Case No. S142892

IN THE SUPREME COURT OF CALIFORNIA

NORTH COAST WOMEN'S CARE MEDICAL GROUP et al.,
Petitioners,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

GUADALUPE T. BENITEZ,
Real Party in Interest.

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

OPENING BRIEF ON THE MERITS OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ

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ISSUE 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?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the earliest days of their profession, physicians have pledged to honor Hippocrates's rule: "First, do no harm." Still today, doctors have no more basic guiding principle than this oath. Thus 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 – the patients who come to them for help and who repose trust in their care.

Given American history, few would deny that discrimination inflicts harm. This court and the United States Supreme Court consistently have taught that nondiscrimination laws "serve interests of the highest order." (See, e.g., *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 624 [104 S.Ct. 3244, 82. L.Ed.2d 462] [enforcing California's Unruh Civil Rights Act]). As this court has said, "the [Unruh] Act is this state's bulwark against arbitrary discrimination in places of public accommodation." (*Isbister v. Boys Club of Santa Cruz* (1985) 40 Cal.3d 72, 77 [219 Cal.Rptr. 150].) Statutes like the Unruh Act serve the essential social function of reducing the "moral and social wrong" of discrimination. (*Heart of Atlanta Motel v. United States* (1964) 379 U.S. 241, 250 [85 S.Ct. 348, 13 L.Ed.2d 258].) Such laws prohibiting discrimination in public accommodations "eliminate [the] evil" of businesses serving only those "as they see fit," which demeans both the individual and society as a whole. (*Id.*, at p. 259.)

Religious motivations cannot mitigate this harm. To the contrary, from the Crusades and the Inquisition to current disputes in Ireland, the Balkans, the Middle East,

and parts of Africa, too much of human history shows how religious sectarianism can exacerbate human strife when deployed to justify lesser treatment of those perceived as different. We have learned this lesson the hard way in America, too. Time and again, religion has been proffered to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of California, the law must be crystal clear that each person's religious liberty ends where harm to a neighbor would begin.

This case concerns sexual orientation discrimination by physicians licensed by the state to care for patients in a for-profit medical practice that offers infertility treatment to the general public. As explained below, plaintiff and real party in interest Guadalupe Benitez is a lesbian in a long-term relationship with her domestic partner, Joanne Clark. After they decided they were ready to raise children together, Benitez learned she has a common infertility problem requiring medical treatment. Benitez's health plan offered just one in-network provider of infertility care – the obstetricians/gynecologists of the North Coast Women's Care Medical Group (North Coast). Defendant and petitioner Dr. Christine Brody of North Coast accepted Benitez as her patient and treated Benitez for nearly a year, but advised Benitez at the outset that she would not provide Benitez the full range of services that she offers to other patients due to Brody's religious objections to treating a lesbian in a same-sex relationship. Brody promised that another North Coast doctor would treat Benitez when it became medically appropriate. Eventually, after persistent excuses and delay, North Coast's medical director, defendant and petitioner Dr. Douglas Fenton, stepped in and informed Benitez that so many of North Coast's medical staff refused on religious grounds to assist her that she would have to go elsewhere.

Benitez's sexual orientation had nothing to do with her infertility problem, but everything to do with her doctors' refusal to treat her as they treat other patients – which is why she sued them for violating the Unruh Act. The doctors answered that their federal and state constitutional rights of religious freedom and free speech give them a complete defense. The superior court granted summary adjudication of this defense, holding that doctors who are paid to care for patients pursuant to a state-issued medical

license may not withhold treatment because of a patient's sexual orientation.

California's prohibition against sexual orientation discrimination has been in force for decades, as has the Unruh Act's prohibition against discrimination by medical service providers. Yet this case reveals widespread confusion within the profession about the duty to treat all patients equally, without invidious distinction on grounds encompassed by our state's civil rights law. Health care providers' need for guidance and patients' need for assurance of equal treatment require a clear ruling confirming that there is no sexual orientation exception to the constitutional rule that guarantees absolutely each person's freedom to believe, while limiting religiously motivated conduct in order to protect others from harm.

This brief explains why defendants may not invoke religion as an excuse for discriminating against Benitez in violation of California's civil rights laws. As shown below, the Unruh Act requires that defendants treat all patients equally, regardless of sexual orientation. Under federal constitutional principles, the Unruh Act, as a neutral law of general applicability that does not target religious belief or practice, satisfies the rational basis test of constitutional review. The Act's ban on sexual orientation discrimination does not restrict speech in a manner warranting heightened federal constitutional review under a so-called "hybrid rights" theory. In addition, under state constitutional principles, religious motivation cannot excuse violation of the civil rights laws under any form of scrutiny. This is true even under the highest level of review – strict scrutiny – because any burdens the Unruh Act imposes on defendants' religious freedom are easily avoidable, such burdens are justified by compelling state interests in eradicating discrimination by business establishments and in protecting public health, and the Unruh Act is narrowly tailored to forbid only harmful conduct.

Religion should never be a shield for invidious deprivations of basic human rights. That well-settled principle of American law must apply equally with regard to invocations of religious belief whether urged to justify racial, gender or marital-status discrimination, or discrimination based on sexual orientation. Our shared pledge that we are "one nation,

indivisible, with liberty and justice for *all*" demands nothing less.

FACTS

Guadalupe Benitez and Joanne Clark live in San Diego County. (Writ Petition Exhibit (Pet. Ex.) 1, at p. 2.) In 1999, they had been domestic partners for many years and felt ready to expand their family by having children. (Pet. Ex. 7, at p. 85.) Benitez had been diagnosed with polycystic ovarian syndrome, a fertility impairment for which many women, regardless of sexual orientation, require treatment. (*Id.* at pp. 85, 97, 143.)[1] The treatment Benitez needed was covered by the healthcare benefits she received from her employer, Sharp Mission Park Medical Group (Sharp). (*Id.* at p. 86.) Benitez's primary physician referred her to North Coast Women's Medical Care Group, Inc., which had an exclusive contract to provide infertility services to Sharp's employees. (*Id.* at pp. 86-87, 97, 143.)

Benitez first met with Dr. Christine Brody of North Coast in August 1999. (*Id.* at pp. 86, 97, 135, 143.) Clark accompanied her. (*Id.* at p. 135.) Brody told them she provides the care Benitez needed and would provide Benitez some services, but if Benitez did not achieve pregnancy through intra-vaginal self-insemination, after having achieved regular ovulation with medication, Brody would not perform an intrauterine insemination (IUI) due to her Christian religious objections to performing that procedure for a woman in a same-sex relationship. (*Id.* at pp. 86-87, 97-98, 135-136.) Brody promised that one of her colleagues who did not share her religious views would perform the IUI at the appropriate time if Benitez had not become pregnant through self-insemination. (*Id.* at pp. 86, 97-98, 135, 146.)

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[1] See generally U.S. Dep't of Health and Human Services, Office on Women's Health, *Lesbian Health Frequently Asked Questions* (Jan. 2005), at p. 3 <http://www.womenshealth.gov/faq/lesbian.pdf> (as of Sept. 19, 2006) (Lesbian Health FAQs). Copies of this publication and other secondary sources are included in a separately-bound "Appendix of Cited Authorities" filed in conjunction with this brief.

Benitez was distressed at Brody's refusal but decided she had no real choice other than to become a patient of North Coast and to accept the treatment plan Brody proposed, because the clinic was the exclusive "in network" provider of such services to Sharp employees in the area. (*Id.* at pp. 86-87.)

Over the next eleven months, Brody prescribed Clomid, a fertility stimulant that caused Benitez to ovulate, and performed many tests on Benitez including exploratory surgery. (*Id.* at pp. 87-89, 98-100, 134-137, 143-150.) Benitez did not become pregnant through self-insemination. (*Id.* at pp. 87, 150.) Instead of asking a colleague to perform the IUI as promised, Brody repeatedly suggested more testing and self-inseminations. (*Id.* at pp. 88-89, 97-99, 143-150.)

Brody was on vacation when Benitez was ready for her July 2000 ovulation cycle. (*Id.* at pp. 90, 137, 155.) In Brody's absence, Benitez sought a renewal of her Clomid prescription and to have the IUI performed by another North Coast doctor, according to her treatment plan. (*Id.* at pp. 90-91.) Dr. Douglas Fenton, North Coast's medical director who was covering for Brody, declined to approve the renewal and to perform or arrange for the IUI. (*Id.* at pp. 91, 100-102, 154-156.) Fenton told Benitez that other members of North Coast's staff, in addition to Brody, shared Brody's religious objection to treating Benitez. (*Id.* at pp. 91, 154-156.) He said Benitez should go elsewhere because she was never going to receive the care she needed at North Coast. (*Id.* at pp. 91, 155-156.)

Benitez was distraught. (*Id.* at p. 92; Request for Judicial Notice in Support of Petition for Review, Exhibit 8, at pp. 1-2 [request granted June 14, 2006] (RJN Ex.).) Having been a North Coast patient for nearly a year, she felt manipulated, deceived, betrayed and humiliated. (Pet. Ex. 7, at p. 91.) She did not seek treatment from another infertility specialist for months. (*Id.* at p. 92; RJN Ex. 8, pp. 1-2.) When she finally began treatment elsewhere, she had to undergo many of the tests again and she had to pay for the "off plan" medical care herself. (Pet. Ex. 7, at pp. 92-93.) Through the treatment she subsequently received from others, Benitez eventually became pregnant and gave

birth to a healthy baby. (*Id.* at p. 94.)

PROCEDURAL HISTORY

Benitez sued North Coast, Brody and Fenton for violating the Unruh Act (Civ. Code, § 51), together with breach of contract, deceit and other tort claims. (Pet. Ex. 1, p. 1.) The defendants demurred based on ERISA preemption and filed an anti-SLAPP motion (Code Civ. Proc., § 425.16). (*Benitez v. North Coast Women's Medical Care Group, Inc.* (2003) 106 Cal.App.4th 978, 991 [131 Cal.Rptr.2d 364]; see also Pet. Ex. 7, p. 95.) The superior court dismissed the action based on ERISA preemption, but the Court of Appeal reversed the dismissal order. (*Ibid.*)

On remand, the defendants alleged an affirmative defense that their constitutional rights of religious free exercise and freedom of speech allowed them to treat Benitez differently from their other patients. (Pet. Ex. 2, p. 37.) They then moved for summary adjudication of various causes of action. (RJN Exs. 4, 5, 6.) On the summary adjudication motion, the defendants and Benitez both said it was an undisputed fact that the doctors' treatment refusal was because of Benitez's sexual orientation. (RJN Ex. 5, pp. 3-4, 7; RJN Ex. 6, pp. 2-3, 6; RJN Ex. 7, pp. 2-3, 5.) The superior court denied the motion as to causes of action for deceit and emotional distress, based on Benitez's declaration attesting to the emotional impact of being told that Brody and other North Coast staff had religious objections to treating a lesbian patient, and on a medical expert's declaration describing the deviations from the standard of care that were obvious from Benitez's medical chart (including numerous delays and the performance of tests not performed before IUI in the usual course of infertility treatment). (RJN Ex. 8, pp. 1-2.) The superior court expressly found, based on the parties' statements of the undisputed facts, that Brody and Fenton had refused to treat Benitez because of their religious objections to her sexual orientation. (*Id.* at p. 1)

Benitez subsequently moved for summary adjudication of defendants' religious

freedom defense, based on the undisputed facts that (1) Brody, Fenton and other North Coast staff routinely perform IUI for non-lesbian patients, and (2) the sole reason they refused to perform IUI for Benitez was their religious objections to treating her, not any medical or other business reason. (Pet. Ex. 4, pp. 3-5; Pet. Ex. 6, at pp. 3-5.) The superior court granted the motion and struck the religious freedom defense. (Pet. Ex. 25, pp. 438-439.)

Defendants filed a petition for writ of mandate, which the Court of Appeal granted, ordering the superior court to vacate the summary adjudication of defendants' religious freedom defense and allow them to explain to a jury their religious reasons for refusing to treat Benitez. (See Petition for Review Ex. 1, pp. 19-21.) After the Court of Appeal granted a rehearing and reissued its opinion with minor changes (see *ibid.*), this court granted review.

LEGAL DISCUSSION

I.

THE UNRUH ACT REQUIRES THAT DEFENDANTS TREAT ALL PATIENTS EQUALLY, REGARDLESS OF SEXUAL ORIENTATION.

The Unruh Act prohibits a physician from discriminating against his or her patients based on personal characteristics such as their race, national origin, religion, sex or sexual orientation. (See Civ. Code, §§ 51, 52; *Leach v. Drummond Medical Group, Inc.* (1983) 144 Cal.App.3d 362, 370-372 [192 Cal.Rptr. 650] [medical practices and physician services are "business establishments" within the coverage of the Unruh Act]; *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716 [234 P.2d 969] [holding over a half-century ago that the State could not suspend a bar's liquor license due to it having gay customers because California's civil rights laws prohibited the bar, as a business, from excluding or otherwise discriminating against patrons based on their sexual orientation].)

Nevertheless, sexual orientation discrimination has persisted in California, requiring occasional reminders by the courts – in various contexts demonstrating the range of discrimination lesbians and gay men frequently encounter in daily life – that the Unruh Act prohibits businesses from acting on anti-gay bias. (See generally *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 857 [31 Cal.Rptr.3d 565].) For example, in *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292 [200 Cal.Rptr. 217], the court held that a restaurant could not deny same-sex couples access to booths designed for couples only. In *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1, 5, [184 Cal.Rptr. 161], the court held that a landlord could not deny housing to a person whose homecare nurse was a lesbian. And in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 686-687, 703 [72 Cal.Rptr.2d 410], this court reiterated that the Unruh Act prohibits sexual orientation discrimination (although the prohibition did not apply to that defendant because it was held not to be a business establishment).[2]

The decision in *Washington v. Blampin* (1964) 226 Cal.App.2d 604 [38 Cal.Rptr. 235] is illustrative. In that case, a doctor refused to provide medical services to an

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[2] Despite California law condemning sexual orientation discrimination, harassment and exclusion of lesbians and gay men continues. (See, e.g., *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 589-590 [36 Cal.Rptr.3d 154] [workplace harassment of gay man]; *Murray v. Oceanside Unified School District* (2000) 79 Cal.App.4th 1338, 1345-346 [95 Cal.Rptr.2d 28] [co-worker harassment and denial of promotion to lesbian teacher]; *Kovatch v. California Casualty Management Company, Inc.* (1998) 65 Cal.App.4th 1256 [77 Cal.Rptr.2d 217] [workplace harassment of gay man by supervisors].) Not infrequently, religious motivations are the reason. (See, e.g., *Harper v. Poway Unified School District* (9th Cir. 2006) 455 F.3d 1052, 1053 (conc. opn. of Reinhardt, J.)[Christian student seeking right at school to wear T-shirt condemning homosexuality]; *Christian Legal Society Chapter of University of California v. Kane* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 27347 [copy included in "Appendix of Cited Authorities"; see fn. 1, *ante*] [student group seeking university funding and use of school facilities while claiming exemption from student organization nondiscrimination rule in order to exclude gay students and those of different religious faiths]; *Erdmann v. Tranquility Inc.* (N.D. Cal. 2001) 155 F.Supp.2d 1152, 1161 [supervisor's harassment of gay subordinate with warnings subordinate would "go to hell" and pressure to participate in workplace prayer services].)

African-American girl because of her race. (*Id.* at p. 605.) In defending against an Unruh Act claim, the doctor argued that, as a professional, he could not be required to treat an "unwelcome" patient. (*Id.* at p. 608.) The Court of Appeal rejected that argument, holding that "the personal nature of the physician-patient relationship creates no obstacle to a recovery of damages when service is refused by reason of the plaintiff's race or color." (*Ibid.*)

There can be no principled distinction between *Washington v. Blampin* and the present case. So long as a physician or medical group offers services to the general public, the Unruh Act tolerates no invidious distinctions among patients, who "are entitled to the full and equal . . . services" offered to the public. (Civ. Code, § 51, subd. (b).) "Our modern society has become so interdependent and interrelated that those who perform a significant public function may not erect barriers of arbitrary discrimination in the marketplace." (*In re Cox* (1970) 3 Cal.3d 205, 218 [90 Cal.Rptr. 24]; see also *Koebke, supra*, 36 Cal.4th at p. 840.)

North Coast, Brody and Fenton offer gynecological and obstetrical services to the public for a fee. They have chosen to specialize in treating infertility, and thus offer IUI and related services. Having chosen that practice area, these defendants cannot reasonably claim an excuse from complying with the laws applicable to such practice, including the Unruh Act. As the superior court correctly observed, the civil rights law "permits [d]efendants free rein to operate their business as long as they do not discriminate." (Pet. Ex. 25, pp. 438-39 [order granting summary adjudication of defendants' religious defense].) Having chosen to offer IUI to their heterosexual patients, they must do so equally for their lesbian patients. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*Ibid.*, quoting *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 565 [10 Cal.Rptr.3d 283].)

II.

THE UNITED STATES CONSTITUTION DOES NOT EXCUSE DEFENDANTS' UNLAWFUL REFUSAL, BASED ON RELIGIOUS OBJECTIONS, TO TREAT LESBIAN PATIENTS.

A. The Unruh Act, as a Neutral Law of General Applicability That Does Not Target Religious Belief or Practice, Satisfies the Rational Basis Test.

Defendants claimed below that the free exercise clause of the First Amendment to the United States Constitution exempts them from the Unruh Act. Under the federal Constitution, neutral laws of general application that do not target religious beliefs or practices are to be enforced as long as they serve a legitimate state purpose in a rational manner. (See *Employment Division v. Smith* (1990) 494 U.S. 872, 885-86 [110 S.Ct. 1595, 108 L.Ed.2d 876].) The Unruh Act easily satisfies this test.

Petitioners' claim of religious exemption from the Unruh Act is directly contrary to *Employment Division v. Smith*, which held that the free exercise clause did not prohibit the application of Oregon's drug laws to ceremonial ingestion of peyote. In *Employment Division v. Smith*, the respondents contended "that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice." (494 U.S. at p. 878.) Similarly here, defendants contend that their religious motivation for discriminating against lesbians places them beyond the reach of the Unruh Act, which likewise is not specifically directed at their religious practice.

Employment Division v. Smith rejected the respondents' contention in language equally applicable here: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise

jurisprudence contradicts that proposition." (*Id.* at pp. 878-79.) "'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious belief. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).'" (*Id.* at p. 879, quoting *Minersville School Dist. Bd. of Ed. v. Gobitis* (1940) 310 U.S. 586, 594-595 [60 S.Ct. 1010, 84 L.Ed. 1375].)

Thus, *Employment Division v. Smith* noted, the United State Supreme Court has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (494 U.S. at p. 879, quoting *United States v. Lee* (1982) 455 U.S. 252, 263, fn. 3 [102 S.Ct. 1051, 71 L.Ed.2d 127].) For example, as further noted in *Employment Division v. Smith, supra,* 484 U.S. at page 879, the U.S. Supreme Court has:

- "held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding" (citing *Prince v. Massachusetts* (1944) 321 U.S. 158 [64 S.Ct. 438, 88 L.Ed. 645]);

- "upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days" (citing *Braunfeld v. Brown* (1961) 366 U.S. 599 [81 S.Ct. 1144, 6 L.Ed.2d 563]);

- "sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds" (citing *Gillette v. United States* (1971) 401 U.S. 437,

461 [91 S.Ct. 828, 842, 28 L.Ed.2d 168]); and

- "rejected the claim" by an Amish employer seeking "exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs" (citing *United States v. Lee, supra,* 455 U.S. at pp. 258-61).

Employment Division v. Smith explained that "[t]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races." (*Id.* at pp. 888-889 [citations omitted].) To this list can be added anti-discrimination laws like the Unruh Act.

Employment Division v. Smith concluded that "[r]espondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation. We have never held that, and decline to do so now." (*Id.* at p. 882.) This court likewise should decline to do so here. Religious convictions are no excuse for violating anti-discrimination laws, just as they created no exemption from the civic obligations described in *Employment Division v. Smith*. To hold otherwise and permit individual religious beliefs to excuse acts contrary to a general law "would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (*Catholic Charities, supra,* 32 Cal.4th at p. 548 [10 Cal.Rptr.3d 283], quoting *Employment Division v. Smith, supra,* 494 U.S. at p. 879.)

B. The Unruh Act's Ban on Sexual Orientation Discrimination Does Not Restrict Speech in a Manner Warranting Heightened Review Under a "Hybrid" Theory.

Defendants argued below that the rational basis test as prescribed in *Employment Division v. Smith* should not apply here; rather, the "strict scrutiny" test should apply because their defense is a "hybrid" claim involving both freedom of religion and freedom of speech. This court noted in *Catholic Charities*, however, that it is unclear whether a hybrid exception to *Employment Division v. Smith* exists at all, implausible as it is. Quoting Justice Souter's concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520, 567 [113 S.Ct. 2217, 124 L.Ed.2d 472] (*Lukumi Babalu*), this court observed: "'If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.'" (*Catholic Charities, supra,* 32 Cal.4th at p. 557.) As Justice Souter pointed out, if a hybrid exception existed, it would have applied in *Employment Division v. Smith* itself, where the peyote ritual at issue implicated both speech and associational rights. (*Lukumi Babalu, supra,* 508 U.S. at p. 567.) Yet *Employment Division v. Smith* applied no such exception. The U.S. Supreme Court's hybrid reference seems little more than a respectful nod at now-obsolete cases. (See *Knight v. Conn. Dep't of Pub. Health* (2d Cir. 2001) 275 F.3d 156, 167 [describing *Employment Division v. Smith's* hybrid reference as "dicta and not binding on this court" and declining to apply such analysis]; *Kissinger v. Board of Trustees of Ohio State Univ.* (6th Cir. 1993) 5 F.3d 177, 180 [describing hybrid exception as "completely illogical" and declining to apply it].)[3]

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[3] Law review commentators likewise have looked askance at any hybrid exception. (See C. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions From Smith* (2000) 75 N.Y.U. L. Rev. 1045, 1068 ["As applied in most cases, the hybrid rights exception is given an extremely narrow interpretation. As a

To whatever extent there is a hybrid exception, it requires joinder of the religious freedom challenge with another independently cognizable constitutional claim. (*Brown v. Hot, Sex and Safer Prods., Inc.* (1st Cir. 1995) 68 F.3d 525, 539 [finding no hybrid exception absent independent constitutional claim]; *American Friends Serv. Comm. Corp. v. Thornburgh* (9th Cir. 1991) 951 F.2d 957, 961; see also *Catholic Charities, supra,* 32 Cal.4th at pp. 557-559 [rejecting assertion that free speech rights were infringed by anti-discrimination requirement, and thus also rejecting claim of religion-and-speech hybrid right requiring strict scrutiny].) Defendants' hybrid claim therefore must fail if they have no colorable free speech claim to accompany their religious freedom claim.

To implicate the free speech guarantee, a religious freedom case must involve some challenge to "communicative activity." (*Employment Division v. Smith, supra,* 494 U.S. at p. 882.) The U.S. Supreme Court draws a firm distinction between expression, which is protected, and conduct, which "remains subject to regulation for the protection of society." (*Id.* at p. 394, quoting *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304 [60 S.Ct. 900, 84 L.Ed. 1213].) As that court put plainly in oft-quoted language, "While freedom to *believe* is absolute, freedom to *act* pursuant to one's religious beliefs cannot be." (*Cantwell, supra,* 31 U.S. at pp. 303-304, italics added.)

In *Catholic Charities*, this court rejected a hybrid claim that is indistinguishable from defendants' claim here. Confirming the longstanding rule that, for conduct to be considered speech, it must be a vehicle for conveying a verbal or symbolic message, the court found that a church-affiliated agency's refusal to provide its employees with

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result, hybrid claims are commonly restricted to those enumerated in *Smith*, with courts finding for the religious party predominantly in cases where the decision could stand on the independent constitutional right."]; W. Esser, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?* (1998) 74 Notre Dame L.Rev. 211, 242-243 [concluding that hybrid exception accomplishes little because lower courts find hybrid rights to exist only when the religious litigant would win anyway based on the other asserted constitutional right]; M. McConnell, *Free Exercise Revisionism and the Smith Decision* (1990) 57 U. Chi. L. Rev. 1109, 1122 [concluding that "a legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously"].)

insurance coverage for contraception was conduct, not expression. (*Catholic Charities, supra,* 32 Cal.4th at p. 558.) Similarly here, defendants' discriminatory treatment of Benitez was conduct, not expression. "For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen [as] a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." (*Id.* at pp. 558-559.)

By defendants' logic, filing an income tax return is an expression of agreement regarding the size of one's tax bill, complying with a highway speed limit amounts to a statement that going faster is unwise, and an employer's compliance with minimum wage laws is an expression of support for such laws. Yet nobody may refuse to file a tax return, obey speed limits, or pay the minimum wage as a matter of free expression. (See *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 440, 463 [32 Cal.Rptr.3d 209] [church required to comply with prosecutor's document demands]; *Tony and Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 303-05 [105 S.Ct. 1953, 85 L.Ed.2d 278] [religious nonprofit corporation required to pay minimum wage].)

Defendants' discrimination against Benitez was not an expression of opinion about lesbians. It was conduct – a refusal of medical treatment – in defiance of our civil rights laws. Defendants have no colorable free speech claim here; thus they can have no hybrid claim.

III.

THE CALIFORNIA CONSTITUTION DOES NOT EXCUSE DEFENDANTS' UNLAWFUL REFUSAL, BASED ON RELIGIOUS OBJECTIONS, TO TREAT LESBIAN PATIENTS.

A. Religious Motivation Cannot Excuse Violation of the Civil Rights Laws Under Any Form of Scrutiny.

Defendants also claimed below that, under the California Constitution, their religious beliefs excuse their violation of the Unruh Act. In reviewing this claim, the threshold question is the appropriate standard of constitutional review. As this court observed in *Catholic Charities*, in cases where a neutral law of general applicability is challenged on state religious freedom grounds, it remains an open question whether the applicable standard is the rational basis test (as in *Employment Division v. Smith*), the strict scrutiny test (used in some federal cases prior to *Employment Division v. Smith*) or some other test. (*Catholic Charities, supra,* 32 Cal.4th at pp. 559-562; see also *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1166-1167 [51 Cal.Rptr.2d 700] (*Smith v. FEHC*); *Valov v. Dept. of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1125-1126 [34 Cal.Rptr.3d 174].)

That open question need not be decided here. Religious motivation cannot excuse violation of California's civil rights laws even under the highest level of constitutional review – strict scrutiny.

Twice recently, in *Catholic Charities* and *Smith v. FEHC*, this court applied the strict scrutiny test in civil rights cases involving religiously-motivated discrimination. In such a context, that test examines whether the statute in question imposes a substantial burden on religious practice, serves a compelling state interest, and is narrowly tailored to forbid only harmful conduct. In both instances, this court determined that the state's compelling interest in ending discrimination and the challenged statute's narrow tailoring

required enforcement of the law to protect vulnerable third parties.

In *Catholic Charities*, the issue was whether a religious-affiliated social services agency's employee healthcare insurance plan for prescription drugs had to include contraceptives in compliance with the Women's Contraception Equity Act (WCEA), which forbids gender discrimination in employee benefit plans. The WCEA conflicted with the agency's religious principles and thus burdened the agency's free exercise rights. (*Catholic Charities, supra,* 32 Cal.4th at pp. 539-540.) Nevertheless, this court held the agency was not free to violate the WCEA, because the law furthered the state's compelling interest in protecting workers from discrimination in healthcare benefits and did so in a properly tailored manner. (*Id.* at p. 564.)

Likely harm to the employees was a key factor in the *Catholic Charities* analysis: "Strongly enhancing the state's interest is the circumstance that any exemption from the WCEA sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties." (*Id.* at p. 565.)

Another consideration in *Catholic Charities* was the fact that any conflict between religious views and the law in question was easily avoidable. The agency could comply with the law by ending its prescription drug coverage altogether, or it could raise wages so that employees independently could purchase prescription drugs or insurance policies for that purpose. Either measure would separate the agency from its employees' decisions with regard to contraception. (*Id.* at p. 562.) What the agency could not do was impose its religious views on its employees to their detriment.

Similar analysis appears in *Smith v. FEHC,* which enforced a requirement in the Fair Employment and Housing Act (FEHA) that landlords not discriminate against

tenants based on marital status. For reasons no longer valid,[4] *Smith v. FEHC* applied the strict scrutiny test to a landlord's claim – based on her religious objection to renting to an unmarried couple – that FEHA impermissibly burdened her religious freedom. As in *Catholic Charities*, this court concluded that there was no constitutional violation because the state has compelling reasons to end discrimination in the rental housing market and FEHA is narrowly tailored to prohibit only harmful conduct. (*Smith v. FEHC, supra,* 12 Cal.4th at pp. 1175-1176.)

Moreover, even more so than in *Catholic Charities*, the burden on religious freedom in *Smith v. FEHC* was avoidable. While the agency in *Catholic Charities* asserted that its religious tenets (serving the poor and treating its employees generously) required it to engage in business activities that created conflicts with state law, the landlord in *Smith v. FEHC* could not claim she had any religious duty to enter the rental housing business. (See *Smith v. FEHC, supra,* 12 Cal.4th at p. 1175.) She could avoid conflict with the fair housing laws simply by engaging in other business activities. In contrast, her tenants had no similar freedom of choice: "To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere." (*Id.* at p. 1175.)

In the present case, just as in *Catholic Charities* and *Smith v. FEHC*, defendants cannot show a violation of their state constitutional free exercise rights even under the strict scrutiny test. As demonstrated below, any burden on their religious freedoms is avoidable, California has compelling interests in eradicating all forms of invidious

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[4] See *Catholic Charities, supra,* 32 Cal.4th at p. 560, fn. 17 [discussing *City of Boerne v. Flores* (1997) 521 U.S. 507 [117 S.Ct. 2157, 138 L.Ed.2d 624], which invalidated the Religious Freedom Restoration Act's attempt to supersede *Employment Division v. Smith* and thereby impose the strict scrutiny test for federal free exercise claims].

discrimination by physicians (including that based on sexual orientation) and in protecting public health, and the Unruh Act is narrowly tailored to forbid only such types of harmful conduct.

B. Any Burdens Imposed by the Unruh Act Easily Are Avoidable.

Like the landlord in *Smith v. FEHC*, defendants cannot claim any religious duty to practice reproductive medicine and offer infertility treatments such as prescription medications and IUI. Thus, they cannot show that the Unruh Act imposes an impermissible burden on their religious freedom.

Defendants have chosen to do business by providing treatment for infertility, in a commercial sphere regulated by the state to prevent harm to third parties – just as the landlord in *Smith v. FEHC* chose to enter the rental housing business and the agency in *Catholic Charities* decided to give its employees prescription drug coverage instead of a raise in salary. Any 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. Alternatively, defendants easily could avoid any burden by selecting at least one member of their medical staff to prepare semen samples and perform IUI for all patients equally, instead of choosing only staff members who have religious objections to doing so for lesbians.

Because there are ample ways for defendants to structure their medical practice that would allow them to thrive professionally and succeed financially, without harming some of their patients by discriminating against them in violation of the Unruh Act, defendants cannot show an impermissible burden on their rights of religious freedom, even under a strict scrutiny test.

C. The Unruh Act's Burdens on Religious Freedom Are Justified by a Compelling State Interest.

1. The state has a compelling interest in eradicating discrimination by business establishments.

Even if the burden on defendants' religious freedom were unavoidable, the California Constitution still would not excuse their violation of the Unruh Act, because its prohibition on discrimination by physicians serves two compelling state interests.

The first compelling interest is in eradicating invidious discrimination by business establishments, including sexual orientation discrimination. The U.S. Supreme Court has affirmed that, by guaranteeing equal access to and equal treatment by business establishments, the Unruh Act "plainly serve[s] compelling state interests of the highest order." (*Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) 481 U.S. 537, 549 [107 S.Ct. 1940, 95 L.Ed.2d 474], quoting *Roberts, supra,* 468 U.S. at p. 624.) This court similarly has held that California's anti-discrimination laws serve the compelling purpose of eliminating discrimination. (*Catholic Charities, supra,* 32 Cal.4th at p. 564 [addressing gender discrimination].) Other courts have held likewise in other contexts. (See, e.g., *EEOC v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1364-1365 (*Fremont Christian School*) [compelling government interest in eradicating gender discrimination where federal law prohibited employer from relying on religious views about gender roles within marriage to offer health insurance only to some employees].)

The compelling nature of this state interest in the context of religiously-based discrimination has been settled in California since *Pines v. Tomson* (1984) 160 Cal.App.3d 370 [206 Cal.Rptr. 866], where the Court of Appeal held that the publisher of the Christian Yellow Pages could not refuse advertising by non-Christians. *Pines* said that, "[a]s a general proposition, government has a compelling interest in eradicating

discrimination *in all forms*." (*Id.* at p. 392, italics added.) Thus, the court enforced the Unruh Act against discrimination motivated by sincere religious belief: "Although it undeniably infringes on [the religious adherents'] freedom of religious association by requiring them to do business with non-Christians despite their preference to the contrary, that infringement is amply justified by the compelling state interest in eradicating invidious discrimination. Religious liberty 'embraces two concepts – freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.'" (*Ibid.*, quoting *Cantwell, supra,* 310 U.S. at pp. 303-304; see also *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* (D.C. App. 1987) 536 A.2d 1, 32 [government's interest in ending sexual orientation discrimination held compelling where anti-discrimination statute placed all forms of discrimination on equal footing and compelling interest in ending other forms already was well established].)

Our Legislature has confirmed that the compelling state interest in ending invidious discrimination by business establishments includes sexual orientation discrimination. In 2005, when amending the Unruh Act to codify decades-old, uniform case law applying the Act to prohibit sexual orientation discrimination, the Legislature made an express finding that California's interest in preventing discrimination by business establishments "is longstanding and compelling." (Stats. 2005, ch. 420 [A.B. 1400 (Civil Rights Act of 2005)].) That finding, in context, leaves no doubt that the Legislature believes the state's compelling interest in ending arbitrary discrimination by business establishments extends to sexual orientation discrimination, and such a finding is entitled to substantial judicial deference. (*American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359, 372 [204 Cal.Rptr. 671]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583-584 [131 Cal.Rptr. 361] [deferring to Legislature's finding regarding necessary public purpose of increasing "decent" housing, because "[l]egislative findings, while not binding on the courts, are given great weight and will be upheld unless they are found to be unreasonable

and arbitrary"]; *Burkle v. Burkle* (2006) 135 Cal.App.4th 1045, 1064-1065 [37 Cal.Rptr.3d 805]; cf. *Valov v. Dept. of Motor Vehicles, supra,* 132 Cal.App.4th at pp. 1117-1118 [denying exemption from statute requiring photographs on drivers' licenses, despite religious objection based on biblical proscription against graven images, because of legislative findings concerning public safety and security interests served].)

2. The state has a compelling interest in protecting public health, including access to and quality of health care.

The second compelling interest justifying the Unruh Act's burdens on religious freedom is in protecting the public health by ensuring that, among others, mothers, prospective mothers, children and gay people receive quality medical care. (See, e.g., *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983) 461 U.S. 731, 742 [103 S.Ct. 2161, 76 L.Ed.2d 277] [government has compelling interest in protecting people's health and well being]; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342 [66 Cal.Rptr.2d 210] [state has compelling interest in protecting children's health and welfare]; *Rains v. Belshe* (1995) 32 Cal.App.4th 157, 176 [38 Cal.Rptr.2d 185] [upholding statute setting protocol for nursing home care because of compelling state interest in "providing ... necessary medical care to patients on a timely basis"]; *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology* (9th Cir. 2000) 228 F.3d 1043, 1054 [upholding constitutionality of licensing scheme for psychoanalysts and describing California's interest in protecting mental health as "even more compelling" than state's interest in regulating in-person solicitation by attorneys]; *Fremont Christian School, supra,* 781 F.2d at pp. 1364-1365 [compelling state interest in eradicating discrimination in employee health benefits program].)

Women's reproductive health and the full range of related medical services are expressly included within the State of California's overall commitment to public health. For example, Health & Safety Code section 123550 provides that prenatal care, labor and

delivery services, postpartum care, and neonatal and infant care are "essential services necessary to assure maternal and infant health." Where federal law excludes abortion services from the medical care provided to poor women through Medicaid, California's broader commitment to women's health and reproductive autonomy requires that poor women not be denied this medically appropriate health care choice through MediCal. (See *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275, 284-285 [172 Cal.Rptr. 866, 625 P.2d 779].)

California's policy concern with reproductive health is framed broadly and has long included infertility treatment as well as prenatal and postnatal care and family planning services. In 1990, the Legislature enacted Health & Safety Code section 1374.55, which requires health care service plans to cover infertility care, as "an urgency statute necessary for the immediate preservation of the public peace, health, or safety." (Cal. Legis. Serv. 1990, ch. 830, § 4.) In 2000, the Legislature found that "[o]ne out of 10 couples in California has problems with fertility." (Cal. Legis. Serv. 2000, ch. 835 [taking action to prevent venereal diseases, which can cause infertility].)

In addition to California's interest in protecting women's reproductive health, the state's general commitment to public health requires that patients be protected against sexual orientation discrimination. Numerous public health studies have documented the bias against lesbian, gay, bisexual and transgender (LGBT) individuals that pervades the healthcare system. (See, e.g., Dean, et al., *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns* (2000) 4 J. Gay & Lesbian Med. Assoc., No. 3, at pp. 103-104 [published by Columbia University School of Public Health and the Gay and Lesbian Medical Association], available at <http://ce54.citysoft.com/_data/n_0001/resources/live/Columbia-GLMA%20White%20Paper.pdf> (as of Sept. 19, 2006); Gay and Lesbian Medical Association, *Health People 2010: Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health* (2001) at p. 49 <http://www.glma.org/policy/hp2010/in dex.heml> (as of Sept. 19, 2006); see generally Meyer, *Why Lesbian, Gay, Bisexual and Transgender Public Health?* (June 2001) 91 Am. J. Pub. Health, No.

6, at pp. 856, 857; Council on Scientific Affairs, American Medical Association, *Health Care Needs of Gay Men and Lesbians in the United States* (1996) 275 J.A.M.A. 1354, 1359.)

This discrimination has serious harmful consequences. According to leading lesbian health policy experts, there is a correlation between increased rates and seriousness of cancer and other ailments among lesbians and the widespread bias by medical practitioners against lesbians. (See Cochran, et al., *Cancer-Related Risk Indicators and Preventive Screening Behaviors Among Lesbians and Bisexual Women* (April 2001) 91 Am. J. Pub. Health, No. 4, p. 592 (hereafter Cochran); O'Hanlan, *Lesbian Health and Homophobia: Perspectives for the Treating Obsetrician/Gynecologist* (1995) 18 Current Probs. Obs. & Gyn. 93, at p. 136.)

Specifically, "lesbian and bisexual women appear less likely to undergo routine screening procedures" because of "negative experiences with health care practitioners." (Cochran, *supra,* at p. 596; see also Allen, *Many Lesbians Avoid Doctors for Fear of a Backlash from Judgmental Practitioners: With Scant Research to Date, New Studies Underscore the Need to Track HIV, Cancer and Other Trends in This Population*, L.A. Times (June 21, 1999) Part S, p. 1).) "[N]egative health care experiences can discourage a lesbian from seeking care in the future, including preventive and screening measures, which further jeopardizes her health." (U.S. Dep't of Health and Human Services, Office on Women's Health, *Lesbian Health Fact Sheet* (Nov. 2, 2000), at p. 3 <http://www.womenshealth.gov/owh/pub/factsheets/lesbian1.pdf> (as of Sept. 19, 2006) ; see also *Lesbian Health FAQs*, *supra,* at p. 3, fn. 1.)

Despite California's longstanding commitment to ending sexual orientation discrimination, the problem persists. (See Kaiser Permanente National Diversity Council, *A Provider's Handbook on Culturally Competent Care: Lesbian, Gay, Bisexual and Transgendered Population* (2000) (hereafter *Kaiser Handbook*); O'Hanlan, *Do We Really Mean Preventive Medicine For All?* (1996) 12 Am. J. Prev. Med., No. 5, p. 411, at p. 414 ["In a survey of nearly one thousand Southern California physicians, one third of

physicians in primary care specialties were found to have significantly homophobic attitudes."].) "LGBT patients have reasonable fears of discrimination when they seek health care services. These fears have been supported by research that demonstrates a lack of understanding and sensitivity by health care providers toward lesbians and gay men that often results in the delivery of substandard care." (*Kaiser Handbook, supra,* at p. 8.) Thus, the sizable Kaiser Permanente health care system directs its staff to care for LGBT patients in a respectful, nondiscriminatory manner that meets their medical needs as required by professional standards of care, which can be done regardless of one's religious convictions. (See *Kaiser Handbook, supra,* at p. 16 ["Providers' personal religious or moral beliefs can be separate from the dynamics of their relationship with LGBT patients."].)

Here, just as in *Catholic Charities*, there is a compelling interest in enforcing California's anti-discrimination laws in order to prevent negative impacts on public health.

3. California's anti-discrimination law is consistent with ethical rules prescribed by the medical profession and other California legal authority.

California's compelling interests in ending discrimination and in protecting public health overlap and reinforce each other in this case in a manner fully consistent with state law. (See, e.g., Health & Safety Code, § 1365.5 [prohibiting health care service plans from discriminating on basis of sexual orientation and marital status].) These state policies also are consistent with ethical rules promulgated by the American Medical Association (AMA), of which the California Medical Association is an affiliate. (See <http://www.cmanet.org/publicdoc.cfm/10/1>.) The AMA has at least two dozen rules and policy statements prohibiting sexual orientation discrimination and calling for culturally-appropriate care for LGBT patients. (See American Medical Association,

LGBT Advisory Committee, *GLBT Policy Compendium* <http://www.ama-assn.org/ama1/pub/upload/mm/42/glbt_policy0905.pdf> (as of Sept. 19, 2006).)

Thus, for example, AMA ethical rule E-9.12, "Patient-Physician Relationship: Respect for Law and Human Rights," prohibits refusals to treat patients based on sexual orientation and directly addresses circumstances like the present case: "Physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, *sexual orientation, or any other basis that would constitute invidious discrimination*. Furthermore, physicians who are obligated under pre-existing contractual arrangements may not decline to accept patients as provided by those arrangements." (*Ibid.*, italics added [policy issued July 1986 and updated June 1994].)

AMA ethical rule E-10.05, "Potential Patients," even more precisely instructs that a doctor's right of religious refusal is limited to particular *treatments*, does not include a right to refuse to treat particular groups of *people*, and is subordinated to the primary duty not to discriminate against patients. The rule states that "[p]hysicians *cannot refuse to care for patients based on* race, gender, *sexual orientation*, or any other criteria that would constitute invidious discrimination," although "it may be ethically permissible for physicians to decline a potential patient when . . . [a] specific treatment sought by an individual is incompatible with the physician's personal, religious, or moral beliefs." (*Ibid.*) Defendants' conduct with regard to Benitez violated this rule.

In briefing and oral argument before the Court of Appeal, defendants relied on a California appellate decision and three statutes granting physicians a right of conscience to refuse a requested service in certain circumstances. The appellate decision, *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 310-311 [253 Cal.Rptr.530], held that a physician lawfully could refuse, on grounds of conscience, to remove a feeding tube from a persistently vegetative patient at her conservator's direction if the patient could be transferred to the care of another physician who would follow the conservator's direction. The three statutes prescribe rights to refuse, as a matter of conscience, to perform an abortion (Health & Saf. Code, § 123420, subd. (a)), to comply

with a health care directive or decision (Prob. Code, § 4734), and to fill certain pharmaceutical prescriptions (Bus. & Prof. Code, § 733, subd. (b)(3)). But these authorities do not allow doctors to *violate the law* according to conscientious objections. Rather, they expressly make certain refusals lawful, avoiding any conflict with the Unruh Act by respecting objections to particular *treatments* without sanctioning discriminatory refusals to treat particular groups of *people*.

Thus, a doctor may refuse all requests to withdraw artificial life support, but may not refuse such a request just for people of color or just for lesbian and gay patients while complying with the wishes of white or heterosexual patients. Similarly, a doctor may refuse to perform all abortions, but may not refuse to do so just because of a patient's national origin or sexual orientation. That is the law in California, and it is in complete harmony with AMA ethical rules.

4. California law does not permit discrimination against lesbian and gay parents and prospective parents.

In support of their writ petition below, when insisting there is no compelling state interest in eradicating sexual orientation discrimination, defendants asserted that not all forms of discrimination are treated equally, nor should they be. (See Replication at p. 25.) According to defendants, "there are many times when discrimination is *necessary* to promote the greater public good." (*Ibid.*, original italics.) They claim that California's public policy favoring marriage means that the Unruh Act cannot forbid discrimination based on marital status, and further that discrimination against gay people, and same-sex couples in particular, is neither arbitrary nor invidious, especially when it comes to parenting. (See *id.,* Replication at pp. 25, 28-30.) Thus, they say, California does not have a compelling interest in ending sexual orientation discrimination.

The error in defendants' analysis of marital-status discrimination is demonstrated by this court's *Koebke* opinion, which distinguishes between legitimate business reasons

for treating patrons differently and prohibited reasons for inferior treatment. (See *Koebke, supra,* 35 Cal.4th at pp. 846-848.) Defendants are just as far off the mark in claiming that California law allows doctors to withhold standard infertility treatments from lesbian parents based on religious beliefs about whether same-sex couples should raise children.

Oddly, in making this claim, defendants cite vacated federal authority and opinions from other jurisdictions that are directly contrary to California law. (See *Thomas v. Anchorage Equal Rights Comm'n* (9th Cir. 1999), 165 F.2d 692, withdrawn upon grant of rehearing en banc and superseded, 220 F.3d 1134 [dismissing case for lack of standing]; *Goodridge v. Dep't of Health* (2003) 440 Mass. 309 [798 N.E.2d 941] (dis. opn. of Cody, J.); *Lofton v. Dep't of Children and Family Svsc.* (11th Cir. 2004) 358 F.3d 804.) For example, in *Lofton, supra,* the Eleventh Circuit Court of Appeals upheld a Florida state law barring adoption by gay people – a 1970s-era law that is the only one of its kind in America. (See *Lofton, supra,* 377 F.3d at p. 1290 (dis. opn. of Barkett, J., from denial of en banc review).)

But Florida's state statutes do not expressly prohibit sexual orientation discrimination. California's do, not just in the Unruh Act but in many other instances.[5]

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[5] See, e.g., Ed. Code, § 200 [forbidding discrimination in education based on sexual orientation or gender]; Gov't Code, §§ 12920-12921 [establishing state public policy of protecting against employment and housing discrimination based on sexual orientation]; Gov't. Code, §§ 12940-12951 [prohibiting sexual orientation discrimination in private employment]; Gov't Code, §§ 12955-12956.2 [prohibiting sexual orientation discrimination in housing]; Gov't Code, § 18500(c)(5) [requiring equal treatment in hiring and employment of state civil service personnel, regardless of sexual orientation]; Gov't Code, § 19702 [prohibiting sexual orientation discrimination in state civil service]; Gov't Code, §§ 50260-50265 [promoting creation of municipal human rights commissions to foster respect for and investigate incidents of discrimination against people subjected to prejudice based on sexual orientation]; Health & Safety Code, § 1365.5 [prohibiting sexual orientation discrimination by health care service plans]; Ins. Code, § 10140(a) [prohibiting sexual orientation discriminating in insurance]; Labor Code, § 4600.6 [prohibiting sexual orientation discrimination in workers' compensation insurance contracts]; Code Civ. Proc., § 231.5 [party may not use peremptory challenge to remove prospective juror on basis of sexual orientation]; Fam. Code, § 297.5 [registered

And California, unlike Florida, has a domestic partnership law, which our Legislature promulgated to "reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." (Stats. 2003, ch. 421, § 1, subd. (b).) That law gives registered domestic partners the same rights and duties as spouses with respect to children and confirms that California law protects their families from discrimination. (See *Koebke, supra,* 36 Cal.4th at p. 839, citing Fam. Code, § 297.5, subds. (d) & (f).) Moreover, unlike Florida, California law does not permit discrimination against parents or would-be parents in same-sex relationships. In this court's words, "[w]e perceive no reason why both parents of a child cannot be women." (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119, 125 [33 Cal.Rptr.3d 46] [Family Code must be applied equally "regardless of . . . gender or sexual orientation"].)

Same-sex parent adoptions are lawful in California, and not just within the domestic partnership law. (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433 [2 Cal.Rptr.3d 699].) Similarly, there is no restriction on lesbians and gay men serving as foster parents. (See *In re Brian R.* (1991) 2 Cal.App.4th 904 [3 Cal.Rptr.2d 768] [foster child placed with lesbian couple]; Welf. & Inst. Code, § 16013 [prohibiting discrimination against foster and adoptive parents based on sexual orientation].) This is consistent with California family law generally, which "bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents." (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 89 [19 Cal.Rptr.2d 494].)

Defendants seem oblivious to *California* law, hypothesizing questions they suggest might arise were California "to change its law to permit same-sex couples to adopt." (Replication at p. 9.) That is *already* the law in California. Going back at least two decades, thousands of lesbians and gay men have adopted each other's children to secure their family ties. (See *Sharon S., supra,* 31 Cal.4th at pp. 438-439.) As this court has

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domestic partners must be treated equally to spouses]; Fam. Code, § 9000 [registered domestic partners may use same stepparent adoption procedures as spouses]; Welf. & Inst. Code, § 16013 [prohibiting sexual orientation discrimination against actual and prospective foster and adoptive parents].

noted, such adoptions "encourage and strengthen family bonds." (*Id.* at p. 439.) The domestic partnership law now provides additional statutory authority for spouses to adopt each other's children through its stepparent adoption procedure. (Fam. Code, § 9000.) Yet again, the parental rights and duties of lesbians and gay men are not limited to those who register as domestic partners. (See *Elisa B., supra,* 37 Cal.4th at pp. 116, 125 [applying provisions of Uniform Parentage Act and holding non-biological lesbian mother responsible for support despite lack of domestic partnership registration].)

California law has long required that parental rights and duties not be restricted based on sexual orientation. (See, e.g., *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [19 Cal.Rptr.2d 494] [homosexuality not a ground for restricting parent's visitation]; *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [63 Cal.Rptr. 352] [homosexuality not a ground to deny parent primary custody of children].) More recently, the California Legislature codified the state's policy that same-sex couples and their families are to be treated equally. (See *Koebke, supra,* 36 Cal.4th at pp. 838-839 [citing legislative findings supporting 2003 Domestic Partnership Act].)

Yet defendants would have this court create an exception that would subject patients in same-sex relationships to deprivation of medical care – an untenable notion given the fact that respect for individual choice in family matters long has been recognized as among the most fundamental of civil liberties. (See *Skinner v. Oklahoma* (1941) 316 U.S. 535 [62 S.Ct. 1110, 86 L.Ed. 1655] [fundamental right to procreate may not be abridged based on judgments about fitness for parenthood or purported likely harms to children]; *Buck v. Bell* (1927) 274 U.S. 200 [47 S.Ct. 584, 71 L.Ed. 1000] [same].) Such rights do not depend on marriage. (See *Eisenstadt v. Baird* (1972) 405 U.S. 438 [92 S.Ct. 1029, 31 L.Ed.2d 349].) Nor do they depend on sexual orientation. (See *Koebke, supra,* 36 Cal.4th at pp. 838-839; *Charisma R. v. Kristina S.* (2006) 140 Cal.App.4th 301, 308 [44 Cal.Rptr.3d 332] [failure to recognize parental rights of non-biological lesbian mother could implicate constitutional rights of both parent and child].) Where the law guarantees equal access to barber shops, skating rinks and movie theaters

(see *In re Cox, supra*, 3 Cal.3d at pp. 212-216), how could there be lesser protection for medical services related to procreation?

Such an exception to California's civil rights laws would be a betrayal of this state's commitment to equal treatment for all – a step backwards into America's troubling history of interference with individual decision-making about partnering and parenting, often based on prejudice and unfounded fears about purported harms to children. (See, e.g., *In re Marriage of Carney* (1979) 24 Cal.3d 725, 736-737 [157 Cal.Rptr. 383] [rejecting assumption that disabled man should not have custody of children if he was unable physically to engage in stereotypically masculine activities such as sports]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 726 [198 P.2d 17] [striking down law restricting marriage to same-race couples and rejecting argument that increased number of biracial children would present "a serious social problem"], 751 (dis. opn. of Shenk, J.) ["The amalgamation of the races is not only unnatural, but is always productive of deplorable results."]; *In re Marriage of Birdsall, supra,* 197 Cal.App.3d at p. 1031 [court may not consider sexual orientation when making child custody determinations]; see also *Palmore v. Sidoti* (1984) 466 U.S. 429, 433 [104 S.Ct. 1879, 80 L.Ed.2d 421] [court must not grant or deny custody based on concern that child may face harassment or ostracism if placed with mixed-race parents].) As the U.S. Supreme Court has admonished, "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Palmore*, 466 U.S. at p. 433.)

As for defendants' assertion that children suffer if raised by gay parents (see Replication at p. 30), that notion is contrary to California law, which is in turn supported by the policies and recommendations of America's preeminent medical and social science experts. For example, according to the American Psychological Association, "Gay and lesbian parents are as likely as heterosexual parents to provide healthy and supportive environments for their children." (American Psychological Association, *Same-Sex Families and Relationships* (June 2006) <http://www.apa.org/ppo/issues/lgbfamilybrf6

04.html> (as of Sept. 19, 2006).) "Studies of various aspects of child development reveal few differences among children of lesbian mothers and heterosexual parents in such areas as personality, self-concept, behavior, and sexual identity." (*Ibid.*; see also American Psychological Association, *Lesbian & Gay Parenting* (2005) <http://www.apa.org/pi/lgbc/publications/lgparenting.pdf> (as of Sept. 19, 2006) [explaining that good parenting and child outcomes are not a function of parental sexual orientation].)

Similarly, the American Academy of Pediatrics reports "[t]here is ample evidence to show that children raised by same-gender parents fare as well as those raised by heterosexual parents. More than 25 years of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment." (O'Keefe, *Special Article in Pediatrics Outlines Laws Affecting Children of Same-Gender Parents* (June 27, 2006) <http://aapnews.aappublications.org/cgi/content/full/e2006217v1> (as of Sept. 19, 2006) [reviewing Pawelski, et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children* (July 2006), Pediatrics, Vol. 118, No. 1, pp. 349-364.)

Accordingly, the AMA's policy is that children with same-sex parents should be protected from sexual orientation discrimination through enforcement of laws requiring equal access to medical services. (See AMA Policy D-65.995, *Health Disparities Among Gay, Lesbian, Bisexual and Transgender Families* in *GLBT Policy Compendium*, *supra*, p. 25.) The AMA has pledged to "work to reduce the health disparities suffered because of unequal treatment of minor children and same sex parents in same sex households by supporting equality in laws affecting health care of members in same sex partner households and their dependent children." (*Ibid.*)

If, despite well-settled California law prohibiting sexual orientation discrimination, religious objections to homosexuality could excuse violations of the Unruh Act, a Pandora's Box of discriminatory refusals would be opened. As Justice Traynor pointed out in *Perez*, prejudicial assumptions about child welfare could be deployed to justify

objections to interfaith couples having children, just as such assumptions were deployed in defense of the anti-miscegenation law struck down in *Perez*. (See *Perez, supra,* 32 Cal.2d at p. 727 [rejecting argument that interracial marriage could be banned because "the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of . . . inferiority but the fear of rejection by members of both races"].)

Defendants asked below whether an adoption lawyer should be allowed to refuse on religious grounds to represent a lesbian or gay couple in an adoption proceeding, or whether a licensed family counselor should be allowed to refuse on religious grounds to provide counseling to a same-sex couple. (See Replication at p. 9, fn. 3.) To this, plaintiff replies with similar questions: Should the lawyer be allowed to refuse on religious grounds to represent *interracial* or *interfaith* couples, and should the counselor be allowed to refuse on religious grounds to treat such couples? The answer to all these questions should be the same: *No*. That is the Unruh Act's answer. Nobody who provides services to the general public should be permitted to deny equal treatment, based on religious objections, in violation of California's civil rights laws.

D. The Unruh Act is Narrowly Tailored to Forbid Only Harmful Conduct.

The Unruh Act's prohibition against business establishment discrimination is tailored tightly to its goal of protecting Californians from harmful conduct – even more obviously than in *Catholic Charities*. The agency in *Catholic Charities* directly discriminated among treatments but not people, without overtly making some people less worthy than others. Here, in contrast, defendants seek permission to treat Benitez as less worthy – and to withhold a standard medical treatment provided to other women who have the same medical need – solely because she is a lesbian. This is precisely the sort of "'deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" (*Smith v. FEHC, supra,* 12 Cal.4th at pp. 1170-1171, quoting *Heart of Atlanta Motel v. United States, supra,* 379 U.S. at p. 250.) The Unruh Act

prohibits this harmful conduct, but does no more. It requires that businesses refrain from inflicting dignitary harm and instead offer equal treatment to all, without dictating any particular treatment. Defendants remain free to decide which services they will offer, and who among their group will offer particular services. Drs. Brody and Fenton may decide not to perform IUI for any patients, if that is their wish – as long as they treat all patients equally, without invidious unlawful distinctions based on personal characteristics.

Defendants' demand for a special exemption from the Unruh Act exemplifies why such exemptions should not be permitted. Their writ petition in the Court of Appeal attempted to minimize the harm to Benitez and others similarly situated, claiming there was "no discernable detrimental effect on Ms. Benitez." (Pet. at p. 35.) For example, defendants contended that they did not "discriminate" against Benitez, but merely refused to treat her "personally." (Pet. at p. 29.) That is no different than the doctor's wish in *Washington v. Blampin, supra,* 226 Cal.App.2d 604, not to treat African-American patients "personally" because of his biased views. Defendants similarly insisted that they provided "complete fertility, prenatal and other medical procedures" to Benitez (Pet. at p. 35), seemingly oblivious to the shipwreck of her year-long treatment plan caused by their refusal to perform IUI for her, and its harmful impact on her.

The record vividly demonstrates the nature and extent of the harm to Benitez. (See, e.g., Pet. Ex. 7, pp. 85-94, 143-150.) Dr. Brody stretched out Benitez's treatment plan with excuse after excuse – prolonging her emotional roller-coaster of failed self-inseminations, continuing her on potentially cancer-causing fertility drugs for extra months, and subjecting her to unnecessary and painful abdominal surgery – all to postpone a mundane, simple and utterly safe IUI procedure. (*Ibid.*; see also RJN Ex. 8 at pp. 1-2.) Benitez was shocked, hurt and humiliated when Dr. Brody told her she would not be treated like other patients because she is a lesbian. She was deeply upset to have been treated as unworthy of a routine medical procedure.

This is precisely the sort of harm that the Unruh Act prevents. No accommodation of defendants' religious beliefs can avoid such harm.

IV.

RELIGION SHOULD NOT BE A SHIELD FOR INVIDIOUS INTERFERENCE WITH BASIC HUMAN RIGHTS.

Sadly, defendants' attempt to enshrine a religious freedom defense in California law echoes many inglorious events in American history that underscore the need to limit religiously-motivated deprivations of basic human rights. In the 17th century, women in Salem, Massachusetts were put to death on religiously-based accusations of witchcraft. In the 18th and 19th centuries, slavery was justified with biblical references. During the past century, Christian schools have restricted admission of African-Americans based on beliefs that "mixing of the races" is a violation of God's commands. (*Bob Jones University v. United States* (1983) 461 U.S. 574, 580, 583, fn. 6 [103 S.Ct. 2017, 76 L.Ed.2d 157].) Restaurant owners have refused to serve African-Americans based on religious objections to "integration of the races." (*Newman v. Piggie Park Enterprises, Inc.* (D.S.C. 1966) 256 F.Supp. 941, 944-945, revd. (4th Cir. 1967) 377 F.2d 433 [district court had erred in holding that Title VI did not apply to some drive-in restaurants and thus non-white guests could be refused based on race and color].) Religious tenets have been offered to justify bans on interracial marriage, with such arguments as this: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix." (*Loving v. Virginia* (1967) 388 U.S. 1, 3 [87 S.Ct. 1817, 18 L.Ed.2d 1010] [quoting trial judge].)

This shameful history is not limited to racial discrimination, but also extends to gender and marital-status discrimination. In the 19th century, a justice of the Illinois Supreme Court insisted that a woman was properly denied a license to practice law because, according to the "law of the Creator," it is "[t]he paramount destiny and mission of woman [] to fulfil[l] the noble and benign offices of wife and mother." (See *Bradwell v. State of Illinois* (1872) 83 U.S. 130, 141 [16 Wall. 130, 21 L.Ed. 442].) More than a

century later, such religiously-based views of gender roles are still held dear by some. (See, e.g., *Fremont Christian School, supra,* 781 F.2d at pp. 1364-1365 [gender discrimination by private school, offering health insurance only to single and married male employees based on religious view that, in marriage, only men should be family providers].) Religious marital-status discrimination likewise has cropped up in the field of rental housing. (See, e.g., *Smith v. FEHC, supra,* 12 Cal.4th 1143; *Swanner v. Anchorage Equal Rights Com'n* (Alaska 1994) 874 P.2d 274; *Attorney General v. Desilets* (1994) 418 Mass. 316, 320 [636 N.E.2d 233, 235].)

This history lives on, unfortunately, with respect to sexual orientation discrimination. Today, there is growing understanding that sexual orientation is a personal characteristic bearing no relevance to one's ability to contribute to society, including one's ability to form a deep personal relationship with a partner and build a family together. (See, e.g., *Koebke*, 36 Cal.4th at pp. 838-839; see also American Psychological Association, *Briefing Sheet: Same-Sex Families & Relationships* (2006), available at <http://www.apa.org/ppo/issues/lgbfamilybrf604d.html> (as of Sept. 19, 2006); American Psychological Association, *APA Policy Statement on Sexual Orientation, Parents, & Children* (2004), available at <http://www.apa.org/pi/lgbc/policy/parents.html> (as of Sept. 19, 2006).) Yet, the pervasiveness and fervor of religious objections to homosexuality linger, inspiring widespread harassment and discrimination. (See, e.g., *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.3d 736 [Christian supervisor claimed religious right to harass lesbian subordinate based on sexual orientation]; *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599 [employee claimed religious right to post anti-gay biblical messages intended to distress gay co-workers]; *Erdman v. Tranquility, Inc., supra,* 155 F.Supp.2d at p. 1152 [supervisor's religious harassment of gay subordinate].)

Just 20 years ago, in a case since renounced as wrongly decided, the United States Supreme Court held that states could imprison same-sex couples for engaging in adult intimacy in their own bedrooms, based on, *inter alia*, "Judeo-Christian moral and ethical

standards," a publication about "the Western Christian Tradition" and, in the words of one justice, "millennia of moral teaching." (*Bowers v. Hardwick* (1986) 478 U.S. 186, 196-197 [106 S. Ct. 2841, 92 L.Ed.2d 140] (conc. opn. of Burger, C.J.), reversed by *Lawrence v. Texas* (2003) 539 U.S. 558, 578 [123 S.Ct. 2472, 156 L.Ed.2d 508].) In dissent, Justice Blackmun faulted the religious references offered by the state as well as his fellow justices to defend the statute, admonishing that the "legitimacy of secular legislation depends instead on whether the state can advance some justification for its law beyond its conformity to religious doctrine." (*Bowers,* 478 U.S. at p. 211-212 (dis. opn. of Blackmun, J.).) Justice Blackmun added, "far from buttressing his case, [the Attorney General's] invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [Georgia's sodomy statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus." (*Ibid.*)

In *Loving v. Virginia, supra,* 388 U.S. 1, the U.S. Supreme Court refused to allow religion to become a shield for invidious interference with people's most basic decisions about choosing a mate and creating a family. This court should do the same here. Religious freedom is a core American value, and burdens on it can make for hard cases to decide. This is not one of those hard cases, however, given the avoidability of the burden and the compelling state interests underlying the Unruh Act's prohibition on sexual orientation discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: September 20, 2006

Respectfully submitted,

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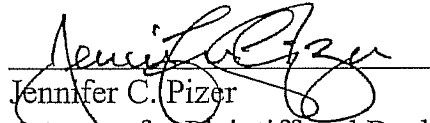
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, I hereby certify that, excluding tables and this certificate, but including footnotes, the foregoing brief contains 12,451 words, based on the computer program used to prepare the brief.

Dated: September 20, 2006



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PROOF OF SERVICE

I, TITO GOMEZ, declare:

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

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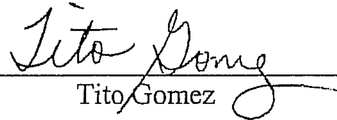
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 20, 2006



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