Appellate Case No. DO 45438
San Diego County Superior Court Case No. GIC 770165

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

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC., DR. CHRISTINE Z. BRODY and DR. DOUGLAS K. FENTON,
Petitioners,

vs.

SUPERIOR COURT FOR SAN DIEGO COUNTY,
Respondent.

GUADALUPE T. BENITEZ,
Real Party in Interest.

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

BRIEF IN SUPPORT OF REAL PARTY IN INTEREST BY *AMICI CURIAE* (1) ANTI-DEFAMATION LEAGUE; (2) AMERICAN ACADEMY OF HIV MEDICINE; (3) AMERICAN MEDICAL STUDENTS ASSOC.; (4) ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIF.; (5) BIENESTAR HUMAN SERVICES; (6) CALIF. LATINAS FOR REPRODUCTIVE JUSTICE; (7) CALIF. PAN-ETHNIC HEALTH NETWORK; (8) CALIF. WOMEN'S LAW CENTER; (9) COALITION FOR HUMANE IMMIGRANT RIGHTS OF L.A.; (10) GAY AND LESBIAN MEDICAL ASSOC.; (11) INT'L ASSOC. OF PHYSICIANS IN AIDS CARE; (12) LATINO COALITION FOR A HEALTHY CALIF.; (13) MAUTNER PROJECT, THE NAT'L LESBIAN HEALTH ORGANIZATION; (14) MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; (15) NAT'L CENTER FOR LESBIAN RIGHTS; AND (16) NAT'L HEALTH LAW PROGRAM

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Brief is submitted by 16 diverse amici in support of Real Party in Interest Guadalupe T. Benitez ("Real Party"), namely, the Anti-Defamation League (ADL); American Academy of HIV Medicine; American Medical Students Association; Asian Pacific American Legal Center of Southern California; Bienestar Human Services; California Latinas for Reproductive Justice, California Pan-Ethnic Health Network; California Women's Law Center; Coalition for Humane Immigrant Rights of Los Angeles; Gay and Lesbian Medical Association; International Association of Physicians in AIDS Care; Latino Coalition for a Healthy California; Mautner Project, the National Center for Lesbian Rights; Mexican American Legal Defense and Educational Fund (MALDEF); and the National Health Law Program (together, the "Health Law Amici"). As discussed further in Section II, the Health Law Amici represent a broad coalition of community-based and professional agencies with expertise concerning health law and health care access, religious freedom and religious tolerance, the harms inflicted by discrimination, and the needs of lesbian, gay, bisexual and transgender people. All of the Health Law Amici share a devotion to improving health care for everyone by reducing discrimination by health care providers.

The Health Law Amici had not planned to submit a friend-of-the-court brief in this matter for the simple reason that they believe the trial court ruling is correct and is clearly dictated both by the law and by the shared commitment of the health care community for quality health care, without regard to a person's protected and medically irrelevant individual characteristics, such as his or her race, sex, national origin, or sexual

orientation. The Health Law Amici believe that the Superior Court below properly followed the precedents of the highest courts of the nation and the State of California and that those precedents dovetail exactly with good, ethical medical practice. As the U.S. Supreme Court has explained, "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." (*Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 878-79.) And as the American Medical Association has stated, following the same principle, "[P]hysicians who offer their services to the public may not decline to accept patients because of ... sexual orientation, or any other basis that would constitute invidious discrimination." (AMA Opinion E-9.12.)

And yet that is what this case is about: A refusal by physicians, purportedly justified on the basis of their religious beliefs, to provide treatment to a woman because of her sexual orientation, in clear contravention of a religiously-neutral civil rights law of general applicability. Petitioners have asked this Court to condone that reprehensible conduct.

That is why the Health Law Amici were startled and saddened to learn that the California Medical Association (the "CMA") and the Christian Medical and Dental Associations (the "Christian Associations") (together, "Petitioners Amici") had submitted amicus briefs that run counter to the law and to the well established policies and practices of the health

care community. The positions set forth in those amicus briefs would do nothing less than condone discrimination and degrade health care. Accordingly, the Health Law Amici now feel compelled to speak out to this Court with this Brief to help ensure that there is no misunderstanding of what is right under the law or of what is proper in the eyes of health care professionals and advocates.

First, prior to a brief discussion of and concurrence in the well settled legal principles that already have been briefed to this Court and followed by the trial court below, the Health Law Amici address and rebut the suggestion created by Petitioners Amici's briefs that the medical community condones unlawful discrimination, if prompted by religious faith. For reasons that are unclear, the Petitioners Amici misrepresent the mainstream position of the health care community to this Court. In fact, most prominent health care organizations, ranging from the American Medical Association to well-regarded hospitals, professional associations, and government committees, take the position that invidious discrimination based on an individual's medically irrelevant personal characteristics in violation of civil rights or other applicable laws is ***never*** warranted. In this Brief, the Health Law Amici correct the Petitioners Amici's misportrayal to this Court and provide additional pertinent information concerning the shared view of the health care community in order to help the Court resolve the issues Petitioners have raised. The Health Law Amici also inform the Court of the rationales for this view, namely, that medical professionals believe that those engaged in the healing profession should not be engaged in the harmful conduct of discrimination, and that health care suffers in the

face of discrimination such as that faced by the gay and lesbian community, as has been documented authoritatively.

Second, the Health Law Amici address the misleading impression that the ability to discriminate that is advocated by the Petitioners Amici somehow would result in better health care through more open communication. Exactly the reverse is true, because while doctors might be free to act on their discriminatory beliefs, they would cause patients to withhold potentially relevant information from doctors, and many patients would not return for further medical care. It should be obvious that given the general public's interest in expanded access to health care and the mission of doctors to heal and to help, the latter poses an urgent problem and the former must give way. Indeed, again, the Health Law Amici apprise the Court that medical professionals share this view, based on respected medical research demonstrating the connection between health care providers' style of communication with lesbian and gay patients and the quality of the doctor-patient relationship, as well as the connection between relationship quality and health.

Third, the Health Law Amici explain why referrals are ***not*** an acceptable method of addressing the intersection of the principle of free exercise of religion and neutral laws of general applicability. Neither doctors nor any other individuals are, or should be, permitted to accomplish indirectly what they cannot accomplish directly, namely, discrimination. The law does not permit an apartment owner to refer a prospective tenant to another apartment building because of the would-be renter's race, and the law does not permit a doctor to refer a woman to another doctor because the

patient is a lesbian. Moreover, such a practice would only worsen medical care.

Fourth, the Health Law Amici explain why they concur in the legal analysis set forth by Real Party to this Court and applied by the Superior Court below. In short, both federal and California law are clear that the federal and state constitutional rights to the free exercise of religion do ***not*** permit a doctor engaged in a commercial enterprise to refuse treatment to someone on the basis of personal characteristics in a manner that violates a non-discrimination law of general applicability. Given California's Unruh Civil Rights Act, a doctor cannot withhold treatment because of a patient's sexual orientation, for example, while providing the same treatment to others -- no matter his or her personal religious, ethical, or moral beliefs.

Finally, the Health Law Amici highlight for the Court the disastrous consequences that the position advocated by the Petitioners Amici would have, eviscerating civil rights laws and other laws. There is no reason to take that path when the courts and the health care community already have found a framework for addressing the intersection of free exercise of religion and non-discrimination laws. The two coexist well and properly under the status quo.

The position of the Petitioners and their amici is simply contrary to the generally accepted practice in the medical profession and all controlling legal authority. When a physician discriminates as the result of sincere religious beliefs, it is still discrimination, it is still unethical and poor health care practice -- and it is still unlawful. For these reasons, the Health Law Amici respectfully request that this Court follow generally accepted

practices of the health care community and well settled legal precedent by upholding the status quo and the Order of the Superior Court.

II. INTERESTS OF *AMICI CURIAE*

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. Today, it is one of the world's leading civil and human rights organizations fighting hatred, bigotry, discrimination, and anti-Semitism. ADL's history is marked by a commitment to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under the law. As part of its core belief, ADL maintains a deep commitment to the principles of religious liberty that are enshrined in the religion clauses of the First Amendment. However, ADL does not believe that discrimination in any form, especially when forbidden by a facially neutral civil rights law, is acceptable even when based on a sincere, good-faith religious belief. ADL has filed *amicus* briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Supreme Court's landmark cases in the area of civil rights and equal protection.[1]

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[1] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer* (1948) 334 U.S. 1; *Sweatt v. Painter* (1950) 339 U.S. 629; *Brown v. Board of Educ.* (1954) 347 U.S. 483; *Cardona v. Power* (1966) 384 U.S. 672; *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409; *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229; *DeFunis v. Odegaard* (1974) 416 U.S. 312; *Runyon v. McCrary* (1976) 427 U.S. 160; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273; *United Jewish Orgs. of Williamsburg, Inc. v. Carey* (1977) 430 U.S. 144; *Regents of Univ. of Cal. v. Bakke* (1978) 438 U.S. 265; *United Steelworkers v. Weber* (1979) 443 U.S. 193; *Fullilove v. Klutznick* (1980) 448 U.S. 448; *Boston Firefighters Union, Local 718 v.*

The **American Academy of HIV Medicine** ("AAHIVM") is an independent organization of specialists in HIV/AIDS care and others dedicated to promoting excellence in HIV/AIDS care. Through advocacy and education, AAHIVM is committed both to supporting health care providers in this area of medicine and also to ensuring better care for those living with AIDS and HIV disease. With 2,000 members, AAHIVM is the largest independent organization of HIV frontline providers, and those health care professionals give direct care to more than 340,000 HIV patients. AAHIVM believes that its expertise and interest in ensuring optimal health care, particularly for often stigmatized populations, can benefit the Court in the consideration of the issues before it.

The **American Medical Student Association** ("AMSA") is the nation's largest independent organization of physicians-in-training. Founded in 1950, AMSA is a non-profit organization that represents more than two-thirds of all medical students and a total of 60,000 physicians-in-training. AMSA has chapters in every allopathic and osteopathic medical school in the country and, indeed, represents the future of medicine in the United States. AMSA's goal is to improve medical training and the nation's health and has a keen interest in this case because of its potential effect on the quality of medical care.

Boston Chapter, NAACP (1983) 461 U.S. 477; *Palmore v. Sidoti* (1984) 466 U.S. 429; *Firefighters Local Union No. 1784 v. Stotts* (1984) 467 U.S. 561; *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267; *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469; *Metro Broadcasting, Inc. v. FCC* (1990) 497 U.S. 547; *Johnson v. De Grandy* (1994) 512 U.S. 997; *Miller v. Johnson* (1995) 515 U.S. 900.

The **Asian Pacific American Legal Center of Southern California** is a nonprofit legal organization dedicated to serving the Asian American communities in this area through impact litigation, direct legal services, community education, leadership development, and public policy advocacy. Founded in 1983, APALC provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, inter-ethnic relations, dispute resolution, and civil rights advocacy. APALC has long been committed to working collaboratively and creatively to reduce discrimination in public accommodations, including in health care services, based on national origin, race and other personal characteristics. In the health care context, persistent discrimination and widespread lack of cultural competence on the part of medical professionals exacerbate health disparities among society's most vulnerable populations, including many of the communities APALC serves in Southern California.

With centers in Los Angeles, San Bernardino, and San Diego counties, **Bienestar Human Services** ("Bienestar") is the largest Latino non-profit, community-based agency in the United States. It meets the social service, health prevention, and education needs of Latinos living with HIV and at risk of HIV and other health problems. Bienestar was founded due to the lack of HIV services for the Latino community, and the mistreatment Latinos commonly experienced in mainstream medical settings. The agency's early focus on AIDS education has broadened to address myriad health and social service issues facing Southern California's Latino community, especially gay, lesbian, bisexual and transgender Latinos, including many Mexican immigrants, such as Real Party. Bienestar's staff and clients are all too familiar with the relationship

between anti-gay bias and HIV stigma, and with how national origin discrimination, language barriers, and particular sectarian views can combine with sexual orientation bias to impede access to medical services. Its experience teaches that a religious exception to California's anti-discrimination laws effectively would end equal health care access for all, putting vulnerable patients at increased risk, and very likely increasing HIV/AIDS stigma, with serious adverse repercussions. For these reasons, Bienestar opposes all health care discrimination, whether or not motivated by religion.

The **California Latinas for Reproductive Justice** ("CLRJ") is a statewide policy and advocacy organization whose mission is to advance California Latinas' reproductive health and rights within a social justice and human rights framework while striving to ensure that policy developments reflect the needs of Latinas, their families and their communities. CLRJ seeks to influence and enforce statewide laws and policies that affect Latinas' reproductive and sexuality health and rights. CLRJ is committed to ensuring that all members of the Latino community – including individuals who are lesbian, gay, bisexual, and transgender – have access to comprehensive, accurate, and unbiased reproductive and sexuality health and rights information and to comprehensive reproductive and sexuality health services that are culturally and linguistically appropriate to improve their quality of life and ensure healthy communities.

The **California Pan-Ethnic Health Network** ("CPEHN") works to reduce racial and ethnic health disparities and to ensure that all Californians have access to health care and can live healthy lives. Formed in 1992 by

the Asian & Pacific Islander American Health Forum, the California Black Health Network, the California Rural Indian Health Board, and the Latino Coalition for a Healthy California, CPEHN now is an established leader in multicultural health, advocating for public policies and sufficient resources to meet the needs of California's large, diverse communities of color. The health of people of color in California continues to lag behind that of the overall population because of many institutional and societal factors. CPEHN champions approaches that can eliminate these disparities. In particular, by holding health care systems accountable to treat all patients with equal respect and concern, CPEHN helps to ensure that everyone in California, regardless of ethnicity, race or cultural background, can access quality health care and live a healthy life.

The **California Women's Law Center** ("CWLC") is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, CWLC works in the following priority areas: sex discrimination, women's health, race and gender, women's economic security, exploitation of women, and violence against women. Since its inception, CWLC has placed a strong emphasis on addressing both discrimination affecting women and women's reproductive rights, and has authored numerous *amicus* briefs, articles, and legal education materials on these issues. Because this case raises important questions within its areas of core concern, the CWLC has the requisite interest and expertise to join in this *amicus* brief.

The **Coalition for Humane Immigrant Rights of Los Angeles** ("CHIRLA") is a nonprofit organization founded in 1986 to advance the

human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of the issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to advocate more effectively for positive change. Toward those goals, CHIRLA provides legal representation, extensive referral services, and a support network for immigrants and refugees; educates and organizes community members; and works to improve race and ethnic human relations throughout Southern California. With reference to this case, CHIRLA underscores the significant health and related challenges facing immigrants in California and its advocacy at the local, state and federal levels for nondiscriminatory, respectful and culturally competent health and social service policies and services.

The **Gay and Lesbian Medical Association** ("GLMA"), founded in 1981, is the world's largest and oldest association of lesbian, gay, bisexual, and transgender ("LGBT") health care professionals. GLMA seeks to reduce the health disparities that LGBT people experience by educating health care providers about how to provide nonjudgmental, culturally competent care. GLMA also promotes LGBT health research and works to eliminate bias in the health care setting. Accordingly, this litigation directly implicates subjects within GLMA's areas of expertise and concern, and GLMA has knowledge about appropriate provision of health care and the treatment of LGBT individuals, such as Real Party, that will assist the Court.

The mission of the **International Association of Physicians in AIDS Care** ("IAPAC") is to craft and implement global educational and advocacy strategies to improve the quality of care provided to all people living with HIV/AIDS. IAPAC envisions a world in which people living with HIV/AIDS may obtain the best healthcare available provided by physicians and allied health professionals armed with cutting-edge clinical expertise. IAPAC has particular interest in this litigation because of its goal of ensuring that people receive optimal health care, without regard to their medically irrelevant personal characteristics. IAPAC believes that its expertise in providing health care will benefit the Court as it reviews the issues before it.

The **Latino Coalition for a Healthy California** ("LCHC") – the only statewide organization with a specific emphasis on Latino health – was founded in 1992 by health care providers, consumers and advocates to improve Latino health through enhanced information, policy development, and community involvement. LCHC works in three key strategic areas -- access to health care, health disparities, and community health -- through public policy and advocacy, community education and research. LCHC places special focus on how inequities in quality of health care contribute to disparities in the health status of our population, and on the role of culturally sensitive and linguistically appropriate services in reducing those disparities. Through its Rapid Response Network of 1,700 community-based organizations and its Regional Networks in San Diego, Los Angeles and the Bay Area, LCHC affiliates mobilize to affect public policies, services, and conditions that affect Latino health.

The **Mautner Project, The National Lesbian Health Organization** ("Mautner") improves the health of lesbians and their families through advocacy, education, research, and direct service. The Project educates the medical community about the health needs of lesbians, while promoting lesbian health priorities in national and local policy arenas. With a special focus on breast cancer issues that affect lesbians and non-lesbians alike, Mautner coordinates peer and family assistance programs; operates support groups, a resource center, and education programs; and provides referrals to lesbian-friendly health care professionals and other services. Mautner also educates medical providers about how cultural competence concerning lesbian patients improves doctor-patient communication and facilitates access to health care (including cancer screenings), and so improves health outcomes for these patients. Mautner encourages health professionals to incorporate cultural competency principles into their approach to every patient.

Established in 1968, the **Mexican American Legal Defense and Educational Fund** ("MALDEF") is the leading national civil rights organization representing the 40 million Latinos living in the United States through litigation, advocacy, and educational outreach. With its headquarters in Los Angeles and offices in Atlanta, Chicago, Houston, Sacramento, San Antonio and Washington, D.C., MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment under the law of Latinos, and is a respected public policy voice in Sacramento and

Washington, D.C. on issues affecting Latinos. MALDEF sets as a primary goal defending the right of Latinos to be free of discrimination in public accommodations, including health care services.

Since 1977, the **National Center for Lesbian Rights** ("NCLR") has worked to create a world in which every lesbian can live fully, free from discrimination. NCLR is a national, lesbian-feminist, non-profit law firm with headquarters in San Francisco and regional offices in St. Petersburg, Florida, and Washington, D.C. Winning legal protections for lesbian, gay, bisexual, and transgender families in all their diverse forms is, and has always been, NCLR's top priority. The agency achieves this through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists. As part of a broader social justice movement, NCLR advances the legal and human rights of lesbians, gay men, and bisexual and transgender individuals across the United States. Each year NCLR serves more than 4,500 clients in all 50 states.

The **National Health Law Program** ("NHeLP") is a public interest law firm working to improve access to quality health care on behalf of limited-income people and others who experience health care disparities, by providing legal and policy analysis, advocacy, information and education. Since its founding more than 30 years ago, NHeLP has developed expertise in both federal and state law bearing on the ability of poor and disenfranchised people to obtain the medical care they need despite their economic status or sociological barriers such discrimination based on race, sex, national origin, religion, sexual orientation, or marital status. With its

headquarters in Los Angeles, NHeLP is especially knowledgeable regarding the health needs of, and the challenges facing, California residents. In particular, it has long been committed to effective enforcement of the laws promising all of this state's residents equal access to medical care services. Consequently, NHeLP has expertise in this area that is relevant and will be helpful to the Court as it considers the issues presented in this appeal.

III. FACTS

Plaintiff and Real Party Guadalupe Benitez, a lesbian woman, sought fertility treatment at the North Coast Women's Care Medical Group, Inc. ("North Coast") in order to have a child. (Pet. Exh. 6, p. 76 at ¶ 1.) The physicians at North Coast, however, refused to perform a procedure on Ms. Benitez, claiming that providing it to a lesbian would violate their religious beliefs. (Pet. Exh. 6, p. 77 at ¶ 12 and Pet. Exh. 7, pp. 97-98.)

Ms. Benitez brought suit against North Coast and her physicians at that facility for, among other things, discrimination on the basis of sexual orientation in violation of one of California's nondiscrimination statutes, the Unruh Act. (Pet. Exh. 1, pp. 14-17.) The Unruh Act prohibits denial of full and equal access to "accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" based on certain personal characteristics. Cal. Civ. Code § 51(b). The Unruh Act includes sexual orientation as a protected characteristic. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1151.) The Unruh Act applies to medical practices and physicians as "business establishment[s]." (*Leach v. Drummond Medical Group, Inc.* (1983) 144 Cal. App. 3d 362.)

As an affirmative defense, North Coast asserted that the physicians were not liable due to the right to free exercise of religion under the state and federal constitutions. (Pet. Exh. 2, p. 37 at ¶ 33.) Ms. Benitez filed a motion for summary adjudication of that affirmative defense, which was granted by the trial court. (Pet. Exh. 3, p. 44 and Pet. Exh. 25, pp. 438-39.) North Coast subsequently filed a petition for review of that order. (Petition for Writ of Mandate and/or Prohibition, filed November 23, 2004.)

On May 5, 2005, the CMA submitted an amicus brief in support of Petitioners. In its brief, the CMA argues that the right to free exercise of religion found in the U.S. and California constitutions purportedly enable physicians to refuse treatment for any particular patient on the basis of their religious beliefs, even if that refusal is discriminatory. (CMA Brief, at 6.) The CMA also argues that California statutes recognize a physician's right to refuse medical treatment for reasons of conscience. (CMA Brief, at 7-11.) The CMA further proposes that a jury be charged with applying a balancing test in this case, determining whether "the defendants were discriminating against plaintiff based upon her sexual orientation or abiding by their religious beliefs." (CMA Brief, at 11-14.) It also argues that even if refusing a specific patient would constitute wrongful discrimination, the physician should be immune from liability if he or she refers the patient to another physician that will perform the procedure. (CMA Brief, at 15-16.) The CMA has since submitted two Notices of Errata in a (futile) attempt to clarify its muddled position and to conform its position with the law.

On May 25, 2005, the Christian Associations also submitted an amici brief in support of Petitioners, echoing many of the same fallacies

and irrelevancies as the CMA. In their brief, the Christian Associations also argue that physicians should be able to refuse any treatment for any patient on the basis of religious beliefs. (Christian Associations Brief, at 4.) The focus of the Christian Associations lies less in the law and more on their own normative beliefs (as well as those of other conservative religious organizations) about how to reconcile the conflicting interests at stake in this case. (Christian Associations Brief, at 4-9.) The Christian Associations echo the erroneous argument of the CMA that allowing physicians to refuse medical treatments for discriminatory reasons would promote physician-patient communications because "physicians will feel free to discuss the impact of their religion upon their decision making process." (Christian Associations Brief, at 11.)

This brief answers and refutes these arguments.

IV. ARGUMENT

A. The Applicable Medical Standards Do *Not* Condone A Doctor's Refusal To Treat A Patient Based On Personal Characteristics That Are Medically Irrelevant And Protected By A Generally Applicable Civil Rights Law, Whatever The Motivation For The Refusal.

From the briefs of Petitioners Amici, one might draw the sad conclusion that it is no longer the principal duty of doctors to heal and to help those who are in medical need. One also might acquire the discouraging impression that doctors as a group wish to be able to pick and choose their patients based on their race, sex, national origin, sexual orientation or other discriminatory and medically irrelevant personal characteristics.

Neither is the case. Contrary to Petitioners Amici, doctors still have a duty -- under professional standards as well as the law -- to help ***all*** patients equally, without invidious discrimination. The Preamble of the AMA's Principles of Medical Ethics reads in part: "As a member of this profession, a physician must recognize responsibility to patients first and foremost. ..." (AMA Opinion E-0.01.) It adds that a physician should provide medical care "with compassion and respect for human dignity and rights," and should "support access to medical care for all people." (*Id.*) Similarly, a modern version of the Hippocratic Oath written in 1964 and used in many medical schools today reminds physicians that they have "special obligations" to "all" of their fellow human beings.[2]

Petitioners Amici have constructed a specious argument that discrimination on the basis of a physician's religious beliefs is somehow not discrimination at all. However, this position both is inconsistent with applicable AMA and CMA policy and lacks general support from the mainstream medical community. In addition, as discussed below, the Health Law Amici concur with the Superior Court and Real Party that the position lacks any support in the law. Petitioners Amici purport to survey a number of policies of medical groups that would permit discrimination. However, certain of those policies are miscited or taken out of context. Moreover, a review of the adopted policies and opinions of recognized leadership of the medical community makes it clear that there is no mainstream support for the position taken by the Petitioners and their amici. Large, well-respected authorities that speak for the medical community --

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[2] http://www.pbs.org/wgbh/nova/doctors/oath_modern.html.

organizations of physicians, hospitals, and government entities -- for many years have had nondiscrimination statements that explicitly prohibit discrimination against patients on the basis of sexual orientation without exception (including on religious or any other grounds). These authoritative voices within the medical profession affirm without qualification the principle enshrined in California law that physicians have a legal and ethical duty to provide equal care for all human beings, regardless of their medically irrelevant, protected personal characteristics.

1. The American Medical Association Prohibits Discrimination On The Basis Of Sexual Orientation, Without Exception.

The AMA is a national organization of physicians that addresses a variety of health issues.[3] The CMA is itself an affiliate of the AMA.[4] The AMA's policies and principles are the national touchstone of the core ethical principles that govern medical practice in the United States today. They thus are useful in an attempt to ascertain whether there is any inconsistency between the equality requirement of the Unruh Act and the governing practices and rules of the medical profession. Given the primacy of the AMA's policies, it perhaps is not surprising that both the CMA and the Christian Associations attempt to employ those policies to bolster their arguments. However, to meet their needs, the Petitioners Amici misconstrue AMA policies by taking them out of context or selectively citing portions of them. Taking those policies as complete statements, it is clear that the AMA explicitly and unequivocally prohibits discrimination

[3] http://www.ama-assn.org/ama/pub/category/1815.html.

[4] http://www.cmanet.org/publicdoc.cfm/10/1.

on the basis of sexual orientation (and other protected personal characteristics), without exception.

a. The Petitioners Amici Misrepresent The AMA's Position.

Petitioners Amici miscite and misrepresent a number of applicable AMA policies.[5] When those policies are read completely, rather than selectively, and in context, rather than out of it, the AMA's policies in fact support Real Party's position.

AMA Opinion E-9.12 concerns the physician-patient relationship. Although the CMA nominally cites this policy in a section stating that ethical guidelines prohibit sexual orientation discrimination (CMA Brief, at 4), the CMA proceeds to argue for sexual orientation discrimination, so long as it is "justified" by a good-faith religious belief. In fact, this policy specifically and unequivocally condemns discrimination on the basis of sexual orientation and other personal characteristics, without exception. It states simply that, "physicians who offer their services to the public ***may not decline to accept patients because of race, color, religion, national***

[5] The Christian Associations also similarly misrepresent the position of the World Medical Association, as being that a physician has "the right to refuse an intervention her or she deems unacceptable" in connection with certain fertilization techniques. (Christian Associations Brief, at 6.) However, the WMA statement permits refusal to engage in a ***procedure*** not a procedure on a particular person because of his or her personal characteristics. In fact, the WMA has adopted the *Declaration of Geneva*, which requires new doctors to solemnly pledge "I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, ***sexual orientation***, or social standing to intervene between my duty and my patient." *See* http://www.wma.net/e/policy/c8.html (emphasis added).

origin, sexual orientation, or any other basis that would constitute invidious discrimination" (emphasis added).[6] And yet that is precisely what Petitioners did in this case.

Similarly, the CMA cites an AMA policy pertaining to "potential patients" in support of a purported broad-brush right to "decline a potential patient when the treatment sought is 'incompatible with the physician's personal religious or moral beliefs.'" (CMA Brief, at 9-10, *citing* AMA Opinion E-10.05.) However, the CMA omits a significant portion of that policy. The beginning of AMA Opinion E-10.05 states that when choosing to enter into a patient-physician relationship, the physician is constrained on the basis that "***physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination***" (emphasis added). Subsequent to that sentence, the policy states that "***in situations not covered above***, it may be ethically permissible for physicians to decline a potential patient when ... [a] specific treatment sought by an individual is incompatible with the

[6] The AMA policies may be found through "Policy Finder" on the AMA's website: http://www.ama-assn.org/apps/pf_new/pf_online. The AMA policies cited herein refer to two distinct categories. First, the "Policies of the AMA House of Delegates," denoted by an "H" before the policy number, are statements established by the AMA House of Delegates. The AMA describes these statements as "one of the cornerstones of the AMA in the sense that they define what the Association stands for as an organization" and as based on "professional principles, scientific standards, and the experience of practicing physicians." (Policies with prefix "D" relate to directives the House has given to the AMA Board.) Second, the "Current Opinions of the Council on Ethical and Judicial Affairs," which are denoted by an "E" before the policy number, are the ethical opinions of the AMA and reflect "the implications of the Principles of Medical Ethics as they apply to specific issues in health care and the practice of medicine." http://www.ama-assn.org/ama/pub/category/8151.html.

physician's personal, religious, or moral beliefs." Accordingly, this policy both reiterates the AMA's unequivocal stance against discrimination and also recognizes the difference between refusing to perform a treatment and refusing to perform a treatment on a particular individual because of his or her personal characteristics (a difference that Petitioners and their amici ignore).

The CMA makes the same mistake with respect to AMA Policy H-920.959. (*See* CMA Brief, at 9.) That policy concerns access to reproductive care and provides that hospitals and their personnel shall not "be required to perform any ***act*** violative of personally held moral principles" (emphasis added). Again, the policy permits refusal to perform an "act" writ large, not an act on people selected on the basis of their race, sex, gender, or sexual orientation. (Indeed, that result would be shocking given its implications.) The AMA's policies, read together, clearly forbid that.

The Christian Associations also selectively cite a portion of the AMA's Principles of Medical Ethics[7] for the argument that a physician should be free to choose his or her patients (set forth as Principle No. VI), forgetting the thrust of the overarching duty to help "all" people (Principle No. IX), the duty to "respect the law" (Principle No. III), and the AMA's clear principles of non-discrimination discussed below and as also set forth, ironically, in the CMA's Brief. (*See* CMA Brief, at 4-6.)

[7] Christian Associations Brief, at 5-6; *see* http://www.ama-assn.org/ama/pub/category/2512.html.

b. The AMA Has Numerous Policies Clearly And Emphatically Prohibiting Sexual Orientation Discrimination And Discrimination On Other, Similarly Invidious Grounds.

The AMA actually clearly prohibits basing a decision to form (or not form) a physician-patient relationship on certain protected personal characteristics, including sexual orientation. In addition to policies that explicitly prohibit physicians from choosing or refusing patients on such grounds, as discussed above, numerous other policies have been adopted by the AMA, explicitly reaffirming its condemnation of any discrimination based on sexual orientation and similar, medically irrelevant characteristics, including the following:

- **AMA Policy H-65.976 (Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population)**: "Our AMA encourages physician practices, medical schools, hospitals, and clinics to broaden any nondiscriminatory statement made to patients, health care workers, or employees to include 'sexual orientation, sex, or perceived gender' in any nondiscrimination statement."

- **AMA Policy H-65.983 (Non-Discrimination Policy)**: "The AMA affirms that it has not been its policy now or in the past to discriminate with regard to sexual orientation."

- **AMA Policy H-65.990 (Civil Rights Restoration)**: "The AMA reaffirms its long-standing policy that there is no basis for the denial to any human being of equal rights, privileges, and responsibilities... because of an individual's sex, sexual orientation, gender, gender identity, or transgender status...."

- **AMA Policy H-65.992 (Continued Support of Human Rights and Freedom)**: "Our AMA continues (1) to support the dignity of the individual, human rights and the sanctity of human life, and (2) to oppose any discrimination based on an individual's sex, sexual orientation...and any other such reprehensible policies."

- **AMA Policy D-65.996 (Nondiscriminatory Policy for the Health Care Needs of the Homosexual Population)**: "Our AMA will encourage and work with state medical societies to provide a sample printed nondiscrimination policy suitable for framing, and encourage individual physicians to display for patient and staff awareness -- as one example: 'This office appreciates the diversity of human beings and does not discriminate based on ... ***marital status, sexual orientation*** ...'" (emphasis added).

2. The California Medical Association Itself Prohibits Sexual Orientation Discrimination And Other, Similarly Invidious Discrimination, Without Exception.

As noted above, the CMA is itself an affiliate of the AMA. Nevertheless, the CMA somehow not only misrepresents the AMA's policies but inexplicably misapplies its own AMA-consistent policies as well. While the CMA urges a result that would enable doctors to discriminate if they have a genuine belief in discrimination, the CMA's own written policy forbids discrimination, without exception. The *California Physician's Legal Handbook*, published by the CMA, provides that physicians "may not decline to accept patients because of ... sexual orientation, or any other basis that would constitute invidious discrimination." (CMA, *California Physician's Legal Handbook* (2003) at 1:83) (CMA Brief, at 5.)

3. The Professional Consensus Within Modern Medicine Condemns Discrimination On The Basis Of Sexual Orientation And Related Medically Irrelevant Personal Characteristics, Without Exception.

A sampling of the policies of major health care organizations, hospitals, and other entities shows how systematically members of the medical community have adopted nondiscrimination statements that

prohibit invidious discrimination on the basis of sexual orientation and similar personal characteristics without any exceptions -- including based on religious beliefs. The practice of specifically including such personal characteristics in a nondiscrimination statement, without any specific exceptions, extends from local to global entities, from private to public entities. Some examples of these organizations, along with their nondiscrimination policies, follow:

- **The American Academy of Family Physicians** (with approximately 88,000 members): "The AAFP supports the principle that family physicians should not discriminate against patients on the basis of race, color, religion, gender, sexual orientation, ethnic affiliation, health or economic status, body habits or national origin. The AAFP supports the principle that family physicians provide quality medial care for all patients and their families, including gay, lesbian, bisexual and transgender patients and families."[8]

- **The American Psychiatric Association** (publisher of the DSM, the primary diagnostic reference of mental health professionals in the United States): "A psychiatrist should not be a party to any type of policy that excludes, segregates, or demeans the dignity of any patient because of ethnic origin, race, sex, creed, age, socioeconomic status, or sexual orientation."[9]

- **The American Psychological Association**: "In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law."[10]

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[8] AAFP Policies on Health Issues. (http://www.aafp.org/x6705.xml).

[9] Annotation to AMA Principles of Medical Ethics, Section 1, Annotation #2. (http://www.psych.org/psych_pract/ethics/ppaethics.pdf).

[10] American Physchological Association, *Ethical Principles of Psychologists and Code of Conduct* § 3.01 "Unfair Discrimination." (http://www.apa.org/ethics/code2002.pdf).

- **California Hospital Association**: Patient Right #22 provides, "Exercise these rights without regard to sex, economic status, educational background, race, color, religion, ancestry, national origin, disability, sexual orientation or marital status or the source of payment for care."[11]

- **Centers for Medicare & Medicaid Services** (the largest provider of health care coverage in the United States with almost 83 million beneficiaries receiving coverage): To be deemed Medicare compliant, an organization must implement "procedures to ensure that enrollees are not discriminated against in the delivery of health care services consistent with the benefits covered in their policy based on race, ethnicity, national origin, religion, sex, age, mental or physical disability, sexual orientation, genetic information, or source of payment."[12]

- **Johns Hopkins Hospital**: Patients have "the right to receive considerate, respectful and compassionate care in a safe setting regardless of your age, gender, race, national origin, religion, sexual orientation or disabilities."[13]

- **Massachusetts General Hospital**: "The hospital's mission [is] to provide high-quality, individualized care that is culturally sensitive to the needs of all individuals regardless of race, age, religion, gender, sexual orientation, ethnicity, disability or socioeconomic status."[14]

- **The President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry**: (comprised of 32

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[11] California Healthcare Association Patient Right #21 (http://www.calhealth.org/Download/2004PatRights.pdf).

[12] Centers for Medicare and Medicaid Services Deeming Application Requirement. (http://www.cms.hhs.gov/healthplans/deeming/webantid.asp).

[13] Johns Hopkins Hospital *Patient Bill of Rights and Responsibilities* No.1. (http://www.hopkinshospital.org/patients/PatientHandbook_2005.pdf).

[14] *See* Massachusetts General Hospital, *MGH Hotline Online* (July 7, 2000 notice to hospital employees and staff about diversity posters). (http://www.massgeneral.org/pubaffairs/Issues/070700FYIdiversity.htm).

members from the private sector, including health care providers, professionals, insurers, and workers) formally stated that consumers must not be discriminated against in the delivery of health care services based on sexual orientation, among other characteristics.[15]

- **Tenet Healthcare Hospitals**: "We treat all our patients equally and with compassion, understanding and respect. We never distinguish among them based on race, ethnicity, religion, gender, sexual orientation, national origin, age, disability or veteran status."[16]

- **UCLA Medical Center**: The patient's rights may be exercised "without regard to sex, economic status, educational background, race, color, religion, ancestry, national origin, sexual orientation or marital status or the source of payment for care."[17]

- **UCSF Medical Center**: "It is the policy of UCSF Medical Center not to engage in discrimination against, or harassment of, any person employed or seeking employment or patient care with UCSF Medical Center on the basis of race, color, national origin, religion, sex, physical or mental disability, medical condition (cancer-related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, or status as a covered veteran."[18]

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[15] President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Consumer Bill of Rights and Responsibilities*, Chapter Five, "Respect and Nondiscrimination" (http://www.hcqualitycommission.gov/cborr/chap5.html).

[16] Tenet Health Care Corporation, *Standards of Conduct* "A commitment to our patients -- care and compassion." (http://www.tenethealth.com/NR/rdonlyres/700466A4-3BF7-4A23-BF8F-B768819F70A3/24680/SOC_Final_Web.pdf).

[17] UCLA Medical Center, *Patient and Visitor Guide: Patient Rights and Responsibilities* no.23. (http://healthcare.ucla.edu/ucla-medical/patient-guide/admission-on).

[18] UCSF Medical Center, *Pre-Admission Information*, 1 at 6 (Non-Discrimination Policy). (http://www.ucsfhealth.org/adult/patient_guide/services/UCSFMedCtrPreAdmit.pdf).

- **UN Committee on Economic, Social and Cultural Rights**: "...the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health."[19]

This is merely a sample of the policies of the myriad organizations and institutions involved in health care, but it is an accurate representation of the solid consensus within the mainstream medical community that it is never appropriate for health care professionals to engage in discrimination against their patients on the basis of sexual orientation and similar personal characteristics.

4. The Health Care Community's Stand Against Discrimination Promotes Good Health Care.

The health care community's policies against discrimination stem not just from a general recognition of the principle of equality, but also from a belief that discrimination -- whatever the rationale -- degrades health care. In recent years, numerous studies, researchers, and health care practitioners have concluded that lesbians and gays continue to face discrimination and that such attitudes worsen their health care. Indeed, the American College of Obstetricians and Gynecologists ("ACOG") explicitly addressed this issue in its 2005 report titled *Special Issues in Women's Health*. ACOG explained that lesbian and bisexual women "may perceive negative

[19] United Nations Office of the High Commissioner for Human Rights, Committee on Economics, Social and Cultural Rights, General Comment 14, Article 12:18 (2000).

attitudes on the part of their caregivers, causing them to hesitate in obtaining routine health maintenance visits. ... [L]esbians reported experiencing ostracism, rough treatment, derogatory comments, or having their life-partners excluded from discussions by their medical practitioners." (*Id.* at 62-63.) Accordingly, ACOG concluded in its report that "[p]ractitioners have the responsibility to provide quality care to all women regardless of their sexual orientation." (*Id.* at 61.) That discussion and recommendation has, of course, direct relevance to the factual background of this case.

Similarly, in an introductory editor's letter to the *American Journal of Public Health*'s first issue ever dedicated exclusively to the health concerns of the lesbian, gay, bisexual, and transgender community, the guest editor explained that "[d]espite the many differences that separate them, [this community] share[s] remarkably similar experiences related to discrimination, rejection, and violence across cultures and locales." (Dr. Ilan H. Meyer, "Why Lesbian, Gay, Bisexual, and Transgender Public Health?" (June 2001) 91 Am. J. Pub. Hlth, No. 6, at 856 (hereinafter, "*Meyer*").) In the health care area, Dr. Meyer observed, "[s]tigma and discrimination affects the health of [the community] in many ways," including poor clinical care and inadequate attention to specific health care concerns. (*Meyer*, at 857.)

Likewise, a study of health care issues related to sexual orientation by Columbia University and the Gay and Lesbian Medical Association observed that "[b]ecause of negative attitudes prevalent in the U.S. public as well as among physicians and other medical staff, [lesbian, gay,

bisexual, and transgender] individuals are subject to discrimination and bias in medical encounters." (Laura Dean, *et al.*, *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns* (2000) 4. J. Gay & Lesbian Med. Assoc., No. 3, at 104.) The AMA confirms that these attitudes have real and adverse effects on patients and their health, stressing that the physician's failure to recognize the patient's homosexuality and "the patient's reluctance to report his or her sexual orientation can lead to failure to screen, diagnose, or treat important medical problems ..." (Report 8 of the Council on Scientific Affairs, "Health Needs of Gay Men and Lesbians in the United States" (1996) *J. Amer. Med. Assoc.*, No. 275, at 1354-9.)

As but one example of a concrete way in which discriminatory attitudes may affect the health care of gay and lesbian patients, Dr. Susan Cochran of UCLA's School of Public Health and her colleagues reported and assessed the implications of research findings concerning cancer in lesbians. (Susan Cochran, *et al.*, "Cancer-Related Risk Indicators and Preventive Screening Behaviors Among Lesbians and Bisexual Women" (April 2001) 91 *Am. J. Pub. Hlth.*, No. 4, at 591 (hereinafter, "*Cochran*").) That research disclosed "a greater prevalence of several behavioral risk factors for breast and gynecologic cancers among lesbians and bisexual women than among women in general" in part because of "unique issues of access and use, including negative experiences with health care practitioners and mistrust of the health care community." (*Id.* at 596; *see also* Audrey S. Koh, *Use of preventive health behaviors by lesbian, bisexual, and heterosexual women: Questionnaire survey* (2000) 172(6) Western J. of Med. 379-84 (reporting significant health disparities between lesbian and bisexual women and heterosexual women, including that the

non-heterosexual women were less likely to have had appropriate cholesterol screening and mammography).)

In contrast, when medical practitioners are dissuaded from expressing discriminatory attitudes and taking discriminatory actions toward lesbians and gay men, health care is better. Dr. Meyer writes, "provision of adequate care requires that care providers be sensitive to the needs of these populations. Insensitive or hostile care may lead to inappropriate interventions, fail to effect change, and add to alienation and mistrust of the authority of public health recommendations." (*Meyer*, at 857.) Indeed, health care professionals have described optimum care as "culturally competent" care, or care that is not just non-discriminatory but also non-judgmental and sensitive to patients' particular communities and behaviors.

One of the largest health care providers in California, Kaiser Permanente, expects "cultural competence" from its physicians and staff. Kaiser has developed a *Provider's Handbook on Culturally Competent Care for the Lesbian, Gay, Bisexual and Transgendered Population* (the "*Provider's Handbook*") to help them meet that expectation. In it, Kaiser explains that "[t]he term 'culturally competent care' describes health care that is sensitive to the health beliefs and behaviors, epidemiology and treatment efficacy of different population groups ... [S]tudies are now indicating that sexual orientation and gender identity are as important as age or race in understanding health care utilization patterns and cost of care." (*Provider's Handbook*, at 1.) Moreover -- and significantly for this case -- Kaiser does not consider a health care practitioner's personal beliefs

to provide an excuse for failing to provide culturally competent care: "Provider's personal religious or moral beliefs can be separate from the dynamics of their relationship with [lesbian, gay, bisexual, or transgender] patients. Assess how your biases impact the way you communicate with the patient ..." (*Id.* at 16.)

The ill effects of discrimination on health care quality explain, at least in part, why so many mainstream leaders of the health care community have made emphatic statements against discriminatory treatment on the basis of sexual orientation, regardless of the purported justification. As discussed further below, firm legal precedent dovetails with these public health policies. For those reasons, the Court of Appeal should unequivocally affirm the Superior Court's ruling.

B. A Right Of Doctors To Withhold Treatment Based On Their Personal Beliefs Would Strongly *Discourage* Open And Honest Doctor-Patient Communications And *Worsen* Healthcare.

Petitioners Amici dedicate a portion of both their amicus briefs to the surreal proposition that, in essence, a doctor's communication of his or her group-based dislike or disapproval of a patient to that patient will encourage open and honest communications between doctor and patient and somehow result in better health care. (CMA Brief, at 11-15; Christian Associations Brief, at 11-14.) Exactly the opposite is true. It defies logic to argue that patients benefit by being told their physician thinks they are insufficient in some way to warrant appropriate medical treatment. It also defies common precepts of medical care.

While exempting physicians from nondiscrimination laws might encourage physicians to be more honest about ***their*** discriminatory views about patients whom they dislike or of whom they disapprove for various sincere personal reasons, doing so undoubtedly would strongly discourage patients from speaking openly about their sexual orientation or any other information that may induce the physician to terminate or impose limits on the treatment relationship. AMA Policy H-160.991 itself recognizes the medical challenge posed by the fact that gay patients often are reluctant to disclose their sexual orientation; it sets out a number of steps to ensure that physicians will adequately respond to the health care needs of this particularly vulnerable population. That policy emphasizes the importance of "the physician's nonjudgmental recognition of sexual orientation and behavior" and explains that "nonjudgmental recognition" of sexual orientation "enhances the ability to render optimal patient care in health as well as in illness."[20] Moreover, medical researchers and practitioners have concluded that many lesbian and gay patients are already reluctant to reveal their sexual orientation.[21] One study noted that "it seemed to be easier for these respondents to disclose to their parents (often reported as the most stressful event in the coming out process) than to health care providers." (Michele J. Eliason, *et al.*, *Does 'Don't Ask Don't Tell'*

[20] In contrast, the Christian Associations' focus is on "sin," though they try to fashion it in terms not of sin of the patient but in terms of the doctors "own sin." (Christian Associations Brief, at 10.) The Health Law Amici disagree with the notion that communication by doctors, explicitly or implicitly, that they believe helping a particular patient is "sinful" will lead to more open communications between them or to better healthcare.

[21] http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1276 (discussing recent studies pertaining to physician-patient communications).

Apply to Health Care (Dec. 2001) 5 J. Gay & Lesbian Med. Ass'n, No. 4, at 132.)

Physicians more freely expressing their views concerning why gay patients should not be treated as others -- cloaked with the legal authority to refuse treatment for patients on the basis of sexual orientation or similar personal characteristics -- would exacerbate this challenge, further undermining the open and honest communication that Petitioners Amici purport to desire. As a doctor at Harvard Medical School wrote in a first-person commentary in the *Annals of Internal Medicine*, "Finding help is not easy. It is hard to trust other people, even professionals, when one anticipates disapproval." (Jennifer E. Potter, *Do Ask, Do Tell* (Sept. 3, 2002)137 Annals of Internal Med. No. 5, Pt. 1.) Given that the position advocated by Petitioners Amici encourages open communication by the physician and inevitably ***discourages*** open communication by the patient, their argument begs the question: Which of these is more important?

AMA policies make clear that it is open communication by the ***patient*** that is essential to quality health care and thus must be encouraged. (*See, e.g.*, AMA Policy H-160.991.) Similarly, the President's Advisory Committee on Consumer Protection and Quality in the Health Care Industry agrees and has observed that "incidences of discrimination -- real and perceived -- mar the relationship between consumers and their health care professionals, plans, and institutions."[22] In contrast, disclosure of a patient's sexual orientation allows physicians to "focus [their] inquiries, personalize professional advice and assistance, and generate an overall

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[22] http://www.hcqualitycommission.gov/cborr/chap5.html

higher quality of care."[23] Dr. Cochran too concluded that in connection with cancer in lesbian and bisexual women, "[d]eveloping effective methods to reach these women raises issues in regard to providing a health care environment in which lesbians and bisexual women are comfortable seeking care and revealing their sexual orientation. At present, many of these women are not." (*Cochran*, at 596.) As other researchers succinctly explained, "[t]o give the best possible health care, physicians, nurses, and other health care providers need to have relevant, accurate information about their patient's needs." (*Eliason*, at 125.)[24]

The suggestion by Petitioners and their amici that national or state ethical rules afford Petitioners any license to discriminate against their patients based on religious conviction is wrong. In fact, the solid consensus among medical professionals is against invidious discrimination and recognizes that it impedes doctor-patient rapport and degrades the quality of health care. Accordingly, the Health Law Amici underscore that the

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[23] http://www.lambdalegal.org/cgi-in/iowa/documents/record?record=1276.

[24] The Mautner Project, one of the Health Law Amici, was founded in 1990 to address the health care needs of lesbians precisely because these women so often receive inadequate care. The adverse effects of discrimination on the health care services lesbians receive are exactly within its core area of expertise. In its 2005 report titled *Effects of Discrimination on Lesbian Health*, Mautner emphasizes that "[b]ecause informed and open discussions regarding all aspects of a patient's life are proven to promote health, prevent disease and improve access to and the quality of health care, providers need knowledge of the needs and concerns of lesbians in their care." (*Id.* at 1; *see also* Andrea L. Solarz, *et al., Lesbian Health: Current Assessment and Directions for the Future* (1999) (Institute of Medicine report published by the National Academy Press stressing that healthcare provider attitude is a major determinant in the quality of care lesbians receive).)

AMA and CMA policies calling for nonjudgmental recognition of sexual orientation diversity are exactly right as a matter of health-care policy and that these policies are supported by California's civil rights law, while the position taken in the Petitioners Amici's briefs turns sound practice upside down.

C. In Answer To The Specific Question Posed By The Court, Neither The Law Nor Good Medical Practice Permits Referrals To Avoid Non-Discrimination Laws.

The CMA urges this Court to adopt a rule that doctors with a religious objection to providing treatment to a particular patient may refer that patient elsewhere. (CMA Brief, at 14-16.) This argument would condone analogous statements such as, "Sorry, you can't ride in this bus, but I'll refer to you one nearby" or "You can't rent this apartment, but you might rent one owned by someone else." This position contravenes both the law and, as the Health Law Amici have explained, good medical practice.[25]

As discussed further below, the legal framework set out by the U.S. and California supreme courts does not permit a religious adherent to avoid a law of general applicability by simply referring someone who is not to their liking elsewhere. The cases discussed below (and avoided or ignored by Petitioners Amici) do not permit a restaurant owner to refer an African-American to a nearby restaurant or an apartment owner to refer an

[25] Indeed, to permit referrals stemming from a discriminatory refusal to treat a patient, based on an assumption that some other doctor can provide equivalent care, would approve a form of "separate but equal" medical practice that neither the law nor society any longer accepts.

unmarried woman to a nearby apartment. The California Supreme Court specifically addressed this idea in *Smith v. Fair Employment and Housing Comm'n* (1996) 12 Cal. 4th 1143, 1175, explaining that "[t]o 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." Here, the well-settled law does not permit the Petitioners to refer Real Party to another doctor because she is lesbian. The California Supreme Court has explicitly held that there are other purposes of a nondiscrimination statute besides obtaining the desired service, such as "equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics." (*Smith*, 12 Cal. 4th at 1170) In sum, legal precedent makes it clear that referrals by physicians do not immunize them from liability for violating anti-discrimination laws.

Moreover, the Health Law Amici believe that such an end-run around anti-discrimination laws undoubtedly would result in worse health care for some of the most needy members of society. Particularly in indigent or rural areas, patients with frowned-upon personal characteristics (racial, ethnic, religious, and sexual minorities, for example) would be sent elsewhere for their medical needs. To some, being sent elsewhere might mean never having their needs addressed or having them addressed much later, and in some circumstances, that could mean serious health problems being untreated entirely or treated belatedly, with adverse health consequences. Accordingly, referrals do not, and cannot, create a wholesale exemption for physicians (or anyone else) from laws of

nondiscrimination. If physicians do not have the right to discriminate directly (and they do not), then they should not be permitted to accomplish discrimination by other means by suggesting or requiring the patient to go elsewhere for treatment.

D. The Rule Advocated By Petitioners And Their Amici Would Eviscerate Civil Rights Laws And Other Laws Of General Applicability.

The Health Law Amici have submitted this Brief because of a common concern that the position advocated by Petitioners and Petitioners Amici (to the extent that they unite behind a common coherent position) is not just troubling and wrong but potentially disastrous. The Health Law Amici believe that a decision in Petitioners' favor would set a precedent that could lead to the evisceration of civil rights laws -- a matter of grave concern to all the Health Law Amici, given their missions and areas of expertise, and to all Californians.

The Health Law Amici do not believe that there is a principled way to distinguish sexual orientation from other protected personal characteristics, such as race or gender, particularly not in the context of civil rights statutes such as the Unruh Act. Moreover, the Health Law Amici do not believe that there is a principled way to distinguish a very specific fertility treatment (such as that sought by Real Party and declined by Petitioners in this case) from other fertility treatments or from other medical treatments or even from arenas outside of health care. Indeed, that is why a California appellate court in 1964 rejected a challenge to the Unruh Act in which a physician refused to treat an African-American child

on the basis of her race. (*Washington v. Blampin* (1964) 226 Cal. App. 2d 604)

That is why a decision for Petitioners would be so dangerous. Petitioners would allow "sincere" religious beliefs to exempt individuals from all statutes that conflict in any way with their beliefs. Religious beliefs, as long as they were sincere, would immunize their adherents from neutral laws of general applicability and allow any individual to be a walking "law-free" zone as to those particular beliefs. Any action (or non-action), no matter how repugnant to the law or how harmful to others in the community, could be protected, provided it was based in a sincere religious belief. This is not overstatement. Real Party already has highlighted to this Court a sampling of behaviors that this new rule could permit. (Real Party Answer to CMA Brief, at 4.) The U.S. Supreme Court too has observed the implications of arguments advanced (unsuccessfully) by those such as Petitioners here: "The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind ..." (*Smith*, 494 U.S. at 888.) Judges and juries would be left with only one relevant question: Did the individual base his or her unlawful conduct on a sincere religious belief? This would create a dramatic new defense to the application of any civil rights law, or indeed of any law.

The U.S. Supreme Court and the California Supreme Court have consistently and clearly held that Petitioners' desired rule cannot be the law for good reason, else "every citizen [would] become a law unto himself." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.

4th 527, 548, *quoting Smith*, 494 U.S. at 879, and *cited in* Superior Court Order at p. 4, Petitioners' Appendix at 0438.) For third parties who rely on protections offered by our secular legal system, Petitioners' proposal would be less like starting down the proverbial slippery slope and more like a quick fall off a high cliff.

E. The Health Law Amici Concur With Real Party That Controlling Legal Precedent Requires This Petition To Be Resolved In Real Party's Favor.

Real Party has set forth in detail the correct, well established legal framework for resolution of this dispute, which was followed by the Superior Court. (*See, e.g.*, Opposition to Petition, at 3-11; Answer to CMA Brief, at 12-16.) In contrast, the Petitioners Amici have completely ignored it. Indeed, the controlling cases from the U.S. Supreme Court and the California Supreme Court are not mentioned or cited by the Petitioners Amici ***at all***. Instead, Petitioners Amici spend their briefs either on irrelevant issues or on proposals of their own design (that happen to conflict with the controlling law).

1. The Federal And State Constitutional Rights To Free Exercise Of Religion Do Not Excuse Compliance With A Law Of General Applicability That Forbids Discrimination.

The Health Law Amici concur with the legal analysis of the Superior Court and Real Party. Neither the federal nor the state constitution provides Petitioners with an excuse to ignore anti-discrimination laws of general applicability. The U.S. Supreme Court has specifically held that the right to free exercise of religion under the U.S. Constitution does not exempt compliance with neutral laws of general applicability, such as the Unruh Act. (*Smith*, 494 U.S. at 879.) If an individual's religious beliefs (regardless of their sincerity) were allowed to trump compliance with a statute of general applicability, that would "permit every citizen to become a law unto himself." (*Id.* (citation omitted).)

As for the right to free exercise under the California Constitution, the California Supreme Court has reached the same outcome. (*Catholic Charities,* 32 Cal. 4th 527; *Smith,* 12 Cal. 4th 1143.) Although that Court has not decided whether to adopt the federal position that religious beliefs never excuse compliance with a neutral law of general applicability or whether to apply strict scrutiny to statutes that impinge on the right to free exercise of religion (*Catholic Charities*, at 562), a doctor may not refuse to treat patients for a discriminatory reason even under the more stringent test -- just as the Superior Court below concluded. Even if a statute substantially burdens religious belief, it will pass the strict scrutiny test if it serves a compelling interest and is narrowly tailored to achieve that interest. (*Id.* at 562.)

But on the facts presented in this action and given the governing case law, the Unruh Act plainly does not substantially burden Petitioners' religious beliefs. A law substantially burdens a religious belief if it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs ... ." (*Id.*) Petitioners can comply with the Unruh Act by ceasing to perform (for all patients, not a selective few based on race, sex, sexual orientation, or other impermissible criteria) a specific procedure or treatment if performing it for some patients conflicts with their beliefs. (*See Catholic Charities*, 32 Cal. 4th at 562.) Alternatively, they can perform it equally for all patients based on patients' individual medical needs, not irrelevant personal characteristics that mark them as members of one group or another. (*Id.*) The choice is entirely for Petitioners.

But irrespective of whether Petitioners experience a personal burden, the Unruh Act is to be enforced because it is narrowly tailored to achieve the compelling public purpose of eliminating invidious discrimination by California business establishments based on irrelevant, prohibited personal characteristics. (*Id.* at 564.)

Without explanation or justification, the Petitioners Amici wholly ignore this legal analysis. The CMA glosses it over, blithely stating that "[t]he federal and state constitutions protect the free exercise of religion," without reviewing how the highest courts of the nation and this State have applied that right. (CMA Brief, at 6.) The Christian Associations take the

same tactic. (Christian Associations Brief, at 10.) Neither of those briefs should obscure the fact that these cases set out the controlling legal framework. And, as the Superior Court determined, the result of the application of that framework is straightforward. In sum, doctors engaged in a commercial practice cannot harm their patients by selectively refusing services in violation of the Unruh Act.[26]

2. No California Statute Permits Doctors To Refuse Medical Treatment Based On Protected Individual Characteristics.

Although the CMA ignores the legal framework established by the U.S. and California supreme courts entirely, it wrongly suggests that certain California statutes are evidence that physicians may discriminate against certain patients. The CMA looks to sections of the California Probate Code and Health and Safety Code pertaining to end-of-life decisions and abortion. (CMA Brief, at 7-10 (*citing* Cal. Health & Saf. Code §123420; Cal. Prob. Code §§4734, §4736, 4740.)

However, none of these statutes permits a doctor to selectively treat patients based on their irrelevant personal characteristics, such as their race, sex, age, or orientation. Rather, these statutes permit a doctor to refuse to perform specific ***treatments*** on the basis of his or her moral beliefs. These statutes contemplate physicians' refusing to perform procedures for all

[26] As the Superior Court concluded in its ruling in favor of Real Party, "[w]hen 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." (San Diego Superior Court Order (October 29, 2004), at p.4, Petitioners' Appendix at 0438, *citing Catholic Charities*, 32 Cal. 4th, at 565.)

patients, not for certain patients in a discriminatory fashion. There is no evidence whatsoever for the argument by the CMA that these statutes somehow allow physicians to refuse treatment based on invidious discriminatory animus -- as long as based on sincere religious beliefs -- and the Health Law Amici strongly dispute that surprising notion.

Indeed, the CMA's argument is symptomatic of the Petitioners' and Petitioners Amici's failure to confront the central issue in this case, namely, that it is not about a refusal to provide a treatment, but rather about a refusal to provide a treatment to a ***particular person***, based on her protected personal characteristics. The former may be acceptable; the latter is definitively not.

3. The Proposals Of Petitioners Amici Conflict With Controlling Law.

Both briefs of Petitioners Amici make two proposals that contravene the law. First, they propose that the jury be charged with a "balancing test" to determine whether Petitioners were "discriminating against plaintiff based on her sexual orientation or abiding by their religious beliefs." (CMA Brief, at 11-14; *see* Christian Associations Brief, at 9.) However, the proposal assumes that discrimination and free exercise of religion are somehow mutually exclusive. They are not. Both can co-exist, as appears to have happened in this case. The question is how to address circumstances where religious beliefs may be discriminatory. The U.S. and California supreme courts have answered that question, and the Superior Court followed their decisions properly.

Second, the Petitioners Amici wish for the Petitioners to be "able to tell their story." (CMA Brief, at 17; *see* Christian Associations Brief, at 16-19.) However, it is black-letter law that there is no "right to tell a story." Here, the Superior Court followed simple, black-letter principles of summary adjudication in resolving Real Party's motion in advance of trial. It will be for the Superior Court after this writ action concludes to give instructions regarding admissible and excludable evidence.

4. The Issue Before This Court Does Not Concern Marital Status.

It is unfortunate that Petitioners Amici join in Petitioners' attempt to cloud the issue before this Court by belatedly attempting to turn it into a case about marital status discrimination. That smokescreen obscures the legal issues and the facts. The Health Law Amici understand that the legal issue before this Court is whether the Superior Court properly decided that Petitioners do not have a viable affirmative defense based on free exercise of religion if they discriminated against Real Party on a ground prohibited by the Unruh Act -- as the doctors' multiple sworn statements to the Superior Court affirmed that they did.[27] The Superior Court applied the proper legal analysis to resolve that question and ruled in Real Party's favor. The question whether Petitioners discriminated against Real Party on the basis of sexual orientation (or some other basis) is for Real Party to prove as part of her case at trial and is a different one than that before this Court now.[28]

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[27] *See* Discussion in Real Party's Answer to CMA Brief, at 5 n.2.

[28] Petitioners' free exercise defense is irrelevant if Real Party cannot establish her case by showing that they discriminated against her on a basis

In any event, the Health Law Amici regret the implication by Petitioners Amici that marital status discrimination by physicians is somehow acceptable or better than sexual orientation discrimination. California law expressly prohibits discrimination on the basis of marital status by licensed professionals, such as the physicians who are petitioners here (Cal. Bus. & Prof. Code § 125.6.) and in many other contexts.[29] The Health Law Amici condemn discrimination by physicians on that basis as well.

F. The Medical Community And The Courts Already Have Achieved A Proper Framework That Permits Free Exercise Of Religion Subject To Civil Rights Statutes And Other Neutral, Generally Applicable Laws.

The Petitioners and their amici seek a radically changed relationship between free exercise of religion and laws of general applicability, including civil rights laws. They seek a test in which the touchstone is a religious adherent's "good-faith" belief. (*See* Real Party's Answer to CMA Brief, at 12-18.) However, free exercise of religion and civil rights laws of general applicability ***already*** co-exist, and the courts and health care community already have fashioned a fair and sensible relationship between them. It is not a relationship that permits the sincerity of one's personal beliefs to justify discriminatory treatment of another.

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covered by the Unruh Act. However, Petitioners Amici neglect to apprise this Court that the California Supreme Court is presently reviewing the question of whether the Unruh Act covers marital status discrimination. (*Koebke v. San Bernardo Heights Country Club*, Case No. S 124179.)

[29] *See* Discussion in Real Party's Answer to CMA Brief, at n.7.

Real Party has repeatedly described the current framework in briefing to the Court. (*See, e.g.*, Real Party's Answer to CMA Brief, at 3.) In short, when doctors enter into a commercial medical practice, like any other licensed business activity, they accept as limits on their conduct laws of nondiscrimination that are generally applicable to the rest of society. In addition to being a rule set forth in well settled law, it is a proper one. Irrespective of their personal religious or moral views, physicians may not choose to perform (or not to perform) medical treatments for certain patients and not for others based on the patients' protected personal characteristics.

V. CONCLUSION

Petitioners and their amici err in their statements of the law and of good health care principles. On the other hand, Real Party describes both accurately and thoroughly. Accordingly, the Health Law Amici respectfully request that the Court of Appeal follow the governing law and good health-care practices by affirming the order of the Superior Court granting summary adjudication in favor of Real Party.

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Dated: July 25, 2005 Respectfully submitted,

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CERTIFICATION OF BRIEF FORMAT

Pursuant to California Appellate Rule of Court 14(c)(1), I hereby certify that the foregoing brief was produced using Microsoft Word and that the brief, inclusive of the cover pages, application, tables, and footnotes contains 12,713 words based on the software's word count.

Dated: July 25, 2005

Respectfully submitted,

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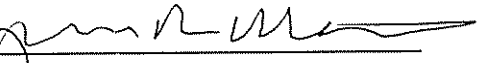
By: 
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PROOF OF SERVICE BY U.S. MAIL

I, PAMELA S. GEE, declare:

That I am a citizen of the United States and am a resident of and employed in the County of Los Angeles, California; I am over eighteen (18) years of age and not a party to this action; and that my business address is 333 South Grand Avenue, 38th Floor, Los Angeles, California 90071.

On July 25, 2005, I served a copy of the attached document, described as **BRIEF IN SUPPORT OF REAL PARTY IN INTEREST BY *AMICI CURIAE* (1) ANTI-DEFAMATION LEAGUE; (2) AMERICAN ACADEMY OF HIV MEDICINE; (3) AMERICAN MEDICAL STUDENTS ASSOC.; (4) ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIF.; (5) BIENESTAR HUMAN SERVICES; (6) CALIF. LATINAS FOR REPRODUCTIVE JUSTICE; (7) CALIF. PAN-ETHNIC HEALTH NETWORK; (8) CALIF. WOMEN'S LAW CENTER; (9) COALITION FOR HUMANE IMMIGRANT RIGHTS OF L.A.; (10) GAY AND LESBIAN MEDICAL ASSOC.; (11) INT'L ASSOC. OF PHYSICIANS IN AIDS CARE; (12) LATINO COALITION FOR A HEALTHY CALIF.; (13) MAUTNER PROJECT, THE NAT'L LESBIAN HEALTH ORGANIZATION; (14) MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; (15) NAT'L CENTER FOR LESBIAN RIGHTS; AND (16) NAT'L HEALTH LAW PROGRAM** by U.S. Mail, on the parties of record by placing true and correct copies thereof in sealed envelopes, with first-class postage thereon fully prepaid, addressed as follows:

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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. Executed this 25th day of July, 2005 at Los Angeles, California.

Pamela S. Gee

Pamela S. Gee