

Case No. S142892

IN THE SUPREME COURT OF CALIFORNIA

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

v.

SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

GUADALUPE T. BENITEZ,
Real Party in Interest.

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

**APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF
OF AMICI CURIAE THE NATIONAL CENTER FOR LESBIAN
RIGHTS, LYON-MARTIN WOMEN'S HEALTH SERVICES, INC.
THE MAUTNER PROJECT, BAY AREA LAWYERS FOR
INDIVIDUAL FREEDOM, AND LESBIAN AND GAY LAWYERS
ASSOCIATION OF LOS ANGELES**

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**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS
CURIAE IN SUPPORT OF REAL PARTY IN INTEREST
GUADALUPE T. BENITEZ**

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF
THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.520 of the California Rules of Court, the National Center for Lesbian Rights, Bay Area Lawyers for Individual Freedom, the Lesbian and Gay Lawyers Association of Los Angeles, Lyon-Martin Women’s Health Services, Inc. and the Mautner Project respectfully request leave to file the accompanying amicus curiae brief in support of real party in interest Guadalupe T. Benitez.

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus The National Center for Lesbian Rights (“NCLR”) is a national legal resource center with a primary commitment to advancing the rights and safety of lesbian, gay, bisexual, and transgender (LGBT) people and their families through a program of litigation, public policy advocacy, and public education. Since its inception in 1977, NCLR has had a particular interest in defending reproductive freedom for all women, regardless of sexual orientation.

Amicus Lyon-Martin Women’s Health Services, Inc. (Lyon-Martin), is a not-for profit community clinic incorporated in the State of California in 1979. Since its inception, it has provided critical personalized primary

care to women in the San Francisco bay area who lack access to quality health care because of their sexual orientation or gender identity, and since 2001 has added services for transgender people. Lyon-Martin Women's Health Services operates a medical clinic in the heart of San Francisco which provides, among other services, reproductive health care. The clinic was created by Sherron Mills, NP, Patty Robertson, MD and Alana Schilling, and named after lesbian activists Phyllis Lyon and Del Martin, to address and respond to the gap in sensitive health services available to lesbians. The founders recognized that homophobia on the part of health care providers was leading to misdiagnosis and mistreatment of lesbian patients, and alienating those individuals to such an extent that they were not seeking adequate or preventive health care. The clinic currently focuses on providing health care services, education, and outreach to lesbian and transgender people, and has been the leading model for other similar health care providers across the country. Currently, the clinic provides primary care for over 2,000 women and transgender people each year.

The mission statement of *amicus* Lyon-Martin recognizes the observable and documented fact that lesbians very often fail to receive quality health care due to their sexual orientation. This case is of great interest to *amicus* Lyon-Martin because Guadalupe Benitez received substandard reproductive health care from the defendants for reasons that are all too common for lesbian patients in California. Her experience

exemplifies precisely the type of discrimination that Lyon-Martin was created to address, combat and remedy.

Amicus The Mautner Project, The National Lesbian Health Organization (“Mautner Project”) improves the health of lesbians and their families through advocacy, education, research, and direct service. The Mautner 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, the Mautner Project 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. The Mautner Project 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. The Mautner Project encourages health professionals to incorporate cultural competency principles into their approach to every patient.

Amicus Bay Area Lawyers for Individual Freedom (BALiF) is the nation's oldest and largest bar association of lesbians, gay men, bisexuals, and transgendered (LBGT) persons in the field of law. It is part of BALiF's mission to take action on questions of law and justice that affect

the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community. BALiF frequently appears as amicus curiae in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance.

Amicus Lesbian and Gay Lawyers Association of Los Angeles (“LGLA”) was formed in 1979 for the purposes of providing a strong leadership presence of and for lesbian, gay, bisexual and transgender persons in the legal profession and in the community at large, through education, legal advocacy and participation in political and civic activities and social functions. The association, consisting of lawyers, judges, law students and other legal professionals, is an affiliate of the Los Angeles County Bar Association. For more than a quarter century, LGLA has served as a leader in efforts to advance civil and human rights and it has submitted and/or joined amicus briefs in many cases important to the gay and lesbian community.

Discrimination by businesses and other places of public accommodation harms society in general. Any discrimination by businesses providing health care services has serious consequences for patients. All persons, irrespective of their sexual orientation, are entitled to receive respectful health care in the state of California, without experiencing invidious discrimination at the hands of their own doctors. For lesbians, discrimination in the health care setting has especially dire effects because lesbians have above-average prevalence rates of several risk factors for breast cancer and gynecologic cancers. The interest of *amici* NCLR, BALiF, LGLA, Lyon-Martin and the Mautner Project in this case is rooted in their longstanding struggles to protect LGBT people against precisely that discrimination and potentially devastating consequences.

THE ACCOMPANYING BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER.

Amici organizations have substantial experience with and knowledge of the real life consequences to lesbians and gay men of discrimination on the basis of sexual orientation, particularly in health care. The Unruh Act protects Californians from invidious discrimination on any grounds, including sexual orientation, and any changes to the interpretation of the Act will have an effect on the ability of lesbians and gay men in California to obtain proper medical treatment. This brief reviews research on discrimination against lesbians and gay men by medical providers, and

explains in concrete terms the health consequences of that discrimination. The brief will assist the court in deciding this matter by showing how a religious exemption to the Unruh Act could fuel invidious discrimination generally, as well as exacerbating the existing problem of treatment disparities between heterosexual Californians and lesbian or gay Californians.

INTRODUCTION

The *Code of Professional Ethics* promulgated by the American Medical Association prohibits physicians from refusing to enter into a doctor-patient relationship or withholding particular medical treatments “based on race, gender, *sexual orientation*, or *any other* criteria that would constitute invidious discrimination.” (American Medical Association, *Code of Professional Ethics*, Opinion E-10.05(2)(a) (Oct. 17, 2005) <<http://www.ama-assn.org/ama/pub/category/8327.html>> [as of Mar. 29, 2007].) Refusing to provide a treatment that a doctor routinely performs based on a patient’s medically irrelevant personal characteristics constitutes discrimination. (See *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527; *Smith v. Fair Employment & Housing Commission* (1996) 12 Cal.4th 1143.) Invidious discrimination against lesbians and gay men is particularly dangerous in the context of medical care because it causes widespread and concrete harm to the health of

thousands of Californians. Any religious exception to the Unruh Act would allow such discrimination, with the dire consequences that follow. To do so would contravene this state's strong public policy. Moreover, a religious exemption would have effects far beyond health care, potentially forcing lesbians and gay men to face intolerance and limited access to services in virtually every aspect of their lives. Such an outcome violates the spirit as well as the letter of the Unruh Act.

ARGUMENT

I. Many Californians Depend on the Ability to Obtain the Full Spectrum of Health Care Treatment Without Regard to Sexual Orientation.

As the U.S. Supreme Court has stated, “If an individual’s religious beliefs, however sincere, were allowed to trump the duty to comply with a statute of general applicability, that would “permit every citizen to become a law unto himself.” (*Employment Division, Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879.) This Court should not permit health care providers or other business owners to be “a law unto [themselves]” at the expense of the thousands of California women who depend on access to services without regard to their sexual orientation or marital status.

At least 84,500 lesbians in same-sex relationships live in California,¹ and there are an estimated 325,000 unmarried women of child bearing age living in this state.² Many lesbians share the same wish to create a family

¹ There are 92,128 same-sex couples in California according to the 2000 Census, 46% of whom are women. (Sears, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000* (May 2004) p. 3 <<http://www.law.ucla.edu/williamsinstitute//publications/CaliforniaCouplesReport.pdf>> [as of Mar. 29, 2007].)

² There are an estimated 2.6 million single women of childbearing age in the United States. (Hardiman, *Women with Benefits: Healthy, Wealthy and Single*, American Chronicle (Jan. 30, 2006) <<http://www.americanchronicle.com/articles/viewArticle.asp?articleID=5291>> [as of Mar. 29, 2007].) Applying the U.S. Census figures that one out of every eight American residents live in

that many heterosexual women have. Indeed, over 35% of lesbians aged 18-44 have given birth and 41% of lesbians surveyed reported that they plan to become parents. (Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* (Mar. 2007) p. 5

<<http://www.law.ucla.edu/williamsinstitute/publications/>

[FinalAdoptionReport.pdf](#)> [as of Mar. 29, 2007].) For lesbians,

insemination, especially intrauterine insemination, generally is the safest and most effective method for achieving pregnancy.

With an estimated 325,000 unmarried women of child bearing age residing in the state of California, many of whom may wish to have a child despite the lack of a male spouse, and over 84,000 lesbians in same-sex couples, this case clearly affects a sizable population. Thus, this case has far-reaching implications for an increasing demographic segment of California society.

II. Discrimination in Health Care Services has Significant Consequences for Lesbians.

Seventy (70%) of all illness is preventable. (See Koh, *Use of Preventative Health Behaviors by Lesbian, Bisexual and Heterosexual Women: Questionnaire Survey* (June 2000) 172 *Western J. of Medicine*

California (see generally State of California, Dep't of Finance, Demographic Research Unit, *Census 2000: An Overview of Californians* (April 2005) <<http://www.dof.ca.gov/HTML/DEMOGRAP/SDC/documents/SF3CA.pdf>> [as of Mar. 29, 2007]) to this statistic yields an estimated 325,000 single, female Californians of childbearing age.

379.) Unfortunately, for lesbians, pervasive discrimination impedes prevention, leading to systemic health disparities in the population. Results from the federally funded National Health Interview Survey recently have confirmed that women in same-sex relationships are significantly less likely than women in opposite-sex relationships to have health insurance coverage or to have seen a medical provider in the previous 12 months, and they are more likely to have unmet medical needs as a result of cost issues. (See Heck, et al., *Health Care Access Among Individuals in Same-Sex Relationships* (June 1, 2006) 96:6 Am. J. of Public Health 1111.)

Research also reflects that lesbians have poorer health than the general population and that there are multiple interacting reasons for this phenomenon. However, all of the reasons are linked to the experience of discrimination faced by lesbian women. Health care providers have noted “that fear of discrimination and stigma have [kept] many in the GLBT community from seeking care for themselves or their families and that others, once in care, [have] withheld personal information that their health care providers needed to provide appropriate care and treatment.” (Clark, et al., *The GLBT Health Access Project: A State-Funded Effort to Improve Access to Care* (June 1, 2001) 91:6 Am. J. of Public Health 895.) It is estimated that between 1% to 5% of all ob/gyn patients are lesbians and that approximately 60% of those lesbians have reported negative experiences with the health care system in the past. (See Robertson,

Offering High-Quality Ob/Gyn Care for Lesbian Patients (Sept. 1, 2003)

Contemporary OB/GYN Magazine

<<http://www.contemporaryobgyn.net/obgyn/article/articleDetail.jsp?id=114766>> [as of Mar. 29, 2007].)

Moreover, it is reasonable for lesbians to fear discrimination when seeking health care: In a national survey conducted in 1994, **67% of LGBT physicians reported knowing of an LGBT patient who had received substandard care or been denied care due to the patient's sexual orientation.** (See Plumb, Re: Confidentiality of Patient Medical Records, presented to the National Committee on Vital Health and Statistics (May 1999) <<http://ncvhs.hhs.gov/970603ta.htm>> [as of March 29, 2007] [citing O'Hanlan and Schatz, *Anti-Gay Discrimination in Medicine: Results of a National Survey of Lesbian, Gay, and Bisexual Physicians*, The American Association of Physicians for Human Rights (May 1994)].)

In another survey, 40% of physicians said they were sometimes or often uncomfortable providing care to lesbian or gay patients. (See Mathews, et al., *Physicians' Attitudes Toward Homosexuality—Survey of a California County Medical Society* (Jan. 1986) 144 *Western J. of Medicine* 106.) In yet another survey, it was disclosed that 21% of infertility and reproductive clinics refuse to treat single women, and **45% refuse to inseminate lesbians.** (See Stern, et al., *Access to Services to Assisted*

Reproductive Technology Clinics: A Survey of Policies and Practices (Mar. 2001) 4 Am. J. Obstetrics & Gynecology 591.) A 1998 survey of nursing students found that 8%-12% of them “despised” lesbian, gay and bisexual people, while 5-12% considered gay people “disgusting” and 40-43% believed they should keep their sexuality private. (See Public Health of Seattle and King County, *Culturally Competent Care for GLBT People: Recommendations for Health Care Providers* (Mar. 25, 2005) <<http://www.metrokc.gov/health/glbtproviders.htm>> [as of Mar. 29, 2007].)

According to a study commissioned by the GLBT Health Access Project, only 8-11% of gay and lesbian individuals sought care at a GLBT identified health setting. (JSI Research and Training Institute, *Access and Use of Health Services by Lesbians and Gay Men in the Greater Boston Area: An Exploratory Study* (1997) <<http://www.glbthealth.org/Research.htm>> [as of Mar. 29, 2007].) This leaves approximately 90% of gay men and lesbians seeking care within the mainstream health system.

As a direct result of expressed negative attitudes towards LGBT persons by the health care community, and due to fear of further discrimination and humiliation, many lesbians do not seek appropriate health or preventative care for themselves, and/or do not disclose relevant personal information once in care which would allow the health care provider to accurately assess health care needs and proper treatments.

This leaves lesbians exposed to increased risk of mental distress, mental disorders, substance abuse, depression, and sexually transmitted diseases. In an article by Dr. Patricia A. Robertson, the author writes, “It’s little wonder that lesbians are less likely to return for preventative care, care for acute health conditions, or worsening chronic conditions.” (Robertson, *Offering High-Quality Ob/Gyn Care for Lesbian Patients, supra*, Contemporary OB/GYN Magazine.) Indeed, many lesbians avoid seeking medical care at all until they are forced to do so by the severity of their symptoms. Where there is delay in diagnosis and treatment, the result is usually a poorer health outcome.

Bias from health care professionals and the perception of bias leads many lesbians to avoid seeking medical treatment altogether. Fewer lesbians are routinely screened with basic tests such as pap smears, cervical and breast cancer screening, TSH, fasting lipid profile, glucose testing, blood pressure measurements and colon cancer. Lesbians are also less likely to undergo mammographic screenings than heterosexual women. (Koh, *Use of Preventative Health Behaviors by Lesbian, Bisexual and Heterosexual Women: Questionnaire Survey, supra*, 172 *Western J. of Medicine* at pp. 379-384.) Consequently, lesbians are at increased risk for breast cancer, ovarian cancer, and endometrial cancer. (See Hughes & Evans, *Health Needs of Women Who Have Sex With Women* (Oct. 23, 2003) 237 *Br. Med. J.* 939.)

Because of discrimination they themselves encountered, or because they may have heard stories of others experiencing such discrimination, some women fail to disclose their sexual orientation to their health care providers. This failure may prevent their health care professionals from providing them with the most appropriate and effective treatment. As the United States Department of Health and Human Services stated in its Lesbian Health Fact Sheet: “Negative health care experiences can discourage a lesbian from seeking care in the future, including preventive and screening measures, which further jeopardizes her health.” (U.S. Dep’t of Health and Human Services, Office on Women’s Health, *Lesbian Health Frequently Asked Questions* (Jan. 2005) <<http://www.womenshealth.gov/faq/lesbian.pdf>> [as of Mar. 2007].)

Many unmarried women, both lesbian and heterosexual, also encounter discrimination when seeking reproductive health services. Some single women encounter health care providers who do not want to provide them with accurate and complete information about contraception and reproductive health issues because they feel it is inappropriate for single women to be engaging in sexual relations outside of marriage. Other single women, like the plaintiff in this case, encounter health care providers who deny them access to assisted reproduction technologies (ARTs) because the providers believe “that the most legitimate indicator for using ART is a male spouse’s infertility” or because they generally do not think it is

appropriate for lesbians to have children or for any women to have children outside of marriage. (See, e.g., Lezin, *(Mis)Conceptions: Unjust Limitations On Legally Unmarried Women's Access To Reproductive Technology And Their Use Of Known Donors* (Summer 2003) 14 Hastings Women's L.J. 185, 195.) The Centers for Disease Control and Prevention report that "16% of reproductive health care providers in the United States routinely refuse to offer treatment for single women." (Ginty, *Single Mothers-To-Be Face Bias, Race Ticking Clock* (June 21, 2004) Women's Enews [available at 2004 WLNR 6943302]); see also Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform* (1993) Am. J.L. & Med. 285, 288-289.)

If they are unable to secure assistance from fertility centers, women may decide to perform the insemination themselves, without the assistance of medical professionals. This can increase health risks because the sperm will not be quarantined and tested for HIV and other sexually transmitted diseases. (See, e.g., U.S. Dep't. of Health & Human Services, *Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/PS)* (May 2004) at pp. 30-34 (listing tests that must be performed on donated tissue, including tests for HIV, Hepatitis B, and syphilis) <<http://www.fda.gov/cber/gdlns/tissdonor.pdf>> [as of Mar. 29, 2007].)

It is undeniable that discrimination dramatically effects the quality and character of health care received by lesbians and unmarried women. Any religious exemption to the Unruh Act will inevitably increase the already pervasive discrimination against lesbians and other unmarried women in health care delivery, including especially the reproductive health care arena.

III. Refusal To Provide Equal And Nondiscriminatory Reproductive Health Services Is Contrary To The Public Policies Of This State.

In addition to conflicting with well-settled principles of California law, any religious exception to the Unruh Act jeopardizes the safety and well-being of millions of California residents. The strong public policies of this state favor reproductive autonomy for all women, regardless of marital status or sexual orientation; equal protection for all children, regardless of the marital status or sexual orientation of their parents; and the elimination of invidious discrimination based on sexual orientation and marital status.

California has led the way in protecting reproductive autonomy for all women. For example, the California Legislature has passed legislation to expand contraceptive coverage in health plans (Health & Saf. Code § 1367.25; Ins. Code § 10123.196), to require training for doctors regarding abortion services (Health & Saf. Code § 123418), to guarantee abortion clinic safety (Pen. Code § 423 *et seq.*), to ensure the availability of

emergency contraception to sexual assault victims (Pen. Code §§ 13823.11, 13823.5), and to require medically accurate information in comprehensive sexuality education (Educ. Code § 51930 *et seq.*).

In addition, the California Family Code explicitly permits single women to have children through the use of artificial insemination. (*See* Fam. Code § 7613(b).) Since its inception as a state, California has been at the forefront of efforts to ensure that all children are treated equally, without regard to the marital status of their parents. In place of “cruel and outmoded” provisions which denied important protections to nonmarital children, today California law “bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents.” *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 89. California’s Family Code explicitly provides that all children must be protected equally, “regardless of the marital status of the parents.” (Fam. Code § 7602.)

California also mandates that rules regarding parentage and custody must be applied equally, without regard to the sex or sexual orientation of the parents. (*See, e.g., Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 125 [holding that California’s Family Code must be applied equally “regardless of . . . gender or sexual orientation”]; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433 [affirming the validity of same-sex parent adoptions]; Fam. Code § 9000 [providing that registered domestic partners can use the same adoption procedures as married couples]; Welf. & Inst.

Code § 16013 [prohibiting discrimination on the basis of sexual orientation against foster and adoptive parents]; *In re Brian R.* (1991) 2 Cal.App.4th 904 [placing foster child with lesbian couple]; *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024 [holding that courts cannot consider sexual orientation when making child custody determinations].)

In addition to these strong protections in the areas of reproductive and family rights, California has continued to strive to eradicate discrimination on the basis of sexual orientation and marital status in many other areas, including employment, housing, and health care service plans. (*See, e.g.*, Gov. Code § 12940 [prohibiting employment discrimination on the basis of sexual orientation and marital status]; Rules and Regulations of the State Bar of California Pertaining to Lawyer Referral Services, rule 13 [prohibiting lawyer referral services from discriminating on the basis of sexual orientation or marital status]; Gov. Code § 12955 [prohibiting housing discrimination on the basis of sexual orientation and marital status]; Gov. Code § 19702 [prohibiting discrimination on the basis of sexual orientation and marital status in state civil service]; Health & Saf. Code § 1365.5 [prohibiting health care service plans from discriminating on the basis of sexual orientation and marital status].)

Because it would roll back the protections against discrimination and in favor of reproductive freedom that are so firmly grounded in California law, including the Unruh Act, any religious exception to the Act would

defeat the strong public policies of California. This Court should uphold those policies and protect the principles of this important statute upon which so many Californians rely.

IV. Any Religious Exemption to the Unruh Act Would Have a Strongly Negative Impact on Lesbian, Gay, and Bisexual and Transgender Californians' Ability to Seek Services Routinely Provided to their Heterosexual Counterparts.

As this Court has stated, the Unruh Act is California's "bulwark against arbitrary discrimination in places of public accommodation." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75.) In *Isbister*, the Court noted that "[a]bsent the principle it codifies, thousands of facilities in private ownership, but otherwise open to the public, would be free under state law to exclude people for invidious reasons like sex, religion, age, and even race." (*Ibid.*) Allowing a religious exemption to the Act in this case will open the door to exactly this kind of invidious discrimination against LGBT people from all businesses and services, not just medical providers. The combined impact on LGBT people would be devastating.

The risk of widespread discrimination against LGBT people from businesses, common carriers and places of public accommodation is clear. Unfortunately, it is still common for service providers of all kinds, from restaurants and retail stores to hospitals, to refuse to serve lesbians and gay men, or to treat lesbians and gay men with such hostility that they feel

compelled to leave the place of business. (See, e.g., Funk, *Lesbian Kiss Falls Flatter Than a Pancake*, Kan. City Star B1 (Mar. 13, 2007) [describing incident in which lesbian couple was asked to leave an International House of Pancakes]; Hagedorn, *Couple: Hospital's Refusal of Visit Was Discrimination*, The Bakersfield Californian (Mar. 7, 2007) [describing incident where hospital refused to allow a lesbian mother to see her minor daughter in the emergency room]; Lundy, *Doctor Discriminated, Gay Men Say*, The Orlando Sentinel (Sept. 14, 2006) [describing incident where fertility specialist refused services to a gay male couple and their surrogate].)

Case law across the country also illustrates that discrimination by businesses on the basis of sexual orientation continues to persist. (See, e.g., *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [lesbian couple denied equal access as heterosexual couples at a golf club]; *Clarke v. Olsten Certified Healthcare Corp.* (Me. 1998) 714 A.2d 823 [establishment providing respite care to families with special needs children would not provide services to eleven-year-old child due to mother's sexual orientation]; *McGrath v. Toys "R" Us, Inc.* (2nd Cir. 2004) 356 F.3d 246 [retail store employees made derogatory remarks toward transsexual customers]; *Cheung v. Merrill Lynch* (S.D.N.Y. 1996) 913 F.Supp. 248 [brokerage firm refused to open investment account for customer due to his perceived sexual orientation]; *Potter v. LaSalle Court Sports & Health*

Club (Minn. 1986) 384 N.W.2d 873 [health club discriminated against gay patrons]; *Blanding v. Sports & Health Club, Inc.* (Minn.Ct.App. 1985) 373 N.W.2d 784 [health club had terminated membership because of member's sexual orientation]; *Romer v. Evans* (1996) 517 U.S. 620 [challenge to an amendment to a state Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination]; *Rogers v. Fiscal Court of Jefferson County* (Ky.Ct.App. 2001) 48 S.W.3d 28 [challenge to a county ordinance prohibiting discrimination in public accommodation, inter alia, based on sexual orientation and gender identity].)

A religious exemption to the Unruh Act would have widespread, dire consequences to lesbians and gay men because it would allow the owner of any supermarket, restaurant, hotel, retail store, or any other business to refuse to serve whomever they chose based on professed religious beliefs. There is no difference between the effects of the discrimination against lesbians and gay men that would result from a religious exemption to the Unruh Act and the effects of other forms of invidious discrimination that the Unruh Act also prohibits. In *Heart of Atlanta Motel, Inc. v. U. S.* (1964) 379 U.S. 241, 253, the United States Supreme Court noted that discrimination by hotel proprietors against blacks led to the “obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging.” The Court further

observed that “this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.” (*Id.*)

As the evidence from the medical context demonstrates, lesbians and gay men already suffer similar discouragement and uncertainty. Because any religious exemption to the Unruh Act would apply to service providers of all kinds, allowing such an exemption would dramatically increase the number of areas in which discrimination limits the ability of lesbians and gay men to live a normal life. For those living in rural areas that have a limited number of businesses in the vicinity, a religious exemption could mean being completely denied access to crucial services, including food, lodging and transportation, in addition to health care. Such an exemption would swallow the rule of the Unruh Act, undermining California’s guarantee that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code § 51(b).)

CONCLUSION

Like all Californians, the thousands of lesbians and gay men who live here depend upon the ability to obtain appropriate medical treatment and preventative care. They must rely on health care providers to treat them without regard to their sexual orientation. But it is clear that too many lesbians and gay men experience discrimination from people in the medical field, and that this discrimination leads to poorer health overall. Any religious exemption to the Unruh Act would only increase this invidious discrimination, in contravention of California's strong public policies and with potentially devastating consequences for health. Further, such an exception would reach beyond health care to allow discrimination from service providers in every aspect of life, which would particularly impact gay and lesbian Californians living outside large urban areas. This outcome would be unacceptable under the Unruh Act and under basic principles of fairness and equality. Therefore, *amici* urge this Court to uphold equal access to health care and to all services by finding no religious exemption to the Unruh Act in this case.

**CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.520(c)(1)**

Pursuant to California Rule of Court 8.520(c)(1), counsel for Amici Curiae hereby certifies that the number of words contained in this Amicus Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 4,861 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: April 2, 2007

Respectfully submitted,

By: _____

Catherine Sakimura

PROOF OF SERVICE

I, Elizabeth Terry, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 870 Market Street, Suite 370, San Francisco, California 94103.

On April 2, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF, BRIEF OF AMICI CURIAE, AND APPENDIX TO BRIEF OF AMICI CURIAE OF THE NATIONAL CENTER FOR LESBIAN RIGHTS, LYON-MARTIN WOMEN'S HEALTH SERVICES, INC. THE MAUTNER PROJECT, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AND LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES

- BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.
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INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on April 2, 2007, at San Francisco, California.

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