Appellate Case No. DO 45438
San Diego County Superior Court Case No. GIC 770165

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

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC., DR. CHRISTINE Z. BRODY and DR. DOUGLAS K. FENTON,
Petitioners,

vs.

SUPERIOR COURT FOR SAN DIEGO COUNTY,
Respondent.

GUADALUPE T. BENITEZ,
Real Party in Interest.

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

ANSWER OF REAL PARTY GUADALUPE T. BENITEZ TO *AMICUS CURIAE* BRIEF OF CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS

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I. INTRODUCTION

Real Party in Interest Guadalupe T. Benitez ("Real Party") hereby answers the *amicus curiae* brief filed by the Christian Medical and Dental Associations (the "Christian Associations") in support of the Petitioners in this action (the "Christians' Brief").

The Christian Associations' brief adds nothing relevant to the briefing already before the Court. Although the Christian Associations begin with a recitation of the two questions presented (Christians' Brief, at 2), it then proceeds to ignore the well settled, controlling precedents that dictate the answers to those questions. Instead, the Christian Associations turn swiftly and solely to the same issues ***not*** presented that Petitioners and amicus California Medical Association (the "CMA") already have addressed at length previously. The Christian Associations' entanglement in issues that are irrelevant or specious (or both) only makes one thing clear – that to address the issues actually presented head on, applying the controlling legal framework established by the U.S. Supreme Court and by the California Supreme Court, necessarily leads to the same conclusion as that reached by the Superior Court below.

Real Party submits this Answer to clear the Christian Associations' rhetorical underbrush from the path paved by those courts and followed, entirely correctly, by the Superior Court below.

II. ARGUMENT

A. The Christian Associations Entirely Ignore The Controlling Legal Precedents.

The primary issue before this Court is, of course, whether a doctor in a for-profit medical practice has a religious right under the federal and/or state constitutions to withhold a medically appropriate treatment from a patient ***based on the patient's medically irrelevant personal characteristics in a manner forbidden by a generally applicable civil rights law***. As the Superior Court recognized and as Real Party has briefed extensively both to it and to this Court, the legal framework for answering that question is well established, and the answer is, "No, a doctor does not have that right."

The United States Supreme Court has held squarely that the right to free exercise of religion under the U.S. Constitution does not exempt religious adherents from neutral laws of general applicability. (*Employment Division Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879.) The California Supreme Court likewise has held that free exercise rights do not exempt sectarians generally from neutral secular laws that protect third parties from harm, including the harms of discrimination. (*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.)

Strangely but tellingly, the Christian Associations – like the CMA before it – do not once even cite these decisions, let alone attempt to apply their analysis. Instead, in discussing what they call the "real focus of the inquiry in this case" – why they believe religious motivation should entitle them to special exemptions from anti-discrimination laws – the Christian Associations simply ignore the controlling federal and state high court precedents. (Christians' Brief, at 9.) But despite their glaring absence from the Christian Association's briefing, these cases' relevance for the one presently before this Court is obvious and inescapable. As the Superior Court concluded its ruling in favor of Real Party, "[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." (San Diego Superior Court Order (October 29, 2004), at p. 4, Petitioners' Appendix at 0438, *citing Catholic Charities*, 32 Cal. 4th at 565.)

Thus, although the Christian Associations, like Petitioners, would wish for a different legal test, the only tenable result is obvious: Where religiously observant doctors choose to offer particular services commercially (whether in connection with treatment for infertility or any

other medical treatments), they cannot do so in a discriminatory fashion in violation of California's Unruh Act. (*See* Cal. Civ. Code §51(b).)

B. The Christian Associations Amplify Irrelevant Fallacies About The Legal And Policy Issues At Stake.

Still, the Christian Associations strive to avoid the obvious implications of the applicable precedents. Their chief tactic appears to be to raise and discuss at length a variety of substantive and procedural issues that simply are not relevant, except to confuse the issue at hand:

- First, the issue in this case is ***not*** whether doctors may refuse to perform a particular treatment across the board, as the Christian Associations and CMA contend. (Christians' Brief, at 4; CMA Brief, 7-11.) In many circumstances, doctors may refuse if they do so consistently, and Real Party does not dispute that. Rather, the issue is whether doctors may refuse ***selectively***, choosing to provide a treatment or not for particular patients because of the patients' protected personal characteristics (such as race or sexual orientation), in an invidiously discriminatory manner in violation of an anti-discrimination law of general applicability.[1] Doctors

[1] Indeed, neither Petitioners, nor the CMA, nor now the Christian Associations ever address the ultimate ramifications of their argument, namely, that sincere religious believers would be permitted to refuse any treatment in any context to any person on invidiously discriminatory grounds (such as race, national origin, religion or sexual orientation), as long as their personal religious or moral views condone doing so.

may not treat or refuse to treat in such a manner – which is what this case actually concerns.

■ Second, the issue in this case is not the sincerity or genuineness of the Petitioners' religious beliefs. (Christians' Brief, at 16-17.) Real Party does not dispute the sincerity of Petitioners' beliefs. Thus, contrary to the Christian Associations' discussion of hypothetical cases in which sincerity may be in question (Christians' Brief, at 17), there is no need for a jury to test Petitioners' sincerity here. But just as in the controlling legal authorities which ***assume sincerity*** (*see, e.g., Catholic Charities*, 32 Cal. 4th at 543; *Smith v. FEHC*, 12 Cal. 4th at 1174-76), sincerity is not dispositive. Even the sincerest of beliefs do not authorize those engaged in commercial enterprises to implement those beliefs by harming third parties.[2]

■ Third, the question is not a disjunctive one of whether the Petitioners discriminated against Real Party ***or*** exercised their sincere

[2] Although Real Party does not dispute the sincerity of Petitioners' religious views, there are material disputes for trial concerning Petitioners' conduct based on those views. Notwithstanding Petitioners' assertions to this Court about their objection to Real Party's marital status (which the Christian Associations echo in their amicus brief) the doctors years ago submitted multiple sworn statements to the Superior Court attesting that they refused to treat Real Party due to her "sexual preference" and the fact that she was in a same-sex relationship, making no mention whatsoever of her marital status. (See discussion in Real Party's Answer to CMA Brief, at 5 n.2, and Real Party's Return to Order to Show Cause at 74.) The doctors' attempt to repudiate these prior sworn statements was the subject of a separate motion for summary adjudication they brought to test Real Party's

religious beliefs. (Christians' Brief, at 10.) ***Both*** can take place concurrently, as the controlling legal authorities recognize; that is what happened here, as Real Party will demonstrate at trial. Indeed, it is easy to anticipate myriad commercial situations in which religious motive and discriminatory conduct coexist, to the detriment of third parties, as pointed out in Real Party's Answer to the CMA's amicus brief. (Real Party's CMA Answer, at 3-5.) This case thus does not pose a disjunctive factual question, but rather the familiar legal question of whether a neutral non-discrimination law may prohibit harmful conduct, even when that conduct is motivated by religion. The U.S. Supreme Court and this State's Supreme Court resoundingly have answered that question: Yes.

- Fourth, as a procedural matter, this Court's task is not to issue an advisory opinion on issues still in the trial court. Yet, nearly one-fourth of the Christian Associations' brief is devoted to such a request. (Christians' Brief, at 19-22.) Initially, the Christian amici appear to be confused about which pleading is being tested in this proceeding – an affirmative defense in Petitioners' Answer, or the Unruh Act claim in Real Party's Complaint. (*See* Christians' Brief, at 18.) But there is no confusion in the Superior Court's Order. Real Party moved for summary adjudication to test one of Petitioners' affirmative defenses. The only

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Unruh Act claim; the motion was denied as the pertinent facts are, at the very

issue accepted by, briefed for, and now before this Court is the propriety of the Superior Court's ruling that Petitioners have no such defense.

Consequently, the Christian Associations are attempting to test the wrong pleading with their assertion (again, echoing Petitioners) that Real Party's Unruh Act claim must fail because Petitioners purportedly engaged only in permitted marital status discrimination and not forbidden sexual orientation discrimination.[3]

■ Finally, Real Party wholeheartedly agrees with the Christian Associations that juries are well suited to hear many matters. Indeed, Real Party looks forward to trial of her lawsuit. However, it is, of course, black-letter law that where the absence of any disputed issue of material fact allows an affirmative defense to be resolved without trial, the Superior Court properly may grant summary adjudication of that defense. And that is precisely what it, rightly, did here. Whether, or to what extent, the doctors will have a "right to tell their story" at trial, as both the Christian

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least, disputed. The doctors did not appeal that ruling.

[3] Real Party's Complaint is to be tested at trial, not here. Petitioners may succeed there, if they can substantiate their current assertion that they were motivated by Real Party's marital status, notwithstanding their own sworn declarations about their objection to her "sexual preference," ***and*** if the California Supreme Court rules in *Koebke v. Bernardo Heights Country Club*, Case No. S 124179, that the Unruh Act permits marital status discrimination. But whether Real Party can substantiate her Unruh Act claim at trial is entirely distinct from whether Petitioners can substantiate their affirmative defense here.

Associations and the CMA request, will be for the Superior Court to decide in due course. (Christians' Brief, at 18; CMA Brief, at 17.)

C. The Christian Associations Are Mistaken To Represent That Standard Medical Ethics Permit Discrimination.

Like the CMA, the Christian Associations spend substantial effort – its first entire argument and one-fourth of its brief – attempting to prove that it is a commonly accepted health care practice to permit discrimination, at least when purportedly grounded in sincere "religious, moral and/or ethical beliefs or conscience." (Christians' Brief, at 5.) But according to the official policies of the American Medical Association, that is ***not*** the accepted standard in medicine. (See discussion in Real Party's Answer to CMA Amicus Brief, at pages 6-9, 16-21.)[4] Notwithstanding the vigor of the Christian Associations' presentation, the obvious reality is that their recommended rule would not improve a patient's communication to her doctor, but rather only the doctor's communication to her patient – specifically, communication of the doctor's harmful view that the patient

[4] Indeed, undersigned counsel has been advised by counsel for organizations with expertise in medical, public health and related matters that such organizations are preparing an amicus brief in support of the Superior Court's Order and Real Party's position, for submission to this Court within weeks, which will address further the adverse public health implications of the arguments made in the amici briefs of the CMA and the Christian Associations. Counsel has been advised that the anticipated amicus brief will explain specifically why the present amici are mistaken to contend that this Court can somehow improve health care by permitting discrimination, and why in fact the opposite is true.

does not deserve the same full-range of medically appropriate treatment as other patients.

Despite the manifest illogic of amici's argument, the implicit position of their brief – like that of the CMA – is that because the Christian Associations represent many people, they must be correct in their claim that sincere discrimination is lawful discrimination. (See Christian's Brief, at 3; CMA Brief, at 3.) But they cannot make up by numerosity what they lack in legal authority.

Ill-advisedly, the Christian amici take their mistaken approach one step further, arguing that because many "religiously affiliated professional organizations" ostensibly believe sincere discrimination is – or should be – permitted (Christians' Brief, at 6-8), the diversity of the conservative sects sharing that position warrants moving their religious views into discriminatory action, notwithstanding the likely detriment to third parties. But whether or not adherents of Catholicism, Orthodox Judaism, traditionalist Islam and certain Christian sects share a common view, alters neither the applicable constitutional precedents nor the state's compelling interest in protecting persons in commercial contexts from unequal treatment based on religious views they do not share.

Yet, the myriad religious groups and beliefs highlighted by the Christian amici do illustrate vividly why the controlling precedents are

correct to require that neutral laws must govern business activity. Real Party emphasized that point in her Answer to the CMA. (Real Party's Answer to CMA Brief, at 4-6.) For if, instead, diverse, inconsistent and discriminatory religious views were to command special exemptions, then religious tenets could eviscerate the secular legal system. In other words, as the Superior Court correctly held, to permit individual religious beliefs to excuse acts contrary to a general law, "'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.'" (Superior Court Order at p. 4, Petitioners' Appendix at 0438 (citing *Catholic Charities*, 32 Cal. 4th at 548, quoting *Smith*, 494 U.S. at 879).)

III. CONCLUSION

The Christian Associations' argument is grounded in omission and repetition, and neither makes it persuasive or correct. This Court should follow the governing legal precedents and affirm the order of the Superior Court granting summary adjudication in favor of Real Party Guadalupe Benitez on Petitioners' Thirty-Second Affirmative Defense.

Dated: June 21, 2005

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