



Joanne Clark, Lupita Benitez and Jennifer Pizer respond to the media outside the courthouse.

# NOTES FROM THE FRONTLINE

BY JENNIFER C. PIZER, SENIOR COUNSEL

**A**s I walked across San Francisco's Civic Center Plaza in the early morning of May 28th, the air held a delicate sparkle. The California Supreme Court building stood ahead, larger and more imposing than I had recalled. At my left, Lupita Benitez, my client of the past five years, hurried along. The steady presence at her side was Joanne Clark, her partner of 18 years. With years of build-up to this day, anticipation and hope tied us together in our march to the courthouse.

I was about to argue on Lupita and Joanne's behalf about a question we face with increasing frequency nationwide: Do federal or state constitutional protections for religious freedom excuse those who violate civil rights laws? Yet rarely do we have the chance

to make our case on the high-stakes stage of a supreme court. It was to be one of the most intense, exhilarating hours of my life.

**L**upita Benitez's path to the California Supreme Court had started nine years earlier. After many attempts at pregnancy through self-insemination at home and intrauterine insemination at a reproductive health center, Lupita's physician had diagnosed her with polycystic ovarian disease, a common infertility condition. He referred her to North Coast Women's Care Medical Group. North Coast had an exclusive contract to provide infertility care to patients in Lupita's health plan. The clinic was near Lupita's home and her workplace.

Joanne had gone with Lupita to her first clinic visit in August of 1999, where they met Dr. Christine Brody. Lupita explained her years of futile, maddening efforts to become pregnant. This being Dr. Brody's area of expertise, she explained how they should proceed. She would perform tests and formulate a plan, including medication to stimulate ovulation. Then the bombshell hit. If Lupita needed intrauterine insemination, as most patients do, Dr. Brody would not perform it. She provides this treatment routinely, but, she explained, she had religious objections to doing so for Lupita because of her sexual orientation.

Lupita was shocked and deeply humiliated. How could this be happening? Dr. Brody stepped out of the room, leaving Joanne to try to calm Lupita. When Dr. Brody

returned, she told them another doctor would provide insemination as needed so Lupita's care would not be compromised. Lupita felt stuck, as her health plan offered only North Coast Women's Care for infertility treatment. Relying on Dr. Brody's assurance, she reluctantly agreed to the plan.

This was to be the first of many broken promises over the next 11 months, ending only when the clinic's medical director, Dr. Douglas Fenton, summarily terminated Lupita's status as a patient, acknowledging she would never receive the care she needed at North Coast because too many staff members refused to treat her. What he did not admit at the time was that he was among them.

The night before our California Supreme Court argument, Lupita was perched on the hotel sofa, trying to prepare emotionally for the justices' questions and reactions. Time had passed, yes, but Lupita had not yet fully healed from the betrayals she had experienced after placing her trust in North Coast's care. Her face strained with anxiety, she asked if her former doctors were likely to attend. I reassured her she was unlikely to see them, that things were different now. She would be surrounded by support; she knows she has rights that were wrongly denied to her.

What should she expect from the media, she asked. Just two weeks after our California marriage victory, the public spotlight was especially bright. "Reporters keep asking if we're getting married," Lupita said. "Don't they understand? We're in a lawsuit and we have three little kids. We don't have time to think about marriage!"

Jason Howe, our public information officer and a former reporter, coached her. "They may ask anything. But you're here to talk about what happened at North Coast Women's Care and how it affected you. How it still affects you because they treated you differently from everyone else."

Lupita and Joanne understand that they represent a community. They speak openly to the media because they know society changes as more people realize that gay people often yearn for parenthood, and that medical discrimination drives patients away from care they need. Mostly, Lupita and Joanne know they can help demystify LGBT families. Lupita was not even out as a lesbian to her coworkers when the case began. But she pushes herself now to talk about the painful events, especially with media that serve Latino communities. And because she is so down-to-earth and expressive, her story is both moving and accessible. At the same time, Lupita and Joanne are vigilant in protecting their family's privacy, especially when it comes to their children.

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**W**alking into California's Supreme Court, one is immediately taken by the high ceiling and ornate decor. Though I've been here many times, the formal chamber still fills me with awe, reverence and anticipation. I took my place and greeted my opposing counsel. Glancing around, I saw representatives of two religious conservative legal groups who are helping Lupita's former doctors and who oppose us on many issues — the Alliance Defense Fund and Advocates for Faith and Freedom. They have lots of company in this litigation, as ten friend-of-the-court briefs were filed against us by more than a dozen religious and other conservative groups, ranging from the Mormon Church (represented by former Whitewater prosecutor Kenneth Starr), to the

Foundation for Free Expression (affiliated with actor Mel Gibson's Catholic sect).

These opposing groups have an extensive history of antigay action: They attacked California's expanded domestic partnership law, claiming it was too broad to co-exist with marriage, as well as the domestic partnership registry and family insurance plan for city workers in New Orleans, claiming even those narrow protections are too much. They have sought special exemptions from civil rights laws that protect LGBT people from discrimination, arguing that those with antigay religious views should be free to deny rights to LGBT people in employment and education, as well as in professional settings, as Lupita experienced. Collectively, these groups

represent hundreds of millions of dollars directed against us, growing every day. Their increasing strength does not make their arguments better. But it requires us to defend each advance we make, and to marshal strategic responses to their expanding initiatives.

At once, the gavel banged and the clerk intoned: "All rise!" The seven robed justices filed in, the case was called, and we were off.

"Good morning, and may it please the Court," I began, "this case is about preserving equal access to business establishments." As expected, three sentences into my opening, Justice Joyce Kennard, the longest-serving member of the court, interrupted to narrow the discussion: "What did the physician refuse to do here? And on what

grounds?” Following my explanation, Chief Justice Ronald George asked whether their refusal had been based on Lupita’s sexual orientation or marital status. “For purposes of the religion question we address here,” I answered, “it doesn’t matter. What matters now is whether a religious motive allows discrimination that otherwise would be unlawful.”

In our diverse, pluralistic society, in which equality and individual liberty stand as twin guarantees, there are some challenging questions when the equality rights of one are in tension with the liberty rights of another. But Lupita’s should not be seen as a difficult case. While freedom of religious belief and practice have been core values in California — and nationwide — throughout our history, the state-licensed practice of medicine and other commercial activities have never been recognized as a protected form of religious worship. It is well-established that our government can and should regulate the marketplace to ensure equal access and public safety.

Justice Kathryn Werdegar took the questioning in a pragmatic direction. “When one doctor objects, another can step in. It happens all the time. Where’s the harm?” I took this invitation to emphasize that there’s a lot of harm. In Lupita’s case, there was nearly a year of delay, deception and substandard care, including unwarranted tests and medications, unnecessary abdominal surgery, thousands of dollars of unfair costs, and cruelly thwarted expectations. More generally, there is harm any time an individual is singled out and humiliatingly denied equal treatment because of who they are. A powerful friend-of-the-court brief by the National Health Law Program cited data released by the federal Institute of Medicine revealing that health care provider bias exacerbates public health disparities correlating to race and ethnicity — and that public health effects are similar for discrimination against LGBT patients.

Justice Werdegar probed, “But what is a medical clinic to do to avoid liability?” I explained that the rules are the same for all businesses, whether professional or commercial. Businesses generally are free to decide what services to offer and which employees will do which jobs. Then all services must be offered to the public equally, with no agents of the business discriminating. Period. Suddenly, my time was up and my opposing counsel stood. The Chief Justice cut to the chase. “Doesn’t your argument mean doctors can turn people away based on race or religion?” he gripped the podium, admitting, “Yes, but I don’t know any religions that call for that kind of discrimination.” The newest member of the court, Justice Carol Corrigan, then turned up the heat. “Doesn’t your position mean a doctor can say, yes, I do this procedure, but I won’t do it for because of who you are?” He looked trapped.

I had a turn for a rebuttal, and made my final key points. We all have a stake in ensuring fair treatment in medical offices. Any different rule opens the door to medical care segregated based on race, religion and all the other traits covered by the civil rights law. All one needs do is imagine sitting in a clinic waiting room watching medical staff call on patients by religion, race and sexual orientation, and the prospect of historical throwback is all too obvious. The law must reject that possibility.

And suddenly, it was over. I took a breath, gathered my notebooks and realized there had not been a single question for which we had not prepared. I gave inner thanks to our Legal Director Jon Davidson and appellate specialist Jon Eisenberg, my close partners in the Supreme Court work, and to all the participants in our three moot court sessions. Our co-counsel at O’Melveny & Myers had been especially rigorous and creative. Our reproductive and civil rights allies had cautioned us wisely.

Our allies in LGBT advocacy had been prescient.

Lupita and I walked together through the crowd to the crush of reporters outside. She seemed overwhelmed by the experience — the intensity of the setting and of the argument itself. Joanne was energized, savoring the directness of the questioning and the fair consideration by their government. For Lupita, the justice’s thoughtful attention was deeply validating. As an immigrant woman of color for whom a lifetime of hard work had not ensured proper treatment when she was most vulnerable, she no longer presumes others’ respect. As a lesbian who faced religious judgment growing up, the court’s straightforward analysis of religious claims was reassuring.

She approached the cameras with hope, knowing her case has stimulated thousands of conversations and is helping move society forward. And perhaps — given the apparently open-minded Supreme Court bench — the case also will establish an important precedent that antigay discrimination has no place in doctors’ offices, whatever individual beliefs may be. There is no LGBT exception to the Hippocratic Oath each new doctor takes. And “equal under law” must mean “equality for all.” **L**

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## Lambda Legal wins again!

On August 18, the California Supreme Court unanimously ruled in favor of Benitez, saying religious belief does not excuse illegal sexual-orientation discrimination.

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