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' REPLY BRIEF, HEARING ON PETITION FOR WRIT OF MANDATE**

The Honorable Harold E. Kahn
Hearing Time: 9:30 a.m.
Hearing Date: May 17, 2021
Department: 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

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## I. INTRODUCTION

Medical, penal, and government institutions in the United States have historically abused tubal ligations to control women's reproductive freedom. (ACOG, *Sterilization of Women: Ethical Issues and Considerations, Committee Opinion No. 695* (Apr. 2017) (Reaffirmed 2020); Decl. of Rebecca Jackson ("Jackson Decl."), Ex. 11 at 3.) Women deemed unworthy of procreating, such as low income women, women of color, and incarcerated women, were sterilized without their consent. (*Id.*) Conversely, white middle class women were denied tubal ligations based on their age or family size, to enforce gendered roles as mothers and homemakers. (Rebecca M. Kluchin, Fit to Be Tied: Sterilization and Reproductive Rights in America 1950-1980, 22 (New Brunswick, Rutgers University Press 2009)). These violations continue to this day, as illustrated by the recent news of sterilizations of Latina women in immigration detention centers. *(See* ICE, A Whistleblower and Forced Sterilization, NPR, (Sept. 22, 2020, 3:04 PM), https://www.npr.org/2020/09/18/914465793/ice-a-whistleblower-and-forced-sterilization.)

The solution to this double-sided effort to control reproductive freedom is to locate the authority over the decision of whether to undergo a tubal ligation with the woman, in consultation with her doctor. By enacting Health and Safety Code Section 1258, the California Legislature intentionally did just that: it prohibited hospitals from engaging in the previously widespread practice of allowing tubal ligations to be performed solely on women *the hospital* deemed deserving, while denying them to other women—in either case based on nonmedical criteria. The Legislature thereby narrowly and specifically acted to address the abuse of a woman's right to control her decision-making with respect to tubal ligations performed in hospitals. Critically, the legislature did not impose on any hospital an affirmative obligation to perform tubal ligations. Rather, it afforded hospitals a choice: either provide access to tubal ligation in a non-discriminatory, non-arbitrary, and medically sound fashion or do not provide any access to tubal ligation.

The evidence already submitted in this case, combined with the live testimony at the writ hearing, will demonstrate that Respondent's hospitals have been engaging in the unlawful control and conduct that Section 1258 was directly aimed at preventing, that is, performing tubal ligations on some women while denying access to the procedure to other women, on the basis of nonmedical criteria. Specifically, Section 1258 applies to Respondent's hospitals because they are performing tubal ligations for "contraceptive purposes." Medically, *all* tubal ligations are for contraceptive purposes; there is no other purpose for a tubal ligation than to prevent conception and resulting pregnancy. Even if Respondent's claim that its hospitals perform tubal ligations only when a future pregnancy would implicate "maternal morbidity and mortality" were credited (a claim that is not borne out by the evidence), the tubal ligations the hospitals perform are still being performed to prevent future pregnancy, which is, by definition, a contraceptive purpose.

The evidence will also demonstrate that Respondent requires patients seeking tubal ligation "to meet special nonmedical qualifications." Respondent does this by submitting requests to special committees that exist solely to review tubal ligation requests; by consulting religious rules to determine whether to approve the request; by considering age and insurance; and by ultimately allowing a determination on the request by religious staff who plainly cannot be making medical decisions.

Because the evidence shows that Respondent cannot credibly argue that its hospitals; conduct is in compliance with Section 1258, Respondent now argues that it has a religious freedom right, not just to deny women access to tubal ligation, which Section 1258 allows, but to engage in precisely the harm that Section 1258 was enacted to prohibit: allowing or denying access to tubal ligations based on nonmedical criteria. But even under the strict scrutiny analysis articulated in the federal courts, the application of Section 1258 to Respondent is constitutional, as Section 1258 is narrowly tailored to prevent arbitrary and nonmedical hospital-imposed obstacles to tubal ligation.

For these and the other reasons spelled out below, the Court should therefore issue a writ ordering Respondent to comply with Section 1258.

## II. ARGUMENT

### A. By Choosing to Operate a Hospital in California, Respondent Subjects Itself to California's Laws regulating Hospital Operations and Hospital Mergers.

Respondent has chosen to operate its Catholic hospitals in the State of California, and so is subject to the same licensing and regulatory provisions required of all health facilities in the state. This includes provisions on specific services, as well as rules on hospital mergers. Respondent is equally bound by the Attorney General's merger conditions and Health and Safety Code Section 1258. If it finds itself in a bind, that is only the result of the manner in which Respondent has chosen to operate a hospital in a state that values women's access to reproductive healthcare.

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

This Court has determined that whether a tubal ligation is performed "for contraceptive purposes," is determined "based on an objective standard grounded in medical literature." (Pet'r Ex. 2, Order Den. Resp't Mot. For Summ. J. (Apr. 30, 2020) at 2:13-14.) That is the only reasonable interpretation of the statute: any other interpretation, including that offered by Respondent, would leave the reach and application of the statute to the subjective whims and assertions of the facility, even if untethered from sound medical practice. The medical literature overwhelmingly supports the conclusion that all tubal ligations are for contraceptive purposes. (*See* Jackson Decl., ¶¶ 2-11.) Respondent argues that *its hospitals* do not have a contraceptive purpose when permitting tubal ligations. Even if that were true, despite the fact that preventing conception is the only possible purpose of a tubal ligation, it is not Respondent's purported subjective "purpose" that matters. (Pet'r Ex. 2, Order Den. Resp't Mot. For Summ. J. (Apr. 30, 2020) at 2:8-10.)

Tellingly, despite having years to develop the record, Respondent cites no medical literature to support its position that tubal ligations may have a purpose other than contraception. Indeed, Respondent's own website describes tubal ligation as "a surgical

procedure for women who wish to prevent pregnancy permanently." Dignity Health, *Tubal ligation*, https://www.dignityhealth.org/conditions-and-treatments/womens-services/gynecology-procedures-and-treatments/tubal-ligation (last visited May 4, 2021). Preventing pregnancy is the very definition of a contraceptive purpose. (*See also* Jackson Decl. ¶ 5(f) & Ex. 7 (citing the California Department of Healthcare Services describing tubal ligation as "a surgery that prevents pregnancy. It closes the tubes that carry eggs from the ovaries to the uterus. Since the eggs have nowhere to go, your body will just absorb them. If sperm can't get to an egg, you can't get pregnant. Tubal Ligation is meant to be a permanent form of birth control."); *id.* at ¶ 5(e) & Ex. 6.) (citing the federal Centers for Disease Control stating that "[t]ubal sterilization for women and vasectomy for men are permanent, safe, and highly effective methods of contraception").)

Respondent claims that by including the phrase "for contraceptive purposes" after "permits sterilization," the Legislature was somehow specifically, although silently, creating a loophole to exempt all Catholic hospitals from the requirements of Section 1258. The legislative history of Section 1258 makes abundantly clear that is not the case. Rather, the phrase "for contraceptive purposes" was necessary to limit the statute to "voluntary" sterilizations, as opposed to "therapeutic" sterilizations performed to treat a medical condition. (*See* Pet'r Ex. 1, Staff Analysis of S.B. 1358 as Amended May 1, 1972 ("Staff Analysis") at 20.) For example, a hysterectomy may be performed for the therapeutic purpose of addressing cancer, and a hospital that performs a hysterectomy for that purpose does not thereby become subject to Section 1258. By contrast, a tubal ligation is always performed for a contraceptive purpose, so performing any tubal ligation brings Section 1258 to bear on that hospital. Indeed, the legislative history names tubal ligation and vasectomy as the types of "voluntary" sterilization to which the bill was intended to apply. *Id.*

The legislative history recognizes that the bill permits hospitals to choose not to provide voluntary sterilizations at all, noting that "[t]he bill is limited to institutions that permit sterilizations for contraceptive purposes, so that it would not affect hospitals and clinics which do not permit such operations as a matter of policy." *Id.* at 21. In other words, the legislature

carefully and narrowly drafted the statute to apply only when a hospital chooses to perform categories of sterilization procedures that are performed for contraceptive purposes—such as tubal ligation and vasectomy. Section 1258 does not require any hospital to perform tubal ligations; it simply prohibits all hospitals choosing to perform tubal ligations from imposing arbitrary nonmedical criteria on any patient that requests one.

Respondent's argument that its hospitals perform tubal ligations for purposes that are not contraceptive is also fundamentally at odds with the hospitals' policies, including the Ethical and Religious Directives (ERDs) and the sterilization policies. For example, Sister Brenda O'Keeffe cites the ERDs as permitting tubal ligations when "their direct effect is the cure or alleviating of a present and serious pathology and a simpler treatment is not available." (Decl. of Sister O'Keeffe Sept. 20, 2020 ("O'Keeffe Decl.", ¶ 15.) Yet as Petitioners' medical expert has testified, a tubal ligation "*never* cures or alleviates a present or serious pathology." (Jackson Decl., Ex. 1, ¶ 53. **(**emphasis added).)[1]

Respondent also claims that it only performs tubal ligations when the immediate effect is to prevent procreation but the intent is to avoid the possibility of a future medical problem from a future pregnancy. (Resp't Trial Br. at 36-38.) That, however, is directly contrary to the language of the hospitals' sterilization policies:

> Procedures whose sole, immediate effect is to render the generative faculty incapable of procreation are contrary to Catholic moral teaching. Therefore, tubal ligation or other procedures that induce sterility for the purpose of contraception ***are not acceptable in Catholic moral teaching even when performed with the intent of avoiding further medical problems associated with a future pregnancy***.

(Pet'r Ex. 14, MMCR000167, MMCR000554, MMCR000565, MMCR000566, MMCR000568, MMCR000570 (emphasis added).)

Indeed, this Court has pointed out the inconsistency in Respondent's policies and practices:

> So this is when postpartum tubal ligations are performed with the intent of avoiding future medical problems associated with a future pregnancy, they are not acceptable, as

[1] *See also* Pet'r Ex. 38 Reyes PMK Tr. 41:22–24 (agreeing that tubal ligation does not cure diabetes); Pet'r Ex. 13, Shields Tr. 72:1–5 (testifying that tubal ligation does not cure or alleviate hypertension).

> I read the sterilization policy. As I read Dignity Health's moving and reply papers, it is acceptable when they are performed with the intent of avoiding future medical problems associated with a future pregnancy. (Pet'r Ex. 37, July 22, 2019 Mot. for Summ. J. Hr'g Tr. 6:18-24.)
>
> I read two separate Dignity Health sets of materials that appear to me to be inconsistent and irreconcilable.

(*Id.* at 12:22-23). The only reasonable conclusion, based on the medical literature and Respondents' own testimony and practices, is that having a tubal ligation performed to prevent a risk from a future pregnancy is, by definition, a tubal ligation for contraceptive purposes. (Jackson Decl., Ex. 1, ¶ 37.)

**2. Age, Insurance, and Faith-Based Factors are Nonmedical Criteria Imposed on Persons Seeking Tubal Ligations at Respondent's Hospitals That are Not Imposed in Other Contexts.**

The evidence in the record, and that to be presented at the writ hearing, demonstrates that Respondent considers several "special nonmedical qualifications" prohibited by Section 1258 when addressing tubal ligation requests. The very existence of the tubal ligation review committees is a nonmedical qualification imposed *only* on persons seeking tubal ligations. (Pet'r Ex. 3, Reyes PMK Tr. 37:21-24; Pet'r Ex. 17, O'Keeffe Vol. 1 Tr. 24:1–16; Pet'r Ex. 10, De Soto Tr. 26:6–8.) Respondent claims that the committees processes are not "qualifications" placed on individuals, but rather on doctors seeking permission to do a tubal ligation, but this is simply semantics. Individual patients seeking tubal ligations must submit requests for the procedure through their doctors to the review committees, a requirement that patients seeking other medical procedures need not meet.

To be sure, a hospital may require a patient to sign a form consenting to sterilization, as discussed in *California Medical Ass'n v. Lackner*, 124 Cal. App. 3d 28, 37 (1981), to assure that a patient is voluntarily consenting. Such a form is permitted under Section 1258 as a "requirement[] relating to the [patient's] mental condition." *Id.* at 38. By contrast, Respondent's sterilization request forms do not provide consent; they are applications that must be submitted to a nonmedical committee and that must contain information on nonmedical criteria such as age and insurance status, to be considered by the committee.

Once the form is before the committee, the decision is made in part using faith-based criteria that are by definition not medical. At her deposition, Sister O'Keeffe, the theological member of the North State hospitals' tubal ligation review committee, testified that: "above all," the decision comes down to "is this what is right for this patient and this family at this moment in time." (Pet'r Ex. 17, O'Keeffe Vol. 1 Tr. 37:3-38:5.) In her most recent declaration, Sister O'Keeffe states: "I focus primarily upon whether the Request fits with the Sterilization Policy, the ERDs and Catholic moral teaching." (O'Keeffe Decl. ¶ 21.) Catholic moral teaching—including any assessment about what is "right" for the patient and her family—is not a medical qualification.

Moreover, none of the decisions being made by the tubal ligation review committees can be medical, because doctors do not make the ultimate decision. The theological members of the committees, Sister O'Keeffe and Mr. Cox—neither of whom are doctors—are the final decision makers for the committees. (Pet'r Ex. 20, De Soto PMK Tr. 25:8–15; Pet'r Ex. 18, Cox Tr. 35:12-21; Pet'r Ex. 3, Reyes PMK Tr. 31:10–24). When tubal ligations are denied, it is not because they are medically contraindicated[2], but because of Respondent's application of its nonmedical, religious rules. (O'Keeffe Decl.¶ 25; Jackson Decl., Ex. 1, ¶¶ 49-50).[3] As the Court will hear from Petitioners' medical expert, Dr. Rebecca Jackson, when Respondent permits tubal ligations, "they are not doing so based on medical decisions or medical necessity." (Jackson Decl., Ex 1, ¶ 11.) The Court will also hear additional evidence demonstrating that the committee decisions are not based on the risk to the patient of carrying a future pregnancy—such as evidence showing that the committees sometimes ignore risk factors that are predictive of poor pregnancy outcomes, like obesity. (Jackson Decl., Ex. 1, ¶ 68.)

---

[2] The exception in the statute allowing consideration of physical or mental factors is to ensure that facilities are not required to perform a tubal ligation when doing so would be medically unsound. Respondent seeks to turn that on its head, arguing that it allows the facility to allow tubal ligations only when the procedure is medically required, which would undermine the very purpose of the statute, i.e., to prohibit facilities from denying tubal ligations for nonmedical reasons.

[3] Respondent devotes many pages to rebut Petitioners' assertion that it is not meeting the standard of care for patients seeking tubal ligations, but includes no medical expert opinion to support its claim, because it cannot.

The committees also consider expressly prohibited criteria. Section 1258 could not be more clear, and in no possible way ambiguous, in stating that a facility that performs contraceptive procedures may not consider age in determining whether to permit a tubal ligation (or any contraceptive procedure) because that is expressly included among the absolutely "prohibited nonmedical qualifications." And nothing in the statute even hints at an interpretation under which age may be considered if it is only one factor or when it is not the dispositive factor. Age simply cannot be included as a consideration. Yet Sister O'Keefe, who sits on the committee that makes the decisions, testified in her deposition that age is, in fact, one of the criteria that is considered by the committee. (Pet'r Ex. 34, O'Keeffe Vol. 1 Tr. 107:9-15). And, confirming that admission, Dr. De Soto, who also sits on the committee, was questioned about a particular request form on which he had written "very young age," and had to concede that the woman's young age is not part of the medical decision (in other words, it is a prohibited nonmedical qualification), but that Sister O'Keefe nonetheless wants to know that information. (Pet'r Ex. 10, De Soto Tr. 57:8-58:22). Put simply, Respondent's own testimony establishes that it is applying expressly prohibited factors.

This Court has also already determined that the prohibition on considering "age" includes "advanced maternal age." (Pet'r Ex. 37, July 22, 2019 Mot. for Summ. J. Hr'g Tr. 35: 9-21). Respondent claims that advanced maternal age refers "to the physical condition of the individual," but this interpretation would undermine the first part of Section 1258, as *any* age is technically related in some fashion to someone's physical condition. The Court recognized this at the July 22nd hearing on Respondent's Motion for Summary Judgment, stating:

> And I got to tell you, age affects mental condition. It affects marital status. It affects -- mental condition is affected by the number of children. It is not a fair reconciling of the last sentence of 1258. And the first sentence of -- last sentence of the first paragraph and the first sentence of the second paragraph, to say that when age relates to physical, condition, or marital status relates to physical condition, or number of natural children relates to physical condition, then it's okay.

(Pet'r Ex. 37, July 22, 2019 Mot. for Summ. J. Hr'g Tr. 36: 11-20; *see also id.* at 37:4-8 ("expressly taken off the table, for health facilities that allow contraceptive purposes sterilizations is

consideration of age and marital status and number of natural children. That's how I read the statute.")

Advanced maternal age is simply the medical term for age 35 or older, and it is clear that Section 1258 was meant to prohibit decision making on tubal ligations based on whether someone had attained a certain age. As this Court recognized:

> By looking at advanced maternal age, you're choosing not to look at 34 and younger, which is itself an age-based criteria.

(Pet'r Ex. 37, July 22, 2019 Mot. for Summ. J. Hr'g Tr. 38:4-6). Even if advanced maternal age is a risk factor for pregnancies, the Legislature has prohibited hospitals from considering it.

**3. Respondent Is Bound By State Law and the Attorney General's Merger Requirements.**

Hospitals operating in California are regulated by both the Health and Safety Code and the Attorney General, who must consent to changes in hospital ownership and structure, including hospital mergers. Cal. Corp. Code § 5920. When Respondent chose to merge with Catholic Health Initiatives in the state of California, it subjected itself to the oversight of the Attorney General, who is mandated to review whether reproductive services, including tubal ligations, will be affected by a proposed hospital merger. Cal. Code Regs. tit. 11, § 999.5(d)(5)(G).

The Attorney General's merger conditions for Respondent included a provision that requires it to maintain "women's reproductive services at current licensure and designation with the current type and/or levels of services." (Resp't Ex. 8 at 3.) Because Section 1258 is a current licensure requirement for Respondent's Catholic hospitals, compliance with the statute is built into the Attorney General's merger conditions. As such, the Attorney General's merger conditions are not an out for Dignity Health to violate the law.

Respondent now complains that if it is forced to comply with Section 1258 it will have to stop providing all tubal ligations, and that will put it in conflict with the Attorney General's merger conditions. (Decl. of Todd Strumwasser, M.D., dated Sept. 29, 2020 ¶ 26.) Respondent was aware of the requirements of Section 1258 and this litigation during the merger process. It

chose to go through with a merger that subjected it to the Attorney General's oversight, and the requirement that it comply with California licensing statutes, *knowing* that Section 1258 did not permit it to offer tubal ligations selectively. There is no evidence that Respondent revealed during the merger proceedings that it was and intended to continue violating Section 1258. Respondent cannot now complain that it is impossible for it to comply with both Section 1258 and the Attorney General's conditions. As a business that operates "in the economy and in society," Respondent is bound by laws meant to protect health care consumers. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n,* 138 S. Ct. 1719, 1727 (2018).

Furthermore, given that Respondent claims it is religiously obligated to provide some tubal ligations, it is unclear whether and why, if forced to comply with Section 1258, it would necessarily opt to provide no tubal ligations. If either way of complying with Section 1258 runs afoul of Respondent's religious beliefs, it may choose to comply in a way that does not conflict with the Attorney General's conditions. Respondent's own witness claims that Respondent approves the vast majority of the requests it receives. (Decl. of James De Soto ("De Soto Decl."), dated Sept. 20, 2020, ¶ 20.) And Respondent's own website has an overview of tubal ligations that indicates that a person may "choose to have a tubal ligation if: You do not want children in the future." Dignity Health, *Tubal ligation*, https://www.dignityhealth.org/conditions-and-treatments/womens-services/gynecology-procedures-and-treatments/tubal-ligation (last visited May 4, 2021). The site directs people "to get expert advice and professional care for tubal ligation, Find a Doctor at Dignity Health or visit one of our locations near you." *Id.* Nowhere on the web page for tubal ligations is there any mention of Respondent's restrictions on tubal ligations. *Id.*

Throughout its opening brief, Respondent attacks the ACLU as being anti-religion and impugns its motives for pursuing this case. Not only are such gratuitous attacks unfounded, they are irrelevant to the important substantive issues of law and fact before this Court. As Respondent well knows, no ACLU entity is a plaintiff in this case; the ACLU is acting solely as counsel of record for Petitioners. It is no secret that the ACLU members wish to ensure maximum availability of reproductive health care to persons in California. This is why the

ACLU of Southern California represented the membership of the ACLU of CA at the merger hearings and advocated that Respondent be required to continue providing reproductive health services at the same level it had been.[4]

It is also true that Petitioners in this case have an interest in removing nonmedical, moral decision making from the operating room, and in ensuring that Section 1258 is enforced. Indeed, the Court has already found that Petitioners have such standing. Petitioners have not asked Respondent to violate the Attorney General's order, and it is Respondent, by choosing to operate hospitals in California, and merge with hospitals in California, that has voluntarily put itself in the position about which it now complains.

**4. The State of California Has Not Endorsed Respondent's Violation of Section 1258.**

Neither the State of California's failure to sanction Respondent for its violation of Section 1258 nor the Attorney General's merger conditions constitute an "interpretation"—much less a "controlling" interpretation—of the statute. (Resp't Req. to Revisit Denial of Free Exercise Challenge at 10.) No regulatory agency or official in California has ever issued *any* interpretation of Section 1258.

Unfortunately, state agencies tasked with enforcement of state law often fail to enforce that law, including the California Department of Public Health (CDPH).[5] That neither precludes enforcement of the law by private parties, nor in any way suggests that the agency has interpreted the law to permit the action alleged by the private party to have violated the law. *See Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609 (2012) (private action against nursing home for violation of licensing requirements appropriate, even where CDPH had not

[4] Respondent claims that Ruth Dawson "identified herself as Petitioner's counsel" at one of the hearings held by the Attorney General. (Resp't Trial Br.at 75:18-19.) This completely mischaracterizes Ms. Dawson's statements. Ms. Dawson identified herself as an attorney at the ACLU of Southern California, testifying on behalf of the ACLU of California. (Resp't Ex. 9 at 162:20-25.) She mentioned in passing that she had represented Ms. Chamorro, *id*. at 164:23-25, but she did not claim to represent Ms. Chamorro or Physicians for Reproductive Health at the Attorney General hearing. *Id.*

[5] For the same reason, Respondent's citations to other entities or rules (such as the Joint Commission, Medicare Integrity, Medicare Standards, and the QIO) that have neither enforced California's Health & Safety Code nor found that Respondent is not violating it, are irrelevant to the issues before this Court.

taken action); *Wehlage v. Empres Healthcare, Inc.*, 791 F. Supp. 2d 774, 789 (N.D. Cal. 2011) ("that the CDPH may enforce [the nursing home licensing statute] does not preclude residents from doing so"). And the Attorney General's merger conditions do not reference Section 1258, nor has the Attorney General taken any official action on the Statute, such as issuing an opinion. As noted earlier, there is no evidence that the Attorney General has ever considered, or knew, that Respondent was violating Section 1258.

Indeed, even if CDPH or the Attorney General had issued an interpretation of Section 1258—which they have not—the courts are the ultimate arbiters of statutory interpretation. *See Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 236 (2015) ("Even in substantive areas of the agency's expertise, however, our deference to an agency's statutory interpretation is limited; determining statutes' meaning and effect is a matter 'lying within the constitutional domain of the courts.'") (quoting *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998).); *Ennabe v. Manosa*, 58 Cal. 4th 697, 716 n.14 (2014) (Opinions of the Attorney General while persuasive, are not binding).

### B. The Court Should Grant a Writ of Mandamus Because Respondent Failed to Follow a Clear Ministerial Duty and Acted in an Arbitrary and Capricious Manner.

A court may issue a writ of mandate pursuant to California Code of Civil Procedure Section 1085 to correct an abuse of discretion or to compel the performance of a nondiscretionary duty. Jon B. Eisenberg, *Cal Practice Guide: Civil Appeals and Writs* ¶15:33 (The Rutter Group 2020); *Unnamed Physician v. Bd. of Trs. of Saint Agnes Med. Ctr.*, 93 Cal. App. 4th 607, 618 (2001), as modified (Dec. 3, 2001). The text and legislative history of Section 1258 create a clear, nondiscretionary duty that bars Respondent from using nonmedical criteria as the basis for denying certain tubal ligations. Respondent's policy and sterilization determinations are also arbitrary and capricious, providing further basis for granting a writ.

The standard of review for writs varies on the nature of the action being challenged. *Carrancho v. Cal. Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265 (2003).

> Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions

> do not merit such deference, and therefore lie toward the opposite end of the continuum.

*W. States Petroleum Ass'n. v. Superior Court*, 9 Cal. 4th 559, 576 (1995). Under both the ministerial duty analysis and arbitrary and capricious standard, the Court should issue a writ to require Respondent to comply with Section 1258.

**1. Section 1258 Creates a Ministerial Duty for Respondents To Avoid Using Nonmedical Criteria for Granting Tubal Ligations.**

Section 1258 creates a clear ministerial duty for Respondent, and the court need not show deference when evaluating whether Respondent has complied with the law. A ministerial duty is an act that an agency is "required to perform in a prescribed manner in obedience to the mandate of legal authority… without regard to his or her own judgment or opinion concerning the propriety of such act." *Ellena v. Dep't of Ins.*, 230 Cal. App. 4th 198, 205, (2014) (citations omitted). When "a statute…clearly defines the specific duties or course of conduct that a…body must take, that course of conduct becomes mandatory and eliminates any element of discretion." *See Great W. Sav. & Loan Ass'n v. City of L.A.*, 31 Cal. App. 3d 403, 413 (1973) (citations omitted).

Where there is a clear, present, and ministerial duty, the courts will not frustrate the legislative creation of the statutory duty and will enforce such duty. *See Santa Clara Cnty. Couns. Attn'ys Ass'n v. Woodside*, 7 Cal. 4th 525, 540-41 (1994), superseded in part by statute as recognized in *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Emp. Rels. Bd.*, 35 Cal. 4th 1072 (2005) (finding that a statute explicitly imposed a duty on public agencies to meet and confer with public employee organizations, and that writ relief was proper to enforce that duty).

If the text of the statute is clear in creating a ministerial duty, the court does not need to rule on whether the act was arbitrary or capricious. *See Ellana*, 230 Cal. App. 4th at 217 (holding that a statute clearly required the Department of Insurance to review new insurance policies before approval, and that since the plaintiff sufficiently alleged the Department's failure to review her policy, the court did not need to determine whether abuse of discretion

was a viable claim). Petitioners agree that Respondent can "adopt any policy or practice lawful under Section 1258" (Resp't Trial Br. at 34), but Respondent cannot adopt a policy that violates Section 1258, and doing so does not make the duty to comply with the statute any less ministerial.

Section 1258 provides that: "[n]o health facility which permits sterilization operations for contraceptive purposes to be performed therein…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." If the Court finds that Respondent permits sterilization operations "for contraceptive purposes," Section 1258 creates a clear duty for Respondent not to impose nonmedical qualifications on persons seeking sterilizations, and the Court may issue a writ of mandate to compel Respondent to comply with Section 1258. *See Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 130 Cal. App. 4th 986, 1003 (2005) (Court issued writ to require school district to comply with state statute on charter school locations.)

When seeking a writ to enforce a ministerial duty under California Code of Civil Procedure Section 1085, the petitioner must also show that they have a "clear, present, and beneficial right to performance of that duty." *Unnamed Physician*, 93 Cal. App. 4th at 618. This Court has already ruled that Petitioners have a beneficial interest in the enforcement of Section 1258 when it ruled that Petitioners have standing to bring this writ. (Pet'r Ex. 2, Order Den. Resp't Mot. For Summ. J. (Apr. 30, 2020) at 3:22-4:2.)

**2. The Court Can Also Grant a Writ to Curb the Arbitrary and Capricious Use of Discretion.**

Even if the Court finds that Section 1258 did not create a ministerial duty for Respondent, the Court can grant a writ of mandate to block an arbitrary and capricious use of discretion. Discretion is the "power conferred on [an agency] to act officially according to the dictates of [its] own judgment." *Rodriguez v. Solis*, 1 Cal. App. 4th 495, 502 (1991). Judicial review of determinations of nongovernmental agencies, such as a nonprofit hospital corporation, is an appropriate use of traditional mandate to ensure that the use of discretion is

not arbitrary and capricious. *See Lewin v. St. Joseph Hosp. of Orange*, 82 Cal. App. 3d 368, 383 (1978). Hospital policy-making receives deference when the policy considered conflicting points of view and rationally furthered patient care and hospital administration. *See id.* at 389-90 (reviewing a hospital's determination to keep certain facilities closed-staff and holding that the determination was not arbitrary and capricious because the hospital held a hearing to consider conflicting points of view and rationally concluded from the evidence that closed-staff facilities best served administrative needs and patient care).

Respondent's criteria for granting tubal ligation requests are arbitrary and capricious because they are not related to any medical standard of care. (Jackson Decl., Ex. 1, ¶¶ 31, 49-50.) They ignore certain factors relevant to maternal risk (although they argue those are the medical criteria they take into account) and impose the consideration of nonmedical factors like religious doctrine. (Jackson Dec., Ex 1, ¶¶ 11, 41, 49-50, 68.) A hospital policy can be overridden by courts when "it clearly appears it is unlawful or will seriously injure a significant public interest." *Lewin*, 82 Cal. App. 3d at 385. Respondent's policy is both clearly unlawful and injures the public interest embodied in Section 1258. The hospital policies upheld by the courts in *Lewin* and *Mateo-Woodburn v. Fresno Community Hosp. & Med. Ctr.*, and cited by Respondent, violated no state statute, or established public policy. *Lewin*, 82 Cal. App. 3d. at 391; *Mateo-Woodburn v. Fresno Cmty. Hosp. & Med. Ctr,* 221 Cal. App. 3d 1169, 1184 (1990).

Respondent's criteria for granting and denying sterilization requests are also arbitrary and capricious because they defy the language of Respondent's own hospital policies. As described above, Respondent's sterilization policies prohibit tubal ligation altogether—yet, Respondent admits that it approves the majority of tubal ligation requests. (De Soto Decl., ¶ 20.) Respondent's purported explanation that its hospitals are engaged in a "pastoral application"—on a case-by-case basis—of the policies, resulting in the policies being interpreted in opposition to their plain terms, only serves to demonstrate that the criteria are arbitrary and capricious.

Finally, Respondent's criteria for granting and denying sterilization requests are arbitrary and capricious because they ignore Section 1258's prohibition on nonmedical criteria

being used to deny tubal ligation. Section 1258 establishes the universe of criteria that hospitals that perform sterilizations may consider in determining whether a patient should be denied the procedure, and which is exclusively medical criteria. *See Monterey Mech. Co. v. Sacramento Reg'l Cnty. Sanitation Dist.*, 44 Cal. App. 4th 1391, 1412 (1996) (Appellate court granted petitioner's writ when County abused its discretion by failing to apply affirmative action criteria required by statute).

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

Respondent asserts that it has a sweeping religious freedom right to violate any aspect of California's hospital licensing law. To be precise, Respondent argues that it has a religious freedom to do *exactly* what Section 1258 prohibits: pick and choose which patients it allows to access tubal ligation, based on special nonmedical criteria not imposed on patients seeking other operations at the hospitals. It contends that it is required to follow the strictures laid out in the ERDs and its associated sterilization policies, yet its practices with respect to tubal ligations are not only prohibited by Section 1258, but also are prohibited by the text of the ERDs and sterilization policies.

Respondent describes the ERDs as general hospital policy applying to all patients. (Resp't Trial Br. at 42). But the ERDs themselves—as well as the sterilization policies that purport to interpret the ERDs and are also hospital policy—explicitly prohibit tubal ligations. *See*, *e.g.*, (Pet'r Ex. 14, MMCR000167, MMCR000554, MMCR000565, MMCR000566, MMCR000568, MMCR000570) (Sterilization policies providing: "Procedures whose sole, immediate effect is to render the generative faculty incapable of procreation are contrary to Catholic moral teaching. Therefore, tubal ligation or other procedures that induce sterility for the purpose of contraception are not acceptable in Catholic moral teaching even when performed with the intent of avoiding further medical problems associated with a future pregnancy."). This prohibition on performing tubal ligations could hardly be more clear.

Thus, Respondent's religious freedom argument actually lies in what it describes as the "pastoral" application of the ERDs to each patient seeking a tubal ligation, resulting in some

patients being approved for the operations—in seeming violation of hospital policy—and others being denied the operations, and all based on prohibited nonmedical criteria.

Respondent now argues that recent cases from the U.S. Supreme Court support its quest to obtain complete autonomy from government regulation and, to disregard California's hospital licensing law in any way it chooses. (Resp't Req. to Revisit Denial of Free Exercise Challenge.) They do not.

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

The governing law with respect to federal free exercise claims continues to be *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). No case has overturned *Smith*, and, despite Respondent's entreaties to act as if it is no longer good law, this Court is bound to apply *Smith* as precedent. *North Coast Women's Care Med. Grp. v. San Diego Cnty. Super. Ct.*, 44 Cal. 4th at 1145 (2008) ("[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."); *see also Smith*, 494 U.S. at 879 (*quoting Reynolds v. United States*, 98 U.S. 145, 166-67 (1878), ("'Laws,' we said, 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.")

Respondent argues that *Tandon v. Newsom* changed everything. It did not. In *Tandon*, the U.S. Supreme Court found certain California COVID-19 restrictions that impacted religious services in homes not to be "neutral and generally applicable." The Court explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) The Court then explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be

judged against the asserted government interest that justifies the regulation at issue." *Id.* And "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.* Indeed, the analysis in *Tandon* accords with existing precedent which deemed laws not "generally applicable" if they treated religious observers unequally. *See Parents for Privacy v.* Barr, 949 F.3d 1210, 1235 (9th Cir. 2020) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The analysis in *Tandon* does not apply Section 1258, which does not treat secular activity more favorably than religious exercise. Nor does the law treat secular hospitals and religious hospitals differently. The "primary" and "central" issues the legislature intended to address in enacting Section 1258 were "whether or not an individual having attained the age of majority has the right to obtain a sterilization if he so desires without encountering obstacles from the hospital or clinic . . ." and "whether sterilization is a matter between the individual and his physician or whether a hospital or clinic has a right to impose an arbitrary standard of its own." (Pet'r Ex. 1, Staff Analysis at 28.) The legislative history of the law is clear that the problem the law was intended to address—obstacles imposed by hospitals on patient access to "voluntary sterilization"—was widespread. The law carefully and narrowly prohibits hospitals from imposing nonmedical qualifications—nonreligious or religious—on patients seeking tubal ligation.

Respondent nonetheless contends that because Section 1258 provides that it does not apply to ban consideration of "requirements relating to the physical and mental condition of the [patient,]" it discriminates against religious exercise if it applies to "religious requirements." (Resp't Req. to Revisit Denial of Free Exercise Challenge at 4-5.). But the second paragraph of Section 1258 was enacted to ensure that the existing medical considerations for tubal ligation—consent and lack of contraindication—could continue. (Pet'r Ex. 1, Staff Analysis at 21 ("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 California Med. Ass'n*, 124 Cal. App. 3d at 38 (1981) (recognizing that consent is a "mental condition" for purposes of the Statute). Recognizing the ongoing application of

existing medical criteria to access tubal ligation fully accords with Section 1258's asserted interest in prohibiting nonmedical requirements—whether religious or nonreligious.

Under the analysis of "comparable activity" in *Tandon*, the religious, nonmedical requirements that Respondent's hospitals impose on patients seeking tubal ligation are *not* comparable to medical requirements, in that the interest that justifies the law is prohibiting the use of nonmedical criteria for hospitals that perform tubal ligations.

**2. Section 1258 Survives Even Strict Scrutiny.**

Even if the Court were to apply the federal standard for strict scrutiny, however, Section 1258 would survive. In the context of federal free exercise claims, a law satisfies strict scrutiny if it is "narrowly tailored" to serve a "compelling" state interest. *Roman Cath. Diocese for Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (citing *Church of Lukumi*, 508 U.S. at 546).

As described in Petitioners' Opening Brief, equitable access to healthcare—namely, access to sterilization operations for contraceptive purposes, free of arbitrary, nonmedical obstacles—is a compelling public interest. (Pet'r Op. Br. at 30-31.) The case law recognizing that equitable access to reproductive healthcare is a compelling state interest is further buttressed by studies showing that transparency and uniformity in accessing reproductive healthcare are critical to a patient's ability to make informed judgments about their own medical care. (Pet'r Ex. 39, Jocelyn M. Wascher et al., *Restrictions on Reproductive Care at Catholic Hospitals: A Qualitative Study of Patient Experiences and Perspectives*, 11 AJOB Empirical Bioethics 257 (2020).) In that study, researchers evaluated women's experiences seeking reproductive services at Catholic hospitals and found that it imposed an "unjust barrier" on patients to "navigate complicated and often-obscured religious policies," and that by increasing transparency, providers can alleviate "ethical impediments to informed-decision making and patient autonomy." *Id.* at 9.

Section 1258 is also narrowly tailored to serve the state interest in the law—indeed, it is the least restrictive means of achieving the state interest in the law. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). As

described above, the objective of Section 1258 was to remove arbitrary and nonmedical hospital-imposed obstacles to accessing "voluntary" sterilization, and to relocate the authority for making decisions about access to these particular operations to doctors and patients. (Pet'r Ex. 1, Staff Analysis at 13, 17.) The law therefore prohibits the hospitals that are performing "sterilization operations for contraceptive purposes" from imposing "special nonmedical qualifications" on patients seeking these operations. Petitioners cannot conceive of, and Respondent has never articulated, any less restrictive means of ensuring that California hospitals that perform tubal ligations do not impose nonmedical criteria on patients seeking them than the neutral and generally applicable rule set forth in Section 1258.

Finally, the law is neither overbroad nor underinclusive. *Church of the Lukumi*, 508 U.S. at 546. In seeking to remove arbitrary and nonmedical hospital-imposed obstacles to accessing sterilization operations for contraceptive purposes, the law is targeted only at the health facilities that perform those operations. But the law applies to all health facilities that perform sterilization operations for contraceptive purposes, including clinics and various types of hospitals. (Pet'r Ex. 1, Senate Bill 1358 at 13-17.)

### D. Applying Section 1258 to Respondent Does Not Violate the Church Autonomy Doctrine.

Respondent has also argued that the church autonomy doctrine prevents the Court from entertaining Petitioners' challenge to Respondent's practices. The church autonomy doctrine provides "constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intrachurch* disputes." *Gen. Council on Fin. and Admin. of the United Methodist Church v. Superior Court*, 439 U.S. 1355, 1372–73 (1978) (Rehnquist, J., Circuit Justice) (emphasis added). Although Respondent argues that Respondent's hospitals are closely connected to the Catholic Church, they *are not* a church—they are licensed hospitals that are open the general public and that voluntarily submitted to California laws governing their operations.

Under California licensing law, "health facility," which includes hospitals, is defined as:

> a facility, place, or building that is organized, maintained, and operated *for the diagnosis, care, prevention, and treatment of human illness, physical or mental*, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer,

Cal. Health & Safety Code § 1250 (emphasis added). Respondent may have chosen to open and continue to operate its hospitals because of its religious beliefs, but has also agreed to be fully subject to California's hospital licensing laws—including operating the hospitals for the purpose of medical care and opening those hospitals fully to the general public.[6]

As such, Respondent is not in a comparable position to religious schools, which as the Supreme Court has recognized, exist to further religion. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("The religious education and formation of students is the very reason for the existence of most private religious schools."). In that case, the Court held that two teachers at Catholic elementary schools could not sue their schools for discrimination under federal nondiscrimination laws, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). *Id.* Because the Court found that the teachers "performed vital religious duties," it concluded that the religious schools' "internal management decisions" with respect to the teachers were exempt from application of the ADEA and ADA under the First Amendment ministerial exception doctrine. *Id.* at 2066, 2060 ("Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions within churches and other religious institutions."). This accords with California statutory law, which also recognizes the independence of religious

---

[6] Because Petitioners are seeking a writ against hospitals for failure to comply with California licensing law, this case is distinguishable from *Means v. U.S. Conference of Catholic Bishops*, No. 1:15–CV–353, 2015 WL 3970046 (W.D. Mich. June 30, 2015). In that case, a patient who was denied care and almost died in a Catholic hospital under the application of the ERDs sued the U.S. Conference of Catholic Bishops directly, under a common law negligence claim. The court concluded that the claim implicated the church-autonomy doctrine, because it lay against the USCCB directly: "This Court is competent to address whether the medical care provided by Mercy physicians, and vicariously provided by Trinity Health, constitute negligence or medical malpractice. However, the Court cannot determine whether the establishment of the ERDs constitute negligence because it necessarily involves inquiry into the ERDs themselves, and thus into Church doctrine." *Id.* at *13. The Court then noted that Means could have sued her doctors directly for the harm she experienced, even though it was a direct result of the application of the ERDs. *Id.* at *14.

schools. *See* Cal. Educ. Code § 221 (nondiscrimination provisions of California Education Code do not apply to "an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.").

The Supreme Court's decision in *Guadalupe* therefore does not exempt Respondent from the application of Section 1258. California licenses Respondent's hospitals for the central purpose of providing medical care, not to further religion. Respondent's decisions regarding whether it permits doctors to perform tubal ligations on patients are not "internal management decisions"; and Respondent's patients seeking tubal ligation do not "perform vital religious duties." Instead, Section 1258 operates like a public accommodations law, applying equally and neutrally to all licensed hospitals. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727 ("while . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."); *Guadalupe*, 140 S. Ct. at 2060 (religious institutions do not "enjoy a general immunity from secular laws[]").

Moreover, this Court is bound by the California Supreme Court's decision in *Catholic Charities*, which explicitly rejected the proposition that the church autonomy doctrine prevents courts from applying state legislation to religiously-affiliated entities. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 542–43 (2004). The Court observed that applying such state legislation "does not implicate internal church governance[]" and does not "require [courts] to decide any religious questions[,]" but only requires them to "apply the usual rules for assessing whether state-imposed burdens on religious exercise are constitutional." The same rationale applies here.

**E. The Doctrine of Constitutional Avoidance Does Not Apply to Section 1258.**

Respondent lastly relies on the doctrine of constitutional avoidance to argue that the Court should change its already established interpretation of Section 1258. But the doctrine of constitutional avoidance applies *only* to ambiguous statutes; to apply the doctrine, "the statute must be realistically susceptible of two interpretations . . . ." *People v. Anderson*, 43 Cal. 3d

1104, 1146 (1987). And the doctrine "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress *did not intend the alternative* which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added).

Here, Section 1258 is not susceptible of two constructions. Section 1258 applies to hospitals that perform "sterilization operations for contraceptive purposes." Cal. Health & Safety Code § 1258. Respondent argues that the statute can be interpreted to permit the hospitals to subjectively define "for contraceptive purposes" and to do so counterfactually: in other words, although Respondent's hospitals perform tubal ligations for the purpose of preventing future pregnancy—the definition of "contraceptive"—Respondent claims that by including the word "purpose" the statute can be construed to permit Respondent to redefine and determine the meaning of the term "contraceptive." (Resp't Trial Br. at 37.)

This interpretation, however, upends not only the statute but all the canons of statutory interpretation. "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." *Hassan v. Mercy Am. River Hosp.*, 31 Cal. 4th 709, 715 (2003). The ordinary and usual meaning of the adjective "contraceptive" is "(of a method or device) serving to prevent pregnancy." Google Dictionary, https://bit.ly/3eZwBlV (last visited May 5, 2021); *see also* Merriam Webster Dictionary, Online Ed. (defining "contraception" as the "deliberate prevention of conception or impregnation") https://www.merriam-webster.com/dictionary/contraceptive (last visited May 5, 2021). This interpretation accords with the way the terms "contraceptive" is used in other parts of California Code. *See* Cal. Health & Safety Code § 1367.25(e) (noting that birth control pills—"contraceptives"—may be taken for "reasons other than contraceptive purposes," "such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause"); Cal. Penal Code § 3440 (prohibiting sterilization of incarcerated persons "for the purpose of birth control," and only permitting sterilization operations if "the sterilizing procedure is medically necessary, as determined by contemporary standards of evidence-based medicine, to treat a diagnosed condition").

Most importantly, in construing statutes, courts must "ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." *Hassan*, 31 Cal. 4th at 715. The legislative history of Section 1258 is equally clear: "Sterilization operations fall into two categories—therapeutic (required by some medical condition) and voluntary (or contraceptive purposes)." (Pet'r Ex. 1, Staff Analysis at 20.) The legislative history explicitly recognizes that tubal ligations are "sterilization operations for contraceptive purposes." *Id.* at 17, 32 ("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.").

It would therefore neither accord with the plain language of the statute nor the legislative history to construe the statute such that tubal ligations performed for the purpose of preventing future pregnancy are excluded from the category of "sterilization operations for contraceptive purposes."

## III. CONCLUSION

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

DATED: May 5, 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 REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH