

## **ISSUE PRESENTED**

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

## **INTRODUCTION**

This case comes to this Court on Plaintiff's motion for summary adjudication seeking dismissal of Defendants' affirmative defense based on the Freedom of Religion Clauses of the California Constitution and the U.S. Constitution. That is the key for deciding the issues now raised before this Court, for that determines how the facts are to be viewed. We are concerned that the factual foundation for this motion has become obscured and confused because Plaintiff's briefs are so divorced from this procedural posture. The arguments in those briefs are based on thoroughly resolving all disputed facts in favor of Plaintiff, the party moving for summary adjudication. Even where the Plaintiff herself has provided conflicting testimony, the Plaintiff's briefs just take the side most favorable to Plaintiff and aggressively assert that as the established fact.

This is exactly the opposite of the correct analysis on the matters now before this

Court. For purposes of deciding Plaintiff's motion for summary adjudication of Defendants' affirmative defense, all disputed issues of fact either must be resolved in favor of the Defendants, or submitted to the jury with Plaintiff's motion denied. Our concern is heightened because the facts in this case are technical and extensive, and, therefore, what is disputed and what is undisputed can be too easily lost.

Therefore, we start below with a concise statement of the facts relevant to deciding the legal issues in this case based on a complete review of the record. Those facts are all either undisputed or, where disputed, are supported with sufficient evidence to be resolved in Defendants favor for purposes of this motion. To the extent Plaintiff disputes these facts, the case must be submitted to a jury, with Plaintiff's motion for summary adjudication denied. We submit that under those facts Defendants' conduct is clearly protected from liability by the Freedom of Religion Clause of the California Constitution. That is why the Court below ruled for the Defendants in denying Plaintiff's motion for summary adjudication, and held that the Freedom of Religion defense should go to a jury.

We are concerned as well that the presentation of this case be clear as to what is not involved in the matter now before this Court. This is not a case involving deprivation of health care to the Plaintiff, despite Plaintiff's repeated false assertions to the contrary. As we will show below, Plaintiff received the fertility treatments she originally sought from the Defendants in full. The Defendants recommended and provided further treatments not originally sought by the Plaintiff. Eventually, the Defendants were unable to provide the treatments the Defendants themselves recommended as necessary to achieve Plaintiff's goal of pregnancy, in accordance with Plaintiff's preferences, not just because of Defendants' religious objections, but for other reasons as well. The Defendants themselves then referred the Plaintiff to another specialist. As a result, Plaintiff eventually did become pregnant through a treatment provided by that specialist, a treatment that Defendants do not provide and are not certified to provide. The Plaintiff did consequently give birth to a healthy baby.

In this context, the medical referral in this case did not involve harm to the dignity of the Plaintiff, or any other sort of harm. To the contrary, that referral was essential to Plaintiff achieving her medical goal of pregnancy, which she did achieve as a result.

Finally, Plaintiff in addition invites this Court to declare invidious the religious objections Defendants raised to providing certain treatments to Plaintiff. While Defendants provided extensive fertility treatments to Plaintiff, they declined to provide an invasive, surgical, fertility treatment in which they would affirmatively have to create the pregnancy inside the plaintiff themselves. They declined to do so because of traditional, Christian, religious beliefs against pregnancy out of wedlock, reflecting moral/religious views widely held throughout society since time immemorial, including the view that it is best to raise a child in an intact, two parent family with both mother and father present. They did not want to be the agents creating the very thing to which they religiously object.

To call that viewpoint and conduct **invidious** discrimination is to deny any validity or respect to these traditional, common, widespread, moral values, which have prevailed as well in most other societies, throughout the history of mankind, and which are widely held even on purely secular grounds. That is not what the law requires, and that is not the role of the Plaintiff, nor, we submit, of this Court. There is a crucial liberty interest in maintaining the freedom of people to make their own individual, moral choice to adhere to such

traditional moral values. Where that choice is grounded in religion, as in the present case, then California law provides the highest possible protection for such freedom.

Such traditional, moral, religious values are not analogous to “religiously based accusations of witchcraft”<sup>1</sup>, or to banning interracial marriage (Plaintiff’s Opening Brief at 35), or to justifying slavery with biblical references (Id.), as Plaintiff suggests. Nor is this a case about the Crusades (Id. at 1), or the Inquisition (Id.).

### **STATEMENT OF FACTS**

As stated above, the facts recounted here are all either undisputed or, where disputed, are supported with sufficient evidence to be resolved in Defendants’ favor for purposes of this motion. To the extent Plaintiff disputes these facts, the case must be submitted to a jury, with Plaintiff’s motion for summary adjudication denied.

In August, 1999, Plaintiff Guadalupe Benitez chose Defendant North Coast Women’s Care to provide fertility treatment because it was the only in network provider under Plaintiff’s employer provided

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<sup>1</sup> Opening Brief on the Merits of Plaintiff and Real Party in Interest Guadalupe T. Benitez (hereafter “Plaintiff’s Opening Brief”) at 35.

health insurance. (App., pp. 3:15; 86:4-6; 229:1-3.)<sup>2</sup> Benitez came to the clinic seeking treatment only through a procedure known as intravaginal insemination (“IVI”), in which the patient impregnates herself at home with a special device. (App., pp. 134:16-19; 135: 11-13.) She was not interested in the more complex procedure known as intrauterine insemination (IUI), which she had tried before at another clinic with no success. (App., p. 85:10-20.)

Benitez disclosed to her doctor at the clinic, Christine Brody, a Board certified Ob/Gyn, that she was an unmarried lesbian. (Opinion, p. 4). Dr. Brody agreed to provide the IVI treatment sought by Benitez, and other care. (App., p. 300:10-16.)

But Dr. Brody stated from the beginning that based on her religious convictions, she would not provide an IUI treatment, in which the doctor herself would personally impregnate the patient through an invasive, surgical procedure. (App., p. 135:11-16; p. 258: 19-20.) Dr. Brody told Benitez that she does not provide such treatment to single women, whether heterosexual or homosexual.<sup>3</sup>

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<sup>2</sup> Factual references are to the Opinion in the Appellate Court below, or to the Appendix of Exhibits filed with the Petition for Writ of Mandate.

<sup>3</sup> Plaintiff states repeatedly that Brody’s position was that she would not provide IUI treatment to a lesbian. E.g., Plaintiff’s Opening Brief

(App. p. 135:17-19; pp. 342: 24-343:4; p. 346:6-13, 20-22; p. 347:20-22.) Effectively, she did not want to be the agent personally causing the very situation to which she religiously objects, out of wedlock pregnancies and births. However, Brody told Benitez that other doctors at North Coast would provide the IUI surgery if the other options failed and Benitez decided she wanted to pursue it. (Opinion p. 4; App. p. 135:17-19.)

By November, 1999, Benitez had not become pregnant with monthly IVI procedures at home, and she asked Dr. Brody to examine further the causes of her infertility. (App., p. 145). Dr. Brody had already ordered lab work to examine whether Benitez suffered from

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at 2,4. But there is substantial evidence showing that Brody and others at North Coast objected to providing certain fertility treatments to any unmarried women, lesbian or not. Even Benitez, and her lesbian partner Joanne Clark, who was present at the first meeting with Dr. Brody, swear under oath that Brody told them from the beginning that she would not perform IUIs for any unmarried woman, lesbian or not. (App., pp. 342:24-343:4; 346:6-22;347:20-22). It is unfathomable to us that on this motion for summary adjudication Plaintiff can simply ignore this conflict and assert as fact the opposite of even what Benitez herself and her own lesbian partner have testified to. Plaintiff argues that the Superior Court found that Defendants refused to provide IUIs for lesbians, not unmarried women in general. Plaintiff's Reply Brief at 3. But Plaintiff cites not to an opinion, or ruling, or order, but to its own brief on another motion apparently related to ERISA. *Id.* In any event, the Court of Appeal below seems to rule quite properly that this is an issue for the jury. Plaintiff refers to some sworn statements by Defendants on this issue, but again provides no citation. *Id.* at 4.

premature menopause given her often low progesterone levels. (App., p. 144.) Brody conducted a hysterosalpingiogram to see if Benitez had blocked fallopian tubes. (App. pp. 87:25-88:4) The test showed no blockage.

Dr. Brody then recommended a diagnostic laparoscopy, which was conducted in April, 2000, finding no new infertility problems. (App., pp. 88:2-4;145-146.) Before coming to North Coast, Benitez had been diagnosed with polycystic ovarian syndrome, or irregular ovulation, and that appeared to be the sole cause of her infertility. (App., p. 97:18-21.)

While Benitez came to the clinic seeking only IVI treatments, it was Dr. Brody who kept raising the possibility of IUI if all else failed. (App., pp. 134:16-19;135:11-13; 136:11-14;146.) Now, in April, 2000, it seemed to both Benitez and Brody that this was the next step to try. But Benitez added an additional complication by asking that the IUI be done with live nonspousal donor sperm from a friend of hers rather than with frozen sperm from the sperm bank. (App., p. 146.)

North Coast had never used live nonspousal donor sperm in its fertility treatments before. (App., p. 308:1-7.) But it still sought to

accommodate Benitez by qualifying itself to do the procedure properly, examining all applicable regulations and medical protocols to ensure that it was in compliance with all requirements. (App., pp. 136:15-24; 154:1-9; 301:9-32)

Preparing to provide this new procedure to patients competently, professionally and legally was not a simple matter. Besides complying with all applicable protocols and regulations, many other issues had to be explored as well. Informed consents were required from the recipient, the donor, the donor's wife, and possibly others. The sperm has to be tested for disease, and the doctor must know the source of the sperm to explore any potential genetic issues. Other issues arise concerning agreement on parenting, child support, who will have what rights to the child, whether the donor will have rights to visitation and some custody.

While North Coast prepared itself to do the IUI with the live nonspousal donor sperm as Benitez requested, Dr. Brody provided additional treatment to Benitez in performing a transvaginal ultrasound to check plaintiff's ovaries and egg development, and in providing Benitez a 10,000 unit beta-HCG shot for ovulation induction. (App., pp. 9:11-14; 149.)

As originally promised to Benitez, North Coast had two doctors who were ready, willing and able, without any religious objection, to perform an IUI on Benitez using frozen sperm from the sperm bank, Dr. Stoopack and Dr. Langley. (App., pp. 135:17-19; 309;6-13.) But either Dr. Fenton, medical director of the IUI program at North Coast, or Nurse Dana Landsparger would have been needed to prepare the live, non-spousal donor sperm, and they had moral/religious objections to doing so. (App. pp. 99: 26-28; 154: 10-12; 301:18-22; 308:11-309:13; 334:12-19.)<sup>4</sup> In addition, however, by the time Plaintiff's ovulation cycle was ready for the IUI treatment, the administrative preparation to provide the IUI with live, nonspousal donor sperm was not yet complete. Therefore, to accommodate Plaintiff's request for the use of live nonspousal donor sperm, it was medically necessary in any event for Dr. Fenton to refer the Plaintiff to another fertility specialist for the IUI treatment.<sup>5</sup>

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<sup>4</sup>Moreover, Dr. Fenton was scheduled to be on vacation in any event when Benitez's ovulation cycle would be ready for the treatment. (App. pp. 301:18-22; 308:11-309:13; 334:12-19.)

<sup>5</sup> Benitez was apparently willing to go ahead and do the IUI with frozen sperm from the sperm bank. But with Dr. Brody on vacation at the time, Dr. Fenton did not know that. He was trying to serve Benitez and help her achieve her medical goals consistently with her stated preferences by his referral to Dr. Kettle.

On these grounds, Dr. Fenton referred Benitez to Dr. Michael Kettle to perform the IUI on a timely basis (App., pp. 308:24-309:2).<sup>6</sup> To further accommodate Benitez, North Coast agreed to pay any extra cost for the treatment of Benitez by Dr. Kettle, who was out of network under the health insurance plan provided by Benitez's employer.<sup>7</sup> (App. p. 310:3-4.)

The IUI performed by Dr. Kettle for Benitez also failed to make her pregnant. (App., p. 138:13-14.) But Benitez later became pregnant under Dr. Kettle's treatment through the procedure of in vitro fertilization. (App., p. 138:13-14.) North Coast does not provide the service of in vitro fertilization. So the referral to Dr. Kettle was medically necessary on these grounds as well. Benitez gave birth to a health baby boy.<sup>8</sup>

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<sup>6</sup> Plaintiff states, "Eventually, after persistent excuses and delay, North Coast's medical director, defendant and petitioner Dr. Douglas Felton, stepped in and informed Benitez that so many of North Coast's medical staff refused on religious grounds to assist her that she would have to go elsewhere." Plaintiff's Opening Brief at 2. This is a gross rhetorical mischaracterization, and to the extent there is any real evidence for it there is definitely a conflict that would require submitting the issue to a jury, with Plaintiff's motion for summary adjudication dismissed.

<sup>7</sup> Plaintiff again states falsely, "[Benitez] had to pay for the "off plan" medical care herself." Plaintiff's Opening Brief at 5.

<sup>8</sup> Plaintiff states, "Dr. Brody stretched out Benitez's treatment plan with excuse after excuse—prolonging her emotional roller coaster of

Nevertheless, Benitez sued North Coast, Dr. Brody, and Dr. Fenton for discrimination on the basis of sexual orientation in violation of the Unruh Act, among other claims. Defendants claimed that their actions were protected from liability by the Freedom of Religion Clauses of the California Constitution and the US Constitution, among other defenses. Plaintiff Benitez moved for summary adjudication to strike this affirmative defense. The trial court granted Plaintiff's motion. But the Court of Appeal reversed, finding triable issues of fact and concluding that the facts relating to the Freedom of Religion defense needed to be fully developed. (Opinion, pp. 20-21.)

### **ARGUMENT**

**I. Based on the Facts on this Motion for Summary Adjudication, Defendants' Conduct Is Clearly Protected by the Freedom of Religion Clause of the California Constitution.**

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failed self-inseminations, continuing her on potentially cancer causing fertility drugs for extra months, and subjecting her to unnecessary and painful abdominal surgery—all to postpone a mundane, simple and utterly safe IUI procedure.” Plaintiff’s Opening Brief at 34. This gross rhetorical mischaracterization is not supported by the record. Based on the record, the course of the treatment Defendants provided to Plaintiff cannot be medically faulted.

**A. The California Constitution Provides Stronger Protection for Freedom of Religion than the U.S. Constitution.<sup>9</sup>**

We submit that the issues now before the Court can only be decided on the precise facts presented by this case, as those facts must be taken on this motion for summary adjudication. Plaintiff seems to want to try a parade of alternative, hypothetical cases, including the Salem witch trials, and even historical issues going back to the Inquisition and the Crusades. None of that has anything to do with this case. As we will show below, the facts on this motion for summary adjudication show that the Defendants did everything possible to avoid any harm to the Plaintiff, and that as a result Plaintiff was not harmed, but quite to the contrary, successfully received the medical treatment and the medical result she sought, precisely because of assistance provided by the Defendants.

We submit as well that this Court should not try to decide this case starting with a purely theoretical labeling analysis of whether

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<sup>9</sup> Since the California Constitution provides stronger protection to religious freedom than the U.S. Constitution, and this Court bears definitive expertise regarding the California Constitution, we limit our analysis of Defendants rights to the California Constitution, without conceding anything in regard to the U.S. Constitution. We do submit, however, that the Supreme Court's religious liberty doctrines are under challenge and are in flux in our view.

strict scrutiny should apply, or super strict scrutiny, or something less than strict scrutiny. Rather, we submit that the Court should focus on the text, history, and original intent of the California Freedom of Religion Clause and apply that to this case. That analysis will show that if the California Freedom of Religion Clause means anything beyond the much different language of the Federal Freedom of Religion Clause, then the actions by Defendants in this case must be protected from liability by that California Clause.

Article I, Sect. 4 of the California Constitution states,

“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.”

This provision has long been thought to provide unique protection for religious liberty beyond what the U.S. Constitution provides. *Sands v. Morongo Unified School Dist.* (1991) 53 Cal. 3d 863; *Serrano v. Priest* (1976) 18 Cal. 3d 728; *State of Minn. v. Hershberger* (1990) 462 N.W.2d 393, 397 (Court said regarding quite similar Minnesota Freedom of Religion Clause that the “language is of a distinctly stronger character than the Federal counterpart...” and, consequently, provides “greater protection for religious liberties against governmental action under the state constitution than under the First

Amendment of the federal constitution.”); Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia’s Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819 (Feb. 1998).

As Justice Mosk stated in *Sands*, the language of the California Freedom of Religion Clause was “carefully selected” to “provide[] the greatest level of protection to California citizens.” *Sands*, 53 Cal. 3d at 907 (concur. of Mosk, J.)

This was the clear intent of the state’s Freedom of Religion Clause as Mosk’s statement above also suggests. Grodin, et al., *The Cal. State Constitution: A Reference Guide* (1993); Browne, *Rep. of Debates in Convention of Cal. On Formation of State Const.* (1850); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Indeed, this intent was strengthened in the 1878-79 state constitutional convention, where the freedom of religion “allowed’ by the Freedom of Religion Clause was changed to “guaranteed.” 1 Willis and Stockton, *Debates and Proceedings, California Constitutional Convention 1878-79*.

The language of the Clause *guarantees* free exercise and enjoyment of religious beliefs sincerely held. Because the plain

language of the Clause refers to “exercise” and “enjoyment” of religion, and “acts”, it protects conduct as well as belief. *In re Young* (2004) 32 Cal. 4<sup>th</sup> 900.

This guarantee of religious liberty applies except only to “acts that are licentious or inconsistent with the peace or safety of the state.” Because the framers listed these exceptions, under standard rules of construction we must take these to be the only exceptions intended absent a clear original intent to the contrary. *Sierra Club v. State Board of Forestry* (1994) 7 Cal. 4<sup>th</sup> 1215. These exceptions were intended to apply to acts of excessive sexual license or to violence. *Browne, supra*, at p. 39; *City of Boerne v. Flores* (1997) 521 U.S. 507, 543; *People v. Phillips* (1813) N.Y. Court of General Sessions, City of New York.

As now Federal Circuit Court Judge Michael McConnell has pointed out, these stated exceptions for objectionable conduct imply that constitutional protection otherwise applies in appropriate circumstances to exempt acts of religious conscience from state laws:

“The existence of these peace and safety provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience.”

McConnell, *Freedom From Persecution, supra*, at 830-831. Such protection and exemptions would not be absolute, of course, but would depend on the facts and circumstances of each case.

Finally, because of the extreme importance of religious liberty indicated by this language, any restriction on freedom of religion allowed must be the least restrictive means of achieving a compelling state interest, with reasonable accommodations to religious liberty where feasible. *Catholic Charities v, Superior Court* (2004) 32 Cal. 4<sup>th</sup> 527, 562.

Therefore, based on analysis of the text, history and intent of the California Freedom of Religion Clause, the standard for determining whether the Clause applies to provide constitutional protection for certain actions is:

- (1) whether sincerely held religious belief or practice based on that belief is substantially burdened;
- (2) whether the actions are licentious or inconsistent with the peace or safety of the state; and
- (3) whether the restriction on religious liberty is the least restrictive means of achieving a compelling state interest.

**B. The California Freedom of Religion Clause Protects the Actions of Defendants from Liability, Given the Facts On this Motion.**

Based on the standard discussed above, the actions of Defendants in this case fall well within the protections of the California Freedom of Religion Clause, given the facts on which the motion now before the Court is to be decided. Indeed, if the actions of Defendants in this case are not protected, it is hard to see how the California Freedom of Religion Clause is anything but a dead letter, adding nothing to the protection of religious liberty.

No one, not even Plaintiff, has questioned whether the Defendants are sincere in the religious beliefs they express. Moreover, the liability Plaintiff seeks to impose on Defendants approaching a million dollars for legal fees alone certainly substantially burdens the religious beliefs and practice of the Defendants. Plaintiff's suggestion that to avoid such liability in the future Christians, Muslims, Orthodox Jews, and others could simply give up any fertility practice, Plaintiff's Opening Brief at 19, is also a substantial burden on religious belief and practice.

Were the actions of Defendants based on their beliefs licentious or inconsistent with the peace and safety of the community? Certainly

those actions did not involve the traditional meanings of those terms involving excessive sexual license or violence.

Plaintiff argues that any violation of law should be taken to involve licentiousness or a violation of the peace and safety of the community. Plaintiff's Reply Brief at 11-13. But in that case the exceptions would eat up the whole rule, and there would be no constitutional protection to exempt acts of religious conscience from state laws. If this is what the framers meant, why did they say that the constitutional protection applies except in cases involving "acts that are licentious or inconsistent with the peace or safety of the state," for those words would then have no independent meaning. If that is what they wanted, why didn't they just say "except where the acts would violate any state law or legal requirement?" Or why didn't they just use the Federal constitutional language, because then there would be no difference between the Federal and state constitutions. We know, however, that the framers of the California Constitution expressly rejected that Federal language because they wanted more protection for religious liberty than the Federal constitutional provision provided.

Defendants provided extensive fertility treatments to Plaintiff for almost a year. They declined to provide an invasive, surgical,

fertility treatment in which they would affirmatively have to create the pregnancy inside the Plaintiff themselves. That reflected their longstanding policy of declining to provide that treatment to any unmarried woman, whether homosexual or heterosexual. That policy stems from their traditional, Christian, religious beliefs against pregnancy out of wedlock, reflecting moral/religious views widely held throughout society since time immemorial, including the view that it is best to raise a child in an intact, two parent family with both the mother and the father present. They did not want to be the agents creating the very thing to which they religiously object.

These traditional, common, widespread, moral values have prevailed as well in most other societies, throughout the history of civilization. They are widely held and supported even on purely secular grounds.<sup>10</sup> Plaintiff now essentially invites this Court to declare these traditional moral values, and actions taken to uphold them, licentious and inconsistent with the peace and safety of the state. Effectively, Plaintiff asks this Court to tell the people of

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<sup>10</sup> See, e.g., Robert E. Rector, Patrick F. Fagan, and Kirk A. Johnson, Ph.D., “Marriage: Still the Safest Place for Women and Children,” Heritage Foundation Backgrounder No. 1732, March 9, 2004; Patrick F. Fagan, Robert E. Rector, Kirk A. Johnson, Ph.D., and America Peterson, *The Positive Effects of Marriage: A Book of Charts* (Washington, DC: The Heritage Foundation, April, 2002).

California that traditional moral values regarding pregnancy and birth out of wedlock, and support for intact families to raise children with both the mother and father present, rooted not only in Christianity, but also in Islam, Judaism, and other religions, are the equivalent of neo-Nazi dogma and, indeed, are now illegal to act upon with substantial sanctions in some circumstances. This is not what the legislature has adopted or meant to endorse.

What Plaintiff argues here is not law, but, rather, ideological extremism. We are not talking here about the government adopting Defendants' views as official policy. We are talking about private citizens holding these views and acting to uphold them, and whether they will continue to have the freedom to do so. There is a crucial liberty interest in maintaining the freedom of citizens to hold such traditional moral values and to act upon them. Such moral choices are for free men and women to make, not for Plaintiff, or the government, or, we submit, even this Court to make for them. This is what the Freedom of Religion enshrined in the California Constitution is all about.

Such Freedom of Religion is protected in the Unruh Act as well as freedom of choice regarding sexual orientation. Moreover, that

Freedom of Religion is given the highest possible legal protection in the California Constitution. This is the law in California and it is what the people of this state have adopted as the law going back to the state's very foundation.

Indeed, the actions of Defendants in this case cannot properly be characterized as **invidious** discrimination either. What Defendants in this case have done is act to uphold their traditional moral values, rooted in their Christian religious beliefs, reflecting the same beliefs of so many others, based not only on their Christian religion, but other religions such as Islam and Judaism, and even secular moral values, and scientific social research. There is nothing invidious about it. Indeed, believing in and acting upon such traditional moral values is not even properly characterized as discrimination.

Therefore, the question of whether Defendants shall have the freedom to maintain the traditional moral religious values they express in this case, and act to uphold them and remain faithful to them, goes to the very core of the religious liberty protected by the California Constitution. We submit that these views and their conduct cannot remotely be characterized as licentious or inconsistent with the peace and safety of the state. Therefore, we submit that such conduct

is constitutionally protected from liability by California's Freedom of Religion Clause.

Finally, one additional consideration greatly eases the decision in this case. The actions of the Defendants did not harm the Plaintiff in any way. Quite to the contrary, precisely because the Defendants did all that they could to avoid any harm to the Plaintiff, the Plaintiff received all the fertility treatment she needed, became pregnant, and bore a healthy baby boy.

Defendants provided thorough fertility treatment to Plaintiff for almost a year. To accommodate Plaintiff's request for a service Defendants had not provided before and ultimately could not provide in a timely fashion, an IUI with live, nonspousal donor sperm, the Defendants promptly referred Plaintiff to another fertility specialist who could. It was that specialist who eventually succeeded in achieving Plaintiff's medical goal of pregnancy, through a procedure, in vitro fertilization, that Defendants do not provide to the public, and are not certified to provide. In the end, therefore, it was Defendants timely referral to another specialist that led to the pregnancy Plaintiff sought, a pregnancy that Defendants in the end could not have

produced because it ultimately resulted from a procedure that Defendants did not and could not provide.

But, Plaintiff argues, the indignity of the medical referral itself harmed the Plaintiff. Lunch counters cannot avoid the responsibility not to discriminate by referral to another restaurant. Why should doctors, who provide the much more important service of health care, be allowed to discriminate through referrals to others, and harm the dignity of the victims in the process?

But the services Defendants provide are not analogous to serving up a ham sandwich. Complex fertility treatments raise moral/religious issues that ham sandwiches do not, and such issues in turn raise issues of constitutionally protected religious freedom.

Moreover, the medical referral in this case could not have harmed the dignity of the Plaintiff, because the referral was medically necessary. The referral arose in the first place because the Defendants were trying to serve Plaintiff's request for an IUI with live, nonspousal, donor sperm. If Plaintiff had not raised the issue of using such sperm, North Coast had two doctors available who were ready, willing and able to provide the IUI with frozen sperm from the sperm bank. But these doctors were not able to prepare the live nonspousal

donor sperm. The problem in accommodating Plaintiff's request for such sperm was not just that others who could properly prepare such sperm had religious objections to doing so. Defendants had also never provided an IUI with such sperm before and at the time Plaintiff's ovulation cycle was ready for the procedure to be done, North Coast had not completed all the administrative and qualification requirements to provide the service. So Defendants referred the Plaintiff to someone else who was immediately ready, willing and able to do so.

In addition, the referral was medically necessary because Plaintiff was ultimately able to achieve pregnancy only through a procedure, in vitro fertilization, that the referral doctor provided to her, but that Defendants do not provide to the public and could not provide.

Finally, medical referrals are common and routine, and private, while "referrals" from a lunch counter to another restaurant are not. Consequently, discriminatory referrals from a lunch counter could harm a Plaintiff's dignity, while medical referrals would not.

Therefore, with no harm to Plaintiff of any sort, and Plaintiff receiving the medical treatment she sought, and her medical goal of

pregnancy and child birth, the actions of Defendants in this case cannot be characterized as invidious, licentious, or inconsistent with peace and public safety.

**C. Banning Christians from Fertility Practice Is Not the Least Restrictive Means of Enforcing the Goals and Policies of the Unruh Act.**

Plaintiff's motion for summary adjudication to strike the Freedom of Religion defense must be denied for the reasons just stated above. The actions of Defendants in this case are constitutionally protected from liability by the Freedom of Religion Clause of the California Constitution.

But Plaintiff's motion must be denied for another reason as well. Since the religious beliefs expressed by the Defendants are sincere, enforcing compelling state interests under the Unruh Act must in any event be accomplished by the least restrictive means possible.

Plaintiff openly advocates a Christians Need Not Apply policy to resolve the issues in this case. Plaintiff rightly recognizes that imposing liability on Defendants for their actions in this case means that Christians who want to uphold their faith would effectively be banned from fertility practice in California. Plaintiff states,

“Defendants have chosen to do business by providing treatment for infertility....Any perceived burden on defendants' religious

freedom is easily avoidable by their specializing in a medical field other than infertility treatment, where their religious views would not create a problem for them.

Plaintiff's Opening Brief at 19. This ban would effectively apply to Muslims, Orthodox Jews, and others as well.

Banning Christians, Muslims, Jews and others from the practice of infertility treatment because of their religious views and commitment to remain faithful to those views is exceedingly harsh, not an option by which people of faith can easily avoid liability. Imposing costly liability on Defendants because of their actions to uphold their traditional, Christians beliefs regarding pregnancy of unmarried women, reflecting longstanding, widely held beliefs throughout our society and others from time immemorial and the desirability of raising children in intact two parent families with both mother and father present, would also be quite harsh, for such traditional moral values cannot be rightly characterized as **invidious** discrimination.

The standard applied by this Court in *Catholic Charities, supra*, would recognize the harshness of this burden. The Court said in that case,

“Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless

the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored....For these purposes, 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.’”

32 Cal. 4<sup>th</sup> at 562.

Effectively banning Defendants from their established fertility practice for not wanting to personally and directly create a pregnancy in an unmarried woman based on traditional Christian beliefs would certainly seem to qualify as “condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith, or...deny[ing] such a benefit because of conduct mandated by religious belief.” It would also certainly seem to qualify as “putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.” The latter would be true as well of imposing liability for legal fees likely approaching a million dollars where the patient ended up successfully impregnated and giving birth to a healthy baby boy. Effectively, that would be the same as conditioning or denying an important benefit as well.

Moreover, while Plaintiff falsely asserts over and over that Defendants deprived Plaintiff of health care, and expresses concern

over the availability of health care to women, it is Plaintiff's standard and analysis that would endanger public health by decreasing the supply of medical care in casting committed Christians, Muslims, and Orthodox Jews out of the practice of fertility treatment altogether.

Accommodating traditional, widespread religious beliefs through medical referral would be a less restrictive means of enforcing all of the goals and policies of the Unruh Act, on the specific facts of this case. That is because, on what must be taken as the facts on this motion, again there was no harm to Plaintiff of any sort, as discussed fully above.

Again, Plaintiff received all the fertility treatment she sought, and, indeed, more. As a result, she achieved her medical goal of pregnancy and birth of a health child. Despite Plaintiff's occasional rhetorical misrepresentations not supported anywhere in the record, the course of the treatment Plaintiff received cannot be medically faulted.

Moreover, the referral itself cannot even be tagged with harming the dignity of Plaintiff. That is true first because medical referrals are common and routine in the practice of medicine, and completely private. But, in addition, the referral in this case was

medically necessary. When Plaintiff asked for a service Defendants had not provided before, IUI with live, non-spousal, donor sperm, Defendants sought to accommodate her by initiating the administrative work necessary to start providing this new service in compliance with all applicable protocols and requirements. But by the time Plaintiff's ovulation cycles mandated that the treatment begin, this administrative work had not been completed. North Coast would have been able to provide the IUI with frozen sperm from the sperm bank, but to get the treatment for Plaintiff with live, nonspousal, donor sperm as she had requested, it was necessary to refer her to another specialist. Moreover, since that IUI did not work, and pregnancy was eventually achieved by the referral specialist through an in vitro fertilization procedure that Defendants do not offer to the public and are not certified to provide, the referral in this case was medically necessary in any event.

We submit that this Court need not announce a broad rule to resolve this case. The decision can quite rightly be limited to the specific facts on this motion. But where the Plaintiff successfully received the medical treatment sought, and there was no harm to Plaintiff of any sort, a medical referral that accommodates religious

beliefs should be constitutionally protected under the California Constitution's Freedom of Religion Clause.

**CONCLUSION**

For all the reasons stated above, we submit that this Court should affirm the decision of the Court of Appeal below to dismiss Plaintiff's motion for summary adjudication of the Freedom of Religion defense raised by the Defendants.

Dated: March 29, 2007

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the brief is proportionally spaced, has a typeface of 13 points or more, and contains 5,631 words, based upon the word count in Microsoft Word, and is in conformance with the type specifications set forth at California Rules of Court 14.

Dated: March 29, 2007

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## PROOF OF SERVICE

I, Peter Ferrara, declare that:

I am a resident of Fairfax County, Virginia; I am over eighteen years of age and not a party to this action; I am employed in Arlington County, Virginia; and my business address is 1600 Wilson Blvd., Suite 960 Arlington, VA 22209.

On March 29, 2007, I served a copy of the attached documents, described as **APPLICATION OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS And BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS**, 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, and personally delivering those envelopes to the U.S. Postal Service and mailing them first class postage prepaid.

I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

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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: March 29, 2007

\_\_\_\_\_  
Peter Ferrara