MANATT, PHELPS & PHILLIPS, LLP
BARRY S. LANDSBERG (Bar No. CA 117284)
blandsberg@manatt.com
HARVEY L. ROCHMAN (Bar No. CA 162751)
hrochman@manatt.com
JOANNA S. MCCALLUM (Bar No. CA 187093)
jmccallum@manatt.com
CRAIG S. RUTENBERG (Bar No. CA 205309)
crutenberg@manatt.com
COLIN M. MCGRATH (Bar No. CA 286882)
cmcgrath@manatt.com
2049 Century Park East, Suite 1700
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000 / Fax: (310) 312-4224

MANATT, PHELPS & PHILLIPS, LLP
BARRY W. LEE (Bar No. CA 088685)
bwlee@manatt.com
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Telephone: (415) 291-7400 / Fax: (415) 291-7474

Attorneys for Respondent
Dignity Health and Dignity Health dba
Mercy Medical Center Redding

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH,

Petitioners,

v.

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

Respondent.

Case No. CGC 15-549626

Hon. Harold E. Kahn

RESPONDENT DIGNITY HEALTH'S RESPONSE TO PETITIONERS' OPENING BRIEF

Hearing Date: May 17-18, 2021
Time: 9:30 a.m.
Dept.: 505

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

Respondent Dignity Health's position in this case not changed since Petitioners filed their initial complaint. The Catholic Hospitals assert that the religious decision-making challenged by the Petition is protected by the First Amendment against interference by Petitioners or the Court.

As Petitioners' claims evolved, a dispute regarding the interpretation of Health & Safety Code Section 1258 crystalized. The parties' competing interpretations are well known at this point. No one disputes that Section 1258 is a licensing statute, and it is well established that the State cannot compel the Catholic Hospitals to forsake their First Amendment rights to obtain a license. This brief elaborates on the free exercise problem arising from the licensing law at issue and shows that Petitioners' interpretation of the law, if adopted by the Court, would violate the First Amendment, and would do so without regard to the Supreme Court's forthcoming decision in *Fulton v City of Philadelphia* and its further instructions in *Minton v Dignity Health*.

Apart from the settled free exercise law applicable to licensing statutes, recent Supreme Court authority, including *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020) and *Tandon v. Newsom*, 593 U.S. at ___, 2021 WL 1328507 (April 9, 2021) (*per curiam*), have changed the law in ways material to this case, and require denial of the Petition. Not only is it clearer than ever that the mission-centric, faith-based, decision-making of religious institutions is protected from government regulation based upon secular standards, but strict scrutiny must be applied to any statute that, facially or as interpreted, treats free exercise less favorably than secular factors. Thus, Petitioners' interpretation of Section 1258, as adopted the Court in the April 30, 2020 summary judgment order, triggers strict scrutiny. Petitioners have no hope of meeting that exacting standard and indeed there is no evidentiary record that even tries to make that case. Accordingly, the Court should deny the Petition.

Petitioners consist of an individual and an organization that can identify only one member physician at any Dignity Health hospital who purports not to understand the hospital's sterilization policy and review process. There is no meaningful evidence to support their claims, let alone demonstrate a need for relief. Petitioners have failed to establish that the Catholic

Hospitals apply prohibited nonmedical qualifications. The evidence establishes that the Catholic Hospitals consider advanced maternal age, which even petitioners and their expert admit is a medical factor. It's just not one that they agree with. The evidence is undisputed that the Catholic hospitals do not consider number of children a woman has had or her marital status. Nor is there a dispute that the Catholic Hospitals conduct a faith-based process, which is what Petitioners really want to prohibit. A careful read of the Petition reveals repeatedly that the foundation of Petitioners' claim is that the Ethical and Religious Directives for Catholic Health Care Services ("ERDs") are a prohibited "nonmedical qualification" on a woman's asserted right to obtain sterilizations on demand, or for convenience only. The Petition decries the ERDs as the heart of the matter not fewer than 19 times, and it asks the Court to declare that the Catholic Hospitals' "sterilization policies reflecting the ERDs … violat[e] … California Health Safety Code §1258". Amended Verified Petition for Writ of Mandate ¶ 67; *see also id* at ¶¶ 2, 4, 5, 6, 7, 11 14, 20, 21, 36, 47, 49, 50, 51, 52, 53, 54, and 56. There is no avoiding Petitioners' central claim that the Catholic hospitals are in violation of a California licensing statute *because they are Catholic Hospitals that adhere to the ERDs*, the tenets of their faith.

Regardless, the Catholic Hospitals' review processes comply with Section 1258 because it is undisputed that the only characteristics of the patient that they consider are related to her physical or mental condition, which the statute expressly permits. Yet, the Petition asks the Court to tell the Catholic Hospitals they must forsake their undisputed religious decision-making process in order to obtain and maintain a hospital license. This is forbidden. *See* Section VI(B), *infra*.[1] The State cannot compel the Catholic Hospitals to forsake their constitutionally protected decision-making to obtain a hospital license, and neither can Petitioners.

As discussed in Sections II and VI(B), Petitioners are "borrowing" Section 1258 because (as this Court ruled long ago) the statute confers no private right of action. Thus, in order to prevail Petitioners' must establish that it was "clearly erroneous" for the State of California's to enforce Section 1258 in a neutral manner that advances the compelling interests of maximizing

[1] The scrutiny applicable to licensing laws was the subject of oral argument in *Fulton v. City of Philadelphia* on November 4, 2020. Dignity Health has no objection to further briefing on the subject.

access to tubal ligations while eliminating the pernicious 120 point system. *Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 604 (1965). Petitioners cannot possibly do this. On top of that, Petitioners borrow Section 1258 subject to all defenses available to Dignity Health against the State. *See Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 180–81 (2000) (claims under UCL subject to same defenses as underlying law); *People v. Duz-Mor Diagnostic Lab., Inc.*, 68 Cal. App. 4th 654, 673 (1998) (same). The numerous constitutional obstacles that would confront a state actor's effort to interpret and enforce Section 1258 compel the neutral, reasonable, and lawful interpretation of the statute set forth in Section V, *infra*.

As noted, First Amendment law has shifted markedly towards the protection of free exercise since the Court last visited these issues. As discussed in Dignity Health's Opening Brief, *Our Lady of Guadalupe Sch.* recognized the autonomy of religious institutions "with respect to internal management decisions that are essential to the institution's central mission." Not only does *Guadalupe* have direct application to this case, in which it is undisputed that the Catholic Hospitals are engaged in religious decision-making, but also *Guadalupe* refutes several of the bases cited by the California Supreme Court in *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 32 Cal. 4th 527 (2004), effectively overruling its Establishment Clause analysis, at least. *See* Section IV(A), *infra.* The Catholic Hospitals are part of the Catholic Church and this Court simply does not have the authority to dictate how the Catholic Hospitals practice their faith.

As discussed in Section VI(B), ***licensing statutes such as Section 1258 are subject to strict scrutiny***. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (conferral of a benefit by the government (*i.e.*, license) may not be "conditioned on the surrender of a constitutional right"). As the Court has already determined in sustaining Dignity Health's demurrers, there is no general law that prohibits the Catholic Hospitals' conduct. A law prohibiting the Catholic Hospitals from adhering to ERDs would be unconstitutional, and the government cannot accomplish indirectly what it is otherwise prohibited from doing in exchange for issuing a hospital license.

And, whatever was left of *Catholic Charities* relevance to this case was nullified by

Tandon. *See* Section VI(C), *infra*. *Tandon* reflects a fundamental shift in the analysis of free exercise challenges to government actions, which began with *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) (*per curiam*). Under *Tandon*, a law is *not* "neutral and generally applicable, and therefore trigger[s] strict scrutiny" whenever it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Id*. at *1 (italics in original).[2] Section 1258, a health facility licensing statute, is clearly subject to meaningful strict scrutiny under the interpretation advanced by Petitioners and adopted in the Court's August 30, 2020 Order. As interpreted by Petitioners and thus far the Court, Section 1258 prohibits a religious institution from engaging in a faith-based process to determine whether to allow a sterilization operation under its faith-based sterilization policy, while expressly permitting the decision to be made based upon secular considerations. At best, Petitioners' interpretation of Section 1258 demands strict scrutiny, a standard that is rarely satisfied and would require evidence that is not to be found in the record. *Tandon*, 2021 WL 1328507, at *2 ("That standard 'is not watered down'; it really means what it says.'"). For one example, a far less restrictive alternative to dictating the manner in which a Catholic Hospital implements its faith, is reflected in the Conditions of Consent imposed by the Attorney General, which compel the Catholic Hospital to continue providing postpartum tubal ligations as exceptions to the ERDs and address geographical access issues ignored by Petitioners' interpretation. Or, Petitioner Chamorro could use other forms of contraception or schedule her C-Section at a secular hospital. The burden on Ms. Chamorro, a pharmacist, of traveling to another hospital for a scheduled procedure is trivial compared with the burden on the hospitals of being prohibited from practicing their healing ministry in a manner that allows certain tubal ligations while prohibiting those that the Catholic Hospitals conclude are merely for contraceptive purposes in violation of religious doctrine. This is a huge burden and not one that this Court can impose, particularly where doing so would have severe negative implications for the very people that Petitioners claim to be protecting.

[2] This Court is bound to follow decisions from the U.S. Supreme Court on matters regarding the U.S. Constitution. *See People v. Suarez*, 10 Cal. 5th 116, 138 (2020) (California Supreme Court may not depart from the United States Supreme Court ruling as to the United States Constitution); *People v. Johnson*, 53 Cal. 4th 519, 528 (2012) ("Lower courts may decide questions of first impression, including the effect that subsequent events, such as a United States Supreme Court decision, have on decisions from a higher court, including this one.").

The conflict between the compelling interest alleged by the Petitioners, and the State's actual compelling interest advanced through its interpretation and actions, also means that they cannot establish that they seek relief that would benefit the public. Proof that the proffered writ confers a public benefit, as opposed to disserving the public interest, is a prima facie requirement for any writ of mandate to issue. *See Rivera v. Div. of Indus. Welfare*, 265 Cal. App. 2d 576, 592 (1968) ("issuance of the writ is not a matter of right, but involves a consideration of its effect in promoting justice; likely public detriment warrants denial of relief"). Petitioners have no evidence that an order that would result in the Catholic Hospitals being unable to provide any tubal ligations would benefit the public. In fact, Petitioners' own counsel believed that maintaining the current level of services at the Catholic Hospitals was so important that they convinced California's Attorney General to make it a Condition of Consent to his approval of the Dignity Health's Ministry Alignment Agreement with another Catholic hospital system in 2019. Indeed, the change in hospital policy that Petitioners now want is so significant that the Attorney General would have to require an impact study to be conducted before consenting to such a change. But, Petitioners would prefer the Court eliminate the Attorney General's ability to do this and assumes the State's interpretation was "clearly erroneous" without any evidence whatsoever.

The Catholic Hospitals are religious institutions – official parts of the Catholic Church – which are afforded "special solicitude" under the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012) ("the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations"). The Catholic Hospitals' religious mission is undisputed and indisputable, as is the faith-based, mission-centric, review process at issue in this case. There is no basis for the Court to interfere, under the guise of interpreting a licensing statute, with what the undisputed evidence establishes is a faith-based decision making process of a Catholic Hospital. The Court should deny the Petition in its entirety.

II. BECAUSE PETITIONERS ARE "BORROWING" SECTION 1258, THEY ARE BOUND TO THE STATE OF CALIFORNIA'S REASONABLE AND NEUTRAL INTERPRETATION AND APPLICATION OF THE STATUTE, AND SUBJECT TO ALL DEFENSES.

In this mandamus action, the Court has already held that Section 1258 confers no private right of action.[3] Rather, as Petitioners admit, Section 1258 is a licensing statute. *See also California Advocates for Nursing Home Reform v. Aragon*, 60 Cal. App. 5th 500, 508 (2021) ("Section 1250 et seq. establish licensing requirements for health facilities.").[4] A "license" is a government benefit that grants legal authority to do what would otherwise be illegal, in this case operate acute care health facilities. Health & Saf. Code § 1253. Each of the Catholic Hospitals is required to obtain a license in order to operate as an acute care facility in accordance with California law. Health & Saf. Code §§ 1253, 1290, 1294(a); *Hutcheson v. Eskaton FountainWood Lodge*, 17 Cal. App. 5th 937, 952 (2017) ("State statute requires persons and entities to obtain a license to operate a health facility.").[5] To be clear, the benefit in this case is the health facility license, not the right to sterilization operations; as noted there is no private right of action conferring any benefit on physicians or patients who want to receive a sterilization operation from a Catholic hospital.[6]

Petitioners are "borrowing" Section 1258 subject to the same defenses that might be asserted if the California Department of Public Health ("CDPH") sought to enforce it. *See Cortez*, 23 Cal. 4th at 180–81 (claims under UCL subject to same defenses as underlying law); *Duz-Mor Diagnostic Lab., Inc.*, 68 Cal. App. 4th at 673 (same). That Section 1258 is a licensing law brings especially acute concerns regarding statutory construction. Stepping into the

---

[3] See Demurrer Order, 8/1/16, 5:16-21 ("Because public entities can seek relief . . . there is no basis to imply a private right of action under section 1258"). .

[4] The California Department of Public Health requires that every acute care hospital have its own license, that the hospital license be renewed on an annual or biannual basis, and that the hospital be inspected at least every two years, at which point CDPH notifies the hospital of any deficiencies in compliance with licensing statutes and regulations. Cal. Code Regs., tit. 22, §§ 70101(c), 70103, 70117.

[5] Section 1258 appears within the "Licensing Provisions" for health facilities in Chapter 2, Article 1 of the Health & Safety Code. *See also* Supplemental McGrath Decl., ¶ 2, Ex. 101 (hospital licenses available at https://firs.cdph.ca.gov/).

[6] Presumably Chamorro contends she has a constitutional right to choose whether or not to bear children rather than one conferred by statute. If this were a straight-up choice between that right, and the Catholic Hospitals' free exercise rights, she would lose. The State cannot grant hospital licenses in a manner that would put a finger on that scale.

government's shoes, among other things, Petitioners must advance "neutral and respectful consideration" of the Catholic Hospitals' religious freedom which they have utterly failed to do in this proceeding. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. To the contrary, their Petition repeatedly decries the Catholic Hospitals' adherence to the ERDs, which is foundational to their existence, as a per se violation of Section 1258. Before ignoring and jettisoning the State of California's unbroken fifty year record of enforcing Section 1258 in a neutral manner, that eliminated the pernicious 120 point system and results in more tubal ligations being performed by the Catholic Hospitals in rural areas where they may not otherwise be performed, the Court must conclude that the State's interpretation is "clearly erroneous." *Rich*, 235 Cal. App. 2d at 604. Petitioners cannot possibly do this.

It is only because of Petitioners' misunderstanding of licensing laws and government neutrality that they could believe that the compelling interest advanced by Section 1258 is "equitable access." Petitioners confuse the cause with the effect of the precedents upon which they rely.[7] The Religion Clauses prohibit the government from pursuing "equity" according to a purely secular standard through an "all or none" approach that sweeps up religious institutions. Otherwise, religious churches, schools, and hospitals could be continually compelled to betray their faith.[8]

Rather, "all or none" is the approach *the government must take when providing benefits.* The government does not have to give a benefit or issue licenses, but if it does, it cannot act in a selective manner that infringes upon constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are

[7] Petitioners have likened themselves to the plaintiffs in the segregated swimming pool cases of the mid-20th century but that analysis is exactly backwards. Those cases involved private plaintiffs, with private rights of action, who sued the government for operating the pools in a non-neutral, racially discriminatory manner. Those plaintiffs prevailed, and the government responded by acting neutrally, and closing the pools altogether. At that point the plaintiffs were at a loss, because the government cannot be compelled to act neutrally one way or another. From this it can be seen that those cases were not about "equitable access" but government neutrality. Here, Petitioners complain of the effect of a neutral application of Section 1258. It is Petitioners, not the State or Dignity Health, that seeks to impart bias to exclude Catholic hospitals from the licensing scheme akin to suing because the pool is integrated.

[8] For example, it is why San Francisco cannot condition occupancy licenses for Catholic churches on their willingness to perform all or no weddings.

some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .”). Under a health facility licensing scheme, the State can grant hospital licenses, or not grant licenses, but it cannot condition the grant of a health facility license on the condition that a religious institution surrender its free exercise rights. Neither *North Coast* nor *Catholic Charities* address this issue because they do not involve licensing schemes.

As discussed in Section VI(B), *infra,* the government cannot condition the grant of a government benefit on the waiver of First Amendment rights, and laws that do so are subject to strict scrutiny under state and federal law.[9] *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (states do not have “unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement”); *Committee To Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 265-66 (1981) (“[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege”). Rather than finding a burden on religion from a facially neutral law, Courts “presume that the Legislature understands the constitutional limits on its power and intends that legislation respect those limits.” *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 129 (2000); *See Penrod v. Cty. of San Bernardino*, 126 Cal. App. 4th 185, 189–90 (2005) (“courts presume that a Legislature did not intend to exceed the scope of its lawful power. From this presumption has developed the rule that courts will construe statutes in a manner that removes doubts as to constitutionality”).

In such cases, courts give deference to the “reasonable” and lawful interpretations of statutes by the administrative agencies responsible for interpreting them. *California Taxpayers Assn. v. Franchise Tax Bd.*, 190 Cal. App. 4th 1139, 1152 (2010); *see also Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998).[10] Here, Section 1258 is a licensing statute

[9] As discussed in Section VI(C), *infra*, Section 1258 would also be subject to strict scrutiny if interpreted to infringe the Catholic Hospitals’ free exercise rights under *Tandon* because their free exercise rights must be treated at least as well as the expressly permitted factors including “the physical or mental condition of the individual.”

[10] Generally, “two broad categories of factors [are] relevant to a court's assessment of the weight due an agency's interpretation: those ‘indicating that the agency has a comparative interpretive advantage over the courts,’ and those ‘indicating that the interpretation in question is probably correct.’” *Yamaha*, 19 Cal. 4th at 12. The first category includes considerations of the agency’s expertise, and the latter considers factors like whether the agency’s interpretation was contemporaneous of enactment of the law and whether it has ever changed. *Id.*

that appears in the Division 2, Article 2 "Licensing Provisions" of the Health and Safety Code, and is enforced by CDPH through its district offices as well as by the district attorney.[11] Health & Saf. Code §§1290, 1293; Cal. Code Regs., tit. 22, § 70135(a). CDPH will renew a general acute care health facility ("GACH") license for a period not to exceed three years, if the GACH "has been found in substantial compliance with statutory requirements, regulations, or standards during the preceding license period." Health and Safety Code § 1267(b) (emphasis added). CDPH regulations on GACH renewals provide that a renewal license "may be issued for a period not to exceed two years *if the holder of the license has been* ***found not to have been in violation of any statutory requirements****, regulations or standards during the preceding license period*." 22 Cal. Code Regs. § 70117(c)(1) (emphasis added). This language makes clear that each time CDPH grants a license to each Catholic Hospital, as it has never failed to do, CDPH has interpreted and neutrally applied Section 1258 in performing the individualized inquiry required to make the statutory compliance finding and issue the license.[12]

These findings are not made in a vacuum. CDPH is required to inspect every health facility to which it has issued a license, including GACHs. Health & Safety Code § 1279(a) ("Every health facility for which a license or special permit has been issued shall be periodically inspected by the department, or by another governmental entity under contract with the department."); 22 CCR § 70101. Such inspections are conducted to determine compliance with state law, including Section1258. Health & Safety Code § 1279 ("Notwithstanding any other law, the department shall inspect the facility for compliance with provisions of state law and regulations during a state periodic inspection or at the same time as a federal periodic inspection, including, but not limited to, an inspection required under this section.") Moreover, CDPH is required to notify the GACH of any deficiencies in its compliance with applicable statutes. Health and Safety Code § 1280(b) ("The state department shall notify the health facility of all deficiencies in its compliance with this chapter and the rules and regulations adopted

[11] Members of the public can easily report alleged violations to CDPH here: https://hfcis.cdph.ca.gov/LongTermCare/ConsumerComplaint.aspx.

[12] These individualized inquiries have always been subject to strict scrutiny, even under *Smith*. *See* Section VI(C), *infra*.

hereunder…"). The fact that CDPH (or its predecessor agency) has *never* notified any Dignity Health hospital that the Catholic Hospitals have been found in noncompliance with Section 1258, during any license renewal process, combined with the robust and mandated statutory enforcement and inspection scheme, further supports the assertion that the Catholic Hospitals have been continuously found in compliance with that statute.

Thus, when confronting an interpretation of a licensing statute that would burden free exercise advanced by a private party, and which is diametrically opposed to the neutral construction and enforcement of that statute by the State for five decades, the question is not whether Petitioners advance a subjectively "better" interpretation but rather whether the *State's interpretation* is "clearly erroneous." To prevail in this case, it is not enough for Petitioners to establish that their interpretation is even more reasonable, in their eyes, than the State's neutral interpretation. The State's neutral interpretation must be clearly wrong.

On the other hand, CDPH has the power, expertise, and statutory mandate to regulate and enforce Section 1258 neutrally, and has an unblemished history of consistently doing so in a lawful manner since the law was enacted in 1972. The State has consistently licensed the Catholic Hospitals, and the Attorney General has imposed specific conditions on the Catholic Hospitals consistent with that neutral interpretation. *See also* Section VII, *infra*. As discussed below, while Petitioners prefer their interpretation, they do not remotely come close to establishing that the State's neutral interpretation, which advances the State's lawful compelling interest is, less preferable, let alone "clearly erroneous."

III. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE.

In addition to the usual rules of statutory construction,[13] as the Court recognized at the

[13] "In construing statutes, 'our fundamental task is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." [Citations.] We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. [Citation.] We give the language its usual and ordinary meaning, and "[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." [Citation.] If, however, the statutory language is ambiguous, "we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." [Citation.] Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute. [Citations.]' " *People v. Gutierrez*, 58 Cal. 4th 1354, 1369 (2014); *see also Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 604 (1965) ("A court should not, moreover, add to or alter the words of the statute to accomplish a purpose that does not appear on the face of the statute or from its legislative history if the words of the statute are clear; nor should the court seek hidden meanings not suggested by

April 12, 2021 hearing on Dignity Health's Motion to Stay, the doctrine of constitutional avoidance compels the Court to avoid constitutional conflicts altogether if possible. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent"); *People v. Gutierrez*, 58 Cal. 4th 1354, 1373 (2014) ("'[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.'").[14] The canon rests on the same presumption discussed in Section II, *supra*. *See Garcia*, 2 Cal. 5th at 804 ("the canon rests not only on a preference for avoiding the unnecessary resolution of constitutional questions, but also on the presumption that the Legislature (whose members have sworn to uphold the Constitution) did not 'intend[ ] to infringe constitutionally protected liberties or usurp power constitutionally forbidden it'"), citing *DeBartolo,* 485 U.S. at 575.

The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). There is nothing on the face of Section 1258, or within its legislative history, that requires Petitioners, the State, or the Court, to read into Section 1258 a free exercise burden that does not exist. The only factors identified, the prohibited "special nonmedical qualifications" (age, number of children and marital status in furtherance of a 120-point based system), and the permitted considerations ("physical and mental condition"),

---

the statute or by the available extrinsic aids.").

[14] States and federal courts are forbidden from "foster[ing] an excessive governmental entanglement with religion." *Singh v. Singh*, 114 Cal. App. 4th 1264, 1275 (2004); *see also Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191 (1960) (state action includes judicial orders). "The potential for political divisiveness based on differences in religious views is a factor in judging the constitutionality of state action." *Feminist Women's Health Ctr., Inc. v. Philibosian,* 157 Cal. App. 3d 1076, 1091 (1984) ("The appearance of support by the state, of one side of this controversy [abortion] over the other, is improper political entanglement.").

are all characteristics of the patient. Considering the serious constitutional consequences, the stretch required to read a legislative intent to infringe upon the free exercise of the health facility, is plainly a bridge too far.

As discussed in Dignity Health's Opening Brief and in Section V, *infra,* Petitioners' interpretation of Section 1258 triggers the same entanglement issues that the Supreme Court has found triggers immunity from review, and, at best, triggers strict scrutiny. *See Our Lady of Guadalupe*; *Tandon*, 2021 WL 1328507, at *1 ("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"). Even if it were possible to interpret Section 1258 as they do, that is a far cry from establishing the State of California has been "clearly erroneous" in its neutral action over five decades.

Under Petitioners' view, Section 1258 prohibits the Catholic Hospitals from "impos[ing] inherently nonmedical, religious qualifications on patients seeking tubal ligation."[15] (Petitioners' Brief, 25:17-20; Petition, ¶ 67.) Put another way, Petitioners contend that the Catholic Hospitals' exercise of their First Amendment rights is a prohibited nonmedical qualification, a contention which necessarily raises "serious and doubtful" constitutional considerations. *See Gutierrez*, 58 Cal. 4th at 1373. Petitioners' interpretation further fosters prohibited excessive entanglement by asking the Court to interpret the ERDs and rule upon the Catholic Hospitals' compliance. But there is a good reason that neither the Attorney General nor DPH have ever sought to interpret and enforce Section 1258 as Petitioners do here. They are forbidden from doing so under the unconstitutional conditions doctrine. *See* Section VI(C), *infra*.

The Court has already recognized that Section 1258 can be reasonably interpreted in a neutral manner that avoids all constitutional concerns.[16] It is not the first to do so. *See California Med. Assn. v. Lackner*, 124 Cal. App. 3d 28, 37 (1981) ("The 'nonmedical

[15] This has been apparent to this Court for years: "You're clearly challenging the ethical directive. You think it's bad medicine. I'll put it in short." Supplemental McGrath Decl., ¶ 3, Ex. 102, at 24:27-25:12.

[16] The Court observed that Dignity Health's interpretation of the phrase "sterilization operations for contraceptive purposes" as referring to the hospital's purpose was "a reasonable interpretation," although the Court believed it was "not the best one." McGrath Decl., ¶ 2, Ex. 22, at 26:6-9.

qualifications' named in the statute age, marital status, number of children unambiguously imply that the evil in mind is the *use of socio-economic factors* to determine whether or not to permit an individual to be sterilized.") (emphasis added).[17] The deference afforded the State's interpretation should be afforded even greater weight considering that it avoids the constitutional conflicts identified in Section VI, *infra.*

First, as set forth in Section VI(A), if Section 1258 is interpreted to interfere in any way with the Catholic Hospitals' religious decision-making central to their mission, Petitioners' interpretation fails under the ministerial exception as set forth in *Our Lady of Guadalupe Sch*. Second, as set forth in Section VI(B), *infra,* because Section 1258 is a licensing statute, and Petitioners' interpretation would burden free exercise, strict scrutiny applies. Third, as set forth in Section VI(C), any interpretation of Section 1258 that treats free exercise less favorably than "*any"* comparable secular considerations is subject to strict scrutiny under *Tandon.* Fourth, as set forth in Section VI(D), *infra,* if, as Petitioners state, "the Legislature passed the law to prohibit *exactly* the kind of arbitrary, nonmedical standards that Respondent's Catholic Hospitals currently impose," then their interpretation is subject to strict scrutiny as any law that targets religion would be. (Pet. Br., 32:20-22.) And, as set forth in Section VI(B)-(D), even if the Court were to reach the conclusion that the State's fifty year practice of licensing the Catholic Hospitals and finding compliance with all licensing laws was "clearly erroneous," and it accepted Petitioners' conflicting interpretation of Section 1258, it would trigger strict scrutiny, which Petitioners' interpretation has no hope of satisfying and Petitioners have never even tried to meet that exacting standard.

Thus, the doctrine of constitutional avoidance is one more reason to deny the Petition.

IV. SECTION 1258'S LEGISLATIVE HISTORY EVIDENCES CONCERN REGARDING ARBITRARY QUALIFICATIONS, IN PARTICULAR THE 120-RULE.

As Petitioners acknowledge, prior to Section 1258's enactment, it was "common" for public and secular hospitals to use the 120-point rule ("120 Rule") to determine whether to

[17] This Court does not have to agree with Dignity Health and *Lackner* that the statute is "unambiguous." Rather, the Court merely must agree that *Lackner's* interpretation is reasonable, as it has already done.

permit a patient's request for tubal ligation. (Pet. Br., 22:6-10.) Thus, Section 1258's legislative history reflects a particular focus on eliminating the barrier posed by arbitrary obstacles to access posed by the application of the 120 Rule at public and private secular hospitals.[18] The principal problem addressed by Section 1258 was not "equitable access,"; rather, it was barriers to access posed by the 120 Rule. There is no evidence in the record that the Legislature ever viewed faith-based institutions, which may provide some but not all tubal ligations based upon religious considerations, as a problem, let alone a problem that needed to be addressed through unconstitutional legislation. For Section 1258 to apply to the Catholic Hospitals the Court would have to find that the Legislature considered the Catholic Hospitals' constitutionally protected free exercise rights an arbitrary consideration, no more valid than consideration of a patient's marital status which the statute does address. But constitutional freedoms are not arbitrary, and there is nothing in the legislative history that would suggest that the Legislature intended Section 1258 to burden the protected free exercise rights of religious institutions.[19]

If anything, the legislative history reflects an intention to exempt hospitals, like the Catholic Hospitals, that do not permit such operations as a matter of policy and faith. If, as Petitioners suggest, Section 1258 is constitutional because it allows the Catholic Hospitals to prohibit the procedures entirely, then the reasonable interpretation of Section 1258 is that the Legislature intended to exempt free exercise. (Pet. Br., 33:5-9.) Of course, the government cannot prefer one set of beliefs to another. So the only interpretation of a statute that purports to

---

[18] "The author's office [Senator Beilenson] advises that [the Bill] results from a survey showing that a large number of hospitals have been refusing to permit contraceptive sterilization operations because of institutional policies requiring conformity with various ratios based upon age and number of children. The purpose is to require discontinuance of these practices while preserving the authority to consider physical and mental conditions . . . ." (Pet. Ex. 1, p. 198.)

[19] The California Legislature apparently believes that no state law can force Catholic hospitals to perform elective sterilization procedures. Specifically, the Legislature is now considering proposed legislation (SB 642) that would allow medical staffs at hospitals to override hospitals' ultimate authority to decide what services physicians can provide at the hospitals. In response to objections by Catholic hospitals that such a law might eviscerate the hospitals' obligations to observe the ERDs and to decline elective sterilization procedures, the Senate Health Committee responded by asserting, in substance, that federal law (specifically, the Church Amendment, 42 USC section 300a-7)) protects Catholic hospitals from being forced to allow their facilities to be used for such procedures. *See* Senate Judiciary Committee at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB642, p. 10 ("Federal law further conditions the receipt of various public funds on a state not requiring any entity to make its facilities or personnel available for sterilization or abortion procedures.").

protect some religious beliefs is that it protects them all. Christmas Day is a federal holiday for everyone, even for Jews, who must be accommodated to observe Yom Kippur, which is not a federal holiday.

The original draft legislation applied simply to "sterilization operations."[20] If Petitioners are correct, and all special nonmedical qualifications are bad, why wouldn't the Legislature enact a broader statute that prohibited special nonmedical qualifications for all sterilization operations? Why should the 120 Rule or (according to Petitioners) free exercise, be permitted for hysterectomies but not tubal ligations? Because there was no such problem. The problem was the 120 Rule applied at hospitals that perform sterilization operations for contraceptive purposes. Had the Legislature wanted the statute to simply apply to tubal ligations—it could easily have said so. Instead, the Legislature made it clear that the health facility's intent or purpose is the key by going out of its way to add the "contraceptive purposes" language to the statute.

Moreover, the rules of statutory construction require the Court to "choose the construction that comports most closely with the apparent intent of the lawmakers, *with a view to promoting rather than defeating the general purpose of the statute*." *Gutierrez*, 58 Cal. 4th at1369 (emphasis added). Petitioners interpretation fails this test because the "general purpose of the statute" is plainly to increase the availability of tubal ligations by eliminating the 120 Rule; if "equitable access" is also advanced by the statute, it is not the law's general purpose. To interpret Section 1258 in a manner that reduces availability of tubal ligations procedures to ensure "equitable access," violates this principle of statutory construction. Section 1258 cannot be interpreted in a manner that thwarts its "general purpose" of increasing availability of the procedure in pursuit of lesser interests.

The 120 Rule factors to be eliminated are described as "arbitrary" several times. (Pet. Ex. 1, p. 186; Respondent's Ex. 26; *see also* Declaration of Jodi Magee (Magee Decl.), ¶ 6

[20] The initial draft of Senate Bill No. 1358 referred only to "sterilization operations" and did not include the term "for contraceptive purposes." (Pet. Ex. Ex. 1 (March 15, 1972). Contrary to Petitioners' contention, this was not a necessary revision needed to address procedures like hysterectomies, which sometimes treat underlying diseases like cancer. First of all, cancer is plainly a medical condition that can be lawfully considered under Section 1258 whether or not it referred to the "purpose" of the sterilization operation. But, moreover, according to Petitioners, all special nonmedical qualifications for all procedures are bad. Why would the Legislature care if special nonmedical qualifications are prohibited for hysterectomies too?

(Section 1258 intended to remove "arbitrary standards and obstacles").)[21] No other non-medical qualifications are mentioned in the legislative history other than the arbitrary product that gives the 120 Rule its name: the patient's age multiplied by the number of children she has (and marital status). And Catholic Hospitals had been operating continuously in California since the 1850s. The Legislature certainly knew this and did not include the ERDs as another prohibited nonmedical qualification. Constitutionally it could not have done so, either expressly or impliedly in the manner Petitioners are urging. Moreover, the legislative history also expressly provides that "requirements as to the individual's physical or mental condition may continue to apply in determining whether the operation should be performed." (Pet. Ex. 1, p. 181, 191.)

In other words, the Legislature clearly intended the health facility to consider the patient's medical condition in connection with any request for sterilization. It did not purport to limit the consideration of medical factors to any particular standard, secular, religious, or otherwise. As the *Lackner* court correctly observed, the purpose of Section 1258 was to eliminate the 120 Rule and similar arbitrary, nonmedical qualifications of an individual patient, while preserving the right to consider the medical, physical, and mental condition of the individual patient in accordance with the health facility's policies, including where guided by protected religious belief. Even Petitioners acknowledge that the bill analysis preceding the enactment reflects that Section 1258 "is limited to institutions that permit sterilization operations for contraceptive purposes and would not affect hospitals or clinics which do not perform such operations." (Pet. Ex. 1 at 27.)

And, because Section 1258 permits health facilities to prohibit all sterilization operations for contraceptive purposes for any reason, it is clearly not intended to address Petitioners' myriad other complaints. Nor is there support for these arguments in the legislative history.[22]

[21] Considering the number of times that "arbitrary" appears in the legislative history, the statement in the Court's April 30, 2020 Order that "Nothing in the language or the legislative history of that statute limits the reach of section 1258 only to consideration of arbitrary factors" is not correct.

[22] This licensing statute is indifferent to the relative ease for the patient to obtain a post-partum tubal ligation as opposed to an interval procedure, or the number of medical procedures a patient may have to undergo, or any inconvenience imposed by the unavailability of post-partum tubal ligation procedures immediately following delivery (what Petitioners describe as the "medical standard of care"). Section 1258 also does not address the risks of subsequent procedures or unintended pregnancies. To the extent the American College of Obstetricians and Gynecologists ("ACOG") considers postpartum tubal ligation to be an "urgent" procedure, it is difficult to see how

V. THE CATHOLIC HOSPITALS' STERILIZATION POLICIES AND REVIEW PROCESS DO NOT VIOLATE SECTION 1258.

The best interpretation of Section 1258 is one that is consistent with its legislative history and text, recognizes the mandates of government neutrality, especially in imposing licensing schemes, and which avoids constitutional entanglement rather than seeks it.[23] First, Section 1258 simply does not prohibit the Catholic Hospitals' request for sterilization process because the practice of the Catholic faith by a Catholic hospital cannot be a prohibited nonmedical qualification given the right of Free Exercise. Second, the Catholic Hospitals do not perform "sterilization operations for contraceptive purposes" as a matter of Catholic faith and doctrine. Third, the Catholic Hospitals' review of the "physical or mental condition" of the patient fully complies with the text of the statute.

A. The Exercise of First Amendment Rights Is Not a Prohibited Nonmedical Qualification.

The Catholic Hospitals do not violate Section 1258 because the free exercise of First Amendment rights is not affected by the statute's prohibition on "special nonmedical qualifications." The only factors discussed in Section 1258 are characteristics of the patient. The Catholic Hospitals' protected free exercise rights arise from doctrinal characteristics of the licensed *health facility*, not the individual patient, and Section 1258 does not purport to infringe upon a health facility's free exercise rights.

The thrust of Petitioners' argument is that the Catholic Hospitals "appl[y] religious criteria—which are inherently nonmedical—to each patient seeking postpartum tubal ligations . . . ." (Pet. Br., 6:22-24.) However, under the doctrine of ejusdem generis, the statute should be interpreted to extend only to factors similar in nature to the listed terms—"the kinds of things

---

Petitioners' requested relief will address ACOG's concerns. ACOG certainly does not suggest that it would be better for a health facility to permit none of these "urgent" procedures rather than some. Moreover, ACOG specifically recognizes the religious rights of Catholic hospitals. It recommends that women seeking maternity care at Catholic facilities receive referrals to institutions that perform the procedure when requested. McGrath Decl., ¶ 45, Ex. 66 (Jackson Report, ¶ 28); Supplemental McGrath Decl., ¶ 20, Ex. 119 (ACOG, Access to Postpartum Sterilization, Committee Opinion No. 503). Thus, according to ACOG, Chamorro had the choice of delivering at MMCR or travelling to the nearest health facility that would accommodate her wishes. In constitutional parlance, Chamorro and other patients had and have less restrictive alternatives.

[23] For example, Petitioners ask the Court to adjudicate the meaning of "present and serious pathology" as that phrase is used in the ERDs by resort to the testimony of their secular expert, Dr. Jackson, and medical literature. (Pet. Br., 33:17-21.)

that are listed in [the] series." *Armin v. Riverside Comm. Hosp.*, 5 Cal. App. 5th 810, 834 (2016). The Catholic Hospitals' so-called "religious criteria" are characteristics of the licensee hospital, not of the patient, and are not similar in any way to the enumerated prohibited factors.

In fact, Petitioners point to no specific "religious criteria" but instead argue that the process of requiring a request to, and review by, the review committees is itself a "special nonmedical qualification". This is wrong. Nothing in Section 1258 indicates that a faith-based review process or any review process violates the statute. To the contrary, Section 1258 assumes that there is a review process and simply seeks to prohibit the consideration of socio-economic factors such as age, marital status and number of natural children while expressly permitting consideration of the physical or mental condition of the patient. As discussed above, to the extent that this exception permits review based upon secular criteria but prohibits review according to faith-based criteria, the statute would be disfavoring religious hospitals and thus subject to strict scrutiny under *Tandon* and earlier Supreme Court cases. Nor is there any need to reach that issue because the statute also does not prohibit a faith-based review process that considers the "physical … condition" of the patient which is the case here. The fact that Petitioners do not agree with religious considerations or that the physical condition of the patient be taken into account–because they believe patients can simply demand post-partum tubal ligations for convenience—does not make them prohibited.

All services for all patients in the Catholic Hospitals must be in accordance with the ERDs. Whether a procedure is subject to review by formal committee is merely a reflection of whether the procedure raises close ethical or moral questions, such as a tubal ligation. The review committee is not a characteristic of the patient, either. This is no different than the use of an ethics committee to address ethically and morally complex issues at a secular hospital.

As interpreted by the Catholic Hospitals, ERD 53 requires requests for sterilization to be considered based upon the unique medical conditions or factors presented by each patient; the committee is simply the mechanism by which the Catholic Hospitals review the Requests for Sterilization and the medical information provided by the patient's physician in order to determine whether the procedure can be permitted consistent with the ERDs. In this case,

committee review is required by the necessity to apply the ERDs to the unique circumstances presented by each Request. Chamorro, Rebecca Miller, and Lynsie Brushett were all pregnant, but just because Dr. Van Kirk filled out three identical Requests does not mean that they shared the same medical and physical conditions.[24] To treat them all the same—as Petitioners do and Dr. Van Kirk did—ignores the Catholic Hospitals' provision of pastoral care to all patients, which considers each patient's unique circumstances.[25] Again, *Tandon* forbids construction of Section 1258 to disfavor comparable acute care hospitals that happen to be Catholic and that have a faith-based review process for determining whether a procedure is ethically proper or not.

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

The Catholic Hospitals do not violate Section 1258 because the statute only applies to hospitals that "permit[] sterilization operations for contraceptive purposes." The Catholic Hospitals presented extensive evidence showing that when a tubal ligation is allowed, it is *never* for a contraceptive purpose. Indeed, that determination is the reason for the review process. Performing a sterilization operation for contraceptive purposes is prohibited by the ERDs, with which the Catholic Hospitals are required to and do comply. However, in some cases the Catholic Hospitals may authorize a tubal ligation when the hospital concludes that it is not for the purpose of contraception. The Hospitals' purpose in permitting a tubal ligation in an individual case is *always* to protect the health of the patient. McGrath Decl., ¶ 12, Ex. 32 (O'Keeffe Depo. Vol. 2), 178:4-12; ¶ 13, Ex. 33 (O'Keeffe Depo. Vol. 1), 43:12-18.)[26] That is why the patient's physician is required to attest in writing to the "medical reasons" for the request for sterilization and the information is considered by the review committee.

In its Order denying Dignity Health's motion for summary judgment, the Court stated:

---

[24] Miller had acute chorioamnionitis in a prior pregnancy, which could retard the healing of a uterine c-section scar. Supp. McGrath Decl., ¶ 15, Ex. 35, at 59:24-60:4. Brushett had severe preeclampsia in a prior pregnancy. (Supplemental McGrath Decl., ¶ 7, Ex. 105 (Van Kirk Depo.), Ex. 12, ¶¶ 7-9; 124:6-135:15.) There is no evidence of Chamorro's medical and physical condition except what Dr. Van Kirk provided on the Request, which is nothing.

[25] Dr. Van Kirk admits that he, too, is "a physician trying to take care of each individual patient." (Petitioners' Brief ("Pet. Br.") 11:18-22.)

[26] Petitioners' expert witness, Dr. Rebecca Jackson, admitted that the MMCR Sterilization Review Committee's review process involves consideration of "the ERDs and/or the hospitals' sterilization policies," which "reflects religious or moral based decision making." (McGrath Decl., ¶ 46, Ex. 66, ¶ 49.) As Dr. Jackson has acknowledged, Catholic hospitals follow a different standard of care. Supplemental McGrath Decl., ¶ 8, Ex. 107.

> 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, and not solely on the viewpoint of either the health facility or the patient or her physician, *based on an objective standard grounded in medical literature on sterilization operations*. (4/30/20 Order, 2:5-14.) (emphasis added).

As described in detail in Section VI(C), *infra*, this construction of Section 1258, which treats the Catholic Hospitals' religious purpose less favorably, is subject to strict scrutiny. This can be avoided by recognizing that in a licensing statute it must be the Catholic Hospitals' purpose that is the relevant inquiry for purposes of Section 1258. Indeed, this is clear from the very words of the statute: "No health facility that permits sterilization for contraceptive purposes . . ." It is the *health facility* that is being licensed and "permitting" or not permitting the category of procedures, and thus it is health facility's purpose alone that is relevant. That is the plain text of the statute. "Purpose" means intent,[27] and only the hospital's intent can possibly be relevant to a law that determines whether the State can issue a license to operate to the hospital.

There is no way for a hospital to police the intentions of its patients and medical staff and the statute does ask for this. It is the hospital that is being licensed under this statute, not the physicians, who are not under the control of the hospital or state regulators that enforce Section 1258. Nor is there any reason to conclude that the hospital's purpose cannot be objectively determined. The Catholic Hospitals' witnesses have uniformly explained that in a relatively small number of cases they make exceptions to the prohibition on sterilizations when the medical indications provided by their physicians indicate that there are substantial risks to the patient from a future pregnancy and the patient is not simply requesting the procedure as a matter of convenience to avoid having children. *See* Section VI(A), *infra.* Moreover, *Tandon* demands that secular considerations receive no more than equal treatment with free exercise, which means they could never outweigh the Catholic Hospitals' constitutional rights.[28]

---

[27] "Purpose" means "something set up as an object or end to be attained: intention." "Effect" means "something that inevitably follows an antecedent (such as a cause or agent)." https://www.merriam-webster.com/dictionary/.

[28] Because religious interests cannot be treated less favorably than secular interests, the First Amendment prevails in close cases involving religious institutions. "The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously. . . ." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019) (erection of 32-foot cross on public land did not violate Establishment Clause). Thus, on controversial issues, "where society's views have sometimes proved more fluid than religion's," the Supreme Court has taken pains to make clear that the First Amendment protects the latter. *New Hope Family Servs., Inc. v. Poole*,

Statutory analysis and legislative history also demonstrate that it is the hospital's purpose alone that matters under Section 1258. The Legislature recognizes that not all sterilization and contraception is for a contraceptive purpose. *See* Health & Saf. Code § 1367.25(e) (distinguishing between contraceptive supplies provided with a contraceptive purpose and those provided for other purposes). Just as contraceptive supplies provided to decrease the risk of ovarian cancer are not provided for a contraceptive purpose, a health facility may permit a tubal ligation to be performed to reduce the risk of maternal morbidity and mortality without a contraceptive purpose.

The Court needs to think through carefully the impropriety of any analysis that would examine whether the Catholic Hospitals are in compliance with the statute solely through a secular lens. To do so not only defies the plain text of the law, as just discussed, it denies the Catholic Hospitals their lawful place under the same statute that regulates secular hospitals, at odds with *Tandon*. The Court also cannot de-value Catholic health care with a statutory gloss that only objective standards grounded in medical literature guides how it reads a law that says no such thing and that speaks only the health facility's purpose. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

Petitioners' evidence does not demonstrate that the tubal ligations that the Catholic Hospitals permit are for a contraceptive purpose. Other than Chamorro—whose request was denied and therefore no procedure was performed—Petitioners have no evidence regarding any other patient's purpose in seeking a tubal ligation, even after reviewing hundreds of Requests.

---

966 F.3d 145, 161 (2d Cir. 2020); *see also Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020) (recognizing the ministerial exception's application to Title VII and affirming "[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society"); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression"); *Obergefell v. Hodges,* 576 U.S. 644, 679–80 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

Petitioners' expert, Dr. Jackson, recognized that patients may have many different reasons for seeking contraceptive supplies or procedures. McGrath Decl., ¶ 45, Ex. 66, ¶¶ 33-35; *id*., ¶ 37, Ex. 58, 35:22-24; 112:1-19; 229:2-23. Dr. Jackson has no background in Catholic healthcare and admitted that she "can't know what [the Hospitals'] intent is." *Id.* Thus, she is incompetent to testify or opine about the purpose of any tubal ligation at the Catholic Hospitals. In short, there is no evidence in the record that the Catholic Hospitals permit any procedures for contraceptive purposes; indeed, all of the evidence of the Catholic Hospitals' purpose is to the contrary.

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

The second paragraph of Section 1258 provides "[n]othing in this section shall prohibit requirements relating to the physical or mental condition of the individual . . . ." As discussed in Section VI(C), *infra*, under *Tandon*, this provision requires the Court to adopt a neutral interpretation that also permits free exercise, or trigger strict scrutiny by preferring these secular factors over free exercise. If the Court simply interprets this language according to its plain meaning, the Catholic Hospitals' review process complies with Section 1258 avoiding constitutional concerns. It is undisputed that the Catholic Hospitals consider medical risk factors; Petitioners expert, Dr. Jackson, concedes it. McGrath Decl., ¶ 45, Ex. 66, ¶¶ 55, 70, 71.

The Catholic Hospitals make exceptions to their sterilization policies, which generally prohibit tubal ligations, based upon a review of these medical risk factors which indicate an increased risk for maternal morbidity and mortality. The factors considered are *medical* qualifications and relate to the "physical … condition" of the patient. Nothing about Section 1258 pertains to whether a procedure is medically necessary under a particular standard, nor does the statute require a "prediction model." (Pet. Br., 20:1-12.) Petitioners argue that age is a prohibited nonmedical factor. However, there is no evidence that the Catholic Hospitals consider "age." The evidence demonstrates that the hospitals consider "*advanced maternal* age" which is a medical and physical consideration that in combination with other medical indications increases the risk to the patient of a future pregnancy. The Catholic Hospitals consider these

physical conditions only when, along with the patient's other medical or physical conditions, they correlate to an increased risk of maternal morbidity and mortality as supported by the medical literature. Contrary to Dr. Jackson's unsupported assertions, the undisputed medical literature reflects a consensus that certain medical and physical conditions, especially when present together, correlate to an increased risk of maternal morbidity and mortality. (Pet. Br., 20:1-12, 29:3-17; McGrath Decl., ¶ 45, Ex. 66, ¶¶ 64, 65, and 68.) Specifically, multiple uterine scars (the result of multiple c-sections) combined with advanced maternal age is directly related to an increased risk of uterine rupture. Nor is this proceeding a forum for litigating medical issues. The evidence establishes that the Catholic Hospitals consider medical and physical factors. There is no requirement that these factors be the best possible factors, the most predictive of anything or the factors that Petitioners' expert believe are important in her purely secular world view. Indeed, Petitioners' expert (and Dr. Van Kirk) assert that there are absolutely no relevant medical or physical factors at all – the sole factor is whether the patient wants a sterilization. That assertion itself establishes that Petitioners have misinterpreted Section 1258 because, if true, it would make nonsense of the specific provisions for the consideration of the "physical … condition" of the patient, without limitation.

The Catholic Hospitals' use of "advanced maternal age" as a factor is quite different from the arbitrary use of a patient's young age multiplied by the number of her children used to implement the 120 Rule, the evil that Section 1258 was designed to remedy. *Lackner*, *supra*. While age could be used in an arbitrary way, such as in the 120 Rule that the court in *Lackner* discusses, the COVID-19 pandemic demonstrates how age can also be a medical risk factor. After the experience of the past year, it is beyond the pale to suggest that a health facility should not consider a patient's advanced age—universally recognized as a medical risk factor—as part of the entire picture of assessing the patient's risk of morbidity and mortality. Given that Section 1258 permits the consideration of the patient's physical condition, it makes little sense to suggest that the Legislature intended to preclude anything more than the consideration of age divorced from medical and physical considerations and of no more value than a patient's marital status or the number of her natural children.

The evidence does not support Petitioners' claim that the Catholic Hospitals consider prohibited nonmedical factors or act arbitrarily. After years of litigation, Petitioners found but a single Request where insurance appears to have been considered in evaluating whether to authorize a tubal ligation,[29] and two cases Petitioners assert were treated inconsistently.[30] But Petitioners have no evidence of any pattern of the review committee considering prohibited nonmedical factors, let alone examples of the Catholic Hospitals ignoring serious medical risk factors like heart disease as Petitioners baselessly contend. As Sister O'Keeffe testified, the Committee performs a case-by-case review of each request, looking "at what is documented by the physician" to determine whether to approve the request. (McGrath Decl., ¶ 13, Ex. 33, at 22:13-23, 32:22-23:7, 74:6-16; ¶ 13, Ex. 32, at 145:12-146:1.) If the Committee denies a request, the physician receives a letter explaining the denial, asking for any additional information about the patient's condition that has not already been provided, and stating that the Request may be resubmitted. (McGrath Decl., ¶ 13, Ex. 33, at 40:5-18).

A review of just a few of the hundreds of records reveals that Requests were granted for patients whose medical history include a range of cardiac problems, deep vein thrombosis/leiden disease/gestational diabetes, hypertension, prior uterine rupture, renal disease/HIV, preeclampsia, complications arising from obesity, and many others. (Pet. Ex. 22 (MMCR001056-570; MMCR00678-79; MMCR001060-61; MMCR000652-53; MMCR000685-87; MMCR000912-913; MMCR00613-14; MMCR00692-65; MMCR001178-79; MMCR00902-903; MMCR001042-43)). Petitioners do not purport to dispute that these are medical factors, and in fact have nothing to say about 99.9% of the evidentiary record. This evidence establishes that every patient is unique, and puts the lie to Petitioners' claim that the Catholic Hospitals ignore such factors, as well as Petitioners' bald assertion that the physicians do not understand how to fill out the forms or what information the committees seek.

[29] The patient's physician had privileges at a non-Catholic hospital that accepted the patient's insurance, and she was able to deliver there. For all Petitioners know, the patient preferred the other hospital and always intended to deliver there.

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

Indeed, Petitioners' contention that the process of requesting authorization for a tubal ligation is confusing is unsupported, quite apart from not providing any basis for mandamus relief based on a violation of any law. Petitioners have come forward with but two physicians (among the many practicing at the Catholic Hospitals) that have asserted a misunderstanding of the process in order to carry out a political agenda. Upon this slender reed, Petitioners assert that it is unclear what "medical indications" the Request form asks the physician to provide, and assert that the Catholic Hospitals do not in fact ask for medical information related to potential risk factors. This is contradicted by the overwhelming evidence—literally hundreds of requests—establishing that physicians are instructed to provide all relevant information regarding medical or physical conditions that may result in maternal morbidity and mortality, and that the huge majority of physicians understood the process perfectly. (Pet. Ex. 22.) On the other hand, only one physician, Dr. Van Kirk, used a pre-printed form response treating all of his patients the same, regardless of their medical indications, rather than submitting the information relevant to the committees' inquiry.[31]

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

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

Petitioners' repeated references to the Catholic Hospitals' religious decision-making only highlights their failure to address *Our Lady of Guadalupe Sch*, which recognized the autonomy of religious institutions "with respect to internal management decisions that are essential to the institution's central mission." *Guadalupe* is another in long line of cases recognizing an exemption for religious institutions from generally applicable laws mandated by the Free Exercise clause.

As established by the governing documents of Dignity Health and CommonSpirit Health, the Catholic Hospitals are part of the Catholic Church, which exist to carry out the healing

[31] The evidence further establishes that Dr. Van Kirk understood the process, but disagreed with it and willfully refused to fill out the Request for Sterilization forms properly. *See* Dignity Health's Trial Brief filed October 7, 2020, Section II(F)(3).

ministry of Jesus.[32] That is their purpose. For example, Article III of Dignity Health's Amended and Restated Bylaws, entitled "Healing Ministry," provides that Dignity Health is committed to the healing ministry of Jesus,[33] shall follow and express the mission and values of the healing ministry in all of its operations,[34] and shall operate in conformity with the ERDs.[35] As such, it is undisputed that the Catholic Hospitals' pastoral care reflects internal management decisions essential to their mission.[36]

Petitioners argue that Dignity Health "interferes in the decision making process between a woman and her physician whether to obtain a tubal ligation" by imposing "the hospital's religious morality" on the patient's request."[37] (Pet. Br. 25:12-17; 26:6-8; *see also* 16:1-6; 28:1-11; Magee Decl. ¶ 6.) Besides having nothing to do with Section 1258, Petitioners have it backwards. It is Petitioners, not Dignity Health, that seek to interfere with what they repeatedly *admit* is a religious decision-making process, and which *Guadalupe* holds is absolutely protected by the First Amendment. Petitioners overlook the fact that for many of the Catholic Hospitals, such as those in the North State area, it is Dignity Health's unique non-profit, religious mission, which dates back over 170 years in California, that has led to the fact that MMCR is the only

---

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

[33] "Healing Ministry. This Corporation, pursuant to the legacy of the Sponsor, as identified in these bylaws, is committed to continuing a healing ministry based on the life and works of Jesus in the provision of healthcare services in the communities it serves . . . ." Strumwasser Decl., ¶ 14, Ex. 6, § 3.1.

[34] "Expression of Ministry. This Corporation shall follow the mission and values of the healing ministry, which are intended to apply to all of its activities and operations. The mission of this Corporation is to deliver compassionate, high-quality, affordable health care; serve and advocate for those sisters and brothers who are poor and disenfranchised; and partner with others in its communities to improve the quality of life. In carrying out the healing ministry, this Corporation shall at all times embrace the values of dignity, collaboration, justice, stewardship, and excellence." *Id*., § 3.2.

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

[36] O'Keeffe Decl., ¶ 10, Ex. 11, p. 10 ("Directed to spiritual needs that are often appreciated more deeply during times of illness, pastoral care is an integral part of Catholic health care. Pastoral care encompasses the full range of spiritual services, including a listening presence; help in dealing with powerlessness, pain, and alienation; and assistance in recognizing and responding to God's will with greater joy and peace.").

[37] The Committees are simply the formal procedure by which the Sterilization Policies are implemented.

hospital to provide maternity care within miles in the first place. Chamorro complains that she would have to drive 70-miles for a tubal ligation, while overlooking the fact that MMCR's religious mission is the only reason why she, and all women in the Redding area, do not have to travel 70 miles simply to deliver their baby in a hospital altogether. Chamorro also refuses to place any weight on MMCR's religious convictions and asserts that she should be able to have a tubal ligation on demand simply as a convenient means of birth control.

The principles of the church autonomy doctrine, from which the ministerial exception derives, apply with particular force here. The Supreme Court has always recognized "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). This case is similar to *Guadalupe* and the other ministerial exception cases in many respects. Both involve private party plaintiffs, a conflict between free exercise and other claimed statutory secular rights, and a statute that does not expressly exempt or target religion (Title VII and Section 1258). In the ministerial exception cases plaintiffs uniformly complain that the faith-based decision of a religious institution interfered with some perceived right, only to find that there is an exception to that perceived right based on the faith-based organization's even greater right to free exercise of its faith. In some respect, that is what is happening here.

Petitioners also continue to rely upon *Catholic Charities*, without acknowledging that *Guadalupe* rejected an interpretation of the Establishment Clause like the one in *Catholic Charities*. First, *Guadalupe* makes clear that the church autonomy doctrine protects all religious institutions. *Guadalupe,* 140 S. Ct. at 2060. One problem with *Catholic Charities* is its consent to a religious gerrymander, whereby the State was permitted to narrowly define a "religious employer." *Catholic Charities,* 32 Cal. 4th at 292-93. However, *Guadalupe* makes clear that all religious institutions are afforded equal protection and they get to make these decisions for themselves. "Determining that certain activities are in furtherance of an organization's religious mission . . . is [] a means by which a religious community defines itself." *Corporation of the*

Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (conc. opn. of Brennan, J.).

Second, *Guadalupe* confirms that when a religious institution engages in protected religious decision-making, the objections by, impact on, and religious practices of those affected are irrelevant. *Guadalupe*, 140 S. Ct. at 2068 ("insisting [that the church autonomy doctrine only applies to affected individuals of the same faith] as a necessary condition would create a host of problems"). Thus, in *Guadalupe* the plaintiff's Title VII claims were barred by the Establishment Clause even though the Catholic school did not require its religious instructors to be Catholic. *See id.* at 2081 (Sotomayor, J., dissenting). And, in *Means*, the district court found that the church autonomy doctrine required the Court to abstain from a plaintiff's claim that a Catholic hospital "did not provide the standard of medical care because it is a Catholic hospital that adheres to Defendant USCCB's Ethical and Religious Directives . . . ." *Means*, 2015 WL 3970046, at *2, *13. Petitioners are no different than those unsuccessful plaintiffs.

Guadalupe also shows that the *Catholic Charities* Court erred in treating Catholic Charities as simply an instance of "followers of a particular sect enter[ing] into commercial activity."[38] Religious schools could be mischaracterized the same religiously hostile way. But such superficial analysis must be eschewed. The Court cannot distinguish or prefer among Catholic schools, churches, hospitals, and charities for these purposes. When a religious institution is involved in providing the same core services it exists to provide and has always provided, it is not engaged in "commercial" activities. *See Kelly v. Methodist Hosp. of S. Cal.*, 22 Cal. 4th 1108, 1124 (2000) ("[W]hat of a soup kitchen located in a church basement? It may be argued that the technical purpose of a soup kitchen is to provide food to the hungry rather than to make an immediate manifestation of devotion to a divine entity. . . . Nevertheless, while

[38] Like education, religious health care and charitable works predate the United States, let alone American commercialism, by many hundreds of years. The California Supreme Court recognized that Catholic Charities was an "organ of the Roman Catholic Church" that offered a range of services – including "immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, housing and vocational training of the developmentally disabled and the like." *Catholic Charities*, 32 Cal. 4th at 539. The Court's failure to recognize that the Catholic Church has provided these services for thousands of years, and that Catholic Charities is merely the corporate form now required so that it can continue its mission, was arguably a failure to afford Catholic Charities the required "special solicitude." *Hosanna-Tabor*, 565 U.S. at 189.

providing food is an arguably secular function, the church's underlying motivation for feeding the destitute remains a matter of religious motivation and faith."); *Amos*, 483 U.S. at 337 (explaining that a not-for-profit gymnasium built over 75 years ago as part of a religious mission is not a commercial activity subject to government regulation); *compare United States v. Lee*, 455 U.S. 252, 256 (1982) (Amish employer must withhold social security taxes for Amish employees at a farm and carpentry shop because the shop was a commercial activity).

Religious institutions that are carrying out their millennia-old mission may need to organize as nonprofit corporations in order to operate churches, charities, schools, and hospitals. *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1222–23 (10th Cir. 2017) ("Since U.S. law does not recognize public juridic persons organized under canon law, public juridic persons need civil-law counterparts—normally nonprofit corporations—in order to transact civil-law business, such as holding title to property."). However, that does not mean they have entered commercial activity so much as that some of the activities they engage in as part of their religious mission have become commercialized around them. But the First Amendment does not shrink every time the government decides to regulate what was traditionally a private function carried out by religious institutions, which are not required to check their First Amendment rights at the door when they organize in a certain form in order to do what they have always done.

Petitioners double down by asserting that *Catholic Charities* stands for the proposition that religious institutions must provide services under an "all or none" framework, such that the Catholic Hospitals must allow tubal ligations for all purposes if they permit tubal ligations for some purposes. Aside from the fact that *Catholic Charities* did not involve a licensing scheme, that notion was explicitly rejected in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723-24 (2018), where the Court said "it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." Whatever was left of *Catholic Charities* was undercut by *Tandon*, which

forbids any court from dishonoring free exercise concerns.

In other words, a member of the clergy is permitted to perform marriages even though he or she may be compelled by religious principles to decline to perform certain marriages. Similarly, some claims brought by employees of a religious institution may be subject to Title VII, but Title VII does not apply where the conduct challenged is central to the religious organization's mission with which a court may not interfere. Therefore, neither Petitioners' rights nor their "dignity and worth" are in any way diminished by the Catholic Hospitals' exercise of their free exercise rights to decline to perform services that conflict with their religious beliefs. At minimum, permitting them to decline these services is the accommodation required by *Masterpiece Cakeshop* and *Bostock*.

While ignoring the relevant authorities, Petitioners cite to numerous cases that do not involve licensing schemes or religious institutions and are therefore irrelevant. In *Walker v. Superior Court*, 47 Cal. 3d 112, 119 (1988), a Christian Scientist was charged with involuntary manslaughter following the death of her daughter, who received prayer but not medical treatment for her illness. Because the record established that resort to medical treatment was not a "sin" for a Christian Scientist and is not a matter of Church compulsion, the Court held that a religious exemption would not further public policy. *Id.* at 139. In *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144 (2018), the Court affirmed mandatory vaccinations and rejected a religious exemption because "the right to practice religion freely does not include liberty to expose the community or [a] child to communicable disease or the latter to ill health or death." *Id*; *see also North Coast Women's Care Med. Grp., Inc. v. Sup. Ct.,* 44 Cal. 4th 1145, 1155 (2008) (neither physician nor medical group had free exercise right to refuse service based upon sexual orientation); *Smith v. Fair Emp't Hous. Comm'n,* 12 Cal. 4th 1143, 1170 (1996) (plurality opinion) (landlord had no free exercise right to refuse to rent to unmarried couples). Nothing about the Catholic Hospitals' conduct involves the deprivation of necessary medical care or the exposure of any patient to disease or death. By definition, the procedures at issue are scheduled, non-emergency procedures for which the patient has time to request an exception and also to schedule the service at another hospital. Nor is a tubal ligation a life-saving procedure or a

method of protecting the community against communicable disease.

B. Section 1258 is Subject to Strict Scrutiny Because it is a Licensing Law.

Petitioners' interpretation of Section 1258 as a licensing law that sweepingly prohibits the Catholic Hospitals' exercise of First Amendment rights runs afoul of the unconstitutional conditions doctrine. A licensing statute cannot be enforced in a manner that requires a licensee to surrender its constitutional rights unless it withstands strict scrutiny under state and federal law.

States do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018). As the Supreme Court reaffirmed in *Trinity Lutheran*, "it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (conferral of a benefit (*i.e.,* license) may not be "conditioned on the surrender of a constitutional right"); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943) (unconstitutional license tax); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) (holding Bingo Act, which permitted charities to raise funds through Bingo, unconstitutional because it restricted the charities' ability to use their funds in violation of the First Amendment); *Country Mill Farms, LLC v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1053 (W.D. Mich. 2017) (denying motion to dismiss where "Plaintiffs [allege that they] must give up their religiously-motivated conduct in order to obtain a vendor license."); *Committee To Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 265-66 (1981) ("[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege"); *Parrish v. Civil Serv. Comm'n of Alameda Cty.*, 66 Cal. 2d 260, 271 (1967).

"[T]he unconstitutional conditions doctrine imposes special restrictions upon the government's otherwise broad authority to condition the grant of a privilege or benefit when a

proposed condition requires the individual to give up or refrain from exercising a constitutional right." *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 457 (2015); *see also Thomas*, 450 U.S. at 716 ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ."); *Satellite Broad. & Commc'ns Ass'n of Am. v. F.C.C.*, 146 F. Supp. 2d 803, 830 (E.D. Va.) ("regulators creating licenses must observe the standard rule that government regulation may not favor one viewpoint over another*"), review denied, order aff'd*, 275 F.3d 337 (4th Cir. 2001). The Free Exercise Clause ensures that religious institutions will not be forced to "disavow [their] religious character" in order to participate in public life. *Trinity Lutheran*, 137 S. Ct. at 2022. *See also McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (explaining that free exercise is impaired if government encourages "abandonment" of religious principles even if the law "does not directly prohibit religious activity").

"[The] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *California Bldg.*, 6 Cal. 4th at 459–60 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Under *Tandon*, it is now clear that any law that subjugates free exercise rights as less important than any secular consideration is subject to strict scrutiny. Section 1258, as interpreted by Petitioners, treats the health facility's free exercise rights less favorably than other secular considerations, is also subject to strict scrutiny.

Petitioners complain about the Catholic Hospitals' religious decision-making process guided by its interpretation of the ERDs. As a threshold matter, there is no federal law or California state law that would authorize such interference with religious decision-making. The Court sustained Dignity Health's demurrers to all of Petitioners' claims with the exception of a

UCL claim that borrowed a claim for violation of Section 1258, and the Court essentially allowed that borrowed claim to continue as a mandamus writ. The Court has never found that the religious decision-making process can be challenged under Section 1258 and to do so would violate Respondent's free exercise rights. A law intended to do accomplish what Petitioners seek to achieve here would be a targeting law, regardless of neutral window-dressing, subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 and 546 (1993) ("facial neutrality is not determinative" and "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

Section 1258, if applied as Petitioners urge, is an unconstitutional statute that conditions a benefit upon the surrender of First Amendment rights. A hospital license cannot be conditioned upon a faith-based hospital's agreement to perform procedures against its religious beliefs, or its agreement not to perform otherwise lawful procedures with patient consent, which would also violate its protected beliefs. If CDPH sought to terminate the Catholic Hospitals' licenses because they will not perform tubal ligations on demand, something it has conspicuously never done and has declined to do when re-licensing the Catholic Hospitals dozens of times, it would be unlawfully conditioning receipt or maintenance of a hospital license on a condition that is proscribed by Catholic religious doctrine. And if CDPH sought to terminate the Catholic Hospitals' licenses because they engaged in a faith-based review process that is part of the hospitals' healing ministry, it would deny the hospitals the benefit of a license based upon conduct (the provision of health care) mandated by religious belief and would in fact criminalize the hospital's pursuit of Jesus' healing ministry. *See Trinity Lutheran,* 137 S. Ct. at 2022 (government cannot deny "benefits" to a church applicant for funding by conditioning participation on "disavow[ing] [its] religious character").

Petitioners' claim, which borrows the Section 1258, is subject to the same limitations applicable to an enforcement action. To the extent that Section 1258 even applies to religious institutions that do not allow sterilizations for a contraceptive purpose – a most dubious proposition in and of itself – Section 1258 is unconstitutional if applied to prohibit the Catholic

Hospitals' sterilization policies and procedures.

C. Section 1258 is Subject to Strict Scrutiny Under *Tandon*.

Tandon redefined what it means for a statute to be a general law of neutral applicability. Previously, in *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) ("*Smith*"), the Supreme Court held that if burdening the exercise of religion is not the "object" of the law, "but [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[39] *See also Church of Lukumi*, 508 U.S. at 531 ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). However, *Tandon* changed that analysis.[40]

Under *Tandon*, a law is not neutral and generally applicable if it treats religious factors less favorably than permitted secular factors. "Government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause,

---

[39] Of course, Section 1258 was enacted in 1972, nearly two decades before *Smith*. For those eighteen years strict scrutiny was the law of the land. It is telling that not once during those nearly two decades did the State ever evince an intent that Section 1258 affected free exercise rights in any way. That's one significant way that the Court can see that Petitioners' interpretation could not possibly be correct.

[40] *See, e.g.,* Jim Oleske, "*Tandon* steals *Fulton*'s thunder: The most important free exercise decision since 1990", *SCOTUSblog*, April 15, 2021, *available at* https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/; Andrew Koppleman, The Supreme Court creates a new religious aristocracy; April 19, 2021 *available* at https://thehill.com/opinion/judiciary/548912-the-supreme-court-creates-a-new-religious-aristocracy; Mark Joseph Stern, The Supreme Court Broke Its Own Rules To Radically Redefine Religious Liberty", *Slate*, April 12, 2021, *available at* https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html; *see also* Ian Millhiser, "The Christian right is racking up huge victories in the Supreme Court, thanks to Amy Coney Barrett", *Vox*, April 12, 2021, available at https://www.vox.com/2021/4/12/22379689/supreme-court-amy-coney-barrett-religion-california-tandon-newsom-first-amendment ("Ever since Justice Amy Coney Barrett joined the Court last fall, however, the Supreme Court has been rapidly dismantling *Smith*. On Friday night, the Court fired a bullet into *Smith*'s heart. . . . Although the Court's new 5-4 decision in *Tandon v. Newsom* doesn't explicitly overrule *Smith*, the decision makes it so easy for many religious objectors to refuse to comply with the law that *Smith* is basically a dead letter."); Stephen I. Vladek, "The Supreme Court Is Making New Law in the Shadows", *New York Times*, April 15, 2021, available at https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html ("In a short, unsigned opinion 'for the court', the majority expressly adopted what has been described by scholars as the 'most favored nation' view of the free exercise clause. Under this approach, otherwise neutral laws that might incidentally burden religious exercise (like zoning laws or public health regulations, for instance) are constitutionally suspect if they create *any* exceptions for what judges deem to be 'comparable' secular activities. . . . But whatever else might be said about the 'most favored nation' argument, no prior majority opinion had ever adopted it. Instead, in what one scholar called the court's 'most important free exercise decision since 1990', the justices used the shadow docket to expand religious liberty.").

whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 2021 WL 1328507, at *1 (U.S. Apr. 9, 2021) (emphasis in original);[41] *see also Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 66 (2020). *Tandon* eliminated the requirement that the "object" of a law must be to burden free exercise rights in order to trigger strict scrutiny. Under *Tandon,* a law is subject to strict scrutiny if it "treat[s] *any* comparable secular activity more favorably than religious exercise", which has been called a "most favored nations" approach. *Id*. at *1 (emphasis in original). Of course, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi*, 508 U.S. at 546.

In both *Tandon* and *Roman Catholic Diocese*, the government COVID regulations restricted religious gatherings to a greater degree than secular gatherings. *Tandon*, 2021 WL 1328507, at *2; *Roman Cath. Diocese,* 141 S. Ct. at 66. In doing so, the regulations "single out" religion for "especially harsh" treatment. *Id.* Accordingly, in both cases the Supreme Court found that strict scrutiny applied, and struck down the regulations as applied to the plaintiffs.

Tandon reflects a fundamental shift in the analysis of free exercise challenges to government actions, which began with *Roman Catholic Diocese of Brooklyn*. In *Tandon*, however, the Supreme Court made clear that a law triggers strict scrutiny *both* when the "object" of the law is to burden free exercise *and* independently when the law (facially or through interpretation) prefers secular considerations to religious considerations for whatever reason. Under *Tandon*, where a statute provides exceptions or exemptions for secular conduct but does not treat faith-based conduct in an equally favorable fashion, to overcome a free exercise challenge, the government must establish that the challenged law satisfies strict scrutiny, including by showing that less restrictive measures on the religious activity could not address the government's compelling interest justifying the law at issue. *Tandon*, 2021 WL 1328507, at *1 ("[N]arrow tailoring requires the government to show that measures less restrictive of the First

[41] The Supreme Court noted that this was the fifth time in six months that it summarily rejected Ninth Circuit free exercise analysis. *See Harvest Rock Church v. Newsom*, 592 U. S. ——, 141 S.Ct. 889, (2020); *South Bay United Pentecostal Church v. Newsom*, 592 U. S. ——, 141 S.Ct. 716; *Gish v. Newsom*, 592 U. S. ——, 141 S.Ct. 1290 (2021); *Gateway City Church v. Newsom*, 592 U. S. ——, 141 S.Ct. 1460, 2021 WL 308606 (2021).

Amendment activity could not address" the government's compelling interest).

Like the COVID regulations repeatedly struck down by the Supreme Court, Section 1258—as interpreted by Petitioners—demands strict scrutiny because it treats secular considerations more favorably than religious exercise. Section 1258 expressly permits consideration of the "physical or mental condition" of the patient. Thus, unless Section 1258 is also interpreted in a manner that also permits consideration of the Catholic Hospitals' free exercise activity, it is subject to strict scrutiny. *Tandon,* 2021 WL 1328507, at *1; *Church of Lukumi*, 508 U.S. at 535 ("the effect of a law in its real operation is strong evidence of its object"). Similarly, if the Court interprets Section 1258 as limiting hospital purposes to the secular perspective of the medical literature, rather than the purpose of a Catholic health facility that adheres to the ERDs, Section 1258 violates *Tandon* and strict scrutiny applies.

Following *Tandon*, *Smith* has no relevance to this case. But if it did, *Smith* does not compel a different result because *Smith* did not involve a benefits law.[42] Though *Smith* overruled applying the strict scrutiny previously required by to a claim that a general law of neutral applicability violates the Free Exercise Clause, *Smith* reaffirmed that strict scrutiny still applies to benefit laws like the one at issue here and in *Sherbert v. Verner,* 374 U.S. 398, 399 (1963) "that condition[] the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Smith*, 494 U.S. at 883.[43]

D. Petitioners' Hostility Towards Religion Requires Strict Scrutiny.

Whenever the government asserts that a law's intended purpose is to burden free exercise, strict scrutiny has always applied. *See, e.g., Church of Lukumi*, 508 U.S. at 541. Here, despite the complete absence of any evidence in the legislative history, Petitioners assert that "the Legislature passed the law to prohibit *exactly* the kind of arbitrary, nonmedical standards

[42] *See also North Coast Women's Care Med. Grp., Inc. v. Sup. Ct.,* 44 Cal. 4th 1145 (2008); *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 32 Cal. 4th 527, 537 (2004); *Minton v Dignity Health*, 39 Cal. App. 5th 1155 (2019) *cert. pending* No. 19-1135. None of these cases involved a situation where the government conditioned a benefit upon infringing upon constitutionally protected rights.

[43] In this regard, Justice Scalia's 1990 dicta comments in *Smith* that *Sherbert's* compelling interest test has been limited to the unemployment compensation field were not true in 1990, and have been repudiated repeatedly since at least 2017. *See Trinity Lutheran*, 137 S. Ct. at 2022 citing *Sherbert*, 374 U.S. at, 404; *see also Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2277 (2020) (citing *Sherbert* and holding "[w]hat benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct.").

that Respondent's Catholic Hospitals currently impose." (Pet. Br., 32:20-22 (emphasis in original).) If that is what the Legislature did, then strict scrutiny applies under *Church of Lukumi*.

Of course, this is not what Section 1258, properly construed, does; it just reflects Petitioners' hostility towards religion. When you're a hammer, everything looks like a nail. Unlike the State, Petitioners do not bring decades of religious neutrality to this dispute. It is not an accident that CDPH has never interpreted sought to enforce Section 1258 in the manner Petitioners do here. Unlike the webpages of Petitioners' counsel, the State of California's website does not say "Across the country, we are seeing hospitals, insurance companies, pharmacies, and other health care entities discriminate against women by denying basic care—such as birth control, emergency contraception, and abortion—in the name of religion . . . The ACLU works to ensure that women are not denied information and the health care they need because of the religious views of their health care providers."[44] CDPH has not authored and published a report about Catholic healthcare called "Health Care Denied," or contend that by adhering to the ERDs Catholic hospitals deny essential health services. The ACLU does.[45] Neither federal nor state law require Catholic hospitals to provide "emergency reproductive health care," nor has the government previously sought to compel Catholic hospitals to provide (or decline to provide) healthcare in violation of their religious beliefs. The ACLU believes that should be the law.[46] When your website claims, "The Federal Government Must Stop Catholic Hospitals From Harming More Women," you cannot claim the mantle of neutrality before the Court.[47] *See id.* at 1729-30; *see also Church of Lukumi*, 508 U.S. at 541.

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

"[H]istorically, strict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' That standard 'is not watered down';

[44] https://www.aclu.org/news/by-issue/religion-and-reproductive-rights/.
[45] https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied.
[46] *Id.*
[47] https://www.aclu.org/blog/reproductive-freedom/religion-and-reproductive-rights/federal-government-must-stop-catholic/.

it 'really means what it says.'" *Tandon*, 2021 WL 1328507, at *2; *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.") (emphasis added); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 314 (2013) ("Strict scrutiny must not be strict in theory but feeble in fact."); *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67; *South Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258, at *2 (U.S. Feb. 5, 2021) ("The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard.") (Gorsuch, J., concurring). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Church of Lukumi*, 508 U.S. at 546. "The Court looks "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) ("'[c]ontext matters' in applying the compelling interest test").

Licensing laws are subject to rigorous strict scrutiny. *See San Diego Cty. Water Auth. v. Metro. Water Dist. of S. California*, 12 Cal. App. 5th 1124, 1159 (2017) (proponent of law bears "a heavy burden" in justifying imposing conditions on constitutional rights as part of a licensing or benefits law); *Trinity Lutheran*, 137 S. Ct. at 2019 and 2024 (conditions that impose a penalty on the free exercise of religion guaranteed by the United States Constitution are subject to the "most rigorous scrutiny"). Petitioners have not submitted any evidence that remotely even addresses much less satisfies the exacting requirements of strict scrutiny analysis.

Under California law, Petitioners must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes

contemplated by conferring the benefit.[48] *See Committee to Defend*, 29 Cal. 3d at 265-66 ("[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege"); *Parrish*, 66 Cal. 2d at 271. As discussed below, Petitioners have not submitted any evidence that would be relevant to this analysis, and they have not even addressed the purpose of the hospital licensing scheme.

In *Committee To Defend Reproductive Rights*, 29 Cal. 3d 252, the plaintiff organization represented indigent women in challenging the California Budget Acts, which prohibited Medi-Cal funding for elective abortions. The California Supreme Court found the funding restriction unconstitutional. First, like the Catholic Hospitals' free exercise rights here, the Court recognized the right to choose whether or not to bear a child guaranteed by the California Constitution. *Committee*, 29 Cal. 3d at 262. Second, the Court concluded that the Medi-Cal funding restriction imposed a burden upon the constitutional right to privacy. *Id.* at 263-66 (affirming long line of cases confirming that "[the] state is without power to impose an unconstitutional requirement as a condition for granting a privilege"). Third, applying the three-part test, the Court held that the restriction on Medi-Cal funds bore no relation to the purpose of the Medi-Cal program, which is "to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons." *Id.* at 271. The Court further held that none of the asserted benefits of the funding restriction "manifestly outweighed" severe impairment of a constitutional right. *Id.* at 276-83 ("only the most compelling of state interests could possibly satisfy this test"). Finally, the Court held the law was not the "least offensive alternative adequate" to achieve "any legitimate state interest." *Id.* at 282.

Petitioners' interpretation of Section 1258 cannot meet this stringent test. First, infringing the Catholic Hospitals' free exercise rights is not reasonably related to the licensing of

[48] Notably, this is a different test from strict scrutiny under *Catholic Charities*, which examines the compelling interest advanced by the particular statute that is being challenged as unconstitutional. *Catholic Charities*, 32 Cal.4th at 562 (whether application of the law "represented the least restrictive means of achieving a compelling interest") (citing *Thomas*, 450 U.S. at 718 and *Sherbert*, 374 U.S. at 403. No one is attacking Section 1258 in this case; the judicial exercise here is limited to interpreting the law, indeed, first to avoid constitutional problems. It is only Petitioners' proffered interpretation of Section 1258 that puts it in constitutional peril. .

acute care hospitals. The purpose of licensing statutes, generally, is to protect the health and safety of the public, not to engineer preferred social or political outcomes. These licensing statutes protect public health not equitable access. Pet. Br. 31:27-28[49]; *Yanke v. State Dep't of Pub. Health*, 162 Cal. App. 2d 600, 604 (1958). As evidenced by their decades of uninterrupted licensure, and the absence of any evidence of sanction or penalty for any violations, the Catholic Hospitals pose no threat to the public health. (Strumwasser Decl., ¶¶ 16-17.)[50] Moreover, the California Attorney General has actually imposed legally enforceable conditions on the Catholic Hospitals which require them to continue the very process that Petitioners claim is illegal, yet further evidence that the State does not view Respondent's religious practice as a violation of licensing law. The Attorney General's conditions are themselves less restrictive alternatives to the massive burden on Respondent's religious freedom posed by Petitioners' interpretation of Section 1258, which would require the Catholic Hospitals to disallow all postpartum tubal ligations in order to preserve their Catholic identities. Indeed, counsel for Petitioners repeatedly urged the Attorney General to continue providing postpartum tubal ligations as "exceptions to the ERDs" and apparently never even mentioned that doing so was supposedly unlawful under Section 1258. (McGrath Decl., ¶ 4, Ex. 24, at pp. 2-7.)

According to Petitioners, Section 1258 furthers the government's interest in "equitable access to health care." Pet. Br. 31:27-28. Even if that were true, the unconstitutional conditions doctrine stands for the proposition that a licensing law cannot promote "equitable access" at the expense of First Amendment rights because the desired engineered result is always subsidiary to the purpose of the licensing scheme. As noted, Petitioners arrive at their "all or none" argument through backwards logic, and nothing in the text of the statute or legislative history indicates that the State (which plainly does not share Petitioners' view about the Catholic Hospitals' compliance with Section 1258) has a greater interest in a result where fewer tubal ligation

[49] In the recent *California Advocates* decision, the Court of Appeal rejected the plaintiff's attempt, like Petitioners' here, to read words and policy into the health facility licensing scheme that do not exist. *California Advocates*, 60 Cal. App. 5th 500, 508 (2021) (Section 1253, which requires skilled nursing facilities to be licensed, does not require a third party that manages the SNF to be licensed).

[50] The right to privacy recognized in *Committee to Defend Reproductive Health* would foreclose any effort by the Legislature to restrict the right to sterilization operations for any purpose.

procedures rather than more tubal ligations.[51] *See Gutierrez*, 58 Cal. 4th at 1369 (interpretation must further the "general purpose" of the statute. Obviously, more tubal ligations is the "general purpose" of the statute and the relevant compelling public interest. *See* Section VI, *infra.*

Second, adopting Petitioners' interpretation of Section 1258 will result in fewer tubal ligations performed at the Catholic Hospitals, which is a worse outcome for the public that in no manner justifies the burden on the Catholic Hospitals' free exercise rights. Petitioners identify the public harm that would arise from impairing the Catholic Hospitals' constitutional rights and eliminating the ability to obtain a postpartum tubal ligation at the Catholic Hospitals when they argue that women who are unable to obtain postpartum tubal ligations are at a higher risk for adverse pregnancy outcomes including maternal mortality. (Pet. Br. 15:13-16; McGrath Decl., ¶ 45, Ex. 66, ¶ 27.) However, the status quo, in which some members of the public may obtain postpartum tubal ligations if there are indications of material increased risk of maternal morbidity, is far preferable to one under which such procedures would be available to no one.[52] Considering the Conditions of Consent between the California Attorney General and Dignity Health requires the Catholic Hospitals' to maintain the status quo, Petitioners cannot established that California has "the most compelling of state interests" in the opposite result. *Committee To Defend Reproductive Rights*, 29 Cal. 3d at 276. In fact, PRH and Petitioners' counsel repeatedly implored the Attorney General to ensure that the Catholic Hospitals *continue to provide* the same services they were providing when Petitioners filed suit *because doing so is a public benefit*. As Dignity Health has argued for years, what Petitioners will accomplish by stripping the Catholic Hospitals of their Free Exercise rights under the false flag of equality of access will be to provide

[51] Petitioners' authorities, involving providing physical access to abortion clinics blockaded by antiabortion protestors and ensuring the physical safety of patients seeking to use those clinics, do not stand for the proposition that licensing laws may socially engineer a preferred secular result through "equitable" access, whatever that means. (Pet. Br., 32:11-19). The Court already made clear that California's "equitable access" statute—the Unruh Act—has no application in this case when it sustained Dignity Health's demurrer to that claim without leave to amend. As discussed in Section II(A) of Dignity Health's Opening Brief and in Section II, *supra*, the legislative history is devoid of any indication that the legislature intended Section 1258 to affect the free exercise rights of religious health facilities in any way. The Legislature can—and did—accomplish that without doing violence to protected constitutional freedoms. *See Church of Lukumi*, 508 U.S. at 538 ("a law which visits 'gratuitous restrictions' on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation").

[52] Chamorro would be in exactly the same position whether she wins or loses here, while future patients who might have otherwise obtained a tubal ligation at the Catholic Hospitals will be unable to do so.

zero access to these procedures in some rural communities, which is precisely the opposite of a public benefit.[53] *See Rivera*, 265 Cal. App. 2d at 592 ("issuance of the writ is not a matter of right, but involves a consideration of its effect in promoting justice; likely public detriment warrants denial of relief").

Third, there are narrowly drawn alternative means, less subversive of the Catholic Hospitals' constitutional rights, that correlate more closely with the purposes contemplated by granting a hospital license. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest . . . ." *Tandon*, 2021 WL 1328507, at *1; *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2394 (2020). One obvious means would be adopting an interpretation of Section 1258, which the Court has already found to be "reasonable," and which does not offensively minimize and equate Catholicism with the 120 Rule. This is consistent with the Attorney General's Conditions of Consent, which is another less restrictive alternative and precisely regulates the Catholic Hospitals' continued provision of postpartum tubal ligations in the same manner the Catholic Hospitals have been doing for many years, without controversy or complaint from regulators. Another would be requiring all acute care health facilities to have maternity and delivery wards, which would require the private secular hospital that now operates in Redding to have one. Still others could include state sponsored education programs, and financial assistance for patients who would need to travel a distance to seek desired services. Insurance companies could also be required to pay for such travel. Of course, if "equitable access" is the purpose of Section 1258 its failure to address other access barriers, including geographic, financial, or other social factors historically bearing on the issue of equity and is therefore underinclusive.

This case does not require the Court to delineate any constitutional boundary in a gray area. Petitioners think no part of this discussion is even necessary because it is gambling on the Court ruling that strict scrutiny does not apply based on *Smith*. That bet has already been lost,

[53] The Catholic Hospitals provide tens of millions of dollars in community benefits on an annual basis. Supplemental McGrath Decl., ¶¶ 9-14, Exs. 108-113.

based on the case law described in this brief. Yet, Petitioners continue to double down on a constitutional analysis that has no teeth at all and they do not even try to make a showing that meets the demands of strict scrutiny. Yet, if the line is not drawn, at least, at protecting religious institutions from coercive licensing schemes consistent with uniform Supreme Court precedent, then the promises of the Supreme Court's repeated recent decisions respecting free exercise are empty words and the protections of the First Amendment are only ephemeral. Whether the effort is to regulate abortion or sterilization, state benefit and licensing laws cannot be used to coerce the surrender of protected constitutional rights. Here, the Catholic Hospitals' constitutional religious liberty interests have been protected by the United States Constitution since 1791 and by the California Constitution since it was ratified in 1879. U.S. Const. amend. I; Cal. Const. art. I, § 4. The evidence establishes that the Catholic Hospitals have been in full compliance with state and federal regulatory requirements for decades; there is no evidence that the Catholic Hospitals pose a threat to the public health and welfare. California's Attorney General has even ordered the Catholic Hospital to continue to provide postpartum tubal ligations as exceptions to the ERDs; that is, pursuant to the Catholic Hospitals' faith-based review process. Thus, there are myriad ways to accomplish the purpose of the hospital licensing scheme that do not infringe upon the Catholic Hospitals' free exercise rights.

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

An order that directly or indirectly forces the Catholic Hospitals to abandon their pastoral application of the ERDs in connection with the consideration of all relevant medical factors would result in a reduction of the availability of postpartum tubal ligations, which is not in the public interest, and would be contrary to the terms of the Conditions of Consent imposed by the California Attorney General. Throughout this litigation, Petitioners have ignored the fact that their efforts to cripple the Catholic Hospitals' ability to carry out their mission and deliver pastoral care is inequitable, directly contrary to what they sought at the outset of the litigation, which was to increase access to the procedure, and will harm the public. Thus, Petitioners began this litigation asserting that "Patients are Harmed When Their Doctors Are Prevented from

Performing Postpartum Tubal Ligation," and conclude it by acknowledging that if Petitioners prevail the services available to the community will be reduced and Petitioners will be the ones responsible for harming patients. Petition, ¶ 10-11; McGrath Decl., ¶ 76, Ex. 96, ¶ 28; Petitioners' Second MSJ Opp. Filed Oct. 23, 2019, 38:4-6. Petitioners ignored the subject entirely in their Opening Brief, which argues for strict and blind adherence to their narrow interpretation of Section 1258, without any consideration of the effect or impact on the community, let alone the contrary views taken by the CDPH and the Conditions of Consent they urged the Attorney General to impose on Dignity Health.

The problematic impact of Petitioners' efforts was apparent from the first hearing, in January 2016, when Chamorro sought a TRO compelling MMCR to perform her postpartum tubal ligation. The Court immediately recognized the implications of Petitioners' attempt to interfere with the Catholic Hospitals' religious decision-making and told Petitioners what would happen: "the hospital here in Redding can say we're not going to deliver babies anymore if we're going to get involved in this. " McGrath Decl., ¶ 3, Ex. 23 at 23:21-23. Dignity Health, too, made clear that the "Catholic Hospitals will shut down their labor and delivery wards unless we recognize their religious freedom to follow ethical and religious directives." *Id.* at 34:8-13. As Petitioners continued to argue that their requested relief would have no effect on the Catholic Hospitals, the Court retorted, "Well, look, I have blinders on if I ignore the essence of this lawsuit. I can't do that. I can't leave my common sense at the door." *Id.* at 32:14-18.

The subject was addressed again at each of Dignity Health's 2018 depositions of Petitioners' witnesses. Dignity Health asked Petitioners and Dr. Samuel Van Kirk if they understood that, as a result of this litigation, the Catholic Hospitals might prohibit all tubal ligations. Supplemental McGrath Decl., ¶ 15, Ex. 114, at 48:10-50:17; ¶ 16, Ex. 115, at 39:22-47:23); ¶ 7, Ex. 106, at 74:20-78:3. Chamorro had never even considered the issue; neither Dr. Van Kirk nor Ms. Magee cared.[54] That alone demonstrates that Petitioners do not act in the

[54] Ms. Magee was examined at length about whether it would be consistent with PRH's mission if PRH prevailed in this lawsuit and the result was that no postpartum tubal ligations at all would be performed at the Catholic Hospitals. Ms. Magee testified, "If that is the outcome, that is the outcome." (Supplemental McGrath Decl., ¶ 16, Ex. 115, at 39:11-47:20; 41:11-20.) Ms. Magee reaffirmed her testimony about PRH's interests in her September 30, 2020 declaration. (Magee Decl., ¶ 6.) For her part, it never occurred to Chamorro that Catholic hospitals could not

public interest and lack any public interest standing.

The subject was addressed again at the November 19, 2019 summary judgment hearing where the Court observed, "Nobody is working on this case who didn't know that the Health and Safety Code statute, which I believe is 1258, said that—on its face clearly allowed an institution not to perform postpartum tubal ligations. And, I'm sure if I asked petitioners if they knew that, they would say, of course we know that." McGrath Decl., ¶ 80, Ex. 100 at 7:24-8:4. The Court continued, "That may be the result of [Petitioners'] success here. . . . What they're saying is that they want, at least with regard to the pure 1258 issue, is compliance with 1258." *Id.* at 12:19-13:4. The Court even asked Petitioners' counsel, "Have I misstated your positions in any way?" *Id.* at 14:10-11; *see also* 15:1-16:2. Petitioners' counsel responded "no," which is consistent with what Petitioners said in their brief: "*a victory for the challengers may entail a reduction of the services offered overall*." (Petitioners' Second MSJ Opp. Filed Oct. 23, 2019, 38:4-6 (emphasis added).)

As discussed in detail in several of Dignity Health's briefs over more than a year, and entirely ignored by Petitioners, at Petitioners' urging the California Attorney General imposed certain conditions on his consent to the ministry alignment between Catholic Health Initiatives and Dignity Health. The ACLU conducted a statewide campaign, including testifying at a public hearing, and partnering with PRH to send a letter to the Attorney General purporting to speak on behalf of "community interests." (McGrath Decl., ¶ 4, Ex. 24.) In November 2018, the Attorney General conditionally approved the Dignity Health – CHI ministry affiliation transaction, rejecting the ACLU's request for any expansion of services that would put Dignity Health in violation of the ERDs. (McGrath Decl., ¶ 49, Ex. 69.) However, consistent with the ACLU's request, the Attorney General required, among other things, that Dignity Health's Catholic hospitals "*maintain and provide* women's healthcare services including women's reproductive services at current licensure and designation with the *current types and/or levels of service*" for five years from the closing date of the transaction. (*Id*., p. 3 (emphasis added); Strumwasser

perform certain procedures, and it did not occur to her that the issues in this case involved a Catholic hospital's free exercise rights until after Dr. Van Kirk referred her to the ACLU. Supplemental McGrath Decl., ¶ 15, Ex. 114, at 13:13-15:14, 38:9-21.

Decl., ¶ 23, Ex. 8.) The Attorney General's approval states that the conditions are "legally binding" on Dignity Health. (McGrath Decl., ¶ 49, Ex. 69, p. 1.) The Attorney General takes such conditions seriously, and investigates complaints to ensure compliance.[55] But the Catholic Hospitals cannot maintain and provide postpartum tubal ligations at the "current levels of service" if Petitioners and the Court interferes with their free exercise rights, which is the basis for delivery of the current level of service.

The Conditions of Consent are persuasive evidence that the State continues to advance a neutral interpretation of Section 1258 that furthers the compelling interests of prohibiting the 120 Rule in California while maximizing the availability of tubal ligation procedures for patients, especially in areas with limited service.[56] This interpretation is reasonable and definitely not "clearly erroneous." The fact that highly biased private interests would prefer that Section 1258 achieve a *contradictory* goal—equity of access—does not mean the State is wrong about its interest; it means the Petitioners are.[57] The State gets to decide its compelling interest; not the ACLU and PRH. Petitioners have *never* explained how the Conditions of Consent do not advance a compelling government in ensuring maximum availability of these procedures, and why that express interest of the actual government can or should be ignored.

To the extent any of Petitioners' policy argument is relevant, it only demonstrates why imposing an "all or nothing" interpretation of Section 1258 is not in the public interest. Whether the Court grants Petitioners' their requested relief forcing the Catholic Hospitals to prohibit postpartum tubal ligations altogether, the result would be the same for a patient like Chamorro; if she wanted a postpartum tubal ligation she would have to travel the 70 miles to another facility or undergo an interval tubal ligation in a subsequent procedure at another facility.[58] Section

---

[55] *See. e.g.,* Micael Hiltzik, *Becerra investigating Providence Health after accusations that it applies Catholic limits on care,* https://www.latimes.com/business/story/2021-03-03/becerra-providence-hoag

[56] For example, in the health impact report ("HIR") for Shasta County prepared for the Attorney General in connection with the Conditions of Consent recognize and respect the North State Hospitals' Catholic faith by acknowledging that "The Ethical and Religious Directives for Catholic Healthcare Services is a national code that guides Catholic healthcare providers on conformance with Christian theology." Supplemental McGrath Decl., ¶ 18, Ex. 117.

[57] If there is not even a suggestion on the face of the statute or in the legislative history that a licensing statute was intended to restrict free exercise in any way, it is difficult to imagine the neutral State's compelling interest in the statute was the subjugation of free exercise to secular considerations in the name of equity.

[58] The difference is, if Chamorro prevails, everyone else will have to travel 70 miles, too. Of course, a result that

1258 does not and cannot address these issues because that is not its purpose.

VIII. CONCLUSION.

Petitioners' interpretation of Section 1258 renders the statute unconstitutional, the facts do not establish a violation of Section 1258 interpreted consistent with constitutional mandates, and the relief Petitioners seek is contrary to the public interest. The Court should deny the Petition in its entirety.

Dated: May 5, 2021

MANATT, PHELPS & PHILLIPS, LLP

By: */s/ Harvey L. Rochman*
Harvey L. Rochman
Attorneys for Respondent DIGNITY HEALTH

required the Catholic Hospitals to forsake their pastoral approach would come at great harm to the community and would require the hospitals to violate the Conditions of Consent.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2021, I electronically filed the foregoing:

RESPONDENT DIGNITY HEALTH'S RESPONSE TO PETITIONERS' OPENING BRIEF

with the Clerk of the Court using the File & ServeXpress system which sent notification of such filing to the following:

Christine Saunders Haskett, Esq.
Sara D. Sunderland, Esq.
Patrick R. Carey, Esq.
Covington & Burling LLP
One Front Street
San Francisco, CA 94111
chaskett@cov.com
ssunderland@cov.com
pcarey@cov.com
Tel: (415) 591-6000

Elizabeth O. Gill, Esq.
ACLU Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
egill@aclunc.org
Tel: (415) 621-2493

Minouche Kandel, Esq.
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017
Tel: (213) 977-5266
Fax: (213) 201-7871
mkandel@aclusocal.org

Michael Greenberg, Esq.
Alice J. Ahn, Esq.
Covington & Burling LLP
Salesforce Tower
415 Mission Street, Ste. 5400
San Francisco, CA 94105
Tel: (415) 591.6000
Fax: (415).591-6091
mgreenberg@cov.com
aahn@cov.com

Regina Coprich

Regina Coprich