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

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

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I. INTRODUCTION

The issue presented is purely legal. Defendants do not dispute that they perform intrauterine insemination (IUI) routinely for other patients and refused to do so for plaintiff. Yet, their main authorities only permit health care providers to refuse *nonselectively* to perform a *procedure* based on conscience. None authorizes selective refusal to perform a routine procedure for a *person* because of a personal characteristic as to which the law prohibits discrimination.

Seemingly conceding that they lose under the analyses used by the U.S. Supreme Court and this court for federal and state religious free exercise claims, defendants argue for what might be called "super strict scrutiny" of laws that restrict religiously-motivated conduct. They contend that religious freedom is guaranteed so absolutely that it cannot be balanced against any other societal needs. Our American democratic system has never so elevated religion over secular law.

The law must protect third parties from harm, even when it has religious motivation. As California becomes ever more diverse, the state's interest in enforcing the Unruh Act against invidious discrimination only grows more compelling.

Defendants suggest the unprecedented Unruh Act exemption they propose can be limited to physicians. But defendants offer no justification for even such a circumscribed license to discriminate. The implications of defendants' claim to absolute freedom for religiously-motivated conduct become clearer and more

alarming as defendants newly assert a right to ignore not just the Unruh Act but also tort and contract law. Such privilege to disregard secular law is anathema to America's pluralistic democracy.

II. DEFENDANTS CONFUSE WHETHER THEY VIOLATED THE UNRUH ACT WITH WHETHER THEY ARE PRIVILEGED TO DO SO.

A. The Material Facts on Plaintiff's Motion For Summary Adjudication Are Undisputed Or Presumed.

As explained in plaintiff's Opposition to Defendants' Motion to Dismiss Review as Improvidently Granted (OMTD), only two facts are material to defendants' religious freedom affirmative defense: (1) whether defendants' religious beliefs are sincere; and (2) whether the Unruh Act substantially burdens defendants' exercise of religion. (See *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 562 (*Catholic Charities*); *Smith v. Fair Employment and Housing Comm'n* (1996) 12 Cal.4th 1143, 1166-1167 (*Smith v. FEHC*).) For present purposes, plaintiff assumes *arguendo* that defendants are sincere.

Religious adherents have a duty to avoid conflicts between religiously neutral, generally applicable laws that protect third parties and the religious duties they assume for themselves. (*Smith v. FEHC, supra,* 12 Cal.4th at pp. 1175-1176.) Defendants claim no religious duty to practice infertility medicine generally or to offer IUI in particular. Where a party has no religious duty to engage in a particular

commercial activity, the conflict is easily avoidable and the imposed burden is insubstantial.

Even if the burden on defendants' beliefs were substantial, the issue before this court easily could be resolved based on the two other elements of the test of defendants' free exercise affirmative defense, both of which present purely legal questions: (1) whether the interests in enforcing the Unruh Act are compelling; and (2) whether the Unruh Act is narrowly tailored. The answer to both questions is yes.

B. Disputes About Defendants' Unruh Act Liability May Remain For Trial But Do Not Support Defendants' Affirmative Defense.

Defendants' brief is a sea of red herrings about whether they should be held liable for violating the Unruh Act. These contentions are irrelevant to the issue before the court – whether defendants' religious free exercise affirmative defense is valid. Plaintiff addresses those contentions only to dispel confusion they might cause.

1. Defendants are judicially estopped to disclaim their motive for refusing treatment.

Defendants persist in challenging the factual predicate of this court's grant of review – that they refused to perform IUI for plaintiff because she is a lesbian. But defendants asserted below, and the superior court found, that they refused to perform IUI for plaintiff because it was against their religious beliefs to do so "for a homosexual couple." (OMTD 4-5.) Consequently, defendants are judicially estopped

to deny the self-proclaimed sexual orientation-based motive for their conduct. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.)

Defendants protest that the superior court's finding of sexual orientation discrimination was made in a ruling on a different motion than the one reviewed here. (Answer Brief on the Merits (ABOM) 19.) That is precisely the point. Parties should be held to their sworn statements as a case proceeds from one phase to the next.

Whether defendants are to be estopped, and whether they violated the Unruh Act, are separate questions from whether they are privileged to violate the Act as a matter of religious exercise. Defendants therefore are incorrect when they charge plaintiff with ignoring the relevant standard of review on appeal from a summary judgment ruling, where the appellate court "must view the evidence in a light favorable to . . . the losing party." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) This standard of review only requires presumptions in the nonmoving parties' favor as to facts that are material to the motion, not to all issues in the case, and plaintiff presumes *arguendo* in defendants' favor the material facts here: that defendants' religious beliefs are held sincerely and burdened substantially.[1]

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[1] Moreover, even if plaintiff's allegations on her Unruh Act claim *were* material on review of this summary adjudication order, judicial estoppel would supplant the usual standard of review to preclude invocation of evidence that might refute what parties are estopped to deny. (See *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 959, fn.8.)

2. Defendants caused dignitary harm to plaintiff.

An essential purpose of the Unruh Act is to protect individuals from the humiliation – the dignitary harm – of discrimination based on personal characteristics that should be irrelevant to commercial transactions. (*Smith v. FEHC, supra,* 12 Cal.4th at pp. 1170-1171.) This was precisely plaintiff's experience, and it illustrates the fatal defect in defendants' contention that physicians should be allowed to "refer" patients on discriminatory grounds.

Lesbians and gay men often experience humiliating unequal treatment, and sometimes it has religious motivation. (See, e.g., *Knight v. State of Connecticut Dep't of Pub. Health* (2d Cir. 2001) 275 F.3d 156 [home-bound AIDS patient subjected to anti-gay proselytizing by visiting nurse].) Whatever the beliefs of those who wish to treat others differently based on personal characteristics, the Unruh Act requires that everyone offering business or professional services to the public refrain from inflicting such dignity harm.

3. Advance warning of discrimination does not extinguish the duty to comply with the Unruh Act.

Defendants are wrong to suggest that they can evade the Unruh Act by announcing preemptively an intention to treat lesbian patients differently so those patients can go elsewhere. Likewise, defendants cannot evade the Act by "referring" patients because of characteristics covered by the Act. (*Smith v. FEHC, supra,* 32 Cal.4th at p. 1175; *Washington v. Blampin* (1964) 226 Cal.App.2d 604, 608; cf.

Bragdon v. Abbott (1998) 524 U.S. 624 [dentist violates ADA by referring HIV-positive patient elsewhere].) Such "referral" of African American guests to other restaurants, hotels and similar public accommodations is what led Congress to pass the 1964 Civil Rights Act. (*Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, 250.)

This rule is consistent with medical ethics. While "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," the right to decline on religious grounds is subject to the primary duty not to discriminate: "Physicians *cannot refuse to care for patients based on* race, gender, *sexual orientation*, or any other criteria that would constitute invidious discrimination." (AMA Policy E-10.05, Plaintiff's Appendix of Authorities, Tab 2, italics added.)

4. Individual physicians are subject to the Unruh Act.

The doctors contend they are not personally subject to the Unruh Act because they are employees, and only the corporation through which they operate their medical practice is a "business establishment" subject to the Act. They are mistaken. "There is nothing novel in referring to the practice of medicine as a business." (*Blampin*, *supra*, 226 Cal.App.2d at p. 606.) Doctors who discriminate against

patients in violation of the Unruh Act may be held individually liable for damages. (*Id.* at p. 608.)

Defendants mistakenly rely on *Leach v. Drummond* (1983) 144 Cal.App.3d 362, which addressed whether a court may compel physicians to perform specific services for particular patients. Plaintiff does not seek to compel defendants to perform IUI, but rather that they not discriminate by providing IUI to others but not to lesbians, and that she be compensated for the harms she suffered due to their discrimination. *Leach* itself acknowledged that a "claim for monetary damages for deprivation of medical care is specifically authorized under the holding of *Washington v. Blampin*." (*Id.* at p. 378.)

III. DEFENDANTS' RELIGIOUS FREEDOM AFFIRMATIVE DEFENSE FAILS UNDER THE CALIFORNIA CONSTITUTION.

This court has recognized core principles that frame our state's religious free exercise jurisprudence: "While freedom to *believe* is absolute, freedom to *act* pursuant to one's religious beliefs cannot be." (*Catholic Charities, supra,* at pp. 558-559, italics added.) As California's population becomes more diverse, with religious beliefs and practices more varied than ever, these principles become increasingly important. The approach set forth in *Catholic Charities* is serving the state well. (See, e.g., *Valov v. Dept. of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1125-1126.) Defendants' request that the court abandon this sensible approach and exempt

religious believers from secular laws, including civil rights laws, threatens harmonious co-existence and public health.

A. Review Under California's Free Exercise Clause Does Not Exceed Strict Scrutiny.

1. The authorities do not support the "super strict scrutiny" defendants propose.

In *Catholic Charities*, the court declined "to declare the scope and proper interpretation of the California Constitution's free exercise clause" because there was no need – the statute at issue passed strict scrutiny. (32 Cal.4th at p. 862.) Here as well, this court need not decide the scope of California's free exercise clause because, even under strict scrutiny, religious motivation cannot excuse defendants' Unruh Act violation.

Defendants assert "[i]t is now time to announce California's rule" because, even if the Unruh Act's application here survives strict scrutiny, California's free exercise clause requires "a review *more rigorous* than strict scrutiny." (ABOM 26, italics added.) Defendants cite no authority for the remarkable proposition that review under California's free exercise clause should exceed the highest level of constitutional review. They simply rely on article I, section 4 of the California Constitution, which states in pertinent part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does

not excuse acts that are licentious or inconsistent with the peace or safety of the State."

Defendants propose a radical new framework for California free exercise claims based on New York's Constitution, the source of California's constitutional text. But in doing so, defendants fail to acknowledge that New York's high court has interpreted that state's free exercise clause in a manner that forecloses defendants' approach. In *Catholic Charities of the Diocese of Albany v. Serio* (2006) 7 N.Y.3d 510, the New York Court of Appeals held that New York's constitutional protection exceeds that of the federal constitution but is less than strict scrutiny review. (*Id.* at p. 525.) The New York court prescribed a standard that falls considerably short of strict scrutiny, making the rational basis test adopted in *Employment Division Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879, "the usual, but not invariable, rule" for claims under the New York Constitution:

> *Strict scrutiny is not the right approach* to constitutionally-based claims for religious exemptions. ... Rather, the principle stated by the United States Supreme Court in *Smith* – that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets – should be the usual, though not the invariable, rule. *The burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption.*

(*Id.* at 526, italics added.) The New York court added that the Legislature's judgment is to be afforded "substantial deference." (*Id.* at 525.)

If it is time to announce California's rule, and if this court is guided by California's constitutional roots in New York, then *Serio* is persuasive. As in New York, the standard in California should not reach, let alone exceed, strict scrutiny, but should be one in which (1) *Smith* is "the usual, but not the invariable, rule," (2) the Legislature's judgment is afforded "substantial deference," and (3) "the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." (*Serio,* 7 N.Y.3d at 525-526.) Plainly the Unruh Act survives such review.

By contrast, the *super*-strict scrutiny test defendants propose would allow discrimination if (1) the religious belief is sincerely held, (2) the discrimination was not "licentious or inconsistent with the peace and safety of the State" (Cal. Const., art. I, § 4), and (3) the victim of the discrimination was offered reasonable alternative means of obtaining what was denied. None of defendants' authorities have adopted such a test, and at least one rejected it. In *First Covenant Church of Seattle v. City of Seattle* (1992) 120 Wash. 203, 206, the Washington Supreme Court interpreted a state free exercise clause similar to California's and New York's and adopted the strict scrutiny test. (*Id.* at 226.) A concurring opinion urged a more stringent rule, much like defendants' proposal, but unsuccessfully so. (*Id.* at 236 (conc. opn. of Utter, J.).)

Similarly, in *Minnesota v. Hershberger* (Minn. 1990) 462 N.W.2d 393, 398, the Minnesota high court applied traditional strict scrutiny with language about "balancing" religious rights against state needs that precludes defendants' *super*-strict test.[2]

2. Invidious discrimination in commercial activity is "licentious" and "inconsistent with the peace and safety of the state."

Defendants assert that their discrimination against plaintiff cannot be considered "licentious or inconsistent with the peace or safety of the State" within the meaning of section 4. But even when a dissenting Justice O'Connor took a somewhat similar view of like language in *City of Boerne v. Flores* (1997) 521 U.S. 507, 552-555 (*Boerne*), she still concluded that strict scrutiny should be applied to free exercise claims, not absolute freedom of action via *super*-strict scrutiny. And Justice Scalia's opinion in *Boerne* shows why defendants' characterization of the historical text is unsound: the ancient case on which defendants rely, *People v. Phillips* (1813) N.Y. Court of General Sessions, the sole case that actually adopted the approach defendants recommend, is "weak authority." (*Boerne, supra,* 521 U.S. at p. 543 (conc. opn. of Scalia, J.).) Despite nearly 200 years of opportunity to inspire or persuade, *Phillips* stands alone.

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[2] *Hershberger* rests chiefly on *State v. Sports & Health Club* (Minn. 1985) 370 N.W.2d 844, 853, which rejected a claimed religious exemption from Minnesota's Human Rights Act because the state interest in prohibiting discrimination was compelling and the law was narrowly tailored, as is true of the Unruh Act.

Justice Scalia explained how the text *should* be understood, which is fully consistent with plaintiff's position that religious beliefs cannot exempt professional services from the Unruh Act. (*Id.* at pp. 538-544.) For example, historically, "licentious" simply meant breaking society's laws. (*Id.* at p. 540, fn.1.) Even today, while the word commonly connotes undue sexual freedom, that is only part of the standard definition, which primarily involves taking "license" or generally being too free.[3] The word should not be read so narrowly as to exclude what historically was intended.

Similarly, the phrase "threat to peace and safety" means violation of laws that prevent people from harming each other. This concept's application in the civil rights area is obvious, and the Legislature has confirmed it explicitly, for example, in the Fair Employment and Housing Act. (See Gov. Code, § 12920 [discrimination in employment and housing "foments domestic strife and unrest. ... [Accordingly, t]his part shall be deemed an exercise of the police power of the state *for the protection of the welfare, health, and peace of the people of this state*," italics added].)

According to New York's high court, the analogous New York provision (N.Y. Const., art. I, § 3 ["licentiousness" or "practices inconsistent with the peace or safety

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[3] According to West's Encyclopedia of American Law, "licentiousness" means, first, "acting without regard to law, ethics, or the rights of others." Only as a second meaning is it stated that licentiousness often is "used interchangeably with lewdness or lasciviousness, which relate to moral impurity in a sexual context." West's Encyclopedia of American Law (1998), available at http://www.answers.com/topic/licentiousness (visited February 1, 2007).

of this state"]) allows the legislature to prohibit "actions which are in violation of *social duties* or subversive of *good order*." (*People v. Sandstrom* (1939) 279 N.Y. 523, 530, italics added.) Looking to Washington, a like provision has been construed as vesting the legislature with discretion "to ascertain the demands of *public interest* and to select measures necessary to secure and protect the same." (*State v. Balzer* (1998) 91 Wash.App. 44, 56, italics added.) Similarly, California's Legislature has determined that various forms of invidious discrimination, including sexual orientation discrimination, violate social duties, subvert good order, and should be prohibited in the public interest.

While most doctors surely comply with civil rights laws and medical ethics, those who fail to put patient needs first threaten patient welfare because patients depend so heavily on their physicians' recommendations and care. Where our law recognizes the harm to individuals and society when disfavored groups are turned away and must find lunch or lodging elsewhere, how can denial of equal services in medical facilities be anything but worse?

B. California Has Compelling Interests In Ending Discrimination Against Patients.

The state has a compelling interest in ending all forms of discrimination forbidden by the Unruh Act. (See, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 31, fn.8; *Dep't of Fair Employment & Hous. v. Superior Ct.* (2002) 99 Cal.App.4th 896, 904-905.) Our Legislature recently confirmed the "longstanding

and compelling" nature of the interests served by the Unruh Act when codifying the prohibition against sexual orientation discrimination. (Stats. 2005, ch. 420, Section 2(a).)

Defendants insist the state cannot have a compelling interest in prohibiting sexual orientation discrimination because such classifications are not entitled to strict scrutiny for equal protection purposes. This argument is mistaken for at least two reasons. First, the present case implicates statutory enforcement, not equal protection. Defendants confuse the importance of the state interest(s) served by the law with whether government has treated a minority group unfavorably in a way that warrants more searching equal protection review.

Second, defendants are incorrect in asserting that sexual orientation classifications receive the most lenient form of constitutional review. Defendants rely on *Romer v. Evans* (1996) 517 U.S. 620, but that case left the level of scrutiny undecided as a matter of federal law because the state constitutional amendment at issue failed even rational basis review. (*Id.* at p. 632.) The question remains open in California as well.[4]

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[4] The court has not ruled expressly on the scrutiny appropriate for sexual orientation-based exclusions but has viewed them suspiciously for decades. (See *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458; see also *Children's Hosp. and Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 769 [indicating such discrimination warrants heightened scrutiny].)

C. Defendants Cannot Be "Accommodated" Without Harming Third Parties.

Defendants contend the Unruh Act is not narrowly tailored because there might be other ways the Legislature could pursue its goal of reducing discrimination. Defendants misunderstand this element of strict scrutiny. The Constitution does not require the Legislature to solve all problems at once. The narrow tailoring requirement thus is not a check into whether the law in question has done too little; rather, it checks whether the law does too much – whether it prohibits more than it should. Like the laws at issue in *Catholic Charities* and *Smith v. FEHC*, the Unruh Act is narrowly tailored in that it forbids only harmful conduct.

Defendants' reliance on Title VII's requirement that employers accommodate employees' religious needs (42 U.S.C.S § 2000e-2(a)(1)) is misplaced. First, the Unruh Act contains no analogous duty of religious accommodation. Second, Title VII does not require employers to allow employees to harm third parties, let alone to violate state law. Thus, Title VII thus does *not* entitle employees with anti-gay religious beliefs to act on those beliefs to the detriment of others. (See, e.g., *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.2d 736.) Looking more broadly than cases concerning sexual orientation reveals an avalanche of similar decisions poised to bury defendants' mistaken invocation of Title VII. (See, e.g., *Knight,* 275 F.3d at p. 168; *Chalmers v. Tulon* (4th Cir. 1996) 101 F.3d 1012, 1021; *Wilson v. U.S. West*

Communications (8th Cir. 1995) 58 F.3d 1337, 1342; *Bollenbach v. Board of Education* (S.D.N.Y. 1987) 659 F.Supp. 1450, 1473.)

Defendants' reliance on *Baker v. Home Depot* (2d Cir. 2006) 445 F.3d 541 is misplaced, as that case underscores that the reasonable accommodation contemplated by Title VII is only that which does not cause an undue hardship for the employer, meaning anything that results in "more than a de minimis cost." (*Id.* at p. 548.) Because violation of the Unruh Act creates the possibility of monetary damages, statutory penalties and attorney fees, a business establishment that permits its employees to discriminate is likely to incur far more than de minimis costs.

IV. *EMPLOYMENT DIVISION V. SMITH* PRECLUDES DEFENDANTS' AFFIRMATIVE DEFENSE UNDER THE U.S. CONSTITUTION.

A. *Gonzales* Did Not Change The Federal Analysis.

Under *Smith, supra,* 494 U.S. 872, the federal free exercise clause does not excuse defendants' refusal to treat lesbian patients. According to defendants, however, federal free exercise jurisprudence "has been in flux," and in *Gonzales v. O Centra Espirita* (2006) 546 U.S. 418 [126 S.Ct. 1211] (*Gonzales*), "the Supreme Court has moved away from the categorical approach of *Smith*." (ABOM 62.)

This is wishful thinking. *Gonzales* said only that the strict scrutiny test adopted by the Religious Freedom Restoration Act (RFRA), which applies to *federally*-imposed burdens on religious exercise, contemplates a case-by-case approach – "more

focused" than the *Smith* categorical approach – in which "[c]ontext matters." (*Gonzales, supra,* 126 S.Ct. at pp. 1220-1221.) The court said nothing to suggest any retreat from the approach prescribed by *Smith* for non-RFRA cases – that neutral state laws of general application like the Unruh Act, which do not target religious beliefs or practices, are to be enforced as long as they serve a legitimate public purpose in a rational manner. If anything, *Gonzales* reiterated the *Smith* rule by commenting: "We have no cause to pretend that the [case-by-case] task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was *not* required as a matter of constitutional law under the free exercise clause." (*Gonzales, supra,* 126 S.Ct. at p. 1225, italics added.)

B. The Unruh Act Is A Religiously-Neutral Law of General Application.

Defendants contend the Unruh Act is not a neutral law of general application because it exempts qualified senior housing from the ban on familial status and age discrimination. They confuse the requirement of religious neutrality with the Legislature's authority to define the areas of the marketplace that shall be subject to religiously-neutral civil rights laws. For example, there is no impropriety in the Legislature setting the parameters of the Fair Employment and Housing Act to require that all employers stop sexual harassment of employees (Gov. Code, § 12940(j)(4)(A)) while restricting the rest of the law's requirements to businesses with

at least five employees. (Govt. Code, § 12926(d).) Similarly, the Unruh Act applies to business establishments but not private associations. (*Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 686-87.) Limitations on the scope of the Unruh Act and the existence of specified defenses that are generally available to all without targeting religion do not invoke strict scrutiny. (*Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531-534.)

C. This Is Not A "Hybrid Rights" Case.

This court rejected in *Catholic Charities* the array of "hybrid rights" arguments defendants offer in pursuit of strict scrutiny. Even defendants' authorities do not support their position. For example, while the court in *Miller v. Reed* (9th Cir. 1999) 176 F.3d 1202 said the "hybrid rights" approach requires a "colorable" second claim to join with a free exercise claim, the Ninth Circuit rejected plaintiff's attempt, finding his proffered second claim "utterly meritless." (*Id.* at p.1208.) Defendants' free speech claim is equally insubstantial. This case is not about defendants' ideas – or their communication of ideas – concerning lesbians, other groups of patients, or religion; it is about their differential treatment of plaintiff.

Defendants claim it would violate their free speech rights to impose liability based on their statements about why they refused to perform IUI for plaintiff. But there is nothing unusual or improper about considering individuals' statements as

evidence when intent is relevant to liability. As in *Catholic Charities*, if liability attaches, it is due to a party's conduct, not the mere expression of ideas.

V. DEFENDANTS' CLAIM OF A RELIGIOUS FREEDOM AFFIRMATIVE DEFENSE TO PLAINTIFF'S TORT AND CONTRACT CLAIMS IS BASELESS.

Defendants claim they have a religious freedom right to breach contracts and are immune from tort liability. They offer no authority for this startling proposition beyond their reading of article I, section 4. Do they believe they can steal, too, in the cloak of religion? Can they commit battery? Would not defendants' theory of absolute freedom for religiously-motivated conduct equally prevent punishment of relatives who force a widow onto her husband's funeral pyre according to the Hindu tradition or parents who procure genital mutilation of their daughters for religious purposes? These examples may seem extreme because such practices are outside the Judeo-Christian traditions common in the United States today. But recent cases involving less shocking but still manifestly injurious conduct make clear it is a Pandora's Box that defendants seek to open. (See, e.g., *Park v. Schlitgen* (N.D.Cal. 1999) 1999 WL 138887 [religious freedom challenge to involuntary manslaughter charge]; *People v. Jones* (Ill.App.Ct. 1998) 697 N.E.2d 457, 460 [claimed religious right to beat wife]; *American Life League, Inc. v. Reno* (4th Cir. 1995) 47 F.3d 642, 654-655 [claimed right to block another's property]; *Urantia Found. v. Maaherra* (D. Ariz. 1995) 895 F.Supp. 1329, 1332-1333 [claimed right to infringe copyright].)

VI. DEFENDANTS' THEORIES CONTRAVENE CALIFORNIA'S "NO PREFERENCE" CLAUSE.

The federal free exercise and establishment clauses "are frequently in tension." (*Locke v. Davey* (2004) 540 U.S. 712, 718.) The United States Supreme Court "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, *if expanded to a logical extreme*, would tend to clash with the other." (*Walz v. Tax Commission* (1970) 397 U.S. 664, 668-669, italics added.)

The same is true of California's free exercise and "no preference" clauses. (Cal. Const., art. I, § 4.) Defendants' *super*-strict scrutiny theories would expand the free exercise clause to the "logical extreme" of which the U.S. Supreme Court has warned. The result would be a religious preference in defendants' favor, which is not permitted because the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (*McCreary County v. ACLU* (2005) 545 U.S. 844, 860.)

In light of our "no preference" clause, California must enforce the religious neutrality principle at least as rigorously as federal law, if not more rigorously. (*Sands v. Morongo Unified Sch. Dist.* (1991) 53 Cal.3d 863, 883-884.) For this court to endorse defendants' sweeping claim of license to ignore all manner of secular

obligations would elevate the believer above the non-believer, and the sectarian's rights above all secular interests. The California Constitution forbids that.

VII. CONCLUSION

For the foregoing reasons, the order of the superior court granting summary adjudication of defendants' religious free exercise affirmative defense should be reinstated.

Dated: February 21, 2007

Respectfully submitted,

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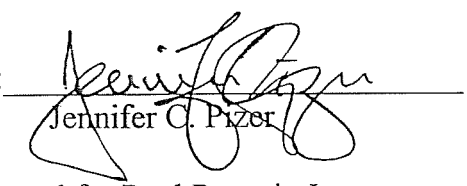
By: 
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CERTIFICATE OF COMPLIANCE

I certify that the brief is proportionately spaced, has a typeface of 13 points or more, and contains 4,712 words, based upon the word court in Microsoft Word, and is in conformance with the type specifications set forth at California Rules of Court 14.

Dated: February 21, 2007

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PROOF OF SERVICE

I, ERIK WILSON, 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.

On February 21, 2007 I served a copy of the attached documents, described as **REPLY BRIEF ON THE MERITS OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ**, on the parties of record by placing true copies thereof in sealed envelopes to the office of the persons at the addresses set forth below:

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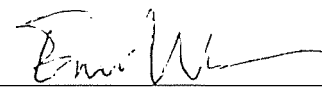
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 21, 2007



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