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 Dist., Div. One,
Court of Appeals Case No. DO 45438

AMICUS BRIEF OF CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND GYNECOLOGISTS, AND PHYSICIANS FOR LIFE, IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici Curiae know of no entity or person that must be listed under (1) or (2) of Rule 8.208(d).

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are professional medical organizations which affirm a physician's right to refuse to perform medical treatments or procedures which violate his or her conscience. *Amicus* Christian Medical & Dental Associations (CMDA) is a non-profit professional medical organization consisting of over 17,000 physicians, including at least 1,064 physicians in the State of California whose professional careers and practices would be directly impacted by any rulings in this case. After much thoughtful consideration and debate, CMDA has adopted the position that healthcare professionals may refuse to offer artificial reproductive technology (ART), including *in vitro* fertilization (IVF), to single individuals and unmarried couples, based upon conscience, including religious, moral, or ethical beliefs. CMDA's position on ART is based on its interpretation of Biblical principles and mandates.

Amicus American Association of Pro Life Obstetricians and Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. AAPLOG maintains the position that physicians and healthcare professionals may refuse to perform a medical procedure for reasons of conscience, and in particular religious, ethical, or moral reasons. For example, AAPLOG was successfully involved in opposing the Accreditation Council for Graduate Medical

[1] An application for permission to file has been filed simultaneously with this brief.

Education's (ACGME) attempt to mandate that every obstetrician-gynecologist have elective abortion training. As a result of AAPLOG's opposition, ACGME has temporarily rescinded this mandate.

Amicus Physicians for Life is also a nonprofit medical organization. The organization exists to inform and educate the general public about stem-cell research, human cloning, fetal development, and other pro-life issues. In addition, the organization seeks to encourage physicians to educate their patients regarding the innate value of human life at all stages of development. As a pro-life medical organization, *Amicus* affirms a physician's right to refuse, on religious, moral, or ethical grounds, to perform medical procedures adverse to his or her conscience.

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 *Amici's* abilities to advocate and defend the merits of their positions in the public square, to effectively commend ethical standards to their members as guiding principles for their practices, and to continue to encourage their members to adhere to Biblical principles in their practice of medicine.

For these reasons, *Amici* urge this Court to answer the question presented—*Does a physician have a constitutional right to refuse on religious grounds to perform a medical procedure for a patient because of the patient's sexual orientation?*—in the affirmative, and affirm the ruling of the court below.[2]

[2] *Amici* refer to the Petitioners as "the physicians," and to the Real Party in Interest as "Ms. Benitez."

ARGUMENT[3]

This case represents a unique circumstance in which the free exercise of religion—protected by both the United States and California Constitutions—arguably conflicts with California's Unruh Civil Rights Act (Civil Code § 51) in the context of the provision of medical care. This Court has posed the following question in the case at hand:

> Does a physician have a constitutional right to refuse on religious grounds to perform a medical procedure for a patient because of the patient's sexual orientation?

Amici urge this Court to answer this question in the affirmative. While *Amici* recognize the social benefit and application of the Unruh Act, they also acknowledge and believe that physicians should not be precluded from exercising their conscience, including their religious, moral, or ethical beliefs, in the provision of medical care.

It cannot be disputed that both federal and state law protect physicians' free exercise of religion. As is discussed in detail in this brief, *both* the patient's interest in avoiding discrimination as prohibited by the Unruh Act and the physicians' conscience, including religious, moral, or ethical beliefs, should be protected. Simultaneous

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[3] In the lower court, the Ms. Benitez accused *Amicus* CMDA of ignoring legal precedent and being "confused about which pleading is being tested in this proceeding." *See* Answer of Real Party Guadalupe T. Benitez to *Amicus Curiae* Brief of Christian Medical & Dental Associations at 2, 6. Apparently, Ms. Benitez herself is confused about the purpose of an *Amicus Curiae* brief: to inform a court of matters not directly argued by the parties. Out of respect for the parties, as well as for this Court, *Amici* have avoided arguing the direct merits of the case, as such arguments would be redundant and only serve to clog the court system. Instead, *Amici*, as outside parties with an interest in the outcome of this case, attempt to explain to this Court how Ms. Benitez's arguments would impact their work.

acknowledgment and protection of both the patient and the physician will benefit health care generally and encourage open and honest communication between patients and physicians, while allowing physicians to practice to the greatest extent possible consistent with their conscience and ensuring that patients receive quality medical care.[4]

Ms. Benitez, on the other hand, urges an extremist position which would deny physicians any free exercise of religion—a position with drastic legal and ethical implications.

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

A. Federal and state law indisputably protect the free exercise of religion.

The real focus of the inquiry in this case is how to balance a physician's free exercise 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. As this Court is well aware, the Unruh Act "prohibits denial of access to public accommodations based on specific classifications."[5] Sexual orientation has been interpreted as a protected classification, even though it is not enumerated in the

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[4] *Amici* recognize that balancing the protection of both patient and physician 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 a jury answers that question in the affirmative, the physician should be absolved of any potential liability under the Unruh Act.

[5] *Brown v. Smith*, 55 Cal. App. 4th 767, 786 (1997).

Act.[6] Importantly, marital status was not a protected classification at the time the events in this case arose.[7] Ms. Benitez argues that these classifications protect the patient in this case and absolutely trump the physicians' conscience arguments.

Both the federal and state constitutions protect the free exercise of religion—including the right to refuse to participate in or perform any treatment that violates the conscience of a physician.[8] Thus, at issue in this case are the *competing* legislative and constitutional provisions that may protect both the patient and the physician. The United States and California Constitutions require that physicians be allowed to refuse to provide medical treatment that violates their conscience, including their religious, moral, or ethical beliefs.

B. Medical ethical standards protect a physician's right to refuse medical treatments or procedures which violate his or her conscience.

Medical ethical standards also require that a physician be allowed to refuse to provide medical treatment that violates his or her conscience. Leading professional medical organizations have consistently held that physicians should be free to determine which procedures they will perform, in what type of practice they will engage, and what patients they will serve. Moreover, in light of the widespread availability of assisted reproductive technology (ART), such as *in vitro* fertilization (IVF) and intrauterine

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[6] *Id*. at 787; *Beaty v. Truck Ins. Exchange*, 6 Cal. App. 4th 1455, 1463 (1992).

[7] *North Coast Women's Care Med. Group v. Super. Ct.*, 137 Cal. App. 4th 781, 790 (Cal. Ct. App. 2006).

[8] *See* U.S. CONST. amend. I; CAL. CONST. art. I, § 4.

insemination (IUI), and the leading number of physicians engaged in this type of practice, many groups have devised and disseminated ethical policies and guidelines governing the provision of ART. Virtually all of these standards—whether promulgated by secular or religious medical organizations—permit a physician to refuse to provide ART services because of religious, moral, or ethical beliefs or conscience. Consider the principles or statements of the following organizations:

American Medical Association

Official position statements of the American Medical Association (AMA) are found in the AMA's *Code of Medical Ethics* (Code).[9] At the beginning of the Code appears the AMA's *Principles of Medical Ethics*, which states, "***[a] physician shall***, in the provision of appropriate patient care, except in medical emergencies, ***be free to choose whom to serve***, with whom to serve, with whom to associate, and the environment in which to provide medical care."[10] Given that the procedures sought by Ms. Benitez in this case cannot be construed as procedures necessary for a "medical emergency," under the principles advocated by the AMA, the physicians were permitted to refuse to provide ART services and, in doing so, did not violate the AMA's Code or *Principles of Medical Ethics*.

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[9] *See* AMA, *Code of Medical Ethics* (2005), *available at*: http://www.ama-assn.org/apps/pf_new/pf_online (last visited Jan. 9, 2007).

[10] See *id*. (emphasis added). The current *Principles of Medical Ethics* were adopted by a two-thirds vote of the AMA's House of Delegates.

The *Principles of Medical Ethics* guide the interpretation of the remainder of the AMA's Code. In E-3.04, *Referral of Patients*, the AMA holds that a physician "may refer a patient… whenever he or she believes that this may benefit the patient."[11] In the case at hand, the physicians abided by this position by referring Ms. Benitez to another doctor when they believed that doctor could provide more care options.

In E-9.06, *Free Choice*, the AMA provides that every individual has "free choice" of which physician to use. However, "[i]n choosing to subscribe to a health maintenance organization or in choosing or accepting treatment in a particular hospital, the patient is thereby accepting limitations upon free choice of medical services."[12] Similarly, by accepting treatment at North Coast Women's Care Medical Group (North Coast), Ms. Benitez accepted the limitations upon her choice of medical treatment by continuing to use physicians who informed Ms. Benitez of certain limitations from the beginning. E-9.06 continues by stating, "[a]lthough the concept of free choice assures that an individual can generally choose a physician, ***likewise a physician may decline to accept that individual as a patient***."[13] Thus, the Code is replete with guidelines allowing physicians to refuse to treat certain persons.

Ms. Benitez relies on only two sections of the Code—E-9.12 and E-10.05—and ignores these other pertinent positions, including the *Principles of Medical Ethics* that set

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[11] *Id*.

[12] *Id*.

[13] *Id*.

the framework for the entire Code. Thus, Ms. Benitez's claim that her interpretation of the law in California is "in complete harmony with AMA ethical rules" is a stretch, at the very least.[14] At the most, Ms. Benitez demonstrates the AMA's attempt to balance the rights of patients with the rights of physicians, which necessarily requires a case-by-case examination of the facts and circumstances.

Ms. Benitez also attempts to persuade the Court that, due to insurance circumstances, she had no other option than to use the physicians at North Coast for her treatment and care. However, E.906, quoted above, demonstrates otherwise. Each patient has a right to choose which physician he or she will use. E.906 takes into account differences in insurance coverage, stating, "[i]n selecting the physician of choice, the patient may sometimes be obliged to pay for medical services which might otherwise be paid by a third party."[15] Thus, the AMA places the responsibility of choosing the appropriate physician for the patient on the patient's shoulders, regardless of the financial implications for the patient.

Finally, according to the AMA, if an issue is not addressed in the Code, the AMA has not adopted an official stance on that issue. Thus, it bears notice that in E-2.05, the AMA's position on *Artificial Insemination by Anonymous Donor*, the Code states the following with regard to single women or women who are part of a homosexual couple: it

[14] Opening Brief on the Merits of Plaintiff and Real Party in Interest Guadalupe T. Benitez, at 27 (Ca. S142892).

[15] AMA Code, *supra*.

is not unethical to provide artificial insemination as a reproductive option.[16] However, the AMA does not *mandate* that physicians provide ART to single or homosexual women. Had the AMA intended to include such a mandate, it could have done so.[17]

World Medical Association

In the World Medical Association's (WMA) *Statement on Professional Responsibility for Standards of Medical Care*, the organization recognizes that a "physician should be free to make clinical and *ethical judgements* [sic] *without* inappropriate *outside interference*."[18] Likewise, the physicians should have been free to make ethical decisions for their practice of medicine without interference from outside the medical profession. WMA's statement goes on to affirm that "[p]rofessional autonomy and the duty to engage in vigilant self-regulation are essential requirements for high quality care" which benefit patients.[19] However, Ms. Benitez's Opening Brief and lower court briefs demand that physicians have no autonomy whatsoever, but instead should blindly follow the whims of patients.[20]

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[16] *Id*.

[17] While Ms. Benitez claims that the AMA has "at least two dozen rules and policy statements prohibiting sexual orientation discrimination," Ms. Benitez does not explain how those can be reconciled with the other areas of the Code supporting the physicians' rights.

[18] WMA, *Statement on Professional Responsibility for Standards of Medical Care* (2006), *available at*: http://www.wma.net/e/policy/m8.htm (emphasis added) (last visited Jan. 9, 2007).

[19] *Id*.

[20] *See infra* Part II.A.

Finally, the WMA states that a "physician's professional services should be considered distinct from commercial goods and services, not least because a physician is bound by specific ethical duties, which include the dedication to provide competent medical practice."[21] Yet Ms. Benitez's Opening Brief demonstrates her attitude that patients are customers and physicians are providers, in that such providers have a duty to serve any customer according to the demands of that customer.

This demeaning attitude is plain from the very beginning of the brief, where Ms. Benitez states, "[t]hus it is strange and troubling that there is confusion about whether medical professionals have religious rights greater than those in other fields to harm those *with whom they conduct business*."[22] Later in the brief, Ms. Benitez uses such terminology as "for-profit medical practice," "business establishment," "marketplace," and "commercial opportunity."[23] Ms. Benitez also asks, "[w]here the law guarantees equal access to barber shops, skating rinks and movie theaters, how could there be lesser protection for medical services related to procreation?"[24] In a sweeping and inapplicable generalization about equal access, Ms. Benitez demeans the work of physicians by placing their practice on par with commercial entities solely devoted to personal appearance and entertainment.

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[21] WMA, *supra*.

[22] Opening Brief, at 1 (emphasis added).

[23] *Id*. at 2, 7, 9, 20, 21.

[24] *Id*. at 30-31 (citation omitted).

Not only is Ms. Benitez incorrect and misinformed about the religious liberties of professionals in other areas,[25] but she clearly demonstrates her inaccurate mindset that she merely entered into a business transaction with the physicians. The history of medical practice—as well as the WMA's statement—demonstrates that the practice of medicine is far more than a business transaction. It is a profession of service and commitment to the health and well-being of patients and the community at large. Ms. Benitez's Opening Brief devalues the very purpose of medical practice.

Religiously-Affiliated Organizations

Religiously-affiliated organizations have also adopted position statements and governing standards holding 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 faith.

For example, in May 1983, CMDA adopted a statement providing that "*in 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."[26] CMDA also

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[25] In no other field must a professional check his conscience at the door. Even children maintain their religious liberties when they step through the public schoolhouse doors. *See*, *e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). If the Court goes along with Ms. Benitez's rhetoric and extreme claims, there is no end to the free exercise infringements that could occur against professionals.

[26] CMDA, *In Vitro Fertilization* (1983), *available at*: http://www.cmdahome.org (last visited Jan. 9, 2007.)

maintains that physicians should never engage in "moral complicity with evil," the culpable association with or participation in wrongful acts.

Similarly, 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.[27] In other words, no healthcare provider should be "forced to perform an action intrinsically incompatible with human dignity."[28] Rather, the "opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be guaranteed" to all involved in the delivery of healthcare services.[29] 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."[30]

Contrary to Ms. Benitez's claims that *Amici's* standpoint is "Christian," Islam and Judaism also instruct that physicians must adhere to the tenets of their religions and not participate in immoral activities. For example, the Islamic Medical Association of North America (IMANA) has developed careful guidance for its member physicians in such medical matters. IMANA's *Position on Assisted Reproductive Technology* advances the position that "all forms of assisted reproductive technology (ART) are permissible

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

[28] *Id*.

[29] *Id*.

[30] *Id*.

between husband and wife during the span of the marriage using the husband's sperm and the wife's ovaries and uterus."[31]

Furthermore, many Jewish theologians 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 performed within the bounds of marriage), and agree that the use of donor sperm or eggs violates Jewish law.[32]

The moral stances taken by these religions demonstrate that Ms. Benitez's demands affect not only "Christians," but peoples of all walks and faiths who conscientiously object to certain procedures or treatments.

II. MS. BENITEZ'S EXTREMIST INTERPRETATION OF APPLICABLE LAW HAS DRASTIC LEGAL AND ETHICAL RAMIFICATIONS

Ms. Benitez discards the foregoing discussion and asserts instead that physicians must treat patients *regardless of* the physicians' religious, moral, or ethical beliefs. Ms. Benitez does not allow for a balanced treatment of the rights of both parties. This extremist interpretation of applicable law poses drastic legal and ethical ramifications.

A. Ms Benitez's extremist interpretation completely eviscerates free exercise, rendering it meaningless.

Forcing a physician to perform a procedure—and particularly an elective procedure—against his or her conscience violates the very essence of free exercise.

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[31] IMANA, *Position on Assisted Reproductive Technology* 22-23, 30 (2005), *available at*: http://www.ildc.net/islamic-ethics/ (last visited Jan. 9, 2007) (emphasis added).

[32] M.Z. Wahrman, *Assisted Reproduction and Judaism* (2005), *available at*: http://www.jewishvirtuallibrary.org/jsource/Judaism/ivf.html (last visited Jan 9, 2007).

Despite this grave result, Ms. Benitez pushes for unfettered patient rights, *regardless of* physicians' religious, moral, or ethical beliefs. Ms. Benitez allows no room for a balancing of patient *and* physician rights. This interpretation of the Unruh Act and patients' rights is extreme and completely eviscerates free exercise, rendering the constitutional provisions meaningless.

Ms. Benitez's Opening Brief is fraught with examples of extreme conclusions. For example, Ms. Benitez makes the broad—and legally unsound—conclusion that "each person's religious liberty ends where harm to a neighbor begins."[33] Not only does this standard denigrate the *constitutional* right of free exercise to a substandard level, but it also opens a veritable "Pandora's Box" of implications.[34] "Harm" as a legal standard is not only vague and open to differing interpretations, but also dangerous. Who decides what is harmful? Ms. Benitez? Is it not harmful for a person's free exercise rights to be ignored, while that person is forced to do something against the tenets of that person's religion?

Indeed, Ms. Benitez's Opening Brief makes clear that she does not value free exercise. Ms. Benitez fails to acknowledge any harms resulting from a violation of another person's *constitutional right* to free exercise of religion. By degrading the physicians' religious beliefs, Ms. Benitez is in essence making a value judgment of the

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[33] Opening Brief, at 2.

[34] Ms. Benitez likes to provide extreme examples, alleging that allowing physicians to practice their religion freely will open a "Pandora's Box of discriminatory refusals." Opening Brief, at 32. Ironically, Ms. Benitez's brief—full of rhetoric and "what ifs"—fails to consider the other side of that famed Pandora's Box.

merits of physicians' beliefs. The U.S. Supreme Court has stated plainly that courts may not investigate the merits of a person's belief, but only whether or not that person holds such a belief.[35] If the existence of the physicians' beliefs must be investigated, such a judgment is rightfully left to a jury.

As previously discussed, Ms. Benitez views the physicians' occupation as a business, and interprets the Unruh Act to require that physicians serve anyone who comes to their "business" for any applicable service that person desires. This is an extreme interpretation, which would force physicians to participate in any procedure to which they are conscientiously opposed, giving patients the right to demand particular treatments or services. Ms. Benitez's arguments leave no room for good faith medical judgment or a check on demanding patients—leaving physicians at the whim of patients who could claim discrimination in just about any conceivable scenario. This is just one example of the many possibilities emerging from the "Pandora's Box" that Ms. Benitez herself would be opening.

On the other hand, Ms. Benitez also claims that the physicians could have practiced in another area of medicine, stating that any burden on the physicians is "avoidable."[36] Because the physicians "have chosen" to specialize in the "commercial

[35] *See U.S. v. Ballard*, 322 U.S. 78, 87 (1944) (stating that when applying the free exercise clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs).

[36] Opening Brief, at 9, 18-19.

activity" of treating infertility, they must treat any patient that comes their way.[37] Ms. Benitez seems to think the answer to the physicians' conscience objections is to avoid religious persecution by not entering the infertility field of medicine at all.[38] This also is an extreme position. Not only is such a suggestion overly broad, but Ms. Benitez ignores the fact that physicians may encounter religious, moral, or ethical differences in just about any medical field.[39] Should the physicians then not practice medicine at all? Such a suggestion would be preposterous and would preclude thousands of the best physicians from practicing medicine—a prospect detrimental to Ms. Benitez and all patients seeking the best medical care. Indeed, the best interests of patients are served by retaining well-trained physicians with consciences. Physicians who follow the mandates of their conscience in recommending and providing therapies for their patients will also follow their consciences to ensure the best possible care for those patients.

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[37] Opening Brief, at 9, 19.

[38] Opening Brief, at 18-19 (stating that "any burden on their religious freedom is avoidable" and that "[a]ny perceived burden on defendants' religious freedom is easily avoidable by their specializing in a medical field other than infertility treatment, where their religious views would not create a problem for them.").

[39] For example, obstetrician-gynecologists are trained to do D&C procedures when women have had spontaneous miscarriages. *Amici* are opposed to performing elective abortions, but their members will generally perform D&C procedures when a woman has miscarried or when a woman's life is endangered. Under Ms. Benitez's line of argument, if a pro-choice woman sought out an *Amici* member as a physician, then sought an elective D&C (*i.e.*, an elective abortion), that D&C is a "treatment" that is offered to all other patients but that woman, and the physician must perform the elective abortion regardless of his or her religious, moral, or ethical beliefs.

Moreover, Ms. Benitez argues that the physicians "cannot claim any religious duty to practice reproductive medicine and offer infertility treatments such as prescription medications and IUI."[40] But again, Ms. Benitez is making a value judgment as to the physicians' religious beliefs and their reasoning for joining the medical field. Even among non-religious people, seeking to "do unto other as you would have them do unto you," following the moral of the "good Samaritan" story, and generally doing good for others is admired and respected.

In addition to this basic religious concept of helping people in need, many of *Amici's* members believe that they have been "called" to the fields in which they practice. Receiving a religious "calling" is equivalent to a religious duty to practice in those areas. But examining the physicians' choice to enter the field of infertility treatment, and thus examining any claimed "duty" to that field, requires an examination of the merits of the physicians' beliefs and actions. Basing an argument around the merits of the physicians' beliefs and their reasoning for joining the medical profession demonstrates that Ms. Bentiez has no regard for free exercise but simply wants to impose her own belief and lifestyle on other people. In other words, *Ms. Benitez's arguments demonstrate her own intolerance for other lifestyle decisions.*

While Ms. Benitez argues that the state has an interest in eradicating discrimination by "business establishments" and protecting health,[41] her interpretation of

[40] Opening Brief, at 19.

[41] Opening Brief, at 20, 22.

the Unruh Act is not narrowly tailored to meet those ends. Completely ignoring a physician's constitutional free exercise rights, as Ms. Benitez's Opening Brief urges, cannot be considered a "narrow" means to achieve those goals.

Ms. Benitez also claims that the physicians are asking for an "exception" that would "subject patients in same-sex relationships to deprivation of medical care."[42] Yet the very facts of this case demonstrate this conclusion to be false. With the exception of one form of treatment—the IUI—the physicians agreed to provide all other medical care Ms. Benitez needed, through her pregnancy and delivery. That dedication to the health and welfare of Ms. Benitez is a far cry from a "deprivation of medical care."[43]

While Ms. Benitez argues that there is a difference between refusing to provide a treatment and refusing to treat a person, she is merely splitting hairs. The physicians refused to provide a certain treatment to Ms. Benitez—they did not refuse to treat her. Nevertheless, free exercise does not apply only to treatments, but to *any* actions which would violate a person's religious, moral, or ethical beliefs.

In addition to the implications of Ms. Benitez's extreme legal positions, the common sense interpretation of her arguments bears notice. Ms. Benitez, "at the outset," knew that Dr. Brody was religiously opposed to performing an IUI for her, and she understood there to be other physicians within the practice who were not religiously

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[42] Opening Brief, at 30.

[43] The dedicated medical care provided to Ms. Benitez also demonstrates that the physicians' actions are not by any means "invidious," as Ms. Benitez claims. *See* Opening Brief, at 2, 3, 18-19, 20.

opposed. Yet Ms. Benitez *chose* to stay with Dr. Brody when she could have started treatment immediately with a physician within her insurance plan who did not hold such religious convictions. She does not explain why she chose not to be treated by another North Coast physician "from the outset." It defies common sense for a patient to continue treating with a physician, knowing that the physician holds such religious convictions, when other physicians are available. Ms. Benitez's choice and subsequent attempt to force Dr. Brody to violate her religious convictions are therefore suspect.

Furthermore, it also defies common sense for Ms. Benitez to *want* Dr. Brody to perform the IUI. Most patients desire doctors who affirm their lifestyle decisions. Certainly the most desired care would be provided by a physician holding similar beliefs. If the medical practice is truly a marketplace, Ms. Benitez could have opted to go elsewhere, even if that meant paying a higher price.[44]

Finally, it defies common sense that a patient would want a physician to violate his or her conscience—in other words, to have no conscience while practicing medicine. It is incomprehensible for a patient to desire a physician who has no conscience. Yet Ms. Benitez argues that if a physician has a conscientious conviction about a certain process or procedure, that physician should practice in some other area. A medical profession free of conscience is indeed a frightening prospect.

[44] In a marketplace, there is no "right" to a low price.

B. On the other hand, allowing physicians to exercise their rights to free exercise will improve patient care, promote open and honest communication between patients and physicians, and protect patient autonomy.

The facts of this case present an example of the type of communications this Court should encourage between physicians and patients. While the record appears to involve significant material factual disputes, some facts can be determined. Even according to Ms. Benitez, Dr. Brody informed Ms. Benitez "at the outset" that she would not perform an IUI upon Ms. Benitez.[45]

While the parties cannot agree upon whether Dr. Brody's decision was based upon the fact that the Ms. Benitez is a lesbian, or whether Dr. Brody would refuse the same IUI to an unmarried heterosexual female, the record does at least demonstrate 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. Ms. Benitez was informed that another physician would treat her if an IUI became medically appropriate.[46]

This Court should encourage such open and honest communication between physicians and patients. Medical treatment plans are best developed when the participants fully discuss the scope of anticipated treatment and any hesitation or unwillingness that either the patient or the physician has to a proposed course of treatment. While it could not have been known at the outset that Ms. Benitez would need an IUI, since she was attempting conception by intravaginal insemination, the potential

[45] Opening Brief, at 2.

[46] *See id*.

existed that Ms. Benitez could request an IUI. Any rule created by the Court in 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 limitation 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 other physicians within the same clinic, and thus within her insurance plan. For example, Dr. Langley and Dr. Stoopack do not share Dr. Brody's beliefs and were willing to perform the IUI upon Ms. Benitez.

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 persons 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. Thus, 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 beneficial to the patient's welfare.

C. *Amici's* position represents a moderate standpoint, recognizing that physicians may not refuse to provide treatment for reasons unrelated to conscience.

Amici believe that the Unruh Act serves an important societal purpose. To that end, *Amici* do 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 sincerely hold such beliefs. The question arises: how do we know if the basis for the refusal was truly a matter of conscience?

1. 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 some circumstances where a physician refuses to perform a particular medical procedure based upon a matter of conscience, including religious, moral, or ethical beliefs, the patient may question 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 a pre-trial motion. However, where the physicians assert that they refuse 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 the one before this Court, the jury can decide many of the facts in dispute. The jury can decide whether Dr. Brody has a sincerely-held religious belief which precludes her from performing an IUI upon Ms. Benitez. 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 an IUI upon Ms. Benitez. The jury can also decide whether Dr. Fenton followed his religious belief in this case. The jury can weigh the credibility of the testifying witnesses, including the testimony concerning what was said at the original meeting between Ms. Benitez and Dr. Brody, and whether Dr. Brody claimed she could not perform an IUI based upon marital status or sexual orientation.

We ask juries to resolve factual issues all the time. Without question, jurors are well-suited to perform their function in this case and in other cases balancing physician and patient rights. Yet Ms. Benitez is urging this Court to unilaterally make such determinations—determinations which should be left to the jury.

2. This Court should clarify the scope of an Unruh Act claim, not only for this case but for future litigation involving California physicians.

If this Court decides that a physician must perform medical procedures that violate his or her 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 physicians from explaining the reason for their decision to the jury. The physicians should be able to tell their story.

After the trial court granted Ms. Benitez's motion for summary adjudication of the physicians' affirmative defense at issue in this appeal, there was a discussion on the record concerning the impact of that order upon the future trial. The counsel for Ms. Benitez argued that the petitioners should be precluded from explaining to the jury why they made their decision to refuse to perform an IUI on Ms. Benitez. Specifically, the counsel argued the following:

> 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?[47]

The trial court indicated an initial willingness to allow the introduction of evidence concerning what was said between the parties.[48] 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, "[y]ou 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?"[49]

Of course, because the motion in limine was not before the trial court, the court 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, a future trial will address the Unruh Act claim. Accordingly, this Court should

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[47] Hearing Transcript 24, p. 430:12-15 (Oct. 27, 2004).

[48] *Id*. at 430:16-23.

[49] *Id*. at 432:4-7.

provide guidance to the trial court and the parties 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 with intent to discriminate against a specified protected class, based upon that protected status. Thus, in this case, Ms. Benitez must establish that petitioners intended to discriminate against her because of her sexual orientation. The "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 the existence of an Unruh Act violation.[50] "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]."[51] 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

[50] *Harris v. Capitol Growth Investors XIV* 52 Cal.3d 1142, 1171-1172 (1991).

[51] *Id.* at 1172-1173.

> terms of the Act. A disparate impact analysis or test does not apply to Unruh Act claims.[52]

Consequently, this Court should further clarify that in the upcoming trial of this matter, the physicians 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 would serve as a basis for the jury to find for the physicians on the Unruh Act claim. Without such evidence, the jury will never be able to properly determine whether the physicians acted in violation of the Unruh Act.

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.[53]

This Court's clarification of the scope of relevant evidence will provide much needed guidance not only to the parties to this case, but also to future litigants. This guidance would enable effective preparation of a case involving an alleged Unruh Act violation, coupled with claims of religious freedom.

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[52] *Id.* at 1175.

[53] *See* CAL. FAM. CODE §308.5 ("Only marriage between a man and a woman is valid or recognized in California.").

CONCLUSION

Amici believe 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 boundaries of his or her sincerely held religious beliefs can and should be protected.

In the end, a jury is best suited to determine disputed factual assertions such as those in the present case, and those future cases wherein the conflict arises between a physician's religious beliefs and a patient's requested medical treatment.

Dated: _____

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that the foregoing brief complies with the type-volume limitation of Rule 14(c)(1) of the California Rules of Court, because this brief contains 6,771 words based upon the computer program utilized to draft the brief, excluding the parts of the brief exempted by the rule.

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PROOF OF SERVICE

I hereby certify that on February 26, 2007, I served one paper copy of the foregoing Brief to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid.

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