

Case No. S142892

**IN THE  
SUPREME COURT OF CALIFORNIA**

---

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

v.

**SUPERIOR COURT OF SAN DIEGO COUNTY,**  
*Respondent;*

**GUADALUPE T. BENITEZ,**  
Real Party in Interest.

---

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

---

**SUPPLEMENTAL BRIEF OF PLAINTIFF  
AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ  
PURSUANT TO RULE 8.520(d)**

---

Jennifer C. Pizer (SBN 152327)  
Jon W. Davidson (SBN 89301)  
Lambda Legal Defense and  
Education Fund, Inc.  
3325 Wilshire Blvd., Suite 1300  
Los Angeles, California 90010  
(213) 382-7600 • Fax: (213) 351-6050  
[jpizer@lambdalegal.org](mailto:jpizer@lambdalegal.org)  
[jdavidson@lambdalegal.org](mailto:jdavidson@lambdalegal.org)

Albert C. Gross (SBN 159208)  
503 N. Highway 101, Suite A  
Solana Beach, California 92075  
(858) 793-7636 • Fax: (858) 794-0836  
[albertgross@nethere.com](mailto:albertgross@nethere.com)

Jon B. Eisenberg (SBN 88278)  
Eisenberg & Hancock, LLP  
1970 Broadway, Suite 1200  
Oakland, California 94612  
(510) 452-2581 • Fax: (510) 452-3277  
[jon@eandhlaw.com](mailto:jon@eandhlaw.com)

Robert C. Welsh (SBN 130782)  
James J. McNamara (SBN 210729)  
Lee K. Fink (SBN 216293)  
O'Melveny & Myers LLP  
1999 Avenue of the Stars, 7<sup>th</sup> Floor  
Los Angeles, California 90067  
(310) 553-6700 • Fax: (310) 246-6779  
[rwelsh@omm.com](mailto:rwelsh@omm.com)  
[smcnamara@omm.com](mailto:smcnamara@omm.com)  
[lfink@omm.com](mailto:lfink@omm.com)

**Attorneys for Real Party in Interest Guadalupe T. Benitez**

# TABLE OF CONTENTS

Page

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION.....	1
DISCUSSION .....	1
I. <i>MARRIAGE CASES</i> CONFIRMS THE COMPELLING STATE INTEREST IN ENDING SEXUAL ORIENTATION DISCRIMINATION, FURTHER VALIDATING THE UNRUH ACT’S PROHIBITION OF SUCH DISCRIMINATION, WHETHER RELIGIOUSLY MOTIVATED OR NOT .....	1
II. <i>MARRIAGE CASES</i> REPUDIATES DEFENDANTS’ ASSERTION THAT SEXUAL ORIENTATION CLASSIFICATIONS RECEIVE THE MOST LENIENT FORM OF CONSTITUTIONAL REVIEW .....	3
III. <i>MARRIAGE CASES</i> VOICES THE DANGER IN JUDICIAL VALIDATION OF THE NOTION THAT THE LAW SHOULD PERMIT SOCIETY TO TREAT LESBIANS AND GAY MEN DIFFERENTLY FROM HETEROSEXUALS .....	4
CONCLUSION .....	5
CERTIFICATE OF COMPLIANCE .....	7

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*In re Marriage Cases*  
(May 15, 2008, S147999) .....passim

**STATUTES**

Civ. Code § 51 .....passim

## INTRODUCTION

Plaintiff and Real Party in Interest Guadalupe T. Benitez (“plaintiff”) respectfully submits this supplemental brief pursuant to rule 8.520(d)(1) of the California Rules of Court in order to address the impact of *In re Marriage Cases*, No. S147999 (opn. filed May 15, 2008), on the issue presented for review in this case.

## DISCUSSION

### **I. *MARRIAGE CASES* CONFIRMS THE COMPELLING STATE INTEREST IN ENDING SEXUAL ORIENTATION DISCRIMINATION, FURTHER VALIDATING THE UNRUH ACT’S PROHIBITION OF SUCH DISCRIMINATION, WHETHER RELIGIOUSLY MOTIVATED OR NOT.**

Plaintiff’s briefs identify the compelling state interests in eradicating sexual orientation discrimination – especially in the provision of medical services including infertility care – and confirm that these interests justify any impact the Unruh Civil Rights Act (Civ. Code, § 51) may have on the religious liberty interests of those who wish to engage in such discrimination. The *Marriage Cases* decision confirms the compelling nature of those state interests through many of the decision’s legal conclusions, including the following:

- “[T]he ability to have children and raise them with a loved one who can share the joys and challenges of this endeavor is without doubt a most valuable component of one’s liberty and personal autonomy.” (Typed opn. p. 61.)

- “This state’s current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation, and, more specifically, recognize that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.” (Typed opn. pp. 67-68, citations omitted.)
- “[A]n individual’s sexual orientation – like a person’s race or gender – does not constitute a legitimate basis upon which to deny or withhold legal rights.” (Typed opn. p. 7; see also *id.* at p. 69.)
- “[S]exual orientation . . . is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual’s ability to perform or contribute to society.” (Typed opn. p. 101.)

*Marriage Cases* recognizes the societal harm that results when the full personhood and dignity of lesbians and gay men are denigrated by denial of their fundamental right to marry and to have and raise their children within the institution of marriage. Lesbian and gay people are likewise harmed when physicians deny them the routinely-offered medical care through which many couples achieve parenthood, irrespective of sexual orientation. As this court noted in *Marriage Cases*, such discrimination against gay people, including couples and their families in

particular, has been and remains widespread and harmful. (See, e.g., Typed opn. p. 101.) Because such discrimination constitutes an ongoing problem in California, there should be no doubt that the state has a compelling interest in enforcing the Unruh Act which fully justifies the Act's impact, whether substantial or not, on the religious liberty interests of those who wish to engage in discrimination against members of this vulnerable group.

**II. *MARRIAGE CASES* REPUDIATES DEFENDANTS' ASSERTION THAT SEXUAL ORIENTATION CLASSIFICATIONS RECEIVE THE MOST LENIENT FORM OF CONSTITUTIONAL REVIEW.**

Defendants have argued that this court should recognize no compelling state interest in ending sexual orientation discrimination because classifications based on sexual orientation receive the most lenient form of constitutional review. Plaintiff's response has been twofold: (1) the issues in this case pertain to statutory enforcement, not equal protection, and defendants lack authority for their novel view that the state's interest in enforcing the Unruh Act varies according to which of a victim's personal characteristics may be at issue; and (2) the level of constitutional review for claims of sexual orientation discrimination has been an open question in California.

*Marriage Cases* now resolves that second point: "[W]e conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision." (Typed opn.

p. 96.) Thus, a fundamental premise of defendants' multiply-erroneous argument – that the state cannot have a compelling state interest in ending sexual orientation discrimination because classifications on this basis are not constitutionally suspect – is untenable in light of *Marriage Cases*.

### **III. MARRIAGE CASES VOICES THE DANGER IN JUDICIAL VALIDATION OF THE NOTION THAT THE LAW SHOULD PERMIT SOCIETY TO TREAT LESBIANS AND GAY MEN DIFFERENTLY FROM HETEROSEXUALS.**

Finally, *Marriage Cases* gives voice to an overarching concern that applies with equal force here: the critical importance of avoiding judicial imprimaturs on sexual orientation discrimination. In the context of marriage by same-sex couples, the court said “there exists a substantial risk that a judicial decision upholding the differential treatment of opposite-sex and same-sex couples would be understood as *validating* a more general proposition that our state by now has repudiated: that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.” (Typed opn. p. 118, original italics.)

The same is true here. Absent this court's express repudiation of the Court of Appeal's widely-publicized decision on review of the issue presented – whether a physician has a constitutional right to refuse on religious grounds to perform a medical procedure for a patient because of the patient's sexual orientation – there will remain a substantial risk of perpetuating widespread confusion within the medical profession and beyond about the duty to treat all customers equally that the law imposes on

those who publicly offer business or professional services. If this court does not reject expressly the Court of Appeal's holding that these defendants are constitutionally entitled to special treatment at trial, the public might well conclude that the courts support physicians treating lesbian and gay patients less favorably than heterosexuals in the provision of medical services.

As the court explained in *Marriage Cases*, discriminatory treatment of gay people historically has had support in law as well as in the views of some religious adherents and some aspects of popular culture. In order to achieve a society that is open to all and that affords respect and equal dignity to all families, California law must communicate throughout its application that gay people are equal – by ending sexual orientation discrimination in medical treatment as well as marriage. There must be no confusion about whether a vulnerable, long-denigrated minority group of patients can be denied care due to health care professionals' views about those patients (whether religiously motivated or not), and most especially about those patients' aspirations and opportunity “to have children and raise them with a loved one who can share the joys and challenges of this endeavor.” (Typed opn. p. 61.)

## CONCLUSION

For the foregoing reasons and those stated in plaintiff's prior briefs, the court should answer in the negative the question presented for review. All persons engaged in business subject to the Unruh Civil Rights Act, including licensed professionals offering medical services to patients, must refrain from invidious discrimination irrespective of any religious motivation for wishing to engage in such harmful, prohibited conduct.



Dated: May 18, 2008

Respectfully submitted,

Jennifer C. Pizer (SBN 152327)

Jon W. Davidson (SBN 89301)

LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND

Jon B. Eisenberg (SBN 88278)

EISENBERG & HANCOCK, LLP

Robert C. Welsh (SBN 130782)

James J. McNamara (SBN 210729)

Lee K. Fink (SBN 216293)

O'MELVENY & MYERS LLP

Albert C. Gross (SBN 159208)

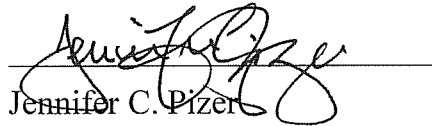
By:   
Jennifer C. Pizer

Counsel for Plaintiff and Real Party in  
Interest Guadalupe T. Benitez

## CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding tables and this certificate, but including any footnotes, the foregoing brief contains 1,193 words, based on the computer program used to prepare the brief, and that it is proportionately spaced and has a typeface of 13 points.

Dated: May 18, 2008

A handwritten signature in black ink, appearing to read "Jennifer C. Pizer", is written over a horizontal line.

Jennifer C. Pizer  
Attorney for Plaintiff and Real Party in Interest  
Guadalupe T. Benitez

## DECLARATION OF SERVICE

I, Jamie Farnsworth, declare:

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

**On May 19, 2008, I served copies of the attached document, described as SUPPLEMENTAL BRIEF OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ PURSUANT TO RULE 8.520(d), on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:**

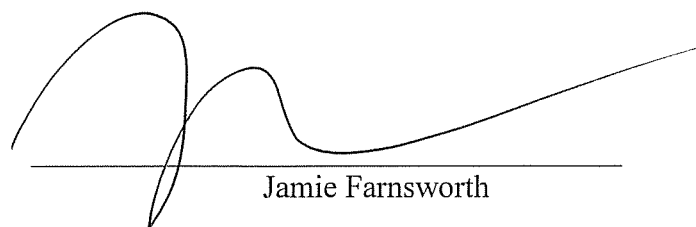
Robert Carlo Coppo, Esq. Andrew Todd Evans, Esq. Di Caro, Coppo and Popcke 2780 Gateway Rd Carlsbad, CA 92011 <i>Attorneys for Defendants</i>	James L. Hirsen SBD Group, Inc. 505 S Villa Real Dr #208 Anaheim Hills, CA 92807 <i>Attorney for Amici Curiae</i>	Steven R. Zatkan Stanley B. Watson Mark S. Zemelman Kaiser Foundation Health Plan, Inc. The Permanente Medical Group, Inc. One Kaiser Plaza, #2775 Oakland, CA 94612 <i>Attorneys for Amici Curiae</i>
Douglas L. Edgar, Esq. Timothy D. Chandler, Esq. Alliance Defense Fund 101 Parkshore Drive, Suite 100 Folsom, CA 95630 <i>Attorneys for Defendants</i>	Deborah Jane Dewart Attorney at Law 620 E. Sabiston Drive Swansboro, NC 28584-9674 <i>Attorney for Amici Curiae</i>	Antonette Benita Cordero Office of the Attorney General 300 So. Spring St., Suite 1702 Los Angeles, CA 90013 <i>Attorney for Amici Curiae</i>
Curtis A. Cole, Esq. Kenneth R. Pedroza, Esq. Matthew S. Levinson, Esq. Cole Pedroza LLP 200 S. Los Robles Avenue Suite 678 Pasadena, CA 91101-4006 <i>Attorneys for Defendants</i>	Karen D. Milam Attorney at Law P. O. Box 1613 Yucaipa, CA 92399 <i>Attorney for Amici Curiae</i>	Edwin Meese, III Peter Ferrara American Civil Rights Union 1600 Wilson Blvd., Suite 960 Arlington, VA 22209 <i>Attorneys for Amici Curiae</i>
Robert Henry Tyler, Esq. Jennifer Lynn Monk, Esq. Advocates for Faith and Freedom 24910 Las Brisas Road, Suite 110 Murietta, CA 92562 <i>Attorneys for Defendants</i>	Mailee R. Smith Americans United for Life 310 S. Peoria Street, Suite 500 Chicago, IL 60607 <i>Attorney for Amici Curiae</i>	Mitchell L. Lathrop Bridget K. Moorhead Duane Morris LLP 101 W. Broadway #900 San Diego, CA 92101-8285 <i>Attorneys for Amici Curiae</i>
Angela L. Padilla Elizabeth O. Gill Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105-2482 <i>Attorney for Amici Curiae</i>	Roger G. Ho Pacific Justice Institute 9851 Horn Road, Suite 115 County Civic Center Sacramento, CA 95827 <i>Attorney for Amici Curiae</i>	Shannon Minter Vanessa H. Eisemann Melanie Rowen Catherine Sakimura National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 <i>Attorneys for Amici Curiae</i>
	James F. Sweeney Stephen J. Greene Sweeney & Greene, LLP 9381 East Stockton Blvd., Suite 218 Elk Grove, CA 95624 <i>Attorneys for Amici Curiae</i>	

<p>John David Blair-Loy  ACLU Foundation of San Diego &amp;  Imperial Counties  P.O. Box 87131  San Diego, CA 92138  <i>Attorney for Amici Curiae</i></p> <p>Clare Pastore  ACLU Foundation of Southern  California  1616 Beverly Blvd.  Los Angeles, CA 90026  <i>Attorney for Amici Curiae</i></p> <p>James Dixon Esseks  ACLU Lesbian Gay Bisexual  Transgender Project  125 Broad Street, 18<sup>th</sup> Floor  New York, NY 10004  <i>Attorney for Amici Curiae</i></p> <p>Sondra Goldshein  ACLU Reproductive Freedom  Project  125 Broad Street, 18th Floor  New York, NY 10004  <i>Attorney for Amici Curiae</i></p> <p>Clerk of the Court  California Court of Appeals  Fourth Appellate District  Division One  750 B Street, #300  San Diego, CA 92101</p>	<p>Margaret C. Crosby  Alex M. Cleghorn  ACLU Foundation  39 Drumm Street  San Francisco, CA 94111  <i>Attorney for Amici Curiae</i></p> <p>Alan Jay Reinach  Public Affairs &amp; Religious Liberty  2686 Townsgate Road  Westlake Village, CA 91359  <i>Attorney for Amici Curiae</i></p> <p>Patrick T. Gillen  Thomas More Law Center  24 Frank Lloyd Wright Dr., POB 393  Ann Arbor, MI 48106  <i>Attorney for Amici Curiae</i></p> <p>Charles S. Limandri  Teresa L. Mendoza  P.O. Box 9120  Rancho Santa Fe, CA 92067  <i>Attorneys for Amici Curiae</i></p> <p>Honorable Judge Prager  San Diego Superior Court  330 West Broadway, Dept. 71  San Diego, CA 92101</p> <p>California Solicitor General  Office of the Attorney General  1300 "I" Street  P.O. Box 944255  Sacramento, CA 94244-2530</p>	<p>Alan Edward Brownstein  U. C. Davis School of Law  400 Mrak Hall  Davis, CA 95616  <i>Attorney for Amici Curiae</i></p> <p>Fred Blum  Bassi, Martini &amp; Blum  155 Sansome St., Suite 700  San Francisco, CA 94194  <i>Attorneys for Amici Curiae</i></p> <p>Richard D. Barton  John M. Morris  Higgs Fletcher &amp; Mack LLP  401 W "A" St #2600  San Diego, CA 92101  <i>Attorneys for Amici Curiae</i></p> <p>Samuel B. Casey  Gregory S. Baylor  Christian Legal Society  8001 Braddock Road, Suite 300  Springfield, VA 22151  <i>Attorneys for Amici Curiae</i></p> <p>Gail J. Standish  Peter E. Perkowski  Kyle R. Gehrman  Winston &amp; Strawn LLP  333 South Grand Ave., 38<sup>th</sup> Flr  Los Angeles, CA 90071  <i>Attorneys for Amici Curiae</i></p>
--	---	--

I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. 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.

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

Dated: May 19, 2008



\_\_\_\_\_

Jamie Farnsworth