

A153662

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

EVAN MINTON,

Plaintiff-Appellant,

vs.

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
AND PROPOSED BRIEF OF AMICI CURIAE NATIONAL
CENTER FOR LESBIAN RIGHTS AND TWELVE ADDITIONAL
NONPROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-
APPELLANT EVAN MINTON**

NATIONAL CENTER FOR
LESBIAN RIGHTS
Julie Wilensky (SBN 271765)
Asaf Orr (SBN 261650)
870 Market Suite, Suite 370
San Francisco, CA 94102
(415) 392-6257

Attorneys for Amici Curiae

FULL LIST OF AMICI CURIAE

- National Center for Lesbian Rights
- Bay Area Lawyers for Individual Freedom
- Equality California
- GLBTQ Legal Advocates & Defenders
- Impact Fund
- Lambda Legal Defense and Education Fund, Inc.
- Los Angeles LGBT Center
- National Center for Transgender Equality
- National LGBTQ Task Force
- National Transgender Bar Association
- San Francisco LGBT Center
- Transgender Law Center
- Transgender Legal Defense and Education Fund, Inc.

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR	COURT OF APPEAL CASE NUMBER: A153662
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 271765 NAME: Julie Wilensky FIRM NAME: National Center for Lesbian Rights STREET ADDRESS: 870 Market Street, Suite 370 CITY: San Francisco STATE: CA ZIP CODE: 94102 TELEPHONE NO.: (415) 392-6257 FAX NO.: (415) 392-8442 E-MAIL ADDRESS: jwilensky@nclrights.org ATTORNEY FOR (name): Amici National Center for Lesbian Rights et al.	SUPERIOR COURT CASE NUMBER: 17-558259
APPELLANT/ Evan Minton PETITIONER: RESPONDENT/ Dignity Health, d/b/a Mercy San Juan Medical Center REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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1. This form is being submitted on behalf of the following party (name): Amici National Center for Lesbian Rights et al.
2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 4/18/19

Julie Wilensky _____
 (TYPE OR PRINT NAME)


 (SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION TO FILE AMICI CURIAE BRIEF

TO THE HON. STUART A. POLLACK, PRESIDING JUSTICE OF THE
FIRST DISTRICT COURT OF APPEAL, DIVISION FOUR:

Pursuant to California Rules of Court, Rule 8.200(c), proposed amici curiae National Center for Lesbian Rights, Bay Area Lawyers for Individual Freedom, Equality California, GLBTQ Legal Advocates & Defenders, Impact Fund, Lambda Legal Defense and Education Fund, Inc., Los Angeles LGBT Center, National Center for Transgender Equality, National LGBTQ Task Force, National Transgender Bar Association, San Francisco LGBT Center, Transgender Law Center, and Transgender Legal Defense and Education Fund, Inc. (collectively, “Amici”) respectfully request leave to file the accompanying amicus curiae brief in support of Plaintiff-Appellant Evan Minton.

Amici are nonprofit organizations with an interest in protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people in California and across the nation. The proposed brief will assist the Court in its consideration of this case by providing additional context for the issues presented, including the critical importance of access to healthcare for transgender people, the pervasive nature of discrimination against transgender people in healthcare settings, and the severe harms that transgender people experience when medical care is denied or delayed due to anti-transgender bias.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the proposed amici made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF PROPOSED AMICI

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBTQ people in healthcare settings and represents LGBTQ people in cases relating to access to healthcare in courts throughout the country.

Bay Area Lawyers for Individual Freedom (BALIF) is a bar association of approximately 500 lesbian, gay, bisexual, transgender, queer and intersex (“LGBTQI”) members in the San Francisco Bay Area legal community. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For nearly 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

Founded in 1998, **Equality California (EQCA)** is the nation’s largest statewide lesbian, gay, bisexual, transgender and queer (“LGBTQ”) civil rights organization. Equality California brings the voices of LGBTQ

people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve. Equality California frequently participates in litigation in support of the rights of LGBTQ persons.

Through litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** seeks to eradicate discrimination based on gender identity and expression, HIV status, and sexual orientation in New England and nationally. Based in Boston, GLAD has litigated widely on discrimination against transgender people including in two federal court cases challenging the ban on open transgender military service, numerous health care and insurance coverage cases, as well as in employment, housing, school and prison contexts, in state and federal courts and at administrative agencies.

The **Impact Fund** is a nonprofit foundation that provides funding, training, and advocacy support to public interest litigators across the country. The Impact Fund is a California Legal Services Trust Fund Support Center that assists legal services projects throughout the State of California. The organization also has served as class counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of

fair housing laws. It shares an interest in enforcement of the Unruh Act's guarantee of "full and equal" services for all people in California.

Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal actively litigates and advocates for full, fair, and equal access to healthcare by LGBT people and people living with HIV. (See, e.g., *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145.)

Since 1969 the **Los Angeles LGBT Center (Center)** has cared for, championed, and celebrated LGBT individuals and families in Los Angeles and beyond. Today the Center's more than 700 employees provide services for more LGBT people than any other organization in the world, offering programs, services, and global advocacy that span four broad categories: Health, Social Services and Housing, Culture and Education, and Leadership and Advocacy. The Center welcomes more than 42,000 visits (more than half a million each year) from youth and adults who represent the full diversity of the LGBT community. We are also the nation's largest and most experienced provider of LGBT medical and mental health services, which includes offering specialized transgender medical care. We are an unstoppable force in the fight against bigotry and the struggle to

build a better world; a world in which LGBT people thrive as healthy, equal and complete members of society.

The **National Center for Transgender Equality (NCTE)** is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE works with policymakers and communities around the country to develop fair and effective public policy, including in the area of health care access for transgender people.

The **National LGBTQ Task Force** is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights. Recognizing that LGBTQ persons of color are subject to multifaceted discrimination, the Task Force is also committed to racial justice. To that end, the Task Force hosts the Racial Justice Institute at its annual Creating Change Conference, which equips individuals with skills to advance LGBTQ freedom and equality.

The **National Trans Bar Association (NTBA)** is a nonprofit bar association of trans and gender non-conforming legal professionals and allies committed to promoting equality both in the legal profession and under the law. In addition to promoting the advancement of trans and gender non-conforming individuals within the legal profession, NTBA seeks to educate and advocate for legislative changes that expand formal legal protections and access to legal representation for trans and gender non-conforming people.

The **San Francisco LGBT Center (Center)** connects San Francisco's diverse LGBT community to opportunities, resources and each other to achieve our vision of a stronger, healthier, and more equitable world for LGBT people and our allies. The Center provides free services to community members as well opportunities for LGBT people to connect and organize to secure equal rights for LGBT people.

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming ("TGNC") people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power

within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Transgender Legal Defense and Education Fund, Inc. (TLDEF)

is a national civil rights organization committed to achieving full recognition of transgender persons civil rights in the United States. Since its founding in 2003, TLDEF has represented transgender persons who have experienced health care discrimination through advocacy, administrative appeals, administrative charges of discrimination, and impact litigation.

BRIEF OF AMICI CURIAE

INTRODUCTION

As pled in the First Amended Complaint, Respondent canceled the scheduled hysterectomy of Plaintiff-Appellant Evan Minton at Mercy San Juan Medical Center (MSJMC) because Mr. Minton is transgender. (See 1 C.T. 153-158.) This violates the Unruh Act, whose guarantee of “full and equal” services prohibits unequal treatment in the provision of services. That Mr. Minton later had a hysterectomy at a different hospital across town after a “flurry of advocacy” from Mr. Minton and his doctor is irrelevant to whether Respondent’s cancellation violated the Unruh Act.

Denying a person medical care for an unlawful reason is harmful, even if the person is able to obtain the care elsewhere. In accessing health care, transgender people “are often forced to navigate a system that is resistant at best and at times openly hostile toward transgender people’s needs.”¹ Pervasive discrimination against transgender people in healthcare settings is well-documented. It may include, for example, denying or delaying care because a patient is transgender, refusing to refer to transgender patients by the correct pronouns or name, and subjecting

¹ Seelman et al., *Transgender Noninclusive Healthcare and Delaying Care Because of Fear: Connections to General Health and Mental Health Among Transgender Adults* (Feb. 2017) 2 *Transgender Health* 17, 18 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436369/pdf/trgh.2016.0024.pdf>>.

transgender patients to hostile and humiliating comments by medical providers and staff. Discrimination in healthcare settings due to anti-transgender bias has harmful consequences and deters transgender people from seeking needed medical care.

ARGUMENT

I. ACCESS TO GENDER-AFFIRMING MEDICAL CARE IS CRITICALLY IMPORTANT FOR TRANSGENDER PEOPLE.

A. Many Transgender People Need Gender-Affirming Medical Care to Live Consistent With Their Gender Identity.

Gender identity is a person’s “deeply felt, inherent sense” of being male, female, or another gender.² It is a fundamental aspect of personal identity for all people. Most people have a gender identity that matches the sex they were assumed to be at birth (often referred to as a person’s “assigned sex at birth”). Transgender people, however, have a gender identity that differs from the sex assigned to them at birth. (1 C.T. 151; Am. Psychological Assn., *supra*, at p. 863.) For example, a transgender man, such as Mr. Minton, is someone who was assumed to be female at birth but has a male gender identity. (1 C.T. 150-51; Am. Psychological Assn., *supra*, at p. 863.) Studies estimate there are approximately 1.4 million

² Am. Psychological Assn., *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People* (Dec. 2015) 70 Am. Psychologist 832, 834
<<https://www.apa.org/practice/guidelines/transgender.pdf>>.

transgender adults in the United States,³ and 92,000 transgender adults in California.⁴

Gender dysphoria is a medical diagnosis characterized by the distress that arises from incongruence between a person’s gender identity and the person’s assigned sex at birth.⁵ Gender dysphoria was previously referred to as gender identity disorder, but in 2013, the American Psychiatric Association changed the name and diagnostic criteria to focus “on dysphoria as the clinical problem, not identity per se.”⁶ Gender dysphoria is a serious medical condition: if untreated, it can lead to “clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.”⁷

³ Flores et al., Williams Inst., How Many Adults Identify as Transgender in the United States? (2016) p. 2 <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>>.

⁴ Herman et al., Williams Inst. & UCLA Ctr. on Health Policy Research, Demographic and Health Characteristics of Transgender Adults in California: Findings from the 2015-2016 California Health Interview Survey (Oct. 2017) p. 2 <<http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/transgender-policybrief-oct2017.pdf>>.

⁵ See Am. Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) pp. 451-53.

⁶ *Id.* at p. 451.

⁷ Am. Medical Assn., House of Delegates, Resolution 122 (A-08), Resolution on Removing Financial Barriers to Care for Transgender Patients (2008) p. 2 <<http://www.imatyfa.org/assets/ama122.pdf>>.

Gender dysphoria can “in large part be alleviated through treatment.”⁸ The World Professional Association for Transgender Health (“WPATH”) has promulgated widely accepted standards of care for treating gender dysphoria.⁹ These standards of care, first issued in 1979, are based on the “best available science and expert professional consensus.”¹⁰ They are recognized as the authoritative treatment protocols for gender dysphoria by leading medical and mental health organizations, the California Health and Human Services Agency, and courts.¹¹ While specific treatment needs

⁸ World Professional Assn. for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th Version 2011) p. 5 <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf> (hereafter *Standards of Care*); 2 C.T. 270.

⁹ See World Professional Assn. for Transgender Health, *Standards of Care*, *supra*, at p. 1; 2 C.T. 266.

¹⁰ *Ibid.*

¹¹ See, e.g., Am. Medical Assn., *supra*, at p. 1; Am. Psychological Assn., *Report of the APA Task Force on Gender Identity and Gender Variance* (2008) p. 32 <<https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf>> [“The *Standards of Care* reflects the consensus in expert opinion among professionals in this field on the basis of their collective clinical experience as well as a large body of outcome research”]; Cal. Health & Human Servs. Agency, Dept. of Health Care Servs., *All Plan Letter 16-013, Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* (2016) p. 2 <<https://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf>> [discussing WPATH *Standards of Care*]; see also, e.g., *Edmo v. Idaho Dept. of Corr.* (D.Idaho 2018) 358 F.Supp.3d 1103, p. 1111 [concluding that WPATH *Standards of Care* “are the internationally recognized guidelines for the treatment of individuals with gender dysphoria”]; *Keohane v. Jones* (N.D.Fla. 2018) 328 F.Supp.3d 1288, p. 1294 [noting that WPATH *Standards of Care* “are recognized by

must be determined on an individualized basis, treatments for gender dysphoria can include: mental health services, such as assessment, counseling, and psychotherapy; social transition (living one’s life in accordance with one’s gender identity); hormone treatment; and surgical procedures.¹² Medical and mental health treatment to treat gender dysphoria is known generally as “gender-affirming care” or “transition-related care.” Surgical procedures to treat gender dysphoria are sometimes called “gender-confirmation surgery,” “gender affirming surgery,” or “sex reassignment surgery.” For example, for transgender men, surgical procedures can include chest surgery, such as mastectomy and creation of a

the American Medical Association, American Psychiatric Association, American Psychological Association, and the American College of Obstetricians and Gynecologists” and concluding that they “are authoritative in the treatment of gender dysphoria”]; *Norsworthy v. Beard* (N.D.Cal. 2015) 87 F. Supp.3d 1164, p. 1170, app. disp. and remanded (9th Cir. 2015) 802 F.3d 1090 [finding that WPATH Standards of Care “are recognized as authoritative standards of care by the American Medical Association, the American Psychiatric Association, and the American Psychological Association”].

¹² See World Professional Assn. for Transgender Health, Standards of Care, *supra*, at pp. 9-10; World Professional Assn. for Transgender Health, Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (Dec. 21, 2016) p. 3 <<https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf>> (hereafter Medical Necessity Statement).

male chest, and genital surgery, such as hysterectomy and phalloplasty, as well as other procedures.¹³

B. Gender-Affirming Medical Care, Including Surgical Procedures, Significantly Improves the Health and Wellbeing of Transgender People.

Gender-affirming treatments, including surgical procedures, have “proven to be beneficial and effective” in treating gender dysphoria.¹⁴ The treatment protocols and medical procedures for treating gender dysphoria are not experimental, and “[d]ecades of both clinical experience and medical research show they are essential to achieving well-being” for transgender people.¹⁵ In reviewing research on gender-affirming medical care, the California Department of Insurance cited a “meta-analysis” of 28 studies showing that 78 percent of transgender people had “improved psychological functioning” after receiving treatment.¹⁶

¹³ World Professional Assn. for Transgender Health, Standards of Care, *supra*, at p. 57.

¹⁴ World Professional Assn. for Transgender Health, Medical Necessity Statement, *supra*, at p. 2; see Am. Medical Assn., *supra*, at p. 1.

¹⁵ World Professional Assn. for Transgender Health, Medical Necessity Statement, *supra*, at p. 3; see Am. Medical Assn., *supra*, at p. 1.

¹⁶ Cal. Dept. of Ins., Economic Impact Assessment: Gender Nondiscrimination in Health Insurance (Apr. 13, 2012) p. 11 & fn. 39 <<http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>> [citing Murad et al., *Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-Analysis of Quality of Life and Psychosocial Outcomes* (2010) 72 *Clinical Endocrinology* 214].

In addition, for many transgender people, gender-affirming surgery “plays an undisputed role in contributing toward favorable outcomes.”¹⁷ As WPATH has noted, “[i]n some cases, such surgery is the *only* effective treatment for the condition [of gender dysphoria], and for some people genital surgery is essential and life-saving.”¹⁸ For many transgender people, “relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.”¹⁹ For example, one study showed that transgender men who had undergone chest reconstruction surgery “had significantly higher scores for general health, social functioning, as well as mental health.”²⁰ Another study, cited by the California Department of Insurance, showed that transgender women who had undergone gender-affirming surgeries had mental health scores comparable to other women, while those who could not access surgical care scored much lower on

¹⁷ World Professional Assn. for Transgender Health, Medical Necessity Statement, *supra*, at p. 2; see also, e.g., Beckwith et al., *Factors Associated With Gender-Affirming Surgery and Age of Hormone Therapy Initiation Among Transgender Adults* (2017) 2 *Transgender Health* 156, 156 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5685205/pdf/trgh.2017.0028.pdf>>.

¹⁸ World Professional Assn. for Transgender Health, Medical Necessity Statement, *supra*, at p. 3.

¹⁹ World Professional Assn. for Transgender Health, Standards of Care, *supra*, at pp. 54-55.

²⁰ World Professional Assn. for Transgender Health, Medical Necessity Statement, *supra*, at p. 4 & fn.8 [citing Newfield et al., *Female-to-Male Transgender Quality of Life* (2006) 15 *Quality of Life Research* 1447].

mental health measures.²¹ In reviewing the empirical research, the California Department of Insurance has noted that “[o]ne of the most severe results of denying coverage of treatments to transgender insureds . . . is suicidal ideation and attempts,” while “studies provide overwhelming evidence that removing discriminatory barriers to treatment results in significantly lower suicide rates.”²²

II. CANCELING A SCHEDULED MEDICAL PROCEDURE BECAUSE A PATIENT IS TRANSGENDER VIOLATES THE UNRUH ACT, AND THE DENIAL OF MEDICAL CARE DUE TO ANTI-TRANSGENDER BIAS CAUSES SEVERE HARMS.

Respondent canceled Mr. Minton’s scheduled hysterectomy at Mercy San Juan Medical Center (MSJMC) because Mr. Minton is transgender. (See 1 C.T. 153-158.) The trial court correctly found that Respondent’s “refusal to have the procedure performed at MSJMC was substantially motivated by Mr. Minton’s gender identity,” but erred in concluding that the cancellation did not violate the Unruh Act. (2 C.T. 431.) As set forth below, the Unruh Act’s guarantee of “full and equal” services prohibits *unequal treatment* in the provision of services, regardless of whether a plaintiff ultimately obtains the services sought. That Mr. Minton

²¹ Cal. Dept. of Ins., *supra*, at p. 11 & fn. 40 [citing Ainsworth et al., *Quality of Life of Individuals With and Without Facial Feminization Surgery or Gender Reassignment Surgery* (2010) 19 Quality of Life Research 1019].

²² *Id.* at pp. 9, 10.

later had a hysterectomy at a different hospital across town after a “flurry of advocacy” from Mr. Minton and his doctor – including contacting attorneys, conducting multiple interviews with the media, and securing emergency privileges for Mr. Minton’s doctor (see 1 C.T. 154-57), is irrelevant to whether Respondent’s cancellation violated the Unruh Act.

Respondent contends, contrary to the allegations in the First Amended Complaint, that it “provid[ed] an alternative means for Minton to have *full and equal* access to the procedure,” and that it made an “effort to accommodate Minton by promptly rescheduling the procedure and granting his physician temporary privileges to perform the procedure.” (Resp. Br. at p. 36.) On de novo review of the demurrer, the Court must “assume the truth of all facts properly pleaded in the complaint” (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052), and “a demurrer ‘is simply not the appropriate procedure for determining the truth of disputed facts’” (*id.* at p. 1058, citation omitted). But even if Respondent took some action that facilitated Mr. Minton’s hysterectomy being performed days later at a different hospital, a business cannot escape liability for an Unruh Act violation when it cancels a scheduled medical procedure on a prohibited basis – here, because the patient is transgender – even if it permits or arranges for the patient to receive the procedure later at a different facility.

Discrimination against transgender people in healthcare settings is widespread and subjects transgender people to a range of devastating, lasting harms. Even if a denial of gender-affirming care is followed by arrangements for the patient to obtain the care elsewhere, that cannot erase the stigma of being turned away in the first instance or the practical harms of having to arrange for later care. Such a denial also exacerbates a patient's gender dysphoria and may jeopardize the effectiveness of gender-affirming medical treatment.

A. Canceling a Medical Procedure Because a Patient Is Transgender, Even if the Patient Later Receives the Procedure, Is Not “Full and Equal” Treatment Under the Unruh Act.

The Unruh Act's guarantee of “full and equal” services “clearly is not limited to exclusionary practices.” (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29.) As the California Supreme Court has made clear, “[t]he Legislature's choice of terms evidences concern not only with access to business establishments, but with equal treatment of patrons in all aspects of the business.” (*Ibid.*) In other words, “the Act applies not merely in situations where businesses exclude individuals altogether, but also where treatment is unequal.” (*Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1174 [citing *Koire, supra*, 40 Cal.3d 24, 29]). Put simply, unequal treatment in the provision of services does not satisfy the law's “full and equal” requirement. (Civ. Code, § 51, subd. (b) [requiring

“full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever”].)

Consistent with this principle, courts interpreting the Unruh Act have found actionable claims where a business treats a plaintiff differently based on a protected characteristic, regardless of whether the plaintiff ultimately receives the requested services. For example, a federal court denied a defendant airline’s motion for summary judgment on Unruh Act claims where Black airline passengers alleged that airline employees treated them differently from white passengers. (*Trigueros v. Sw. Airlines* (S.D.Cal. Aug. 30, 2007, Civil No. 05-CV-2256-L(AJB)) 2007 WL 2502151.) Before the flight took off, the plaintiffs were twice removed from the plane and lectured, including for refusing to move a carry-on bag, while a white woman who also refused to move her bag was not admonished. (See *id.* at p. *1.) At issue was not whether the plaintiffs ultimately reached their destination, but whether the plaintiffs received unequal treatment on the flight because of their race. (See *id.* at pp. *3-*8.)

A discriminatory refusal to perform a medical procedure – even if the patient later receives the medical procedure – also violates the Unruh Act’s requirement of equal treatment. In the disability discrimination context, a federal court found that a plaintiff stated a claim under the Americans with Disabilities Act when a doctor refused to perform surgery on the plaintiff’s leg due to the plaintiff’s HIV-positive status. (*Sharrow v.*

Bailey (M.D.Pa. 1995) 910 F.Supp. 187, pp. 191-93.) A different doctor performed the surgery the next day at the same hospital, and the plaintiff “made a full recovery.” (*Id.* at 190.) Nonetheless, the court concluded that “[t]he denial of equal treatment by virtue of plaintiff’s disability violates the ADA.” (*Id.* at 192.)

As Mr. Minton alleged in the First Amended Complaint, Respondent canceled Mr. Minton’s scheduled hysterectomy at MSJMC because Mr. Minton is transgender, although doctors perform the same procedure at MSJMC on patients who are not transgender. (See 1 C.T. 153-158.) That unequal treatment based on sex and gender identity violates the Unruh Act. Nothing in the language of the Unruh Act supports Respondent’s contention that because Mr. Minton ultimately obtained a hysterectomy, there was no Unruh violation. (Resp. Br. at p. 36.) The Unruh Act protects the right to equal treatment in the provision of services, not just the right to obtain a particular service.

Here, Respondents’ cancellation of Mr. Minton’s hysterectomy because Mr. Minton is transgender is the injury. Later events may be relevant to the amount of actual damages, apart from the minimum statutory damages for “every violation of Section 51,” which were established by the Legislature to recognize the “*per se* injurious” nature of “arbitrary sex discrimination by businesses.” (*Koire, supra*, 40 Cal.3d 24, at p. 33; see also *Swanner v. Anchorage Equal Rights Com.* (Alaska 1994)

874 P.2d 274, 283 [in case involving housing discrimination, noting that “[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing”].) To accept Respondent’s argument that a hospital does not violate the Unruh Act by cancelling a procedure on discriminatory grounds simply because: (1) the patient can receive the same procedure at another of Respondent’s hospitals, or (2) “obtain virtually any other procedure at the first hospital” (Resp. Br. at p. 36), would eviscerate the Unruh Act’s protections.

The Unruh Act does not treat hospitals differently from any other kind of business establishment. (See *North Coast Women’s Care Medical Grp., Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1153 [“A medical group providing medical services to the public has been held to be a business establishment for purposes of the Act.”].) To find no Unruh violation because Mr. Minton ultimately received a hysterectomy at a different hospital would allow a landlord to refuse to rent an apartment to a prospective tenant because the tenant is transgender, as long as the landlord would permit the prospective tenant to rent an apartment in another building it owns. This cannot satisfy the “full and equal” requirement (Civ. Code, § 51, subd. (b)), let alone serve the government’s “compelling interest in eradicating discrimination in all forms” (*Koire, supra*, 40 Cal.3d at p. 31 fn. 8, citation omitted).

B. Pervasive Discrimination in Healthcare Subjects Transgender People to Devastating Harms.

Respondent's cancellation of Mr. Minton's hysterectomy at MSJMC is part of a much broader pattern of widespread discrimination against transgender people in health care settings. That discrimination subjects transgender people to severe and lasting harms.

Transgender people "are often forced to navigate a system that is resistant at best and at times openly hostile toward transgender people's needs."²³ In the U.S. Transgender Survey, a national survey of almost 28,000 transgender people, one-third of the respondents in California who saw a health care provider in the past year had "at least one negative experience related to being transgender."²⁴ This included "being refused treatment, verbally harassed, or physically or sexually assaulted, or having

²³ Seelman et al., *supra*, at p. 18.

²⁴ Nat. Ctr. for Transgender Equality, 2015 U.S. Transgender Survey: California State Report (2017) p. 3 <<http://www.transequality.org/sites/default/files/docs/usts/USTSCAStateReport%281017%29.pdf>> (hereafter Cal. State Report). The California data are consistent with national data, which show that 33% of respondents who saw a health care provider in the past year had at least one negative experience related to being transgender, with a higher percentage for transgender men, people with disabilities, and those who identified as American Indian, Black, Middle Eastern, or multiracial. (James et al., Nat. Center for Transgender Equality, 2015 U.S. Transgender Survey (2016) pp. 96-97 <<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>>.)

to teach the provider about transgender people in order to get appropriate care.”²⁵

The discriminatory cancellation of Mr. Minton’s hysterectomy is not an isolated incident. A nationally representative study from the Center for American Progress showed that among transgender respondents who saw a health care provider in the past year, 29% said a provider refused to see them because of their actual or perceived gender identity.²⁶ The stories behind those statistics are disturbing. For example, Human Rights Watch reported an account from a social worker who shared that a transgender child was initially accepted for treatment and then turned away from a religiously affiliated psychiatric practice once the doctor learned the child was transgender.²⁷ As the social worker explained:

They accepted the person at first, but when they found out [the person] was a trans client, the doctor said we don’t see trans clients here. They got in the door, but then got turned away. It often takes months to get an appointment here, and the family felt they had invested a lot of time to get in, and was then turned away.²⁸

²⁵ Nat. Ctr. for Transgender Equality, Cal. State Report, *supra*, at p. 3.

²⁶ Mirza & Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People From Accessing Health Care* (2018) <<https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>>.

²⁷ Human Rights Watch, “You Don’t Want Second Best”: Anti-LGBT Discrimination in US Health Care (2018) p. 19 <https://www.hrw.org/sites/default/files/report_pdf/us_lgbt0718_web.pdf>.

²⁸ *Ibid.*

There are many other examples of denials of care due to anti-transgender bias. For example, a transgender woman reported that when she asked her long-time doctor for help obtaining hormone therapy, the doctor “looked at me, and then she kind of hemmed and hawed . . . and she said, ‘Well, I just don’t believe in that, and I can’t help you with that.’”²⁹ One respondent to a national survey of transgender people reported, “I have been refused emergency room treatment even when delivered to the hospital by ambulance with numerous broken bones and wounds.”³⁰ In a situation similar to what happened to Mr. Minton, Oliver Knight, a transgender man, was told minutes before his scheduled hysterectomy, after several hours of pre-operative preparations, that St. Joseph’s Hospital in Eureka would not allow the procedure to happen because Mr. Knight is transgender.³¹

²⁹ Grimaldi, *It’s ‘Scary,’ But Transgender Patients Are Fighting Trump’s Health-Care Discrimination Agenda*, Rewire.News (Mar. 13, 2018) <<https://rewire.news/article/2018/03/13/scary-transgender-patients-fighting-trumps-health-care-discrimination-agenda/>>.

³⁰ Grant et al., Nat. Ctr. for Transgender Equality & Nat. Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011) p. 73 <https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf>.

³¹ Allday, *Transgender Man Sues Over Eureka Hospital’s Refusal to Perform Hysterectomy*, S.F. Chron. (Mar. 25, 2019) <<https://www.sfchronicle.com/health/article/Transgender-man-sues-over-Eureka-hospital-s-13707502.php>>.

For transgender people who seek out medical care and are turned away, alternative providers or facilities may not be easily accessible.³² Nearly a third of transgender respondents to the Center for American Progress survey said it would be “very difficult” or “not possible” to find the same type of service at a different hospital, health center, or clinic.³³ According to the U.S. Transgender Survey, 29% of respondents seeking transition-related care had to travel 25 miles or more to access that care.³⁴

Even when doctors do not turn them away, transgender people frequently experience a deliberate refusal by providers to refer to them by the correct name and pronouns, which is stigmatizing and can cause serious emotional harm. In the Center for American Progress study, 23% of transgender respondents said a healthcare provider intentionally referred to them by the wrong name or pronouns.³⁵ As the mother of a transgender teenager told Human Rights Watch, “I said these are his name and his pronouns and he was sitting there, and the doctor uses his birth name and pronouns After the doctor left, [my son] cried for a solid ten minutes,

³² Mirza & Rooney, *supra*.

³³ *Ibid.*

³⁴ James et al., *supra*, at p. 99 & fig. 7.7.

³⁵ Mirza & Rooney, *supra*. In addition, 21% of transgender respondents said a doctor or other health care provider used “harsh or abusive” language when treating them, and 29% said they experienced “unwanted physical contact” from a doctor or other health care provider, including fondling, sexual assault, or rape. (*Ibid.*)

and said I don't want to come back here ever again.”³⁶ A respondent to the U.S. Transgender Survey shared, “I was consistently misnamed and misgendered throughout my hospital stay. I passed a kidney stone during that visit. On the standard 1-10 pain scale, that's somewhere around a 9. But not having my identity respected, that hurt far more.”³⁷

Providers' refusal to use a transgender person's name and pronouns can also result in dangerous denials of care. Kyler Prescott, a transgender boy, was admitted to a hospital inpatient psychiatric unit in San Diego because of his suicidal thoughts. (*Prescott v. Rady Children's Hospital-San Diego* (C.D.Cal. 2017) 265 F.Supp.3d 1090, 1096 [citing complaint]). Although hospital staff assured Kyler's mother that Kyler's gender identity would be respected and that staff would refer to Kyler with male gender pronouns, staff repeatedly addressed and referred to Kyler as a girl. Kyler reported that one employee said, “Honey, I would call you he, but you're such a pretty girl.” (*Id.* at 1097 [quoting complaint].) “Despite concerns over Kyler's continuing depression and suicidal thoughts, Kyler's medical providers concluded that he should be discharged early from the hold at [the hospital] because of the staff's conduct.” (*Ibid.* [citing complaint].)

³⁶ Human Rights Watch, *supra*, at p. 20.

³⁷ James et al., *supra*, at p. 96.

Transgender people also experience other forms of discriminatory and humiliating treatment from healthcare providers, including mockery from providers and office staff. Human Rights Watch reported an incident where a transgender woman was being treated for cardiomyopathy, and a nurse “left the room[] and audibly told another nurse to come look at [the patient’s] breasts.”³⁸ Another transgender woman reported hearing nurses’ and office staff’s “giggles” and “snickers” when she began to live openly as a transgender woman.”³⁹

Delays in care also occur due to anti-transgender bias. A transgender man reported that when emergency room personnel found breasts under his clothing, he was left untreated in the emergency room for two hours.⁴⁰ As Human Rights Watch reports, a transgender woman recounted that she had been admitted and then ignored when seeking care at the emergency room of a hospital, and a year later, a transgender male friend had a similar experience at the same hospital.⁴¹

One study showed that transgender people who sought hormone therapy, gender-affirming surgery, or gynecological care were more likely to experience discrimination than those who did not reveal their transgender

³⁸ Human Rights Watch, *supra*, at p. 19.

³⁹ Grimaldi, *supra*.

⁴⁰ Grant et al., *supra*, at p. 73.

⁴¹ Human Rights Watch, *supra*, at p. 19.

status or seek medical intervention for transition-related care.⁴² Another study found that transgender people were concerned that if they disclosed their gender identity, “service quality might be compromised, either through substandard care, problematic notes placed by providers in their medical records, or discriminatory referrals to other medical providers solely on the basis of one’s transgender identity.”⁴³ Although being recognized “as the gender with which they identify is an essential issue for transgender people,” it can be “difficult to balance expressing [one’s] gender identity with the fear of being a target for violence or discrimination in healthcare”⁴⁴

Fear of discrimination deters transgender people from seeking needed medical care in many contexts, including care unrelated to a person’s gender transition as well as gender-affirming care. In the U.S. Transgender Survey, 22% of the respondents in California did not see a doctor in the past year when they needed to because of fear of being

⁴² Seelman et al., *supra*, at p. 18 & fn. 18 [citing Ahern et al., *Discrimination and the Health of Illicit Drug Users* (2007) 88 *Drug & Alcohol Dependence* 188].

⁴³ *Id.* at p. 18 & fn. 16 [citing Sherman et al., *Communication Between VA Providers and Sexual and Gender Minority Veterans: A Pilot Study* (2014) 11 *Psychological Services* 235].

⁴⁴ *Id.* at p. 18 & fn. 14 [citing Levitt & Ippolito, *Being Transgender: The Experience of Transgender Identity Development* (2014) 61 *J. Homosexuality* 1727].

“mistreated as a transgender person.”⁴⁵ As respondent to the U.S.

Transgender Survey described:

Multiple medical professionals have misgendered me, denied to me that I was transgender or tried to persuade me that my trans identity was just a misdiagnosis of something else, have made jokes at my expense in front of me and behind my back, and have made me feel physically unsafe. I often do not seek medical attention when it is needed, because I’m afraid of what harassment or discrimination I may experience in a hospital or clinic.⁴⁶

Such experiences make transgender people who have experienced discrimination or mistreatment in healthcare settings even more likely to delay necessary medical care.⁴⁷ A mother of a teenager reported to Human Rights Watch that her transgender son had not been to the dentist in two years because of fear of discrimination.⁴⁸ A recent study found “a significant association between delaying needed healthcare in the past year because of fear of discrimination and worse general health and mental health (current depression, suicidal ideation, and suicide attempts).”⁴⁹ This is consistent with earlier research about transgender people and the

⁴⁵ Nat. Ctr. for Transgender Equality, California State Report, *supra*, at p. 3.

⁴⁶ James et al., *supra*, at p. 96.

⁴⁷ See Mirza & Rooney, *supra* [noting that LGBTQ people who reported having experienced discrimination in the past year were nearly seven times more likely than LGBTQ people who had not experienced discrimination in the past year to avoid doctor’s offices].

⁴⁸ Human Rights Watch, *supra*, at p. 25.

⁴⁹ Seelman et al., *supra*, at p. 25.

“minority stress” model, in which discrimination and other chronic stressors for transgender and gender non-conforming people are associated with poor mental and physical health outcomes.⁵⁰

In sum, discrimination against transgender people in healthcare settings is pervasive and harmful. The type of discrimination that Mr. Minton experienced – Respondent’s cancellation of Mr. Minton’s scheduled hysterectomy at MSJMC – has well-documented harms. *Sixty percent* of respondents in a national study of transgender and gender non-conforming people who said they had been refused medical care because of anti-transgender bias reported a lifetime suicide attempt, a rate significantly higher than the percentage of respondents as a whole.⁵¹ The examples of discrimination described above demonstrate the range of harms that stem

⁵⁰ See *id.* at pp. 27, 19 [citing studies]; Streed et al., *Association Between Gender Minority Status and Self-Reported Physical and Mental Health in the United States* (2017) 177 JAMA Internal Medicine 1210, 1210-1212; James et al., *supra*, at pp. 105-07 [finding that transgender individuals were nearly eight times more likely than the general population to be experiencing serious psychological distress, and that psychological distress was “associated with a variety of experiences of rejection, discrimination, and violence”]; see also U.S. Dept. of Health & Human Servs., HealthyPeople 2020 <<https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>> [“Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights.”].

⁵¹ Haas et al., UCLA Williams Inst., *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* (2014) p. 12 & tbl. 18, <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>>.

from being refused medical care, including the stigmatizing impact of being turned away and denied care, the practical harms of having to find alternative providers or facilities, and the direct health consequences of not receiving needed care, such as a delay in obtaining care (or not obtaining that care at all).

These harms persist even when a person denied medical care due to anti-transgender bias ultimately obtains the procedure being sought, as Mr. Minton did. First, obtaining treatment later cannot erase the stigmatizing impact and emotional trauma of being denied care in the first instance, or the practical harms of having to arrange for later care. (1 C.T. 154, 157.) Second, while a delay in any kind of needed medical care can have negative consequences, a delay in gender-affirming medical care due to anti-transgender bias exacerbates the gender dysphoria that the medical care is designed to treat. In addition, as the American Medical Association has recognized, delaying treatment for gender dysphoria “can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients’ health”⁵² Finally, a delay in receiving a specific gender-affirming medical procedure can jeopardize a whole course of gender-affirming treatment. When transgender people such as Mr.

⁵² Am. Medical Assn., *supra*, at p. 2.

Minton seek gender-affirming surgical care, they often undergo multiple surgical procedures in sequence. (1 C.T. 154 [describing importance of timing of Mr. Minton’s hysterectomy due to scheduled phalloplasty].)

CONCLUSION

For the reasons above, Amici respectfully request that the Court reverse the trial court’s ruling and overrule the demurrer.

DATED: April 18, 2019

Respectfully submitted,

NATIONAL CENTER FOR
LESBIAN RIGHTS

By: /s/ Julie Wilensky
Julie Wilensky

Attorneys for Amici Curiae

CERTIFICATE OF WORD COUNT

I certify that according to the word count feature of Microsoft Word, this brief contains 5,290 words, exclusive of matters that may be omitted under California Rules of Court, Rule 8.520(c)(3).

DATED: April 18, 2019

Respectfully submitted,

NATIONAL CENTER FOR
LESBIAN RIGHTS

By: /s/ Julie Wilensky
Julie Wilensky

Attorneys for Amici Curiae

PROOF OF SERVICE

I, Desiree Robedeaux, declare as follows:

I am more than 18 years of age and not a party to this action. I am employed in the County of San Francisco, California. My business address is 870 Market Street, Suite 370, San Francisco, California 94102.

On April 18, 2019, I served the following document:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND TWELVE ADDITIONAL NONPROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT EVAN MINTON

BY ELECTRONIC COURT FILING SYSTEM: I submitted the document using the court authorized e-filing service at TrueFiling.com.

BY MAIL: I placed the document in a sealed envelope, postage prepaid for first-class mail, for collection and mailing at my business address. It was deposited with the U.S. Postal Service on the same day during the ordinary course of business.

on the following:

<p>Christine Haskett Lindsey Barnhart Covington & Burling LLP One Front Street San Francisco, CA 94111-5356</p> <p>Elizabeth O. Gill Christine P. Sun ACLU Foundation of Northern California 39 Drumm Street San Francisco, CA 94111</p> <p>Amanda Goad Melissa Goodman ACLU Foundation of Southern California</p>	<p>Attorneys for Plaintiff-Appellant Evan Minton</p>
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<p>1313 West Eight Street Los Angeles, CA 90017</p> <p>David Loy ACLU Foundation of San Diego & Imperial Counties P.O. Box 87131 San Diego, CA 92138-7131</p>	<p><i>By electronic court filing system and U.S. Mail</i></p>
<p>Barry S. Landsberg Harvey L. Rochman Joanna S. McCallum Craig S. Rutenberg Manatt Phelps & Phillips, LLP 11355 West Olympic Boulevard Los Angeles, CA 90064-1614</p> <p>David L. Shapiro Harvard Law School Langdell 336 1563 Massachusetts Ave. Cambridge, MA 02138</p>	<p>Attorneys for Defendant- Respondent Dignity Health</p> <p><i>By electronic court filing system and U.S. Mail</i></p>
<p>Clerk of the First District Court of Appeal, Division Four 350 McAllister Street San Francisco, CA 94102</p>	<p>First District Court of Appeal, Division Four</p> <p><i>Filed electronically pursuant to Rule 8.212(c)</i></p>
<p>Superior Court of California San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102</p>	<p>Superior Court</p> <p><i>Via U.S. Mail for delivery to the Hon. Harold E. Kahn</i></p>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 18, 2019**, in San Francisco, California.

/s/ Desiree Robedeaux
Desiree Robedeaux