IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent,

GUADALUPE T. BENITEZ,

Real Party in Interest.

S142892

Fourth Appellate District, Division One, No. DO 45438
Superior Court of California, County of San Diego, No. GIC770165
The Honorable Ronald S. Prager, Judge

BRIEF OF AMICUS CURIAE EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN SUPPORT OF REAL PARTY IN INTEREST

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BRIEF OF AMICUS CURIAE EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN SUPPORT OF REAL PARTIES IN INTEREST

TO THE HONORABLE RONALD B. GEORGE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Edmund G. Brown Jr., Attorney General of the State of California, respectfully submits the following brief as amicus curiae in support of real parties in interest, pursuant to California Rules of Court, rule 8.520(f)(7).

INTEREST OF THE ATTORNEY GENERAL

The Attorney General is constitutionally designated as the chief law officer of the state, and has the duty to see that the laws of the state,

including the Unruh Civil Rights Act (the "Unruh Act," Civ. Code, § 51), "are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) The Attorney General also exercises broad civil enforcement powers to prevent and remedy unlawful discrimination under the Unruh Act (Civ. Code, § 52, subd. (c)), and, thus, has a strong interest in the proper interpretation of that statute. He is uniquely situated, therefore, to assist the Court in resolving the key issue in this case – whether the freedom of religion guarantees of the California and United States Constitutions provide a defense to a claim of alleged discrimination under the Unruh Act. The Attorney General believes that it is vitally important that this Court not only answer that question in the negative, but that it also declare that the California Constitution, like the federal Constitution, does not excuse compliance with otherwise valid, neutral laws of general application based on religious objections. Should this Court choose to apply a strict scrutiny standard, however, the Attorney General asserts that the Unruh Act serves California's compelling state interest in eradicating invidious discrimination in the provision of goods and services, especially medical care.

INTRODUCTION

The Court has posed the following question: Does a physician have a constitutional right to refuse on religious grounds to perform a medical

procedure for a patient because of the patient's sexual orientation?[1/] The Attorney General submits that, in California, a physician does not have such a right. Refusal to perform a medical procedure because of a patient's sexual orientation constitutes discrimination in violation of California's Unruh Act (Civ. Code, § 51).

The Unruh Act is a neutral, generally applicable statute that regulates business establishments such as petitioners. Therefore, under settled United States Supreme Court precedent, the First Amendment provides no basis for petitioners' claim that their religious beliefs should excuse them from complying with the law. (See *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872 (hereafter *Employment Div. v. Smith*); cf. *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 549 (hereafter *Catholic Charities*) [general rule would appear to dispose of claim that Women's Contraception Equity Act violates charity's free exercise rights].)

States need not demonstrate that facially neutral and generally applicable statutes such as the Unruh Act serve a compelling state interest in order to justify a burden on religious belief. (*City of Boerne v. Flores* (1997) 521 U.S. 507, 514; *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah* (1993)

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1. Because this Court directed that briefing be limited to this issue, the Attorney General does not address any of the other issues raised by the parties or the Court of Appeal's decision below.

508 U.S. 520, 531; *Employment Div. v. Smith, supra,* at p. 885.)

Nevertheless, the Unruh Act does serve California's compelling interest in prohibiting invidious discrimination by business establishments, including providers of medical services.

This Court has not yet determined whether the California Constitution's free-exercise guarantee (Cal. Const., art. I, § 4) similarly permits neutral regulation of business operations to impose an incidental burden on religious beliefs and practices without a demonstration of compelling governmental need. Rather, in *Catholic Charities, supra,* 32 Cal.4th 527, and in *Smith v. Fair Employment and Housing Commission* (1996) 12 Cal.4th 1143, 1179 (hereafter *Smith v. FEHC*), the Court found no need to resolve the question because the statutes at issue in those cases satisfied even strict scrutiny. Should the Court elect to address the question in the present proceeding, the Court should conclude that, like the First Amendment, California's Constitution affords no religion-based exemption from the ordinary obligation of all citizens to comply with facially neutral laws of general application.

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ARGUMENT

THE FEDERAL CONSTITUTION AFFORDS NO BASIS FOR A DOCTOR'S CLAIM OF RIGHT, IN VIOLATION OF THE UNRUH ACT, TO REFUSE MEDICAL SERVICES TO A PATIENT BECAUSE OF HER SEXUAL ORIENTATION; NEITHER SHOULD THE CALIFORNIA CONSTITUTION BE CONSTRUED TO AFFORD SUCH A "FREE EXERCISE" EXEMPTION FROM THE UNRUH ACT.

Both the First Amendment to the United States Constitution and Article I, section 4 of the California Constitution protect the free exercise of religion. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The United States Supreme Court has recognized that the constitutional protection of a person's right to hold certain *beliefs* is absolute, but the right to engage in conduct, even where triggered by those beliefs, may lawfully be restricted. (*Employment Div. v. Smith, supra,* 494 U.S. at pp. 877-879.)

This Court has also recognized that California has a compelling interest in eliminating invidious discrimination. (*Catholic Charities, supra,* 32 Cal.4th at p. 564 [gender discrimination].) The Unruh Act is a declaration of California's policy to prohibit discrimination in the provision of business services. (*Rotary Club of Duarte v. Board of Directors* (1986) 178 Cal.App.3d 1035, 1047; *Winchell v. English* (1976) 62 Cal.App.3d 125, 128.) That policy includes prohibiting invidious discrimination in business services on the basis of sexual orientation. (Civ. Code § 51, subd. (b).)[2/]

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2. The Attorney General recognizes that the parties dispute whether the petitioners' religious objection to treating Ms. Benitez was based on her marital

And physicians have been found to come within the scope of the Unruh Act in the provision of medical services. (*Leach v. Drummond Medical Group, Inc.* (1983) 144 Cal.App.3d 362, 370, citing *Washington v. Blampin* (1964) 226 Cal.App.2d 604, 608.)

Amicus is unaware of any decision construing either the United States Constitution or a state constitution to exempt a business operator from a law prohibiting discrimination in the provision of business services.

A. In Light of Unequivocal United States Supreme Court Precedent, Petitioners Can Find No Support in the First Amendment for Their Claim of Entitlement to a Religious Exemption from Compliance with the Unruh Act.

This Court is well informed concerning the high court's analysis of First Amendment guarantees in relation to facially neutral laws of general applicability (see *Catholic Charities, supra*, 32 Cal.4th at pp. 547-549), and Amicus will not repeat that analysis here. Suffice it to say that there can be little doubt that, to the extent the Unruh Act is a facially neutral law of general applicability, the First Amendment's free exercise clause affords petitioners no basis for claiming exemption from the act's reach. (*Employment Div. v. Smith, supra,* 494 U.S. 872.)

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status or her sexual orientation. However, the Court has limited the issue to be briefed to the question of whether there is a free exercise right to discriminate on the basis of sexual orientation. For that reason, this brief assumes, for the sake of argument, that sexual orientation was the basis for the discrimination. The Attorney General's arguments would, in any event, be the same as to discrimination on any of the bases prohibited by the Unruh Act.

The Unruh Act provides, in relevant part:

> 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, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(Civ. Code § 51, subd. (b).) It has long been recognized as prohibiting unequal treatment of customers based on prohibited discrimination, even where the customer is not completely excluded from the business. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29-30.)

1. On its face, the Unruh Act is facially neutral; and, indeed, no argument is made that the Act is intended to target religion in general or a religious tradition in particular. (Cf., *Catholic Charities, supra*, 32 Cal.4th at pp. 550-556.) The Act is similar to a provision of the Fair Employment and Housing Act (FEHA) that this Court upheld against a First Amendment free exercise challenge. (See *Smith v. FEHC, supra,* 12 Cal.4th 1143.)

The provision at issue in *Smith v. FEHC* declared it to be unlawful "[f]or the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of that person." (Gov. Code § 12955, subd. (a).) The owner of rental property argued that she should not be required to offer her units for rent to unmarried, co-habitating couples of the opposite sex because she held the religious belief that such living arrangements were sinful. (*Smith v. FEHC, supra*, at p. 1161.) Applying

Employment Div. v. Smith, this Court rejected the property owner's claim that under the federal Constitution's free exercise clause she was exempt from complying with FEHA. The Court observed that "[t]he statutory prohibition against discrimination because of marital status . . . is a law both generally applicable and neutral towards religion.") (*Ibid.*)

Like the FEHA, the Unruh Act is "a law both generally applicable and neutral towards religion". The long history of public accommodation laws from which the Unruh Act derives underscores this point. (See *In re Cox* (1970) 3 Cal.3d 205, 212-213 [setting forth the history of public accommodation laws in California].) As such, its application to the petitioners under the circumstances of this case does not offend the free exercise clause of the First Amendment.

2. This conclusion is not undermined by petitioners' assertion of a "hybrid rights" exception to the Supreme Court's ruling in *Employment Div. v. Smith.* Under this theory, the strict scrutiny standard would apply when a challenge to such a law involves the free exercise clause in conjunction with some other constitutional protection, such as freedom of speech or of the press or the right of parents to direct the education of their children. This Court has treated the theory with some skepticism, suggesting that the concept may, in fact, be a "misreading" of the Supreme Court's opinion. (*Catholic Charities*, *supra,* 32 Cal.4th at pp. 557-558.) The Court further

noted that it was "aware of no decision in which a federal court has actually relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim" (*Id.* at p. 558), and Amicus does not believe that this circumstance has changed.

In any event, the instant case may not be an appropriate vehicle for consideration of the "hybrid rights" theory of exception. Here, petitioners do not actually argue that compliance with the Unruh Act would require them to espouse a message with which they disagree. Rather, they make two assertions that admittedly concern speech but are collateral to a "hybrid rights" analysis.

First, petitioners assert that Dr. Brody's free speech rights are implicated because she only *said* she would refuse to perform an intrauterine insemination on Ms. Benitez, but did not *actually refuse* to perform the procedure because she was on vacation when it was needed. (Answer Brief on the Merits, pp. 58-59.) But this amounts to a denial that Dr. Brody engaged in discrimination at all, not an assertion that she had a First Amendment right to discriminate. It therefore does not present a true "hybrid rights" claim.

Petitioners also assert that their free speech rights are infringed because "Plaintiff is now trying to silence the doctors at trial." (Answer Brief on the Merits, p. 59.) But again, this assertion is collateral to the

"hybrids rights" issue: it relates to a right to *put on evidence* about religious belief at trial, not to a claim that compliance with the Unruh Act is tantamount to compelled speech.[3/]

Even accepting that a "hybrid rights" exception may exist, this Court has said that the "*non*-free-exercise component of a hybrid claim" must be more than merely colorable or "'the hybrid exception would probably be so vast as to swallow the *Smith* rule....' [Citation.]" (*Catholic Charities, supra,* 32 Cal.4th at p. 557, citing *Lukumi Bablu Aye, Inc. v. City of Hialeah, supra,* 508 U.S. 520, 567 (conc. opn. of Souter, J.).) Here the non-free-exercise component of petitioners' claim is not even "colorable," and cannot, therefore, support the application of the "hybrid rights" theory.

B. Article I, Section 4 of the California Constitution May Reasonably Be Understood to Similarly Require Compliance with Neutral, Otherwise Valid Laws of General Application, Even If They Incidentally Burden the Exercise of Religion

Article I, section 4 of the California Constitution provides, in part:

> 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 or safety of the State.

Petitioners argue that this Court should interpret article I, section 4 as

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3. At the same time, if petitioners' religious beliefs provide no defense to the discrimination claims, as a matter of law, then evidence of those beliefs would be irrelevant with respect to those claims. It is not a denial of free speech rights to exclude irrelevant evidence.

compelling, at a minimum, strict scrutiny, requiring that the least restrictive means be used to achieve a compelling state interest. (Answer Brief on the Merits, at p. 45.)[4/] Unquestionably, the interpretation of the California Constitution is not dependent on the interpretation of any provision of the federal Constitution. (*Catholic Charities, supra,* 32 Cal.4th at pp. 560-561; *Smith v. FEHC, supra*, 12 Cal.4th at p. 1177.) However, as the Court has observed, to date article I, section 4 "'has not . . . played an independent role in free exercise claims.'" (*Catholic Charities, supra,* 32 Cal.4th at p. 561, citing Grodin et al., The Cal. State Constitution: A Reference Guide (1993) p. 44.)

So far, this Court has declined to proclaim the proper standard of

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4. Nothing in the language of the California Constitution or its legislative history supports petitioners' contention that a test more rigorous than strict scrutiny must apply to challenges to neutral laws of general application that incidentally burden the free exercise of religion. Petitioners and some amici cite for the proposition that a stricter standard is required language from the debate over the 1897 amendment to Article I, section 4, replacing the word "allowed" with the word "guaranteed." In that debate, the amendment's sponsor explained that the amendment was necessary to dispel any implication that the word "allowed"conveyed the idea that the right could also be *dis*allowed. He opined that "[f]reedom of *thought* is inalienable" and that no "Government or any power on earth has a right to grant or deny freedom of religious *belief*." (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 p. 1171 (emphasis added). There is no dispute here that the right to hold whatever religious *beliefs* one chooses is absolute. (*Employment Div. v. Smith, supra,* 494 U.S. 872, 893 (conc. opn. of O'Connor, J.).) Where a law is neutral, i.e. does not target a particular religion or prohibit conduct because of its religious significance, and applies across-the-board, it does not infringe on a person's *beliefs*. Rather, it proscribes (or prescribes) *conduct*.

review for challenges to neutral, generally applicable laws under the California Constitution. (*Smith v. FEHC, supra,* 12 Cal.4th 1143, 1177-1179; *Catholic Charities, supra*, 32 Cal.4th 527, 559.) Rather, this Court has expressly left that question open. (*Ibid.*) In doing so, it explained that at different times, the Court has used both the strict scrutiny test and an approach similar to that of *Employment Div. v. Smith, supra,* 494 U.S. 872, "which found no constitutional objection to the application to a religious objector of a neutral, generally applicable law." (*Smith v. FEHC, supra*, 12 Cal.4th 1143, 1178.) The Court also acknowledged that cases decided before *Employment Div. v. Smith* treated the state and federal free exercise clauses "as interchangeable." (*Id.* at p. 1177.) Thus, this Court recognized that at the time of the *Employment Div. v. Smith* decision, "no settled interpretation of the state Constitution's free exercise clause existed." (*Catholic Charities, supra*, 32 Cal.4th 527, 561.) Nor has this Court yet established how Article I, section 4 should be interpreted. This case may provide an opportunity for this Court to do so.

1. There Are No Persuasive Reasons for this Court to Construe Article I, Section 4 as Imposing a Greater Restriction on the State's Ability to Enforce Neutral Laws of General Application Than That Imposed by the First Amendment

This Court interprets the California Constitution independently from the interpretation of the federal Constitution. (*Catholic Charities, supra,* 32

Cal.4th at pp. 560-561; *Smith v. FEHC, supra*, 12 Cal.4th at p. 1177.) Nevertheless, "[d]ecisions of the United States Supreme Court . . . are entitled to respectful consideration (citations) and ought to be followed unless persuasive reasons are presented for taking a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836.) No such persuasive reasons exist here.

In *Teresinski, supra,* this Court, reconsidered its interpretation of article I, section 13 of the California Constitution in a criminal case on remand from the United States Supreme Court. This Court altered its prior ruling to conform to a then-recent federal Supreme Court decision construing the Fourth Amendment. (30 Cal.3d at p. 827.) Although this Court recognized its authority "to construe the California Constitution to provide protection beyond that afforded by parallel provisions of the federal document," it found "the reasoning of [the federal decision] persuasive and consistent with past California decisions." (*Ibid.*) It therefore adopted the federal decision "as defining the rights of the parties under the California Constitution." (*Ibid.*)

The Court listed four factors leading it to adopt the federal standard. First, it found that "nothing in the language or history of the California provision suggests that the issue before us should be resolved differently than under the federal Constitution." The same is true in the present case.

Petitioners argue that the differences in wording between article I, section 4 and the First Amendment to the federal Constitution, compel, at a minimum, that challenges under the California provision be evaluated using a strict scrutiny standard. (Answer Brief on the Merits, at p. 45.)

Although the language of the state and federal provisions are different, that difference does not justify applying a stricter standard to laws challenged under the California Constitution. Article I, section 4 specifically states that its free exercise guarantee "does not excuse acts that are licentious or inconsistent with the peace or safety of the State." (Cal. Const., art. I, § 4.) Justice Scalia, joined by Justice Stevens, in his concurring opinion in *City of Boerne v. Flores, supra,* explained that early protections of religion enacted by the colonies and states contained language similar to that of article I, section 4. (521 U.S. 507, 538 (conc. opn. of Scalia, J.).) He pointed out that in those provisions "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws." (*Id.* at p. 539.) He also noted that "[t]he word 'licentious,' used in several of the early enactments, likewise meant 'exceeding the limits of law.' 2 An American Dictionary of the English Language 6 (1828)." (*Id.* at p. 540, n. 1.) Thus, Justice Scalia concluded that these enactments – like the California provision – were "a virtual restatement of *Smith*: Religious exercise shall be permitted *so long as it does not violate general laws governing conduct.*" (*Id.* at p. 539 (emphasis

in original).)

Second, this Court considered whether the new federal decision limited "'rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion,'" i.e. did the new federal ruling overrule past precedent or limit previously established rights under the federal Constitution. (*Teresinski, supra,* at p. 836.) Again, this factor does not justify a departure from the federal rule. On the contrary, the United States Supreme Court observed in it decision in *Employment Div. v. Smith, supra,* that recognizing a free exercise right to violate neutral laws of general application would contradict constitutional tradition and produce an anomaly in the law. (494 U.S. at p. 885, 886.)

Another factor this Court considered was whether following the federal ruling would overturn "established California doctrine affording greater rights" under the California Constitution. (*Teresinski, supra,* at p. 837.) Here, adopting the rule of *Employment Div. v. Smith* clearly would not overturn established California doctrine. This Court has expressly stated as much, noting that at the time of the *Employment Div. v. Smith* decision, "no settled interpretation of the state Constitution's free exercise clause existed." (*Catholic Charities, supra*, 32 Cal.4th 527, 561.)

Finally, the Court also noted that it had "on occasion been influenced not to follow parallel federal decisions" by the criticism of those decisions.

(*Teresinski, supra,* at p. 836.) Although there has been criticism of the *Employment Div. v. Smith* decision, it has by no means been unanimous. In light of the fact that the other factors all weigh in favor of following the federal decision, this factor, alone, does not provide persuasive reason to take a different course.

2. Construing the State Constitution to Afford a Religious Exemption from Compliance with All but "Compelling" Anti-discrimination Laws Would Be Inconsistent with Norms of Social Governance.

1. The application of the strict scrutiny test to any law that may incidentally burden religious practices, even a law that is neutral and applies to all businesses across-the-board, would result in a multitude of exceptions and impose a substantial burden on the State. (*City of Boerne v. Flores, supra,* 521 U.S. 507, 534.) Justice Scalia, writing for the majority in *Employment Div. v. Smith,* cautioned that:

> if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," [citation] and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind-ranging from compulsory military service, [citation], to the payment of taxes, [citation]; to health and safety regulations such as manslaughter and child neglect laws, [citation], compulsory vaccination laws, [citation],

> drug laws, [citation], and traffic laws, [citation]; to social welfare legislation such as minimum wage laws, [citation], child labor laws, [citation], animal cruelty laws, [citations], environmental protection laws, [citation], and laws providing for equality of opportunity for the races, [citation]. The First Amendment's protection of religious liberty does not require this. [Footnote omitted.]

(*Employment Div. v. Smith, supra,* 494 U.S. at pp. 888-889.)

The courts have repeatedly warned that religious exemptions from such laws would allow each person to effectively alter society's laws to suit her own purposes. (See e.g., *United States v. Lee* (1982) 455 U.S. 252, 261 ["Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees"]; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 215-216, footnote omitted ["the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."]; *Catholic Charities, supra,* 32 Cal.4th at p. 558 ["Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition."]; *Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232, 243 ["If the applicability of government regulation turned on the religious motivation of activities, plausible motivations would multiply and in the end vitiate any regulation."].)

The high court in *Employment Div. v. Smith* recognized that:

> [t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a

> governmental action on a religious objector's spiritual development." *Lyng [v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988).] To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"-permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States,* 98 U.S., at 167-contradicts both constitutional tradition and common sense.

(*Employment Div. v. Smith, supra,* 494 U.S. at p. 885.) In the Court's words, such a result would be a "constitutional anomaly." (*Id.* at p. 886.)

2. The problem is compounded when an exemption is claimed from compliance with anti-discrimination laws. Then, allowing the claim would not only exempt the religious claimant from the reach of the law that binds all others, it would allow the claimant's religious beliefs to diminish the rights of others.[5/]

In *Smith v. FEHC,* for example, this Court observed that, to permit a landlord to discriminate against unmarried, co-habiting couples because of her religious objection to such living arrangements, "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." (*Smith v. FEHC, supra,* 12 Cal.4th at p. 1170.) Similarly, permitting doctors – on religious grounds

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5. This Court has previously noted the apparent absence "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." (*Catholic Charities, supra,* 32 Cal.4th at p. 565.)

– to vary treatment options depending on the sexual orientation of the patient, sacrifices the patient's legal right to equal access to treatment options as well as her dignity interest in not being relegated to a second-class status among all other patients solely because of her sexual orientation. Article I, section 4 should not be construed to permit such a result.

3. A Strict Scrutiny Standard Would Likely Entangle Courts in Religious Issues.

In *Employment Div. v. Smith,* the Court noted that applying a strict scrutiny test to compel compliance with neutral laws of general application against a free exercise objection would unavoidably drag the courts into the quagmire of trying to determine the "centrality" of religious beliefs. (*Employment Div. v. Smith*, *supra*, 494 U.S. at p. 887.) Though "beliefs need not be acceptable, logical, consistent, or comprehensible to others" in order to merit protection (*Thomas v. Review Bd. of Indiana Employment Security Div.* (1981) 450 U.S. 707, 714; see also, *Smith v. FEHC, supra*, 12 Cal.4th at pp. 1167-1168), they must be rooted in religion and not mere philosophy. (*Catholic Charities, supra,* 32 Cal.4th at p. 563.) Thus, this Court, quoting the United States Supreme Court, has said:

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

(*Ibid.*, quoting *Wisconsin v. Yoder, supra,* 406 U.S. 205, 215-216, footnote omitted.)

However, courts are precluded from assessing the "validity" of an asserted religious belief. In fact, "'[r]epeatedly and in many different contexts,' the high court has 'warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.' [*Employment Div. v. Smith, supra,* 494 U.S. 872, 887.]" (*Catholic Charities, supra,* 32 Cal.4th at p. 563.) Thus, if the strict scrutiny standard were adopted, courts would be in the untenable position of being required to assess whether a genuine religious belief is being asserted, while at the same time having to carefully avoid inquiring into the validity of the belief, itself. Article I, section 4 does not compel such a standard.

4. In Any Event, the Unruh Act Only Incidentally Burdens Petitioners' Religion and the Act Serves a Compelling State Interest in the Least Restrictive Manner.

A law "substantially burdens a religious belief if it 'conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . .'" (*Catholic Charities, supra,* 32 Cal. 4that p. 562, quoting *Thomas v. Rev. Bd., Ind. Empl. Sec. Div., supra,* 450

U.S. at pp. 717-718.) Even under a strict scrutiny analysis, a facially neutral and generally applicable law generally is not constitutionally infirm if it is in the claimant's power to avoid the religious conflict.

Thus, in *Catholic Charities*, while this Court accepted the organization's assertion that to offer insurance coverage to its employees for prescription contraceptives was religiously unacceptable (*Catholic Charities, supra,* 32 Cal.4th at p. 562), the Court nonetheless found that Catholic Charities could avoid the conflict simply by not offering prescription drug coverage to its employees at all. (*Ibid.*) In *Smith v. FEHC,* this Court likewise found that the FEHA did not substantially burden the petitioner landlord's religious beliefs against renting her property to an unmarried couple because she could avoid the conflict by removing her property from the rental market. (*Smith v. FEHC, supra,* 12 Cal.4th at p. 1170.) The United States Supreme Court reached a similar conclusion in *Bob Jones University v. United States,* (1982) 461 U.S. 574, holding that the Internal Revenue Service could properly deny tax-exempt status to religious schools engaged in racial discrimination. The Court said that the "[d]enial of tax benefits [would] inevitably have a substantial impact on the operation of private religious schools but [would] not prevent those schools from observing their religious tenets." (*Id.* at pp. 603-604.)

Similarly, here nothing requires doctors to perform intrauterine

insemination for any of their patients, and they are free to simply decline to perform these services under all circumstances. They run afoul of the Unruh Act only when they offer the services to some patients but not to others based on characteristics that the Unruh Act prohibits – in this case, sexual orientation.

1. Thus, arguments by petitioners and various amici to the effect that the Unruh Act may be used to force doctors to perform medical services that violate their religious beliefs are faulty. The Unruh Act does not require that result, nor does it provide the tools for a patient to compel that result. Petitioners here would not be in violation of the Unruh Act if they decided, based on their religious beliefs and objections, not to perform intrauterine insemination for any of their patients.

2. Petitioners argue that a physician's religious beliefs and the patient's rights can be accommodated by allowing the doctor to refer a patient she is unwilling to treat to another doctor. Without such an exemption, they argue, the Unruh Act is not the least restrictive means of achieving the state's interest in combating discrimination. This Court, in *Smith v. FEHC,* rejected such an argument by a landlord claiming a religious freedom right to discriminate against unmarried, co-habiting prospective tenants:

> 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.

(*Smith v. FEHC, supra,* 12 Cal.4th at p. 1175.)

Here, Ms. Benitez's access to the full choice of available medical care would not be preserved by forcing her to seek care from a new doctor, rather than the one who had been treating her for almost a year. (See Answer Brief on the Merits, at pp. 5-15.) Similarly, forcing her to seek medical care elsewhere because petitioners had a religious objection to her becoming a mother would impair her dignity interest in being treated equally in obtaining medical treatment.

3. Moreover, California has a compelling state interest in eradicating invidious discrimination by business establishments. (*Catholic Charities, supra,* 32 Cal.4th at p. 564 [gender discrimination].) The Unruh Act is a declaration of California's policy to prohibit discrimination in the provision of business services. (*Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 37; *Rotary Club of Duarte v. Board of Directors, supra,* 178 Cal.App.3d 1035, 1047; *Winchell v. English, supra,* 62 Cal.App.3d 125, 128.) That policy predates the passage of the Unruh Act, going back to early common law. (*In re Cox, supra,* 3 Cal.3d 205, 212-214.)

The *Cox* Court explained that "at various stages of doctrinal

development" the common law had imposed on enterprises "'affected with a public interest'" certain obligations, including "the duty to serve all customers on reasonable terms without discrimination." (*In re Cox, supra,* 3 Cal.3d. at 212.) In 1897, the California Legislature codified "these common law doctrines into the statutory predecessor of the present Unruh Civil Rights Act. [Citation.]" (*Id.* at p. 213.) The 1897 version provided: "'That all citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.' (Stats, 1897, ch. 108, p. 137, §§ 1.)" (*Ibid.*) Amendments to the Act in 1919 and 1923 broadened its application. (*Ibid.*)

In the late 1950's, the Legislature enacted the Unruh Act out of concern that Courts of Appeal were too narrowly defining the kinds of businesses that afforded public accommodation and, as a result, were improperly curtailing the scope of the public accommodations provisions. (*In re Cox, supra,* 3 Cal.3d at p. 214.) Accordingly:

> the Legislature, enacting the Unruh Act, modified the mandate that "All citizens ... are entitled to the full and equal accommodations" and broadened its scope so that it read thereafter: "All citizens [footnote omitted] ... are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal

> accommodations ... in all business establishments of every kind whatsoever[.]" [Footnote omitted.]

(*Ibid.*)

California's lengthy history of prohibiting invidious discrimination in business establishments manifests its compelling interest in eradicating such discrimination. This interest is even more compelling in the area of medical care. This Court recognized, in denying Catholic Charities a religion-based exemption from complying with a law governing prescription drug coverage, that:

> Strongly enhancing the state's interest is the circumstance that any exemption from the [prescription drug coverage law] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits.

(*Catholic Charities, supra,* 32 Cal.4th 527, 565.)

Thus, even applying a strict scrutiny standard, there is no free exercise right to violate the Unruh Act.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: April 30, 2007

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.204, I certify that the attached Brief of Amicus Curaie contains 6,708 words.

Executed this 30th day of April, 2007, in Los Angeles, California.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **NORTH COAST WOMEN'S CARE MEDICAL GROUP, v. S.C. (BENITEZ)**

No.: **S142892**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On April 30, 2007, I served the attached **BRIEF OF AMICUS CURIAE EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN SUPPORT OF REAL PARTIES IN INTEREST** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 30, 2007, at Los Angeles, California.

Antonia G. Fernandez
Declarant

Signature

60214447.wpd

NORTH COAST WOMEN'S GROUP v. S.C.(BENITEZ)
Cal. Supreme Court No.: S142892
Court of Appeal Case No. DO 45438

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