IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent;

GUADALUPE T. BENITEZ,

Real Party in Interest.

No. S142892

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AS AMICI CURIAE IN SUPPORT OF REAL PARY IN INTEREST

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The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and cognate statutes. The American Civil Liberties Union of Northern California, the ACLU Foundation of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties are the three regional California affiliates of the ACLU.

The ACLU has a long tradition of supporting religious liberty, nondiscrimination, and reproductive privacy. All of these important values are implicated in the present case, in which doctors providing fertility services claim a constitutional exemption from the state's primary civil rights law. Amici participated in the two major cases before this Court which involved accommodation of religious freedom with principles of nondiscrimination, *Smith v. Fair Employment and Housing Comm'n*, 12 Cal. 4th 1143 (1996) and *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004). As in those cases, the ACLU submits that the California Constitution requires exemptions from neutral laws that substantially burden religious exercise unless strict scrutiny is satisfied, and that the state here does have a compelling interest in outlawing discrimination on the basis of sexual orientation in the provision of reproductive health care.

INTRODUCTION

Once again, this Court is asked to grant people who have entered the commercial world a constitutional right to ignore state laws requiring equal treatment. This Court has consistently and correctly refused earlier invitations to recognize religious rights to discriminate, whether on the basis of marital status, *Smith v. FEHC*, 12 Cal. 4th 1143 (1996) or gender, *Catholic Charities*, 32 Cal. 4th 527 (2004). This Court should also decline to carve out a religious exemption to California's major civil rights law, the Unruh Act, which guarantees access to public accommodations regardless of sexual orientation. Our Constitution strongly protects religious freedom. However, the state is well within its constitutional authority to insist that doctors licensed to provide fertility treatments do not reject or abandon patients because of the patients' sexual orientation.

ARGUMENT

Unlike the familiar "conscience clause" situation, where health care providers refuse to perform a particular treatment such as sterilization, the defendant North Coast doctors in this case *did* provide the specialized care plaintiff needed. They simply refused to provide that care to people who, because of their sexual orientation, the doctors believe should not be parents. This refusal, grounded in religious doctrine, collides with the Unruh Act. Amici submit that the doctors' claim for a religious exemption from the state's civil rights law must be rejected.

I.

THE CALIFORNIA CONSTITUTION PROTECTS RELIGIOUS FREEDOM

A. The Court Should Clarify the State Constitutional Standard Governing Laws that Burden Religious Exercise.

This case affords the Court an opportunity to clarify the appropriate standard for evaluating religious freedom claims under the California Constitution. It has been 17 years since the United States Supreme Court drastically constricted the federal free exercise clause to no longer require any exemptions from neutral laws that collide with religiously mandated conduct. *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Because the Court also struck down the federal Religious Freedom Restoration Act's application to states, *City of Boerne v. Flores*, 521 U.S. 507 (1997), the major source of protection for the religious rights of California's diverse residents is Article I, Section 4 of the California Constitution.

In *Smith v. FEHC* and in *Catholic Charities*, this Court declined to articulate the state constitutional standard for evaluating claims for religious exemption from neutral laws, because in both cases the state had a compelling interest in outlawing discrimination that would satisfy strict scrutiny. In this case, too, amici submit that California's public policy of preventing invidious discrimination in health care justifies uniform application of the Unruh Act. However, amici urge the Court to rule that strict scrutiny is the appropriate test for evaluating claims for religious exemption from neutral laws. The state needs

guidance on this important civil liberties principle. While the cases that have reached this Court since the federal *Smith* decision have involved discrimination, other conflicts between faith and law regularly occur in California that involve a variety of less paramount concerns. For example, some public schools have an absolute ban on headgear, which prohibits the wearing of yarmulkes, kuftis or other head coverings required to be worn by Jewish and Muslim students in accord with the dictates of their religions. Does the California Constitution compel a religious exemption so that these devout students may attend school without violating the tenets of their faith? The state would benefit from clarification of the constitutional standard governing religious freedom in California.

B. Article I, Section 4 Requires Strict Scrutiny.

Article I, Section 4 of the California Constitution remains unaffected after the federal *Smith* decision. The California Constitution requires, as it has for over 40 years, strict scrutiny of laws that impose a substantial burden on religion. Applying this Court's traditional framework for independent interpretation of the state Constitution requires that California maintain its strong protection for religious freedom.

In interpreting the state Constitution, this Court is of course not bound by federal precedent construing the parallel federal text. The "state courts, in interpreting constitutional guarantees contained in state constitutions, are *independently responsible* for safeguarding the rights of their citizens.'" *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 261 (1981),

quoting *People v. Brisendine*, 13 Cal. 3d 528, 551 (1975) (emphasis added in *Myers*). In *People v. Teresinski*, 30 Cal. 3d 822 (1982), this Court identified four factors that support departing from United States Supreme Court constructions of the federal Constitution: textual differences; stability of precedent; doctrinal criticism of the federal opinion; and maintaining rights Californians have come to enjoy. All four factors compel a conclusion that Article I, Section 4 exempts religious adherents from the application of neutral laws that substantially burden their faith, absent a compelling need for statewide uniform application.

1. Text and History. Article I, Section 4's protection for religious freedom has a language and history totally distinct from the federal Free Exercise Clause. Article I, Section 4 of the California Constitution provides:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State.

This language has no parallel in the United States Constitution. The California Constitution, by its express language, protects religiously motivated behavior unless it endangers paramount state interests. The entire debate on the free exercise clause in the 1849 Constitutional Convention focused on the degree to which the government could limit religiously motivated conduct by application of secular law.[1] Thus, the text of Article I, Section 4 simply is not susceptible to

[1] The disagreement among the delegates was not on whether religious conduct would be protected, but on whether to allow the government to impose *any* restrictions on religiously motivated behavior. The view that ultimately prevailed,

the current interpretation of the First Amendment as not requiring any religious exemptions from neutral laws. In California, a conflict between secular law and a religious duty triggers an inquiry into whether religious accommodation may be recognized or whether the state policy requires uniform application of secular law.

Since its adoption in 1849, California's free exercise clause has undergone only one substantive revision. When California drafted and adopted its second Constitution in 1879, it changed the language in Article I, section 4 to read that "the free exercise and enjoyment of religious profession and worship ... shall forever be *guaranteed* in this state," replacing the previous phrase "*allowed* in this State." 3 *Debates and Proceedings of the Constitutional Convention of the State of California Convened at the City of Sacramento*, Saturday, September 28, 1878 (1880) at 1171 (hereafter "*Debates of 1878-79*"). The only recorded debate over this amendment is the supporting statement by its sponsor, delegate O'Sullivan:

> I propose this amendment, because it is quite evident that the word "allowed" conveys the idea that the right to disallow or deny exists. Now, sir, I deny that any Government or any power on earth has a right to grant or deny freedom of religious belief. No such power exists, and where it is attempted to be enforced, it is simply despotism. Freedom of thought is inalienable. Our Government, being republican, should guarantee full liberty to the citizen in his actions. "Guarantee," therefore, is the proper word to be used in this case, because its meaning is in full accord with the genius of our institutions, which recognize the inalienable rights of all men.

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that society could enforce very important public policies, authorized the limited exceptions that exist in Article I, Section 4. *Report of the Debates in the Convention of California on the Formation of State Constitution in September and October, 1849* (1850) at 30-39.

Debates of 1878-79 at 1171. This amendment provides important insight into how the delegates saw the relationship between the people and their government. By replacing the word "allowed" with the word "guarantee," the delegates made it plain that individual liberties exist independent of the state's authority, and the state is charged with their protection. Thus, the government must demonstrate a strong interest in order to overcome the high position afforded religiously motivated liberty of conscience in our state's constitutional order.

In the 20th century, the voters reaffirmed the strong protection for religious freedom. California's Constitutional Revision Commission, established in 1969, reviewed the scope of rights included under Article I. The Background Study included a discussion of the protection available under the religion clauses. The Commission expressed its understanding that the rights established by Article I, Section 4 were independent of and arguably broader than those rights guaranteed under the First Amendment. The basis of this conclusion was Article I, section 4's specific language limiting "liberty of conscience."

> Although California and federal standards in this area appear to be analogous, it might be argued that Section 4 offers broader protection because it specifically refers to "liberty of conscience."

California Constitution Revision Commission, *Proposed Revision of the Cal. Const. Article I, XX, XXII* (1971), Part V at 14 (hereafter "*Proposed Revision*"). Significantly, the Commission recognized that the proper analysis to be applied to a claim of violation of rights under this provision was the compelling state interest test. *Id.* at 13. The Commission cited this Court's decision in *People v. Woody*, 61

Cal. 2d 716 (1964), applying that test, and the text of Article I, Section 4 itself. *Proposed Revision* at 12-13. The Commission's report emphasized that the rights granted under federal law were not intended to be coextensive with Article I, Section 4. The "California Constitution is a prime manifestation of the obligation of California law to provide for its own citizens independent of Federal law." *Id.* at 15.

The Commission's recommendations were presented to voters at the November, 1974 election. The voters ensured the continued independent vitality of California's Constitution by reaffirming Article I, section 4 and by adopting Article I, section 24, which expressly provides that rights guaranteed under the California Constitution are independent of the federal Constitution. Ballot Pamphlet, General Election (Nov. 5, 1974).[2] Thus, the voters intended Article I, Section 4 to have the scope and protection established in this Court's prior decisions when they readopted it without change. *People v. Mims*, 136 Cal. App. 2d 828, 831(1955). The compelling state interest test therefore has become firmly embedded as the rule governing California's free exercise analysis.[3]

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[2] The "ballot pamphlet is an important aid in determining the intent of the voters in adopting a constitutional amendment." *Lungren v. Deukmejian*, 45 Cal. 3d 727, 740, n.14 (1988).

[3] Amici reject the North Coast doctors' claim that Article I, Section 4 constitutionally shields any behavior that cannot be neatly characterized as "licentious" or a threat to "peace" and "safety" according to contemporary understanding of those terms. The state constitutional text allows restriction of religiously motivated conduct that jeopardizes important public policies;

Moreover, California's Article I, Section 4 was not derived from the First Amendment but originated in language from the parallel constitutional provisions of states along the East Coast. Other states interpreting similar free exercise clauses have declined to constrict the interpretation of its state provision. For example, the Minnesota Supreme Court retained traditional strict scrutiny of laws that burden free exercise following *Smith*. *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).[4] In light of the similar language of the Minnesota and California constitutions, the *Hershberger* opinion provides better guidance than the federal *Smith* ruling, interpreting a wholly different constitutional text.

2. Stability of Precedent. The federal *Smith* opinion represented a sharp constriction of federal free exercise doctrine. *Compare Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), with *Smith, supra*. California has applied strict scrutiny since this Court's 1964 *Woody* decision. In this situation, respect "for our Constitution as 'a document of independent force' forbids us to abandon settled applications of its terms every time changes are

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preventing the injury and civil strife fomented by discrimination is an interest of the highest order.

[4] *See also, Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992).

announced in the interpretation of the federal charter." *People v. Pettingill*, 21 Cal. 3d 231, 248 (1978) (citation omitted).[5]

3. Criticized federal rule. Rarely has a United States Supreme Court opinion attracted as much academic and judicial criticism as *Smith*. Four justices strongly dissented from the new no-exemption rule, characterizing it as "incompatible with our nation's fundamental commitment to individual religious liberty." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring). Scholars have also attacked *Smith* for its analytic weakness and for relegating members of minority faiths to a political process indifferent to the tenets of unfamiliar religions.[6] This Court has in the past "been influenced not to follow parallel federal decisions by

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[5] Recently, the New York Court of Appeals announced a new test, more protective than the no-exemption rule of federal *Smith* but less protective than strict scrutiny. *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 525-526 (2006). The Court refashioned its constitutional standard as a frank acknowledgment that its past decisions, while purporting to apply strict scrutiny, were in fact more deferential to legislative judgment.

The plaintiff urges this Court to follow New York and to adopt a similar diluted standard for Article I, Section 4 of the California Constitution. However, amici do not support this diluted standard, which is both unclear and inadequate in its protection of religious observance. Strict scrutiny is not always fatal to legislation but is sufficiently flexible to protect important state policies. See page 12, *infra.* In addition, the novel *Serio* standard would also represent an abrupt departure from 40 years of precedent in California following *Woody*.

[6] *See, e.g.*, David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995); Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 20 (1992); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137-40 (1992); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 215-19 (1992).

the vigor of the dissenting opinions and the incisive academic criticism of those decisions." *Teresinski*, 30 Cal. 3d at 836, citing *Myers*, 29 Cal. 3d at 267 n. 17 and *People v. Bustamonte*, 30 Cal. 3d 88, 100-101 (1981). The denunciation leveled at *Smith*, both by legal scholars and dissenting members of the Supreme Court, indicates that the opinion is not entitled to deference.

4. Important and settled rights. The *Smith* decision, if followed by this Court, would overturn established constitutional doctrine affording greater rights to California's religiously pluralistic people. For more than 40 years, Californians have been entitled to follow their religious convictions, when they conflicted with law, unless accommodations jeopardized important state policies.

The refusal to recognize any constitutionally mandated accommodation for religious observance has extremely adverse consequences. For example, under the federal *Smith* rule, states are free to refuse exemptions for orthodox Jews from general regulatory laws requiring autopsies for individuals who die of apparently natural causes at home, even if there is no evidence of foul play, despite the fact that this state-mandated postmortem mutilation of the body subsequently precludes burial in consecrated ground under Jewish law. *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990); *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990). The federal standard would not stop the government from enacting a general law prohibiting all "non-humane" slaughter of animals which would effectively outlaw Jewish and Muslim ritual slaughter requirements. Similarly, a local government in a dry county could establish an absolute ban on

alcohol which would seriously impede communion for Catholics.

While the strict scrutiny framework creates important space for religious observance, it has not interfered with the promotion of important public policies, such as child abuse protection,[7] equal access to housing[8] or gender equity in insurance coverage.[9] The experience of federal courts applying the Religious Freedom Restoration Act similarly disproves the myth that strict scrutiny inherently and inevitably disqualifies important legislation.[10] This case also illustrates the flexibility of the strict scrutiny standard, for its proper application results in uniformly enforcing the Unruh Act to fertility doctors, upholding the state's important policy of ensuring access to reproductive health care regardless of sexual orientation.

The North Coast doctors contend that the Unruh Act's ban on selecting and refusing patients according to their sexual orientation imposes a substantial burden on their sincere religious convictions. In essence, they claim a right to impose their religious beliefs about which people deserve assistance to become parents upon the patients who come to them seeking medical care. To hold that a religious

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[7] *Walker v. Superior Court,* 47 Cal. 3d 112 (1988).

[8] *Smith v. FEHC, supra.*

[9] *Catholic Charities v. Superior Court, supra.*

[10] Religious adherents lost 143 of 168 (or 85%) of cases decided on the merits under the strict scrutiny mandated by the Religious Freedom Restoration Act as of 1978. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. J. 575 (1998).

objector has the right to violate neutral, generally applicable laws regardless of the impact on third parties essentially would grant those objectors the right to impose their orthodoxy upon others. This Court observed in *Catholic Charities* that it was "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." 32 Cal. 4th at 565.

In addressing a claim under the Religious Freedom Restoration Act and thus applying the strict scrutiny formulation, this Court suggested in *Smith v. FEHC* that application of laws which conflict with religious tenets does not constitute a substantial burden on the exercise of religion where recognizing an exemption would have the effect of inflicting harm upon third parties. 12 Cal. 4th at 1175 (concluding that requiring a landlord to comply with the ban on marital status discrimination in housing did not impose a substantial burden on her exercise of religion in part because "to grant the requested accommodation would not affect [the landlord] alone, but would necessarily impair the rights and interests of third parties"). More recently, in *Catholic Charities*, this Court declined to resolve whether California's contraceptive equity law imposed a substantial burden on the free exercise of religion because this Court found that there was a compelling interest in ensuring gender equality for employees. 32 Cal. 4th at 564.

After *Catholic Charities* and *Smith*, it is somewhat unclear where the detrimental effect upon third parties fits into the constitutional analysis. However, this Court need not determine whether the detrimental effect upon third parties is relevant to assessing whether a substantial burden on religious exercise exists in the first place (as the *Smith* plurality suggests); whether the burden on third parties gives the state a compelling justification for burdening religious exercise (as *Catholic Charities* suggests); or, finally, whether a better reading is that the constitutional right to free exercise of religion does not extend so far as to protect religiously-motivated actions that detrimentally affect third parties. As in *Catholic Charities*, California's compelling interest in preventing invidious discrimination in the provision of reproductive health care justifies any burden on religious exercise imposed by the application of the Unruh Act's prohibition on sexual orientation discrimination to the North Coast doctors.

II.

CALIFORNIA HAS A COMPELLING INTEREST IN PREVENTING INVIDIOUS DISCRIMINATION

California has a compelling interest in preventing invidious discrimination in public accommodations. Therefore, if the Unruh Act does impose any burden on North Coast's religious freedom, it is fully justified under any level of constitutional scrutiny. Accordingly, there is no basis for granting the North Coast doctors' request for an exemption from the Unruh Act's prohibition on discrimination.

A. California Has a Paramount Interest In Eliminating The Range Of Harms That Invidious Discrimination Inflicts On Californians.

California has a compelling interest in eliminating invidious discrimination in health care. Invidious discrimination is a "classification which is arbitrary, irrational and not reasonably related to a legitimate purpose." *Halford v. Alexis,* 126 Cal. App. 3d 1022, 1029 (1981) (internal citations removed). Invidious discrimination inflicts at least three harms: it causes tangible injury to those suffering discrimination, "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life." *Roberts v. United States Jaycees,* 468 U.S. 609, 625 (1984). Thus, "invidious discrimination in the distribution of publicly available goods, services and other advantages cause[s] unique evils that government has a compelling interest to prevent ...." *Id.* at 628, *see also Aguilar v. Avis Rent A Car Sys., Inc.,* 21 Cal. 4th 121, 134 (1999) (citing *Roberts*, *supra*, for the proposition that California's interest in eliminating discrimination is compelling). California courts have also embraced this precept and found that "it is without question that the state has a legitimate and compelling state interest in the battle against discrimination on the basis of race, gender, age, national origin, or other invidious categories of discrimination." *Pacific-Union Club v. Superior Court,* 232 Cal. App. 3d 60, 79 (1991).

Invidious discrimination in health care causes Californians tangible harms in their everyday lives.[11] People are denied access to medical care altogether, receive sub-standard medical care, *see, e.g.*, *Payne v. Anaheim Mem'l Med. Ctr., Inc.*, 130 Cal. App. 4th 729, 746 (2005) (discussing Unruh Act claim against hospital that provided intentionally inadequate medical care to racial minority patients), or are denied services that are necessary to provide them effective access to care, *see, e.g.*, *Aikens v. St. Helena Hosp.*, 843 F. Supp. 1329, 1339-40 (N.D. Cal. 1994) (discussing Unruh Act claim regarding hospital's failure effectively to communicate with deaf woman about her husband's care). Such denials inflict obvious harms, but when they occur not because of ordinary negligence, but because of invidious discrimination, the state has an equally obvious and compelling reason to act to fix the problem.

Invidious discrimination also harms the dignity interests of those discriminated against, since the "act of discrimination itself demeans human dignity." *Walnut Creek Manor v. Fair Employment and Housing Commission*, 54 Cal. 3d 245, 287 (1991) (Kennard, J., dissenting). *See also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) ("the fundamental object of [federal civil rights legislation] was to vindicate 'the deprivation of personal

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[11] Lesbians in particular face discrimination in health care that results in the provision of substandard medical care. This discrimination also serves as a disincentive (and thus as a barrier) for lesbians to seek regular preventative health care. This discrimination and its resulting effects are clearly laid out in Plaintiff's Opening Brief on the Merits at 23-25.

dignity that surely accompanies denials of equal access to public establishments.'"). Plaintiff's dignitary interest is harmed even if she could obtain medical services elsewhere. This Court has recognized that "to say that [she may get services] elsewhere is to deny [her] the right to be treated equally by commercial enterprises; the dignity interest is impaired by even one [] refusal ...." *Smith v. FEHC,* 12 Cal. 4th at 1175.

The civil rights laws are also designed to ensure that society has the benefit of participation from the full range of citizens in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," *Romer v. Evans*, 517 U.S. 620, 631 (1996). Thus, invidious discrimination is antithetical to our ideal of the free society, which is strengthened by the widespread participation of all citizens in the political, economic and cultural life of the state. *See Gay Rights Coalition v. Georgetown Univ.,* 536 A. 2d 1, 37 (D.C. 1987) (government's compelling interests in preventing invidious discrimination include "the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit" from society). By enacting broad civil rights protections, such as those in the Unruh Act, California furthers its vital interest both in ensuring the equal treatment of all residents and in securing their full participation in society.

The state also has a legitimate concern for preventing the harm caused when people impose their religious views or practices, or the consequences of

those views, on others. Thus, in *Smith v. FEHC,* this Court refused to grant an exemption to a non-discrimination statute for those who hold religious objections to renting apartments to unmarried couples, noting that such an exemption would detrimentally affect the rights of the third parties. 12 Cal. 4th 1170, at 1176 ("to permit Smith to discriminate would sacrifice rights of [those protected] to have equal access to public accommodations and the legal and dignity interests in freedom from discrimination based on personal characteristics."). This Court reached a similar conclusion in *Catholic Charities*, holding that any exemption from the contraceptive equity law "sacrifices the affected woman's interest in receiving equitable treatment with respect to health benefits" and that there was no precedent for exempting "a religious objector from [a law] despite the recognition that the requested exemption would detrimentally affect the rights of third parties." 32 Cal. 4th at 564-65.

The North Coast doctors have chosen to establish a medical practice in California but argue that they should receive an exemption from the state's civil rights laws. As this Court has explained, 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* 32 Cal.4th at 565 (internal citations omitted). Accordingly, any exemption for North Coast doctors is unwarranted here because of the undeniable harm it would cause to those Californians whom the doctors believe are unfit to become parents.

B. California Has A Longstanding And Compelling Interest In Prohibiting Discrimination Based On Sexual Orientation.

California enacted civil rights legislation such as the Unruh Act to prevent the harms that its residents suffer when they are excluded from a job or denied health care based not on merit or sound medical judgment, but on irrelevant factors such as their race, sex, sexual orientation, disability, or gender identity. The Supreme Court recognized in *Roberts* that the harms resulting from discrimination are the same regardless of what kind of bias prompts it: "stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." 468 U.S. at 625. Because the consequences of such discrimination are the same regardless of what particular brand of animus motivates the discrimination (bias based on race, sex, religion, or sexual orientation), the state's interest in preventing the harm of discrimination is equally strong in all such contexts. *See* Stats. 2005, ch. 420, Sec. 2 (AB 1400) (stating that California's interest in preventing the various forms of invidious discrimination proscribed by the Unruh Act is "longstanding and compelling").

The North Coast doctors would have the Court focus narrowly on whether California has a compelling interest in eliminating sexual orientation discrimination in health care specifically, but that recommended construction misses the point. The proper question is not whether the state has an overriding interest in eliminating sexual orientation discrimination against this person in this

particular transaction, or disability, marital status, or gender identity discrimination against other individuals in other specified settings. The proper question is whether the state has a compelling interest in eliminating the harms that inevitably result from invidious discrimination of any kind in the public marketplace. As the discussion above illustrates, the state's compelling interest in eliminating those harms is manifest. Nevertheless, if such a classification-specific interest were required, California can easily demonstrate a compelling interest in eliminating sexual orientation discrimination.[12]

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[12] The North Coast doctors has confused this question by arguing that because a court has found that "the prevention of sexual orientation discrimination is not a right of the highest order" and that since the U.S. Supreme Court has not yet applied a heightened scrutiny to sexual orientation in a federal equal protection analysis, the interest California has in preventing invidious discrimination based upon sexual orientation is somehow less compelling than the interest California has in preventing invidious discrimination based upon race or gender. Answer Brief on the Merits at 51. First, the only case that the doctors cite for the first proposition, *In Re Marriage Cases* 144 Cal. App. 4th 873, 923 (2006)), has been granted review by this court and thus is vacated and cannot be relied upon as authority. Second, this Court has previously recognized that California may have a compelling interest in eliminating invidious discrimination based upon a characteristic (marital status) that does not receive strict scrutiny under a federal equal protection analysis. *Smith v. FEHC,* 12 Cal. 4th 1143 (1996). *See, e.g. Department of Fair Empl. and Hous. v. Superior Ct.*, 99 Cal. App. 4th 896, 620 (2002) (prohibiting marital status discrimination serves a compelling state interest); *Catholic Charities v. Superior Ct.*, 32 Cal. 4th 527, 564 (2004) (eliminating gender discrimination is a compelling state interest); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that Minnesota's interest in preventing sex-based discrimination is "compelling" even though sex-based classifications are not subject to strict scrutiny); *Gay Rights Coalition v. Georgetown Univ.*, 536 A. 2d 1, 37 (D.C. 1987) (prohibiting sexual orientation discrimination is a compelling interest).

Sexual orientation discrimination has been, and continues to be, a serious problem in California. The significance of the problem, and of the harms it inflicts, is reflected in the many court decisions addressing specific incidents of such discrimination and in the growing number of laws that the Legislature has passed to address this pervasive and persistent discrimination. This evidence shows that California is confronting a real problem and that its non-discrimination laws advance a compelling state interest.

Court decisions document the long history of sexual orientation-based discrimination and unequal treatment, which has resulted in lesbians and gay men being denied equal opportunity to participate in all aspects of civic life and to enjoy basic human dignity in California. Lesbians and gay men have faced discrimination by employers ranging from the telephone company to schools to public correctional facilities.[13] Lesbians and gay men have also faced discrimination in a variety public of public accommodations contexts from restaurants to country clubs. See *Rolon v. Kulwitzky*, 153 Cal. App. 3d 289 (1984); *Koebke v. Bernardo Heights Country Club,* 36 Cal. 4th 824 (2005).

The state's compelling interest in eliminating sexual orientation discrimination is also reflected in the Legislature's ongoing and systematic efforts

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[13] See, e.g., *Gay Law Students,* 24 Cal. 3d 458 (1979); *DeSantis v. Pacific Telephone,* 608 F.2d 327 (9th Cir. 1979); *Murray v. Oceanside Unified School District,* 79 Cal. App. 4th 1338 (2000); *Hope v. California Youth Authority,* 134 Cal. App. 4th 577 (2005); *Kovatch v. Cal. Cas. Mgmt. Co.,* 65 Cal. App. 4th 1256, 1277 (1998) *overruled on other grounds by Aguilar v. Atantic Richfield Co.,* 25 Cal. 4th 826 (2001).

to pass comprehensive legislation to prohibit unequivocally the discrimination lesbians and gay men encounter in a wide range of societal contexts:

- The Civil Rights Act of 2005 (AB 1400)[14] added sexual orientation[15] to the Unruh Act, declaring that "California's interest in preventing that [arbitrary] discrimination is longstanding and compelling."

- In 1999, AB 1001 amended the Fair Employment and Housing Act to include sexual orientation as an unlawful basis for discrimination in employment and housing accommodations. This amendment moved the protection against such employment discrimination from the Labor Code, where it had resided in prior years, into the comprehensive non-discrimination law applicable to other forms of employment and housing discrimination. See Stats. 1999, ch. 592, sec. 1 (codifying *Gay Law Students v. Pacific Tel. & Tel.*, 24 Cal. 3d 458 (1979)).[16]

- The California Student Safety and Violence Prevention Act of 2000 (AB 537) amended California's Education Code to ensure all students are offered equal protection from discrimination based upon sexual orientation.

- The Foster Care Non-discrimination Act of 2003 (AB 458) found that foster children are harmed by sexual orientation and gender identity based discrimination and declared California's policy that foster children have a right to have fair and equal access to all available services without discrimination because of sexual orientation or gender identity.

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[14] Section 2 of Stat.2005, c. 420 (A.B.1400).

[15] The Legislature explicitly amended the Act even though California case law has recognized sexual orientation as an impermissible basis for discrimination under Unruh for over twenty years. *See Rolon v. Kulwitzky*, 153 Cal. App. 3d 289 (1984); *see also Stoumen v. Reilly,* 37 Cal. 2d 713 (1951) (holding that gay clientele were entitled to service in public establishments by virtue of predecessor to Unruh Act).

[16] The Legislature has recognized that the practice of denying employment opportunity and discriminating [based upon sexual orientation] in the terms of employment foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general. Government Code § 12920.

- In 2004, the California Insurance Equality Act (AB 2208) required health care service plans and health insurers "to provide coverage to the registered domestic partner of an employee, subscriber, insured, or policyholder that is equal to the coverage it provides to the spouse of those persons [and] extended this requirement to all other forms of insurance regulated by the Department of Insurance."

- The Civil Rights Housing Act of 2006 (AB 2800) amended California's anti-discrimination housing provisions to include all of the classifications in the Fair Employment and Housing Act including sexual orientation.

- In 2006, the Nondiscrimination in State Programs and Activities Act (SB 1441) prohibited discrimination based on sexual orientation and gender identity in state-operated or -funded services, activities and programs.

The very existence of these laws demonstrates that the Legislature recognizes that discrimination based upon sexual orientation is a problem that California still needs to address. Further, California's repeated determination to prohibit discrimination on the basis of sexual orientation is consistent with the government's broader compelling interests in eliminating barriers to participation in civic life for all its residents.

C. California Has A Compelling Interest In Preventing Discrimination In Reproductive Health Care.

California's interest in forbidding doctors to refuse to treat patients for invidious reasons is particularly strong here because this case involves access to reproductive health care. This is not a case involving a medical practice refusing services such as treatment of a rash or an ulcer to patients whose sexual orientation they dislike – a practice that the state could certainly constitutionally forbid. The state interest here is, in fact, more compelling because the North Coast doctors refuse to provide fertility treatments to people they do not believe are fit to

become parents. This case therefore involves an intersection of discrimination based on sexual orientation and interference with the fundamental right to bear children.

Childbearing is at the core of the right to privacy protected by Article I, Section 1 of the California Constitution and the federal Constitution. This Court has recognized that procreation is a "fundamental, constitutionally protected" interest. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 161 (1985). *See also Perez v. Sharp*, 32 Cal. 2d 711, 715 (1948) ("right to have offspring" is "fundamental"). The appellate courts have recognized the rights of women with mental illness, *Maxon v. Hurlbut*, 135 Cal. App. 3d 626, 632 (1982), and women convicted of felony child abuse, *People v. Pointer*, 151 Cal. App. 3d 1128, 1139 (1984), to bear children.

California's interest in protecting this fundamental right to procreate is certainly compelling. The state has declared that the right to bear children is fundamental, Health and Safety Code § 123462(b), and has acted to prevent involuntary sterilization by the private medical sector. 22 Cal. Admin. Code §§ 70037 *et seq.*; *California Med. Ass'n v. Lackner*, 124 Cal. App. 3d 28 (1981). Indeed, California's commitment to guaranteeing the right to procreate is so strong that it is one of only a handful of states to require health care service plans to cover infertility care. Health and Safety Code § 1374.55.

This case, which involves physicians essentially selecting who may procreate, echoes the now discredited practice of involuntary sterilization. As this

Court is aware, in the first half of the twentieth century, approximately 60,000 individuals—primarily the mentally ill and mentally retarded, but also in some cases, criminals, epileptics and gays—were subjected to involuntary sterilization in the United States, *Valerie N.*, 40 Cal. 3d at 175 (Bird, C.J., dissenting); Janet Simmonds, *Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation*, 17 HASTINGS WOMEN'S L. J. 269, 275 (2006); Edward J. Larson, *Tailored Genes*, 2003 Dec LEGAL AFFAIRS 56 (2003), based on the belief that the "sterilization of the unfit would promote the general health and welfare of our society." *Maxon*, 135 Cal. App. 3d at 632. California was a "pioneer" in this infamous experiment, performing the greatest number of sterilizations. *Valerie N.*, 40 Cal. 3d at 151. Between 1900 and 1960, nearly 20,000 people were sterilized in this state. *Id.* at 175 (Bird, C.J., dissenting); Tom Abate, "State's Little Known History of Shameful Science," *San Francisco Chronicle*, Mar. 10, 2003; Peter Irons, "Forced Sterilization: A Stain on California," *Los Angeles Times*, Feb. 16, 2003. It was not until 1979 that the Legislature repealed California's sterilization law, and not until 2003 that Governor Davis issued an apology to the victims for "a sad and regrettable chapter in the state's history . . . that must never be repeated." Simmonds, *supra*, at 270-71, 275.

Although involuntary sterilization was state-sponsored, the initial decision about whether to sterilize was left to hospitals and institutions, and to the doctors and other personnel treating the individuals in those facilities. *Id.* at 273. Thus,

the doctors and other medical personnel selected who they deemed "unfit" to procreate, initiating the process that would result in sterilization.

The North Coast doctors in this case denied plaintiff the routine procedure appropriate for her infertility, not because of medical concerns, but simply because they did not view her as fit to be a parent because of her sexual orientation. But California's Unruh Act does not allow licensed fertility specialists to pick only heterosexual patients as worthy mothers. Allowing this kind of discrimination, in the name of religion, raises the specter of doctors in this state again choosing who can procreate and who cannot. The state's interest in ensuring that this does not happen is surely compelling and justifies the denial of the North Coast doctors' religious defense.

III.

THE COURT SHOULD GIVE NO MORE WEIGHT TO THE NORTH COAST DOCTORS' RELIGIOUS JUSTIFICATION FOR AN EXEMPTION FROM CIVIL RIGHTS LAWS THAN IT HAS GIVEN TO SIMILAR RELIGIOUS JUSTIFICATIONS FOR OTHER TYPES OF DISCRIMINATION

This is not the first time that claims of religious freedom to act and civil rights protections have been in tension. Where religious justification is invoked for discrimination in commerce that imposes a burden on third parties, this Court has been unwilling to grant an exemption and has resolved the conflict in favor of equality. Allowing the North Coast doctors' religious justifications for discrimination to prevail would depart from this approach and would have consequences outside the context of sexual orientation discrimination in health

care. Indeed, if a religious objection to the patient were sufficient to eviscerate the protection of the Unruh Act, doctors would be free to refuse on religious grounds to provide health care not only to lesbians, but to Muslims, Hispanics, women, men, people with disabilities, and on and on. The exemption for religiously motivated actions would undermine the equality that is currently protected by California's civil rights laws and is so important to a just society. A rule that allowed businesses the right to disregard our civil rights protections whenever the law conflicted with a religious belief would severely weaken the protections of the non-discrimination laws. In the past, we have seen religious reasons offered to justify differential treatment on the basis of race,[17] gender,[18]

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[17] For example, racial segregation was long justified by religious convictions. *See, e.g.*, *State v. Gibson*, 36 Ind. 389 (1871) (holding that segregation laws derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts'") (quoting *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 214 (1867)); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) ("'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'") (quoting trial court opinion). Indeed, "Christianity, Islam, and Judaism relied on the Old Testament for the justification of slavery." Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women* 12 COLUM. J. GENDER & L. 154 (2003); *see also* Forrest G. Wood, *The Arrogance of Faith* 43 (1990) ("[In the] second quarter of the nineteenth century . . . southern whites, largely in response to the attacks by abolitionists, began to invoke scriptures in a systematic defense of slavery."); David Brion Davis, *Slavery and Human Progress* 86 (1984) (citing Biblical justifications for slavery). Religion was also used to negate American Indians' claims to their land, as some Europeans believed that "the absence of Christianity meant there was no legitimate recognition of [their] jurisdiction." Wood, *The Arrogance of Faith* 33.

disability,[19] and national origin,[20] in addition to sexual orientation and gender identity. While some of these views may no longer be commonly held religious beliefs, there is no doubt that these beliefs were once as sincerely held as those that the North Coast doctors hold today. Yet courts have rejected claims that these beliefs permit those who hold them to violate nondiscrimination mandates. The harm in accepting the North Coast doctors' argument that discrimination is permissible whenever it is supported by the discriminator's religious belief becomes clearer when considering other contexts in which religious defenses have been (and continue to be) raised to nondiscrimination laws.

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[18] *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132 (1872) (quoting the state supreme court decision upholding the exclusion of women from practicing law because "'God designed the sexes to occupy different spheres of action, and . . . it belonged to men to make, apply, and execute the laws'"); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter* 35 COLUM. J. TRANSNAT'L L. 271, 273 (1997) (describing ways in which various world religions "have traditionally promoted, or even required, differentiated roles for women and men").

[19] *See, e.g.*, K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I,* in *The New Disability History* 236, 241 (Paul K. Longmore & Lauri Umansky eds., 2001) ("Until the late nineteenth century, disability and its economic effects of unemployment, poverty, and dependence were often regarded as a preordained fate, a divine stigma incurred at birth, or as a result of individual moral flaws and self-destructive habits such as criminality, alcoholism, and sexual promiscuity."); Michele Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 RUTGERS L. J. 597, 649 (1999) (noting that "the earliest misdiagnoses of mental illness were explained as demonic possessions").

[20] *See, e.g.*, John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* 6 (2d ed. 1975) ("Protestant Nativists, charged with the Protestant evangelical fervor of the day, considered the immigrants minions of the Roman despot, dispatched here to subvert American institutions.").

For example, a doctor in Kentucky recently argued that, because of his religious beliefs, he could not be required to work with anyone who was gay or lesbian, notwithstanding a city ordinance that prohibited employment discrimination on the basis of sexual orientation. This doctor may well have felt strongly that being gay was relevant to whether or not he could work with someone. However, the court correctly held that he was not entitled to violate the non-discrimination laws. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001) (holding that application of the ordinance did not violate the doctor's freedom of association, expression or religion), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002).

Religious beliefs about the appropriate roles of men and women may also conflict with laws prohibiting sex discrimination. In resolving these conflicts, courts have correctly held that religious beliefs may not override guarantees of equal treatment of men and women. *See, e.g.*, *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the "heads of the household" violated Title VII); *E.E.O.C. v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (holding that a private school could not pay women less than men in accordance with theological doctrine that men and women occupy different family roles); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450 (S.D.N.Y. 1987) (school district that granted male

bus drivers with less seniority preference over female bus drivers on certain routes because of the religious belief held by Hasidic families that boys should not be in contact with women violated Title VII); *see also E.E.O.C. v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (upholding Title VII retaliation claim of a woman who, because of religious doctrines that "prohibit lawsuits by members against the church," was fired for participating in EEOC proceedings alleging sex discrimination).

Similarly, some theological doctrines view HIV and AIDS as divine punishment that called for differential treatment.[21] As in other contexts, however, courts have rejected attempts to justify disability discrimination based on those religious convictions. *See, e.g., Stepp v. Review Bd. of Ind. Employment Sec. Div.*, 521 N.E.2d 350, 352 (Ind. App. 1988) (holding that a lab worker who refused to perform analysis of specimens that contained HIV warnings because of her religious belief that "'AIDS is God's plague on man, and performing the tests would go against God's will'" could properly be dismissed from her job).

And just forty years ago, a restaurant owner in South Carolina argued that his religious beliefs conflicted with the civil rights law that required him to serve black customers in his restaurant. *Newman v. Piggie Park Enters.*, 256 F. Supp.

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[21] *See, e.g.*, Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 LOY. L. REV. 55, 57 & n.7 (1990) (citing religious leaders who described AIDS as God's retribution for sinful behavior); O'Brien, *Discrimination: The Difference with AIDS*, 6 J. CONTEMP. HEALTH L. & POL'Y 93, 94 n.4 (1990) (43 percent of respondents to a 1987 Gallup poll indicated that AIDS is "divine punishment for moral decline").

941, 944-45 (D.S.C. 1966), *aff'd in part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). While the court and others considering similar defenses held that religious objections to desegregation were not sufficient to allow discrimination, those beliefs nonetheless were sincerely held by many. *See, e.g., id* at 945. ("This court refuses to lend credence or support to [the plaintiff's] position that [he] has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."); *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 897 (S.D. S.C. 1978) ("The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof."), *rev'd in part*, 461 U.S. 574 (1983) (holding that a religious school that excluded unmarried black students because of their beliefs about interracial relationships was appropriately denied a federal tax benefit offered to charitable organizations).

Had religious beliefs been sufficient to warrant an exemption to generally applicable civil rights laws, courts would have been required to rule in favor of the discriminating entities in all of these cases, and our civil rights protections would be considerably weakened. Thus, in assessing whether a doctors have a constitutional right to refuse on religious grounds to perform a procedure for a patient because of the patient's sexual orientation, the proper focus is on California's compelling interest in prohibiting invidious discrimination and its

consequences. California's critically important interest in preventing the harms that flow from invidious discrimination justifies enforcing its civil rights laws uniformly throughout the state.

CONCLUSION

The North Coast doctors are not entitled to an exemption from the Unruh Act. They must accept and treat patients regardless of the patients' sexual orientation.

San Francisco, California
April 2, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.204, I certify that the attached Brief of Amici Curiae contains 8476 words.

San Francisco, California
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PROOF OF SERVICE BY U.S. MAIL

North Coast Women's Care Medical Group et al. v. Superior Court of San Diego County, Guadalupe T. Benitez., Real Parties in Interest

No. S142892.

I, Leah Cerri, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, California, 94111.

On April 2, 2007, I served a copy of the attached

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AS AMICI CURIAE IN SUPPORT OF REAL PARY IN INTEREST

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 2, 2007 at San Francisco, California.

Leah Cerri