Court of Appeal No. D045438

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent.

GUADALUPE T. BENITEZ,
Real Party in Interest.

San Diego County Superior Court Case No. GIC 770165
Honorable Ronald S. Prager, Judge

RETURN TO ORDER TO SHOW CAUSE REGARDING PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

(*Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento* (2004) 32 Cal. 4th 527, 565.)

By this Return, Real Party in Interest Guadalupe Benitez ("Ms. Benitez") opposes the petition for writ of mandate and/or prohibition brought by her former health care providers – petitioners North Coast Women's Care Medical Group, Inc. ("North Coast"), and Drs. Christine Brody and Douglas Fenton. Petitioners seek review of an order entered by San Diego Superior Court Judge Prager granting Ms. Benitez's motion for summary adjudication that neither the federal nor our state's constitutional protection for free exercise of religion gives Petitioners an affirmative defense to Ms. Benitez's claim that their refusal to provide her with certain medically appropriate treatment violated the Unruh Act's prohibition against sexual orientation discrimination. (Petitioners' Appendix of Exhibits ("Pet. Ex."), No. 25.) [1]

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[1] This Return supplements the presentation made in Ms. Benitez's preliminary opposition filed January 24, 2005. Because the Court has limited its order to show cause only to the relief requested by petitioners Brody and Fenton, and not that sought by North Coast, this return does not add to the argument set out in that letter brief as to why North Coast's petition is not well-taken.

The United States Supreme Court has made clear that Petitioners' federal right of free exercise of religion does not relieve them of their obligation to comply with a neutral law of general applicability. (*Employment Division Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879.) The Unruh Act is clearly such a law. It generally prohibits various forms of discrimination, including sexual orientation discrimination. The Act does not single out religious behavior for disparate treatment and its prohibitions are equally applicable to religiously and secularly motivated discrimination.

Nor does the California Constitution sanction Petitioners' religiously-motivated discrimination even if, as Petitioners assert, the so-called strict scrutiny test is applied. California has a compelling interest in protecting the dignity of all of its citizens by prohibiting certain types of invidious discrimination. The Unruh Act as narrowly tailored to achieve that interest. (*See generally Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal. 4th 527; *Smith v. Fair Employment and Housing Comm'n* (1996) 12 Cal. 4th 1143.) Moreover, no decision of this state has ever embraced the proposition that the state Constitution's free exercise clause prevents the state from outlawing acts of religiously-motivated discrimination. (*Catholic Charities*, 32 Cal.4th at 566-67 (analyzing and rejecting religious free exercise claims presented under both the federal and the state constitutions); *Smith v. FEHC*, 12 Cal. 4th at 1178 (same).)

Yet, that is precisely the legal principle Petitioners are asking this Court to adopt. Petitioners contend that their religious beliefs prohibit them from directly assisting lesbians such as Ms. Benitez, in getting pregnant. At the same time, Petitioners are doctors who, among other things, provide fertilization procedures for their patients. Petitioners want to have their cake and eat it too: they want to be able to continue to provide such services to their heterosexual patients while at the same time denying them to their lesbian patients. Stated another way, Petitioners not only want to be able to practice their religion, they want to be able to inflict their discriminatory beliefs on their patients.

The unfettered view of religious freedom advocated by Petitioners is markedly different from a situation where a doctor, on religious grounds, decides not to perform any abortions or sterilization procedures or where a Seventh Day Adventist doctor decides not to practice on Saturdays. As these examples illustrate, alternatives exist whereby the doctor is able to reconcile her religious beliefs and her medical practice without discriminating among her patients.

The same alternative has always been available to Petitioners. They can cease providing fertilization procedures to all patients and focus on those areas of their practice where their religion does not mandate discriminatory treatment. What they cannot do is harm certain of their

patients by discriminating against them in the name of religion. (*See Smith v. FEHC*, 12 Cal. 4th at 1170.

Turning to the first of the questions posed by the Court -- "whether a doctor has a right under the federal and/or state Constitution to refuse to perform a medical procedure for religious reasons," the answer is, she may if she can do so in a non-discriminatory manner. However, if the question is whether a doctor may discriminate in the provision of medical services she provides in the name of her religious beliefs, the answer is clearly, no. Any other answer would create anarchy, as it would allow any business person to withhold goods and services to any individual or group that the person's religion teaches are "sinful," morally inferior" or "unworthy." (*See Employment Division v. Smith*, 494 U.S. at 885 (making compliance with a law contingent upon the law coinciding with an individual's beliefs permits each person "to become a law unto himself.")

The Court also has also inquired "whether a doctor can accommodate his or her religious beliefs and satisfy his or her nondiscrimination obligations by referring a patient to another qualified physician and paying any additional costs incurred by the patient as a result of the referral?" The answer to this question follows from the response to the previous question. If the doctor wishes to refer the patient because, on religious grounds, he refuses to perform a certain ***procedure*** for any of his patients, such an accommodation may, depending on the circumstances, be

permissible.[2] However, if the doctor on religious grounds wishes to refer the patient because of the ***patient's*** race, religion, sexual orientation or other attribute protected by the Unruh Act, the answer again is no.

The issue is not whether doctors may make referrals to other qualified physicians for non-discriminatory reasons such as a lack of necessary expertise, having an over-crowded medical practice, a patient's inability to pay, or other non-discriminatory reasons for declining to treat a patient. Of course they can. But turning away some patients based on their race, sexual orientation or other forbidden ground violates the dignity of the victim regardless of the motivation. And no matter how sincere one's religious belief, the constitutional protections for religious practice do ***not*** authorize those engaged in business activities to harm others in the name of their sectarian beliefs. (*Catholic Charities*, 32 Cal. 4th at 543; *Smith v. FEHC*, 12 Cal. 4th at 1174-76.)

Instead, according to controlling federal and state case law, anti-discrimination statutes are to be followed even if they impose some burden on religious exercise, including financial costs and inconvenience. (*See Smith v. FEHC*, 12 Cal. 4th at 1161.) In circumstances directly analogous to this case, the California Supreme Court held that the burdens of compliance in fact were not substantial. But even assuming *arguendo* that

[2] For example, it may not be permissible for an emergency room doctor to refuse to perform all blood transfusions because he is a Christian Scientist.

they are substantial in a particular case (*see Catholic Charities*, 32 Cal. 4th at 547), the anti-discrimination laws still must be followed because they serve the state's compelling interest in reducing discrimination. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 624; *Pines v. Tomson* (1984) 10 Cal. App. 3d 370, 391 (emphasizing that government has a compelling interest in eradicating all forms of invidious discrimination, and holding that publisher of Christian Yellow Pages could not refuse paid advertisements from non-Christians).) In addition, with particular relevance to this case, the state also has a compelling interest in enforcing laws that protect the health of its citizens. (*Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983) 461 U.S. 731, 742.)

Petitioners' brief devotes many pages to arguing that a "strict" constitutional scrutiny test should apply to their religious freedom affirmative defense. As will be explained, much of their discussion misrepresents or misconstrues existing law. But more importantly, most of their presentation is beside the point. As noted above, the California Supreme Court made clear in both *Catholic Charities* and *Smith v. FEHC* that, even assuming *arguendo* strict scrutiny does apply, religious objections like the one presented here do not exempt those engaged in commercial activities from complying with the civil rights laws that apply generally to everyone.

Just as all members of society must comply with society's rules, everyone is entitled to the full and equal protections of the law. As Ms. Benitez's experience with Petitioners illustrates, discrimination causes humiliation and emotional pain; often it causes a range of tangible losses as well. The liberty to worship freely is not a license to inflict such injuries on others.

II. DEMURRER OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

Real Party in Interest Guadalupe T. Benitez, by way of Return to the Order to Show Cause filed January 27, 2005 and the Petition For Writ Of Mandate ("Petition") of Petitioners North Coast Women's Care Medical Group, Inc. ("North Coast"), Christine Z. Brody, M.D., and Douglas K. Fenton, M.D. ("Petitioners"), hereby demurs to the Petition on the following grounds:

1. The Court has no jurisdiction of the subject of the Petition.
2. A person who filed the Petition does not have the legal capacity to sue.
3. There is a defect or misjoinder of parties.
4. The Petition is untimely.
5. The Petition fails to state sufficient facts to constitute a cause of action.
6. The Petition is defective because it is unverified.
7. The Petition is defective because it is unsigned.
8. There is a defect of service.

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Dated: February 25, 2005

Respectfully submitted,

Robert C. Welsh (S.B.N. 130782)
Margaret C. Carroll (S.B.N. 170403)
Lee K. Fink (S.B.N. 216293)
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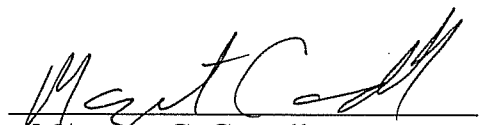
By: 

Margaret C. Carroll
Attorneys for Real Party in Interest Guadalupe Benitez

III. ANSWER OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

Real Party In Interest Guadalupe T. Benitez, by way of return to the Order to Show Cause filed January 27, 2005 and to the Petition For Writ Of Mandate ("Petition") of Petitioners North Coast Women's Care Medical Group, Inc. ("North Coast", Christine Z. Brody, M.D., and Douglas K. Fenton, M.D. ("Petitioners"), admits, denies, and alleges as follows:

1. Real Party incorporates herein by reference as though fully set forth herein the entire contents of her Separate Statement of Undisputed Material Facts In Support of Motion For Summary Adjudication As to Defendants' Thirty-Second Affirmative Defense Regarding Constitutionally Protected Rights (Pet. Ex. 6) and alleges affirmatively each and every fact set forth therein.

2. Real Party incorporates herein by reference as though fully set forth herein the entire contents of her First Amended Complaint for Damages and Petition for Injunctive Relief (Pet. Ex. 1), her Declaration in Opposition to Defendants' Motion for Summary Adjudication as to Plaintiff's Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action and to Plaintiff's Claim for Punitive Damages and of her medical chart notes for August 6, 1999 to August 10, 2000 (Pet. Ex. 7, Exs. A and E) and alleges

affirmatively each and every fact set forth therein except as to her medical chart notes which speak for themselves.

3. Real Party incorporates herein by reference as though fully set forth herein the contents of the declarations of Christine Brody, M.D. and Douglas K. Fenton, M.D. in Support of Defendant's Special Motion to Strike (Anti-SLAPP) (Pet. Ex. 7, Exs. B, D and F).

4. Answering paragraph 1, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS and on that basis DENIES each and every allegation of the paragraph.

5. Answering paragraph 2, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS and on that basis DENIES each and every allegation of the paragraph. Real Party further alleges that Dr. Brody does not adhere to a "religious belief against inseminating or otherwise impregnating unmarried women" and such purported "religious belief against inseminating or otherwise impregnating unmarried women" is not sincerely held.

6. Answering paragraph 3, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS and on that basis DENIES each and every allegation of the paragraph. Real Party further alleges that Dr. Fenton does not adhere to a "religious belief against inseminating or otherwise impregnating unmarried women" and such

purported "religious belief against inseminating or otherwise impregnating unmarried women" is not sincerely held.

7. Answering paragraph 4, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS and on that basis DENIES each and every allegation of the paragraph.

8. Answering the first sentence of paragraph 5, Real Party ADMITS that she was a patient and she received some infertility treatment at North Coast, but she DENIES that the treatment she received was complete or adequate. Answering the second sentence of paragraph 5, Real Party ADMITS that she received some treatment from Dr. Brody, but she DENIES that treatment was complete or adequate and that she was referred to Dr. Kettel for particular treatments by Dr. Brody or anyone else at North Coast.

9. Answering paragraph 6, Real Party ADMITS that she filed the underlying action in Superior Court, but DENIES that she was a patient seeking treatment for infertility at North Coast when she did so.

10. Answering paragraph 7, Real Party ADMITS the allegations of the first sentence. As to the allegations in the second sentence, Real Party ADMITS that she informed Dr. Brody that she was in a same-sex relationship but DENIES that Dr. Brody mentioned Real Party's marital status.

11. Answering paragraph 8, Real Party ADMITS that Dr. Brody told her she would not perform an intrauterine insemination ("IUI") for her, but DENIES that Dr. Brody said the reason was Real Party's status as an unmarried woman and DENIES each and every allegation of the second sentence. Further answering paragraph 7, Real Party affirmatively alleges that Dr. Brody stated that the reason she would not perform the IUI for Real Party is the fact that Real Party is a lesbian, and that Real Party was shocked and upset at being told her physician would not personally provide the treatment Real Party was likely to need, for a discriminatory reason unrelated to Real Party's health needs.

12. Answering paragraph 9, Real Party DENIES each and every allegation of paragraph 9. Further answering paragraph 9, Real Party affirmatively alleges that Dr. Brody did not state than any other medical staff at North Coast shared her unwillingness to provide equal services to patients based on sexual orientation or any other characteristic covered by the Unruh Act, and did not identify by name particular physicians who would perform IUI for her and others who would not, stating only that a North Coast physician would perform the IUI for Ms. Benitez. Finally, Dr. Brody did not describe the religious beliefs of other doctors.

13. Answering paragraph 10, Real Party ADMITS that Dr. Brody assured her that other North Coast doctors would perform an IUI for her at such time as that procedure was medically appropriate, and DENIES each

and every remaining allegation of paragraph 10. Further answering paragraph 10, Real Party affirmatively alleges that she had no knowledge that Dr. Fenton refused to perform an IUI for her and she had the understanding that Dr. Brody "could" perform the IUI procedure and did perform it for other patients, but that she would not perform it for Real Party because Real Party is a lesbian.

14. Answering paragraph 11, Real Party ADMITS that she was a patient of Dr. Brody's for roughly eleven months and that Dr. Brody provided her with a range of treatments including medications, tests and surgery. Further answering paragraph 11, Real Party DENIES that the treatments she received were necessary, appropriate or adequate. Further, Real Party affirmatively alleges that Dr. Brody promised to arrange for an IUI in a timely manner according to the treatment plan, and that she did not do so and instead created needless delay to forestall Real Party's IUI. Further answering paragraph 11, Real Party affirmatively alleges that she remained as a patient at North Coast because that facility was the sole "in network" provider of obstetrics and gynecology services available to her through her employer-provided health plan, she did not have any other economically feasible options and she believed should could trust Dr. Brody to carry out her treatment plan efficiently and honestly, in furtherance of Real Party's interests.

15. Answering paragraph 12, Real Party ADMITS the allegations of paragraph 12, including that she performed IVI self-insemination at home numerous times with semen purchased from a sperm bank, without becoming pregnant. Further answering paragraph 12, Real Party affirmatively alleges that she became frustrated when Dr. Brody still had not arranged for an IUI for her, despite having arranged for her to undergo numerous tests and discretionary but invasive surgery. Real Party alleges further that she became worried and asked Dr. Brody for information about the link between ingestion of Clomid for longer than one year's time and an increased risk of cancer, and that Dr. Brody confirmed that studies have found such a correlation.

16. Answering paragraph 13, Real Party ADMITS that Dr. Brody informed her that she finally would arrange for an IUI for Real Party, but DENIES that it had been unnecessary to do the IUI earlier and that it was decided that she would use frozen donor sperm from a sperm bank.

17. Answering paragraph 14, Real Party ADMITS that she informed Dr. Brody at that time that she would use fresh donor sperm rather than frozen donor sperm from a sperm bank. Real Party alleges that in or about March 2000, she informed Dr. Brody that she intended to use fresh donor sperm. Real Party further alleges that at that time, Dr. Brody advised her that certain tests were required for the donor and that those tests were performed and the results provided to Dr. Brody prior to May, 2003.

18. Answering paragraph 15, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS of paragraph 15 and on that basis DENIES each and every allegation in paragraph 15. Real Party alleges that Dr. Brody did not tell her of North Coast's refusal to perform the IUI with fresh donor sperm until the day before the procedure was scheduled to occur. At that time, Dr. Brody informed Real Party that North Coast did not have a "tissue license" required to perform the procedure. Dr. Brody and Dr. Fenton later admitted that at all times, North Coast had the "tissue license" necessary to perform the IUI.

19. Answering paragraph 16, Real Party ADMITS that she decided to use frozen semen from a sperm bank rather than fresh donor sperm at home because Dr. Brody refused to arrange for the IUI at North Coast using fresh donor sperm. Real Party DENIES that there was any legitimate reason why Petitioners could not have performed an IUI for her using fresh donor semen, and also DENIES the remaining allegations of paragraph 16.

20. Answering paragraph 17, Real Party Real Party DENIES each and every allegation of paragraph 17 except that she ADMITS that when she called Petitioners' offices in July to renew her Clomid prescription as directed by Dr. Brody, she was told that Dr. Brody was on vacation. Real Party also LACKS INFORMATION OR BELIEF SUFFICIENT TO

ANSWER THE REMAINING ALLEGATIONS and on that basis DENIES each and every allegation of the paragraph except Real Party alleges she had seen Dr. Brody several days prior to calling to renew her prescription and that Dr. Brody and North Coast's office manager have testified that it is North Coast's policy to enter doctor's notes into the chart withIN a day or two.

21. Answering paragraph 18, Real Party DENIES each and every allegation of paragraph 18. Further answering paragraph 18, Real Party affirmatively alleges that when she spoke with Dr. Fenton in July, 2000, he informed her that a North Coast employee had moral or religious objections to preparing sperm for a lesbian. Real Party alleges further that Dr. Fenton informed Real Party that he had no objection to preparing the sperm and refused to identify the person who objected to performing the sperm preparation.

22. Answering paragraph 19, Real Party DENIES each and every allegation of paragraph 19. Further answering paragraph 19, Real Party affirmatively alleges that when she spoke with Dr. Fenton in July, 2000, he offered to refer her to a physician not affiliated with North Coast where she could obtain an IUI.

23. Answering paragraph 20, Real Party DENIES each and every allegation of paragraph 20. Further answering paragraph 20, Real Party affirmatively alleges that when she spoke with Dr. Fenton in July, 2000, he

offered to refer her to a physician not affiliated with North Coast where she could obtain an IUI and offered to speak with her insurer to assist Real Party in arranging for "out of network" care. Real Party further affirmatively alleges that at no time have Petitioners paid any of the extra costs incurred by her as a result of Petitioners' refusal to treat her and abandonment of her.

24. Answering paragraph 21, Real Party ADMITS the allegations in paragraph 21.

25. Answering paragraph 22, Real Party ADMITS the allegations in paragraph 22. Real Party asserts that the First Amended Complaint speaks for itself and respectfully refers the Court to the First Amended Complaint for its allegations.

26. Answering paragraph 23, Real Party ADMITS that Petitioners filed an Answer to the First Amended Complaint. Real Party asserts that the Answer speaks for itself and respectfully refers the Court to the Answer for its allegations.

27. Answering paragraph 24, Real Party ADMITS that she filed a Motion For Summary Adjudication with respect to Petitioners' Thirty-Second Affirmative Defense. Real Party asserts that the Motion For Summary Adjudication speaks for itself and respectfully refers the Court to the Motion For Summary Adjudication for its contents.

28. Answering paragraph 25, Real Party ADMITS that the trial court issued a tentative ruling on the Motion For Summary Adjudication with respect to Petitioners' Thirty-Second Affirmative Defense. Real Party asserts that the trial court's ruling speaks for itself and respectfully refers the Court to the ruling for its contents.

29. Answering paragraph 26, Real Party ADMITS that the trial court confirmed its tentative ruling.

30. Answering paragraph 27, Real Party ADMITS that notice of the trial court's ruling on the Motion For Summary Adjudication with respect to Petitioners' Thirty-Second Affirmative Defense was mailed on October 29, 2004.

31. Answering paragraph 28, Real Party LACKS INFORMATION OR BELIEF SUFFICIENT TO ANSWER THE ALLEGATIONS the allegations in paragraph 28 and on that basis DENIES each and every allegation of the paragraph.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that the Petition fails to state a claim on which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that Petitioners lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that the Petition does not satisfy the statutory deadline provided for in subdivision (m)(1) of California Code of Civil Procedure section 437c and is therefore jurisdictionally barred.

FOURTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that Petitioners are barred by the doctrine of unclean hands from seeking the requested relief.

FIFTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that this Court lacks jurisdiction to hear the Petition and/or to grant the relief requested by the Petition

SIXTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that the Petition is barred by the doctrine of estoppel, laches, and/or waiver.

SEVENTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Real Party alleges that Petitioners are not entitled to attorney fees or costs.

PRAYER

WHEREFORE, Real Party prays as follows:

1. That this Court dismiss and/or deny in full the Petition for Writ of Mandate and/or Prohibition;

3. That this Court affirm the judgment of Respondent Superior Court;

4. That Petitioners take nothing by their action;

5. That Real Party recovers costs and attorney fees in this action; and

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6. That the Court order any other appropriate relief as justice may require.

Dated: February 25, 2005

Respectfully submitted,

Robert C. Welsh (S.B.N. 130782)
Margaret C. Carroll (S.B.N. 170403)
O'MELVENY & MYERS

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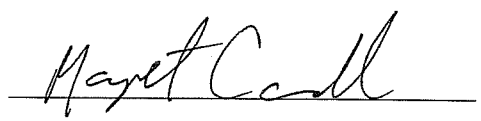
By: 

Attorneys for Real Party in Interest

VERIFICATION

I, Guadalupe T. Benitez, declare as follows:

I am the Real Party In Interest in this action. I have read the foregoing DEMURRER OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION and the foregoing ANSWER OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION and the exhibits referenced therein and lodged with this Court, and I know their contents. The facts alleged in the foregoing documents, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

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

Executed February 24, 2005 in San Diego, California.

Guadalupe T. Benitez

V. MEMORANDUM OF POINTS AND AUTHORITIES

The trial court properly ruled that neither the United States Constitution nor the California Constitution permit Petitions to treat Ms. Benitez in a discriminatory manner. Accordingly, as explained below the Petition should be denied.

VI. FACTS AND PROCEDURAL HISTORY

Guadalupe Benitez wanted to have a child. (Pet. Ex. 7, p. 85.) She tried to get pregnant for several years. Having attempted to become pregnant without success through multiple cycles of intravaginal insemination ("IVI") performed at home, and one intrauterine insemination ("IUI") performed by a medical professional, Ms. Benitez was diagnosed as suffering from polycystic ovarian disease, which tends to impede pregnancy. (Pet. Ex. 7, pp. 85-86.)

As a benefit of her employment with Sharp Mission Park Medical Group, Inc., Ms. Benitez receives health care through the Sharp Health Plan ("the Plan"). (Pet. Ex. 7, pp. 85-85.) Her primary care physician referred her to North Coast Women's Care Medical Group, Inc. ("North Coast") for specialized infertility treatment. (Pet. Ex. 7, p. 86.) North Coast was the only "in network" provider available to Ms. Benitez under the Plan. (*Id.*)

Ms. Benitez met with Petitioner Dr. Brody in August of 1999 to discuss treatment options for her infertility. (*Id.*) Having tried to become

pregnant through IVI and IUI, and having learned that IUI is more likely to result in pregnancy, Ms. Benitez expected Defendants to perform an IUI if necessary. (*Id.*) Dr. Brody has confirmed that IVI has "far less chance of success" than IUI, and that she "generally [does] not favor or recommend" IVI for patients who have had "failure [to become pregnant] in the past." (Pet. Ex. 7, p. 134.) In the case of Ms. Benitez, however, Dr. Brody took a different approach.

At their first meeting, she explained to Ms. Benitez that, although she routinely performs IUI for patients who have not achieved pregnancy, she would not do so for Ms. Benitez because she objected on religious grounds to providing this service to a lesbian patient.[3] (Pet. Ex. 7, p. 97-98.) Dr. Brody assured Ms. Benitez, however, that other physicians at North Coast did not share her religious views and that one of the other doctors would perform the IUI for Ms. Benitez if IVI continued to prove ineffective. (Pet. Ex. 7, p. 98.)

Because North Coast was the only "in network" provider of the necessary obstetrics and gynecological services available to her, Ms. Benitez had little choice but to rely on Dr. Brody's representation that her colleagues would provide the care Ms. Benitez needed. Ms. Benitez had no option but to remain at North Coast. (Pet. Ex. 7, pp. 86-87.)

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[3] Dr. Brody no longer provides IUI in conjunction with hormone treatment to any patient.

Dr. Brody created a treatment plan for Ms. Benitez in August 1999, which included taking potentially harmful fertility medications to stimulate ovulation and undergoing three more cycles of IVI at home, before proceeding to IUI if pregnancy did not result. (Pet. Ex. 7, p. 87.) However, Dr. Brody again deviated from her normal practice. Instead of following the treatment plan she had created for Ms. Benitez, Dr. Brody insisted that Ms. Benitez continue to perform IVI procedures at home rather proceed to an IUI procedure that Dr. Brody had represented would be performed by a North Coast physician. Additionally, Dr. Brody recommended that Ms. Benitez undergo physically invasive tests in lieu of proceeding to an IUI.

After ten months of treatment, Ms. Benitez had still not become pregnant. (Pet. Ex. 7, pp. 87-88 and 143-150.) Ms. Benitez had, on numerous occasions, asked when she could expect the IUI procedure to be performed. (Pet. Ex. 7, pp. 88-89.) Each time, Dr. Brody promised that the IUI would happen soon, but recommended additional testing or continued IVI attempts for Ms. Benitez. (Pet. Ex. 7, pp. 87-89.)

Dr. Brody went on vacation in late June 2000 and left Ms. Benitez in the care of Petitioner Fenton, North Coast's medical director of the IUI program. According to Petitioners, the IUI program is a very small part of Petitioners' practice. (Pet. at 35.) Dr. Fenton, like Dr. Brody, objected to performing the IUI for Ms. Benitez because she is a lesbian. (Pet. Ex. 7, p. 153.) Dr. Fenton even refused to perform the necessary preparation for the

sperm to be used by Ms. Benitez. (*Id.*) Moreover, Dr. Fenton, as North Coast's medical director, had designated and trained only himself and nurse Dana Landsparger to prepare sperm for IUI. (*Id.*)

When Ms. Benitez telephoned Dr. Brody for a renewal of her hormone prescription, she was referred to Dr. Fenton because Dr. Brody was on vacation. At that time, Dr. Fenton asked nurse Landsparger if she felt comfortable preparing a sperm sample to inseminate a lesbian patient or whether, like him, she preferred not do so for religious or "moral" reasons. (Pet. Ex. 7, p. 99.) She told him she preferred not to do so. (*Id.*) Nurse Landsparger has never asserted that her decision was based on her religious beliefs.

Nevertheless, Dr. Fenton instructed the North Coast office manager to call Ms. Benitez and inform her that North Coast would not perform an IUI for her and would refer her to another physician. (Pet. Ex. 7, p. 100.) The next day, Dr. Fenton informed Ms. Benitez that North Coast would not perform an IUI for her because various members of the North Coast staff objected on religious grounds to treating her due to her sexual orientation. (*Id.*) He told her she should seek care elsewhere and offered to provide her with a referral to another medical group. (*Id.*)

Ms. Benitez felt shocked, hurt, betrayed and deeply humiliated to be abandoned in this manner by her doctors after having been a patient at North Coast for nearly a year, and having received repeated assurances that

North Coast would assist her in achieving pregnancy – specifically including providing IUI – despite the religious objections of some members of the facility's staff. (Pet. Ex. 7, p. 91.)

Months later, after having taken a break to recover from the emotional distress of how she had been treated by North Coast, Ms. Benitez began her treatment all over again with Dr. Kettle in downtown San Diego, a much longer distance from her home and work, on an out-of-network basis. (Pet. Ex. 7, p. 92.) After submitting to many of the same tests performed while under Dr. Brody's care, but this time paying for them herself, Ms. Benitez finally obtained the IUI treatment she had requested for so long from Petitioners. Eventually, Ms. Benitez became pregnant and later delivered a healthy boy. (Pet. Ex. 7, pp. 92-93.) Although Dr. Fenton had suggested to Ms. Benitez that North Coast would pay any additional costs to her for treatment by physicians not part of North Coast, North Coast did not make good on the promise. Instead, Ms. Benitez herself paid the higher "off-plan" rates for the IUI procedure Petitioners refused to provide to her. (*Id.*)

In August of 2001, Ms. Benitez brought suit against North Coast and Drs. Brody and Fenton for discrimination on the basis of sexual orientation, as well as various contract and tort law violations. In response, the defendant doctors asserted forty-seven affirmative defenses. Ms. Benitez moved for summary adjudication as to the thirty-second of these, which

contends that the doctors' withholding of medically indicated care from Ms. Benitez due to her sexual orientation was a constitutionally protected form of religious exercise and of speech.[4]

The trial court granted Ms. Benitez's motion for summary adjudication. Defendants Brody, Fenton and North Coast petitioned this Court for a writ of mandate and/or prohibition seeking relief from the trial court's decision. The Court ordered the Superior Court to show cause why the relief requested should not be granted as to Petitioners Brody and Fenton only and directed Ms. Benitez to file a return to the order to show cause.

VII. EXTRAORDINARY RELIEF BY WRIT IS NOT WARRANTED HERE

The granting of a writ is an extraordinary remedy. (*Lompoc Unified Sch. Dist. v. Superior Ct.* (1993) 20 Cal. App. 4th 1688, 1692.) Wholly apart from the procedural problems with the Petition that were discussed in Ms. Benitez's preliminary response letter of January 25, 2005, Petitioners must overcome numerous substantive hurdles in order to establish that they are entitled to relief by the extraordinary writ they have requested. (*See Science Applications Int'l Corp. v. Superior Court* (1995) 39 Cal. App. 4th 1095, 1100 (stating that "writ relief is deemed extraordinary") (internal quotation omitted).)

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[4] Ms. Benitez's complaint includes claims under the Unruh Civil Rights Act (the "Unruh Act") and for breach of contract, deceit, negligence and intentional infliction of emotional distress. (Pet. Ex. 1.) Petitioners unsuccessfully moved below for summary adjudication of the deceit, negligence and intentional infliction claims (*see* Pet. Ex. 25), but have not sought writ review of that ruling.

A writ may issue only if Petitioners demonstrate that the trial court abused its discretion in entering judgment, which means that trial court must have "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 showing that the trial court abused its discretion, writ relief also requires a showing that there are unsettled questions of law. (*See* 1 Jon Eisenberg, et al., California Practice Guide: Civil Appeals and Writs (2003) 15:36.)

Summary adjudication properly is granted when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law.

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 *Lompoc Unified School District* and *State Farm.* Although review of summary adjudication orders is *de novo,* summary adjudication properly is granted when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law. (CCP § 473c; *Kahn v. East Side Union High School Dist.*, (2003) 31 Cal.4th 990, 1002.) Judge Prager was correct to grant Real Party's motion because the material facts pertaining to that motion are undisputed. Petitioners' assertions that particular facts are in dispute do not warrant the relief they seek because ***none of those purportedly disputed facts are material*** to the disposition of Real Party's motion. Accordingly, the Petition should be denied.

VIII. ARGUMENT

A. Ms. Benitez Has A Right To Health Care Free Of Invidious Discrimination Practiced By Petitioners.

The Unruh Act prohibits of invidious discrimination. The statute's language is broad and deliberately inclusive.[5] The California Legislature enacted the Unruh Act in 1959 in part to overrule a series of decisions that had construed the prior statute narrowly in a manner that permitted discrimination based on race. (*In re Cox* (1970) 3 Cal. 3d 205 (discussing enactment history of Unruh Act).[6])

Sexual orientation discrimination is prohibited by the Unruh Act. The California Supreme Court made clear long ago that denial of equal access based on an individual's sexual orientation is unlawful in places of public accommodation. (*Stoumen v. Reilly* (1951) 37 Cal. 2d 713, 715-16 (finding that the State Board of Equalization acted illegally by suspending the license of a bar and restaurant merely because it allowed patronage by

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[5] The Unruh Act provides, in pertinent part, that:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51(b).

[6] Petitioners seem to have been confused about this in the trial court, in that they mistakenly relied upon a pre-Unruh case that allowed discrimination as a basis for permitting the discrimination they wish to engage in against lesbian patients like Ms. Benitez. (*See* Pet. Ex. 23, p. 393.)

gay people whom the licensor saw as "immoral").) When the anti-discrimination law was reframed as the Unruh Act, the ban on sexual orientation discrimination continued undiminished. (*Harris v. Capital Growth Investors* (1991) 52 Cal. 3d 1142, 1155 (affirming the Unruh Act's protection of individuals with "personal characteristics" that some business people might find "unwelcome" or "distasteful," such as an unconventional appearance or being gay).)

The persistence of sexual orientation discrimination has required California's courts to reiterate the Unruh Act's prohibition against this bias in commercial settings. In fact, appellate decisions enforcing Unruh illustrate the range of exclusions lesbians and gay men may experience in daily life. (*See, e.g., Rolon v. Kulwitzky* (1984) 153 Cal. App. 3d 289 (holding that the Unruh Act prohibited a restaurant from denying gay couples access to booths intended only for "couples"); *Hubert v. Williams* (1982) 133 Cal. App. 3d Supp. 1, 5 (finding a violation of the Unruh Act in denial of rental housing to an individual whose homecare nurse was a lesbian).) But, no legitimate dispute exists about the fact that lesbians and gay men are entitled to equal access to, and equal treatment by, business establishments. (*See, e.g., Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, 686-87, 703 (affirming California's commitment to vigorous enforcement of the anti-discrimination mandate

against entities that are business establishments, including the ban on sexual orientation discrimination). [7])

Referring prospective customers to other businesses rather than serving them is ***not*** equal access; thus, doing so violates the Unruh Act. In *Smith v. FEHC*, the California Supreme Court considered, and rejected, a request for "an accommodation" of religious belief much like what Petitioners seek here. Evelyn Smith was a landlady who objected on religious grounds to renting her apartments to unmarried couples. (12 Cal. 4th at 1170-71.) The Supreme Court recognized that the applicable anti-discrimination law might impose some amount of burden on the landlady's beliefs, but nonetheless determined that "the state cannot exempt her from [that law] without affecting the members of the public she encounters in the course of her business." (*Id.*)

The fact that the unmarried couple to whom Mrs. Smith refused to rent may have been able to procure housing elsewhere did not diminish the violation. The Court held that the couple was entitled to protection from the demeaning experience of being turned away on a discriminatory basis,

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[7] For purposes of the civil rights laws, doctors are considered businesses and therefore may not discriminate on grounds covered by the Unruh Act. *See, e.g., Leach v. Drummond Med. Group* (1983) 144 Cal. App. 3d 362, 372 (a hospital or medical group is a business serving a public interest that must serve all persons "on reasonable terms without discrimination."); *Washington v. Blampin* (1964) 226 Cal. App. 2d 604 (holding that a white doctor's refusal to treat a black patient because the patient's race made the doctor "uncomfortable" violated the Unruh Act).

and also to enjoy the full range of housing options available to everyone else. (*Id.*) As the Court explained:

> to permit Smith to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.

(*Id.*)

To underscore the importance of its holding, the Supreme Court cited a national landmark civil rights case, *Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 250, which enforced the new federal public accommodations law against a hostile hotel proprietor who had turned away prospective guests based on their race.

Heart of Atlanta emphasizes that the public accommodations laws are designed to serve the essential social function of reducing the "moral and social wrong" of discrimination. In addition, the harm inflicted by such "referrals" is not suffered only by those deemed by others to be "objectionable", but by society as a whole. (*Id.* at 260.) Indeed, it was the "overwhelming evidence of the disruptive effect" that discrimination has on commerce (*id.* at 257) that justified Congress' authority to eliminate such "effects" under the commerce clause. The public accommodations laws

thus are intended "to eliminate that evil" of proprietors serving only those "as they see fit," thereby demeaning both the individual and society as a whole. (*Id.* at 259.)

As the undisputed facts of this case illustrate, these principles remain as true and critical today as they were when *Heart of Atlanta* was decided. Whether the service offered to the public is a restaurant meal, overnight lodging, a rental apartment or medical treatment, those choosing to operate businesses in California may not deny some prospective customers equal services by "referring" them elsewhere on grounds forbidden by state law. (*Smith v. FEHC,* 12 Cal. 4th at 1175; *accord Bragdon v. Abbott* (1998) 524 U.S. 624 (upholding discrimination claim presented by patient against her former dentist based on dentist's discriminatory refusal to treat patient in his office like other patients).)

Accordingly, Petitioners are mistaken in their claim that it was not unlawful discrimination to send Ms. Benitez to another doctor for a procedure they routinely performed for other patients.[8]

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[8] Petitioners also are incorrect to assert that Ms. Benitez has no evidence that she was harmed by their discriminatory treatment of her. In the first instance, the issue is not properly before the Court because it was not raised before the trial court in connection with this motion. (Pet. Ex. 18.) Moreover, Ms. Benitez has introduced ample evidence substantiating, and will prove at trial, that she was harmed emotionally and physically as well as financially by her former doctors. (*See* Pet. Ex. 7, p. 92-94. As discussed, however, *Smith v. FEHC* makes clear that there is harm from discrimination as a matter of law.

B. Neither The United States Nor The California Constitution Permits Petitioners To Refuse To Treat Ms. Benitez Or Otherwise To Discriminate Among Patients On Prohibited Grounds.

Under the United States Constitution, a generally applicable, neutral law such as the Unruh Act is subject only to rational basis review when challenged as an infringement of religious freedom. (*Employment Division v. Smith*, 494 U.S. at 872.) To survive rational basis review, the government need only show that the anti-discrimination law in question is rationally related to the government's legitimate purpose of protecting members of society from discrimination. (*Catholic Charities*, 32 Cal. 4th 527.) The California Supreme Court has not settled on whether such challenges under the state Constitution mirror federal law, or if the more rigorous strict scrutiny analysis is required. (*Catholic Charities*, 32 Cal. 4th at 559, 562.) But controlling decisions of the California Supreme Court make unmistakably clear that the Unruh Act applies and forbids the discrimination at issue here even if strict scrutiny were to apply. (*Catholic Charities*, 32 Cal. 4th at 559; *Smith v. FEHC*, 12 Cal. 4th at 1176.) Given these governing precedents, this is not even a close case.

The trial judge correctly followed *Employment Division v. Smith* *Catholic Charities* in ruling that Petitioners' affirmative defense based on the religious freedom guarantees of the United States and California Constitutions failed as a matter of law. Judge Prager found that based on *Employment Division v. Smith* the United States Constitution did not allow

Petitioners to ignore the Unruh Act, a neutral law of general applicability. Applying the reasoning of *Catholic Charities,* he further held that the California Constitution likewise offers Petitioners no shelter for their discrimination, finding that the Unruh Act survives strict scrutiny because it does not substantially burden Petitioners' religious beliefs and, in any event, is narrowly tailored to serve a compelling state interest.

To clarify, Petitioners are not asserting a right to refuse to perform a procedure as to ***all their patients***; they instead want to refuse to perform a procedure ***for certain patients***. These doctors ***do*** perform the procedure in question for some patients. Thus, what this case concerns is whether, having chosen to perform a procedure for some, doctors may pick and choose among patients in a discriminatory manner. The Unruh Act says that they may not, and neither the federal nor the California Constitution makes doing so a protected form of religious exercise.[9]

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[9] Unfortunately, this argument has been heard before, repeatedly. Religion has been invoked to excuse discrimination for as long as this nation has tried to ensure equality. Religious tenets were offered to justify bans on interracial marriage. Indeed, as recently as 1967, state courts were upholding anti-miscegenation laws on religious grounds: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia* (1967) 388 U.S. 1, 3 (quoting trial court). But in *Loving*, the Supreme Court refused to find religion was a shield for the unlawful discrimination inherent in such meddling with other people's decisions about how they wish to create their families. (*Id.* at 7 n.5, 11-12 (striking down Virginia's law, and the similar laws of 18 other states).)

1. The United States Constitution Does Not Excuse The Doctors' Misconduct Because The Unruh Act Satisfies The Rational Basis Test.

While the United States Constitution protects their right to religious exercise, neutral laws of general applicability must be followed as long as they survive minimal judicial review. (*Employment Division v. Smith*, 494 U.S. at 872; *see also Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520 (explaining that neutrality and general applicability in this context mean not treating religious belief or practice less favorably than secular motives or activity).) In setting this general rule, the U.S. Supreme Court explicitly rejected the standard set forth in *Sherbert v. Verner* (1963) 374 U.S. 398, upon which Petitioners mistakenly rely. (Petition at 28.)

In evaluating a free exercise claim under the U.S. Constitution, the California Supreme Court recently applied the *Employment Division v. Smith* test to a challenge to the Women's Contraception Equity Act ("the WCEA"), a California statute prohibiting employers from discriminating on the basis of sex in the provision of health insurance benefits offered to their employees. (*Catholic Charities*, 32 Cal. 4th at 527.) The agency objected to the law because it forced the agency to choose between its religiously-motivated desire to provide a helpful health-related benefit to its employees, and its similarly-motivated wish not to facilitate its employees' purchase and use of contraceptives.

As our state's Supreme Court explained, quoting *Employment Division v. Smith*, the federal free exercise right "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (*Catholic Charities* 32 Cal. 4th at 528.) To permit individual religious beliefs to excuse acts contrary to a general law, the *Smith* court had reasoned, "'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'" (*Id.* at 548 (quoting *Smith*, 494 U.S. at 879).)

Applying the same analysis here, it is evident that the Unruh Act, a neutral law of general applicability, survives rational basis review because the law is rationally related to California's legitimate goal of eliminating discrimination. Given that the Unruh Act survives this review – indeed, Petitioners do not even attempt to argue otherwise – *Employment Division v. Smith* disposes of Petitioners' claim that the federal Constitution excuses them from compliance with it.

Petitioners attempt to avoid this result by misguidedly asserting that the Unruh Act is not a generally applicable law because it exempts specified senior citizen housing facilities from the Act's ban on discrimination against families with children. (Pet. at 18-20.) Thus, they claim it should be subject to strict scrutiny. However, a law does not cease

to be "generally applicable" within the meaning of the free exercise cases by having a defined scope or legitimate exceptions. Rather, a law or policy will be found not to be "generally applicable" and "neutral" under the free exercise clause only if it makes exceptions for non-religious purposes that it does not extend to religiously-motivated behavior, or if its "object ... is to infringe upon or restrict practices because of their religious motivation." (*Lukumi Babalu,* 508 U.S. at 543.) In other words, a law is not generally applicable under the free exercise clause if it "in a selective manner imposes burdens only on conduct motivated by religious beliefs." (*Id.* at 533.)

The Unruh Act does not restrict practices or selectively impose burdens on conduct motivated by religious beliefs. Rather, it proscribes specified conduct – irrespective of the beliefs or purposes that may motivate it in particular instances – in order to protect third parties.[10]

The California Supreme Court's analysis in *Smith v. FEHC* confirms that a law does not cease to be generally applicable because it contains exceptions. There, Evelyn Smith challenged the fair housing law as

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[10] Indeed, when reviewing the enactment history of the Unruh Act, and confirming the modern statute's expanded anti-discrimination purposes, the Supreme Court has made clear that targeting particular religious views, practices or groups formed no part of the Legislature's intent. (*See Curran*, 17 Cal. 4th at 686-87; *In re Cox*, 3 Cal.3d at 218; *compare Church of the Lukumi Babalu*, 508 U.S. at 520 (striking down local ordinance designed to prevent animal sacrifices during Santaria religious rituals, but not killing of animals in other, non-religious contexts).)

religiously discriminatory. The Court rejected her argument and found the law to be neutral and generally applicable – despite the existence of exemptions for senior housing, married student housing, and other rental housing not covered by the same anti-discrimination rules – because the exemptions neither favor nor disfavor based on religion. (12 Cal. 4th at 1143, 1161, 1165.)

Like *Employment Division v. Smith*, which generally outlawed all use of peyote, irrespective of the user's motive, the Unruh Act is a religiously neutral prohibition on conduct. The fact that the Legislature has narrowed the scope of a law's prohibitions does not mean the law is not "generally applicable" within its stated scope. (*See Lukumi Babalu,* 508 U.S. at 543.)

Petitioners draw the wrong conclusion from *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (3rd Cir. 1999) 170 F.3d 359 which is of no precedential value in any event. (Petition at 18.) Unlike the Unruh Act, the "no-beards" policy at issue in *Fraternal Order* was not found to be "generally applicable" for free exercise purposes because it prohibited beard-wearing for religious reasons while at the same time permitting beards for non-religious reasons. (*Id.* at 366; *compare United States v. Indianapolis Baptist Temple* (7th Cir. 2000) 224 F.3d 627 (rejecting free exercise defense because tax laws at issue did not treat defendant or other religiously affiliated employers differently from secular

employers); *Nuha Saabirah El v. City of New York* (S.D.N.Y. 2002) 2002 U.S. Dist. LEXIS 12431 (same regarding religiously neutral treatment of religious employee).)[11]

Like the tax laws at issue in *Indianapolis Baptist Temple* and *Nuha Saabirah El*, California's Government Code provision exempting senior housing facilities from the Unruh Act makes no distinction based on religion. A senior housing complex operated by the Catholic Church is exempt from Unruh in the same manner and to the same extent as one operated by atheists.

In another attempt to avoid the result required by *Employment Division v. Smith*, and with obvious wishful thinking, Petitioners assert that *Employment Division* was a narrow decision and that strict scrutiny still applies to many free exercise claims under federal law. But, they have not cited even one post-*Smith* federal case in which courts have applied strict scrutiny in a free exercise challenge to a neutral law of general applicability

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[11] Petitioners also appear to confuse the standards under Title VII, which contains an express requirement that employers accommodate their employees' religious beliefs, with those under the Unruh Act, which makes no special provision – either favorable or unfavorable – for conduct with religious motivation. Petitioners' attempt to import Title VII employment law into their free exercise analysis is misguided. (*See* Petition at 18-19.) Unlike the Unruh Act, the FEHA and the WCEA, Title VII contains an explicit statutory requirement that employers accommodate their employees' religious needs. But even Title VII does not condone harm to third parties. The cases construing the statutory duty to accommodate religious practice underscore that beliefs and conduct are not the same; while employees are entitled to hold whatever beliefs they wish, they may not translate their beliefs into workplace conduct that injures a third party. (*See,*

involving conduct harmful to third parties. Indeed, the only case Defendants cite for the applicability of strict scrutiny that has not obviously been overruled is *Wisconsin v. Yoder* (1972) 406 U.S. 204 (granting the Amish an exemption from a state law requiring teenagers to attend high school). *Yoder* does not help Defendants here. It pre-dates *Employment Division v. Smith* and uses the analysis replaced in *Employment Division v. Smith*; it also is factually inapposite because no third party interests were at stake there, as there are here. Indeed, even the *Yoder* decision itself emphasized that no third party interests were involved. (*Id.* 406 U.S. at 231.)

The general rule under the United States Constitution is plain: "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*Catholic Charities*, 32 Cal. 4th at 565.) Petitioners are no exception.

2. Petitioners Have No Independent Constitutional Rights Warranting Heightened Review Under A "Hybrid" Rights Theory.

Petitioners also contend that strict scrutiny should apply to the federal free exercise claim because their defense is a "hybrid" one

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e.g., Peterson v. Hewlett Packard Co. (9th Cir. 2004) 358 F.3d 599; *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.3d 736.))

involving both freedom of religion and freedom of speech, conscience and/or professional endeavor. At the outset, it is unclear whether a "hybrid" exception to the general rule announced in *Employment Division v. Smith* exists at all. As the California Supreme Court acknowledged in *Catholic Charities*, Justice Souter has pointed out the implausibility of this legal theory. (*Id.* 32 Cal. 4th at 557.) "If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule." (*Id., quoting Lukumi Babalu*, 508 U.S. at 567 (Souter, J., concurring).) He noted that the hybrid exception, if it really exists, should have applied in *Smith* itself, because both speech and associational rights were implicated in the peyote ritual found to violate state law in that case. (*Id.*) But, of course, there was no exception; the Court identified the law as neutral and enforced it against the religiously-motivated conduct. The "hybrid" reference seems merely a gesture at now obsolete cases.

Moreover, if a "hybrid" exception exists, it requires, at a minimum, that the free exercise challenge be joined with another independently cognizable constitutional claim. (*See, e.g., American Friends Serv. Comm. Corp. v. Thornburgh* (9th Cir. 1991) 951 F.2d 957, 961 (rejecting hybrid rights claim not based on any cognizable constitutional claim in addition to free exercise claim); *Brown v. Hot, Sex and Safer Prods., Inc.* (1st Cir. 1995) 68 F.3d 525, 539, *cert. denied* (1996) 516 U.S. 1159 (finding no

hybrid exception where plaintiffs failed to state an independent constitutional claim with their free exercise claim).[12] But, as explained below, Petitioners' claim fails, because no matter how they characterize it, they have no colorable constitutional claim independent of their religious freedom claim.

a. Petitioners Have No Free Speech Claim.

To implicate the free speech guarantee, a case must involve some challenge to "communicative activity." (*Smith*, 494 U.S. at 882.) The Supreme Court draws a firm distinction between expression, which is protected, and conduct, which "remains subject to regulation for the protection of society." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-04 ("While freedom to ***believe*** is absolute, freedom to ***act*** pursuant to one's religious beliefs cannot be.") (emphasis added).)

Addressing a claim under the U.S. Constitution, the California Supreme Court considered whether a "hybrid" claim could be said to exist. (*Catholic Charities*, 32 Cal. 4th at 527.) The Court confirmed the longstanding rule that, for conduct to be considered speech, it must be a vehicle for conveying a verbal or symbolic message. (*Id.* at 558 (finding

[12] Petitioners' principal support for its unpersuasive argument that its second claim need only be "colorable" is a vacated decision of the Ninth Circuit Court of Appeals that is entitled to no weight. (*Thomas v. Anchorage Equal Rights Comm'n* (9th Cir. 1998) 165 F.3d 692, *granting reh'g en banc* (9th Cir. 1999) 192 F.3d 1208, *on reh'g en banc* (9th Cir. 2000) 220 F.3d 1134 (vacating prior decision for lack of justiciable controversy).)

that church-affiliated agency's refusal to provide its employee's insurance coverage for contraception was not speech).)

Here, Petitioners' attempt to characterize their discriminatory actions as speech is ineffectual. Their conduct toward Ms. Benitez was not speech, and the Unruh Act requires no speech of them. Rather, it requires that all patients receive care based on their medical needs, not their personal characteristics. It is the Petitioners' misconduct, not the expression of their views, that is the gravamen of Ms. Benitez' Unruh Act claim.

Petitioners now contend that whether their denial of IUI to Ms. Benitez was conduct or speech is an issue of fact. (Petition at 25.) Yet, they have submitted nothing to show why their case is not controlled by the Supreme Court's analysis of Catholic Charities' similar argument:

> Catholic Charities' compliance with a law regulating health care benefits is not speech. ... For 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 [as] a statement 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.

(*Catholic Charities*, at 558-59.)

The mistake in Petitioners' argument is easy to see. By their logic, filing one's income tax return is an expression of agreement with the size of one's tax bill, complying with the speed limit on an open highway amounts

to a statement that going faster is a bad idea, and an employer's compliance with the minimum wage laws is speech in support of them. None of these is correct. (*Cf. Tony and Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 303-05 (holding that religious nonprofit corporation was required to comply with minimum wage laws).)

This case is not about censorship of Petitioners' *speech* about gay people, or about suppression of other constitutionally protected rights, as Petitioners contend. Rather, it is about the discriminatory *conduct* of physicians who deem certain patients to be objectionable and who seek to foist them off onto other doctors, based on criteria forbidden by our civil rights laws. Petitioners do not have even a colorable free speech interest here, and their feeble attempt to assert a "hybrid" claim must fail.

b. There Is No "Right Of Conscience" That Is Legally Distinct From The Right To Free Exercise Of Religion.

Petitioners did not plead a right of conscience in the trial court, and thus this argument is not properly before the Court now. Petitioners' sole "hybrid rights" argument below was that their free speech rights have been curtailed because complying with the Unruh Act necessarily would convey their agreement with its terms.

Even if their "conscience" argument were before the Court, it is baseless. Petitioners have not cited any cases that establish any constitutionally protected "right of conscience" that is distinct from

religious free exercise rights, nor can they. Further, while Petitioners are correct that certain federal and California statutes do recognize specific rights of "conscience" that allow medical professionals to decline to perform abortion (e.g. Cal. Health & Saf. Code § 123420) or to refuse to honor a living will (e.g. Cal. Prob. Code § 4734), these limited statutory rights do not support Petitioners' "hybrid rights" theory under the U.S. Constitution.

First, notwithstanding Petitioners' claim that "[t]hese statutes were designed to specifically enumerate the constitutional right of conscience" (Petition at 23), these statutes address employer/employee relations and not government action as constitutional rights do, and thus they are not relevant to a "hybrid rights" free exercise analysis. Indeed, the fact that these "enumerated" conscience rights in the employment context are statutory, highlights the fact that Petitioners can cite no case law supporting their claim of a constitutional right of conscience independent from that provided by the free exercise clause.

Second, these two statutory provisions pertain only to specified services to be performed by an employee and confer no broad freedom to refuse to provide other "unenumerated," medically warranted treatments on religious, moral or "conscience" grounds.

Third, as discussed above, there is a vital difference between a doctor's right to refuse to provide specified procedures to all patients on

religious grounds, and the ability to withhold medically appropriate treatment based on a patient's personal characteristics such as race, ethnicity and sexual orientation. Plainly, Health and Safety Code section 123420 would not shelter from the Unruh Act's anti-discrimination commands a physician inspired by eugenics or "moral" views to refuse abortion services to women of particular races, while performing the procedure for others. Likewise, Probate Code section 4734 would not permit doctors to disregard a patient's living will based on her race, sexual orientation or other forbidden grounds.

As with Petitioners' free speech claim, to permit a "right of conscience" to create a "hybrid" right would allow the exception to swallow the rule. (*Catholic Charities,* 32 Cal. 4th at 558.) Accordingly, Petitioners' assertion of a hybrid right based on compounding her religious right with a right of conscience must fail.

c. There Is No Independent Constitutional "Right To Choose One's Profession" That Excuses Violation Of Valid Public Welfare Laws.

Petitioners assert that they have a constitutional right to pursue any chosen profession unfettered by neutral, generally applicable public welfare laws. However, not surprisingly, in support of this anarchistic argument, they cite cases decided on inapposite constitutional grounds such as equal protection based on alienage and gender.

Indeed, Petitioners' own phrasing of their argument belies their claim of a constitutional right independent of their free exercise claim. They state:

> because the Act, as applied to Petitioners creates a general barrier to adherence of their religious belief and this belief is not related to their ability to perform the job, Petitioners have made a "colorable" claim that the Act also infringes on their right to choose their profession.

(Pet. at 26.)

Petitioners' assertion of a right to chose their profession, like all of their other arguments, is foreclosed by the California Supreme Court's analysis of the federal constitutional claim in *Smith v. FEHC*, in which the Court concluded that Evelyn Smith was required to choose a different way to make her living if she could not comply with the fair housing laws. (*Id.* 12 Cal. 4th at 1170.) Rather than having special constitutional protection for her choice of how she earned a living, the burden on her was deemed legally insignificant. The same would be true for a restaurant proprietor who believes his faith prevents him from serving a particular racial minority, or from serving female customers who have not covered their heads with a prayer scarf.

In sum, the doctors have not shown that they have any independently cognizable constitutional rights at issue here other than their right to free exercise of religion. Accordingly, under *Employment Division v. Smith*,

they must comply with the Unruh Act despite their federal religious freedom claim if that Act satisfies the rational basis test. Because they have not even tried to argue that the Unruh Act fails that test, their federal constitutional defense is unavailing.

3. The California Constitution Does Not Permit Petitioners To Discriminate Against Ms. Benitez Based On Her Sexual Orientation.

Controlling precedent is clear that Petitioners' claim under the California Constitution also fails because the Unruh Act is enforceable even under the strictest analysis. Petitioners argue at length that strict scrutiny should apply. ***But it makes no difference what type of scrutiny is used;*** Petitioners' conduct is not exempted from compliance with the Unruh Act. In both *Catholic Charities* and *Smith v. FEHC*, the California Supreme Court applied strict scrutiny. (*Catholic Charities*, 32 Cal. 4th at 559; *Smith v. FEHC,* 12 Cal. 4th at 1178. [13]) And in both cases, the Court concluded that those engaged in commercial activities covered by the civil rights laws have no constitutionally protected religious right to discriminate. (*Catholic Charities*, 32 Cal. 4th at 565; *Smith v. FEHC,* 12 Cal. 4th at 1175-76.)

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[13] In *Catholic Charities*, the California Supreme Court noted that it remains an open question whether rational basis review or strict scrutiny applies to free exercise claims under the state Constitution. 32 Cal. 4th at 559-562. In *Smith v. FEHC*, the Supreme Court applied strict scrutiny to the federal constitutional claim, as well as the state claim, for reasons that no longer apply. As explained in *Catholic Charities*, the Religious Freedom Restoration Act ("RFRA"), which appeared to require strict scrutiny for the federal claim in *Smith v. FEHC*, has been overruled and the federal standard set in *Employment Division v. Smith* now controls. *Id.* 32 Cal. 4th at 560 n.17, *citing Boerne v. Flores* (1997) 521 U.S. 507.

To withstand a strict scrutiny analysis, a statute that substantially burdens religious practice must be narrowly tailored to serve a compelling government interest. (*Catholic Charities*, 32 Cal. 4th at 562.) As demonstrated in the following sections, any burden on Petitioners' exercise of religion is incidental and easily avoidable by them, while California has a compelling interest in eradicating unlawful discrimination by those operating commercial businesses, and a separate compelling interest in safeguarding public health. Because the Unruh Act is narrowly tailored to forbid only harmful conduct, applying it to protect patients like Ms. Benitez is a proper government action even under strict scrutiny.

a. The Unruh Act Does Not Substantially Burden Petitioners' Religious Beliefs.

Whether analyzed under federal or California law, the strict scrutiny test only requires a compelling state interest to justify enforcement of a law when a party demonstrates that the law imposes a "significant" burden on religious exercise. (*U.S. v. Lee* (1982) 455 U.S. 252 (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."); *Smith v. FEHC*, 12 Cal. 4th at 1170.) By contrast, "incidental" burdens on free exercise are an unavoidable part of life in modern society. (*Tony and Susan Alamo Foundation*, *supra*, 471 U.S. at 303 (ruling that a non-profit religious

agency had to comply with minimum wage laws because compliance would not impose a substantial burden on its exercise of religion).)

A law burdens religious liberty to a cognizable extent if it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." (*Smith v. FEHC*, 12 Cal. 4th at 1170 (*quoting Thomas v. Review Board* (1981) 450 U.S. 707, 717).) Increases in the cost of operating one's business in order to comply with society's neutral laws do not constitute substantial burdens. (*Id.* at 1173.)

Using that standard, the Supreme Court assessed the burden allegedly placed on a landlady's religious beliefs by FEHA's requirement that she treat married and unmarried rental applicants equally. (12 Cal. 4th at 1143.) Reiterating that any challenge based on the free exercise clause must demonstrate a ***substantial*** burden on religious practice, the Supreme Court rejected Mrs. Smith's claim of an improper burden on her religious freedom upon determining that her fundamentalist Christian faith did not require her to make money by conducting a rental housing business. (*Id.* at 1169-75.)

The court concluded the burden on her beliefs was incidental because, knowing the restrictions of her religious practice, Mrs. Smith could avoid the conflict with the fair housing laws and also the harm to prospective tenants by choosing a different way to make her living. (*Id.* at

1175-76.) The Court emphasized the importance of the tenants' interests, explaining:

> The exemption from FEHA Smith seeks can be granted only by completely sacrificing the rights of the prospective tenants not to be discriminated against by her in housing accommodations on account of marital status. To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere. In short, were we to grant the requested accommodation, Smith would have more freedom and greater protection for her own rights and interests, while [the unmarried couple seeking housing] would have less freedom and less protection.

(*Smith v. FEHC*, 12 Cal. 4th at 1175.)[14]

Here, as in *Smith v. FEHC*, any burden on Petitioners' religious worship is incidental. Petitioners provide gynecological and obstetrical services to their patients. By their own admission, advanced reproductive services such as the IUI sought by Ms. Benitez comprises a small part of Petitioners' practice. (Pet. at 35.) Like Mrs. Smith, Petitioners have not

[14] In *Catholic Charities*, the Supreme Court similarly pointed out that the religiously affiliated agency had multiple ways to avoid what it considered to be a conflict between its religious views and the religiously neutral rules that govern all who do business in the state. The Court determined that Catholic Charities could comply with the anti-discrimination rule, for example, by ending the prescription drug coverage or by raising its employees' wages so they could purchase prescription drugs or individual insurance policies for that purpose. Any such arrangements would separate Catholic Charities from its employees'

shown that their religion requires them to practice advanced reproductive medicine and to offer technical interventions – such as intrauterine insemination – to help patients cure infertility problems.

Just as Mrs. Smith decided to make her living by renting apartments, Petitioners have chosen to provide these services as part of their obstetrics and gynecology practice. And just like Mrs. Smith, Petitioners wish to provide those services selectively. According to their own declarations, Drs. Brody and Fenton are willing to provide general wellness care, obstetrical care, and post-natal care to all patients. They also were willing to prescribe fertility medications, perform tests and do invasive surgery on Ms. Benitez. Their sole objection was to performing an IUI for her. (Pet. Ex. 7, pp. 85-91.)

However, in both cases the landlord and the medical practitioner chose to enter the commercial sphere, and must accept that their business conduct is subject to general regulation by the state to prevent harm to third parties. As was true of those asserting religious freedom defenses in *Catholic Charities* and *Smith v. FEHC*, Petitioners here are in the best position to avoid what they perceive as a conflict between a longstanding, statewide prohibition against discrimination in health care settings, and

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personal decisions regarding whether or not to use the insurance coverage to obtain contraceptives. *Id.* at 562.

their personal, religious beliefs simply by declining to provide such services to all patients.

Thus, it appears that Drs. Brody and Fenton need only make a minor adjustment to their medical practice in order to continue to practice in their chosen profession while avoiding conflict with the anti-discrimination laws and harm to those patients from whom they would withhold treatments for medically irrelevant reasons. For example, they can practice routine gynecology and obstetrics that does not present any conflict with their religious restrictions, or they can practice fertility medicine, but restrict themselves to procedures they are willing to provide to all patients. What they cannot do is to offer services to some patients and not to others based on invidious criteria.[15]

On the other hand, as in *Smith v. FEHC* and *Catholic Charities*, allowing Petitioners to select when and how they comply with the law would value their right not to be even incidentally burdened as greater than Ms. Benitez's right to be treated equally, to receive medically appropriate health care, and not to be subjected to the emotional distress of being discriminated against by those she had trusted, based on an irrelevant personal characteristic.

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[15] The same would be true for doctors who are willing to perform abortion, but who would provide it, or withhold it, based on their patients' race, national origin or religion. Such an approach to medical practice has no shelter in the Constitution.

Such a result would not be defensible. Petitioners agreed to be the sole providers of specialized gynecological services to Sharp Mission Park (Ms. Benitez' primary care physicians), and accepted full payment for their work in that role. Yet, turning logic and reason upside down, they now insist that they can elect to withhold these contracted services as they wish – for reasons entirely unrelated to a patient's medical needs, their medical licensure and their contract with Sharp Mission Park – and the patient should accommodate ***them***. Under the controlling decisions of the California Supreme Court, any incidental burdens on Petitioners' religious practices must give way to Ms. Benitez' right to be free of invidious discrimination at the hands of her own doctors.

The doctors' repeated suggestions that IUI is "invasive" and "controversial" (*see* Petition at 1) do not change the analysis. They practice gynecology and obstetrics, including pre- and post-natal care. Whether or not IUI is "invasive" or "controversial," the doctors have chosen to provide it to certain patients and not to others. They have not shown that they are required – either by their religious beliefs or by any applicable professional standards – to provide any infertility treatments (let alone this particular one) within the broad range of other Ob/Gyn services they offer.

Despite their rhetorical claims about how they will be restricted professionally if they cannot discriminate with respect to the one IUI

procedure, they provided no evidence of any actual burdens on them. Moreover, their own assertions about the broad range of services they provided to Ms. Benitez establish conclusively that they are not differently situated from Mrs. Smith who, in *Smith v. FEHC*, was held to have been burdened only incidentally.

b. The Unruh Act Serves The Government's Compelling Interests In Eradicating Discrimination And Protecting Public Health.

The California Supreme Court considered the issue of compelling government interests in *Catholic Charities*. There, the Court assumed for the sake of argument that the law requiring employers not to discriminate based on sex in their employee benefit plans did impose a substantial burden on the employer's free exercise rights. (*Id.* at 564.) Nevertheless, the Court determined that the anti-discrimination law furthered a compelling state interest, specifically, to protect workers from unjust discrimination in employment, including in their health insurance coverage. (*Id.*) This focus upon the likely harm to workers – the interested third parties in the case – highlights how critical this factor is in the analysis:

> Strongly enhancing the state's interest is the circumstance that any exemption from the WCEA sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. ***We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that***

the requested exemption would detrimentally affect the rights of third parties.

(*Id.* at 565) (emphasis added.)

As discussed above, the Court in *Smith v. FEHC* placed similar emphasis on the interests of third parties in being protected from discrimination and enjoying the same range of commercially available opportunities as everyone else.

Even if the burdens on Petitioners were substantial, Petitioners still would be required to comply with the Unruh Act because the government has compelling reasons for protecting third parties from discrimination by business establishments subject to the Unruh Act, and for safeguarding public health.

(i) The Government Has A Compelling Interest In Preventing The Harms Inflicted By Discrimination.

California has a compelling interest in eliminating discrimination. (*Catholic Charities*, 32 Cal. 4th at 564 (holding that "the WCEA serves a 'compelling state interest' of eliminating discrimination".) This is consistent with the federal decisions that underscore this point. (*See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) 481 U.S. 537 (upholding the Unruh Act because "public accommodations laws 'plainly serve compelling state interests of the highest order'") (quoting *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 626).)

The *Catholic Charities* decision is consistent with settled California law. (*See, e.g., Pines v. Tomson* (1984) 10 Cal. App. 3d 370, 391 (holding that publisher of Christian Yellow Pages could not refuse to accept advertisements from non-Christians). The *Pines* court stressed that, "[a]s a general proposition, '***government has a compelling interest in eradicating discrimination in all forms***.'" (*Id.* (citation omitted) (emphasis added).)

Accordingly, the *Pines* court enforced the Unruh Act despite the fact that the discriminating business was motivated by sincere religious belief. (*Id.* at 392; s*ee also Curran*, 17 Cal. 4th at 686-87.)

With reasoning that is just as apt in the present case, the *Pines* court stressed:

> [a]lthough it undeniably infringes on [the religious adherent's] freedom of religious association by requiring them to do business with non-Christians despite their preference to the contrary, that infringement is amply justified by the compelling state interest in eradicating invidious discrimination. Religious liberty 'embraces two concepts – freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot [be].'

(10 Cal. App. 3d at 392 (citing *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304); *see also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* (D.C. App. Ct. 1987) 536 A.2d 1, 32 (explaining why government has a compelling interest in ending sexual

orientation discrimination).[16]) Accordingly, California has a compelling interest in preventing discrimination based on sexual orientation.

In the face of these precedents, Petitioners are mistaken in their attempt to use federal equal protection analysis of "suspect classifications" to create distinctions within the types of discrimination barred by state statutes, when the California case law contains no such distinctions or ranking among the types of statutorily prohibited discrimination. Like the FEHA, the Unruh Act forbids businesses from treating people unequally based on prohibited criteria. Because cases like this one concern discrimination by a private, commercial enterprise, rather than by the government, it is entirely irrelevant what level of scrutiny may apply under the federal equal protection clause.[17]

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[16] The *Georgetown* court concluded that the government's interests in banning sexual orientation discrimination was "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 review led it to conclude, "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*, 536 A.2d at 36 (*citing* J. Ely *Democracy and Distrust* (1980) 162-64 and *Gay Law Students Association v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal. 3d 458, 474-75 (equal protection guarantee of California Constitution was violated by public utility's exclusion of gay people from employment opportunities).

[17] In addition to the fact that federal equal protection analysis plainly has nothing to do with California statutory analysis, Petitioners' reliance on *High Tech Gays* (9th Cir. 1990) 895 F.2d 563, obviously is misplaced because that decision relied entirely on *Bowers v. Hardwick* (1986) 478 U.S. 186, which since then has been held to have been wrongly decided and expressly overruled. *Lawrence v. Texas* (2003) 539 U.S.558.) Moreover, if equal protection analysis were relevant here, the pertinent doctrine would be California's, according to which sexual orientation classifications *are* suspect and warrant heightened scrutiny for equal protection purposes. (*See, e.g., Children's Hospital and Medical Center v. Belshe*

As noted above, the main authority on which Petitioners rely for their troubling theory that federal equal protection analysis should be imported into California's statutory analysis to create disparate treatment of the anti-discrimination goals addressed in one, unified fashion by the Unruh Act is a vacated decision of the Ninth Circuit Court of Appeals, which Petitioners do not identify as having been vacated. (*Thomas v. AERC,* 165 F.2d at 692, *on reh'g en banc*, 220 F.3d 1134 (vacating prior decision).)

Petitioners also are mistaken in their argument that the pertinent governmental interest should be defined narrowly to be an interest in ensuring that lesbian patients can obtain intrauterine insemination, rather than the broader governmental interests in ending discrimination by business establishments and safeguarding public health. (Petition at 30, 32-33.) The California Supreme Court expressly rejected a "narrow interest" argument in *Catholic Charities*, dismissing the agency's assertion that the government had to show that it had a compelling interest in female employees having insurance coverage for contraceptives. (*Catholic Charities*, 32 Cal. 4th at 564.) The Court held to the contrary that the

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(2003) 97 Cal. App. 4th 740 (identifying race and sexual orientation as examples of suspect classifications under the California Constitution); *cf. People v. Garcia* (2000) 77 Cal. App. 4th 1269 (holding that excluding lesbians and gay men from juries on the basis of their sexual orientation violates the California Constitution and discussing factors considered on strict scrutiny review).) In addition, the California Legislature has made findings that are consistent with these state court decisions, such as that the comprehensive domestic partner law enacted in 2003 is important to serve the State's interest in reducing discrimination based on sexual orientation. (Stats. 2003, ch. 421.)

relevant state interest was in ending sex discrimination in employer-provided benefit plans, and *that* interest was compelling. (*Id.*)

Precisely the same analysis applies here. The Unruh Act serves the government's interest in ending "all forms of discrimination" by business establishments, and *that* interest is compelling. (*Pines*, 160 Cal. App. 3d 370, 391; *accord Catholic Charities,* 32 Cal. 4th at 564.)

(ii) The Government Has A Compelling Interest In Protecting Public Health By Reducing Discrimination In Health Care.

Petitioners make the remarkable claim that, if doctors are not permitted to discriminate against their patients, doctor-patient relationships will be disrupted and public health will suffer. (Petition at 13. [18]) The facts here show just the opposite.

The undisputed evidence in this case proves the need for enforcement of the anti-discrimination law. Petitioners' treatment of Ms.

[18] As discussed in Ms. Benitez's preliminary opposition, Petitioners inexplicably continue to rely on the American Medical Association's ethical guideline that expressly qualifies doctors' right to object on "moral or religious grounds" with an anti-discrimination rule that forbids sexual orientation discrimination. It is difficult to understand why Petitioners continue to miscite the AMA's ethical guidelines, as if they support Petitioners' petition. In fact, when Petitioners' quoted language is read in context, it shows that the protection for doctors' decisions to decline to perform certain procedures on moral or religious grounds is explicitly subject to anti-discrimination provisions that prohibit discrimination based on sexual orientation. The pertinent language is set out in full not only in Ms. Benitez's January 24, 2005 letter brief, but also was discussed in her briefs to the Superior Court.

Benitez had precisely the negative effects on her that these studies document, and that the Unruh Act should prevent. (Pet. Ex. 7, pp. 91-94.)

For example, medical need did not prompt Dr. Brody to subject Ms. Benitez to painful, invasive, laparoscopic surgery – for which general anesthesia is required and which poses risks to the patient -- instead of performing the IUI anticipated by the treatment plan she herself had fashioned for Ms. Benitez. In addition, Dr. Brody's delaying tactics caused Ms. Benitez to spend eleven months taking Clomid without the insemination procedure most likely to result in pregnancy, despite the fact that this fertility medication is correlated with increased cancer risk if taken for more than one year. (Pet. Ex. 7, p. 87-90.) After Dr. Fenton, in his role as North Coast's medical director, abruptly told her she would not receive the treatment she needed at North Coast, Ms. Benitez had to begin her treatment all over again, at her own expense and inconvenience, including tests that had previously been performed, and a much longer period of taking potentially risky medications. (Pet. Ex. 7, pp. 90-94.)

In addition to the physical harms she suffered by enduring unnecessary tests, surgery, and months of taking medications without maximizing the likelihood of achieving positive results, Ms. Benitez also suffered through months of emotional stress and disappointment – as well as expense – from attempting pregnancy in a medically ill-advised manner, by repeated cycles of IVI self-insemination at home.

After Petitioners abandoned her, Ms. Benitez also bore significantly increased expense and inconvenience of having to travel from North County – where she lived and worked – into San Diego to obtain her medical care on an out-of-network basis.

The parties dispute whether or not Petitioners actually offered to pay the cost of Ms. Benitez's treatment from Dr. Kettel. It is not disputed, however, that Petitioners did not, in fact, ever reimburse her for those costs. Moreover, there can be no disputing the inconvenience imposed on Ms. Benitez from having to travel a significant distance for her medical appointments, nor the fact that Petitioners' treatment of her had an emotional impact that caused Ms. Benitez to delay for months beginning a new course of treatment with Dr. Kettel, as she attempted to recover.

The distress to which Ms. Benitez has attested – feeling deceived, betrayed and humiliated by the doctor she had trusted – is precisely what the research studies report as a prime reason why disproportionate numbers of lesbians avoid health care settings, with the inevitably increased negative public health consequences. Of course, the sum of Ms. Benitez's damages is not at issue here. What matters is that the Unruh Act exists to protect customers, tenants, patients and others from such harms. These third party interests are at the heart of the California Supreme Court's free exercise analysis. They remove all possible doubt that any burdens on Petitioners' religious views do not warrant exemption from the Unruh Act.

Also peculiar is that the Petition provides no response to Ms. Benitez's facts regarding the public health consequences of sexual orientation discrimination by medical professionals. In fact, California has an independently compelling interest in maintaining the health and well being of its residents, and in ensuring that mothers, prospective mothers, and children all receive quality medical care without fear of reprisal or discrimination. (*See, e.g., Bill Johnson's Restaurants*, 461 U.S. at 742; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 342 (noting that the State has a special, compelling interest in protecting the health and welfare of children); Cal. Health & Saf. Code § 1374.55 (health care service plan contracts are required to provide coverage for fertility treatments); Cal. Health & Saf. Code § 123550 (prenatal care, delivery service, postpartum care, and neonatal and infant care are "essential services necessary to assure maternal and infant health").)

Numerous public health studies have documented that bias against lesbian, gay, bisexual, and transgender ("LGBT") individuals pervades the health care system. (*See, e.g.,* Meyer, *Why Lesbian, Gay, Bisexual and Transgender Public Health?* (June 2001) 91 Am. J. Pub. Hlth., No. 6, at 856, 857; Council on Scientific Affairs, American Medical Assoc., *Health Care Needs of Gay Men and Lesbians in the United States* (1996) 275 J.A.M.A. 1354, 1359.)

The prevalence of discrimination against LGBT individuals has been shown to have serious public health consequences. Leading researchers from Stanford and UCLA have found a correlation between increased incidences of cancer and other ailments and the widespread bias by medical practitioners against gays and lesbians. (*See* Dr. Kate O'Hanlan, *Lesbian Health and Homophobia: Perspectives for the Treating Obstetrician/ Gynecologist (1995)* 18 Current Probs. Obs. & Gyn. 93, at p. 136.[19])

These experts have concluded that this correlation most likely is due to the fact that "lesbian and bisexual women appear less likely to undergo routine screening procedures" because of "negative experiences with health care practitioners." (*See* Dr. Susan Cochran, *et al., Cancer-Related Risk Indicators and Preventive Screening Behaviors Among Lesbians and Bisexual Women* (April 2001) 91 Am. J. Pub. Hlth., No. 4, p. 591, at 596.) The United States Health Resources Services Administration report *Healthy People 2010: Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health* confirmed that bias against LGBT patients pervades the medical profession, and has important, preventable public health consequences. (Gay and Lesbian Medical Association, *Healthy*

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[19] *See also* O'Hanlon *Do We Really Mean Preventive Medicine For All? (1996)* 12 Am. J. Prev. Med., No. 5, p. 411, at 414 ("In a survey of nearly one thousand southern California physicians, one third of physicians in primary care specialties were found to have significantly homophobic attitudes.") (citation omitted).

People 2010: Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health (2001) at 49, available at <http://www.glma.org/policy/ hp2010/index.html>.)

A study by Kaiser Permanente confirmed that these problems exist in California. (*See* Kaiser Permanente National Diversity Council, *A Provider's Handbook on Culturally Competent Care: Lesbian, Gay, Bisexual and Transgendered Population* (2000).) Kaiser summarized its findings as follows:

> Extensive research on attitudes toward homosexuals among health care providers shows a disturbing picture. Studies have shown that the attitudes of health care providers reflect those of the general population. Most health related training ignores or does not adequately incorporate LGBT issues in the curricula.
>
> * * *
>
> LGBT patients have reasonable fears of discrimination when they seek health care services. These fears have been supported by research that demonstrates a lack of understanding and sensitivity by health care providers toward lesbians and gay men that often results in the delivery of substandard care.

(*Id.* at 7-8.) Based on its own findings, Kaiser's Handbook instructed its professional staff to develop cultural competence in order to be able to care for LGBT patients in a respectful, nondiscriminatory manner that meets their medical needs as required by professional standards of care. (*Id.*) With particular relevance to this case, Kaiser instructs:

> Providers' personal religious or moral beliefs can be separate from the dynamics of their relationship with LGBT patients. Assess how your biases impact the

> way you communicate with the patient and the way you interpret symptoms.

(*Id.* at 16.)

Even without this expert consensus that LGBT people in fact do experience sexual-orientation-related health disparities it would be obvious that California has a compelling interest in reducing and preventing the threats to public health that flow from the unwillingness of health care providers to treat gay people according to their medical needs, rather than their sexual orientation. Enforcement of our state's civil rights must be matter-of-fact and consistent laws toward this goal.

c. The Unruh Act Is Properly Tailored And Only Forbids Harmful Conduct.

Petitioners have not demonstrated that the Unruh Act is overbroad to any degree – that that it forbids any conduct whatsoever in which they should be free to engage. They cannot make such a showing because the business-establishment anti-discrimination law is tailored tightly to its goal of protecting Californians from discrimination. Indeed, this is an easier assessment than the analysis of the WCEA in *Catholic Charities*, in which the Supreme Court found that law to be narrowly tailored.

The distinction, again, is that Catholic Charities objected to having a connection with particular treatments (contraceptives), but not to particular people (women). Its objection to contraceptives had a far greater – and important – impact on women than on men. Yet, the different treatment of

women that Catholic Charities sought to maintain in its benefit plan was not due to an overt assessment of women as being less worthy than men.

Here, by contrast, Petitioners seek permission to treat lesbian patients differently simply because they are lesbians; they wish to withhold the standard medical treatment provided to other women who have the same medical need, solely because of who they are. This case, therefore, is closer to *Smith v. FEHC*, in which the Supreme Court underscored the importance of "vindicat[ing] 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" (12 Cal. 4th at 1171, *quoting Heart of Atlanta Motel*, 379 U.S. at 250.)

The Unruh Act proscribes this harmful conduct, and only this harmful conduct. It requires that businesses refrain from inflicting dignitary harm by offering equal treatment to all, but it does not dictate what that treatment is to be.

Here, Petitioners remain free to decide which services they wish to offer, and who among them will offer which ones. Perhaps Drs. Brody and Fenton will decide not to perform IUI for any patients. As noted above, their own descriptions of the many services they claim to have provided to Ms. Benitez certainly appear to indicate that such a decision would have little impact on their medical practice. In any event, the Unruh Act leaves them free to operate their business as they see fit, as long as they treat all

patients with equal care and dignity, and without arbitrary distinctions based on prohibited personal characteristics.

Petitioners' argument for a special exemption from the Unruh Act illustrates further why accommodations of such wishes cannot be permitted. The petition is replete with statements attempting to minimize the harm to Ms. Benitez, or others who may come after her to North Coast. They contend they did not discriminate against her at all, although, by their own words, they refused to treat her "personally." (Petition at 29.) This is no different than Dr. Blampin's wish not to have to treat black patients 'personally,' because doing so made him "uncomfortable." (*Washington v. Blampin,* 226 Cal. App. 2d 604.)

Moreover, Petitioners are at pains attempting to persuade that their religious beliefs are "not related to their ability to do their job," and that they provided "complete fertility, prenatal and other medical procedures" to Ms. Benitez, despite their own declarations attesting to the sperm preparation and IUI that were warranted for Ms. Benitez's condition, the fact that they were unwilling to perform, and the resulting shipwreck of Ms. Benitez's year-long treatment plan. (Petition at 35; Pet. Ex. 7, pp. 90-94.) They must be willfully blind to the impact they have had on their former patient.

In any event, their incredible assertions fly in the face of the history recorded in Ms. Benitez's chart and Ms. Benitez's sworn description of her experiences at North Coast. (Pet. Ex. 7, pp. 143-150; Pet. Ex. 7, pp. 85-94.)

The self-evident text of the medical records themselves show that Dr. Brody did not follow the treatment plan she had devised for Ms. Benitez. Instead, Dr. Brody stretched out the treatment plan with excuse after excuse – prolonging Ms. Benitez's emotional roller-coaster of failed self-inseminations, continuing her on potentially cancer-causing fertility drugs for extra months, and subjecting her to unnecessary, painful abdominal surgery – all to postpone the IUI. Yet, despite Ms. Benitez's declaration and no evidence to the contrary, Petitioners still assert that there was "no discernable detrimental effect on Ms. Benitez." (Petition at 35.) In other words, their position is that harms such as those they inflicted on their former patient do not matter. They claim a right to inflict such harms in service of their religious beliefs. Their own presentation makes manifest that there is no "accommodation" of their approach that can avoid inflicting the very harms that the Unruh Act exists to prevent.[20]

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[20] Again, Petitioners' reliance on Title VII cases as support for a duty to accommodate their religious practice is misplaced. First, Title VII contains a statutory requirement of accommodation that the Unruh Act does not have. 42 U.S.C.S. § 2000e *et sec.* Second, the Title VII cases make clear that an employer's duty to accommodate an employee's religious beliefs stops at the point at which that employee causes harm to others. (*See, e.g., Peterson v. Hewlett Packard Co.* (9th Cir. 2004) 358 F.3d 599; *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.3d 736.)

C. Petitioners May Not Relitigate Here Motions They Lost Below For Which They Did Not Seek Writ Review.

Petitioners contend that they did not discriminate against Ms. Benitez in violation of the Unruh Act because she was not truly harmed by their conduct. They assert that they provided her with a full range of services for nearly a year, and were free at that point to refer her to another practitioner for the treatment they were unwilling to perform for her because she is a lesbian.

Their presentation is defective for at least two reasons. First, as to the range of services and the quality of the care they provided to Ms. Benitez, the doctors moved for summary adjudication of Ms. Benitez's fraud, negligence and intentional infliction of emotional distress claims, arguing that Ms. Benitez received adequate care prior to their abandonment of her. Judge Prager correctly denied the doctors' motion because Ms. Benitez's medical records reveal that Dr. Brody provided substandard, harmful care to Ms. Benitez in her effort to keep Ms. Benitez as a patient, but not to provide the standard treatment for a patient with Ms. Benitez's infertility problem. Based on the explanations set out in the declarations of Ms. Benitez, Judge Prager determined that the extent of the deviation from standard medical care and of the harm to Ms. Benitez are factual issues for trial. Because the doctors chose not to seek writ review of the order

refusing to dismiss these tort claims, they cannot argue here that they did not harm Ms. Benitez in the ways described by those claims.

Second, despite Petitioners' assertion in the petition that they refused to perform the IUI for Ms. Benitez because she is unmarried, this issue also is not before this Court. Petitioners only inserted this attempted defense into the case recently, contradicting the statements in their own prior, sworn declarations. (Pet. Ex. 7, pp 97-98 and 153.). Indeed, the issue of whether their discrimination was based on sexual orientation (as they claimed in their earlier declarations) or marital status (as they claimed in their later declarations) was the subject of another motion for summary adjudication by Petitioners. The trial court correctly denied that motion, and Petitioners failed to seek writ relief from that ruling in this Court.[21] Accordingly, Petitioners' attempt to reargue that issue here is improper.

V. CONCLUSION

Petitioners' affirmative defense based on the United States and California Constitutions' guarantees of religious freedom and free speech fails as a matter of law. Both the United States Supreme Court and the California Supreme Court have addressed whether and when the federal or

[21] It is notable that, despite briefing on the issue in the trial court, Petitioners continue to cite *Beaty v. Truck Ins. Exchange* (1992) 6 Cal. App. 4th 1455, for the proposition that marital status discrimination is not prohibited by the Unruh Act, without acknowledging that the California Supreme Court presently is considering that question in *Koebke v. Bernardo Heights Country Club* (2004) 91 P.3d 163 (grant of review dated June 9, 2004, which vacated this Court's decision principally relying on *Beaty* dated March 8, 2004).

state Constitutions provide a religious freedom defense against generally applicable, neutral laws – including anti-discrimination statutes like the Unruh Act at issue here – when secular, for-profit enterprises wish to refuse service or otherwise to discriminate against customers on religious grounds. The governing precedents establish that this is not even a close case.

In California, doctors simply do not have a right to withhold procedures or types of care based on medically irrelevant characteristics such as race or sexual orientation. The Unruh Act's requirements in this regard do not impose any impermissible burdens on the doctors' exercise of religion. The civil rights law may not require health care practitioners to perform procedures to which they object on religious grounds; but it does prevent doctors from providing services to some patients while refusing to perform the same services for others based on factors such as the patient's race, religion or sexual orientation. That is, doctors must perform procedures – or not perform them – equally, without regard to medically irrelevant criteria that are placed off limits by the Unruh Act.

Nor is this case is about censorship of Petitioners' *speech* about gay people. Rather, it is about the harmful *conduct* of doctors who deny some patients equal treatment based on unlawful criteria. Neither the United States Constitution, nor the California Constitution, permits such misconduct.

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Nor is this case is about censorship of Petitioners' *speech* about gay people. Rather, it is about the harmful *conduct* of doctors who deny some patients equal treatment based on unlawful criteria. Neither the United States Constitution, nor the California Constitution, permits such misconduct.

For all of the foregoing reasons, the petition for a writ of mandate or prohibition should be denied.

Dated: February 25, 2005

Respectfully submitted,

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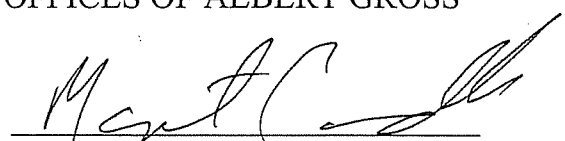
By: 

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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 12,643 words, based upon the word court in Microsoft Word, and is in conformance with the type specifications set forth at California Rules of Court 14.

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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.

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