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April 1, 2008

Chief Justice Ronald George and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *North Coast Women's Care Medical Group, Inc., et al. v. Superior Court (Benitez)*, Case No. S142892– Plaintiff's Responding Letter Brief re Code of Civil Procedure section 437c

Dear Chief Justice George and Associate Justices:

This responding letter brief on behalf of Plaintiff and Real Party in Interest Guadalupe Benitez ("plaintiff") answers the March 21, 2008 supplemental letter brief of Defendants and Petitioners ("defendants"). Defendants are mistaken in each of the arguments made in their supplemental letter brief ("DSLB") as to why the trial court's grant of summary adjudication of defendants' thirty-second affirmative defense purportedly was inconsistent with Code of Civil Procedure section 437c.[1] The trial court properly distinguished between the two summary adjudication motions it considered concurrently and, in particular, between the facts material to each motion. Regarding defendants' motion for summary adjudication of plaintiff's Unruh Act claim, the trial court determined that defendants' inconsistent statements about whether they had refused to provide medical services to plaintiff because of her sexual orientation or her marital status prevented a ruling in defendants' favor. Regarding plaintiff's motion for summary adjudication of defendants' freedom of religion affirmative defense to plaintiff's Unruh Act claim, the trial court properly concluded that defendants' "real" motivation for denying medical services to plaintiff was not material because, regardless of whether defendants withheld medical care from plaintiff because of her sexual orientation or only her marital status, there is no freedom of religion defense to the Act's general prohibitions against certain forms of discrimination by business establishments. As a result, plaintiff was entitled to adjudication of the defense in her favor as a matter of law with respect to that cause of action. Nothing in the trial court's procedure in granting plaintiff's motion was inconsistent with Section 437c.

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[1] Code references in this letter are to the Code of Civil Procedure unless stated otherwise.

I. THE TRIAL COURT CORRECTLY IGNORED IMMATERIAL FACTUAL AND LEGAL DISPUTES WHEN CONSIDERING, AND GRANTING, PLAINTIFF'S SUMMARY ADJUDICATION MOTION.

A. Defendants' Contentions That They Discriminated Against Plaintiff Based On Her Marital Status And That Marital Status Discrimination Was Permissible Under The Unruh Act Are Not Material To Whether Religious Believers Are Constitutionally Privileged To Violate The Act.

On October 28, 2004, the trial court ruled on two motions for summary adjudication. (Petitioners' Appendix Of Supporting Exhibits To Petition For Writ Of Mandate ("PA"), at pp. 436-439.) In the first, defendants moved for adjudication of plaintiff's Unruh Act claim. (PA at pp. 436-437.) In the second, plaintiff sought adjudication of defendants' free exercise of religion affirmative defense. (PA at pp. 438-439.)

In support of their motion, defendants contended (a) that their only reason for refusing plaintiff the treatment she needed was her marital status, and (b) that the Unruh Act allowed marital status discrimination at the relevant time. Opposing defendants' motion, plaintiff pointed to defendants' numerous sworn statements in which they acknowledged that the reason they refused to perform insemination for plaintiff was her "sexual orientation" and that she was a member of a "homosexual couple" or a "gay couple."[2] The trial court thus concluded, consistently with Sections 437c(c) and 437c(f)(1), that the key fact regarding defendants' motion — the reason for defendants' refusal of treatment to plaintiff — was disputed, and that the motion had to be denied. (PA at p. 437.)[3]

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[2] See, e.g., declarations of defendants Brody and Fenton, PA at pp. 98, 99, 102, 134, 154, 156; see also Petition for Review, Att. 2, at pp. 2-9; Plaintiff's Request for Judicial Notice, Exh. 1, at pp. 2-5, 8, Exh. 2, at p. 2, Exh. 3, at p. 6, Exh. 5, at pp. 3-4, 7, Exh., 6, at pp. 2-3, 6, Exh. 7, at pp. 2-3, 5, Exh. 8, at p. 1 [request granted June 14, 2006]; Plaintiff's Supplemental Request for Judicial Notice, Exh. 1, at p. 3 [pages 155-157 of Brody deposition transcript], Exh. 2, at pp. 3-4 [pages 51-52 of Fenton deposition transcript] [request granted June 14, 2006]; see also plaintiff's Opposition to Defendants' Motion to Dismiss Review ("ODMDR") 4-7, 10; plaintiff's Reply Brief on the Merits ("RBOM") 3-4.

[3] The trial court accordingly did not decide the legal question briefed by both sides, whether the Unruh Act prohibited marital status discrimination at the relevant time.

In support of her motion for summary adjudication, plaintiff argued that neither the federal nor the California Constitution requires that religious believers be allowed greater leeway to violate the Unruh Act than those who discriminate for secular reasons. (PA at pp. 60-71, 380-388.) Defendants opposed, contending that the motion should be denied because (a) as a legal matter, they asserted that both the federal and state Constitutions require that they be free to act according to their religious beliefs without being constrained by the Unruh Act (PA at pp. 263-271), and (b) as a factual matter, they asserted that they had not violated the Unruh Act because they had denied the requested medical treatment based on plaintiff's marital status. (PA at pp. 262-263.) The trial court rejected defendants' legal assertion, concluding instead that, under the federal test established by *Employment Division v. Smith*, there is no freedom of religion exemption to the Unruh Act because "the Act's requirements apply neutrally and generally to all employers, regardless of religious affiliation [and it] conflicts with [Drs.] Brody and Fenton's religious beliefs only incidentally." (PA at pp. 438-439, applying *Employment Division v. Smith* (1990) 494 U.S. 872 [110 S.Ct. 1595] ("*Employment Division*").) Moreover, under California law, there likewise is no freedom of religion exemption because the Unruh Act "serves the compelling state interest of eliminating discrimination by business establishments" and is narrowly tailored. (PA at pp. 438-439, applying *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527 ("*Catholic Charities*") and citing *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549 [107 S.Ct. 1940, 1948] [Unruh Act "plainly serve[s] compelling state interests of the highest order."].)[4]

Based on these legal determinations, the trial court properly concluded that the factual dispute about the motivation behind defendants' conduct was immaterial to plaintiff's motion because under no circumstances would defendants be permitted to engage in discriminatory practices not allowed to the public generally. In other words, if it were the case, as defendants contended in opposition to plaintiff's motion, that the Act did not prohibit marital status discrimination at the time in question and that they acted solely based on plaintiff's marital status,[5] those facts would have been material

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[4] The trial court noted this court's observation, in *Catholic Charities*, that it remains an open question what standard of review the California Constitution requires of free exercise of religion claims — rational basis review similar to the U.S. Constitution, strict scrutiny, or another form of review. (PA at p. 439, citing *Catholic Charities*, *supra*, at p. 559.)

[5] If defendants engaged both in prohibited discrimination and in differential treatment not covered by the Unruh Act, the existence of some permitted conduct does not operate as a

only to whether defendants violated the Act, not to whether they had a religious freedom defense. Because the trial court ascertained that no factual issues were material on plaintiff's motion, and that defendants' affirmative defense was invalid as a matter of constitutional law, the court did nothing inconsistent with Section 437c.

Pressing a similarly immaterial factual dispute, defendants also contend the trial court erred because defendants purportedly rejected plaintiff due to an innocent misunderstanding about whether she wished the insemination done using fresh semen donated by a friend or a frozen sample from a sperm bank. (DSLB 3-4.) The trial court was correct in determining that this factual dispute also was immaterial to whether defendants could assert a freedom of religion affirmative defense.

Defendants acknowledge that they perform insemination using fresh semen for some patients and not for others, and that they gave authorization to prepare fresh semen samples only to staff who had religious objections to treating patients like plaintiff and thus would discriminate against lesbians. (See declarations of defendants Brody and Fenton, PA at pp. 96-97, 99-101, 134-137, 153-156.) Defendants thus ensured that plaintiff would not receive equal treatment. But the staffing decisions of defendant Fenton, in his role as Medical Director, and treatment decisions of defendant Brody, plaintiff's treating physician, all pertain to what defendants did, not to the legal question of whether the state or federal Constitution allows those acting pursuant to religious faith to act in ways forbidden to those with secular motives.

The following parallel example illustrates why the trial court complied with Section 437c when it granted plaintiff's motion after recognizing that the factual dispute about liability was immaterial and that the validity of the affirmative defense turned only on legal questions. Consider that a woman lawyer seeks infertility treatment from a Christian doctor. The doctor asks if she is a Christian, and she answers that she is Muslim. The doctor refuses the treatment, saying he has a religious objection to treating her. The patient sues, claiming discrimination based on her religious creed. The doctor answers that he refused her treatment due to her occupation because he has a

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shield for the unlawful conduct. (See, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29, 36, 38 [holding that Unruh Act prohibited discrimination "based on" sex of male customers, and rejecting defense that "Ladies' Day" discounts offered only to female customers were instead "based on admission prices and services" that "any patron could satisfy"].) Accordingly, only if defendants engaged *solely* in marital status discrimination and not in sexual orientation discrimination, and if marital status discrimination was not covered by the Unruh Act at the relevant time, would defendants not be liable under the Act.

religious conviction that women should not work outside the home. The case would present a dispute of fact as to the ground for the denial, and a dispute of law as to whether occupation discrimination is covered by the Unruh Act.[6] But the religious motive for the doctor's conduct would make no difference to whether his conduct violated the Unruh Act. Under both federal and state law, the Constitution either grants religious believers special latitude to ignore this civil rights statute or it does not, and the answer to that question does not depend on whether a particular doctor denied services to a patient for a prohibited reason or a reason that the Unruh Act may not bar.[7]

B. The Prudential Rule That Constitutional Questions Should Be Avoided Does Not Authorize Violation Of Procedural Statutes To Thwart Resolution Of Validly Presented Legal Questions.

Defendants contend that the trial court should have avoided the constitutional question whether the federal or state protection for religious exercise provides a defense against an Unruh Act claim. They assert that the court first should have resolved through a trial whether or not defendants actually violated the civil rights statute[8] before

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[6] Compare *Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, 1168-1169 [Unruh Act covers listed characteristics and similar personal characteristics that, unlike one's economic status, "have no bearing on a person's status as a responsible consumer," so it is an open question whether occupation discrimination is covered by the Act] with *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1405-1406 [occupation discrimination held to be prohibited by Unruh Act, following *Long v. Valentino* (1989) 216 Cal.App.3d 1287].

[7] To make the point clearer still, imagine that the doctor also had posted a sign in his office stating: "We reserve the right to refuse service to anyone." If the doctor asserts as an affirmative defense that he believed his posted sign protected him from liability under the Unruh Act, whatever types of discrimination might be alleged, it would be proper under Section 437c(f) for the court to adjudicate the legal validity of the "posted sign" affirmative defense (and whether "ignorance of the law" is a valid defense), without regard to either (a) the immaterial factual dispute about the actual basis for the proprietor's refusal or (b) the irrelevant legal dispute about whether the Unruh Act prohibits occupation discrimination.

[8] Defendants' position would require the trial court to decide the open statutory question whether the Unruh Act prohibited marital status discrimination at the relevant time. (See *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 851 [leaving for a future case whether the Unruh Act prohibited discrimination against unmarried individuals before

deciding the constitutional question whether they were privileged to do so. Defendants are wrong. The constitutional avoidance doctrine makes clear that courts should decide cases on statutory grounds rather than constitutional grounds *only when both grounds of decision properly are available*. (See, e.g., *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal.4th 1178, 1190 [following the "prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds *if a statutory basis for resolution exists*" (italics added), citing *Ashwander v. Valley Authority* (1936) 297 U.S. 288, 347 [56 S.Ct. 466, 483, 80 L. Ed. 688] [conc. opn. of Brandeis, J.].)[9] The "prudential rule" does not authorize courts improperly to ignore applicable rules and deprive a party of a clear procedural right.[10] Defendants' argument also improperly elevates the procedural rights of the religious believer over those of the non-believer, in violation of the California Constitution's "no preference" clause. (See, e.g., *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 432 [religious freedom rights do not warrant misapplication of religiously neutral evidence rules]; see also *McCreary County v. ACLU* (2005) 545 U.S. 844, 860 [125 S.Ct. 2722, 2733] ["First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."].)

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the Legislature's clarifying amendment, Stats. 2005, ch. 420 (AB 1400), which added sexual orientation, marital status and a more detailed definition of "sex" to Civil Code section 51].)

[9] This is different from the "common practice of construing statutes, when reasonable, to avoid difficult constitutional questions." (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105; *Myers v. Philip Morris Companies* (2002) 28 Cal.4th 828, 846–847.) Defendants' affirmative defense rests only on the state and federal Constitutions, and requires determination of the scope of their protections. Ascertaining the validity of the defense does not involve interpretation of a statute with multiple plausible readings, one of which gives rise to constitutional questions and another of which does not and thus should be chosen.

[10] Nor does it authorize courts to refuse to consider claims that are presented directly. (Accord *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1069, 1073-1074 [declining to decide constitutional validity of marriage law's exclusion of same-sex couples in case concerning local officials' authority to decide constitutional questions, noting that marriage question would be proper to decide in case with question presented directly].)

II. THE TRIAL COURT DID NOT ERR IN APPLYING THE PLAIN TEXT OF SECTION 437c(f).

A. There Is No Ambiguity In Section 437c(f) Warranting Resort To Legislative History.

Defendants contend that the legislative history of Section 437c(f) requires that summary adjudication motions should be granted only when doing so will streamline the trial. (DSLB 5-7.) But the text of Section 437c(c) clearly states when motions shall be granted and does not authorize trial courts to assess whether and how the trial in a given case will be affected before ruling on a motion. Where, as here, the language of the statute is clear, its text controls and there is no cause to consider legislative history. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103; *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379.)

B. Pre-Trial Adjudication Of Defendants' Affirmative Defense Provided Clarity, Thereby Increasing Trial Efficiency And Reducing The Risk Of Prejudicial Errors, As Intended by The Legislature.

As discussed in plaintiff's supplemental letter brief (at pp. 3-4, fn. 3, and p. 7), defendants are wrong in their assertion that evidence about defendants' religious beliefs is relevant to both plaintiff's Unruh Act claim and their affirmative defense such that elimination of the defense had no salutary effects on how the trial is to be conducted and improperly denied them the opportunity to present relevant evidence. Elimination of the defense *does* assist with trial management in ways intended by the Legislature because it allows the court to frame proper jury instructions and to make sound evidentiary rulings, thereby increasing trial efficiency and avoiding potentially prejudicial errors. Moreover, the trial court did *not* rule that defendants will be precluded from testifying about their religious beliefs. Rather, the court appropriately distinguished between whether the defendants will be allowed to testify about why they withheld certain medical procedures, which may include some explanation of their religious beliefs, and the entirely separate and legally unsupportable contention that there is a "religious belief" exemption to the Unruh Act.[11] In any event, nothing about

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[11] Indeed, the transcript of the hearing on plaintiff's motion makes perfectly clear that the trial court did *not* rule that elimination of defendants' affirmative defense would mean that defendants cannot "tell their story" regarding their alleged religious motivations to the jury. Rather, the trial court responded to defendants' concerns in this regard by suggesting that

defendants' argument on this point shows any inconsistency between the trial court's handling of plaintiff's motion and Section 437c.[12]

III. DEFENDANTS HAVE WAIVED THEIR NEWLY MINTED CONTENTION THAT SUMMARY ADJUDICATION OF THEIR RELIGIOUS FREEDOM AFFIRMATIVE DEFENSE WAS IMPERMISSIBLE BECAUSE THE DEFENSE ALSO RUNS AGAINST PLAINTIFF'S TORT AND CONTRACT CLAIMS; THEIR ARGUMENT ALSO IS PROCEDURALLY INCORRECT AND LEGALLY UNSOUND.

A. Defendants Have Waived Any Argument That Plaintiff's Motion Could Not Be Granted Because Their Religious Defense Runs Against All Of Plaintiff's Causes Of Action.

Defendants have asserted for the first time in this court that the trial court could not grant plaintiff's summary adjudication motion because defendants' religious freedom affirmative defense runs against all of plaintiff's claims, not just her Unruh Act claim. (See Answer Brief on the Merits ("ABOM") 66.) The trial court did not

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they may well be able to discuss their religious beliefs at trial to some extent. (See PA at p. 430 [hearing transcript at p. 34:22-23: "They have to tell the jury what happened in this case"]; PA at p. 431 [transcript at p. 35:18-19: "But isn't the jury going to hear what happened?"].) The court, however, also noted the importance of appropriate jury instructions. (See *id.* [transcript at 35:7-8, 10-11: "Facts are the facts, and the jury is instructed on the law and the jury is going to follow the law. ... I don't know that the jury is going to be instructed that religious belief is a defense."].) Ultimately, the trial court declined to rule anticipatorily on the extent to which defendants may be able to discuss their religious beliefs, observing that it was premature in advance of any evidentiary motions and briefing by the parties. (*Id.* at pp. 431-432 [transcript at p. 35:27-36:1: "I think it will be an interesting argument. I have a hard time envisioning how this case would be presented without telling the jury what happened."]; *id.* at p. 432. [transcript at p. 36:10-12: "That will be an interesting argument. I don't know. It's hard for me to opine on that right now. It's not really before me."].)

[12] There is no error if the trial court's opinion set forth the grounds for its decision less fully than it might have done. Appellate courts may affirm a summary adjudication on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court. (See *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; *California School of Culinary Arts v. Lujon* (2003) 112 Cal.App.4th 16, 22.)

consider this argument because defendants did not make it before that court. Instead, defendants opposed plaintiff's motion on its terms, arguing only that they have a religious freedom affirmative defense to the Unruh Act. Defendants' writ petition and replication to the Court of Appeal likewise only contend that they have a religious freedom defense to the Unruh Act cause of action.

A defense theory not asserted in the trial court is waived and cannot be argued for the first time in the Court of Appeal, let alone the Supreme Court. (See *Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498; *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960.) Even if it were true that a plaintiff's summary adjudication motion regarding an affirmative defense must negate that defense with respect to each cause of action (which is not the rule), defendants waived any claim of error on that point by failing to assert it in the trial court. (See *Telles Transport, Inc. v. Workers' Comp. App. Bd.* (2001) 92 Cal.App.4th 1159, 1167; *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743; *Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857.) Accordingly, given defendants' failure to make any such argument before reaching this court, they have waived the argument and it cannot be a basis for contending that the trial court acted inconsistently with Section 437c when granting plaintiff's motion.

B. Section 437c Permits Trial Courts To Grant Motions For Summary Adjudication Limited To A Single Cause Of Action.

Even if defendants had contended in opposition to plaintiff's motion that they assert their thirty-second affirmative defense with respect to each of plaintiff's causes of action, the trial court still would have acted consistently with Section 437c when it granted plaintiff's motion. Section 437c(f)(1) provides in part that "[a] party may move for summary adjudication as to . . . one or more affirmative defenses . . . if that party contends that . . . there is no merit to an affirmative defense *as to any cause of action*." (Italics added.) Plaintiff asserts that there is no merit to defendants' thirty-second affirmative defense as to plaintiff's first cause of action, her Unruh Act claim, and adjudication of the validity of that defense as to that cause of action accordingly is proper under Section 437c(f)(1).

The rule plainly does not require summary adjudication motions to show that an affirmative defense is invalid as to *every* cause of action.[13] For example, a defendant may obtain pre-trial adjudication on statute of limitations grounds with respect to one plaintiff but not others, or that one cause of action is time barred, although other causes of action may not be. (See, e.g., *Knowles v Superior Court* (2004) 118 Cal.App.4th 1290 [granting defendant pre-trial adjudication that medical malpractice wrongful death claims of three plaintiffs were time barred, despite lack of motion on this ground regarding fourth plaintiff's claim; entertaining, but rejecting on merits, defendant's motion for adjudication of affirmative defense made only as to fourth plaintiff that mental retardation precludes loss of companionship claim].)

C. Defendants' Thirty-Second Affirmative Defense Is Invalid As Against Plaintiff's Contract And Tort Claims.

When defendants made this argument for the first time in their Answer Brief on the Merits, they offered only article 1, section 4 of the California Constitution and one New York City court decision from 1813 as supporting authority. (ABOM 23-34.) But numerous courts over the years have considered and rejected religious freedom affirmative defenses to both civil and criminal charges. (See RBOM 19.)[14] The systematic rejection of such religious freedom claims is not surprising. The spectre they invoke of myriad harms to third parties is disturbing indeed.

Accordingly, if defendants press their thirty-second affirmative defense against plaintiffs' contract and tort claims upon remand to the trial court, the defense should be rejected soundly. As explained in plaintiff's Reply Brief on the Merits, the framers of the California Constitution did not intend the protection of religious liberty to excuse

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[13] If the rule did limit summary adjudication in this manner, Section 437c(f)(1) would be phrased to allow such motions when a moving party contends that an affirmative defense has no merit as to "every cause of action" or as to "all causes of action," rather than as to "any cause of action" as it actually provides.

[14] (See, e.g., *Park v. Schlitgen* (N.D.Cal. Mar. 9, 1999) No. C 97-1813 SI, 1999 WL 138887 [claimed right to commit involuntary manslaughter] [copy attached hereto per Rule 8.1115(c)]; *People v. Jones* (Ill.App.Ct. 1998) 697 N.E.2d 457, 460 [claimed right to beat wife]; *American Life League, Inc. v. Reno* (4th Cir. 1995) 47 F.3d 642, 654-655 [claimed right to block property entrance]; *Bridge Publications, Inc. v. Vien* (S.D. Cal. 1993) 827 F.Supp. 629, 635 [claimed right to infringe copyright]; *Hester v. Barnett* (Mo.App. 1987) 723 S.W.2d 544, 557-558 [claimed right to defame].)

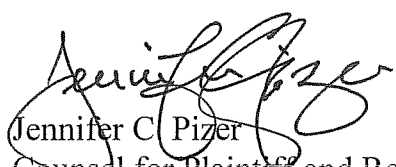
lawless conduct and conduct that harms others. (RBOM 11-13.) Since our tort and contract laws descend from the common law and predate not only California but the Nation, and given this court's focus on the importance of protecting third parties from religiously motivated harm (see *Catholic Charities*, *supra*, at p. 565; *Smith v. Fair Employment & Housing Comm'n* (1996) 12 Cal.4th 1143, 1170-1171, 1174-1175), it seems obvious that the state has compelling interests in enforcing the tort and contract laws invoked by plaintiff's complaint, all of which apply in a religiously neutral manner and prevent designated harms in a properly tailored manner.

The health care context of this case underscores the importance of the "do no harm to third parties" principle. Cases from other jurisdictions have confirmed that patients suffer if it is not clear that protection for religious freedom ends when the exercise of religion begins to harm others. (See, e.g., *Knight v. Conn. Dep't of Public Health* (2nd Cir. 2001) 275 F.3d 156 [protected religious liberty could not allow state-employed visiting nurse to proselytize when providing in-home care to gay male AIDS patient and his partner]; *Bruff v. North Mississippi Health Services, Inc.* (5th Cir. 2001) 244 F.3d 495 [employee assistance counselor could not retain job while refusing on religious grounds to counsel unmarried or gay or lesbian employees on relationship issues].) It certainly must be true in California, too, that patients are entitled to receive the nondiscriminatory, nontortious medical care promised to them by contracts with their licensed health professionals, regardless of the range of personal religious views that may be held by individual care providers.

IV. CONCLUSION

For the foregoing reasons, the trial court's order granting summary adjudication of defendants' thirty-second affirmative defense was not inconsistent with Code of Civil Procedure, section 437c.

Respectfully submitted,



Jennifer C. Pizer
Counsel for Plaintiff and Real Party In Interest
Guadalupe T. Benitez

cc: All counsel listed on the attached proof of service

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 April 1, 2008, I served copies of the attached document, described as **Plaintiff's Responding Letter Brief,** on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

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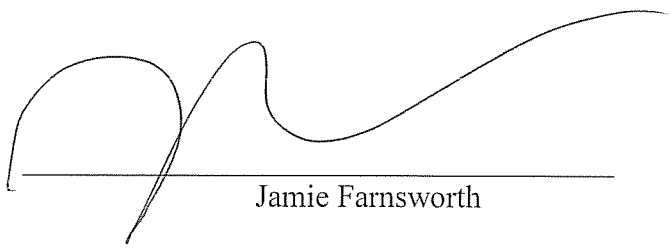
I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

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

Dated: April 1, 2008



Jamie Farnsworth