Prepared by the Court

SUPERIOR COURT OF CALIFORNIA

County of San Francisco

Department No. 505

REBECCA CHAMORRO and PHYSICIANS FOR REPRODUCTIVE HEALTH, Petitioners, v. DIGNITY HEALTH, Respondent.	No. CGC-15-549626 STATEMENT OF DECISION DENYING IN LARGE PART PETITIONERS' PETITION FOR WRIT OF MANDATE

Per Code of Civil Procedure 632, this is my statement of decision, issued after review of the objections to my combined tentative and proposed statement of decision.

Both sides filed objections to the tentative and proposed statement of decision. Although Dignity Health argued that petitioners' objection did not conform to the limited scope for objections to a proposed statement of decision, I exercised my discretion to fully consider all of

the points made in petitioners' brief, and not, as urged by Dignity Health, peremptorily reject those points. (*See Bay World Trading , Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal. App. 4th 135, 141 (prior to entry of judgment, a trial court may make any desired changes to a statement of decision); *see generally Le Francois v. Goel* (2005) 35 Cal. 4h 1094 (prior to entry of judgment, a trial court has the discretion to treat a procedurally improper motion for reconsideration as an invitation to exercise its discretion to correct its own errors)). Because I want this statement of decision to be as free of error as my abilities permit, to fully evaluate petitioners' arguments I re-read the transcript of the writ hearing and much of the written evidence submitted by the parties.

Neither side requested a hearing on the objections. Because petitioners explained the bases for their objection at great length and I previously received extensive briefing and held many hearings on the issues covered by this statement of decision, per California Rule of Court 3.1590(k) I opted not to hold another hearing.

While I made several changes to the tentative and proposed statement of decision to respond to some of the arguments made in petitioners' objection, I am not persuaded that any of the arguments made in that objection warrant any change to my previously stated views how section 1258 should be construed and whether the factors considered by Dignity Health's Catholic hospitals in evaluating requests for tubal ligations are prohibited by that statute. Consequently, this statement of decision reaches the same conclusions for the same reasons as the tentative and proposed statement of decision.

In re-affirming the views I expressed in the tentative and proposed statement of decision, I construe section 1258 in a way that permits health facilities to make decisions regarding tubal ligations based on advanced maternal age, parity, gravidity, and number of prior cesarian sections. Doing so follows from my view that advanced maternal age, parity, gravidity, and

number of prior cesarian sections are medical considerations not within the prohibition of the statutory phrase "special nonmedical qualifications."

In their objection petitioners forcefully argue that permitting health facilities to make decisions regarding tubal ligations based on advanced maternal age, parity, gravidity, and number of prior cesarian sections severely undermines the purpose of the section 1258 and gives the green light to employ the discredited 120 point system merely by using these considerations as pretexts for age and number of natural children. I disagree for three reasons. First, per the text of the statute, age and number of natural children are impermissible criteria, while medical considerations are permissible. Any flaw in logic or policy in distinguishing between impermissible "special nonmedical qualifications" and permissible medical criteria needs to be directed to the Legislature, not the judiciary. Second, petitioners have not shown that any Dignity Health hospital or any other California health facility has used, or attempted to use, any medical considerations to approximate anything resembling the 120 point system. Third, while the issue need not be resolved in this case, I believe that any pretextual use of advanced maternal age, parity, gravidity, number of prior cesarian sections or any other medical consideration to justify something akin to the 120 point system would, as do pretextual reasons for other unlawful conduct, fail to provide a safe haven..

Except for the preliminary injunction motion denied by Judge Goldsmith, I have been involved in all aspects of this lawsuit for the more than six years the case has been pending. While the issues have been both interesting and challenging, what stands out most about this lawsuit is the extraordinary dedication and passion of the attorneys, parties, and witnesses on both sides and the equally extraordinary skill and competence of counsel at every stage of the case. This case represents the very best of litigation: hard fought, but fought civilly and

cooperatively, by attorneys and parties who gave it their all and that all was most impressive to observe.

I. Pertinent Procedural History, Sole Claim, and Religion-Based Affirmative Defenses

Rebecca Chamorro and Physicians for Reproductive Health (PRH) filed this lawsuit against Dignity Health on December 28, 2015. Chamorro and PRH filed a first amended complaint on February 29, 2016. The first amended complaint alleged five causes of action. The fifth cause of action alleged a claim for violation of Bus. & Prof. Code 17200 based, on among other things, that Dignity Health had violated Health & Safety Code 1258. After Dignity Health demurred to all five causes of causes of action, by order filed August 1, 2016 I sustained the demurrer to the first four causes of action without leave to amend and overruled the demurrer to the fifth cause of action based on an alleged predicate violation of section 1258.

By order filed February 9, 2017, I granted Dignity Health's motion for judgment on the pleadings on the grounds that the proper procedural form for the section 1258 claim is a petition for writ of mandate. My order gave Chamorro and PRH leave to amend to file a petition for writ of mandate. On March 1, 2017 petitioners filed a document entitled "Verified Amended Petition for Writ of Mandate" alleging a single cause of action for a writ of mandate per CCP 1085 based on an asserted violation of section 1285.

Since March 1, 2017 the sole claim alleged by Chamorro and PRH is that Dignity Health's policies and practices of allowing some postpartum tubal ligations and denying other postpartum ligations at its Catholic hospitals violate section 1285. More specifically, Chamorro and PRH allege that Dignity Health's implementation of Directive 53 of the Ethical and Religious Directives for Catholic Health Care Services (ERDs) and the sterilization policies of those hospitals run afoul of section 1258's prohibition that any health care facility "which permits sterilization operations for contraceptive purposes" shall not require an individual

seeking such an operation to "meet any special nonmedical qualifications, which are not imposed on individuals seeking other operations in the health facility."

On April 17, 2017 Dignity Health filed a verified answer denying that it violates section 1285 and alleging an array of affirmative defenses. Dignity Health's affirmative defenses include the allegations that the section 1285 claim is barred by federal and California constitutional and statutory provisions: 1) protecting the "free exercise of religion;"2) protecting "religious healthcare providers from being forced to perform procedures that violate their religious principles;" and 3) prohibiting a court from being "excessively entangle[d]" with religious doctrine.

The parties engaged in extensive discovery focusing on six of Dignity Health's Catholic Hospitals, three referred to as the "North State hospitals" (Mercy Medical Center Redding, Mercy Medical Center Mr. Shasta, and St. Elizabeth Community Hospital) and three referred to as the "Sacramento area hospitals" (Mercy San Juan Medical Center, Mercy Hospital of Folsom, and Mercy General Hospital).

On April 5, 2019 Dignity Health filed a motion for summary judgment on the grounds, among others, that: 1) Dignity Health did not allow postpartum tubal ligations for "contraceptive purposes" at its Catholic hospitals; 2) Dignity Health did not require patients seeking a postpartum tubal ligation at its Catholic hospitals to meet any "special nonmedical qualifications;" and 3) any violation by Dignity Health of section 1258 is nonactionable due to various free exercise of religion doctrines.

After two rounds of briefing and two hearings, by order filed April 30, 2020 I denied Dignity Health's motion for summary judgment in its entirety. As stated in that order, I found that there were triable issues: 1) "whether Dignity Health 'permits sterilization operations for contraceptive purposes' at its Catholic hospitals as the quoted phrase is used in section 1258"

and 2) "whether Dignity Health requires its patients seeking postpartum tubal ligations to meet one or more 'special nonmedical qualifications' as the quoted phrase is used in section 1258." I also rejected Dignity Health's religious freedom arguments relying on *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal. 4th 1145, *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal. 4th 527, and *Minton v. Dignity Health* (2019) 39 Cal. App. 5th 1155. Although couched as a definitive ruling, since Chamorro and PRH did not file their own summary motion, per summary judgment procedure my determination on the religious freedom issues is properly understood as a ruling that Dignity Health had not proved the validity of its free exercise affirmative defenses as a matter of law, rather than as a ruling that those affirmative defenses lacked merit as a matter of law.

II. Proceedings on the Writ Claim, Including the Evidence and Objections Thereto

Once Dignity Health's summary judgment motion was denied, the parties' attention turned to a hearing on petitioners' writ of mandate claim. Over the objection of Dignity Health, I stated that the parties need not rely solely on written evidence and had the opportunity to provide limited oral testimony in addition to declarations and appended exhibits. In October 2020 the parties made objections to each other's proposed written and oral evidence that, although not so styled, were in the nature of motions in limine, which I decided on November 16, 2020.

The parties filed eight separate briefs, four before and four after the June 17, 2021 decision in *Fulton v. City of Philadelphia* (2021) 141 S.Ct. 1868. The eight briefs totaled approximately 330 pages. While lengthy, the parties' briefs are just a tiny fraction of the quantity of the evidentiary materials they filed. Those evidentiary materials are briefly summarized below.

Chamorro and PRH filed one or more substantive (i.e. more than merely authenticating exhibits) declarations from: 1) Chamorro who had been denied a postpartum tubal ligation by

Mercy Medical Center Redding; 2) Dr. Lindsey Dawson, an obstetrician-gynecologist with admitting privileges at Mercy San Juan Medical Center; 3) Rebecca Jackson, petitioners' obstetrician-gynecologist and tubal ligation expert; 4) Jodi Magee, the former president and CEO of PRH; 5) Bishop Jaime Soto, the Bishop of the Diocese of Sacramento; and 6) Dr. Samuel Van Kirk, Chamorro's doctor and an obstetrician-gynecologist with admitting privileges at Mercy Medical Center Redding.

Chamorro and PRH also filed excerpts from the depositions of: 1) Chamorro; 2) Dr. James De Soto, a physician who reviewed and, in concert with others, granted or denied requests for postpartum tubal ligations to be performed at the North State hospitals; 3) Dr. Jackson; 4) Sister Brenda O'Keeffe, vice-president of Mission Integration and Spiritual Care Services at the North State hospitals who reviewed and, in concert with others, granted or denied requests for postpartum tubal ligations to be performed at the North State hospitals; 5) Dr. Carolyn Reyes, a physician who reviewed and, in concert with others, granted or denied requests for tubal ligations to be performed at the Sacramento area hospitals; 6) Dr. Laurence Shields, a physician who had been designated as an expert by Dignity Health; and 7) Dr. Van Kirk.

Chamorro and PRH also filed numerous other exhibits, including: 1) legislative history of section 1258; 2) Dr. Jackson's expert report; 3) documents produced during discovery; 4) medical journal articles; and 5) sterilization request forms, correspondence approving and disapproving postpartum tubal ligations, and related documents for the North State and Sacramento area hospitals.

Dignity Health filed one or more substantive declarations from: 1) Chamorro; 2) Michael Cox, vice-president of Mission Integration at the Sacramento area hospitals who reviewed and, in concert with others, granted or denied requests for postpartum tubal ligations to be performed at the Sacramento area hospitals; 3) Dr. De Soto; 4) Elizabeth Keith, Dignity Health's executive

vice-president for Sponsorship and Mission Integration; 5) Sister O'Keeffe; 5) Dr. Todd Strumwasser, president of the Northern California division of CommonSpirit Health, the parent corporation of Dignity Health; and 6) Dr. Van Kirk.

Dignity Health also filed excerpts from the depositions of: 1) Chamorro; 2) Mr. Cox; 3) Dr. De Soto; 4) Dr. Jackson; 5) Ms. Magee; 6) Sister O'Keeffe; 7) Dr. Reyes; and 8) Dr. Van Kirk.

Dignity Health also filed numerous other exhibits, including: 1) documents regarding the California Attorney General's approval of the Ministry Alignment Agreement between Dignity Health and Catholic Health Initiatives; 2) legal, historical, religious, public relations and corporate documents pertaining to Dignity Health, its hospitals, and its predecessors; 3) the ERDs; 4) the sterilization policies for each of the six North State and Sacramento area hospitals: 5) medical journal and Internet articles and excerpts from a book about tubal ligations; 6) legislative history of section 1258; 7) petitioners' discovery responses; 8) documents about PRH; 9) documents by and about the ACLU; 10) a draft of Dr. Jackson's expert report; 11) a petition to UCSF leaders opposing UCSF affiliation with Dignity Health; 12) documents produced during discovery, and 13) documents pertaining to *California Medical Association v. Lackner* (1981) 124 Cal. App. 3d 28.

A two-day evidentiary hearing was held on May 17 and 18, 2021. Each side made opening statements. Four witnesses testified at the hearing: 1) Dr. Jackson; 2) Dr. Strumwasser; 3) Sister O'Keeffe; and 4) Dr. De Soto. The parties deferred oral closing arguments until after *Fulton* was decided, which occurred September 20, 2021.

Not surprisingly, given the avalanche of evidentiary materials filed by the parties, the parties also filed numerous objections to each other's evidence. Here are my rulings on those objections.

Petitioners' objection to paragraph 26 of Mr. Strumwasser's declaration is sustained.

Petitioners' objection to paragraph 22 of Sister O'Keeffe's declaration is overruled.

Petitioners' objection to paragraphs 16-17 of Dr. De Soto's declaration is overruled.

All of petitioners' objections to the deposition of Sister O'Keeffe are overruled.

All of petitioners' objections to the deposition of Dr. De Soto are overruled.

All of petitioners' objections to the deposition of Mr. Cox are overruled.

All of petitioners' objections to the deposition of Dr. Reyes are overruled.

All of Dignity Health's objections to Chamorro's declaration (petitioners' exhibit 4) are overruled.

Dignity Health's objections to paragraphs 7-9, 11,12, 16-18, and 24-26 of Dr. Van Kirk's declaration (petitioners' exhibit 7) are overruled.

Dignity Health's objections to paragraphs 15 and 28 of Dr. Van Kirk's declaration (petitioners' exhibit 7) are sustained.

All of Dignity Health's objections to Dr. Dawson's declaration (petitioners' exhibit 12) are overruled.

Dignity Health's objections to paragraphs 9-10, 14-30, 32, 36-39, and 69-70 of Dr. Jackson's expert report are overruled.

Dignity Health's objections to paragraphs 11-13, 31, 40-68, and 71-73 of Dr. Jackson's expert report are sustained.

Dignity Health's objections to paragraphs 5 and 12 of the declaration of Chamorro submitted in support of petitioners' opening brief are overruled.

Dignity Health's objections to paragraphs 11 and 14 of the declaration of Chamorro submitted in support of petitioners' opening brief are sustained.

Dignity Health's objections to paragraph 5 (including subparagraphs 5 a-j) and exhibits 2-9 of the declaration of Dr. Jackson are overruled.

Dignity Health's objection to paragraph 5 of the declaration of Ms. Magee is overruled.

Dignity Health's objection to paragraph 6 of the declaration of Ms. Magee is sustained.

III. Dignity Health "Permits Sterilization Operations for Contraceptive Purposes" at its Catholic Hospitals as the Quoted Phrase is Used in Section 1258

Dignity Health renews its argument that the issue of whether any of the postpartum tubal ligations it has allowed to be performed at its Catholic hospitals were performed for "contraceptive purposes" within the meaning of the first clause of section 1258 should be determined from its own viewpoint. Because Dignity Health's intent in allowing postpartum ligations is "never for contraception" (Dignity Health's Exhibit 32 at 43:17 (deposition testimony of Sister O'Keeffe)), Dignity Health contends that section 1258 by, its explicit terms, is inapplicable to it. In rejecting this argument in my order denying Dignity Health's motion for summary judgment, I wrote: "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." I re-affirm that decision.

The text of section 1258 does not state or suggest whether the determination of "contraceptive purposes" is based on an objective or subjective standard, nor does the text state or suggest what considerations are pertinent in making that determination. No published California decision addresses the meaning of the phrase "contraceptive purposes" in section 1258. In the absence of any guidance from the text or case law, I look to the legislative history of section 1258 and statutory interpretation principles. The legislative history and the interpretive

rule to avoid an interpretation that renders the statute nugatory or would frustrate the statute's purpose strongly favor my interpretation of section 1258.

A staff analysis of Senate Bill (SB) 1358, the genesis of section 1258, states that "Sterilization operations fall into two categories—therapeutic (required by some medical condition) and voluntary (for contraceptive purposes)." (Petitioners' Exhibit 1 at Lis-3). This dichotomy between "medically required" and "voluntary" sterilization operations evinces a clear legislative intent that the phrase "sterilization operations for contraceptive purposes" includes all sterilization operations other than those that are medically required.

But whose viewpoint determines whether a sterilization operation is medically required for purposes of the application of section 1258? As a licensing statute administered by an agency with, or capable of, obtaining knowledge of the substantive medical areas covered by the statute, the only reasonable answer is that the relevant viewpoint is generally accepted medical standards. The primary purpose of licensing standards for a health facility is to ensure that the facility adheres to a set of objective standards grounded in medical science, not that the facility adheres to its own subjective standards. Moreover, in common parlance, a medically required operation, as distinct from a voluntary operation, is one which is necessary to treat a disease, injury or other pathology based on generally accepted standards of the medical community. Thus, while I could not locate any authority directly on point, I am convinced that the legislative history's division of the universe of sterilization operations into medically required and voluntary operations imports an objective medical standard into section 1258 and eschews reliance on the subjective views of the health facility. (*See* Transcript of May 17, 2021 Hearing at 75:8-14 (Dr. Jackson's testimony suggesting that a hysterectomy to address pain or bleeding would be a medically required sterilization operation)).

"We must not construe a statute in a manner that renders its provisions essentially nugatory or ineffective, particularly when that interpretation would frustrate the underlying legislative purpose." (*People v. Torres* (2020) 48 Cal. App. 5th 550, 557, *quoting People v. Carter* (1996) 48 Cal. App. 4th 1536, 1540). Yet Dignity Health's proposed interpretation of section 1258 whether a sterilization operation is for "contraceptive purposes" should be determined by the health facility's own intent would do exactly that. Dignity Health's proposed interpretation would allow any health facility to avoid the proscriptions of section 1258 merely by saying that, per its own subjective determination, the facility did not perform sterilization operations for contraceptive purposes. As previously mentioned, licensing statutes do not work that way. Imagine a health facility that employed the 120 point system stating that it did so for other than contraceptive purposes. While this is an admittedly extreme example, it demonstrates that Dignity Health's proposed interpretation that a health facility's subjective intent governs whether a sterilization operation is for "contraceptive purposes" is untenable. The point here is patent: as petitioners have argued, section 1258 would be rendered nugatory and/or its statutory purpose frustrated if the determination of whether a facility allowed "sterilization operations for contraceptive purposes" was determined by the facility's stated intent.

At the July 22, 2019 hearing on Dignity Health's summary judgment motion I stated that Dignity Health's interpretation of how to determine whether a sterilization operation is for "contraceptive purposes" was a "reasonable interpretation but not the best one." I now retract that statement. After having more thoroughly considered the legislative history of section 1258, heard the oral testimony, and read the mountain of materials submitted by the parties about sterilization operations, particularly tubal ligations, I am convinced that the only reasonable interpretation of section 1258 and the only one that is consistent with section 1258's central purpose to bar use of the 120 point system is that the determination whether a sterilization

operation is for "contraceptive purposes" must be based on an objective standard grounded in medical literature.

As explained by Dr. Jackson and not materially disputed by Dignity Health or any of the written or oral evidence, per commonly accepted medical science and widely recognized by the sterilization medical literature, all tubal ligations are for contraceptive purposes. This is because, also as explained by Dr. Jackson, "the only medical purpose of a tubal ligation is to prevent future pregnancy, and thus the medical purpose of a tubal ligation is inherently contraceptive." (Dr. Jackson's Expert Report at paragraph 36; *see also* Dignity Health's Exhibit 25 referring to tubal ligations as "elective sterilization" and the consideration of any medical issues as "medical indications"). Stated differently, in the language of the statute's legislative history, I find that all postpartum tubal ligations are "voluntary" and not "medically required." Accordingly, I conclude that Dignity Health permits postpartum tubal ligations for contraceptive purposes at its Catholic hospitals. Of course, that is only the beginning of the section 1258 inquiry.

IV. As Used in Section 1258, the Phrase "Special Nonmedical Qualifications" Refers to the Socio-Economic Characteristics of the Patients and Excludes Religious Decision-Making by the Health Facility Based on Criteria Other Than Nonmedical Socio-Economic Characteristics

The second interpretative issue of section 1258 is what is meant by the phrase "special nonmedical qualifications." At the outset of the evidentiary hearing, petitioners' counsel stated that the phrase includes all nonmedical factors used to decide whether or not to allow a sterilization operation. Per petitioners' proposed interpretation of section 1258, the word "special" is so unspecial (assuming there is such a word) that it lacks any meaning at all and its sole purpose is to "highlight" that the prohibited factors are nonmedical. (Transcript of May 17, 2021 hearing at 18:3-19).

In their objection petitioners state that I misconstrued their position as to the meaning they ascribe to the word "special." Pointing out that Dignity Health also construed the word "special" in the same way, petitioners contend that "special" qualifies the phrase "nonmedical qualifications" by referring to "any nonmedical qualifications that are imposed on tubal ligations but not on other operations." Petitioners support this position by what they say is the "grammatical structure" of the first sentence of section 1258 where a comma after the word "qualifications" shows that the language following the comma is "descriptive, not restrictive" of the meaning of the word "special."

Petitioners' contention that "special" means "not imposed on other operations" is unpersuasive because it too gives no independent meaning to the word "special.". Even if the word "special" did not appear in section 1258, the statute would already prohibit the consideration of "nonmedical qualifications" that "are not imposed on … other types of operations." Nothing in the legislative history states that the phrase "not imposed on … other types of operations" defines the word "special." If the Legislature intended the meaning that petitioners now ascribe to the word special, the more logical phraseology would have been not to include the word "special" and instead say something like "nonmedical qualifications not imposed on … other types of operations." Moreover, if "special" is identical to "not imposed on … other operations," there would be no need to call out "age, marital status, and number of natural children" as exemplars of "nonmedical qualifications" since the dividing line between permissible and impermissible criteria would be medical/nonmedical rather than special nonmedical/other than nonspecial nonmedical. This is because "age, marital status, and number of natural children" are obviously nonmedical, but not obviously "special nonmedical."

The sole published decision addressing the interpretation of section 1258 or any of the other statutes that include the phrase "special nonmedical qualifications" (Health & Safety Code

1232, 1459 and 32128.19) states, albeit in dicta, that the only prohibited "nonmedical qualifications" are "socio-economic factors." (*Lackner,* 124 Cal. App. 3d at 28). This dicta is important for two related reasons. First, the *Lackner* dicta refutes petitioners' arguments that the word "special" adds or subtracts nothing to the noun "nonmedical qualifications" for which it is an adjective or is merely a repeat of the later phrase "not imposed on … other types of operations." Second, the *Lackner* dicta provides both a reasonable and relatively easy to apply limitation on which "nonmedical qualifications" are permitted and which are prohibited.

While the *Lackner* dicta is brief and not fully developed, as the only published statement on point, the dicta should not be blithely disregarded. (*See, e.g.,* 9 Witkin, *California Procedure* (5th edition March 2020 update) "Appeal" §511 ("To say that dicta are not controlling does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nonetheless be considered highly persuasive"). Not only is there no published authority contrary to the *Lackner* dicta, but for the reasons discussed in this section of the statement of decision, I am persuaded that the *Lackner* dicta is correct, so I choose to follow it. (*Id.* ("while a court is free to disregard dictum that it strongly disapproves, it is quite likely to rely on dictum where no contrary precedent is controlling and where the view [of the dictum] commends itself on principle.")).

Petitioners' proposed interpretations giving no independent meaning to the word "special" that isn't in the statute absent the inclusion of the word "special" run afoul of "the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary. Significance should be given, if possible, to every word of an act. Conversely, a construction that renders a word surplusage should be avoided." (*People v. Arias* (2008) 45 Cal. 4th 169, 180, *partially*

quoting Delaney v. Superior Court (1990) 50 Cal. 3d 785, 798-799 (internal quotation and citation reference omitted)).

As pertains to this case, this point – when possible, every word should be given meaning -- is perhaps best illustrated by a California Supreme Court decision where the primary issue was the meaning of the word "special" in a provision of the California Constitution. (*City and County of San Francisco v. Farrell* (1982) 32 Cal. 3d 47). *Farrell* was a dispute about the phrase "special taxes" in a provision which prohibited cities and counties from imposing "special taxes" absent a two-thirds vote of their electorate. Mr. Farrell, the San Francisco Controller, argued that a particular San Francisco tax was a "special tax" and thus was invalid because it had been imposed without a two-thirds vote of San Franciscans. The California Supreme Court disagreed with Mr. Farrell:

> In construing the words of a statute or constitutional provision … an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning … Farrell's claim that the word "special" as used in section 4 means "additional" or "extra" or "supplemental" effectively reads the word "special" out of the statute … We are asked to read the word "special" out of the phrase "special taxes," in violation of settled rules of construction … Our choice here is not simply between acceptance of one of one of a number of different meanings of an ambiguous word in a statute, but between disregarding the word "special" altogether … or affording it some meaning consistent with the intent … in enacting the provision.

(32 Cal. 3d at 54-57). *Farrell* is a significant authority that casts doubt about petitioners' proposed interpretation of the ambiguous phrase "special nonmedical qualifications" in section 1258.

While *Farrell* persuasively shows that petitioners' proposed interpretations are counter to an important California rule of statutory interpretation, *Farrell* does nothing to support the second aspect of the *Lackner* dicta construing the phrase "special nonmedical qualifications" as "socio-economic factors." For that, let's turn to *Lackner* itself. The full stated rationale for the

Lackner dicta is contained in two sentences and a single law journal citation: "'The nonmedical qualifications' named in the statute age, marital status, number of children unambiguously imply that the evil in mind is the use of socio-economic factors to determine whether or not to permit an individual to be sterilized. (See "Selected 1972 Legislation" (1973) 4 Pac.L.J. 579, 680). No such factors are present here."

Petitioners criticize and seek to distinguish the *Lackner* dicta for its lack of analysis, incorrectly equating "age, marital status, and number of natural children" with "socio-economic factors," misunderstanding of the law journal article it cites, and focusing on a different sterilization "evil" than what section 1258 addresses. Petitioners' efforts to cast aside the *Lackner* dicta are unsuccessful.

While succinct, the *Lackner* dicta is both logical and clear. That others, including the California Legislature when it enacted other statutes at different times and for different purposes than when they enacted section 1258, may have a different understanding of what are or are not "socio-economic factors" does not undermine *Lackner's* statement that "age, marital status, and number of natural children" are "socio-economic factors." Both of the law review articles written shortly before the passage of section 1258 mentioned in the Pacific Law Journal article cited in *Lackner* refer to the use of the 120 point system, or a slight variant of that system recommended by the American College of Obstetricians and Gynecologists (ACOG), as "socio-economic sterilizations." (Forbes, *Voluntary Sterilization of Women As a Right,* 18 De Paul Law Review 560, 563 (1969); Tierney, *Voluntary Sterilization , A Necessary Alternative,* 4 Family Law Quarterly 373, 384, citing the Forbes article)). Thus, far from *Lackner* arbitrarily characterizing "age, marital status, and number of natural children" as "socio-economic factors," *Lackner* was following the lead of journal writers pointing out the very evil, the 120 point system, that section 1258 was enacted to redress.

Nor is there any basis to support petitioners' assertion that the *Lackner* court "misconstrued the Comment" it cited. The Comment makes clear that section 1258 was enacted to ban use of age/number of natural children ratios such as those recommended by ACOG. The *Lackner* court's brief analysis shows that it understood this point.

Lastly, while it is true that coercing uninformed women without consent is a historical evil of 20th century America, petitioners' speculation that the reference to "socio-economic factors" in the *Lackner* dicta focused on that evil rather than the "evil" of disallowing sterilizations to those who knowingly request them is similarly off base. The plain language of the *Lackner* dicta shows that the court was focusing on section 1258, its bar of "nonmedical qualifications," and the "evil" of the use of socio-economic factors in determining whether to allow or disallow sterilization operations.

Without acknowledging that it was doing so, the *Lackner* court invoked another important California statutory interpretation principle known by the Latin phrase "*ejusdem generis*." *Arias, supra,* explicates this principle:

> A second principle of statutory construction explains that, when a particular class of things modifies general words, those general words are construed as applying only to things of the same nature or class as those enumerated. This canon of statutory construction, which in the law is known as *ejusdem generis,* applies whether the specific words follow general words in a statute or vice versa. In either event, the general term or category is restricted to those things that are similar to those which are enumerated specifically … The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.

(45 Cal.4th at 180 (internal quotation marks and citations omitted)).

Much like section 1258, the statutory language at issue in *Arias* was framed in general language followed by the phrase "including, but not limited to" followed by three specific examples. In accordance with *ejusdem generis,* the *Arias* court interpreted the general language

preceding the phrase "including, but not limited to" as restricted to the same category of items as the three specific examples. The California Supreme Court employed the same statutory interpretation analysis in *Kraus v. Trinity Management. Inc.* (2000) 23 Cal. 4th 116, 141, *superseded by statute on a different ground.*

Though the *Lackner* court did not reference the principle of *ejusdem generis,* the court's brief analysis supporting its interpretation of the phrase "special nonmedical qualifications" as "socio-economic factors" is a straight-forward application of that principle in precisely the ways the California Supreme Court did years later in *Arias* and *Kraus*. By its citation to the Pacific Law Journal article summarizing and commenting on section 1258, the *Lackner* court confirmed its analysis by referring to the article's characterization of the factors prohibited by section 1285 as "socio-economic." (Comment, *Miscellaneous; sterilization operations,* 4 Pacific Law Journal 679, 680 (1973)). Petitioners' assertion that "advanced maternal age" is of the same class as "age" for purposes of *ejusdem generis* ignores the fact, as discussed in the next section of this statement, that the evidence established that "advanced maternal age" is a medical consideration and the text of section 1258 unequivocally distinguishes between medical and nonmedical considerations.

While the legislative history of section 1258 does not contain any explicit reference to the meaning of the word "special" as a modifier of the phrase "nonmedical qualifications," it is very telling that the only examples of prohibited "nonmedical qualifications" in the legislative history are age, marital status and number of children, the three factors explicitly called out in the statute. This shows that the three expressly identified "special nonmedical qualifications" are both the primary focus of the statute and the paradigms for what the statute prohibits. Petitioners' argument that the prohibited qualifications should include matters far afield from the socio-

economic factors specified in the statute ignores the sharp focus of the statute, which the legislative history makes plain was to preclude use of the perceived evil of 120 point system.

The sparse references in section's 1258's legislative history to what the statute prohibits strongly support limiting the phrase "special nonmedical qualifications" to factors that are similar to and are of the same character as age, marital status and number of natural children. For example, after stating that the discredited 120 point system considers the patient's age and number of children, a staff analysis says that "SB 1358 would prohibit the imposition of *such non-medical standards for sterilization.*" (Petitioners' Exhibit 1 at Lis-3 (emphasis added)). Similarly, an enrolled bill report by the Department of Consumer Affairs states that "The author's office advises that it [section 1258] results from … a large number of hospitals [that] have been refusing to permit contraceptive sterilization operations because of institutional policies … based upon age and number of children. *The purpose [of section 1258] is to require discontinuance of these practices.*" (Petitioners' Exhibit 1 at PE-6 (emphasis added)).

In sum, key statutory interpretation principles and the legislative history of section 1258 demonstrate the correctness of the *Lackner* dicta. By adopting the *Lackner* dicta's construction of the the phrase "special nonmedical qualifications" to connote patients' "socio-economic factors," it becomes clear that religious decision-making, however labeled or described, such as that done by Dignity Health's Catholic hospitals is not prohibited by section 1258 as long as that religious decision-making is not based on nonmedical socio-economic criteria. Except to the extent that the religious decision-making is based on nonmedical socio-economic criteria, religious decision-making is not fairly encompassed within the statute's prohibitions on consideration of socio-economic factors to permit or disallow sterilization operations. As applied to this case, this means that the decision-making of Dignity Health's Catholic hospitals grounded in the ERDs and the hospitals' sterilization policies is outside the purview of section 1258. Therefore, I reject

petitioners' contention that consideration and implementation of the ERDs and sterilization policies, including the existence of the sterilization review committees and the use of sterilization request forms, are prohibited by section 1258.

A further reason supporting my view that section 1258 does not preclude religious decision-making except for consideration of nonmedical socio-economic factors is that the text of section 1258 provides no clue that it covers religious decision-making. Given California's long history of religious-affiliated hospitals, including hospitals identifying as Catholic, it seems unlikely that the California Legislature would enact a statute that had a significant adverse impact on religious decision-making by hospitals without the Legislature acknowledging that it was doing so.. This is particularly true when one realizes that California's many Catholic hospitals have been bound by ethical directives prohibiting "direct sterilization" since long before the enactment of section 1258. (Dignity Health Exhibit 50).

Not only is the text of section 1258 silent about any effect on religious decision-making, none of the staff analyses of SB 1358 contain any mention of religious decision-making. (Transcript of May 17, 2021 Hearing at 8:26-9:21 (petitioners' counsel acknowledges that there is no mention of religious decision-making in section 1258's legislative history)). The lone mention of religious decision-making in the legislative history materials provided by the parties is a single equivocal sentence in a letter by the Acting Director of Public Health to the author of SB 1358. The last sentence of that letter states: "We are also concerned with the *possible* effect this proposal *might* have on hospitals operated by religious groups." (Petitioners' Exhibit 1 at AP-3 (emphasis added)).

This letter which was not written by a legislator has questionable legislative history value. (*See People v. Tarkington* (2020) 49 Cal. App. 5th 892, 902-907, *review granted and later dismissed by the California Supreme Court* (extensive discussion that letters not written by

legislators are not cognizable legislative history). But even if it did have any legislative history value, the uncertain words "possible" and "might" illustrate that the author of the letter had significant doubts whether section 1258 had anything to do with religious decision-making. In all events, while it is sometimes risky to infer knowledge from inaction, the total silence from the Catholic hospitals and other religious-based hospitals about section 1258 before it was enacted and for many years thereafter is striking and, at a minimum, shows that religious-based hospitals had such insufficient concern that section 1258 applied to their religious decision-making that they felt no need to publicly address section 1258.

Still another reason to adhere to the *Lackner* dicta and to reject petitioners' position that section 1258 prohibits all religious decision-making is the absence of any suggestion, much less contention, by the California Department of Public Health, the California Attorney General or any other California governmental entity or official that section 1258 should be so construed. The California Attorney General's approval of the Ministry Alignment Agreement between Dignity Health and Catholic Health Initiatives and his rejection of the request that postpartum tubal ligations prohibited by the ERDs be allowed at the Catholic hospitals are implicit determinations that the Catholic hospitals' religious decision-making regarding approval and disapproval of postpartum tubal ligations does not violate California law. (Dignity Health's Exhibit 9 at 165:17-24 (California Attorney General requested to require the Catholic hospitals to "expand their health services to include a full range of reproductive health services, including those prohibited by the ERDs")).

Even if I were not persuaded of the correctness of the *Lackner* dicta, I would still hold as a matter of law that religious decision-making not based on nonmedical socio-economic criteria such as the ERDs and the sterilization policies is outside the scope of section 1258's prohibitions. At the very least, the undefined phrase "special nonmedical qualifications" is

susceptible to at least two reasonable interpretations: one which prohibits all religious decision-making in deciding whether to allow sterilization operations and another that prohibits religious decision-making only to the extent that it is based on nonmedical socio-economic factors.

I reject petitioners' contention that the "only reasonable interpretation" of "special nonmedical qualifications" is that the statutory phrase includes religious decision-making. The fact that religious decision-making is not expressly mentioned by section 1258 or its legislative history is not decisive. The absence of any mention of religious decision-making in the statute and legislative provides support for an array of interpretations of section 1258 including that it permits all religious decision-making, permits some religious decision-making (the view I have adopted), and prohibits all religious decision-making.

What is decisive is not the absence of any mention of religious decision-making, but the scope of the undefined statutory phrase "special nonmedical qualifications." At the very least, the statute's text, legislative history, the *Lackner* dicta, and statutory interpretation principles show that phrase can be reasonably interpreted as not covering religious decision-making in any respect or, as I have determined, not covering religious decision-making to the extent that the religious decision-making is not based on nonmedical socio-economic criteria. Per the doctrine of constitutional avoidance, another well-established California statutory interpretation principle, "When faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids *any* doubt about its validity." (*National Asian American Coalition v. Newsom* (2019) 33 Cal. App. 5th 993, 1014, *quoting Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal. 3d 384, 394 (emphasis in original)).

Notwithstanding *North Coast Women's Care, Catholic Charities* and *Minton,* recent United States Supreme Court decisions give ample reason to harbor *significant doubt*, not just

any doubt, that an interpretation of section 1258 barring all religious decision-making regarding approval or disapproval of sterilization operations would be invalidated by the First Amendment. Most noteworthy of these recent decisions are *Fulton, Tandon v. Newsom* (2021) 141 S.Ct. 1294, *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S. Ct. 63, and *Old Lady of Guadalupe School v. Morrissey-Berru* (2020) 140 S.Ct. 2049, all of which were decided after *Minton* and all of which indicate that the First Amendment in now construed, and likely will continue to be construed, to be more protective of religious rights than they were in the cited California cases.

V. Advanced Maternal Age, Parity, Gravidity, and Number of Prior Cesarian Sections Are Medical Considerations and thus are not "Special Nonmedical Qualifications" as that Phrase is Used in Section 1258

I now turn to whether the Catholic hospitals' consideration of advanced maternal age, parity, gravidity, and number of prior cesarian sections falls within section 1258's prohibition on "special nonmedical qualifications." They do not. The evidence establishes that each of those matters are medical terms and/or considerations related to the risks of future pregnancies. (*See, e.g.,* Transcript of May 17, 2021 Hearing at 111:17-112:11, 115:2-8 and 118:14-23(testimony of Dr. Jackson); Transcript of May 18, 2021 Hearing at 67:12-18 (testimony of Dr. De Soto); Dr. Jackson's Expert Report at paragraph 70; Dignity Health's Exhibit 21 ("advancing maternal age is associated with an increased risk of uterine rupture"); Dignity Health's Exhibit 59 at 90:19-91-2 and 115:12-17 (deposition testimony of Dr. Van Kirk); Dignity Health's Exhibits 70-71 and 74-76). As such, they are not "nonmedical qualifications," special or otherwise.

Consideration of advanced maternal age, parity, gravidity, and number of prior cesarian sections are also exempted from the reach of section 1258 by the express language of the first sentence of the second paragraph of that statute which provides that "Nothing in this section shall prohibit requirements relating to the physical … condition of the individual." While

advanced maternal age is related to age, it is a distinct concept from age and is widely regarded as a medical consideration. Similarly, while parity, gravidity and number of prior cesarian sections are related to number of natural children, all three are distinct concepts from the number of natural children and the evidence establishes that each of them are medical concepts that bear on risks of future pregnancies.

In their objection petitioners assert that my order denying Dignity Health's motion for summary judgement stated that section "1258 prohibits consideration of any 'age,' including advanced maternal age." That is not correct. The order refers only to age, not advanced maternal age.

In their objection petitioners argue that "the only reasonable interpretation of Section 1258 is that it permits consideration of a physical characteristic or condition of the person, whether termed medical or not, *only* when the characteristic or condition in question, from an objective, medical perspective, provides a basis for determining that the procedure itself (or the result of the procedure) would present a medical risk to the patient." (Emphasis in original). While the Legislature surely could have drafted a statute that so limited a health facility's consideration of medical criteria and physical condition, the plain text of section 1258 shows that it is not such a statute. The statute contains *no* limitation or restriction on a health facility's consideration of medical criteria and physician condition. Nor is there even a hint in section 1258's legislative history that any limitation or restriction was intended or is implied by the statutory language.

Reduced to its core, petitioners' position regarding advanced maternal age, parity, gravidity, and number of prior cesarian sections is that section 1258 prohibits a health facility from considering risks or complications of future pregnancies and limits consideration of medical criteria solely to a present illness, injury or pathology. But, as I stated in the previous

paragraph, section 1258 contains no such limitation and there is no support for such a limitation in the statute's legislative history.

While it is true that section 1258 applies only to voluntary, as distinct from medically required, sterilizations, the fact that a procedure is not medically required does not make consideration of medical criteria irrelevant or impermissible. Consider for instance a person with mild or moderate sleep apnea. Available options are to do nothing, use a device such as a CPAP or an oral appliance, or a variety of surgeries such as removal of tonsils or throat tissue. In common parlance, as well as medical literature, all of these options are voluntary or elective, as distinct from medically required, yet patients and their health care providers in discussing and choosing among these options often consider an array of medical considerations. This is likely true of all or nearly all voluntary/elective medical procedures.

Section 1258 recognizes that medical criteria and physical condition can be relevant considerations for voluntary sterilizations. Section 1258 only prohibits consideration of "special nonmedical qualifications" for voluntary sterilizations and explicitly allows consideration of "physical condition." While petitioners fervently believe that advanced maternal age, parity, gravidity, and number of prior cesarian sections should never be considered in allowing or disallowing tubal ligations and to do so is bad medical practice, in my view my statutory task goes no farther than determining whether or not advanced maternal age, parity, gravidity, and number of prior cesarian sections are medical considerations. Based on the evidence, I find that they are and thus the consideration of those matters are not prohibited by section 1258.

In a footnote in their objection petitioners argue that the first sentence of the second paragraph of section 1258 allows consideration of "physical condition" only to the situation where the "patient's physical condition was such that performing the procedure was contraindicated." Section 1258 doesn't say that nor does the legislative history.

Petitioners also suggest that, when Dignity Health considers advanced maternal age, parity, gravidity, and number of prior cesarian sections, these criteria are not medical factors because "the admitted evidence [is] that Respondent's Catholic hospitals are not making medical decisions when they decided which patients are permitted to access tubal ligations." I disagree. Based on the evidence, I find that a component of Dignity Health's Catholic hospitals' religious decision-making regarding tubal ligations is medical in nature, which Dignity Health's representatives sometimes refer to as "medical necessity." Although the ultimate decision to allow or disallow a requested tubal ligation is a religious one, the evidence shows that the decision is often informed by medical considerations. In particular, the evidence establishes that, when Dignity Health considers advanced maternal age, parity, gravidity, and number of prior cesarian sections, it does so with the understanding and on the belief that such matters are appropriate medical criteria in evaluating the risks of a patient's future pregnancy.

Though not mentioned at the writ hearing, petitioners contend that there is documentary evidence that Dignity Health's Catholic hospitals consider "young age" and age other than advanced maternal age in making their tubal ligation decisions. I find otherwise. After re-reading the transcript of the hearing and much of the voluminous evidence, I find that petitioners have not satisfied their burden of proof that Dignity Health considers age in any way other than advanced maternal age.

VI. Whether a Physician has Admitting Privileges at Another Health Facility is Not a Socio-Economic Characteristic of a Patient and thus is Not a Prohibited "Special Nonmedical Qualification"

Whether or not a patient's doctor has admitting privileges at another health facility is not a "special nonmedical qualification." Admitting privileges of a patient's doctor at another facility is not a socio-economic characteristic of the patient and thus is outside the meaning of the phrase "special nonmedical qualifications" as construed by the *Lackner* dicta.

VII. Dignity Health's Request for and Consideration of Patients' Insurance Information Violate Section 1258 and are Not Protected by Free Exercise Doctrines

The request forms of both the North State hospitals and the Sacramento area hospitals ask for information about patients' insurance. Those form ask: 1) Type of Insurance; 2) Will patient's insurance coverage permit access to a non-Mercy facility?; and 3) Does [t]he patient's insurance limit access to specific facilities. (Dignity Health's Exhibits 15 and 16). Although the members of the North State hospitals' review committee deny that they have ever approved or denied a postpartum tubal ligation based on a patient's insurance information, they acknowledge that they ask for and consider that information as part of their committee's work. (Transcript of May 18, 2021 Hearing at 14:21-24, 31:10-14, 55:16-18, and 96:17-21). A member of the Sacramento area hospitals review committee testified that on at least one occasion a request for a postpartum tubal ligation was denied based on the patient's insurance. (Petitioners' Exhibit 18 at 74:16-75:18 (deposition testimony of Mr. Cox)). Because a patient's insurance information is both nonmedical and socio-economic, requests for and consideration of that information are prohibited by section 1258.

The evidence established that prohibiting Dignity Health's Catholic hospitals from requesting and considering patients' insurance information would not burden Dignity Health's religious beliefs and practices. Absent any burden on religion, none of the free exercise religion doctrines relied on by Dignity Health apply to its requests for and consideration of patients' insurance information. (*Bronx Household of Faith v. Board of Education of the City of New York* (2d Cir. 2014) 750 F. 3d 184, 199-200 (no free exercise violation when the challenged practice imposes no burden on religion)). The lack of burden on Dignity Health's religious beliefs and practices is made plain by Sister O'Keeffe's testimony:

It's always nice when a patient has insurance, but it's not going to deter them from

> receiving the best care possible at our hospitals. That's why we're a Catholic hospital, and we come to serve those who are poor and terminal … We have patients and families that … come to us that have no health insurance, that have no ability to … have any care outside of the hospital … and that's what Mercy stands for … compassionate care for the most vulnerable … *It's not about … if they have health insurance or don't have health insurance.* We will still be … that center for them to receive care and to receive healing at our facilities.

(Transcript of May 18, 2021 Hearing at 31:21-25 and 48:22-49:7 (emphasis added)). In all events, at no time during this litigation has Dignity Health contended that precluding it from asking for considering patients' insurance information would be a burden on its Catholic hospitals' religious beliefs and practices.

VIII. Petitioners' Medical Critique of Dignity Health's Analysis of Medical Considerations is Not Relevant to Whether Dignity Health Violated Section 1258

Many of petitioners' arguments and much of the evidence they submitted was offered to show that the review committees' consideration of medical issues was not in accordance with good or accepted medical practices. These arguments and evidence are irrelevant because section 1258 is not a standard of care statute, nor does it regulate the physician-patient relationship or mandate that a health facility act in the patient's best interest. (*Compare* Dr. Jackson's Expert Report at paragraph 31 ("in my opinion it is improper for a hospital to set a policy that prohibits postpartum sterilization because doing so intrudes on the physician-patient relationship, prevents the physician from providing the standard of care, and is contrary to the patient's best interest")). Section 1258 does not require or prohibit consideration of any particular medical factor or mandate or bar how any medical factors are to be considered. Rather, section 1258 is far more limited in scope: its sole role is to remove consideration of socio-economic nonmedical factors from a health facility's consideration of whether or not to allow sterilizations operations for contraceptive purposes.

IX. Whether or Not Dignity Health is Correctly Implementing Directive 53 or the Sterilization Policies of its Catholic Hospitals is Not Cognizable By this Court

Largely through Dr. Jackson's oral and written testimony, petitioners also contended that the review committees misapplied the ERDs and sterilization policies, as petitioners understand the ERDs and sterilization policies. This contention, too, is out of bounds in this case. While the ERDs and sterilization policies relate to medical issues, they are religious tracts expressing "theological principles" whose purpose is "to reaffirm ethical standards … that flow from the [Catholic] Church's teaching about the dignity of the human person … [and] to provide authoritative guidance on certain moral issues that face Catholic health care today." (Dignity Health's Exhibit 11, p. 4 (preamble to the 6th edition of the ERDs)).

Because the ERDs and the sterilization policies are religious documents, it is not for petitioners or me to evaluate whether the review committees correctly implemented them. Where, as here, there is no contention that the Catholic hospitals' religious beliefs are insincerely held, the First Amendment forbids this and every other federal or state court from deciding whether the Catholic hospitals correctly implemented the ERDs and sterilization policies. (*See, e.g., Our Lady of Guadalupe School,* 140 S.Ct at 2060, 2063; *Thomas v. Review Board of the Indiana Employment Security Division* (1981) 450 US 707, 715-716).

X. While Dignity Health is the Prevailing Party, That Does Not Mean that it is Entitled to An Award of Any or All of its Statutory Costs

The parties agree, as do I, that the pertinent statutory language regarding the determination of the prevailing party is the lengthy second sentence of CCP 1032(a)(4). That sentence states:

> If any party recovers other than monetary relief and in situations other than as specified [in the previous sentence], the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

The gist of this sentence is that: 1) the trial court needs to determine which party, if any, is the prevailing party, and 2) if a party is determined to be a prevailing party, the trial court has discretion, unconstrained by the general rule that a prevailing party is entitled to recover all of its statutory costs, to determine whether to award any costs to the prevailing party and, if so, how much. (*See, e.g., Friends of Spring Street v. Nevada City* (2019) 33 Cal App. 5th 1092, 1104 *quoting Charton v. Harkey* (2016) 247 Cal. App. 4th 730, 738 (the second sentence of CCP 1032(a)(4) "operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right"); *Texas Commerce Bank v. Garamendi* (1994) 28 Cal. App. 4th 1234, 1249 (the second sentence of CCP 1032(a)(4) "permits the ruling the trial court made in this case, ordering each side to pays its own costs, even though appellants were without question the prevailing parties.")).

The determination of prevailing party per the second sentence of subsection 1032(a)(4) is made by "comparing the relief sought with that obtained, along with the parties' litigation objectives as disclosed by their pleadings, briefs, and other such sources." (*Friends of Spring Street, supra, quoting On-Line Power, Inc. v. Mazur* (2007) 149 Cal. App. 4th 1079, 1087). "Thus, the trial court determines whether the party succeeded at a practical level by realizing its litigation objectives and the action yielded the primary relief sought in the case." (*Id.* internal citations omitted). Because Dignity Health largely achieved its litigation objectives and obtained the primary relief it sought, Dignity Health is the prevailing party.

Because Dignity Health has not filed a costs memorandum and the parties have not briefed whether Dignity Health, as prevailing party, should receive all, some or none of it statutory costs, it is premature to address that issue.

XI. Conclusion

For the reasons discussed above, except for requests for and consideration of patients' insurance information, I conclude that Dignity's Health's policies and practices regarding allowing and disallowing postpartum tubal ligations at its Catholic hospitals do not violate Health & Safety Code 1258. Also, for the reasons discussed above, Dignity Health is the prevailing party per CCP 1032(a)(4), but per that subsection I have discretion to disallow some of all of Dignity Health's statutory costs. A judgment will be entered in accordance with this statement of decision.

Dated: April 22, 2022

Harold Kahn
Superior Court Judge

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Rosallie Gumpal, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 25, 2022, I electronically served the attached STATEMENT OF DECISION DENYING IN LARGE PART PETITIONERS' PETITION FOR WRIT OF MANDATE via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: April 25, 2022

T. Michael Yuen, Clerk

By: _____
Rosallie Gumpal, Deputy Clerk