INTRODUCTION

This case presents a unique circumstance in which the free exercise of religion, as protected by both the California and U.S. Constitutions, arguably conflicts with California's Unruh Civil Rights Act (Civil Code section 51) in the context of the provision of medical care. In that regard, this Court has posed two questions:

1. Whether a doctor has a right under the federal and/or state constitution to refuse to perform a medical procedure for religious reasons?
2. Whether a doctor can accommodate his or her religious beliefs and satisfy his or her nondiscrimination obligations by referring a patient to another qualified physician and paying any additional costs incurred by the patient as the result of the referral?

The Christian Medical & Dental Associations ("CDMA") files this amicus brief in support of petitioners Christine Z. Brody, M.D. and Douglas K. Fenton, M.D. and respectfully requests that this Court answer the first question in the affirmative. While CMDA recognizes the social benefit and application of the Unruh Act, it also acknowledges and believes that physicians should not be precluded from exercising their conscience, including their religious, moral or ethical beliefs, in the provision of medical care.

As to the Court's second question, CMDA understands that the petitioners did, in fact, refer the real-party-in-interest, Guadalupe Benitez, to another qualified physician and paid the additional costs associated with this referral. Thus, strictly limited to the facts of this

case, CMDA believes that an acceptable resolution of this particular case was achieved.

However, CMDA asserts that any pronouncement of a definitive rule by this Court requiring any physician who declines to provide specific medical services because of his or her conscience, including religious, moral or ethical beliefs, to refer the patient to another qualified physician for the service would, in many cases, still require that physician to violate his or her conscience and would be a violation of the U.S. and California Constitutions' guarantees of free exercise of religion. Thus, such a "bright-line" rule should be avoided at all costs.

As is discussed in detail in the brief, both the patient's interest in avoiding discrimination as prohibited by the Unruh Act and the physician's conscience, including religious, moral and ethical beliefs, should be protected. Simultaneous acknowledgment and protection of both the patient and the physician will benefit health care generally and encourage open and honest physician/patient communication, while allowing physicians to practice to the greatest extent possible consistent with their conscience and ensuring that patients receive quality medical care.

CMDA recognizes that, by urging this Court to avoid the promulgation of a "bright-line" rule requiring referral, that such an outcome will necessitate an in-depth factual inquiry in each case. However, as with most other factual inquiries, California's juries are well-suited to make the necessary factual determinations, guided by appropriate instructions that allow the jury to make determinations such as whether the physician's refusal to provide treatment or

services was motivated or related to that physician's conscience, including religious, moral or ethical beliefs. If the jury answers that question in the affirmative, the physician should be absolved of any potential liability under the Unruh Act.

INTERESTS OF THE AMICUS IN THE ISSUE

In relevant part, CMDA exists to motivate, educate and equip Christian healthcare professionals, including physicians, to live out the character of Christ in their homes, practices, and communities; to pursue professional competence; and to speak as a trust voice on bioethics, including assisted reproductive technology (ART), to our culture. CMDA has a membership of over 17,000 physicians in the United States and represents the interests of 1,064 physicians in the State of California whose professional careers and practices could be directly impacted by any rulings in this case. Moreover, this Court's rulings may eventually impact CMDA's member physicians nationwide should other state and federal courts adopt, use or reference this Court's rulings, findings and/or analysis in addressing similar questions within their jurisdictions.

In achieving its aims, CMDA provides a variety of resources to its member physicians including ethical standards and statements on

relevant medical issues and procedures such as in-vitro fertilization. After much thoughtful consideration and debate, CMDA, along with a variety of other secular and religiously-affiliated professional medical organizations, has adopted the position that healthcare professionals, including physicians, may refuse, based upon conscience, including religious, moral or ethical beliefs, to offer ART, including in-vitro fertilization, to single individuals and unmarried couples. CMDA's position on ART is based on its interpretation of biblical principles and mandates. This Court's determination as to whether a physician has a right under the federal and/or state constitution to refuse to perform a medical procedure for reasons of conscience will significantly impact CMDA's ability to advocate and defend the merits of this position in the public square, to effectively commend ethical standards to its members as guiding principles for their practices and to continue to encourage its members to adhere to biblical principles in their practice of medicine.

LEGAL ANALYSIS

CMDA urges this Court to find that a physician has a constitutional right to refuse to perform a medical procedure for reasons of conscience, including religious, moral or ethical beliefs.

As is explained below, such a rule will benefit both physicians and patients alike.

I. MEDICAL ETHICAL STANDARDS PROMULGATED BY BOTH RELIGIOUS AND SECULAR ORGANIZATIONS CONSISTENTLY MAINTAIN THAT A PHYSICIAN SHOULD BE ALLOWED TO REFUSE TO PROVIDE SPECIFIC MEDICAL TREATMENT OR PROCEDURES.

Leading professional medical organizations have consistently held that physicians should be free to determine what procedures they will perform, what type of practice they will engage in and what patients they will serve. Moreover, in light of the wide-spread availability of assisted reproductive techniques ("ART") such in-vitro fertilization and intrauterine insemination and the increasing number of physicians engaged in this type of practice, many leading medical associations and groups have devised and disseminated ethical policies and guidelines governing the provision of ART. Virtually all of these standards permit a physician to refuse to provide ART services because religious, moral and/or ethical beliefs or conscience.

On June 17, 2001, the American Medical Association's ("AMA") House of Delegates adopted its "Principles of Medical Ethics," defining the "essentials of honorable behavior of the physician."[1] These principles provide that "[a] physician ***shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve,*** with whom to associate, and the

[1] American Medical Association, "Principles of Medical Ethics," www.ama-assn.org/ama/pub/category/2512.html.

environment in which to provide medical care."[2] (Emphasis added). Given that the ART sought by Ms. Benitez in this case cannot be construed as a medical "emergency," under the principles advocated by the AMA, the petitioners were permitted to refuse to provide ART services and did not, in doing so, violate the AMA's principles of ethics.

Moreover, in October 1987, the World Medical Association ("WMA") issued a "Statement on In-Vitro Fertilization and Embryo Transplantation" that provides in pertinent part that "[t]he technique of in-vitro fertilization … may present serious legal, moral, and ethical issues for both patients and physicians involved …The physician should observe all applicable laws and ethical restrictions imposed by the National Medical Association or appropriate medical associations… ***The physician has the right to refuse any intervention he or she deems unacceptable.***"[3] (Emphasis added).

Similarly, religiously-affiliated professional organizations have adopted position statements and governing standards maintaining that associated physicians, in the practice of medicine generally and ART specifically have the right to refuse to provide services to certain individuals based upon the religious tenets of the physician's conscience and/or faith.

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[2] *Id.*

[3] The World Medical Association, "World Medical Association Statement on In-Vitro Fertilization and Embryo Transplantation," http://www.wma.net/e/policy/e5.htm.

For example, in May 1983, CMDA adopted a statement providing that "[I]n vitro fertilization, IVF, may be morally justified when such a pregnancy takes place in the context of the marital bond" and that "[w]hen IVF is advocated outside the context of the marital commitment, such a procedure lacks moral justification."[4] Thus, under these standards, petitioners would be free, consistent with their religious beliefs, to refuse to artificially inseminate Ms. Benitez because she was unmarried.

The Islamic Medical Association of North America ("IMANA") has propagated similar guidance for its member physicians. The IMANA's "Position on Assisted Reproductive Technology" advances the position that "assisted reproductive technology (ART) are [sic] permissible between husband and wife during the span of the marriage using the husband's sperm and the wife's ovaries and uterus."[5]

Furthermore, many Jewish theologians generally agree that both the Torah and other aspects of Jewish law permit ART when the husband's sperm and the wife's eggs are used (i.e. the procedure is

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[4] Christian Medical & Dental Associations, "In Vitro Fertilization," http://www.cmdahome.org/index.cgi?BISKIT=1806323179&CONTEXT=art&art=297

[5] Islamic Medical Association, "IMANA's Position on Assisted Reproductive Technology (22, 23, 30), http://data.memberclicks.com/site/imana/IMANA_Ethics_Position_Paper.pdf

performed within the bounds of a marriage) and that the use of donor sperm or eggs violates Jewish law.[6]

Finally, the Roman Catholic Church teaches that a healthcare provider has both a right and a duty to "refuse to take part in committing an injustice" against human life.[7] In other words, no healthcare provider should be "forced to perform an action intrinsically incompatible with human dignity."[8] Rather, the "opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be ***guaranteed***"[9] to all involved with the delivery of healthcare services. Thus, healthcare providers, including those in training, who conscientiously object "must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane."[10]

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[6] Wahrman, Z., "Assisted Reproduction and Judaism," http://www.jewishvirtuallibrary.org/jsource/Judaism/ivf.html

[7] John Paul II, Encyclical Letter *Evangelium Vitae* (March 25, 1995), 74. The Catholic Church opposes ART as an affront to both human dignity and the sanctity of marriage.

[8] *Id.*

[9] *Id* (emphasis added).

[10] *Id.*

II. A PHYSICIAN SHOULD BE ALLOWED TO REFUSE TO PERFORM A MEDICAL PROCEDURE FOR REASONS OF CONSCIENCE

The parties to this matter seemingly agree that a physician has a right to refuse treatment for reasons of conscience, specifically religious beliefs. As real-party-in-interest, Ms. Benitez states "she may, if she can do so in a non-discriminatory manner." (Return, p. 4.)[11] Likewise, petitioners Christine Z. Brody, M.D. and Douglas K. Fenton, M.D. agree that a physician cannot be forced to perform a medical procedure that would violate their religious beliefs. (Replication, pp. 5-8.)

Thus, the real focus of the inquiry in this case is how to balance a physician's right to refuse to perform a medical procedure for reasons of conscience, including religious, moral or ethical beliefs, with the discrimination prohibitions detailed in the Unruh Act.

The Unruh Act "prohibits denial of access to public accommodations based on specified classifications." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 786.) Sexual orientation has been interpreted as a protected classification, even though it is not enumerated in the Unruh Act. (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715-717.) Importantly, marital status is not a protected classification. (*Brown v. Smith, supra,* 55 Cal.App.4th at 787; *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, 1463.) Ms.

[11] Matters of form: References are made to the Petition, Return and Replication, with a corresponding page number. References to the Appendix of Exhibits in support of the Petition are to "Exh.," with corresponding reference to Exhibit number and consecutively paginated page number.

Benitez argues the classifications encompassed with the Unruh Act protect the patient in this case.

The federal and state constitutions protect the free exercise of religion. (U.S. Const., First Amend., Cal. Const., Art. I, §4.) In this case, the guarantee of the free exercise of religion protects the physician. Ms. Benitez claims answering this Court's first question affirmatively "would create anarchy" and that people would withhold services for those their "religion teaches are 'sinful,' 'morally inferior' of 'unworthy.'" (Return, p. 4.) In doing so, Ms. Benitez misses the point of this issue. The petitioners' focus is not on whether Ms. Benitez is "sinful," but on whether their active participation in impregnating an unmarried woman makes them sinful by violating their own conscience and religious beliefs. Stated alternatively, the doctors' focus is on their own sin, not that of their patient.

Thus, at issue in this case are competing legislative and constitutional provisions that may protect both the patient and physician. Medical-ethical standards, the U.S. and California Constitutions' rights to the free exercise of religion, and the current application of the Unruh Act require that physicians be allowed to refuse to provide medical treatment that violates their conscience, including their religious, moral or ethical beliefs.

III. ALLOWING PHYSICIANS TO EXERCISE THEIR RIGHTS TO RELIGIOUS EXPRESSION WILL PROMOTE OPEN AND HONEST COMMUNICATIONS BETWEEN DOCTORS AND PATIENTS AND PROTECT PATIENT AUTONOMY

The facts of this case as developed in relation to Ms. Benitez's motion for summary adjudication are an example of the type of communications this Court should encourage between physician and patient. Specifically, while the record appears to involve significant material factual disputes, same facts can be determined from the Petition, Return, Replication and Exhibits. During their first visit, Dr. Brody informed Ms. Benitez that she would not perform an intrauterine insemination ("IUI") upon her. (Petition, p. 4, ¶8; Return, p. 13, ¶11.)

An IUI is an invasive medical procedure. At North Coast Women's Care Medical Group, IUI's are only performed by physicians. (Exh. 18, p. 258.) "For an IUI, the patient has a speculum placed in the vagina, and a catheter is threaded by the physician through the cervix into the uterus where the semen specimen is then injected." (Exh. 18, p. 258.)

Ms. Benitez denies in her Return that Dr. Brody said the reason she would not perform the IUI was due to the fact that she was not married. (Return, p. 13, ¶ 11.) Rather, she claims the reason her IUI was refused was because she is a lesbian. (Return, p. 26.) Yet, during her deposition Ms. Benitez acknowledged that during their first meeting, Dr. Brody informed her that the only medical procedure she would not perform was an IUI due to Dr. Brody's religious beliefs. (Exh. 21, p. 342.) While Ms. Benitez does not remember exactly

what was discussed, she does remember that Dr. Brody informed her "she couldn't perform that procedure because it was against her religious beliefs . . ." "and that she wouldn't do it on a single woman either." (Exh. 21, p. 342-343.)

Joanne Clark, Ms. Benitez's partner, was present at the first visit. She testified Dr. Brody would not perform an IUI upon a single heterosexual female either. (Exh. 21, p. 347.) According to Ms. Clark, this decision was expressed by Dr. Brody as being "based on her religious beliefs." (*Ibid.*)

Petitioners Dr. Brody and Dr. Fenton both allege they adhere to a sincerely-held religious belief against inseminating or impregnating unmarried women. (Petition, p. 3, ¶¶ 2-3; p. 4, ¶¶ 8-9.)

The parties cannot agree upon whether Dr. Brody's decision was based upon the fact that Ms. Benitez is a lesbian or whether Dr. Brody would refuse the same IUI to an unmarried heterosexual female.[12] At a minimum the record supports the conclusion that Dr. Brody expressed, during her first meeting with Ms. Benitez, that due to her religious beliefs, she would not perform an IUI upon Ms. Benitez. Apparently Ms. Benitez was informed that other physicians within her group, who did not share Dr. Brody's religious beliefs, were willing to perform the IUI. (Return, p. 25.) Neither Dr. Langley nor Dr. Stoopack had any religious belief that prohibited them from performing the IUI on Ms. Benitez. (Exh. 21, p. 300.)

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[12] Whether the refusal to perform the IUI was because of Ms. Benitez's marital status or her sexual orientation is critical to this case. If it is based upon marital status, the Unruh Act does not prohibit such conduct. (*Brown v. Smith, supra*, 55 Cal.App.4th 767, 787, citing *Beaty v. Truck Ins. Exchange*, *supra*, 6 Cal.App.4th at 1462.)

This is the type of open and honest communication that should be encouraged between physicians and patients. Medical treatment plans seem best developed when the participants fully discuss the scope of anticipated treatment and any hesitation or unwillingness that either the patient or physician has to a proposed course of treatment. While it was not clear from the outset that Ms. Benitez would need an IUI, since she was attempting conception by intravaginal insemination, there was a potential that, in the future, Ms. Benitez might request an IUI. Any rule created by this case should encourage the patient and the physician to discuss these potential eventualities and develop a clear course of treatment from the outset, with both the physician and the patient aware of any potential limitations on the treatment.

If, for example, Ms. Benitez decided that she did not want to treat with Dr. Brody because of Dr. Brody's professed religious beliefs, which potentially limited her future care, Ms. Benitez was free to consult with the other physicians at North Coast. For example, Dr. Langley and Dr. Stoopack, do not share Dr. Brody's religious beliefs and were willing to perform the IUI upon Ms. Benitez.

It might also be that in some circumstances a patient may be unwilling to accept treatment from a physician when that relationship holds the potential for a referral to another physician in the future. A rule that protects the patient's choice and promotes honest discussions between the physician and the patient will encourage both the physician and the patient to discuss the potential eventualities of a patient's treatment. In this way, the patient will receive the greatest amount of information and can decide for herself whether she wishes

to treat with the particular physician, given that the physician has discussed his or her religious beliefs and any limitations upon the future treatment. In this way, the patient will also be able to decide which course of treatment best serves her needs.

The opposite rule may not encourage physicians to disclose their religious beliefs for fear of future litigation. Clearly, this will not be productive for the patient.

IV. A PHYSICIAN'S CONSCIENCE, INCLUDING RELIGIOUS BELIEFS, SHOULD NOT PRECLUDE HIM OR HER FROM PRACTICING MEDICINE TO THE FULLEST EXTENT HE OR SHE DESIRES

In this case, the particular medical procedure at issue is an IUI. During an IUI, the physician uses a sterilized catheter to insert into the woman's vagina, passed the cervix into the uterus where the prepared sperm is released. Obviously, this medical procedure is invasive. Especially in contrast to the intravaginal insemination that was already being performed by Ms. Benitez, without the assistance of Dr. Brody.

Dr. Brody objected to her active participation in assisting Ms. Benitez with conception through the IUI procedure for religious reasons. This was the only medical procedure Dr. Brody objected to during the anticipated course of Ms. Benitez's treatment. Despite this limitation on treatment, Dr. Brody offered to provide all other care, through term delivery to Ms. Benitez. (Exh. 21, p. 300.)

This set of facts is unique, but other circumstances are sure to arise where medical advancements will raise matters of conscience,

including religious, moral and ethical issues. As reproductive and fertility treatments and procedures develop over time, they are sure to involve matters of conscience. By the same token, the ever-developing field of genetics necessarily involves an overlap between medical and matters of conscience.

It is anticipated that this Court's decision may impact the provision of medical care in these developing areas. Physicians in California and elsewhere, including those represented by CMDA, are very much concerned that this Court might answer either of the two enumerated questions in the negative. That is, CMDA is concerned that this Court may agree with one or more of the extreme arguments that have been made in this case. For example, Ms. Benitez has argued that if a particular patient requests a particular procedure, but a physician declines to perform that procedure and, rather, refers the patient to another physician, that there is a violation of the Unruh Act. Ms. Benitez's suggestion is that the physician not perform the procedure in question on any patient. (Return, pp. 3-4.)

However, even she recognizes that such a solution is unworkable in many situations, so she offers exceptions. First, Ms. Benitez acknowledges that there are certain procedures that physicians may and should refuse to perform on certain patients. Second, she acknowledges that there are certain religious considerations that should be respected.

A rule that would preclude physicians from performing a particular medical procedure to the extent they will not perform it for all of their patients will necessarily limit the number of physicians performing various medical procedures, including the IUI at issue in

this case. However, a determination that physicians have a constitutional right to refuse medical treatment based upon conscience, including religious, moral or ethical beliefs, will serve four important functions: (1) respect a physician's conscience, including religious beliefs, as required by the free exercise of religion provisions of both the U.S. and California Constitutions; (2) allow physicians to practice medicine consistent with their conscience and to the fullest extent possible; (3) ensure that patients are provided the greatest choice for treatment; and (4) ensure the greatest availability of health care for Californians.

V. BY THE SAME TOKEN, CMDA DOES NOT SUPPORT A PHYSICIAN'S REFUSAL TO PROVIDE TREATMENT UNRELATED TO THE PHYSICIAN'S CONSCIENCE

CMDA believes the Unruh Act serves an important societal purpose. To this end, CMDA does not support a physician's unfettered right to discriminate. A physician, like any other individual, should not be allowed to discriminate under the guise of conscience, including religious, moral or ethical beliefs, if the physician does not have a sincerely held belief. The question arises: how do we know if a matter of conscience was the basis for the refusal?

A. Juries Are Well-Suited To Decide Factual Disputes Arising In Cases Such As This

Ultimate resolution of this issue will often lie with a jury. In those circumstances where a physician refuses to perform a particular

medical procedure based upon a matter of conscience, including religious, moral or ethical beliefs, it may be that the patient questions whether the view is sincerely held by the physician. In such circumstances, California's juries are well-suited to decide that factual issue.

That is not to say that in some cases, where the facts are undisputed, the issue cannot be resolved by pre-trial motion. However, where the physicians assert that they refused to provide a medical procedure because of conscience, including a religious belief, while the patient contends that conscience is being used as a guise to discriminate against a protected class, the issue should be presented to the jury based upon the factual dispute between the parties.

In a case such as this, the jury can decide many of the facts in dispute. The jury can decide whether Dr. Brody has a sincerely held religious belief that precludes her from performing an IUI upon unmarried women. The jury can decide whether Dr. Brody followed her sincerely held religious belief in this case. The jury can decide whether Dr. Fenton has a sincerely held religious belief precluding him from performing IUI upon an unmarried woman. The jury can also decide whether Dr. Fenton followed his religious belief in this case. The jury can weigh the creditability of the witnesses who testify. We ask juries to resolve such factual issues all the time. There is no reason why jurors are not well-suited to perform their function in this case.

B. Even If This Court Creates A Rule That Forces California Physicians To Provide Care Against Their Conscience, Under No Circumstances, Should A Physician Be Precluded From Explaining The Reasons For His Or Her Decision At Trial.

Procedurally, this case involves Ms. Benitez's motion for summary adjudication of the Thirty-Second affirmative defense raised by petitioners. That defense asserts that the physicians' refusal to artificially inseminate Ms. Benitez is protected by their freedom of religion. (Exh. 2, p. 37.) Ms. Benitez's motion for summary adjudication, effectively assumed her own characterization of the facts: that physicians discriminated against her because she was a lesbian and that this was "religiously-motivated discrimination."

Petitioners denied this version of the facts, however, and asserted that their policy was to not impregnate unmarried women due to sincerely held religious beliefs.

Therefore, based upon the record before the trial court, in the form of the moving and opposition papers, the trial court necessarily assumed that the Unruh Act would apply to the facts as described by petitioners.[13] That is an incorrect reading of the Unruh Act. While it may, arguably, prohibit the petitioners from refusing to perform the procedure upon Ms. Benitez solely because she is a lesbian, it does not prohibit the petitioners from refusing to perform a procedure upon Ms. Benitez because she was part of a larger class of unmarried women. While the Unruh Act prohibits the former, discrimination for sexual orientation, it does not prohibit the latter, discrimination based

[13] If the trial court accepted Ms. Benitez's version of the facts then the order should be reversed based upon the procedural mistake.

upon marital status. (*Beaty v. Truck Ins. Exchange, supra,* 6 Cal.App.4th at 1460-1461.)

In effect, the trial court concluded that petitioners' policy directed at unmarried women was, necessarily, a policy directed at lesbians. That too appears to be a conclusion based upon disputed facts. The jury should decide this issue, as well as the second question posed by this Court.

Direction from this Court will provide guidance to California's physicians when they determine what, if any, limitations they need to place on their current practice to comply with the Unruh Act.

C. This Court Should Clarify The Scope Of An Unruh Claim, Not Only For This Case, But Future Litigation Involving California Physicians

If this Court decides that a physician must perform medical procedures that violate their conscience, including religious, moral or ethical beliefs, then this Court should clarify that within the context of an Unruh Act claim, its rule does not prohibit a physician from explaining the reason for their decision to the jury. The doctors should be able to tell their story.

During the October 27, 2004 hearing on Ms. Benitez's motion for summary adjudication of petitioners' affirmative defense at issue in this case, after the granting of the motion for summary adjudication, there was a discussion on the record concerning the impact of that order upon the future trial. Specifically, counsel for Ms. Benitez effectively argued that the petitioners should be

precluded from explaining to the jury why they made their decision to refuse treatment to Ms. Benitez. Specifically, counsel argued:

> Query your honor: What basis would there be for them presenting their motive to the jury if not to say it was okay that you violated Unruh because you had this religious belief?

(Exh. 24, p. 430:12-15.) The trial court indicated an initial willingness to allow the introduction of evidence concerning what was said between the parties. (Exh. 24, p. 430:16-23.) In response, Ms. Benitez's counsel suggested that she would file a motion in limine to preclude such testimony. According to Ms. Benitez's counsel, "You can tell the jury they said they were—that they weren't going to treat her. But why do you get to tell them there was this defense that doesn't exist?" (Exh. 24, p. 432:4-7.) Of course, since the motion in limine was not before the trial court, it did not decide the issue at the hearing on the motion for summary adjudication.

Nevertheless, regardless of the manner in which this Court decides the question presented to it, there will be a future trial of the Unruh Act claim. This Court should provide guidance to the trial court, and parties to future litigation, concerning the scope of relevant evidence for such claims. This should be done for two reasons.

First, the Unruh Act has been construed to require proof of willful conduct which was intended to discriminate against a specified protected class, based upon their protected status. Thus, in this case, Ms. Benitez must establish that petitioners intended to discriminate against her because of her sexual orientation. A "disparate impact

test" that California applies in analyzing employment discrimination claims under the Fair Employment and Housing Act ("FEHA") has not been extended to determining whether there has been an Unruh Act violation. (*Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, 1171-1172.) "By its nature, an adverse impact claim challenges a standard that is applicable alike to all such persons based on the premise that, notwithstanding its universal applicability, its actual impact demands scrutiny. If the Legislature had intended to include adverse impact claims, it would have omitted or at least qualified this language in section 51 [referring to the Unruh Act]." (*Id.* at 1172-1173.) In *Harris*, the California Supreme Court summarized its holding declining to extend disparate impact analysis to Unruh Act claims:

> In summary, we hold that a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act. A disparate impact analysis or test does not apply to Unruh Act claims.

(*Id.* at 1175.)

Consequently, this Court should further clarify that in the upcoming trial of this matter, the petitioners are entitled to introduce evidence concerning their decision making process and why they refused to perform an IUI upon an unmarried female. If Dr. Brody and Dr. Fenton's testimony is believed by the jury, it serves as a basis for the jury to find for petitioners on the Unruh Act claim. Without

such evidence, the jury will never be able to properly determine whether the petitioners acted in violation of the Unruh Act.[14]

Second, precluding the petitioners from introducing evidence concerning their decision making process would effectively allow Ms. Benitez to pursue an adverse impact claim. She would be in a position to assert that because she is not allowed to marry in the State of California, she is necessarily discriminated against whenever an individual decides to refuse treatment or services based upon a her marital status. (Family Code §308.5 ("Only marriage between a man and a woman is valid or recognized in California.").)

This Court's clarification of the scope of relevant evidence will provide needed guidance not only to the parties to this case, but to future litigants in determining how to prepare for a case involving an alleged Unruh Act violation, coupled with claims of religious freedom.

CONCLUSION

CMDA believes that both the patient's right to be protected from discriminatory conduct and the physician's right to be free to practice medicine within the constraints of his or her sincerely held religious beliefs can and should be protected.

In the end, the jury is best suited to determine the factual issues similar to the present case, and those future cases where the conflict

[14] This is the second appellate proceeding arising from this case. (See *Benitez v. North Coast Women's Care Medical Group, Inc.* (2003) 106 Cal.App.4th 978.) This Court's guidance may prevent a third proceeding.

arises between a physician's religious beliefs and a medical procedure requested by a patient.

Dated: _____

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CERTIFICATION

This brief has been prepared using a proportionately spaced typeface, consisting of 14 points, producing approximately 240 words per page. Counsel relies on word processing software to determine the word count of this brief. As determined by that software, this brief consists of approximately 5,177 words and is therefore in compliance with California Rules of Court, rule 14(c)(1).

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Karen D. Milam

4th Civil No.
D045438

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC., a California corporation; DR. CHRISTINE Z. BRODY, an individual; and DR. DOUGLAS K. FENTON, an individual,

Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,

Respondent.

GUADALUPE T. BENITEZ,
Real Party in Interest.

San Diego Superior Court Case No. GIC 770165
Honorable Ronald S. Prager, Judge

AMICUS BRIEF OF CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS IN SUPPORT OF PETITIONERS' WRIT OF MANDATE, ETC.

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