valente*, when it exempted some religions from reporting their charitable donations based on the source of the donations. *Larson v. Valente*, 456 U.S. 228, 246 (1982).

Respondent thus mischaracterizes Section 1258 as preferring "one set of competing religious views" about whether all tubal ligations are for contraceptive purposes. (Resp't Br. at 30.) On the contrary, Petitioner's analysis of Section 1258 rests, as the Court requested it do, on what the *medical* literature and *medical* experts say about the nature and purpose of tubal ligations:

> The proper construction of section 1258 requires that the determination of whether an operation is "for contraceptive purposes" is made by looking at all facts and circumstances pertaining to the operation… based on an objective standard grounded in medical literature on sterilization operations.

(Pet'rs Ex. 2, Apr. 30, 2020 Order Den. Resp't Mot. for Summ. J. at 2.) Respondent's claim that an interpretation based on medical sources is "secular" and therefore discriminates against religion would make any medical statute open to challenge, and the Court should reject that argument.

B. Section 1258 Is Generally Applicable and Does Not Permit Individualized Exceptions.

Section 1258 is generally applicable because it applies to all health care facilities and does not permit California to make "individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). By contrast, 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'" *Id.,* citing *Smith*, 494 U.S. at 884. This not a situation where a state agency can make exemptions for which health facilities must follow section 1258 and which may not.

In *Fulton*, the U.S. Supreme Court found Philadelphia's law was not generally applicable because the City had the ability to determine which agencies were entitled to an exemption from the requirement to serve parents of all sexual orientations. In *Sherbert v. Verner,* South Carolina's unemployment compensation statute was found to violate free exercise because it allowed the State's unemployment benefits agency to make individualized determinations of whether claimants had "good cause" to reject available, suitable work. 374 U.S. 398, 401 (1963). The California Department of Public Health does not entertain individual hospital requests to be exempted from Section 1258. It is doctors and hospitals—not the state—who determine whether there are physical or mental conditions that affect the availability of a tubal ligation.

The use of the word "exceptions" in the heading of Health & Safety Code Section 1258 does not mean that the Statute includes the kind of "exceptions" that would convert it into a law that is not generally applicable for purposes of constitutional analysis. Indeed, it is not even clear what are the "exceptions" to which that word in the heading applies. It could refer to hospitals that do not provide sterilizations for contraceptive purposes, which is not an "exception" for free exercise purposes, since it applies to all licensed California health care facilities.

Nor does Section 1258 lack general applicability by "prohibit[ing] religious conduct while permitting secular conduct *that undermines the government's asserted interests in a similar way*." *Fulton* at 1877 (emphasis added). Section 1258 prohibits religious and secular hospitals alike from imposing special, nonmedical qualifications on persons seeking tubal ligations. Respondent argues that because Section 1258 permits requirements "relating to the physical or mental condition" of the patient

while prohibiting requirements relating to religion, it is not generally applicable. But the government interests embodied by Section 1258 are the imposition of *non-medical* criteria, and if that were the "exception" Respondent means, it is generally applicable to all health facilities too.

Requirements relating to the "physical or mental condition" are related to medical criteria—such as the patient's ability to comprehend and give informed consent, or whether the patient has a medical condition that would make the procedure too risky and thus medically contraindicated. The non-medical and religious criteria Dignity Health imposes undermine completely California's asserted interests in removing barriers unrelated to the patient's physical or mental ability to obtain a tubal ligation. The fact that Section 1258 addresses some, but not all, barriers to obtaining a tubal ligation (e.g., because it does not also address potential unavailability of a physician or a facility or geographic barriers) does not render the law unconstitutional.[11] *Cf. Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (upholding the constitutionality of a state law and noting, "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. . . [o]r the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). The analysis remains on whether any distinctions exist within the statute. Within Section 1258, secular non-medical qualifications imposed by hospitals are prohibited in the same manner as religious non-medical qualifications imposed by hospitals. It is thus different than the facially neutral ordinance invalidated in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, which treated secular killing of animals differently than religious killing of animals. 508 U.S. 520, 537-38 (1993).

C. Section 1258 Does Not Implicate Internal Church Management Decisions

Section 1258 does not interfere with Respondent's internal church management. It does not seek to invade Respondent's decisions as to who can be a religious leader or teach its religious doctrine. As the California Supreme Court made clear in *Catholic Charities,* a statute that relates to women's access to prescription contraceptives does not implicate internal church governance, even when it conflicts with a religious employer's beliefs. *Cath. Charities of Sacramento, Inc. v. Super. Ct*., 32 Cal. 4th 527, 542

[11] Indeed, Respondent cites no case holding that if the Legislature does not in one fell swoop address every possible aspect of the governmental interest being addressed by a statute, (here every barrier to tubal ligation) then the statute is constitutionally infirm.

(2004) ("This case 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.")

As with *Catholic Charities*, this is not a Title VII case that implicates the ministerial exception, and cases dealing with employees at religious institutions, including hospitals, are not apt.[12] *Catholic Charities* at 544. Rather, Section 1258 is about Respondent's *external* obligations to the patients for whom California licenses it to care. The Court in *Guadalupe* confirmed that religious institutions do not get a free pass from secular laws:

> This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020). Section 1258 in no way seeks to control who can provide certain key roles at Dignity Health's hospitals.

Nor does Respondent's choice to operate a religious hospital insulate it from laws meant to protect patients. In *National Institute of Family & Life Advocates v. Schneider,* 484 F. Supp. 3d 596, 626 (N.D. Ill. 2020) the Court upheld a law requiring health care facilities to inform patients about their legal treatment options and the risks and benefits of those options, finding that "requiring that medical professionals abide by the regulations and standards governing their chosen field" does not violate the Free Exercise clause. And as the Court in *Means v. United States Conference of Catholic Bishops* explained, a Plaintiff who suffered harm as a result of a religious hospital's refusal to provide care related to miscarriage management could still sue the hospital for negligence; the First Amendment simply prevented her from asking the Court to establish that the Ethical and Religious Directives (ERD's) constitute negligence. No. 15-CV-353, 2015 WL 3970046, at *14 (W.D. Mich. June 30, 2015),

[12] The following cases cited by Respondent all dealt with religious institutions as employers*: Penn v. N.Y. Methodist Hosp*., 884 F.3d 416 (2d Cir. 2018); *Hollins v. Methodist Healthcare, Inc*., 474 F.3d 223 (6th Cir. 2007), abrogated by *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C*., 565 U.S. 171 (2012); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299 (4th Cir. 2004); *Scharon v. St. Luke's Episcopal Presbyterian Hosps*., 929 F.2d 360 (8th Cir. 1991); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015).

aff'd, 836 F.3d 643 (6th Cir. 2016). In the case at hand, the ERD's do not shield Dignity Health from having to comply with section 1258.

D. Section 1258 Does Not Foster Excessive Entanglement with Religion

Respondent repeats its specious argument that the medical view of contraceptive purposes is a religious one to argue that Section 1258 creates excessive entanglement with religion. Excessive entanglement occurs when there is government "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 393 (1990). Excessive entanglement "typically involves comprehensive, discriminating, and continuing state surveillance of religion." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir. 1994) citing *Lemon v. Kurtzman*, 403 U.S. 602, 613, 619-22 (1971).

Section 1258 does not involve the state in overly invasive surveillance of Respondent's religion. It does not require California to audit Respondent's financial records, or closely monitor Respondent's religious services or activities. *See Calvary Chapel of Ukiah v. Newsom*, No. 2:20-CV-01431-KJM-DMC, 2021 WL 916213, at *14 (E.D. Cal. Mar. 10, 2021) (California's COVID-19 health order prohibiting indoor singing at churches and other indoor venues did not create excessive entanglement). *See also S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (denying application seeking injunction of California's prohibition on indoor singing and chanting); *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 434 (E.D. Va. 2020), appeal dismissed, No. 20-1515, 2020 WL 6074341 (4th Cir. Oct. 13, 2020) (no excessive entanglement when state cited church for violating COVID-19 health order prohibiting gatherings of more than 10 people).

Petitioners highlight the religious nature of Respondent's decision-making simply to show that Dignity Health is violating the statute by using a special, non-medical qualification—religion—to make decisions about tubal ligations. This is similar to plaintiffs in employment cases who can question the validity of an employer's claim that an employment decision was based on religious reasons, without running afoul of entanglement. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006) citing *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328-30 (3d Cir. 1993). *See also Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 577 F. Supp. 2d 731, 749 (D.N.J. 2008), *aff'd*, 587 F.3d 597 (3d Cir. 2009) (public school policy that prohibited all religious music from school

programs did not create excessive entanglement simply because the school had to identify whether songs were religious).

To the extent Petitioners have inquired into the religious nature of Respondent's decision making, it is due in part to Respondent's vigorous denial at certain times that it makes decisions on tubal ligations based on non-medical factors. Petitioners point out the inconsistencies in Respondent's policies not to question the sincerity of their religious beliefs, but as evidence that some of Respondent's policies themselves recognize that tubal ligations are done for contraceptive purposes even when performed to avoid the harm from a future pregnancy. (*See* Pet'rs Ex. 14, MMCR Sterilization Policy at MMCR000167).

E. The State May Require All Hospitals, Including Religious Ones, to Meet Certain Conditions in Order to Be Licensed

When California requires hospitals to meet licensing requirements that protect patient safety and autonomy, it does not impose "unconstitutional conditions." Dignity Health is not being "punished" for its religious status, as were the religious schools in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2257 (2020) or *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). Again, Section 1258 contains no such categorical exclusion. It is Respondent's actions in applying non-medical criteria to sterilization operations that violate Section 1258, not its status as a religious hospital.

The Supreme Court has recognized that if a law can be constitutionally imposed, then it cannot constitute an "unconstitutional condition." In *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006), the Court held that the federal government's conditioning of some federal funding for colleges and universities on those entities providing access to military recruiters was not an "unconstitutional condition" because requiring the inclusion of military recruiters did not violate the First Amendment:

> This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in *Grove City* and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958). Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

Id. at 59-60.

As discussed in Petitioners' Opening Brief, *Smith* remains the law of the land[13] and under the federal constitution, neutral, generally applicable licensing laws do not trigger strict scrutiny, even if they burden religion. (Pet'rs Br. at 5-6, 30-33). Respondent cites no cases in support of the argument that all licensing laws that burden free exercise are subject to strict scrutiny, because their premise is incorrect. Thus, in *Valov v. Department of Motor Vehicles*, the Court of Appeal held that California's requirement that persons seeking driver's licenses provide a photograph did not violate state or federal free exercise clauses or trigger strict scrutiny, even when the applicant has a religious prohibition against photographing a person's image. 132 Cal. App. 4th 1113, 1122, 1131 (2005), *as modified* (Oct. 7, 2005); *see also Al-Amin v. City of New York*, 979 F. Supp. 168, 170-71 (E.D.N.Y. 1997) (law that required vendors to obtain license did not violate Free Exercise clause when applied to Muslim vendors selling perfume oils and incense used for religious purposes, even when it impinged on their religious practice). While the ordinance invalidated in Fulton involved the licensing of foster care providers, it was struck down in the majority opinion on the basis that it was not generally applicable, not due to unconstitutional conditions.

Nor is Section 1258 a licensing law enacted to target a religious entity, as in *Country Mill Farms, LLC v. City of East Lansing,* 280 F. Supp. 3d 1029, 1050 (W.D. Mich. 2017). *Country Mills Farms* dealt with a City's denial of a vendor's license to a farmer after it changed its licensing laws *specifically* in response to the farmer's conduct. *Id*. There is no evidence that the California legislature harbored animus against religion when enacting Section 1258. There is a presumption that legislative acts do not violate the Constitution:

> In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act.

Amwest Sur. Ins. Co. v. Wilson, 11 Cal. 4th 1243, 1252 (1995) (citations omitted). There is no "clear and unquestionable" conflict between Section 1258 and the state or federal Constitution.

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[13] Thus, Respondent is again wrong when it argues here that, in light of *Tandon* and *Fulton*, *Smith* has "tenuous survival" as precedent and "is only of academic interest. " Resp't Br. at n. 5.

Respondent attempts to divert the argument by peppering its brief with groundless, irrelevant attacks on counsel in this case, asserting that the ACLU harbors animus against Catholic health care, trying to frame this case as a war on religion. None of that is true. Moreover, it is improper targeting of religion by *government actors* that violates the Constitution. *Church of Lukumi Babalu Aye*, 508 U.S. at 537-38 (City's discriminatory enforcement of animal cruelty ordinance violated Constitution.)

F. Section 1258 Achieves the Compelling Interest of Prohibiting Hospitals from Imposing Arbitrary, Non-Medical Qualifications for Tubal Ligations

Section 1258 seeks to further the compelling public interest in providing patients with access to the reproductive health service of sterilization, free from arbitrary, nonmedical conditions imposed by health care facilities. Section 1258 is not under inclusive in its goal of eliminating nonmedical conditions for sterilizations imposed by health care facilities. The other barriers to access that Respondent cites (lack of insurance, lack of physician or facility availability, Medicaid consent forms) are not "qualifications" that hospitals impose to purposely prevent patients from obtaining sterilizations.

As discussed above, there is no process for health care facilities to be exempted from Section 1258, which makes this different from the cases cited by Respondent to argue that California has no compelling interest in denying an exemption to Section 1258 to Respondent. As noted above, in *Fulton,* the foster care program in Philadelphia permitted exemptions; similarly, in *Mast v. Fillmore County, Minnesota*, the gray water statute permitted exemptions, 141 S. Ct. 2430, 2432 (2021) (J. Gorsuch, concurring).

Furthermore, when examining the harm of granting an exemption to this particular religious claimant, it is important to acknowledge that third parties (patients and physicians seeking to remove nonmedical considerations from medical decision making) will be harmed by the exemption. *See Catholic Charities,* 32 Cal.4th at 565 (religious objectors are not exempted from the operation of a neutral, generally applicable law when the exemption would detrimentally affect the rights of third parties). Equal access to care, free of arbitrary factors, is a vital interest. *See Minton v. Dignity Health,* 39 Cal. App. 5th 1155, 1164 (2019), *review denied* (Dec. 18, 2019) (Dignity Health's refusal to provide gender affirming care to transgender patient harmed him even when he was able to get the care several days later).

This Court has already found that there is a public interest in enforcing Section 1258 as Petitioners request, when it determined Petitioners had public interest standing to bring a writ and denied Respondent's motion for summary judgment:

> Petitioners have an interest in the elimination of Dignity Health's alleged consideration of "special nonmedical qualifications" in its determination whether to permit postpartum tubal ligations at its Catholic hospitals.

(Pet'rs Ex. 2, Order Den. Resp't Mot. for Summ. J. at 3).

Importantly, Petitioners are not requesting an order that Respondent stop providing all tubal ligations. They are simply asking for Respondent to comply with the law. Respondent has argued it is religiously mandated to provide some tubal ligations, so it is not self-evident that it ultimately would select to provide no tubal ligations. But if it did, it would still be in the public interest for Respondent to comply with a law that prohibits the imposition of arbitrary, non-medical criteria on women's healthcare decisions.

V. CONCLUSION

Based on the evidence submitted in connection with the writ hearing, and for the reasons stated herein and in Petitioners' Opening Post-Hearing Brief, Petitioners respectfully request that the Court issue a writ of mandate requiring Respondent's hospitals to comply with Health & Safety Code Section 1258.

DATED: September 13, 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