No. _____

In The
Supreme Court of the United States

DIGNITY HEALTH D/B/A MERCY SAN JUAN MEDICAL CENTER,

Petitioner,

v.

EVAN MINTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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Date: March 13, 2020

QUESTIONS PRESENTED

Petitioner Dignity Health d/b/a Mercy San Juan Medical Center ("Mercy") is a Catholic hospital that seeks to further the healing ministry of Jesus by caring for the sick in accordance with Catholic teachings. Mercy provides compassionate care to all patients without discrimination but is prohibited from allowing certain procedures that violate Catholic teachings.

Respondent brought suit against Mercy under California's Unruh Civil Rights Act after Mercy declined to allow an elective sterilization procedure that was prohibited by the Ethical and Religious Directives that govern Catholic health care institutions. The California Court of Appeal rejected Mercy's First Amendment defenses, relying on earlier precedent purporting to apply this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

The questions presented are:

(1) Does the Free Exercise Clause of the First Amendment bar a state-law claim that seeks to compel a religiously affiliated hospital to allow medical procedures that violate its longstanding, deeply held religious beliefs?

(2) Do the First Amendment's free expression and free association guarantees bar a state-law claim that seeks to compel a religiously affiliated hospital to allow—and thereby endorse and be associated with—medical procedures that violate its longstanding, deeply held religious beliefs?

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Dignity Health d/b/a Mercy San Juan Medical Center was the defendant in the superior court and respondent in the California Court of Appeal.

Respondent Evan Minton was the plaintiff in the superior court and appellant in the California Court of Appeal.

Pursuant to Rule 14(b)(iii), Petitioner is not aware of any "directly related" cases in state or federal courts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Dignity Health d/b/a Mercy San Juan Medical Center certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock. CommonSpirit Health, a Colorado nonprofit corporation, is the sole member of Dignity Health.

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INTRODUCTION

This case poses a profound threat to faith-based health care institutions' ability to advance their healing ministries consistent with the teachings of their faith. Petitioner Dignity Health d/b/a Mercy San Juan Medical Center ("Mercy") is a Catholic hospital that seeks to further the healing ministry of Jesus by caring for the sick in accordance with Catholic teachings. Mercy is committed to serving all who need care and does not discriminate against any category of patients, including transgender individuals. But Mercy does not allow its facilities to be used for a limited number of *procedures*—primarily abortion, sterilization, and euthanasia—that are contrary to the Catholic faith.

Respondent seeks to compel Mercy to allow its facilities to be used for surgical procedures that directly contravene Catholic teachings and doctrines. Respondent is a transgender man (*i.e.*, a biological woman who identifies and lives as a man) who sought to have a hysterectomy performed at Mercy as a treatment for gender dysphoria. The complaint alleges that Mercy cancelled the scheduled procedure after learning the reason why it was being performed.

It is undisputed that allowing this surgery to be performed at Mercy's facilities would have violated the Ethical and Religious Directives for Catholic Health Care Services, which "provide authoritative guidance on certain moral issues that face Catholic health care today." ROA.195.[1] The elective

[1] "ROA" citations refer to the Record on Appeal before the California Court of Appeal.

hysterectomy sought by Respondent was prohibited by the Religious Directives, which do not allow sterilization in the absence of a "present and serious pathology." ROA.218.

Respondent subsequently received the requested surgery three days later at a non-Catholic hospital also owned by Dignity Health but with no religious objections to performing the surgery. Respondent nonetheless brought this suit against Mercy, alleging that Mercy violated California's Unruh Act, which guarantees "full and equal" access to public accommodations regardless of sex, gender, gender identity, or gender expression. Cal. Civ. Code §§51(b), (e)(5). Respondent seeks a declaration that Mercy violated the Unruh Act and a sweeping injunction that would prohibit Mercy and every other Catholic hospital owned by Dignity Health in California from "preventing doctors from performing hysterectomy procedures in its hospitals on the basis of a diagnosis of gender dysphoria." ROA.159.

Mercy argued that Respondent's attempt to coerce it to permit procedures contrary to its religious beliefs is barred by the First Amendment's protections for the free exercise of religion, free expression, and free association. Yet the Court of Appeal held that the First Amendment poses no obstacle to this suit. App.15. The court invoked earlier precedent holding that because the Unruh Act is a "valid law of general applicability," *any* free exercise challenge to that law is barred by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The court also concluded that Mercy's free expression and free association rights were not

violated because "simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose." App.15-16.

This Court's intervention is imperative. Relying on *Smith*, the California state courts have adopted a categorical rule that the Free Exercise Clause provides *no protection whatsoever* to religious health care providers that are compelled to allow procedures that violate their faith. But regardless of whether *Smith* remains good law—a question this Court will address next Term—nothing in that decision remotely suggests that a state may coerce a *religious institution* into allowing its facilities to be used for activities that run counter to its beliefs. Notwithstanding *Smith*, 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 Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017).

The decision below also flouted this Court's precedent in rejecting Mercy's compelled speech arguments. This Court held just two years ago that "requiring [crisis pregnancy centers] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women from choosing that option—… plainly 'alters the content' of [the clinics'] speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Yet the decision below held there was no First Amendment issue with compelling Mercy to allow elective sterilizations at its facilities even as the Catholic Church teaches that such procedures are

contrary to its faith. Forcing Mercy to allow those procedures to be performed in a Catholic hospital would unquestionably *express the message* that they are consistent with Mercy's healing ministry, thereby altering the content of—and directly undermining—Mercy's own message.

The scope of First Amendment rights for religiously affiliated health care providers is a matter of profound national importance. Notwithstanding the vital care Catholic hospitals provide to poor and marginalized individuals—and notwithstanding that they decline to allow only a handful of procedures, such as abortion, certain sterilizations, and assisted suicide—they have faced repeated attacks on their beliefs and efforts to coerce them into abandoning the tenets of their faith. These attacks on religious health care providers "because of their beliefs," *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring), show no signs of abating and warrant this Court's prompt intervention.

Although the important issues presented by this case warrant certiorari in their own right, the Court should alternatively hold this petition pending its resolution of *Fulton v. City of Philadelphia*, No. 19-123. *Fulton* is likely to address the scope and ongoing validity of *Smith* as well as important questions about the free speech rights of religious institutions. If the Court does not grant certiorari outright, it should hold this petition pending its decision in *Fulton*.

OPINIONS BELOW

The California Supreme Court's order denying Dignity's petition for review is unpublished and is

reproduced at App.19. The decision of the California Court of Appeal is published at 39 Cal. App. 5th 1155 and is reproduced at App.1. The superior court's demurrer orders and judgment are unpublished and are reproduced at App.20-27.

JURISDICTION

The California Supreme Court issued its order denying discretionary review on December 18, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a). Although the Court of Appeal remanded for further proceedings, "the federal issue … has been finally determined by the state courts for purposes of the state litigation," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

California's Unruh Civil Rights Act provides in relevant part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic

> information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code §51(b). The Act further provides: "'Sex' also includes, but is not limited to, a person's gender," and "'[g]ender' means sex, and includes a person's gender identity and gender expression." *Id.* §51(e)(5).

STATEMENT OF THE CASE

A. Mercy, a Catholic Hospital, Refuses to Allow a Medical Procedure that Violates Its Religious Beliefs.

1. The Sisters of Mercy, a congregation of Catholic women religious, arrived in the Sacramento area in 1857 and have been providing health care to the community for more than 100 years to carry out the healing ministry of Jesus. ROA.174-75. The Sisters founded Mercy San Juan Medical Center—a Catholic hospital just outside Sacramento—in 1967 to expand the reach of their health care ministry. *Id.* Today, Mercy is owned by Dignity Health, a nonprofit corporation whose mission is to "further[] the healing ministry of Jesus" by delivering compassionate, high-quality, affordable health services; by serving and advocating for the poor and disenfranchised; and by partnering with others in the community to improve the quality of life. *Id.*

Mercy is listed in the Official Catholic Directory, which establishes it as an official part of the Catholic Church. ROA.189-90; *see Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (discussing Official Catholic Directory).[2] As a Catholic institution, Mercy must comply with the Ethical and Religious Directives for Catholic Health Care Services ("Religious Directives"), which "reaffirm the Church's commitment to health care ministry and the distinctive Catholic identity of the Church's institutional health care services." ROA.194. The Religious Directives specify "the ethical standards of behavior in health care that flow from the Church's teaching about the dignity of the human person," and "provide authoritative guidance on certain moral issues that face Catholic health care today." ROA.195; *see also* ROA.199. All Catholic health care services "must adopt these Directives as policy, require adherence to them," and provide guidance to employees about how to comply with them. ROA.203.

The Directives are clear that Catholic hospitals must provide compassionate care to "those in need of it," especially those "at the margins of our society." ROA.202. Mercy welcomes transgender patients in its facilities every day and offers those patients any procedure or service that is not prohibited by Catholic religious doctrine. Pope Francis has emphasized that individuals who are "convinced they were born in the wrong body deserve the same attentive pastoral care as anyone else." Cindy Wooden, *Gay, transgender*

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[2] The superior court granted Mercy's request to take judicial notice of the Official Catholic Directory and the Religious Directives. *See* ROA.432 (order); App.5 n.2.

people deserve pastoral care, Pope says, Catholic News Service (Oct. 3, 2016), *available at* https://bit.ly/2QaOR07.

Although Mercy provides compassionate care to all *persons* without discrimination, it declines to allow certain *procedures* that violate Catholic teachings to be performed at its facilities. As relevant here, Directive 29 provides that "[a]ll persons served by Catholic health care have the right and duty to protect and preserve their bodily and functional integrity," which may be sacrificed only "to maintain the health or life of the person when no other morally permissible means is available." ROA.211. Directive 53 further provides that "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution." ROA.218. "Procedures that induce sterility" are permissible only when "their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Id.*

For example, Church doctrine would allow the surgical removal of a woman's uterus to address a "pathological condition … (*e.g.*, a hemorrhage which cannot be stopped by other means)," even though "it may be foreseen that permanent sterility will result." Congregation for the Doctrine of the Faith, Responses to Questions Proposed Concerning "Uterine Isolation" and Related Matters (July 31, 1993) (cited in Directive 53 at ROA.218 & ROA.232 n.34), *available at* bit.ly/2vPXCpI. But the doctrine is equally clear that a Catholic hospital may not allow a hysterectomy to be performed where the uterus "does not constitute in

and of itself any present danger to the woman" and "does not pose a pathological problem." *Id.*

2. Respondent's complaint seeks relief against Mercy based on its refusal to allow a medical procedure that violates the Religious Directives to be performed at its facilities. ROA.158-59. Respondent is a transgender man (*i.e.*, a biological woman who has been diagnosed with gender dysphoria and identifies as a man). ROA.151-53. Between 2011 and 2016, Respondent began taking steps to identify and present outwardly as a man, such as obtaining a name change and taking male hormones. ROA.152-53.

In August 2016, Respondent scheduled a hysterectomy to be performed at Mercy. ROA.153. That procedure, which entails removal of the "uterus, fallopian tubes, and ovaries," *id.*, results in permanent, irreversible sterilization. The sole reason alleged in the complaint for obtaining the hysterectomy was "to treat [Respondent's] diagnosis of gender dysphoria." *Id.*

The complaint alleges that Mercy cancelled that procedure after learning Respondent "was a transgender man undergoing the procedure in conjunction with gender transition." ROA.154. Respondent subsequently went to the local media in an effort to pressure Mercy into performing the hysterectomy notwithstanding its religious beliefs. ROA.155. In response, Mercy issued a public statement that read:

> At [Mercy], the services we provide are available to all members of the communities we serve without

> discrimination. … In general, it is our practice not to provide sterilization services at Dignity Health's Catholic facilities in accordance with the [Religious Directives] and the medical staff bylaws. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available. When a service is not offered the patient's physician makes arrangements for the care of his/her patient at a facility that does provide the needed service.

ROA.155.

Respondent's physician and Mercy's president subsequently discussed the possibility of performing the surgery at "Methodist Hospital, a non-Catholic Dignity Health hospital also located in the Sacramento metropolitan area." ROA.156. The physician was able to obtain surgical privileges at Methodist and perform Respondent's hysterectomy on September 2, 2016, just three days after the originally scheduled date. ROA.153.

B. Proceedings Before the Superior Court.

In April 2017, Respondent brought suit against Mercy in California Superior Court. ROA.7. The complaint (as amended) includes a single claim for relief under the Unruh Act, Cal. Civ. Code §51(b). ROA.158. Respondent alleges that Mercy's refusal to perform the hysterectomy constitutes discrimination on the basis of sex—which is defined as including

"gender identity," Cal. Civ. Code §51(e)(5)—and deprived Respondent of "full and equal access to [Mercy's] facilities and services." ROA.158. The complaint acknowledges that Mercy will allow hysterectomies for "other diagnoses," *id.*, but does not allege that Respondent had one of those diagnoses. And nothing in the complaint alleges—nor could it—that Mercy would refuse to allow Respondent to receive any care other than an ethically prohibited sterilization procedure.

Respondent's complaint requests a declaration that "[Mercy's] preventing Mr. Minton's physician from performing his hysterectomy at [Mercy] violated the Unruh Act." ROA.159. Respondent also requests sweeping injunctive relief: an order enjoining Mercy (and Dignity Health) from "(1) discriminating on the basis of gender identity or expression, transgender status, and/or diagnosis of gender dysphoria in the provision of health care services, treatment, and facilities; and (2) preventing doctors from performing hysterectomy procedures in its hospitals on the basis of a diagnosis of gender dysphoria." *Id.* That is, Respondent's requested injunctive relief would categorically prohibit Mercy—and all other Dignity Health Catholic hospitals in California—from declining to allow elective sterilization procedures that violate the Religious Directives. It would also compel Mercy's "employees" and "agents" (*e.g.*, its nurses and technical staff) to participate in such procedures. *Id.*

Mercy filed a demurrer arguing that Respondent's claim failed as a matter of law for several independent reasons. First, Respondent was

not deprived of "full and equal" access to health care because the requested surgery was performed by Respondent's doctor three days later at a non-Catholic hospital owned by Dignity Health. ROA.177-79. Second, Mercy did not intentionally discriminate against Respondent based on transgender status because, consistent with the Religious Directives, Mercy does not perform elective sterilizations on *anyone*, regardless of transgender status. ROA.180-81. And, finally, even if Mercy's conduct were found to violate state law, it would be protected by the First Amendment. The relief sought in Respondent's complaint would violate Mercy's free exercise rights as well as its speech and expression rights because "forcing Mercy to perform prohibited medical procedures contrary to Catholic doctrine would directly interfere with the expression of Catholic health services and severely burden Catholic health care's ability to express its particular message about human dignity." ROA.183.

The superior court sustained Mercy's demurrer. App.21-22. The court held that a three-day delay in receiving the requested surgical procedure did not involve a denial of "full and equal" access to health care under the Unruh Act. *Id.* Because the superior court sustained the demurrer on the ground that Respondent's complaint did not allege a violation of the Unruh Act, it did not reach Mercy's alternative argument that Respondent's suit was foreclosed by the First Amendment.

C. Proceedings on Appeal

The California Court of Appeal reversed. The court first rejected the superior court's holding that a

three-day delay of the requested surgery did not constitute a denial of "full and equal" access to care. The Court of Appeal concluded that Respondent adequately alleged a violation at the moment Mercy "cancelled the scheduled procedure," regardless of any subsequent accommodation. App.12-13. According to the court, the prompt rescheduling of Respondent's surgery at another hospital without religious objections would likely "mitigat[e] plaintiff's damages" but would not "extinguish his cause of action for discrimination." App.2, 13.

The Court of Appeal also rejected Mercy's argument that Respondent failed to plead a claim of intentional discrimination because Mercy's adherence to the Religious Directives was a facially neutral, non-discriminatory reason for its decision. App.9-11. The court concluded that "[d]enying a procedure as treatment for a condition that affects only transgender people supports an inference that [Mercy] discriminated against Minton based on gender identity," and that this issue "is not susceptible to resolution by demurrer." *Id.* at 10-11.

Finally, the Court of Appeal squarely rejected Mercy's argument that the First Amendment foreclosed Respondent's claim. App.14-16. The court relied on *North Coast Women's Care Medical Group, Inc. v. Superior Ct.*, 189 P.3d 959 (2008), which, in turn, cited this Court's decision in *Smith* for the proposition that "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." 189 P.3d at 966. The court

further rejected Mercy's compelled expression and association arguments on the ground that "simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose." App.15-16 (quoting *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 89 (2004)).

Mercy subsequently filed a petition for review in the California Supreme Court, which that court denied on December 18, 2019. App.19.

REASONS FOR GRANTING THE PETITION

The California courts have "decided an important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c)—namely, whether the First Amendment's guarantees of free speech, association, and exercise of religion protect a religiously affiliated hospital from being compelled to allow procedures that violate its longstanding, deeply held religious beliefs.

I. The Court Should Grant Certiorari to Address the First Amendment Rights of Religiously Affiliated Health Care Providers.

A. The California courts seriously erred in categorically rejecting the free exercise claims of religious health care providers.

1. This case represents a profound threat to religious health care providers' ability to carry out their healing ministries in accordance with the

principles of their faith. The relevant facts are not in dispute. Mercy is a Catholic hospital affiliated with the Roman Catholic Church. ROA.189-90. Catholic hospitals must follow the Religious Directives, which specify "the ethical standards of behavior in health care that flow from the Church's teaching," and "provide authoritative guidance on certain moral issues that face Catholic health care today." ROA.195. And the Religious Directives prohibit Catholic hospitals from allowing procedures that will result in permanent sterilization unless needed to treat a "present and serious pathology." ROA.218.

It is undisputed that the sterilization surgery Respondent sought to have performed at Mercy would have violated the Religious Directives. *See* App.26 ("both sides agree that the reason [for denying the surgery] was [Mercy's] interpretation of" the Religious Directives); ROA.100 (Respondent conceding same). Although Respondent correctly acknowledges Mercy's religious beliefs, the complaint nonetheless seeks a decree that would *override* those beliefs and compel Mercy to take actions that violate them. The injunctive relief requested in the complaint would enjoin Mercy from "preventing doctors from performing hysterectomy procedures in its hospitals on the basis of a diagnosis of gender dysphoria." ROA.159. Simply put, the complaint seeks to enjoin Mercy from ensuring that its facilities are used only for procedures that comport with the teachings of its faith.

Respondent's claim poses a direct and substantial threat to, and a severe burden on, Mercy's free exercise of religion. The First Amendment bars

the government from making any law "respecting the establishment of religion[] or prohibiting the free exercise thereof." U.S. Const. amend. I. By its plain terms, the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189 (2012); *see also Burwell v. Hobby Lobby Stores, Inc.*, 537 U.S. 682, 752 (2014) (Ginsburg, J., dissenting) ("The First Amendment's free exercise protections … shelter churches and other nonprofit religion-based organizations."). The Free Exercise Clause reflects "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. St. Nichols Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

Just two years ago, this Court found it so obvious that it could 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." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Any such 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." *Id.* The Court further emphasized the need for a "proper reconciliation" between government protection for the rights of those who may suffer discrimination and the "right of all

persons to exercise fundamental freedoms under the First Amendment." *Id.* at 1723.

The Court's recent decision in *Trinity Lutheran* further underscores the serious free exercise interests at stake here. In *Trinity Lutheran*, the Court rejected the notion that free exercise rights were limited to matters such as "the way [a religion] worships" or its unique "view of the Gospel." 137 S. Ct. at 2022. As the Court explained, the Free Exercise Clause "protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions'" on specific religious practices. *Id.* The Court also expressed grave constitutional concerns about policies that would force a religious entity to "disavow its religious character" in order to participate in public life. *Id.*; *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 relief Respondent seeks here would flout those fundamental free exercise principles. Respondent's complaint puts Mercy to an impossible choice: either allow medical procedures that are prohibited by the tenets of its faith to be performed at its facilities or face liability under California law. As explained in greater detail below, *see infra* Part II, the clear and obvious goal of this suit and many similar actions is to force Mercy and other religious hospitals to do precisely what this Court feared in *Trinity Lutheran*—to "disavow [their] religious character" and to engage with the public only if their practices

and beliefs meet state-approved conditions. 137 S. Ct. at 2022.

2. Notwithstanding the severe burden Respondent's requested relief would impose on Mercy's religious beliefs, the California courts brushed aside any free exercise concerns. The Court of Appeal held that Mercy's free exercise arguments were "soundly rejected" by the California Supreme Court in *North Coast*. App.15. *North Coast*, in turn, cited *Smith* for the proposition that "a religious objector has *no federal constitutional right* to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." 189 P.3d at 966. That is, the California courts have effectively declared that the Free Exercise Clause is *not implicated at all* when a religiously affiliated health care provider is compelled to perform a medical procedure in violation of the principles of its faith.

This Court will be reconsidering *Smith* next Term in *Fulton v. City of Philadelphia*, No. 19-123. But, even to the extent *Smith* remains good law, the California courts' interpretation of that decision is untenable and would render the Free Exercise Clause a dead letter in the context of religiously affiliated health care providers. *Smith* held that religious beliefs protected by the Free Exercise Clause do not exempt an individual from complying with a neutral state law of general applicability that does not target religion. 494 U.S. at 879. But *Smith* noted several times that it was addressing only "individual" rights. *See id.* at 878-79 ("We have never held that an individual's religious beliefs excuse him from

compliance with an otherwise valid law."); *id.* at 879 (noting that free exercise rights do not "relieve an individual of the obligation to comply" with generally applicable law). *Smith* did not purport to address the free exercise rights of religious *institutions*, nor could it because no such claim was before the Court in that case.[3]

Moreover, unlike the California courts, this Court has never treated *Smith* as a categorical rule barring any free exercise claim arising from a generally applicable law. The Court recently reiterated that *Smith* did not hold "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause." *Trinity Lutheran*, 137 S. Ct. at 2021 n.2. Similarly, in *Masterpiece Cakeshop*, the Court noted that the interplay between state anti-discrimination laws and the Free Exercise Clause presents "difficult" and "delicate" questions. 138 S. Ct. at 1723-24. The California courts, however, do not view the question as difficult or delicate at all—they instead construe *Smith* as imposing a *categorical* bar on invoking the Free Exercise Clause as a defense to an Unruh Act claim. *See* App.15; *North Coast*, 189 P.3d at 966.

This Court has declined to apply *Smith* when the government seeks to interfere with church

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[3] Relatedly, *Smith*'s concerns about "permit[ting] every citizen to become a law unto himself," 494 U.S. at 879, are inapposite here. Any concerns about *individuals* being able to obtain religious exemptions from generally applicable *criminal* laws do not extend to civil laws that would compel religious institutions to act contrary to the tents of their faith.

doctrine, teachings, or ministry. In *Smith* itself, the Court cited with approval several prior decisions protecting a church's right to institutional autonomy—*i.e.,* its ability to decide for itself matters of church government, faith, and doctrine without state interference. *See Smith*, 494 U.S. at 877 (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff*, 344 U.S. 94). *Smith* did not question the Court's longstanding holding that federal courts "exercise no jurisdiction[] in a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Milivojevich*, 426 U.S. at 713-14.

Drawing on that line of cases, this Court held in *Hosanna-Tabor* that the Free Exercise Clause bars government interference—even through a neutral law of general applicability—with a church's selection of ministers, which is "an internal church decision that *affects the faith and mission of the church itself*." 565 U.S. at 190 (emphasis added). Even the plaintiff in *Hosanna-Tabor* conceded that "employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances" if, for example, "courts [applied] such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary." *Id.* at 189. If a religious institution has a free exercise right (notwithstanding *Smith*) to choose the *persons* who will advance its ministry, it should follow a fortiori

that it has a similar right to specify the *activities* that are (or are not) consistent with its beliefs and mission.

Smith also declined to apply strict scrutiny because the challenged law there imposed only "incidental" burdens on religion in the course of pursuing the otherwise-valid objective of restricting controlled substances. 494 U.S. at 878. Here, however, the burden on Mercy's religion is anything but incidental. As explained in greater detail below, groups throughout California and the United States—including Respondent's counsel—view Catholic hospitals' religious beliefs as a "threat" to the provision of certain services, and have engaged in a coordinated campaign of litigation, legislation, and public advocacy to pressure those institutions to abandon their beliefs. Forcing religious hospitals such as Mercy to abandon or disregard their beliefs is not just an "incidental" byproduct of a suit that seeks to pursue some other goal—it is the *raison d'etre* of these cases.

3. Although the importance of this issue alone would justify granting certiorari, *see infra* Section II, there is also confusion among the lower courts about how *Smith* applies in cases like this one.

As noted, the California Supreme Court has held that *any* free exercise challenge to an application of the Unruh Act must fail under *Smith* because the Act is a "neutral and valid law of general applicability." *North Coast*, 189 P.3d at 966. But several other courts have correctly recognized that *Smith*'s holding is limited to *individuals* and does not address the free exercise rights of religious *organizations* or *institutions* such as Mercy.

As the D.C. Circuit has explained, even if *Smith* prevents an individual from invoking her religion to avoid compliance with a neutral and generally applicable law, "[i]t does not follow … that *Smith* stands for the proposition that a *church* may never be relieved from such an obligation." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996). The court thus rejected the argument that Title VII need only meet the lower *Smith* standard in order to apply against religious organizations. *Id.* at 461-62; *see also Combs v. Cent. Tex. Ann. Conf. of United Methodist Church*, 173 F.3d 343, 348 (5th Cir. 1999) ("*Smith* only addressed the strand of Free Exercise Clause protection afforded an individual to practice his faith."); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1303-04 (11th Cir. 2000) (same); *Catholic Charities*, 85 P.3d at 99 (Brown, J., dissenting) (noting the "fundamental difference[]" between *Smith* and a situation where a "religious organization" is forced to engage in an activity "despite its theological objections").

Other courts have also held that the First Amendment protects religious organizations from even generally applicable laws of tort, contract, and property when those laws are applied in a way that directly burdens their religious practices. For example, in *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), the Tenth Circuit held that the church autonomy doctrine barred a youth minister's tort claim arising out of remarks made by ministers and parishioners. The court found that the statements at issue were "rooted in religious belief" rather than "purely secular"

purposes. *Id.* at 657. Even if the statements could have been seen by some as "offensive" or "incorrect," they "fall squarely within the areas of church governance and doctrine protected by the First Amendment." *Id.* at 658; *see also Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 333 (4th Cir. 1997) (holding that a church's decisions about "the nature, extent, administration, and termination of a religious ministry fall[] within the ecclesiastical sphere that the First Amendment protects from civil court intervention").

* * *

At bottom, the California state courts view the Free Exercise Clause as a dead letter in Unruh Act claims against health care providers, even when state law is used to coerce religious institutions to act contrary to their deeply held beliefs. Nothing in *Smith* justifies that abdication of a core constitutional protection. Certiorari is warranted for this Court to directly address the application of free exercise principles to religious institutions that provide health care as part of their ministries.

B. Forcing a religious hospital to allow medical procedures that violate its faith constitutes coerced expression and association.

1. The First Amendment problems with this case are by no means limited to the Free Exercise Clause. If Mercy is forced to allow elective sterilization procedures that violate the Religious Directives to be performed at its facilities, this will force Mercy to be associated with such procedures and

will express the message to the public that such procedures are consistent with its religious mission.

There is no question that the Religious Directives Mercy is bound to follow are *expressive* as well as prescriptive. The Directives provide that "[t]he mystery of Christ *casts light on every facet of Catholic health care*," and "Catholic health care *expresses* the healing ministry of Christ." ROA.197, 199 (emphasis added). Each bishop is also instructed to "ensure[] the moral and religious identity of the health care ministry in whatever setting it is carried out in the diocese." ROA.199. In short, Catholic health care is an expression by the Church of its religious beliefs and missions.

This is precisely the sort of situation in which a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *see also Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression."). Respondent's suit would compel Mercy to allow elective sterilization procedures to be performed at its facilities even as the Church teaches that such procedures are contrary to Catholic doctrine regarding "bodily and functional integrity." ROA.211.

If Mercy is forced to allow elective sterilizations notwithstanding the Catholic Church's doctrinal prohibition on such procedures, it would unquestionably impede the Church's ability to communicate the message that such procedures are intrinsically wrong. That was exactly the situation

this Court addressed (and found unconstitutional) in *NIFLA*: "[R]equiring [the clinics] to inform women how they can obtain state-subsidized abortions—at the same time [the clinics] try to dissuade women from choosing that option—… plainly 'alters the content' of [the clinics'] speech." *NIFLA*, 138 S. Ct. at 2371.

Similarly, in *Hurley*, this Court unanimously held that the First Amendment protected the organizers of a parade from being compelled to include groups who wanted to advance a message inconsistent with the organizers' message. 515 U.S. at 572-76. The First Amendment ensures that "the choice of a speaker not to propound a particular point of view" is "beyond the government's power to control." *Id.* at 575. Those principles apply with full force in the context of religious beliefs. Under the proper approach, 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 central to their lives and faiths." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

In short, the relief Respondent seeks would compel Mercy to "contradict [its] most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). Respondent's suit represents an unconstitutional attempt to force Mercy to "be an instrument for fostering public adherence to an ideological point of view [it] find[s] unacceptable." *Id.* (cleaned up).

2. The Court of Appeal nonetheless found no compelled speech or expression in light of California Supreme Court precedent holding that "simple

obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose." App.15-16 (quoting *Catholic Charities*, 85 P.3d at 89). But that reasoning is flawed several times over and would effectively eliminate any First Amendment protections for religious institutions' expressive and associational activities.

First, forcing a Catholic hospital to allow a medical procedure that violates the Religious Directives to be performed at its facility would emphatically "convey … a symbolic message." *Id.* As noted, a core tenet of the Directives is that "Catholic health care expresses the healing ministry of Christ" through everything the institution does. ROA.199. Thus, when a Catholic hospital permits a certain procedure or service, it sends an unambiguous message to the public that the service is consistent with the hospital's mission and ministry. It blinks reality, and disregards the foundational tenets of Catholic health care, to suggest that allowing a procedure contrary to the Church's beliefs would have no "symbolic message."

The California Supreme Court has suggested—with only a "cf." citation to an earlier California case—that forcing a religious institution to provide birth control does not violate the First Amendment because "regulating heath care benefits is not speech" and merely entails "simple obedience" to the law. *Catholic Charities*, 85 P.3d at 89. If that were the law, however, then cases like *NIFLA* would have been decided the other way; under the California Supreme Court's reasoning, *NIFLA* would not have implicated the

crisis pregnancy centers' speech at all because providing a government-drafted notice about the availability of abortion would have merely entailed "obedience" to California state law. As Justice Thomas recently explained, accepting the notion that no First Amendment interests are at stake when a person is merely forced to "comply with [a state's] public-accommodations law" would "justify any law that compelled protected speech." *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in the judgment). This Court "has never accepted" such an argument, *id.*, for good reason.

The California courts have also suggested that there are no free speech concerns when the Unruh Act compels a religious health care provider to violate its faith as long as that organization "remain[s] free to voice … objections, religious or otherwise" to the law at issue. *North Coast*, 189 P.3d at 967; *see also Catholic Charities*, 85 P.3d at 89. Once again, however, that view of the First Amendment proves too much and would justify nearly any restriction on speech. The notion that a speaker can be compelled to voice certain messages as long as it has other outlets for speech merely "begs the core question" because the actual inquiry is whether the *compelled* speech or expression is permissible. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Here, it is not: a state may not "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Calif.*, 475 U.S. 1, 16 (1986) (plurality op.); *see also NIFLA*, 138 S. Ct. at 2371; *Masterpiece Cakeshop*, 138 S. Ct. at 1745

(Thomas, J., concurring in part and concurring in the judgment).

C. There are readily available less restrictive alternatives to forcing religious health care providers to violate their beliefs.

1. The severe burdens that Respondent's suit would impose on Mercy's free exercise, free association, and free expression rights are especially unwarranted because there are a number of less restrictive alternatives that would serve the state's objectives without trampling Mercy's First Amendment rights. The most obvious alternative is for the state—perhaps in coordination with the many organizations advocating on Respondent's behalf—to publicize information about physicians and hospitals willing to perform hysterectomies as treatment for gender dysphoria. *See*, *e.g.*, *NIFLA*, 138 S. Ct. at 2376 (recognizing that a less restrictive alternative to compelled disclosure was for California to "inform the women itself" about abortion availability through "a public-information campaign").

Respondent may argue that this alternative is less efficient than simply requiring Catholic hospitals to allow all requested procedures, even those that violate their beliefs. But the First Amendment has never allowed the government to invoke "efficiency" as the basis for impairing constitutional rights. By "demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*,

487 U.S. 781, 795 (1988)). After all, "the prime objective of the First Amendment is not efficiency," and the government cannot disregard fundamental constitutional rights merely because "the chosen route is easier." *Id.* at 495.

Finally, these less restrictive alternatives would not result in "stigma" or "indignities" for individuals who have to obtain sterilization procedures at non-Catholic hospitals. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727, 1732. The Catholic Church's teachings regarding abortion, contraception, and sterilization are well known and are not new. Just as it does not impose a stigma on anyone when a church declines to perform a wedding ceremony that violates its religious beliefs, *id.* at 1727, any reasonable observer would understand that Mercy's policies regarding sterilization flow from its longstanding, well-publicized religious beliefs rather than an invidious desire to stigmatize or discriminate against a certain class of people.

Consistent with its healing mission, Mercy would allow countless medical treatments or surgeries to be provided to transgender individuals. *See id.* at 1736 (Gorsuch, J., concurring) (noting that "it was the kind of cake, not the kind of customer, that mattered to the bakers"). But Mercy would not allow *anyone*—regardless of how they identify—to use its facilities for elective sterilization procedures that are barred by the Religious Directives. None of this could be construed as Mercy inflicting stigma or indignity rather than simply following the longstanding tenets of its faith.

2. The California courts have suggested that, even if strict scrutiny applied, any free exercise or free

expression claims would fail because there is *always* a compelling interest in "ensuring full and equal access to medical treatment," and there are "no less restrictive means available for the state to achieve that goal." App.15 (citing *North Coast*, 189 P.3d at 968). That reasoning is flatly contrary to this Court's decision in *NIFLA*, which recognized that a state cannot compel health care providers to express or associate with a particular message when the state could provide that message directly. *See* 138 S. Ct. at 2376.

Moreover, the California courts' conclusory suggestion that *every* application of the Unruh Act to a health care provider would survive strict scrutiny flouts general First Amendment standards. Strict scrutiny requires a particularized, "focused," case-by-case analysis of the particular facts and context of a case. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006). This Court has rejected a "categorical" application of strict scrutiny, emphasizing that courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. The California courts' breezy dismissal of the severe burdens on Mercy's free exercise and free expression rights flouts this Court's precedents and would render the First Amendment a dead letter for religious health care providers in the Nation's largest state.

II. This Court's Intervention Is Imperative in Light of Increasing Attacks on Religiously Affiliated Health Care Providers.

This case is unfortunately not an outlier. Across the country, states and individual plaintiffs are increasingly attacking hospitals, physicians, and other medical professionals who decline to perform certain procedures and practices on religious grounds. *See*, *e.g.*, Dep't of Health & Human Serv., *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170, 23175-79 (May 21, 2019) (collecting numerous instances of religious intolerance in health care, citing this case twice).

Like this case, many of those attacks specifically target hospitals or physicians who adhere to religious doctrine regarding the sanctity of life and respect for bodily functional integrity. *See, e.g.*, Complaint, *Knight v. St. Joseph Health Northern California*, No. DR190259 (Cal. Super. Ct. Mar. 21, 2019) (hospital refused to allow hysterectomy as treatment for gender dysphoria); Complaint, *Mahoney v. Centura Health Corp.*, No. 19-cv-02478 (D. Colo. Aug. 30, 2019) (religious hospital disallowed employees from advocating for physician-assisted suicide); Complaint, *Dale-Jablonowski v. Univ. of Cal. Bd. Of Regents*, No. CGC-15-549626 (Cal. Super. Ct. July 7, 2017) (physician declined to participate in suicide of terminally ill cancer patient); *Conforti v. St. Joseph's Healthcare Sys., Inc.*, 2:17-cv-00050 (D. N.J. Jan. 5, 2017) (Catholic hospital refused to perform hysterectomy for gender dysphoria); *ACLU v. Trinity Health Corp.*, 178 F. Supp. 3d 614 (E.D. Mich. 2016)

(network of Catholic hospitals sued for adhering to religious directives prohibiting abortion); *Chamorro v. Dignity Health*, No. CGC-15-549626 (Cal. Super. Ct. Dec. 28, 2015) (Catholic hospital refused to conduct tubal ligation sterilization procedure). In one case, the plaintiff, assisted by the ACLU, bypassed the hospital and physicians altogether and instead sued the U.S. Conference of Catholic Bishops directly for its implementation of and adherence to the Religious Directives regarding abortion. *Means v. U.S. Conf. of Catholic Bishops*, 836 F.3d 643 (6th Cir. 2016).

Moreover, opponents of religious health care—including Respondent's counsel—are running public campaigns against Catholic hospitals based on the so-called "threat" posed by their refusal to allow a handful of procedures that violate their beliefs. *See Health Care Denied*, ACLU, bit.ly/2Stt5GC (attacking Catholic institutions for refusing to allow "a range of reproductive health services, including contraception, sterilization, many infertility treatments, and abortion"). Attacks that deem Catholic hospitals to be a "threat" are especially ironic given that those hospitals—consistent with their healing ministry—seek to distinguish themselves by serving "those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination: the poor; the uninsured and the underinsured; children and the unborn; single parents; the elderly; those with incurable diseases and

chemical dependencies; racial minorities; immigrants and refugees." ROA.202.[4]

Many groups have been quite candid that they are targeting Catholic hospitals "because of their beliefs." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). Those groups have joined together in an attempt to "prevail" over what they call the "undue influence of religion in health care." *See* John Geyman, M.D., *Catholic Hospital Systems: A Growing Threat to Access to Reproductive Services*, Physicians for a Nat'l Health Program (Mar. 24, 2014), bit.ly/31VRtnv. According to the U.S. Conference of Catholic Bishops, these groups are "trying to enforce [their] own orthodoxy on moral issues as they see them. … It's really unfortunate, but they're trying to essentially force Catholic hospitals to not be Catholic anymore." Stephanie Slade, *Why is the A.C.L.U. targeting Catholic Hospitals*, America Mag. (May 31, 2017), bit.ly/39AA5qJ. Similar attacks have been waged on Seventh Day Adventist and Orthodox Jewish groups that refuse to condone or take part in assisted suicide practices. According to the critics, those deeply held beliefs actually entail "barriers to health care" that "do not belong in a democratic and compassionate society such as ours." Claudia Comins,

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[4] Many of the attacks on Catholic hospitals are driven by fear about the prevalence and degree of dependence on such facilities. *See Percentage of Beds in Catholic Hospitals, 2016*, ACLU, bit.ly/37taGy0. But the ACLU's research shows that only 15.9% of beds and 14.2% of hospitals in California are affiliated with the Catholic Church—meaning that more than 80% of hospital beds and facilities are *not* subject to the Religious Directives.

Barriers to Medical Aid in Dying even when it is legal, End of Life Choices California (Sept. 3, 2019), bit.ly/2SucO42.

Similarly, in its amicus brief below, the California Medical Association ("CMA") argued that Mercy "seeks to impose [its] discriminatory practice under the *guise* of a conscience objection." Br. of Amicus Curiae California Medical Association, at 20 (Cal. Ct. App. Apr. 19, 2019) (emphasis added). That is, CMA has characterized the Catholic Church's long-held and widely documented views regarding elective sterilization as a mere "guise" or pretext for discrimination. Such arguments denigrate Catholic hospitals' beliefs by brushing them aside as merely "insubstantial and even insincere." *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

Moreover, although critics frame their attacks on Catholic hospitals as being about "access," suits like this one would serve only to *diminish* the health care services available to the public. If Mercy is found to have engaged in discrimination because it declines to allow certain elective sterilization procedures based on its religious beliefs, the result is not going to be that the Catholic Church changes its views on sterilization and begins allowing those surgeries for gender dysphoria. Instead, the result would be that Mercy stops performing hysterectomies altogether if that is the only way to avoid violating the Religious Directives. The end result of this campaign of coercion and intolerance will be less "access to care," not more.[5]

[5] The ACLU has also threatened to sue the University of California unless it revokes longstanding affiliations with all

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It is an unfortunate reality that nonprofit institutions that provide compassionate care to millions of Americans—especially those at the margins of society—have come under coordinated attack based on their refusal to allow a handful of medical procedures that violate their deeply held religious beliefs. But this disturbing trend shows no signs of abating, and all indications are that it will continue until religious health care institutions have been forced to abandon the beliefs at the core of their mission. The First Amendment's guarantees of free exercise, free expression, and free association exist precisely so that Mercy and other religious hospitals need not be put to that impossible choice. The Court should grant certiorari to reaffirm that religious institutions need not "disavow [their] religious character" as a condition of participating in public life. *Trinity Lutheran*, 137 S. Ct. at 2022.

III. If the Court Does Not Grant Certiorari Outright, It Should Hold this Petition Pending Its Decision in *Fulton v. City of Philadelphia*.

For all the reasons noted above, the Court should grant certiorari to address critical issues of free exercise, free expression, and free association in the specific context of religiously affiliated health care

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Catholic hospitals in California, notwithstanding the fact that doing so would "disrupt[]" services to those who are uninsured, the homeless, children, burn victims, and adolescent behavioral health patients. *See, e.g.*, *Working Group on Comprehensive Access Chair's Report of Findings and Recommendations*, Univ. of California, at 17 (Jan. 28, 2019), bit.ly/2uNQjy9.

providers. At a minimum, however, if the Court does not grant certiorari outright, it should hold this petition pending its decision in *Fulton v. City of Philadelphia*, No. 19-123 (cert. granted Feb. 24, 2020).

In *Fulton*, the City of Philadelphia removed Catholic Social Services ("CSS") from its foster care program because CSS, based on its religious beliefs, refused to provide endorsements for same-sex couples. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 147-51 (3d Cir. 2019). The Third Circuit rejected the plaintiffs' free exercise claim based on *Smith*. The court held that the City "has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation." 922 F.3d at 156. According to the Third Circuit, CSS's free exercise claim "runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements." *Id.* at 159. The Third Circuit also rejected CSS's claim that the City independently violated its First Amendment rights by seeking to compel it to voice certain messages. *Id.* at 160-61. The court reasoned that CSS was merely being required to "abide by public rules of nondiscrimination in the performance of its public function under any foster-care contract." *Id.* at 161.

Fulton implicates several critical legal issues regarding the First Amendment's guarantees of free exercise and free expression. The *Fulton* petition expressly argues that "*Smith* should be reconsidered." Fulton Pet. 18; *see also id.* at i (second question presented). As CSS argues, "surely the Court that

decided *Smith* could not have envisioned that *Smith* would be used to permit Philadelphia to shut down a century-old ministry because the City disagrees with the Archdiocese over marriage." *Id.* at 31-32. "This is precisely the sort of church-state conflict the Free Exercise Clause was designed to prevent." *Id.* at 32. The *Fulton* petition also raises questions of free expression. CSS argues that Philadelphia has effectively compelled it to "endorse same-sex relationships" and that it is being punished because it "does not speak and act as the government prefers." *Id.* at 34-35.

Several of the issues presented in *Fulton* are also implicated here. Most notably, the California state courts have relied heavily—indeed, almost exclusively—on *Smith* in rejecting the free exercise arguments advanced by religious health care providers. As noted, the California Supreme Court has cited *Smith* for the proposition that "a religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs." *North Coast*, 189 P.3d at 966 (emphasis omitted). That holding would obviously be untenable if the Court overrules or narrows the holding of *Smith*.

The Court's resolution of the third question presented in *Fulton* may also affect the analysis of Mercy's free expression rights. If the Court holds that Philadelphia unconstitutionally coerced CSS into endorsing same-sex relationships as a condition of participating in the foster program, then the same could be surely said for Respondent's efforts to compel

Mercy to allow procedures at its facilities that violate the Religious Directives.

CONCLUSION

The Court should grant the petition for certiorari or, alternatively, hold the petition pending the disposition of *Fulton v. City of Philadelphia.*

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