**No. A153662**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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EVAN MINTON,
Plaintiff-Appellant
v.
DIGNITY HEALTH, d/b/a MERCY
SAN JUAN MEDICAL CENTER,
Defendant-Respondent.

---

Appeal from the Superior Court of the State of California
for the County of San Francisco
The Honorable Harold E. Kahn, Judge Presiding
Superior Court Case No. 17-558259

---

# APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT & AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

(*California Rules of Court, Rule 8.208*)

Pursuant to California Rules of Court, Rule 8.208, Amicus Curiae Catholic Medical Association, by and through its undersigned counsel of record, hereby certifies that there are no interested entities or persons to list in this Certificate pursuant to California Rules of Court, Rule 8.208(e)(3).

**Dated**: April 19, 2019

Respectfully submitted,

/s/ Charles S. LiMandri

/s/ John J. Bursch

Counsel for *Amicus Curiae*
Catholic Medical Association

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# APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

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Pursuant to California Rules of Court, Rule 8.200(c), the Catholic Medical Association respectfully requests permission to file the accompanying Amicus Curiae Brief in Support of Respondent, Dignity Health. The Catholic Medical Association is intimately familiar with the issues presented and submits that its Brief will materially assist the Court in resolving this matter.

The Catholic Medical Association is the largest association of Catholic individuals in health care. With over 2,000 physicians and hundreds of allied health members nationwide, the Association and its members seek to uphold the principles of the Catholic faith in

the science and practice of medicine—including the belief that every person's and religious entity's conscience and religious freedoms should be protected. The Association's mission includes defending its members' right to follow their conscience and Catholic teaching in their professional work, while engaging in evidence-based practice and always acting in the patient's best interests.

The Catholic Medical Association submits its proposed Brief to assist this Court in deciding the fundamental questions of wide-ranging significance to Catholic hospitals and medical professionals, as well as all agencies and individuals of faith, raised by the Appellant and Respondent. The Association urges this Court to hold that the ecclesiastical abstention doctrine forecloses judicial inquiry into the Catholic Church's Ethical and Religious Directives for Catholic Health Care Services. Alternatively, the Association asks this Court to affirm the trial court on the merits because (1) federal law preempts Minton's claim under the Unruh Civil Rights Act, (2) Minton fails to state a claim under the Act, and (3) applying the Unruh Act to Dignity Health's action here would violate the United States and California Constitutions and their protection of religiously affiliated healthcare entities.

No party, counsel for a party, or any person or entity other than the Catholic Medical Association and its counsel have made a monetary contribution intended to fund the preparation or submission of the brief, and no party or counsel for a party has

authored this brief in whole or in part.

For these reasons, the Catholic Medical Association respectfully requests that the Court grant it leave to file the accompanying Amicus Curiae Brief that provides additional discussion of the reasons why the trial court's judgment in favor of Respondent should be affirmed.

**Dated**: April 19, 2019

Respectfully submitted,

/s/ *Charles S. LiMandri*

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# AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

The Catholic Medical Association is the largest association of Catholic individuals in health care. With over 2,000 physicians and hundreds of allied health members nationwide, the Association and its members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person's and religious entity's conscience and religious freedoms should be protected. The Association's mission includes defending its members' right to follow their conscience and Catholic teaching in their professional work, while engaging in evidence-based practice and always acting in the patient's best interest. The Association has a profound interest in the issues presented here.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Ethical and Religious Directives for Catholic Health Care Services (the "Directives") are promulgated by the United States Conference of Catholic Bishops to provide a theological basis for healthcare ministry in Catholic facilities around the country. (United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (6th ed. 2018) https://bit.ly/2o20Wq2.) As the Directives explain in their Preamble, "a body of moral principles has emerged that expresses the Church's teaching on medical and moral matters and has proven to be pertinent and applicable to the ever-

changing circumstances of health care and its delivery." (*Id*. at 4.) The Directives are developed in consultation with Catholic bishops, theologians, administrators, physicians, and other healthcare providers.

Directive 5 states that "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel." (*Id*. at 9.) And Directive 53 states "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. 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." (*Id.* at 19.)

The Catholic Church has further explained that a hysterectomy may be performed when necessary to "counter an immediate serious threat to the life or health of the mother." (Congregation for the Doctrine of the Faith, *Responses to Questions Proposed Concerning "Uterine Isolation" and Related Matters* (July 31, 1993) https://bit.ly/2QlFbNx; Ethicists of The National Catholic Bioethics Center, *Commentary on the CDF* Responsum *of December 10, 2018* https://bit.ly/2UIMW7o.) For example, a Catholic hospital could allow a hysterectomy to cure

uterine cancer that endangers a woman's life or health, but it could not perform the procedure for other reasons.

Minton asks this Court to hold Dignity Health liable for adhering to the Directives in its Catholic hospitals. The Court should reject that invitation for multiple reasons. First, the Court should abstain from this dispute under the church-autonomy doctrine, also known as the ecclesiastical abstention doctrine. Such abstention affirms "freedom for religious organizations, an independence from secular control or manipulation, . . . power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." (*Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.* (*Kedroff*) (1952) 344 U.S. 94, 116.) The questions Minton presents are inextricably intertwined with the Catholic Church's tenets for Catholic hospitals, and this Court should not wade into doctrine.

Second, federal law preempts any possible claim under California's Unruh Act. The federal Church Amendment prohibits "any court or any public official or other public authority" to require a healthcare entity to "make its facilities available for the performance of any sterilization procedure . . . if the performance of such procedure . . . in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." (42 U.S.C. § 300a-7(b).) Those are precisely the circumstances present here.

Third, as explained in Dignity Health's brief, Minton fails to state a claim under the Unruh Act. The Directives are a facially neutral religious policy. So when a Catholic hospital in the Dignity Health system fulfilled its role in response to Minton's request, it did not intentionally discriminate or provide any differential treatment based on Minton's gender dysphoria.

Finally, applying the Unruh Act to Dignity Health's action here would violate the United States and California Constitutions. Both documents guarantee a Catholic hospital's right to practice its religious beliefs.

## STATEMENT OF THE CASE AND FACTS

The Catholic Medical Association incorporates by reference the thorough Statement of the Case set forth by Dignity Health.

## ARGUMENT

### I. This Court should not adjudicate Minton's claim because doing so would impermissibly intrude on ecclesiastical matters.

Courts use the church-autonomy principle, or ecclesiastical abstention, when resolving disputes between Church and State under the First Amendment. The U.S. Supreme Court's first opinion addressing a civil court's jurisdiction over matters involving religious organizations was *Watson* v. *Jones* (1871) 80 U.S. 679. The case involved a schism between a local

Presbyterian Church and the national General Assembly regarding slavery and the ownership and use of church property. (*Watson*, 80 U.S. at 684.) The Church resolved the dispute internally through a series of hierarchical ecclesiastical tribunals knows as Church Sessions (the local churches), Presbyteries, Synods, and a General Assembly (the highest governing authority). (*Id.* at 681.)

The Kentucky Court of Appeals overruled a decision of the Presbyterian General Assembly, holding that certain ruling elders of the local church were not elders and did not need to be recognized as such by the congregation. (*Watson*, *supra*, 80 U.S. at 699–700.) The Supreme Court reversed, articulating the rule of law recognized as the basis for church autonomy:

> [W]here a subject-matter of dispute, strictly and purely ecclesiastical in its character, — a matter over which the civil courts exercise no jurisdiction, — 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 . . . [i]t may be said . . . that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it . . . . [*Id.* at 733.]

The U.S. Supreme Court has expanded church autonomy from its original foundation to limit every branch of government. As applied to the judiciary, church autonomy is a lack of subject-matter jurisdiction that prevents courts from resolving disputes

that are strictly ecclesiastical in character. (*Watson*, *supra*, 80 U.S. at 733.) When applied to the legislative and executive branches, church autonomy strikes down laws that unlawfully prohibit or burden the free exercise of religion. (*Kedroff*, *supra*, 344 U.S. at 107.)

Church autonomy now has a carefully defined scope that affects many Free Exercise and Establishment Clause cases. At its core, church autonomy gives religious organizations and denominations the power to decide for themselves—free of state interference—matters of church government as well as those of faith and doctrine. (*Kedroff*, *supra*, 344 U.S. at 116; accord, e.g., *Serbian E. Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696.)

Ecclesiastical abstention ensures that religious organizations can decide matters of faith and doctrine without state interference. (*Kedroff*, 344 U.S. at 116.) Accordingly, a court may hear a suit if it turns on secular standards without reference to religious doctrine, but it may not scrutinize religious doctrine to assess a legal position's merits. (*Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951, 959.)

Here, it cannot be disputed that the Catholic Church's Ethical and Religious Directives state the Church's moral and religious principles on healthcare issues. Indeed, the Directives' Preamble states that their purpose is "to provide *authoritative* guidance on certain moral issues that face Catholic health care

today." (emphasis added.) Yet Minton's lawsuit requires this Court to interpret and evaluate the prudence of the Directives.

For example, Minton argues at length that because a Dignity Health Catholic hospital will provide hysterectomies for other patients but not Minton, Minton is denied "full and equal treatment." (Minton Br. 18.) That position raises several additional questions. Does the Church consider Minton and women with uterine cancer to be similarly situated? Under what circumstances will the Church allow and deny a hysterectomy? What is the Church's view on Dignity Health's decision to allow Minton's physician to perform the procedure at a non-Catholic hospital in Dignity's network? Is the Church's teaching regarding sterilization motivated by gender or gender identity? Or is it motivated by the Church's beliefs and teachings? (See, e.g., Paul VI, Pope, *Humanae Vitae* (Encyclical Letter on the Regulation of Birth) (July 25, 1968) https://bit.ly/1KSrQG2.)

These questions show how the application of the Directives as they relate to Minton's claim is inextricably intertwined with the Catholic Church's religious tenets. And while this Court is certainly competent to address claims of discrimination, it is constitutionally prohibited from determining whether Dignity Health's application of the Directives in a Catholic hospital constitutes discrimination; such a determination necessarily involves inquiry into the Directives and Church doctrine. It is not

the role of the courts—in California or any forum—to mandate the policy and structural reform to Catholic hospitals that Minton seeks. That issue resides with the Catholic Church alone.

The U.S. District Court for the Western District of Michigan reached this very conclusion in an indistinguishable context in *Means v. U.S. Conference of Catholic Bishops* (W.D. Mich. 2015) 2015 WL 3970046, affd. on other grounds (6th Cir. 2016) 836 F.3d 643. There, the plaintiff was about 18 weeks pregnant when she sought medical care at a Catholic hospital. In her negligence action, the plaintiff alleged that the hospital did not discuss with her the option of terminating her pregnancy. The action implicated the Ethical and Religious Directives' prohibition on abortion in Directives 45, 47, and 49, among others. (*Id.*, at *12–13.)

The plaintiff argued that the ecclesiastical abstention doctrine was not implicated because she was not asking the Court to rule on the Directives' validity, only to decide whether the hospital's imposition of the Directives caused her harm. (*Means*, *supra*, 2015 WL 3970046, at *13.) The analysis, she argued, "would be the same whether [the Catholic hospital] imposed the ERDs [the Ethical and Religious Directives] from religious or secular motivations." (*Id.*) The court emphatically rejected that characterization of the issues.

"Plaintiff's claim," the court said, "oversimplifies the text

and theological underpinnings of the [Directives], as well as how the Directives are applied in hospital settings." (*Means*, *supra*, 2015 WL 3970046, at *13.) Assessing the availability of abortions under the Directives "would require a nuanced discussion about how a 'direct abortion' is defined in Catholic doctrine." (*Id.*) As here, such questions "demonstrate[d] how the application of the Directives [is] inextricably intertwined with the Catholic Church's religious tenets." (*Id.*) And the court could not determine whether the "establishment of the [Directives] constitute negligence because it necessarily involves inquiry into the [Directives] themselves, and thus into Church doctrine." (*Id.*) Accordingly, the court dismissed the plaintiff's claim, even though the claim arose outside the context of internal church governance and minister discipline.

The same is true here. Like the Court in *Means*, this Court should not adjudicate Minton's claim against Dignity Health, because to do so would impermissibly intrude on ecclesiastical matters. The court should abstain and dismiss Minton's claims in this case with prejudice.

## II. Federal law preempts Minton's claim.

The federal Church Amendment provides that no "court or any public official or other public authority [may] require" a healthcare entity to "make its facilities available for the perfor-

mance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." (42 U.S.C. § 300a-7(b).) What is more, the Amendment states no court or public official may require a healthcare entity to "provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel." (*Id.*) Even if the entity receives a government grant, contract, loan, or another form of public assistance, it retains its religious liberty rights in the context of abortion and sterilizations. (*Id.*)

Here, Minton is asking this Court to do precisely what § 300a-7 prohibits: forcing a Catholic hospital in the Dignity Health system to perform sterilization procedures contrary to the hospital's religious beliefs. Those beliefs are undisputed, as they are embodied in the Ethical and Religious Directives that the hospital must follow in order to call itself "Catholic." And it cannot be disputed (particularly without getting into the Church's ecclesiastical teachings on the subject, as noted above) that the Directives forbid a Catholic hospital from performing a hysterectomy in the circumstances presented here.

The U.S. Supreme Court has reiterated that the

"Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." (*Arizona v. United States* (2012) 567 U.S. 387, 399 [citing U.S. Const., art. VI, cl. 2].) Federal preemption of state law occurs whenever a federal statute has an express preemption provision, regulates an entire field, or conflicts with a state law. (*Id.*) The third category, conflict with state law, "includes cases where 'compliance with both federal and state regulations is a physical impossibility," and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Id.* at 399–400 [quoting *Fla. Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142–43 and *Hines v. Davidowitz* (1941) 312 U.S. 52, 67]; accord, e.g., *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955; *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1265; *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 934–935.)

Here, Minton is asking this Court to enforce the Unruh Civil Rights Act to compel a Dignity Health Catholic hospital and other California religious entities to perform procedures that violate those entities' religious beliefs. Accordingly, the state statute, if applied as Minton requests, impedes Congress from accomplishing the Church Amendment's objective of protecting

religious healthcare institutions. The conflict could not be clearer: by invoking the Act, Minton is asking this Court to do precisely what the Church Amendment prohibits. This is a second and independent ground to reject Minton's claim before reaching the merits.

## III. Minton fails to state a claim of intentional discrimination under the Unruh Civil Rights Act.

As Dignity Health persuasively explains, the Unruh Act applies only to intentional discrimination. (Dignity Health Br. 21–29.) In fact, the Act expressly exempts facially neutral policies like Dignity Health's standards. (Civ. Code, § 51, subd. (c) [stating that the provision "shall not be construed to confer any right or privilege on a person . . . that is *applicable alike* to persons" regardless of sex, sexual orientation, medical condition, and other classes (emphasis added)].)

The problem with Minton's claim here is that the Ethical and Religious Directives do not intentionally discriminate based on Minton's gender dysphoria or expression. In particular, Directive 53's application does not turn on the gender identity of the patient. "Direct sterilization of either men *or* women, whether permanent or temporary, is not permitted in a Catholic health care institution." (*Ethical and Religious Directives for Catholic Health Care Services*, *supra*, at 19.) The only exception is when such sterilization is necessary to counter an immediate and

serious health threat to the life of the patient.

Here, it does not matter whether Minton is a man or a woman. Nor does it matter whether Minton believes a hysterectomy was necessary or for what reason Minton desired it. Without regard for any of those considerations, the Directives indicate that Minton was not eligible for such a procedure.

It is equally specious to suggest that the Directives themselves somehow differentiate based on sex, sexual orientation, or gender identity or expression. They do not. As stated above (supra at 17), directive 53's prohibition on sterilization applies equally to all patients. And it would be absurd—not to mention an invasion of ecclesiastical authority—to suggest that the Catholic Church was motivated by animus based on sex, sexual orientation, or gender identity or expression in adopting and promulgating Directive 53 or any of the other Directives. Accordingly, Minton's claim under the Unruh Civil Rights Act fails as a matter of law.

## IV. Applying the Unruh Civil Right Act to Dignity Health's action would violate the United States and California Constitutions.

Both the California and United States Constitutions guarantee religious freedom. (Cal. Const., art. I, § 4; U.S. Const., Amend. I.) Dignity Health asserts that forcing a Catholic Hospital to contravene the Directives violates its religious

freedom under any level of scrutiny. (Dignity Health Br. 43-51.) We agree.

The United States Supreme Court implicitly recognized that in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 138 S.Ct. 1719. Though the Court noted that gay persons and same-sex couples are entitled to exercise their freedom "on terms equal to others," *id.* at 1727, it also noted that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." (*Id.*) The First Amendment "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." (*Id.* [quoting *Obergefell v. Hodges* (2015) 135 S.Ct. 2584, 2607].)

Thus, while some states have held that it would violate their law for a place of public accommodation to treat opposite-sex and same-sex couples differently, the Supreme Court said 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. This refusal would be well understood in our constitutional order as an exercise of religion." (*Masterpiece Cakeshop*, *supra*, 138 S.Ct. at 1727 [emphasis added].) And the Court so stated without considering whether the

public-accommodation law is facially neutral, without specifying a level of scrutiny, and without weighing the government interest against the interest of a church and its clergy.

The same reasoning applies here. It should be assumed that a religious hospital that objects to sterilization on religious grounds cannot be compelled to perform the surgery without denying the institution the free exercise of religion. This outcome should be well understood as a constitutional exercise of religion, one that all people can recognize and accept, even Minton's counsel, the ACLU. (See Dignity Health Br. 41 n.43.)

Moreover, it is constitutionally problematic to compel a religious organization to express messages that conflict with the entity's religious beliefs. As Dignity Health persuasively explains, interpreting the Unruh Act to require the hospital to perform medical procedures that Catholic doctrine prohibits would severely burden the Church's ability to express its views. (Dignity Health Br. 52); Cal. Const., art I., § 4; U.S. Const., amend. I.)

And under *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*) (2018) 138 S.Ct. 2361, forcing the hospital to perform medical procedures would be an impermissible content-based regulation of speech. *NIFLA* involved a California statute that required licensed crises pregnancy centers to disseminate a government-drafted notice about how to obtain government-subsidized abortions. The Court concluded that the notice was a

"content-based regulation of speech." (*NIFLA,* 138 S. Ct. at 2371.) "By compelling individuals to speak a particular message, such notices 'alter the content of their speech.'" (*Id.* [cleaned up].) "By requiring [clinics] to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of [the clinics]' speech." (*Id.* [cleaned up].)

Here, Minton would require Catholic hospitals to perform sterilization procedures at the same time those hospitals are trying to avoid engaging in those procedures because of the Church's teachings. Such a requirement alters the content of the expression and impermissibly requires the Catholic hospital to express ideas contrary to its religious beliefs. Accordingly, it would be unconstitutional. Of course, this Court can avoid that constitutional problem by interpreting the Unruh Act as inapplicable to Dignity Health's teachings and practice regarding sterilization in its Catholic hospitals. (See *Jennings v. Rodriguez* (2018) 138 S.Ct. 830, 842 ["When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"].)

## CONCLUSION

The Catholic Medical Association respectfully requests that this Court affirm the trial court's ruling dismissing this case with prejudice.

**Dated**: April 19, 2019

Respectfully submitted,

/s/ *Charles S. LiMandri*

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Century Schoolbook font, including footnotes. The brief contains 3486 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of Microsoft Word, the word processor used to generate this brief.

**Dated**: April 19, 2019

Respectfully submitted,

/s/ *Charles S. LiMandri*

Counsel for *Amicus Curia*e

## CERTIFICATE OF SERVICE

I, Charles S. LiMandri, declare:

I am over the age of 18 years and not a party to this action. My business address is Freedom of Conscience Defense Fund, P.O. Box 9520 Rancho Santa Fe, CA 92067.

On April 19, 2019, I electronically filed the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT & AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT** through TrueFiling with the First District Court of Appeal, Division Four and served via TrueFiling a copy of the foregoing on all parties, including:

| | |
|---|---|
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| Superior Court of California<br>San Francisco County Superior Court<br>400 McAllister St.<br>San Francisco, CA 94102 | *Via U.S. Mail For delivery to the Hon. Harold E. Kahn* |
| Clerk, Supreme Court of California<br>350 McAllister St.<br>San Francisco, CA 94102 | *Electronically served pursuant to* CRC 8.212(c) |

I certify that service on the San Francisco County Superior Court was accomplished electronically via One Legal on April 19, 2019.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct.

Executed on April 19, 2019, at Rancho Santa Fe, California.

/s/ *Charles S. LiMandri*

Counsel for *Amicus Curiae*