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June 4, 2007

BY FED-EX

Clerk of the Court
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

Re: *Benitez v. North Coast Women's Care Medical Group, Inc., et al.*
Supreme Court Case No. S142892

Dear Clerk of the Court:

Please find enclosed for filing the following document pertaining to the above case:

1. An original and thirteen copies of an Answer to Amicus Curiae Briefs of Plaintiff and Real Party in Interest Guadalupe T. Benitez.

Also enclosed is one additional copy of the document and one self-addressed, postage-prepaid envelope. We would appreciate if you would stamp the document when it is filed and return the conformed copy to me. If there are any problems with this filing, please contact me at (213) 382-7600, ext. 235. Thank you for your assistance.

Sincerely yours,

Jamie Farnsworth
Legal Assistant

Enclosures

Case No. S142892

IN THE
SUPREME COURT 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.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One,
Court of Appeal Case No. DO 45438

ANSWER OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO *AMICUS CURIAE* BRIEFS

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I.

INTRODUCTION

This answer brief addresses the amicus curiae briefs filed in support of defendants by the following organizations and individuals:

1) Foundation for Free Expression ("FFE ACB");
2) Christian Medical & Dental Associations, American Association of Pro-Life Obstetricians and Gynecologists, and Physicians for Life ("CMDA ACB");
3) Pacific Justice Institute ("PJI ACB");
4) California Catholic Conference ("CCC ACB");
5) Islamic Medical Association of North American and Rabbis Elliot Dorff, Ph.D., David Frank and Arthur Gross-Schaefer ("IMA ACB");
6) Catholic Exchange, Inc. and Human Life International ("CEI ACB");
7) American Civil Rights Union ("ACRU ACB");
8) Christian Legal Society ("CLS ACB");
9) Thomas More Law Center ("TMLC ACB"); and
10) Seventh Day Adventist Church State Council ("SDA ACB").

Plaintiff responds to these amici curiae with this consolidated answer brief because they offer numerous similar arguments that are mistaken or irrelevant for identical reasons. First, all of defendants' amici start from the erroneous premise that enforcement of the Unruh Civil Rights Act (Civ. Code, § 51) forces doctors to perform procedures and offer treatments to which they object for reasons of conscience. But the Unruh Act does not speak to particular procedures or treatments at all; rather, the law requires only that, once doctors have decided to offer particular treatments to *some* patients, they must make those treatments available to *all* patients without discriminating against some of their patients on bases prohibited by law.

Second, defendants' amici invoke medical ethics rules, some of which *do* speak to doctors' religious objections to particular procedures. Those rules, however, *also* prohibit sexual orientation discrimination. Because doctors may not pick-and-choose among ethics rules, but must abide by them as a whole, physicians' rights of conscience may not be exercised in a selective, invidious manner.

Third, defendants' amici urge an abandonment of California jurisprudence that long has held that each individual's religious freedom must end where harm to others would begin. These amici instead ask the court to read California's constitutional text in an ahistorical manner to permit an improperly heightened, if not absolute, protection for harmful conduct. Contrary to the inaccurate suggestions of these amici, other states whose constitutions share California's textual roots appropriately have not sacrificed civil rights protections in the manner these amici urge. Moreover, some of defendants' amici seem to confuse religious free exercise doctrine with the doctrines that govern free speech claims. None of the case law offered by defendants' amici stands for the proposition that the Legislature is barred from insisting that those engaged in a licensed professional activity – such as the practice of medicine – must offer their services equally, without discrimination based on irrelevant personal characteristics of their patients or clients.

Fourth, disregarding California's "no preference" clause, defendants' amici seek an unconstitutional preference for a particular type of religiously motivated discrimination based on views shared by neither other sects nor secularists. The California Constitution's stringent ban both on preferring religion in general and on preferring any one form of religion precludes acceptance of the proposition that doctors who assert particular sectarian beliefs about human sexuality and sacred duties within family relationships as a justification for discriminating against lesbian and gay patients should be exempt from the Unruh Act.

Fifth, defendants' amici argue about facts and legal questions that may be germane when the case returns to the trial court for consideration of plaintiff's Unruh Act cause of

action but that are not material to the issue currently before this court. They dispute, for example, whether defendants harmed plaintiff by treating her less well than other patients and then abruptly terminating her care altogether. They assert that doctors improve quality of health care by expressing their biases about certain patients to those patients. They argue that only medical clinics and not doctors who run them can be subject to the Unruh Act. Plaintiff addressed such arguments in her Opposition to Defendants' Motion to Dismiss Review As Improvidently Granted (OMTD), and also in her Reply Brief on the Merits (RBOM). Nothing raised by defendants' amici changes the conclusion that no grounds exist for the religious exemption to the Unruh Act that defendants' amici seek.

Accordingly, this court should answer in the negative the question presented for review. Whatever their religious beliefs about lesbians and gay men, doctors should not be allowed to violate the Unruh Act by discriminating against patients based on sexual orientation. Although licensed physicians are free to select their area of specialization and have considerable discretion about the treatments they offer to patients, the constitutional protection for religious belief and worship does not extend so far as to permit doctors to select among patients the way they select among practice areas and procedures. Given California's great demographic diversity and religious pluralism, it is critical that the court not abandon this sound jurisprudence.

II.

DEFENDANTS' AMICI MISTAKENLY POSIT THAT ENFORCEMENT OF THE UNRUH ACT REQUIRES DOCTORS TO PERFORM PROCEDURES OR OFFER TREATMENTS TO WHICH THOSE DOCTORS OBJECT ON CONSCIENCE GROUNDS.

Like defendants' Answer Brief on the Merits (see ABOM 21), every one of the amicus briefs filed in support of defendants proceeds mistakenly from an incorrect

premise – that enforcement of the Unruh Act in medical contexts compels doctors to perform particular procedures in some instances and thereby forces some doctors to violate their religious tenets. (See CCC ACB 11 ["compelled to perform services contrary to their rights of conscience"]; PJI ACB 13-14 ["freely pursue their choice of career or employment without substantial fear that it might require them to do something that would compromise their religious conscience"]; CMDA ACB 13 ["[f]orcing a physician to perform a procedure . . . against his or her conscience"]; FFE ACB 1 ["a frontal assault on the federal and state constitutions that would force conscientious religious Californians to violate their own beliefs"]; IMA ACB 11 ["the choice between disobeying God or disobeying the State"]; CEI ACB 4 ["would compel a physician to perform a medical procedure which clearly violates the established tenets of the physician's religious beliefs"]; CLS ACB 10 ["forcing *these doctors* to violate their consciences," original italics]; ACRU ACB 22-23 ["whether Defendants shall have the freedom to maintain the traditional moral religious values they express, and act to uphold them and remain faithful to them"]; TMLC ACB 9 ["compelling conduct contrary to religious conviction"]; SDA ACB 3 ["defense based on the rights of conscience"].)

This premise is incorrect. The Unruh Act's proscription of sexual orientation discrimination does *not* require doctors to perform any procedure or to offer any treatment that is contrary to their religious conscience. The Unruh Act only requires that, once a doctor freely has decided to offer a procedure or treatment, the doctor *not discriminate* among patients based on their sexual orientation. California's commitment to equal access to public accommodations cannot countenance the kind of defense defendants' amici urge without opening the door to myriad types of harmful discriminatory conduct. (See *Angelucci v. Century Supper Club* (2007) 2007 Cal. LEXIS 5489, *9-10 (*Angelucci*) ["The Act ... imposes a compulsory duty upon business establishments to serve all persons without arbitrary discrimination. The Act serves as a preventive measure, without which it is recognized that businesses might fall into discriminatory practices."]

[citations omitted].)[1]

Thus, if health care providers, for reasons of conscience, do not wish to provide intrauterine insemination (IUI) to patients who are in same-sex relationships (or, for that matter, inter-racial or inter-faith relationships), the providers can be true to their religious convictions and refuse to do so. But, if that is their choice, then they cannot offer IUI to other patients, because to do so would constitute a form of invidious discrimination that our Legislature has prohibited.[2]

CMDA's brief insists that "[a] physician should be allowed to refuse to perform a medical procedure for reasons of conscience." (CMDA ACB 4, bolding and capitalization omitted.) In some circumstances, that surely is true.[3] But, indisputably,

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[1]A simple analogy conveys the non-discrimination point. The State of California certainly does not, and could not, require the proprietor of a Kosher delicatessen to serve ham and cheese sandwiches. But, when proprietors have decided to do so, they cannot refuse to serve such sandwiches to Jews, or to Arabs, even if the proprietors have a devout religious belief against providing this food to either group of people.

[2]ACRU insists it "is not the role of the Plaintiff, nor, we submit, of this Court" to decide whether defendants' discrimination against lesbians is "invidious." (ACRB ACB 5.) CMDA asserts that the question whether a doctor's conduct was invidious discrimination or protected religious exercise should be decided as a factual matter by a jury. (CMDA ACB 23.) The question of whether sexual orientation discrimination by those engaged in commercial activity is invidious, however, is a legal question that already has been decided by the Legislature. This action seeks enforcement of that decision -- which most certainly is an appropriate role for those harmed by such discrimination and, when they bring suit, of the courts.

[3]Doctors' freedom to refuse to perform procedures for religious reasons may be limited, of course, by the roles they voluntarily have assumed and their patients' needs. One who has obtained employment as a surgeon hardly can object on conscience grounds to providing blood transfusions to patients who need that treatment. Moreover, in addition to medical standards of care, physicians also must comply with applicable state health and safety regulations, licensing requirements, and other generally applicable, neutral laws. (See, e.g., Bus. & Prof. Code, § 125.6 [prohibiting discrimination on various grounds by licensed professionals].) Rather than granting extensive license to refuse treatment, California protects doctors against adverse action due to their refusal to

that is not what happened here. Defendants did not refuse to perform a *type of medical procedure* for reasons of conscience; they regularly offer the procedure they denied to Benitez. Rather, defendants refused to perform the procedure for a *type of patient* because of her sexual orientation. This distinction is not, as CMDA puts it, "merely splitting hairs." (CMDA ACB 18.) It is the essential distinction between conscientious objection, which sometimes is protected, and invidious discrimination based on sexual orientation, which the Unruh Act squarely bans.

Like CMDA's amicus brief, the IMA brief similarly insists that defendants' "sincerely-held religious beliefs" should not be treated as "wholly *irrelevant*." (IMA ACB 14, original italics.) This plea would be more compelling, however, if the law in question actually forced people to act against religious conscience. But the Unruh Act does not require any such thing. If some doctors consider it against their religious beliefs to treat lesbians equally in providing fertility services, those doctors easily can do so without running afoul of the civil rights law. Those who have chosen to practice

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provide medically appropriate care on grounds of conscience only in a small number of situations through statutes pertaining to specific procedures or treatments. (See Health & Saf. Code, § 123420, subd. (a) [abortion]; Prob. Code, § 4734 [termination of artificial life support per patient's request]; Bus. & Prof. Code, § 733, subd. (b)(3) [emergency contraception].) CMDA thus speaks too broadly it contends that doctors generally are free "to determine which procedures they will perform, in what type of practice they will engage, *and what patients they will serve*." (CMDA ACB 5, italics added.) Instead, doctors enjoy free choice to pursue a practice area that fits their talents, temperaments, life goals and moral values, but that practice area will entail expectations and restrictions. That is why each doctor – like everyone who must conform professional conduct to law – has a duty to consider any conduct restrictions he or she voluntarily has assumed, for religious or other personal reasons, when choosing a professional field. (See *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562-563, 565 (*Catholic Charities*) [concluding that religiously affiliated social services agency had duty to avoid conflict between civil law and its own religious beliefs and noting that "a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective."] [quoting *Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460].)

gynecology and obstetrics simply must refrain from offering certain specialized infertility treatments, such as IUI, to any patient, just as "one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1170 (*Smith v. FEHC*).) That choice might be unappealing to some doctors because specializing in infertility care can be lucrative as well as personally rewarding, but at least they are free to make it. Plaintiff had no choice. Having made contractual promises not to discriminate, defendants cornered the market with an exclusive contract to provide infertility services to plaintiff's health plan, promised her the treatment she needed for nearly a year, and then abruptly sent her packing because of religious objections to treating her the same as other patients. (Opening Brief on the Merits (OBOM) 4-5.) Defendants' conduct, in addition to being substandard medical care, inflicted precisely the sort of demeaning, humiliating affront to individual dignity that our civil rights laws are designed to prevent. (*Id.* at p. 5.)

Defendants' amici balk at the notion of health care professionals having to forego a small part of a specialized gynecology and obstetrics medical practice – by not providing IUI at all rather than denying it selectively to lesbians[4] – in order to remain true to their religious convictions while complying with California law. But by defendants' own description of their medical practice, limiting the scope of their services in this way so that they can follow both the law *and* their consciences will curtail to only a very minor

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[4]There is no specter here of these defendants being forced into "choosing an entirely different profession." (IMA ACB 17.) They have asserted consistently that they are willing to provide lesbian patients a wide range of medical services, and only objected to the one IUI procedure. To remain true to their religious convictions, they need only refer to other physicians any patient for whom IUI proves to be necessary, which, by their own description of their practices, is hardly an everyday occurrence.

degree their ability to practice in their chosen field. In contrast, civil rights laws – and other general laws that regulate the marketplace to protect consumers – would become meaningless if each religious believer could demand that society's laws yield to individual convictions. (*Catholic Charities, supra*, 32 Cal.4th at p. 548, citing *Employment Division v. Smith* (1990) 494 U.S. 872, 879 [110 S.Ct. 1595, 108 L.Ed.2d 876] (*Employment Division*).)[5] Especially when an individual's beliefs are about the worthiness of others, the believer must "accommodate" to society in a manner that seeks to avoid the conflict and that in any event does not harm others.

III.

MEDICAL ETHICS RULES ARE CONSISTENT WITH THE UNRUH ACT IN PROSCRIBING REFUSAL TO TREAT PATIENTS BASED ON SEXUAL ORIENTATION.

CMDA accurately cites medical ethics rules confirming that, in certain circumstances, doctors may refuse to perform certain treatments to which they object. (CMDA ACB 5-9.) Plaintiff has no quarrel with those rules. As with all codes of conduct, however, those rules must be read and applied consistently with those codes' other applicable rules. American Medical Association Rule E-10.05 illustrates how principles of non-discrimination and respect for doctors' conscience co-exist harmoniously, with the physician's religious refusal right subordinated to the primary

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[5]See generally Brief In Support of Real Party In Interest By Amici Curiae National Health Law Program, et al. ("NHLP ACB") 1-6, 35-40 [explaining why amici community health organizations believe "any exception to the Unruh Civil Rights Act for religiously motivated discrimination would swallow the rule"]; Brief of Amici Curiae National Center for Lesbian Rights, et al. ("NCLR ACB") 19-22 [addressing current discrimination against lesbian, gay, bisexual and transgender people and amici's conclusion that it would increase if religious beliefs were held to provide an affirmative defense to the Unruh Act].)

duty never to discriminate against patients on proscribed grounds, including sexual orientation.

The amicus briefs of Kaiser Permanente ("Kaiser ACB") and the Gay and Lesbian Medical Association, et al. ("GLMA ACB") examine in even greater detail than plaintiff's merits briefs the applicable medical ethics standards that prohibit discrimination. (See, e.g., Kaiser ACB 6 ["It is well accepted in professional standards that physicians have a duty to perform their professional services in a non-discriminatory manner. . . . These standards are applicable regardless of the religious or ethical beliefs of the physician."] [citing AMA Opinions E-9.12 and E-9.123]; see also GLMA ACB 6-16.) Based on the experience of its thousands of member physicians, Kaiser emphasizes the critical distinction between permissible, often necessary, differences in treatment due to *medically* relevant patient characteristics and illicit differences in treatment due to medically *irrelevant*, statutorily prohibited characteristics: "whether or not a physician should be able to refuse to perform a medical procedure for a particular patient depends upon whether the refusal is based upon a medically relevant characteristic of the patient. In the case at hand, neither the sexual orientation of the plaintiff nor her marital status appears to be medically relevant." (Kaiser ACB 14.)[6]

On behalf of physicians and physicians-in-training, GLMA answers CMDA's complaint (see CMDA ACB 9-11) against the allegedly "demeaning" characterization of the practice of medicine as a business. GLMA agrees with CMDA that the "history of medical practice . . . demonstrates that the practice of medicine is far more than a business transaction" (see CMDA ACB 11); however, GLMA explains, this history does not support discrimination against patients: "The reason why medicine is so different from ordinary commerce . . . is also the reason why the requirements of the Unruh Act

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[6]The defendant doctors confirmed in their respective depositions that they had no medical reasons for refusing to perform IUI for plaintiff, only religious reasons. (Real Party's Supplemental Request for Judicial Notice ("SRJN"), Exh. 1, Brody Depo., May 13, 2004, pp. 155:5-156:2 [no medical reasons for refusal]; SRJN Exh. 2, Fenton Depo., May 17, 2004, pp. 51:15-52:23 [same].)

should be seen as a floor of professional conduct. . . . The dependency of the patient on the physician . . . places the physician in a position of great power—with the correlatively great potential for abuse. It is for this very reason that we in the medical profession have imposed significant ethical obligations on ourselves, from the Hippocratic Oath, developed in the 4th Century B.C., to today's AMA Code of Medical Ethics. While medical ethics standards recognize and respect physicians' interests vis-à-vis patients, the standards are written not to protect medical professionals—they are written to protect our patients." (GLMA ACB 21-22, citing AMA, *Principles of Medical Ethics, Preamble* <http://www.ama-assn.org/ama/pub/category/2512.html> ["The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient."].)

IV.

DEFENDANTS' AMICI SEEK A RETREAT FROM SETTLED JURISPRUDENCE ESTABLISHING THAT RELIGIOUS FREEDOM ENDS WHERE HARM TO OTHERS BEGINS.

A. California's Religious Liberty Doctrine Long Has Prohibited Religiously Motivated Invasion Of Others' Rights.

Defendants' amici press this Court to jettison 150 years of methodically evolved California jurisprudence on the scope of religious freedom. For example, FFE rejects this court's rulings in *Catholic Charities, supra,* 32 Cal.4th at p. 527 (upholding statutory requirement that health and disability insurance contracts cover prescription contraceptives) and *Smith v. FEHC, supra,* 12 Cal.4th at p. 1143 (upholding statutory prohibition against marital status discrimination in housing) as "counter-productive 'solutions'" which "actually restrict access to good and services." (FFE ACB 9.) Similarly, FFE's attack on what it calls "the radical redefinition of the family when a

child is brought into the world with two 'mothers'" (FFE ACB 17) targets the Legislature's extensive, ongoing efforts to protect lesbian and gay couples and their children (see, e.g., Fam. Code, § 297 et seq., and § 9000 [same-sex domestic partners may adopt each other's children as "stepparents"]), as well as this court's decisions in *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 (child can have two mothers by adoption) and *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 (same-sex couples who have children through assisted reproduction are subject to same rights and responsibilities as different-sex couples who do the same).

These statutory provisions and court decisions are not, however, aberrations of California law. They are consistent with settled principles in this state's family law doctrine (see, e.g., *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [homosexuality not a ground for restricting parent's visitation]; *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [homosexuality not a ground to deny parent primary custody of children]) and core constitutional equality principles (see, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel.* (1979) 24 Cal.3d 458, 474-475).

Catholic Charities and *Smith v. FEHC* themselves are firmly rooted in *Ex Parte Newman* (1858) 9 Cal. 502 (*Newman*), in which this court long ago embraced a mandate of "religious liberty in its largest sense – a complete separation between Church and State, and a perfect equality without distinction between all religious sects." (*Id.* at p. 506.) It is FFE that seeks a radical redefinition both of whom it is that California considers to be "family" and of the family of cases to which *Newman* gave birth.

CMDA and CLS similarly attack as "legally unsound" (CMDA ACB 14) and "anemic" (CLS ACB 2) Benitez's statement of another, more universal tenet of California jurisprudence – that "each person's religious liberty ends where harm to a neighbor begins." (OBOM 2.) Yet here is what *Newman* said on the subject of harming one's neighbor under the cloak of religious liberty: "'[W]hatever may be the religious sentiments of citizens, and however variant, they are entitled to protection from the government, so long as they do not invade the rights of others.'" (*Newman, supra,* 9 Cal.

at p. 506.) "The true rule of distinction would seem to be that which allows to the Legislature the right so to restrain each one, in person, health, and property; that each individual shall be required so to use his own as not to inflict injury upon his neighbor . . . ." (*Id.* at p. 508; see also Civ. Code, § 3514 ["One must so use his own rights as not to infringe upon the rights of another."].) Thus, the law of California – since 1858 – is precisely as this court affirmed in *Catholic Charities*, *Smith v. FEHC* and many cases in between. It is this sound and important legal rule that CMDA and CLS attack.

This foundational legal tenet also rebuts FFE's argument that "[i]f morally shocking behavior (flag burning, computer-generated child pornography, cross burnings) is protected as free expression, then surely Christian doctors should be free to refer rather than compelled to sin." (FFE ACB 45.) Behavior like flag burning, production of child pornography, and cross burning is *not* protected as free expression when it crosses the line into conduct that hurts others. For example, in *In re Steven S.* (1994) 25 Cal.App.4th 598 – where the defendant had burned a cross on his African-American neighbor's lawn – the court held that, while *public* cross burning generally is deemed to be protected expression, the state may criminalize "an unauthorized cross burning on *another person's private property*" (*id.* at p. 611, italics added) as "an act of terrorism that inflicts pain on its victim, not the expression of an idea" (*id.* at p. 612). In *Steven S.* it was true literally that the defendant's First Amendment freedoms ended where harm to his neighbor began. Although discriminatory withholding of needed medical treatment may not constitute terrorism, it is a group-based judgment of inferiority and rejection that demeans and inflicts pain on its victim in a manner that, like cross-burning on another's property, can be banned.

FFE itself provides an all-too-vivid example of how the religiously-neutral anti-bias principles that long have governed in California must operate. FFE quotes selected Biblical injunctions that it contends condemn all same-sex sexual conduct, proffering these injunctions as controlling individual moral duty because they are "the eternal, infallible Word breathed out by God." (FFE ACB 21-22.) FFE emphasizes Leviticus

20:13, which says: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death . . . ." Defendants certainly are constitutionally protected in any beliefs they may have about the purported sinfulness of lesbian and gay couples, but defendants are *not* free to "put [gay people] to death," however fervently they might believe it to be divinely ordained. There is no question that the state may prohibit murder irrespective of religious inspiration. Likewise, the state may prohibit discrimination by those engaged in commercial enterprises, whether that discrimination is religiously-inspired or not.

CMDA's notion that lesbian patients can avoid the pain of invidious discrimination simply by going elsewhere for treatment fares no better under California law. CMDA's invocation of a patient's "right to choose which physician he or she will use" and a concomitant responsibility to do so "regardless of the financial implications" (CMDA ACB 8) brings to mind Anatole France's ironic observation that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (A. France, The Red Lily (1894).) In today's world of managed health care, few have the luxury of choosing freely among physicians, especially not for specialized care when faced with a primary-care doctor's specific in-network referral. But even for those few whose choices are not constrained by health plan rules, CMDA's policy recommendation misses the point. Just as there is an injury when a would-be lunch patron is sent away, told "we don't serve your kind here," so patients are injured when refused treatment because a health care provider objects not to what the patients request, but to who they are. And just as a rejected lunch patron's dignitary injury is not cured if she can obtain service – perhaps even good service – elsewhere down the street, neither is the rejected patient's.[7]

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[7]The brief of California's Attorney General reinforces this point, stressing that the state's interest in ending discrimination by business establishments not only is compelling but has been a state priority for generations. (AG ACB 23-25 [citing *Catholic Charities, supra,* 32 Cal.4th at p. 564, *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 (*Koire*) and *In re Cox* (1970) 3 Cal.3d 205, among other cases, and discussing both pre-Unruh Act

B. *Employment Division v. Smith* Has *Not* Been Rejected In Favor Of Allowing Religiously Motivated Discrimination In Commercial Contexts.

Defendants' amici erroneously contend that *Employment Division, supra,* 494 U.S. at pp. 885-886, has been vastly repudiated. Certainly there have been efforts toward that end by some in the California Legislature and Congress, and by some academics. But the paltry results of those efforts disprove the claim of significant public support for increasing the burden of justification on government when general, neutral laws incidentally restrict religiously motivated conduct, especially discriminatory conduct otherwise subject to civil rights laws.

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common law doctrine and the state's continuing commitment to prohibiting invidious discrimination].) Indeed, notwithstanding FFE's disparaging references to the "recently minted" rights of lesbians and gay men in California (see, e.g., FFE ACB 1), our state's proscription of sexual orientation discrimination by business establishments actually predates the Unruh Act, which was enacted in 1959. (See *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716 [holding that gay people may not be excluded from bars and restaurants merely based on sexual orientation absent some kind of improper behavior].)

The ACLU similarly confirms that sexual orientation discrimination is a serious problem and that the state's interest in deterring it is compelling. (ACLU ACB 14-26; see also NCLR ACB 9-16 [surveying literature concerning health needs of lesbians and reporting on correlation between anti-lesbian bias and diminished health status of lesbian population].) The ACLU further underscores that patients' interests in receiving non-discriminatory medical treatment for infertility, and in being able to exercise their fundamental rights to create a family, are among the most important and cherished of individual liberties. (*Id.* at pp. 23-26.) The state's interest in preventing discrimination in health care settings so patients receive preventive care and also are able to exercise these basic individual rights is particularly compelling. (See generally NHLP ACB 7-40 [discussing parallel conclusions of two Institute of Medicine reports on health disparities affecting minority populations – one concerning racial and ethnic minorities and one concerning lesbians – both finding correlation between bias of health care providers and diminished health status of disfavored minority populations].)

1. Efforts in California to codify strict scrutiny for religious free exercise claims have failed.

After the U.S. Supreme Court's ruling in *City of Boerne v. Flores* (1997) 521 U.S. 507 [117 S.Ct. 2157, 138 L.Ed.2d 624] (*Boerne*) that the Religious Freedom Restoration Act (RFRA) (42 U.S.C. §2000bb-1) did not validly reverse *Employment Division v. Smith*, and this court's 1996 decision in *Smith v. FEHC*, California-based proponents of expanded religious free exercise rights urged state legislators to enact statutes adopting the view that California courts should protect free exercise of religion more vigorously, along the lines of earlier cases such as *Sherbert v. Verner* (1963) 374 U.S. 398 [10 L. Ed. 2d 965, 83 S. Ct. 1790] and *Wisconsin v. Yoder* (1972) 406 U.S. 205 [32 L. Ed. 2d 15, 92 S. Ct. 1526]. To this end, the Religious Freedom Protection Act (RFPA) was introduced during the 1997-1998 Legislative Session as Assembly Bill 1617. Recognizing that certain proponents of AB 1617 were hostile to the *Smith v. FEHC* decision, some civil rights advocates expressed concern that the bill might be taken as intended to curtail *Smith v. FEHC* in order to allow otherwise prohibited discrimination, such as the marital status discrimination at issue in that case and also discrimination against lesbians and gay men. To address these concerns, the bill's author amended AB 1617 to clarify that it was not intended to permit discrimination. (See final bill text, available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_bill_19980820_enrolled.html>.)[8]

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[8]The June 30, 1998 Senate Judiciary Committee Report explained that the bill had been amended expressly to clarify that it was not intended to allow discrimination, and specifically not discrimination based on sexual orientation:

> The bill states in the legislative intent language that "Nothing in this act shall be construed to alter the existing balance between religious liberty claims and other civil and constitutional rights." ...
>
> This language, and the earlier language introduced in the

In its amended form, AB 1617 was passed by the Legislature. Governor Davis vetoed it, however, for reasons including his concern that its strict scrutiny test likely would have invited an increase in constitutional challenges by prisoners. (See Governor's Veto Message, dated 09/28/98, available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_vt_19980928.html>.)[9]

2. Congressional efforts to repudiate *Employment Division* also have failed.

After the *Boerne* determination that RFRA did not validly supersede *Employment Division v. Smith*, proponents of increased deference to religious activity unsuccessfully sought passage of further federal legislation to do so. From 1998 through 2000, Congress repeatedly considered, but did not pass, the Religious Liberty Protection Act (RLPA) as a

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> Assembly ... were introduced into the bill as a result of concern, expressed largely by the lesbian and gay community, that some might construe RFPA to encourage religious-based discrimination. This fear of discrimination in application of RFRA led the sponsors and author to re-draft the bill in an attempt to allay those concerns. The author's staff also draws attention to case law which supports the concept that anti-discrimination laws constitute a compelling state interest, citing *Pines v. Tomson* (1984) 160 Cal. App.3d 370; and *Lumkin v. Brown* (9th Cir. 1997) 109 F.3d 1498.

(See Sen. Jud. Comm. Report (6/30/98), available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_cfa_19980702_093123_sen_comm.html>.)

[9]In the next legislative session, the proponents of expanded protection for religious exercise tried again, introducing S.B. 38, also titled the "Religious Freedom Protection Act." (See bill text available at <http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0001-0050/sb_38_bill_19990427_amended_sen.html>.) This bill focused only on zoning and provided in part that any land use rules that substantially burdened exercise of religion would be subject to a form of intermediate scrutiny. S.B. 38 was heard in the Senate Local Government Committee in April of 1999 (the committee report is available at <http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0001-0050/sb_38_cfa_ 19990419 _114959_sen_comm.html>), and was rejected the following year.

post-*Boerne* revision of RFRA.[10] Reasons why Congress balked are evident in the legislative history from the 1999 session. The House Judiciary Committee's report contained both a majority and a minority assessment. The majority surveyed testimony seeking expanded protection for religious exercise due to burdensome government rules, such as restrictive zoning regulations and rigid school policies. (See House Judiciary Committee Report on Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219, available at <http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp106&sid=cp106qP8dz&refer=&r_n=hr219.106&item=&sel=TOC_120212&>.) The minority report responded by cataloguing concerns that religious groups would invoke any expanded religious rights to try to evade civil rights laws, historic preservation ordinances and child welfare laws, and that the proposed strict scrutiny approach would hamstring government in problematic ways. (*Id.*)[11] The bill then died in the Senate Judiciary Committee. An

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[10]See Religious Liberty Protection Act (RLPA) of 1998 (HR 4019, S 2148) (full text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h4019ih.txt.pdf>); RLPA of 1999 (HR 1691) (full text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h1691rfs.txt.pdf>); RLPA of 2000 (S 2081) (full text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s2081pcs.txt.pdf>).

[11]In pertinent part, the House Judiciary Committee Minority Report stated:

> We know from our brief experience with RFRA and with several state versions of that statute that some religious groups will use RLPA to attack state and local civil rights laws. We can expect that, if passed, RLPA will invite more of these challenges, because it specifically authorizes individuals to raise a religious liberty affirmative defense in any judicial proceeding. Thus, the religious liberty defense could be asserted against federal civil rights plaintiffs in cases concerning disability, sexual orientation, familial status and pregnancy. Employers in non-religiously affiliated organizations, for example, may assert the religious liberty defense against gay or lesbian applicants. Even if a majority of these defense claims fail, they will increase the cost of bringing a federal civil rights suit.

attempt the following year failed similarly.[12] Congress then abandoned RLPA as posing problems exceeding its proponents' demonstration of need, and instead enacted a narrow law providing for strict scrutiny of religious free exercise claims only as to land use rules and prison regulations. (See Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), §§ 2, 3, 42 U.S.C. §2000cc.)

Similarly, the Workplace Religious Freedom Act (WRFA), which would expand the duty currently imposed by Title VII on employers to provide reasonable accommodation of employees' religious practices, has not been well received in Congress. Introduced seven times between 1994 and 2006,[13] WRFA has languished in committee year after year, notwithstanding Congress's changing membership and the bill's vocal proponents. On the issue of exempting religiously motivated conduct from generally applicable, neutral laws, congressional *in*action speaks louder than advocates' words.

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[12] The text of the RLPA of 2000, S 2081, is available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s2081pcs.txt.pdf>.

[13] Workplace Religious Freedom Act (WRFA) of 1994 (HR 5233) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:h5233ih.txt.pdf>); WRFA of 1996 (HR 4117, S 2071) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:s2071is.txt.pdf>); WRFA of 1997 (HR 2948, S 92, S 1124) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h2948ih.txt.pdf>); WRFA of 1999 (HR 4237, S 1668) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s1668is.txt.pdf>); WRFA of 2002 (S 2572) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s2572is.txt.pdf>); WRFA of 2003 (S 893) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s893is.txt.pdf>); WRFA of 2005 (HR 1445, S 677) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s677is.txt.pdf>); WRFA of 2007 (HR 1431) (text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1431ih.txt.pdf>).

3. Academic commentary abounds, but without any consensus for replacing *Employment Division v. Smith* with an approach that allows discrimination or other harms.

Defendants' amici cite the numerous law review articles of Professor Michael McConnell and some others who disagree with Justice Scalia's description of pre-*Employment Division v. Smith* free exercise jurisprudence or, what is more relevant here, the U.S. Supreme Court's conclusion that neutral, general laws that incidentally burden exercise of religion warrant only rational basis review under the United States Constitution. (See, e.g., FFE ACB 41-47; ACRU ACB 15-17; TMLC ACB 6-8; SDA ACB 25-27.)

The amici generalize from these commentators and suggest that *Employment Division v. Smith*, *supra*, has been "almost universally rejected." (See, e.g., SDA ACB 25.) That is wishful thinking. Although the religious free exercise literature is considerable, as California's Attorney General noted in his amicus brief (AG ACB 16), it is not one-sided. In fact, many in academia recognize the sound elements of the U.S. Supreme Court's approach and argue against expanding religious exemptions from generally-applicable laws. (See, e.g., Koppelman, *Is It Fair To Give Religion Special Treatment?* (2006) 2006 U. Ill. L. Rev. 571 [building on Eisgruber and Sager, *infra*, and explaining that "privilege" and "protection" are not distinct, but rather lie on a continuum, and even in states that have passed a law like the federal RFRA, courts apply a balancing test that the state often wins]; Volokh, *A Common-Law Model for Religious Exemptions* (June 1999) 46 UCLA L. Rev. 1465 [arguing that states with RFRA analogues have not returned to the *Sherbert* regime of constitutionally compelled exemptions for religion, but are more in line with the *Employment Division v. Smith* approach]; Eisgruber and Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct* (Fall 1994) 61 U. Chi. L. Rev. 1245 [arguing that religion should not be privileged over other "deep human commitments" and should only be protected from

itself being subject to discrimination]; Sullivan, *Religion and Liberal Democracy* (Winter 1992) 59 U. Chi. L. Rev. 195 [disagreeing with McConnell's reading of the constitutional text and history].)[14]

C. CLS Mistakenly Posits That Religious Motivation Justifies Harmful Conduct Based On Irrelevant Free Speech Cases and Federal Statutes.

Defendants' amicus CLS takes issue with plaintiff's observation that religious free exercise jurisprudence does not protect religiously motivated conduct that invades the rights of third parties. (CLS ACB 2-10.) Plaintiff's description of the law (see OBOM 2, 17; RBOM 15-16) should not be controversial. This court made the same observation in *Catholic Charities*. (See *Catholic Charities*, *supra*, 32 Cal.4th at p. 565; see also *Smith v. FEHC, supra*, 12 Cal.4th at pp. 1174-1175.) California's Attorney General also underscored the point in his amicus curiae brief. (AG ACB 6, 18 fn.5.)

CLS contends, however, that cases addressing *speech* and *expressive association* somehow undermine plaintiff's description of the jurisprudence governing free exercise of *religion*. (CLS ACB 2-9 [citing cases upholding, *inter alia*, Nazis' speech rights to engage in expressive conduct, publishers' speech rights concerning defamation of public figures, and students' expressive association rights to organize clubs].) CLS relies especially on *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group Boston* (1995)

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[14]The disagreement between the Attorney General and the ACLU about the form of scrutiny required by the California Constitution in religious free exercise cases need not be resolved here. (Compare AG ACB 10-20 with ACLU ACB 3-14.) These amici do agree that, as in *Catholic Charities* and *Smith v. FEHC*, the state's interests in enforcing the Unruh Act in the context of medical services are compelling. The court likely will see future cases – such as those hypothesized by the ACLU involving the desire of individuals in educational or correctional institutions to wear religious garb or to have minor scheduling accommodations for prayer – in which the government's interests will be less strong because the costs of others' religious practices are borne by an institution rather than other individuals. (See ACLU ACB 4.) In such a case, the court may find reasons to decide the standard of review.

515 U.S. 557 [115 S.Ct. 2338, 132 L.Ed.2d 487] (*Hurley*) and *Boy Scouts of America v. Dale* (2000) 530 U.S. 640 [120 S.Ct. 2446, 147 L.Ed.2d 554] (*Dale*), pointing out that the state public accommodations laws at issue in those cases had to yield to rights of free speech and expressive association. (CLS ACB 5.)

But free speech and free exercise of religion are different constitutional rights governed by different doctrines. Speech receives uniquely heightened protections under both the U.S. Constitution and the California Constitution.[15] As the U.S. Supreme Court noted in *Hurley*, it was unusual for the Massachusetts high court to have concluded that a parade – a quintessentially expressive activity – should be considered a public accommodation. (*Hurley*, *supra*, U.S. 515 at p. 573.) Similarly, in *Dale*, the Supreme Court noted that, in applying to a group like the Boy Scouts, New Jersey's public accommodations law is broader than the laws of some other states, including California's Unruh Act. (Accord *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 686-687, 703].) Because the U.S. Supreme Court concluded that communicating values was a core aspect of the Boy Scouts' purpose, the majority held that the Scouts' rights of expressive association could not be restricted by the anti-discrimination law. (*Dale*, *supra*, 530 U.S. at pp. 655-659.)

Dale and *Hurley* do not apply here. Beyond the fact that they did not involve religious free exercise claims, the Supreme Court determined that both cases involved quintessentially expressive activity entitled to the greatest protection offered by free speech doctrine. (*Hurley*, *supra*, U.S. 515 at p. 573 [organizing a parade is an inherently expressive activity so organizers may exclude messages with which they disagree]; *Dale*,

[15]For example, prior restraints of speech generally are impermissible (*Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 70 [83 S.Ct. 631, 9 L.Ed.2d 584]), and advocacy of even lawless action, including use of force, may be protected. (See, e.g., *Brandenburg v. Ohio* (1969) 395 U.S. 444 [89 S.Ct. 1827, 23 L.Ed.2d 430].) Moreover, appeals involving free speech claims generally are subject to de novo review of factual findings. (See, e.g., *Hurley, supra,* 515 U.S. at 568, citing *New York Times C. v. Sullivan* (1964) 376 U.S. 254, 285 [84 S.Ct. 710, 11 L.Ed.2d 686].) There is no similar presumption against prior restraint of religious exercise, nor a special rule providing for independent appellate review of factual findings in religious free exercise cases.

supra, 530 U.S. at p. 659 [because the Boy Scouts are an expressive association they may exclude a leader whose presence would change their ability to convey their message].) Free speech jurisprudence addresses many forms of communication that receive varying levels of protection. Conduct with both expressive and non-expressive elements, for example, receives less protection than pure expression. (*United States v. O'Brien* (1968) 391 U.S. 367, 376 [88 S.Ct. 1673, 20 L.Ed.2d 672] (*O'Brien*) [governmental interest in preventing destruction of draft cards justified rule against card-burning despite anti-war message conduct communicated].) "[T]he goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, 'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs.'" (*In re M.S.* (1995) 10 Cal.4th 698, 710; see also *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 916 [102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215].)

Non-expressive commercial conduct, however, does not warrant any free speech protection. (*See Catholic Charities, supra*, 32 Cal.4th at pp. 558-559 [compliance with law requiring nondiscriminatory employee benefits does not convey message of support for law].) That is the relevant rule in this case. Unlike the expressive activities held to be protected in *Hurley* and *Dale*, a doctor's performance of a medical procedure such as IUI is non-expressive commercial conduct that is not entitled to free speech protection under either the First Amendment or article 1, section 2 of the California Constitution.[16]

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[16]CLS faults plaintiff for citing the federal district court's unpublished decision in *Christian Legal Society v. Kane* (N.D. Cal. 2006) 2006 WL 997217, for not noting that the decision has been appealed, and for not discussing similar cases CLS has brought in other jurisdictions. (CLS ACB 7 fn. 1.) But plaintiff did not cite *Kane* for the district court's analysis of associational rights, which are not germane to this case. Rather, plaintiff cited it with other cases that similarly show that some groups with anti-gay religious views actively are seeking exemptions from anti-discrimination rules so they may exclude and express more vehement disapproval of lesbians and gay men. (See OBOM 7.) If plaintiff's citations left any doubt on this point, CLS and defendants' other amici have removed it. Indeed, FFE's brief – with its accusation that "[h]omosexual activists are like the suicide bombers who destroy themselves while they murder others" (FFE ACB 5) – shows all too clearly why there must be separate tests for assessing

CLS also tries to substantiate its claim that constitutional guarantees of religious freedom authorize devout believers to harm others by citing two federal statutes – RFRA and RLUIPA (see *ante*, pp. 17-18) – and two federal district court decisions applying RFRA against local zoning restrictions. (CLS ACB 3-4.) CLS's argument is perplexing first because both cases on which it relies pre-dated the U.S. Supreme Court's 1997 *Boerne* decision, which held that RFRA cannot be applied against the sort of zoning ordinances at issue in those cases. (*Boerne*, *supra*, 521 U.S. at p. 507.) Thus, although CLS may be correct that courts may "have faithfully applied" RFRA to local zoning rules before *Boerne* (CLS ACB 4), courts obviously do not do so now.

As noted above, after multiple attempts to re-enact RFRA as RLPA after *Boerne*, Congress passed RLUIPA in 2000 based on complaints that religiously-affiliated groups were experiencing disfavored treatment in zoning disputes, and that prisons were refusing to accommodate inmates' religious needs. (See *ante*, pp. 17-18.) By invoking RLUIPA as authority for its proposition that doctors may discriminate on religious grounds against patients, CLS again misses the mark. RLUIPA does *not* grant religious institutions and individuals greater rights than others. Rather, that law is designed simply to place churches on equal footing with secular entities before local zoning boards and to insist that correctional authorities provide more religious accommodation when possible to prisoners. (See, e.g., *Guru Nanak Sikh Soc'y v County of Sutter* (9th Cir. 2006) 456 F.3d 978 [upholding RLUIPA as permissible exercise of Congress's remedial power under Fourteenth Amendment because the law addressed documented discrimination against

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speech claims and religious exercise claims. While FFE's alarmingly extreme condemnation of gay people is entitled to the highest form of speech protection, there cannot be similar protection for conduct in furtherance of such ideas. As a matter of religious liberty, FFE's constituents are protected absolutely in their beliefs, even their belief that plaintiff sought medical treatment from defendants because she had an "agenda" to undermine other people's families and society generally. (FFE ACB 18, 22.) (In fact, plaintiff's only "agenda" was to receive the medical care she needed so she could become a mother and build a family with her life partner.) FFE's constituents, however, are not entitled to act upon their beliefs by harming plaintiff in ways California law prohibits.

religious entities and required equal treatment]; *Midrash Sephardi, Inc. v Town of Surfside* (11th Cir. 2004) 366 F3.d 1214 [finding no Establishment Clause violation because RLUIPA merely mandates equal as opposed to special treatment for religious institutions, addressing problem of states and municipalities treating religious entities less favorably than secular institutions].)

RLUIPA and CLS's free speech cases are not germane here. Because doctors practice a profession for which the state licenses and regulates them to protect patient well-being, defendants' religious liberty claim is governed by the rule that has served the country well for many decades: "'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, supra,* 32 Cal.4th at p. 565, quoting *United States v. Lee* (1982) 455 U.S. 252, 261 [102 S.Ct. 1051, 71 L.Ed.2d 127].)

D. PJI Misreads The Title VII Cases; Neither Federal Nor California Employment Law Requires Accommodation Of Religiously Motivated Discrimination Or Other Harm To Third Parties.

Defendants' amicus PJI contends that federal employment nondiscrimination law requires accommodation of health care employees who refuse on religious grounds to comply with the Unruh Act, and that such employees must be allowed to refer patients to whom they object – such as lesbians – to other doctors who agree to treat such patients. (PJI ACB 11-14.) PJI insists any state law that would limit health care employees' freedom to "refer" lesbian and gay patients elsewhere is preempted by the federal law. (*Id.* at pp. 13-14.)

PJI ignores extensive Title VII case law making crystal clear that federal law does *not* require employers to allow their employees to harm third parties in violation of state law. (See OBOM 36, RBOM 15-16.) In addition to the cases applying this principle to

illicit anti-gay conduct (see OBOM 36; RBOM 15), there are many others that remove any possible doubt about whether Title VII permits, let alone requires, religiously motivated infringements of the rights of others. (See, e.g., *Knight v. Conn. Dep't of Pub. Health* (2d Cir. 2001) 275 F.3d 156, 168 ["the accommodation [the former employees] now seek is not reasonable. Permitting [them] to evangelize while providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter."]; *Chalmers v. Tulon* (4th Cir. 1996) 101 F.3d 1012, 1021 [unreasonable to require employer to accommodate employee's need to write letters to co-workers criticizing their private lives and pressing religious views where doing so would subject company to religious harassment complaints, if not lawsuits, by targeted employees]; *Wilson v. U.S. West Communications* (8th Cir. 1995) 58 F.3d 1337, 1342 ["Title VII does not require an employer to allow an employee to impose . . . religious views on others"]; *Bollenbach v. Board of Education* (S.D.N.Y. 1987) 659 F.Supp. 1450, 1473 [Title VII violated by employer's decision to use only male bus drivers for routes serving Hasidic male students who would not ride buses driven by women]; *Stepp v. Review Bd. of Indiana Emp. Sec. Div.* (Ind. 1988) 521 N.E.2d 350, 352 [rejecting employee lab technician's religious discrimination claim following firing due to employee's religiously motivated refusal to perform tests on specimens labeled with HIV warning because technician believed "AIDS is God's plague on man and performing the tests would go against God's will"].) Moreover, as noted above, persistent attempts to expand Title VII"s religious accommodation duty have failed annually since 1998. (See *ante*, pp. 16-17.)

E. The Unruh Act Does Not Unconstitutionally Disqualify Doctors From Employment.

ACRU contends that, if the Unruh Act is understood to require doctors to chose between performing IUI for patients and foregoing that aspect of an obstetrics and

gynecology medical practice, such application of the civil rights law would amount to a "Christians need not apply" rule. (ACRU ACB 26.) FFE goes further, arguing that putting doctors to such a choice would violate article 1, section 8 of the California Constitution, under which religious creed cannot be a basis for disqualification from entering or pursuing employment. (FFE ACB 26, 40.) As defendants have never made an article 1, section 8 argument, it is waived. Even were that not the case, such an argument also lacks substance. This constitutional provision protects religious believers from being *disqualified entirely* from particular employment based on their creed. It does not apply when a person's religious beliefs or practices prevent the performance of job responsibilities. (See, e.g., *Rankins v. Commission on Prof. Competence* (1979) 24 Cal.3d 167 [section 8 does not prohibit dismissal where religious adherent created own inability to perform job tasks]; *Duffy v. Cal. State Personnel Bd.* (1991) 232 Cal.App.3d 1 [no violation of section 8 where plaintiff's own conduct rendered him unable to perform required aspects of job]; see also *Strother v. Southern Cal. Permanente Med. Gp.* (9th Cir. 1996) 79 F.3d 859 [section 8 only applies to complete exclusion from employment, not to job restrictions or promotion denial].)

F. Defendants' Amici Misconstrue The State's Compelling, Religiously-Neutral Interests In Ending Prohibited Discrimination By Business Establishments.

Defendants' amici err in numerous ways in contending that the state does not serve compelling interests by enforcing the Unruh Act to prevent sexual orientation discrimination against lesbian infertility patients. *First*, for example, FFE contends that the state's interests in enforcing the Unruh Act cannot be compelling because, for equal protection purposes, sexual orientation classifications do not receive strict scrutiny. (FFE ACB 33-34.) As noted in plaintiff's Reply Brief on the Merits (see RBOM 14), however, ascertaining the relative importance of the state interests served by a statute is a different inquiry from determining whether courts should be suspicious that another arm of the

government (here, the Legislature) has abused its authority when framing a rule and has disfavored a minority group in a way that warrants more searching equal protection review.[17] Moreover, while it is a separate question from whether the state's interests in eradicating business discrimination are compelling, the level of scrutiny appropriate for sexual orientation classifications remains an open question under both the United States and the California Constitutions. (See RBOM 14.)[18]

Second, continuing its misguided argument that the governmental interest inquiry is mingled with whether particular classifications receive heightened scrutiny, FFE insists that such scrutiny cannot be warranted for sexual orientation classifications because the identity of lesbian and gay people is "inseparably linked" to conduct within same-sex relationships of which some disapprove. (FFE ABC 16.) But numerous personal characteristics covered by the Unruh Act involve elements of identity, belief and conduct as well as physical traits. Religious believers, for example, often engage in conduct related to their faith, and those who identify with a particular ethnic heritage may engage in traditional rituals.[19] Unruh Act protection does not wax and wane with respect to

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[17]As an example, consider a law passed to protect children's health. The state surely has a compelling interest in enforcing it. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342 [state has compelling interest in protecting children's health and welfare].) But that compelling public purpose does not indicate, favorably or unfavorably, whether any classifications employed within the law warrant heightened scrutiny.

[18]FFE's string cite of federal military and security clearance decisions rejecting arguments for heightened scrutiny of such classifications is not to the contrary. Those decisions all relied either on *Bowers v. Hardwick* (1986) 478 U.S. 186 [106 S. Ct. 2841, 92 L.Ed.2d 140], or on cases that relied on *Bowers*, and Bowers has been reversed and repudiated by the U.S. Supreme Court. (*Lawrence v. Texas* (2003) 539 U.S. 558, 578 [123 S.Ct. 2472, 156 L.Ed.2d 508].)

[19]Thus a doctor who, for example, routinely performs IUI for Christian patients would violate the Unruh Act by refusing IUI to Jewish patients, and also by refusing the procedure to those who do not plan to Baptize the child.

characteristics covered by the law depending on whether characteristics may be discerned visually, through conduct, by a person's reputation, or a mix of these.

Third, CLS charges that "plaintiff must demonstrate how exempting these doctors from Unruh Act liability will significantly undermine the state's pursuit of its admittedly important broad interests." (CLS ACB 12.) In fact, however, it is *defendants* who bear the burden of proof to establish the elements of their affirmative defense.

Fourth, defendants' amici claim enforcement of the Unruh Act in this context would constitute religious discrimination, which itself would be an Unruh Act violation. (See, e.g., FFE ACB 8, 47-48; ACRU ACB 26 ["Plaintiff openly advocates a Christians Need Not Apply policy."].) CMDA charges further that plaintiff "simply wants to impose her own belief and lifestyle on other people. . . . [Her] arguments demonstrate her own intolerance for other lifestyle decisions." (CMDA ACB 17, italics omitted.) These amici misperceive the goal and mechanism of nondiscrimination laws. The Unruh Act imposes the same nondiscrimination requirement equally on all engaged in offering services to the public. It is religiously neutral, which is to say it neither favors nor disfavors religious believers generally or any particular creeds. It *would* be unlawful religious discrimination if the constituents of these amici were denied medical services because of their creed. But rejection of the special exemption defendants and their amici seek is *not* discrimination against them. It is equal treatment.

Fifth, defendants' amicus CEI contends that application of the Unruh Act against defendants would punish defendants' religious motives unconstitutionally because it would forbid patient referrals for religious reasons, while referrals for medical reasons are commonplace. (See CEI ACB 7.) The Unruh Act prohibits different treatment based on *sexual orientation* (and other personal characteristics) whether done for religious reasons or secular reasons. It simply regulates certain selective conduct. CEI thus fails to appreciate that, when doctors refer patients for legitimate medical and business reasons – such as lack of expertise, an over-crowded practice, patient noncompliance or insurance limitations – there is no Unruh Act issue absent illicit selectivity. (See Kaiser ACB 7-9.)

V.

DEFENDANTS' AMICI SEEK AN UNCONSTITUTIONAL PREFERENCE FOR A PARTICULAR TYPE OF RELIGIOUS DISCRIMINATION.

It long has been a fundamental tenet of California's religious freedom jurisprudence that our Constitution's "no preference" clause (Cal. Const., art. I, § 4) prohibits state support of particular sectarian doctrines as well as religion generally. As Justice Mosk explained a generation ago, "a law may violate the clause by aiding all religions" or "by preferring one sect or religion over another." (*California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 599-600.) This notion is a function of the "absolute separation of church and state," which "was firmly recognized from the initial days of California jurisprudence." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 908 (conc. opn. of Mosk, J.).) Its roots are in *Ex Parte Newman, supra,* 9 Cal. 502.

The issue in *Newman* was the constitutionality of legislation requiring observance of the "Christian Sabbath." (*Newman, supra,* 9 Cal. at p. 504.) In holding the legislation unconstitutional, the court explained that the purpose of California's constitutional proscription against "discrimination or preference in religion" is not "merely to guarantee toleration" of religion generally but also to prohibit discrimination or preference in favor of any one particular sect. (*Id.* at p. 506.) Specifically, the court warned against "'the danger of applying the powers of government to the furtherance and support of sectarian objects." (*Ibid.*) This notion stretches all the way back to our nation's founding, when James Madison asked rhetorically: "Who does not see that the same authority which can establish Christianity in exclusion of all other religions may establish, with the same ease, any particular sect of Christians in exclusion of all other sects?" (J. Madison, A Memorial and Remonstrance Against Religious Assessments (1785).)

That is what defendants' amici seek – an unconstitutional preference for a

particular type of sectarian discrimination, as well as religious discrimination generally.

FFE's brief illustrates all too clearly the problems that would result were the state to excuse particular religious sects from neutral laws that generally require of all of us that we tolerate and interact with each other as equals in the commercial realm, regardless of what may be sincere and deeply-held wishes to do otherwise. There is no mistaking the passion and sincerity of FFE's belief that lesbians and gay men should not have equal rights to participate in society. FFE's argues forthrightly that, in their view, there is a "homosexual agenda [that] conflicts with Christian doctrine" and that "Christians cannot facilitate [this] homosexual agenda." (FFE ACB 20, fn. 2, 22.) Further, according to FFE, "[h]omosexuality is not a minor aberration, but a revolutionary attack on God's creation and His plan for both the family and the church." (FFE ACB 22.) In FFE's view, "providing fertilization services to a lesbian advances the homosexual agenda by enabling a same-sex couple to raise a child," which is "contrary to Christian doctrine." (FFE ACB 17-18.)

This viewpoint is what *Newman* called a "sectarian object." (*Newman, supra,* 9 Cal. at p. 506.) It is not so much a broad "Christian doctrine" as it is *FFE's* doctrine – a dogma of the particular sect to which FFE adheres.[20]

Of course, not all "Christian doctrine" treats gay people with such hostility. Many mainstream Christian denominations welcome lesbians and gay men as congregants, ministers and/or church-sanctioned spouses, including the Presbyterian Church USA (with 229,918 California adherents in 2000),[21] the Evangelical Lutheran Church in

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[20]FFE, which is funded largely by actor Mel Gibson, is affiliated with a schismatic Catholic movement that rejects all recent Popes and the Vatican II reforms of 1965. (See R. Friedman, *Church Digs Mel Gibson's $5 Million*, Fox News (Feb. 13, 2006); C. Noxon, *Is the Pope Catholic . . . Enough?* New York Times (March 9, 2003), p. 50. col. 1.)

[21]In contrast stands the Presbyterian Church In America, one of whose members is quoted in FFE's brief as saying "[w]e cannot understand the radical implications of homosexuality's acceptance until we realize that homosexuality turns the blueprint for life

America (171,110 California adherents), the Episcopal Church (168,895 California adherents), the United Church of Christ (50,493 California adherents), the Reconciling Ministries Clergy of the United Methodist Church (228,844 California adherents), the Unitarian Universalists (15,173 California adherents), and the Quakers (9,061 California adherents). The California Council of Churches, representing 4,000 congregations of 21 denominations and 1.5 million members, supports equal rights for lesbians and gay men.[22]

One Christian scholar describes "the struggle within Christian tradition between the profoundly human view that 'otherness' is evil and the words of Jesus that reconciliation is divine." (E. Pagels, The Origin of Satan (1995) p. 184.) FFE's brief is best understood when viewed through the prism of that description: FFE sees the

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inside out and upside down." (P. Jones, The God of Sex (2006) p. 27, quoted at FFE ACB p. 22.) The Presbyterian Church In America split from the Presbyterian Church USA in 1973 in opposition to the latter's so-called "liberalism." (See <http://www.pcanet.org/general/history.htm>.)

[22]The positions of these churches on these issues are set forth at the following Internet websites: <http://www.pcusa.org/101/101-homosexual.htm> [Presbyterian Church USA]; <http://www.spselca.org> [Evangelical Lutheran Church]; <http://www.episcopalian.org/cclec/paper-homosexuality.htm> [Episcopal Church]; <http://www.ucc.org/lgbt/> [United Church of Christ]; <http://www.rmnetwork.org/rmc/> [Reconciling Ministries Clergy of the United Methodist Church]; <http://www.uua.org/obgltc/> [Unitarian Universalist]; <http://www.afsc.org/lgbt/default.htm> [Quaker]; <http://www.speakfromtheheart.net/calchurches/calchurches_about.htm/> [California Council of Churches].) Statistics on religious adherents in California are published in D. Jones, et al., Religious Congregations & Membership in the United States 2000 (Glenmary Research Center 2002) p. 16.

There is considerable diversity of Jewish thought on issues pertaining to sexual orientation. (See IMA ACB 8 ["there are nuanced differences in interpretation of Jewish law and ethics between 'Orthodox,' 'Conservative' and 'Reform' Jews"].) For example, the lawmaking body of Conservative Judaism recently issued three mutually-contradictory opinions on ordination of gay and lesbian rabbis – one in support and two in opposition. (See R. Spence, *Conservative Panel Votes To Permit Gay Rabbis*, Jewish Daily Forward (Dec. 6, 2006) (available at <http://www.forward.com/articles/conservative-panel-votes-to-permit-gay-rabbis/>).)

"otherness" of lesbians and gay men as evil, while other Christian denominations urge reconciliation, inclusion and embrace.

Defendants and their amici claim the religious freedom defense they seek is very narrow, and that allowing doctors to discriminate against lesbian patients in violation of the Unruh Act need have no implications for others who might wish to discriminate on other grounds in other contexts. But even if this court were to attempt such a "narrow" approach, the effect would be to create a government preference for defendants' particular sectarian doctrine as against all other viewpoints – sectarian as well as secular – that welcome lesbians and gay men into the California fold. And if there is a state "preference" for those who share defendants' religious views, where would the religious exemption stop? If California's constitutional law were to permit religiously-motivated sexual orientation discrimination, it would have to permit – freely and without preference – *all* religiously-motivated discrimination. Just a few decades ago, some of America's major religious institutions still embraced racial discrimination as dogma (see OBOM 35), and even today a few churches on the fringe of the white supremacy movement continue to do so. Defendants' amici's vision of a constitutionally-approved religious discrimination free-for-all necessarily would embrace religiously-motivated *racial* discrimination, breathing new life into a waning national shame.

FFE quotes the well-worn 1892 bromide of Justice David Josiah Brewer that "this is a Christian nation." (*Church of the Holy Trinity v. United States* (1892) 143 U.S. 457, 471 [12 S.Ct. 511, 36 L.Ed. 226]; see FFE ACB 45.) Yet Brewer himself repudiated what FFE now seeks – a state preference for FFE's particular Christian doctrine. In an address to a church gathering in 1905, Brewer explained: "'I do not mean that as a nation we should have a state religion, or that by secular means we support any form of Christianity.'" (S. Green, *Justice David Josiah Brewer and the 'Christian Nation' Maxim* (1999) 63 Albany L.Rev. 427, 449.) (*Id.* at p. 429.) America is indeed a Christian nation, but only in the sense that some 77% of its population (67% in California) identifies as Christian. (City University of New York, American Religious Identification

Study (2001), available at <http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm>.) But America is also Jewish, Muslim, Buddhist, Hindu . . . everything literally from A to Z – Animism to Zen. Part of what holds us together as a nation is our constitutional prohibition against preference for any one of these diverse religions or for a particular sect within one of them.

VI.

DEFENDANTS' AMICI ARE BOTH PREMATURE AND MISTAKEN IN THEIR ARGUMENTS ABOUT DEFENDANTS' UNRUH ACT LIABILITY.

A. ACRU Mistakes What Facts Are Material To The Question Before The Court And Disregards The Effect Of Judicial Estoppel On The Factual Posture Of This Case.

ACRU reargues irrelevant purported factual disputes that have been briefed thoroughly on defendants' pending Motion to Dismiss Review as Improvidently Granted. But on a summary adjudication motion such as the one here, seeking to test the legal validity of an affirmative defense, potential factual disputes as to other defenses – including whether the defendant engaged in the conduct giving rise to liability – need not be disproved as a matter of law before the legal validity of the challenged defense can be determined. Only factual disputes relating to the particular defense need to be resolved in the defendant's favor in order to determine whether the defense is viable or not. (See RBOM 3-4.) Just two facts are material to defendants' religious freedom affirmative defense: (1) whether defendants' religious beliefs are sincere; and (2) whether the Unruh Act substantially burdens defendants' exercise of religion. (See Opposition to Defendants' Motion to Dismiss Review as Improvidently Granted (OMTD) 1-2; RBOM 2-4; see also *Catholic Charities, supra,* 32 Cal.4th at p. 562*; Smith v. FEHC, supra,* 12 Cal.4th at pp. 1166-1167.) For present purposes, plaintiff assumes *arguendo* that

defendants are sincere. Regarding the extent to which defendants claim their ability to practice their religion would be burdened, there are no material factual disputes because defendants do not claim any religious duty to practice infertility medicine, let alone to offer IUI to patients. (Compare *Catholic Charities, supra*, 32 Cal.4th at pp. 562-564, with *Smith v. FEHC, supra*, 12 Cal.4th at p. 1175.) Disputes about the extent to which defendants manipulated and deceived plaintiff, and the ways in which their treatment of her amounted to substandard medical care, are not relevant now. (See OMTD 5-7; OBOM 4-5; RBOM 3-5.)

By confusing the undisputed allegations that *are* material to defendants' affirmative defense and those that may be material in the trial court when plaintiff's Unruh Act claim is at issue, ACRU also disregards the effect judicial estoppel will have when the case arrives at that stage.[23] ACRU claims the factual posture of this case "has become obscured and confused" (ACRU ACB 2) and insists there is an evidentiary conflict as to whether defendants discriminated against Benitez because she is a lesbian, saying "[i]t is unfathomable to us that on this motion for summary adjudication Plaintiff can simply ignore this conflict" (ACRU ACB 7, fn. 3). But it is ACRU that has ignored not only the issue presented but also the dispositive legal principle Benitez invokes – judicial estoppel.

Judicial estoppel may be invoked within the procedural posture of summary adjudication proceedings. (See *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th

[23]ACRU seems to have drawn mistaken conclusions from the discussion of the facts in the Court of Appeal's decision. Unfortunately, the Court of Appeal lacked a complete trial court record concerning the range of factual and legal issues addressed in the decision, as the writ proceeding in that court contained only the limited record on plaintiff's motion for summary adjudication of defendants' religious free exercise affirmative defense. When defendants raised arguments before the Court of Appeal on unrelated issues, plaintiff attempted to supplement the record accordingly with additional relevant portions of the trial court record, but the intermediate court declined to accept that material. Thus, the Court of Appeal's decision, and amicus briefs like that of the ACRU, contain inaccurate and incomplete recountings of the allegations concerning the defendants' Unruh Act liability.

950, 959, fn. 8 [whether to apply judicial estoppel is a question of law "which can be made in the context of a summary judgment motion where none of the facts material to the court's decision to apply judicial estoppel are disputed"].) Thus, judicial estoppel supplants the normal standard of appellate review by precluding a party from invoking evidence that might otherwise refute what the party is judicially estopped to deny – here, that defendants refused to provide IUI to Benitez because she is a lesbian.[24]

B. Defendants' Discrimination Inflicted Dignitary Injury And Caused Substandard Medical Care.

1. Patients should be protected against dignitary harm.

Defendants' amici imply that plaintiff should be grateful for the care she received, rather than complaining that defendants refused her the IUI she needed. (See, e.g., ACRU ACB 23-25, 29-30; PJI ACB 10-11.) Were they familiar with the trial court

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[24]For example, in *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, where the plaintiff had contended in a prior workers' compensation proceeding that he required a stress-free work environment, the plaintiff was judicially estopped to deny that work restriction when opposing summary judgment in a subsequent employment discrimination action challenging his employer's determination that the work restriction rendered him unqualified for employment. (*Id.* at pp. 188-190.) The *Jackson* court did not even mention the normal standard of review – which would have favored evidence that the plaintiff was qualified for employment – because it was supplanted by judicial estoppel.

The same is true here. Defendants asserted in sworn declarations and their moving papers in support of their January 2004 motion for summary adjudication that they had told plaintiff it was against their religious beliefs to perform IUI "for a homosexual couple." (See Request for Judicial Notice in Support of Petition for Review, Exh. 1, pp. 3-4, Exh. 5, p. 3, Exh. 6, pp. 2-3, Exh, 7, pp. 3, 5 [request granted June 14, 2006].) Based on defendants' own sworn statements, the superior court ruled: "It is undisputed that Dr. Brody informed Plaintiff at the initial consultation that it was against her religious beliefs to perform intrauterine insemination ('IUI') for a homosexual couple." (*Id.*, Exh. 8, p. 1.) Defendants thus cannot invoke the evidentiary conflict ACRU asserts because judicial estoppel prevents them from doing so.

record, they would know of the glaring departures from the medical standard of care that resulted from Dr. Brody's unequal treatment of plaintiff. (See April 12, 2004 Court order, RJN, Exh. 8, p. 1.) Unequal treatment is substandard treatment. (Cf. *Rolon v. Kulwitsky* (1984) 153 Cal.App.3d 289, 292 [restaurant violated Unruh Act's requirement of "full and equal services" by serving lesbian couple but refusing to treat them like other couples]; AG ACB 7 [Unruh Act prohibits unequal treatment that is short of complete exclusion, citing *Koire, supra,* 40 Cal.3d at pp. 29-30].)

A core purpose of the Unruh Act is to protect individuals from the humiliation and other dignitary harm caused by "arbitrary, invidious discrimination" based on personal characteristics that should be irrelevant to commercial transactions. (*Angelucci*, *supra*, 2007 Cal. LEXIS at pp. 9-10; see also *Smith v. FEHC, supra*, 12 Cal.4th at pp. 1170-1171.) This was precisely plaintiff's experience. (Declaration of Guadalupe T. Benitez, Petitioners' Appendix of Supporting Exhibits To Petition For Writ of Mandate (Pet.App.), Exh. 7, at pp. 86, 91-94.) It reveals the fatal error in defendants' amici's assertion that doctors should be allowed to "refer" patients on discriminatory grounds (as opposed to referrals for individual medical reasons or because a physician does not provide the particular treatment to any patient).

2. Doctors' expressions of bias against patients do not enhance doctor-patient communication or quality of patient care.

Defendants' amicus CMDA offers the surreal suggestion that a doctor's advance warning of a religiously motivated refusal to treat lesbians encourages open and honest communication and results in better health care. (CMDA ACB 20-21.) The opposite is true. Such warning only would discourage patients from speaking openly about their sexual orientation or any other information they fear might motivate the physician to terminate or impose limits on the treatment relationship.

The AMA recognizes the medical challenge posed by the fact that gay patients

often are reluctant to disclose their sexual orientation to their health care providers, emphasizing the importance of "the physician's nonjudgmental recognition of sexual orientation" to the physician's "ability to render optimal patient care in health as well as in illness." (AMA Policy H-160.991, text included in *GLBT Policy Compendium* (Sept. 2005), available at <http://www.ama-assn.org/ama1/pub/upload/mm/42/glbt_policy 0905.pdf> and at Tab 2, Appendix of Cited Authorities filed in conjunction with plaintiff's Opening Brief on the Merits.) "Finding help is not easy. It is hard to trust other people, even professionals, when one anticipates disapproval." (Potter, "Do Ask, Do Tell" (Sept. 3, 2002) 137 *Annals of Internal Med.* No. 5, Pt. 1.) Open communication by the *patient* is essential to quality health care and must be encouraged. (AMA Policy H-160.991.) "[I]ncidences of discrimination – real and perceived – mar the relationship between consumers and their health care professionals, plans, and institutions. . . . An environment of mutual respect is essential to maintain a quality health care system. Consumers must not be discriminated against in the delivery of health care services . . . as required by law based on . . . sexual orientation. . . ." (Advisory Committee on Consumer Protection and Quality in the Health Care Industry, Report to the President of the United States, *Consumer Bill of Rights and Responsibilities* (November 1997), available at <http://www.hcqualitycommission.gov/ cborr/chap5.html>; see also NHLP ACB 20-35.) CMDA's suggestion that care of lesbian and gay patients improves when doctors express anti-gay religious views to those patients stands the Hippocratic Oath on its head.

C. PJI Is Both Mistaken And Off-Point In Arguing That The Individual Defendants Cannot Be Liable Under The Unruh Act.

Defendants' amicus PJI mistakenly asserts that Drs. Brody and Fenton cannot be held individually liable for violating the Unruh Act, asserting that, because they are individuals, they cannot be liable under a law regulating business establishments. (PJI

ACB 3-5.) PJI invokes *Leach v. Drummond* (1983) 144 Cal.App.3d 362 (*Leach*) as grounds for this point, but ill-advisedly so. *Leach* itself acknowledged that a "claim for monetary damages for deprivation of medical care is specifically authorized under the holding of *Washington v. Blampin* [1964] 226 Cal.App.2d 604." (*Leach*, *supra*, 144 Cal.App.3d at p. 378.) The settled principle that both an entity and its employees can be liable for violation of the Unruh Act is beyond dispute. (See, e.g., *Long v. Valentino* (1989) 216 Cal.App.3d 1287.) PJI's assertion is even less tenable with respect to a medical practice itself run by the doctors who are the defendants in this action. (See Pet.App. at pp. 104, 132, 203-204 [articles of incorporation, corporate bylaws, and contracts identifying individual doctors as principals of medical business].)

VII.

CONCLUSION

For the foregoing reasons, the court should answer in the negative the question presented for review. Whatever their religious beliefs, doctors should not be allowed to discriminate against patients based on the patients' sexual orientation in violation of the Unruh Act.

Dated: June 4, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding tables and this certificate, but including footnotes, the foregoing brief contains 12,742 words, based on the computer program used to prepare the brief, and that it is proportionately spaced and has a typeface of 13 points.

Dated: June 4, 2007

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DECLARATION OF SERVICE

I, Jamie Farnsworth, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On June 4, 2007, I served copies of the attached document, described as **ANSWER OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ TO *AMICUS CURIAE* BRIEFS,** on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

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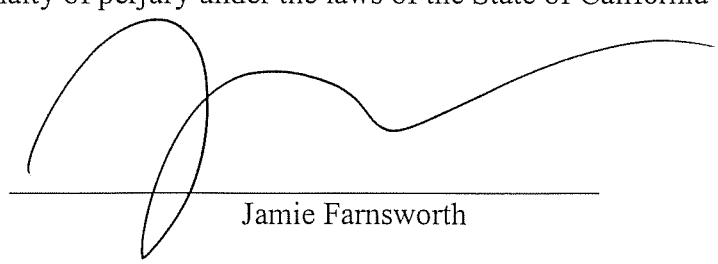
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 4, 2007



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