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Honorable Justices of the
California Court of Appeal
Fourth Appellate District, Division One
750 B Street, #300
San Diego, CA 92101-8189

Re: ***Opposition to Petition by North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez) -- Case No. D045438***

Dear Justices of the California Court of Appeal:

The writ petition submitted by North Coast Women's Care Medical Group, Inc. ("North Coast"), Christine Z. Brody, M.D. and Douglas K. Fenton, M.D. (collectively "Petitioners")[1] is not only procedurally defective[2], but is premised on a clear misunderstanding of controlling precedent. Petitioners declined to provide certain fertilization procedures to Real party in interest, Guadalupe T. Benitez ("Ms. Benitez"), because of Ms. Benitez's sexual orientation.[3] Even though Petitioners routinely perform these fertilization procedures for their heterosexual patients, Petitioners advised Ms. Benitez that their religious beliefs prohibited them from providing these services to her because of her sexual orientation. Believing she was the victim of sexual orientation discrimination, Ms. Benitez brought this lawsuit alleging violations of California's anti-

[1] Should the Court deem it necessary, Ms. Benitez requests the right to supplement this Preliminary Opposition by filing a full opposition to the Petition before the Court grants an alternative writ.

[2] As fully discussed below, Petitioners failed to serve a copy of the Petition on the California Attorney General as required by California Civil Code § 51.1and the Petition should not have been accepted for filing.

[3] Petitioners now claim that their refusal to provide Ms. Benitez with certain fertility treatments was based on her marital status. The trial court ruled on a motion for summary adjudication that there is an issue of fact as to whether their discrimination was based on sexual orientation or marital status. The outcome of that issue has no relevance to this Petition regarding Petitioners' free exercise defense to the Unruh Act. Petitioners last minute attempt to recast the basis on which they refused to provide Ms. Benitez certain fertility treatments is refuted by their earlier declarations in which they acknowledged that the basis for their actions was her sexual orientation not her marital status. (Pet. Ex. 7 at 97-98.)

discrimination statute (the "Unruh Act"), Civil Code § 51 which prohibits business establishments from discriminating based on sexual orientation and certain other personal characteristics.

This Petition arises from the trial court's decision granting Ms. Benitez's Motion for Summary Adjudication ("MSA") regarding Petitioners' religion-based affirmative defense under the United States and California Constitutions. The trial court did not make new law but simply followed controlling precedent involving almost identical issues. Regarding the Petitioners' claim under the United States Constitution, the trial court followed the general rule set forth in *Employment Division, Ore. Dept. of Human Resources v. Smith* (1990) 494 U.S. 872 that the right of free exercise does not excuse compliance with laws of general application. Turning to the Petitioners' free exercise defense under the California Constitution, Judge Prager applied a strict scrutiny analysis set forth in the California Supreme Court's decision in *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, (2004) 32 Cal. 4th 527, and concluded that the Unruh Act's prohibition against sexual orientation discrimination is narrowly tailored to serve a compelling state interest.

Petitioners contend that the trial court's application of the *Employment Division v. Smith* rule to their free exercise claim under the United States Constitution was incorrect because the Unruh Act substantially burdens their free exercise rights and is not a law of general applicability. Thus they argue that a strict scrutiny analysis was necessary under the federal Constitution. They further assert that the trial court erroneously applied the strict scrutiny test to their free exercise claim under the California Constitution. Controlling case law demonstrates that Petitioners are wrong on both points.

Equally unavailing is Petitioners attempt to manufacture a "legal" conflict between California law and the American Medical Association's ethical guidelines. As discussed below, no such conflict exists. Nor are Petitioners being compelled to perform medical procedures in violation of their religious beliefs. Rather, the trial court correctly ruled that Petitioners may not pick and choose the medical services they will perform based on their patients' sexual orientation. Accordingly, the Petition should be denied.

STANDARD OF REVIEW

The granting of a writ is an extraordinary remedy. (*Lumpoc Unified Sch. Dist. v. Superior Ct.* (1993) 20 Cal.App.4th 1688, 1692.) Wholly apart from the procedural problems posed by the Petition which are discussed below, Petitioners must overcome numerous substantive hurdles in order to establish that it is entitled to review by extraordinary writ. A writ may only issue if Petitioners demonstrate that the trial court abused its discretion in entering judgment. That is, only if the trial court has "exceed[ed]

the bounds of reason" and committed prejudicial legal error. (*State Farm Mut. Auto. Ins. Co. v. Superior Ct.* (1956) 47 Cal.2d 428, 432.) In addition to demonstrating that the trial court abused its discretion, another prerequisite for writ review requires a demonstration that there are unsettled questions of law. (*See* 1 Jon Eisenberg, et al. California Practice Guide: Civil Appeals and Writs at 15:36 (2003).)

As the trial court here did not abuse its discretion and there are no unsettled questions of law, Petitioners fail to meet the standards set for it in *Lumpoc Unified School District* and *State Farm.* Accordingly, the Petition should be denied.

I. PETITIONERS DISREGARD CONTROLLING PRECEDENT UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS.

Petitioners assert that the trial court erred in its analysis under both the United States and the California Constitutions. They claim a strict scrutiny analysis was required under both the federal and state constitutions rather than the more limited standard the trial court applied under the United States Constitution. Under a strict scrutiny analysis, a law that imposes a substantial burden on religious exercise may be enforced only if it furthers a compelling government purpose in a narrowly tailored manner. (*Catholic Charities*, 32 Cal. 4th at 562.)

The trial court properly applied the standard set forth by the United States Supreme Court in *Employment Division v. Smith* which established that an individual's free exercise rights do not excuse compliance with a neutral law of general applicability that does not target religious beliefs or practice. (*Id.* 494 U.S. at 878-79.) Moreover, the trial court determined, in connection with its interpretation of Petitioners' freedom of religion defense under the California Constitution that the Unruh Act's prohibition against sexual orientation discrimination survives a strict scrutiny because the Act serves a compelling interest and is narrowly tailored to achieve that interest.

1. The Trial Court Correctly Held That Under The United States Constitution, Petitioners' Free Exercise Rights Do Not Excuse Compliance With The Unruh Act, A Neutral Law Of General Applicability.

Petitioners' contention that a strict scrutiny analysis is required under the United States Constitution is refuted by the Supreme Court's decision in *Employment Division v. Smith* which declared unequivocally that free exercise rights do not excuse compliance with neutral laws of general applicability. (*Id.* 494 U.S. at 878-79 (holding that state law prohibiting illegal narcotics did not pose an impermissible burden on religion by criminalizing the smoking of peyote); *see also Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520.) An individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to

regulate." *Id.* The *Smith* court expressly rejected the test set forth in *Sherbert* v. *Verner* (1963) 374 U.S. 398 requiring a "compelling" governmental interest to enforce a neutral law that substantially burdens religious practice. In doing so, it stated that requiring such a balancing would "permit the individual to become a law unto himself." (*Employment Division v. Smith,* 494 U.S. at 885.)

Petitioners assert that the Unruh Act is not a neutral law that applies generally to business establishments in California because senior housing is specifically exempted in the Act.[4] However, simply because a law recognizes a legitimate exception does not mean the law itself is not neutral toward religion or is not a law of general application. As the U. S. Supreme Court has made clear, a law's "neutrality" will only be questioned its "object ... is to infringe upon or restrict practices because of their religious motivation. (*Church of Lukumi Babalu Aye,* 508 U.S. at 543.) Similarly, a law's "generality" will only be questioned where it "in a selective manner imposes burdens only on conduct motivated by religious beliefs." *Id.* at 533.

The Unruh Act does not infringe or restrict practices because of their religious motivation. On reviewing the enactment history of the Unruh Act, and confirming the statute's expanded anti discrimination purposes, the California Supreme Court has made clear that targeting particular religious views, practices or groups formed no part of the Legislature's intent. (*See Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 686-87; *In re Cox* (1970) 3 Cal.3d 205, 218.) Nor does it selectively impose a burden only on conduct motivated by religious beliefs. Rather, it generally proscribes particular conduct -- irrespective of the beliefs or purposes that may motivate it in particular instances -- in order to protect third parties from harmful discrimination. Thus, it is a neutral law of generally applicability and Petitioners' religious beliefs do not excuse them from complying with its prohibitions against sexual orientation discrimination.

Petitioners also claim that the act of refusing to provide certain fertility services to Ms. Benitez constituted speech creating a "hybrid right" subject to strict scrutiny.[5] (Pet. at 23-25.) The trial court properly dismissed this argument citing *Catholic Charities*:

> [f]or the purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen a (sic) statement

[4] Petitioners also claim that the act of refusing to provide certain fertility services to Ms. Benitez constituted speech creating a "hybrid right" subject to strict scrutiny. (Pet. at 23-25.)

[5] Petitioners also assert before this court that additional purported constitutional rights are burdened by the enforcement of the Unruh Act namely a right of conscience that is distinct from the First Amendment rights Petitioners actually pleaded (Pet. at 20-23) and a right to choose one's profession. (Pet. at 25-26.) Neither of these purported rights was asserted before the trial court and thus neither is properly before this Court.

> of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." *Id.* at 558-559. Thus requiring compliance with the Act is not speech. (Pet. Ex. 25 at 439).

Additionally Petitioners' attempt to convert their medical treatment or lack thereof into constitutionally protected "speech" would presumably insulate them from any liability for their own malpractice.[6] Thus Petitioners' assertion of a hybrid right is without merit. In any event, Petitioners' argument is unavailing because the trial court applied strict scrutiny in connection with its analysis of Petitioners' defense under the California Constitution.

2. Contrary to Petitioners' Assertion, The Trial Court Correctly Applied a Strict Scrutiny Analysis Under the California Constitution.

As the trial court observed, proper standard of review for challenges to neutral, generally applicable laws under the California Constitution is an open question. Recently, the California Supreme Court declined to resolve this issue, finding that the California statute challenged on free exercise grounds satisfied the more stringent strict scrutiny standard. (*See, e.g. Catholic Charities,* 32 Cal. 4th at 562 (applying strict scrutiny to *plaintiff's* free exercise challenge to a statute requiring all businesses that provide their employees both group health care and disability prescription coverage include coverage for prescription contraceptives).) In applying strict scrutiny, a court first considers whether the challenged statute substantially burdens religious beliefs. If the court finds that it does, it then determines whether the law serves a compelling interest and is narrowly tailored to achieve that interest. (*Id.*)

Based on the California Supreme Court's decision in *Catholic Charities*, the trial court correctly determined that the Unruh Act only incidentally burdens Petitioners' religious beliefs and, in any event, that the Act serves a compelling government interest and is narrowly tailored.

Here, the trial court applied a strict scrutiny analysis as set forth in *Catholic Charities.*[7] First, it considered whether the Unruh Act substantially burdens Petitioners

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[6] Ms. Benitez has submitted evidence, in the form of a declaration from Dr. Hsiao that Petitioners' repeated (and wrongful) use of intra-vaginal inseminations coupled with the fertility drug Clomid in connection with their treatment of her constituted medical malpractice.

[7] While acknowledging the uncertainty as under the California Constitution as to whether strict scrutiny or rational basis was applicable, the trial court proceeded to apply strict scrutiny -- just as the California Supreme Court had in *Catholic Charities*. The trial court was explicit on this point:

free exercise rights and found that it imposed only an incidental burden on Petitioners' free exercise rights. Nevertheless, the trial court went on to apply the other parts of the strict scrutiny test to Petitioners' claim. It determined that even if the burden imposed by Unruh Act was more than "incidental," the Act would still survive strict scrutiny because it serves a compelling interest of eliminating discrimination and is narrowly tailored to achieve that interest.

A. The Trial Court's Finding That The Unruh Act Only Incidentally Burdens Petitioners' Religious Beliefs Is Correct Under California Law.

Petitioners assert the trial court erroneously concluded that the Unruh Act's prohibition against sexual orientation discrimination imposes only an incidental burden on the religious beliefs of the defendant doctors. Petitioners provide no evidence supporting their contention that having to comply with the Unruh Act's ban on sexual orientation discrimination will significantly impact their religious practices. This omission is not surprising given that Petitioners' own documents show precisely the opposite have entered into contracts with insurers including Scripps Clinic Health Plan Services, Inc. and Greater Tri-Cities IPA, in which they expressly agree not to discriminate on the basis of sexual orientation. (Pet. Ex. 13 at 178.) Moreover, the Unruh Act does not require that Petitioners provide any particular medical services to their patients. Rather, the Act requires that once they elect to go into the business of providing particular medical services[8], these services be provided to all patients equally without regard to the patients' race, gender or sexual orientation.

That generally applicable laws impose some burdens on religiously motivated behavior is an unavoidable part of society. (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985) (religious organization must comply with minimum wage law); *see also U.S. v. Lee*, 455 U.S. 252 (1982) (in deciding that the Amish must pay social security taxes the court held that the comprehensive system could not accommodate "myriad exceptions flowing from a wide variety of religious beliefs.").) A law substantially burdens religious liberty if it, "conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial

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Here, the Act serves the compelling interest of eliminating discrimination by business establishments. See Civ. Code §51; See also Bd. of Directors of Rotary Internat. v. Rotary Club of Duarte (1987) 481 U.S. 537, 549. It is also narrowly tailored in that it permits Defendants free rein to operate their business as long as they do not discriminate. (*Id.*) (Pet. Ex. 25 at 439.)

[8] California courts have long held that the practice of medicine is a "business." (*See, e.g., Young v. Board of Med. Examiners* (1928) 93 Cal.App. 73, 75 [268 P. 1089] ("While the occupation of a physician more commonly is referred to as a profession, nevertheless it may properly be included within the broader word of 'business.'").)

pressure on an adherent to modify his behavior and to violate his beliefs." (*Catholic Charities,* 32 Cal. 4th at 562.)

In *Catholic Charities*, the Supreme Court found that the religiously affiliated agency could have avoided any conflict with its religious beliefs by simply "not offering coverage for prescription drugs to its employees." (*Id.*) On the other hand, if it wished to continue to provide its workers with a much-appreciated benefit, then it was required to provide coverage for birth control prescriptions because excepting this coverage was a form of sex discrimination against its female employees that was prohibited by a state anti-discrimination law. Either way, there was only an incidental burden on their religious beliefs. (*Id.*) Likewise, in *Smith v. FEHC*, 12 Cal. 4th at 1143, the Supreme Court assessed the burden allegedly placed on a landlady's religious freedom by FEHA's requirement that she treat married and unmarried would-be tenants equally. Reiterating that any challenge based on the free exercise clause must demonstrate a ***substantial*** burden on religious practice, the Supreme Court rejected Smith's claim of an improper burden on her right to practice her faith upon determining that ***her faith did not require her to make her living in the rental housing market.*** (*Id.* at 1169-75.)

Petitioners provide general obstetrics and gynecological services. Performing the infertility procedure sought by Ms. Benitez is a small part of their practice routinely offered to their non-gay patients. (Pet. Ex. 20 p. 280.) The trial court found that just as in *Catholic Charities* and *Smith*, Petitioners could decline to provide this treatment to all patients, thereby avoiding the ostensible conflict between the state's protective law and their religion. The trial court found that what doctors cannot do under the Unruh Act is to provide these fertility services to some patients, while at the same time refusing to offer the same services to their non-heterosexual patients. (Pet. Ex. 24 p. 412: 8-16.)

Here, the trial court properly found that under the controlling decisions of the California Supreme Court in *Catholic Charities* and *Smith v. FEHC*, the Unruh Act imposed only incidental burdens on Petitioners' religious beliefs and any incidental burden on Petitioners must give way to Ms. Benitez's right to be free of invidious discrimination at the hands of her own doctors. (Pet. Ex. 25 p. 439.)

B. The Trial Court Correctly Found That The Unruh Act Serves A Compelling State Interest And Is Narrowly Tailored.

Petitioners assert that the trial court erred because they claim that eliminating sexual orientation (or marital status) discrimination is not a sufficiently compelling interest to warrant the burden on their religious practices. California law refutes this contention. The California Supreme Court has declared:

> In part pertinent here, section 51 expresses a policy against discrimination, on certain bases, in the general area of relationships between private persons and entities: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." In addition to those listed, the prohibited bases of discrimination have been construed to include sexual orientation. (See, e.g., Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1154-1162 [278 Cal.Rptr. 614, 805 P.2d 873]; In re Cox (1970) 3 Cal.3d 205, 213,-216 [90 Cal.Rptr. 24, 474 P.2d 992]; Hubert V. Williams (1982) 133 Cal.App.3d Supp. 1, 5 [184 Cal. Rptr. 161].)

California's intermediate appellate courts have reached the same conclusion. Thus the trial court found that California has a compelling interest in eliminating certain types of discrimination including sexual orientation discrimination.[9]

Given that controlling precedent holds that the Unruh Act serves a compelling interest in eliminating all types of invidious discrimination including sexual orientation discrimination, Judge Prager's finding that the Unruh Act "serves the compelling interest of eliminating discrimination by business establishments" is proper. (Pet. Ex. 25 at 439.)

Petitioners argue that the trial court erred in finding that the Unruh Act is narrowly tailored because "the trial judge failed to weigh Petitioners' paramount free exercise interest ***over*** the state's interest in eliminating sexual orientation or marital status discrimination." (Pet. at 33.) The basis for their argument is that since eliminating

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[9] The federal courts are in accord. (*See Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* (D.C. App. Ct. 1987) 536 A.2d 1, 32 (the government's interests in banning sexual orientation discrimination should be recognized as "compelling" because the anti-discrimination statute placed all forms of prohibited discrimination on equal footing, and it already was well established that the interest in ending other forms was "compelling.") In addition, the court's independent legal review led it to conclude that sexual orientation classifications have much in common with other classifications that receive especially careful scrutiny under the equal protection clause. The court explained that, "Although by no means a prerequisite to our conclusion of a compelling governmental interest, we note parenthetically that sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause." (*Georgetown* at 36 (*citing* J. Ely, Democracy and Distrust 162-64 (1980) and *Gay Law Students Association v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 474-75 [156 Cal.Rptr. 14, 24, 595 P.2d 592, 602] (equal protection guarantee of California Constitution was violated by public utility's exclusion of gay people from employment opportunities).)

sexual orientation and marital status discrimination purportedly are not compelling interests, Petitioners' free exercises rights are paramount. But, Petitioners are incorrect. As discussed above, eliminating sexual orientation discrimination is a compelling state interest. Protecting individuals from marital status discrimination is also a compelling state interest. (*See generally*, *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 939.) Precisely because this is a compelling interest, Petitioners' contention that the trial court failed to weigh their free exercise interest over the state's compelling interest is clearly erroneous.

In *Catholic Charities*, the Supreme Court found that there were no less restrictive means "readily available for achieving the state's interest in eliminating" discrimination than the statute's prohibition of such discrimination because any exemption would increase the number of women harmed by the discrimination. (*Id.* 32 Cal. 4th at 565.) Here, too, there can be no less restrictive means for achieving the elimination of sexual orientation discrimination and any exemption would necessarily increase the number of individuals affected by discrimination. Indeed, the trial court specifically held that the Unruh Act "is also narrowly tailored in that it permits Defendants free rein to operate their business as long as they don't discriminate." In doing so, Judge Prager properly weighed Petitioners' interest ***against*** the state's compelling interest as the strict scrutiny test requires.

2. The Trial Court Properly Found There Were No Triable Issues.

Petitioners assert that the trial court improperly granted the MSA against defendant North Coast because it failed to consider two triable issues of fact.[10] First, they argue that "there is clearly a question of fact over whether Ms. Benitez was denied access to medical treatment or experienced the denial of any other rights." (Pet. at 35.) In addition, they assert that the trial court failed to consider whether North Coast was required to accommodate the religious beliefs of its employees. (Pet. at 16.) Petitioners are wrong on both points. First, the issue before the trial court was whether Petitioners could assert a religious defense to the Unruh Act. (Pet. Ex. 4.) Thus the trial court did not need to consider whether Ms. Benitez suffered any harm.[11] Second, accommodation of an employee's religious beliefs is a question of law.

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[10] Petitioners argue this point with respect to defendant North Coast only.

[11] Moreover, it is axiomatic that subjecting someone to discrimination causes harm. *Walnut Creek Manor v. Fair Employment and Housing Com.*, (1991) 54 Cal.3d 245, 287 [284 Cal.Rptr. 718] ("the act of discrimination itself demeans basic human dignity").

A. **Whether Ms. Benitez Was Harmed By Petitioner North Coast's Failure To Provide Her With the Same Services As Other Patients Was Not Before The Court On The MSA.**

Petitioners admit that they refused to perform certain services for Ms. Benitez that they provide to other patients because of her status. [12] (Pet. Ex. 20 at 280-81.) They argue that there is a triable issue as to whether she was harmed because they referred Ms. Benitez to another physician group where she could obtain the desired services. Petitioners are wrong. The only issue before the trial court on the MSA was whether Petitioners were entitled to assert a religious defense to the Unruh Act claim. (Pet. Ex. 4 at 46-71.)

Ms. Benitez brought this action against Petitioners asserting a claim for, among other things, violation of the Unruh Act. In their answer, Petitioners asserted as their thirty-second affirmative defense that they have a Constitutional right to refuse to treat Ms. Benitez because she is a lesbian. Ms. Benitez moved for summary adjudication of this affirmative defense, which contends that Defendants' discrimination is protected based on their right to the free exercise of religion. The trial court held, among other things, that North Coast could not assert a religious defense because it is a secular corporation.

Petitioners now argue that this Court should issue a writ because the trial court did not make a specific finding as to the issue of harm to Ms. Benitez. But whether there was harm to Ms. Benitez or not was not before the trial court. Indeed, Petitioners did not mention the issue at the trial court level. (Pet. Ex. 18.) Petitioners attempt to manufacture a triable issue where none exists should not be tolerated.

B. **The Trial Court Properly Found That Any Duty On The Part Of North Coast To Accommodate Its Employees Free Exercise Rights Did Not Permit It To Discriminate Against Ms. Benitez As A Matter Of Law.**

Petitioners assert that there is a triable issue of fact as to whether North Coast was permitted to discriminate in order to accommodate its employees' discriminatory religious practices. But, the trial court properly found that North Coast could not simply ignore its statutory duty to Ms. Benitez to treat her in a non-discriminatory manner.

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[12] Whether Petitioners were to perform the requested intra-uterine insemination for Ms. Benitez with live sperm or donor sperm is irrelevant to Petitioners' assertion of a religious defense and so is not before this Court.

The law is clear that employers are ***not*** permitted to discriminate or otherwise harm third parties to accommodate certain employees' anti-gay religious beliefs. Thus, for example in *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, the employer was permitted to discharge an employee who had subjected other employees to anti-gay harassment in the name of religion. (*Id.* (finding that dismissal of employee for insubordination was not unlawful discrimination when employee claimed his religious beliefs required the posting of anti-gay biblical messages in workplace); s*ee also Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.2d 736 (upholding dismissal of religious discrimination claim brought by Christian fundamentalist supervisor following her dismissal for harassing a subordinate employee based on the subordinate's sexual orientation).)

As in *Peterson,* North Coast's duty to accommodate its employee's religious beliefs does not permit ***it*** to engage in unlawful discrimination against its patients. North Coast refused care to Ms. Benitez and claims it instead referred her to a different physician practice group in spite of the fact that it had promised to provide the intra-uterine insemination treatment she needed and that two North Coast physicians had no religious objections to providing this service to lesbian patients. (Pet. Ex. 7 at 98.) Taking Petitioners' assertion to its logical conclusion, a restaurant could refuse to serve would -be patrons based on their race, sex, sexual orientation, or other personal characteristics expressly prohibited by the Unruh Act, simply because one of its employees had a religious objection to serving those patrons.

The trial court correctly dismissed, as a matter of law, North Coast's assertion of a religious defense saying, "The motion is granted with respect to defendant North Coast Women's Care Medical Group, Inc., as it is a secular, for-profit corporation." (Pet. Ex. 25 at 438.) The trial court further correctly found that North Coast's obligation to accommodate its employees' free exercise rights was not without bounds. Indeed, Judge Prager found that such accommodation was not necessary if it would result in discrimination against another. (*Id. citing Peterson,* 358 F.3d 599.)

II. CONTRARY TO PETITIONERS' REPRESENTATION, THERE IS NO CONFLICT BETWEEN THE TRIAL COURT'S RULING AND THE AMERICAN MEDICAL ASSOCIATION ETHICAL GUIDELINES.

In an attempt to create some conflict worthy of this Court's attention -- where there is none -- Petitioners begin their petition with a misrepresentation. They cite a portion of an AMA Guideline that, when taken out of context, appears to conflict with the trial court's ruling that a religious objection is not a defense to the Unruh Act, and assert that because AMA Guidelines differ from California law an untenable conflict exists:

> Physicians statewide, and possibly nationwide, will be thrown into a period of uncertainty and apprehension as a result of not knowing whether they can adhere to the ethical standards articulated by the American Medical Association or whether they must adhere to the trial court's ruling that a physician's religious beliefs can play no role with regard to the Unruh Civil Rights Act. (Pet. at 2.)

As "support" for Petitioners' claim of a "right" to discriminate in violation of the Unruh Act, they cite the AMA Code of Ethics §E-10.05. ("Ethical Rule E-10.05") (Pet. Ex. 21, at 0351.) Ethical Rule E-10.05 discusses a physician's prerogative to choose whether to enter into a patient-physician relationship. In particular, Petitioners quote subsection (3)(c) of Ethical Rule E-10.05, which provides that "it may be ethically permissible for Physicians to decline a potential patient when a specific treatment sought by an individual is incompatible with the physician's moral, religious or moral beliefs." (sic) (Pet. at 2. n. 2.)

However, Ethical Rule E-10.05 (3) (c) does not support Petitioners' position. Just the opposite. By its plain language, Ethical Rule E-10.05 (3) (c) would permit a physician to decline a particular patient only when a particular ***treatment*** violates the physician's ethical code. In other words, when a physician refuses to perform that ***treatment*** for all patients.

Moreover, Ethical Rule E-10.05, in a section preceding (3) (c) not quoted by Petitioners, specifically ***prohibits a physician from refusing to care for patients based on the physician's discriminatory views***:

> (2) The following instances identify the ***limits on physicians' prerogative***:
>
> * * *
>
> (b) Physicians ***cannot refuse*** to care for patients based on race, gender, ***sexual orientation or any other criteria that would constitute invidious discrimination*** . . . .

(Pet. Ex. 21, p. 0351) (emphasis added).

The language Petitioners attempt to wrest out of context to justify their acts, by the plain text of the ethics policy only applies "[i]n situations ***not*** covered" by the paragraphs 2(b) and (c) cited above. *Id.* at (3) (emphasis added).[13]

Petitioners' actions violate California law as well as the AMA's ethical requirements and contrary to Petitioners' attempt to manufacture one, create no conflict between the two.

III. THE PETITION CONTAINS A SIGNIFICANT PROCEDURAL DEFECT IN THAT IT WAS NOT SERVED ON THE STATE SOLICITOR GENERAL AS REQUIRED BY STATUTE.

In addition to the substantive inadequacies in this Petition, Petitioners failed to comply with a mandatory requirement that they serve the California Solicitor General.[14] Indeed, according to the statute, the Petition should not even have been accepted for filing.

California Civil Code Section 51.1 provides that, "If a violation of [the Unruh Act] is alleged or the application or construction of any of these sections is in issue in any proceeding in ... a state court of appeal, ... each party shall serve a copy of the party's brief or petition and brief, on the state Solicitor General at the Office of the Attorney General." Section 51.1 further provides, "No brief may be accepted for filing unless the proof of service shows service on the State Solicitor General." The purpose of this section is to provide the Solicitor General with an opportunity to interpose the state's position on the interpretation of California law.

Here, Petitioners did not comply with §51.1 and only served counsel of record for Ms. Benitez not the Solicitor General.[15] Petitioners' failure to serve the Solicitor General as required by statute should have precluded filing of the petition because it deprived the Solicitor General of the opportunity to assert the state's position on the significant issue

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[13] Petitioners are not innocently confused in offering this argument. They have pressed it repeatedly in the trial court, despite Real Party's consistent pointing out that the rule's complete text stands for the opposite ethical command. Petitioners' attempt to mislead this Court is improper as well as ineffectual.

[14] Petitioners also disregard two of the most basic rules of practice. California Code of Civil Procedure § 128.7 requires that all pleadings be signed by counsel of record and calls for the striking of an unsigned paper. The Petition is unsigned and therefore should be stricken. Moreover, California Rule of Court 56(a) provides that a petition for a writ of mandate "must be verified." without exception. (People v. Superior Court, (1989) 207 Cal.App.3d 464, 470.) Petitioners failed to verify the petition. Their disregard of procedural requirements should not be condoned.

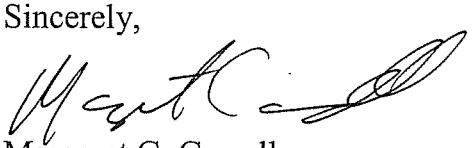
[15] Petitioners served and filed only an unsigned proof of service. The unsigned proof does not indicate service on the Solicitor General.

of the interpretation of the Unruh Act. Indeed, the failure to serve the Solicitor General along with Petitioners' other defects and distortions dictate additional reasons to deny the Petition.

III. ***Conclusion***

For the foregoing reasons, this Court should deny the Petition.

Sincerely,



Margaret C. Carroll
for O'MELVENY & MYERS LLP

cc: Carlo Coppo
Gabrielle Prater
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Douglas Edgar
California Solicitor General
Jennifer Pizer
Albert Gross

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE OF COURT 14

I certify that the brief is proportionately spaced, has a typeface of 13 points or more, and contains 4,627 words, based upon the word count in Microsoft Word, and is in conformance with the type specifications set forth at California Rules of Court 14.

Margaret C. Carroll
Attorney for Plaintiff

PROOF OF SERVICE

I, Evelyn M. Wilson, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1999 Avenue of the Stars, 7th Floor, Los Angeles, California 90067. On January 24, 2005, I personally served the following:

LETTER BRIEF re Opposition to Petition by North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez) -- Case No. D045438

☒ by transmitting **a courtesy copy** via facsimile machine the document(s) listed above to the fax number(s) set forth below on this date. The outgoing facsimile machine telephone number in this office is (310) 246-6779. The facsimile machines used in this office create a transmission report for each outgoing facsimile transmitted.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing.

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

Executed on January 24, 2005.

Evelyn M. Wilson

PROOF OF SERVICE

I, Evelyn M. Wilson, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1999 Avenue of the Stars, 7th Floor, Los Angeles, California 90067. On January 24, 2005, I served the within document

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by placing the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing.

Honorable Ronald S. Prager
SAN DIEGO SUPERIOR COURT
220 West Broadway
San Diego, CA 92101
(1 Courtesy Copy)

CALIFORNIA SOLICITOR GENERAL
Office Of The Attorney General
110 West "A" Street, Suite 110
San Diego, CA 92186-5266
(1 Copy Served)

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

Executed on January 24, 2005, at Los Angeles, California.

Evelyn M. Wilson