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RELIGIOUSLY BASED DISCRIMINATION: STRIKING A BALANCE BETWEEN A HEALTH CARE PROVIDER'S RIGHT TO RELIGIOUS FREEDOM AND A WOMAN'S ABILITY TO ACCESS FERTILITY TREATMENT WITHOUT FACING DISCRIMINATION

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INTRODUCTION

A woman is having a difficult time becoming pregnant, but she desperately wants to have a child. She and her female partner live in a rural area and seek out the only physician in town to undergo intrauterine insemination, a fertility treatment that will increase her chances of becoming pregnant. The physician at the fertility center informs the woman that because of her religious beliefs, she refuses to perform intrauterine insemination on lesbian patients. The physician recommends that she find another provider. Should the physician be held liable for sexual orientation discrimination under state antidiscrimination laws, or should the physician be shielded from liability because performing the treatment on lesbian patients is against her religious beliefs?

Physicians who refuse to provide care based on reasons of conscience have three potential sources of protection: (1) the First Amendment,[1] which protects actions guided by sincerely held religious beliefs; (2) a state constitution's free exercise clause;[2] and (3) statutory protection granted by state and federal

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[1] U.S. CONST. amend. I.

[2] *See* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1089 (2008) (discussing the free exercise clauses in state constitutions).

legislatures, typically called "conscience clauses."[3] Historically, state conscience clauses have shielded physicians from discrimination by their employers when, for example, a physician refused to perform an abortion or sterilization procedure that violated the physician's firmly held religious or moral beliefs.[4] The scope of these clauses, however, have in some states been expanded to protect health care providers who refuse to perform any type of health care procedure that is against the practitioner's religious or moral beliefs and to afford the practitioner protection from civil or criminal liability.[5]

The hypothetical scenario presented above demonstrates the conflict of values that arises when a lesbian patient is refused treatment because of her sexual orientation by a physician who declines to treat her based on religious or moral grounds. The scenario pits an individual's right to religious freedom against the government's strong interest in protecting citizens from discrimination.

These values will increasingly clash because of the changing landscape of our society and our health care system. The number of homosexual women seeking fertility treatments is rising due to the increased ability of homosexuals to form civil unions, as well as technological advancements in the field of fertility treatment that afford more women the ability to undergo assisted reproductive technology ("ART"). These factors, along with patients' diminished ability to choose a fertility specialist whose moral or religious beliefs align with their own, will increasingly lead to frustration and tension between patients and providers within the field of fertility medicine. The significance of this final factor, restricted access to treatment, is due, at least in part, to the rise of health care management organizations ("HMOs"), which restrict a patient's ability to choose a health care provider and the increasing presence of religious-based health care systems, such as those run by the Catholic Church, that refuse to provide fertility treatments to homosexuals.

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[3] *See* Bruce Patsner, *Refusing To Treat: Are There Limits to Physician "Conscience" Claims?*, HEALTH L. PERSP., Aug. 19, 2008, at 2, http://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20conscience.pdf.

[4] *See infra* Part II.A (discussing the emergence of state conscience clauses).

[5] *See, e.g.*, 745 ILL. COMP. STAT. 70/2 (2008); W. VA. CODE. § 16-30-12 (2008).

Many physicians and religious organizations are pushing to increase the scope of conscience clauses to protect their rights to religious freedom and ensure that they are not subject to liability for refusing to provide reproductive services on certain protected classes of individuals such as lesbians. As lesbian patients begin to recognize this movement and learn that the law does not guarantee them access to ART,[6] they are fighting back to protect their ability to access fertility services without facing discrimination. They are also engaging in the debate over when and under what circumstances a physician or health care institution should be permitted to refuse to provide fertility services to certain classes of patients because of a conflicting moral or religious belief.

As the debate over the scope of conscience clauses continues, state legislatures need to reexamine their conscience clauses to ensure that they are appropriately tailored to balance these competing interests. This Note argues that state conscience clauses should shield health care providers from incurring civil, criminal, or administrative liability for blanket refusals to perform fertility treatments on any class of patients because it violates their religious or moral beliefs but posits that health care providers who make a conscience refusal to perform fertility treatments based on a patient characteristic, such as sexual orientation, should have statutory protection only in limited circumstances—specifically, protection should only be afforded to practitioners who work at religiously based health care facilities or sole practitioners who can refer patients with relative ease and convenience to another willing practitioner.

Part I provides the background for this discussion by highlighting important societal and healthcare developments that have fueled this debate. Part II maps the changing scope of state and federal conscience clauses and depicts the spectrum of conscience clauses among the states. The standard for claiming a moral or religious objection under these provisions is also explored. Part III discusses a recent Supreme Court of California case, *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*,[7] which demonstrates in a practical sense how state courts have balanced a physician's right to

[6] *See* Andrea D. Gurmankin et al., *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 61 (2005).

[7] 189 P.3d 959 (Cal. 2008).

religious freedom against a patient's ability to access fertility treatment without facing sexual orientation discrimination. Part III analyzes the United States Supreme Court standard that the California court applied in *North Coast* to determine whether the First Amendment right to freedom of religion should triumph over a conflicting state antidiscrimination law. It also delineates state and federal antidiscrimination laws and explores to what extent these laws have been upheld against a First Amendment right of religion defense in the context of other areas of law, such as employment and property law. Part IV discusses the American Medical Association's ("AMA") directives on conscience refusal and compares these standards to two state conscience clauses: one in accord with these standards and one at odds with them. The outcome of *North Coast* is discussed in the context of these broader conscience clauses that provide health care practitioners protection for refusing to provide any type of care based on a religious or moral belief. Part V makes recommendations to state legislatures on how to craft their conscience clauses in a manner reflective of the appropriate balance between these two competing interests. It then applies the proposed statute to a variety of scenarios to demonstrate its practical application.

I. TYPES OF FERTILITY TREATMENTS, ETHICS, AND THE SURROUNDING MEDICAL DEBATE

A. *Medical Background*

Infertility, a common medical problem that affects more than six million Americans,[8] is often treated with ART and artificial insemination. About twenty percent of infertile women seek fertility treatment with ART,[9] a field of medicine that has grown

[8] *See* Elizabeth Weil, *Breeder Reaction: Does Everybody Have the Right To Have a Baby? And Who Should Pay When Nature Alone Doesn't Work?*, MOTHER JONES, July/Aug. 2006, at 33, 33.

[9] *Id.* Between 1981 and 2005, approximately 177,000 infants were born in the United States with the help of ART. Gurmankin et al., *supra* note 6, at 61.

to a four-billion-dollar-a-year industry.[10] ART is defined as "all fertility treatments in which both eggs and sperm are handled."[11] An ART procedure

> involve[s] surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. [An ART procedure does not] include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or a procedure[] in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.[12]

Another common type of fertility treatment is intrauterine insemination, which is also referred to as artificial insemination.[13] This procedure involves the insertion of sperm into a woman's uterus through a catheter to facilitate fertilization.[14]

1. Medical Ethics

Lesbian women, who are part of the so-called "lesbian baby boom"[15] because of the increased number of lesbians who want to bear children, are being denied fertility treatments based on their sexual orientation even though there is no professional ethical restriction on providing this type of treatment.[16] One

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[10] Weil, *supra* note 8, at 34.

[11] CTR. FOR DISEASE CONTROL AND PREVENTION, DEP'T OF HEALTH AND HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY: HOME, http://www.cdc.gov/art/ (last visited Apr. 25, 2009).

[12] *Id.*

[13] *See* CTR. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT app. B (2001), http://www.cdc.gov/ART/ART01/appixb.htm.

[14] *See id.* Unlike heterosexual women who typically seek out these types of fertility treatments only when they are infertile, cannot find a willing partner, or lack the opportunity to mate with males, some lesbians seek out these fertility treatments simply because they are not attracted to males. *See* John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 325 n.9 (2004).

[15] *See* Paula Amato & Mary Casey Jacob, *Providing Fertility Services to Lesbian Couples: The Lesbian Baby Boom*, 2 SEXUALITY, REPROD. & MENOPAUSE 83, 83 (2004) (noting that health surveys reveal that approximately one-third to one-half of lesbian women of childbearing age plan to become parents, presumably implying that half of these women will try to become pregnant).

[16] The Ethics Committee of the American Society for Reproductive Medicine has declared that fertility "[p]rograms should treat all requests for assisted reproduction equally without regard to marital status or sexual orientation." The Ethics Comm. of

study published in *Fertility and Sterility* in 2005 revealed that a hypothetical lesbian candidate would be very or extremely likely to be excluded from seventeen percent of ART programs, and a woman without a husband or partner would be very or extremely likely to be turned away by twenty percent of ART programs.[17] Twelve countries completely ban unmarried women from undergoing ART.[18] Additionally, ensuring access to fertility treatment for lesbian women may be especially important because one clinical research study has indicated that lesbian women, as compared to heterosexual women, are almost four times as likely to have polycystic ovary syndrome, a condition that makes a woman more likely to miscarry and decreases her ability to bear a child.[19]

B. Factors Fueling the Debate

There are three main factors that have brought the current discussion over lesbian patients accessing fertility treatment to the forefront of debate. The first of these factors is society's increasing acceptance of homosexual couples forming families—an expanding number of states now allow homosexuals to form civil unions or enter into same-sex marriages. The second factor is the growth of religious health care systems that typically refuse to provide any type of ART and often deny homosexuals the limited fertility services that they do provide. The third factor fueling this debate is the proliferation of HMOs. These

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the Am. Soc'y for Reprod. Med., Am. Soc'y for Reprod. Med., *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 86 FERTILITY & STERILITY 1333, 1333 (2006).

[17] Gurmankin et al., *supra* note 6, at 65 tbl.6. The study did not attempt to explain the rationale for these refusals; however, it did note that regional variability was likely, in part, due to variations in "local mores, religious beliefs, and religiosity." *Id.* at 66–67.

[18] *See* Judy E. Stern et al., *Attitudes on Access to Services at Assisted Reproductive Technology Clinics: Comparisons with Clinic Policy*, 77 FERTILITY & STERILITY 537, 537 (2002) (noting specifically that Ireland, India, and Saudi Arabia, among nine other countries, do not allow ART treatment of unmarried women).

[19] *See* Rina Agrawal et al., *Prevalence of Polycystic Ovaries and Polycystic Ovary Syndrome in Lesbian Women Compared with Heterosexual Women*, 82 FERTILITY & STERILITY 1352, 1355 (2004). The study noted that, "women with [polycystic ovary syndrome] may miscarry at a rate of approximately [forty percent], compared with a [fifteen percent] rate in the general population"; however, it also noted that "[a]lthough there may [sic] a higher incidence of subfertility in lesbian women related to their [polycystic ovary syndrome], in our study, the pregnancy rates were similar in both groups of women when matched for age." *Id.* at 1356.

last two factors restrict a woman's ability to access treatment, while the rising number of civil unions is increasing demand for treatment.

1. Civil Unions and Same-Sex Marriages

The first factor, the increasing number of states granting same-sex couples the same or similar state-recognized rights as married couples,[20] provides same-sex couples greater family stability and security.[21] This will likely encourage more same-sex couples to want children. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire now allow same-sex marriages, and New Jersey allows civil unions.[22] States that recognize domestic partnerships, which grant homosexual couples many of the same state rights as married couples, now include California, Oregon, and Nevada.[23]

2. Religious Health Care Systems

The second factor, one which restricts a lesbian's access to fertility treatment, is the proliferation of religiously controlled hospital systems that provide limited fertility services. Many of these systems are owned by the Catholic Church and refuse to provide ART to any patient[24] and specifically forbid performing artificial insemination on homosexuals.[25] The *Ethical and Religious Directives for Catholic Health Care Services* guides the

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[20] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS, http://www.ncsl.org/programs/cyf/samesex.htm (last visited Apr. 25, 2009).

[21] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 415, 474 (Conn. 2008) (legalizing same-sex marriage in Connecticut and noting that "[a] primary reason why many same sex couples wish to marry is so that their children can feel secure in knowing that their parents' relationships are as valid and as valued as the marital relationships of their friends' parents.").

[22] *See* NAT'L CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS, http://www.ncsl.org/programs/cyf/samesex.htm (last visited Jan. 26, 2010). The District of Columbia has also passed a same sex marriage law, which is now under Congressional review. *Id.*

[23] *Id.*

[24] ART is banned under Catholic directives because it is considered a "technique used to achieve extra-corporeal conception." *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (4th ed. 2001) (Directive No. 41), *available at* www.usccb.org/bishops/directives.shtml.

[25] *See id.* (directives Nos. 40, 41).

care rendered at Catholic health care systems.[26] These directives provide, in part, that artificial insemination using sperm from a non-spouse donor is never acceptable, and artificial insemination from a spouse should not be performed when it "separates procreation from the marital act in its unitive significance,"[27] meaning that the Catholic Church does not condone artificial insemination between spouses "if the sample is obtained and handled by non-licit means ([a] masturbated specimen)."[28] It does, however, condone the collection of sperm for use in artificial insemination if the sperm is obtained from a perforated condom after normal intercourse between a husband and a wife.[29]

Catholic health care institutions that refuse to provide these fertility treatments have an ever-increasing presence in health care. Catholic institutions represent the largest group of non-profit hospitals in the United States.[30] From 1990 to 1998, there were 127 mergers and affiliations between Catholic and non-Catholic hospitals.[31] Approximately half of these mergers eliminated all or some reproductive health services.[32] In 1998, ninety-one Catholic hospitals were sole providers for health care services, meaning the hospital was the only hospital in the

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[26] *See generally id.* (pt. 4, para. 1) (noting that "[t]he Church's commitment to human dignity inspires an abiding concern for the sanctity of human life from its very beginning" and that "[t]he Church cannot approve medical practices that undermine the biological, psychological, and moral bonds on which the strength of marriage and the family depends.").

[27] *Id.*(directives Nos. 40, 41).

[28] U.S. CONFERENCE OF CATHOLIC BISHOPS, REPRODUCTIVE TECHNOLOGY (EVALUATION & TREATMENT OF INFERTILITY) GUIDELINES FOR CATHOLIC COUPLES(1) (1999), http://www.usccb.org/prolife/issues/nfp/treatment.htm.

[29] *See id.*

[30] Susan Berke Fogel & Lourdes A. Rivera, *Saving* Roe *Is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 729–30 (2004).

[31] LIZ BUCAR, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH (1999), http://www.catholicsforchoice.org/topics/healthcare/documents/1998cautioncatholichealthrestrictions.pdf; *see also* Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1070–71 (2000) (explaining that mergers between Catholic and non-religious hospitals often result in a trade-off: It permits some communities to retain basic health services that were in financial jeopardy, but it sacrifices a significant portion of their reproductive health services).

[32] Minow, *supra* note 31, at 1070–71.

county.[33] By 2004, Catholic health care systems controlled twenty percent of all hospital beds in the United States.[34]

Other religions, such as Islam, forbid the use of fertility treatments on lesbian patients, but unlike the Catholic Church, they do not own a commanding control of our health care system.[35] Individual practitioners who follow Islam and hold moral objections to performing fertility treatment on lesbians do, however, create another barrier for lesbians seeking fertility treatment.

3. The Proliferation of Health Maintenance Organizations

The third factor fueling this debate is the proliferation of managed care organizations—a factor that restricts patient autonomy by limiting their ability to choose a health care provider.[36] A limited choice of health care providers will "compound the current tensions between religious autonomy in providing health care and patient choice of provider and treatment."[37] As one commentator has noted, "[t]he issue of hospital provider choice is central to the balance of patient rights and organizational imperatives where religiously affiliated hospitals enter into participatory contractual arrangements with general service [health maintenance organizations] as medical service providers."[38]

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[33] BUCAR, *supra* note 31.

[34] *See* Fogel, *supra* note 30, at 730.

[35] Catholicism and Islam are at least two religions that formally reject the use of fertility treatment for homosexuals. *See* Reza Omani Samani et al., *Access to Fertility Treatments for Homosexual and Unmarried Persons, Through Iranian Law and Islamic Perspective*, 1 IRANIAN J. FERTILITY & STERILITY 127, 130 (2007) (asserting that under Islam, "fertility treatment is restricted to heterosexual married couples"); *supra* text accompanying notes 24–29 (discussing the Catholic directives banning reproductive technologies and prohibiting unmarried couples from undergoing fertility treatment).

[36] *See* William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 457 (2001).

[37] Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1505 (1995).

[38] Bassett, *supra* note 36, at 458–59.

Further complicating access to fertility treatment, some state conscience clause provisions have allowed health insurance companies to avoid covering fertility services that are against the company's religious or moral beliefs.[39] Twelve states, however, require that insurers cover infertility treatment.[40]

II. MAPPING THE DEVELOPMENT OF CONSCIENCE CLAUSES

A. *An Analysis of State and Federal Conscience Clauses*

This Section discusses the history of conscience clauses and tracks their expanding scope of protection. A conscience clause, also referred to as a "refusal clause," "refers to any statute or regulation providing explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs."[41] The depth and scope of protection afforded by these clauses varies greatly among the states.[42] The flexibility states have in drafting their conscience clauses is a result of these provisions being "neither constitutionally mandated by the Free Exercise Clause, nor constitutionally forbidden by the Establishment Clause."[43] These clauses can protect employees who decline to provide abortions, sterilizations, and other enumerated procedures from firing, demotion, and professional sanctions.[44] They can also protect "religious hospitals and health care institutions from any obligation to perform the contested

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[39] *See, e.g.*, MISS. CODE ANN. § 41-107-3 (2008). This provision is the broadest example of a state conscience clause providing protection for health insurance institutions.

[40] NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO INSURANCE COVERAGE FOR INFERTILITY TREATMENT, http://www.ncsl.org/programs/health/50infert.htm (last visited Apr. 25, 2009) (summarizing state statutes requiring insurance coverage for either infertility treatment or in vitro fertilization); *see, e.g.*, CAL. INS. CODE § 10119.6 (West 2008) (requiring insurers to provide coverage for infertility treatments).

[41] Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 178 (1993).

[42] *See* Martha S. Swartz, *"Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269, 284–86 (2006).

[43] *Id.* at 327.

[44] LESLIE C. GRIFFIN, LAW AND RELIGION 114 (Foundation Press 2007).

service."[45] Additionally, they can shield health care facilities and individual health care practitioners from liability due to lawsuits by patients.[46]

Conscience clauses were first enacted at the state and federal levels following *Roe v. Wade,*[47] the United States Supreme Court decision holding that a woman's decision to undergo an abortion is constitutionally protected by the right to privacy,[48] and *Taylor v. St. Vincent's Hospital,*[49] the district court decision that ordered a Catholic hospital to perform a tubal ligation in violation of its Catholic directives.[50] Following *Taylor* and the resulting debate over whether receipt of federal funds required the recipients of such funds to provide abortions or sterilizations, Congress passed the Church Amendment to the Health Programs Extension Act of 1973, declaring that a hospital that receives federal funding is not a state actor.[51] Under this provision, the court could not order a hospital that receives federal funding to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."[52] The

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[45] *Id.* at 114.

[46] *Should Conscience Be Your Guide? Exploring Conscience-Based Refusals in Health Care*, L. & HEALTH CARE NEWSL., Fall 2006, at 12, 13. These types of conscience clauses are often referred to as "horizontal conscience clauses" because they protect health care facilities and individual health care practitioners from suit by patients. *Id.* Conscience clauses that protect health care providers from coercion by the government or employers are often referred to as "vertical conscience clauses." *Id.*

[47] 410 U.S. 113 (1973).

[48] *Id.* at 154.

[49] 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

[50] *Id.* at 949–51. The plaintiff requested a sterilization procedure during her cesarean section, but St. Vincent's Hospital refused her request because it violated the *Ethical and Religious Directives for Catholic Hospitals*. *Id.* at 949. The patient and her husband claimed that their constitutional rights were violated and sued under 42 U.S.C. § 1983, claiming that because the hospital received federal funding to help pay for its construction under the Hill-Burton Act, the hospital was a state actor. *Id.* Congress responded by passing the Church Amendment to the Health Programs Extension Act of 1973, allowing the district court to declare that the hospital was not a state actor and thereby refuse jurisdiction. *Id.* at 950.

[51] *See* 42 U.S.C. § 300a-7 (2006). This amendment allowed the district court in *Taylor* to dissolve the injunction against St. Vincent's Hospital because the hospital was no longer a state actor. *See Taylor*, 369 F. Supp. at 950.

[52] 42 U.S.C. § 300a-7(b)(2)(A). The second conscience provision in the Church Amendments prohibits an employer who receives certain federal funding from

Church Amendment's protection was expanded in 1974 to include protection for religious or moral objections to perform *any health service* in which a hospital received funds from the Secretary of Health, Education, and Welfare.[53]

In addition to conscience clauses promulgated by the federal government that imposed restrictions on facilities as conditions to receive federal funding,[54] most states enacted conscience clauses to provide additional protection for their citizens. Many religious groups, including Catholics, Mormons, Seventh-Day Adventists, Baptists, and Muslims, morally objected to abortions and demanded conscience clauses at the state level to protect health care providers' rights to freely exercise their religions by shielding them from liability or discriminatory treatment for refusing to perform abortions.[55] Forty-five states adopted conscience clauses in response to these demands for greater religious protection.[56] While some states limited their conscience clauses to abortion,[57] other states also included sterilization procedures.[58]

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discriminating against a physician or other health care personnel for either performing a lawful sterilization procedure or abortion or refusing to perform these procedures because of his or her religious or moral convictions. *See id.* § 300a-7(c)(1). Another provision in the Church Amendments prohibits any entity that receives certain federal funding from discriminating against, "any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions." *Id.* § 300a-7(e). The Act also prohibits discrimination against health care personnel who refuse to perform any lawful health service or research activity funded by the Department of Health and Human Services because it is contrary to his or her religious beliefs or moral convictions. *Id.* § 300a-7(c)(2).

[53] *See id.* § 300a-7(d).

[54] *See supra* notes 52–53 and accompanying text (discussing federal conscience clauses).

[55] GRIFFIN, *supra* note 44, at 115.

[56] *Id.* Alabama, Vermont, New Hampshire, West Virginia, and Mississippi are the five states that did not enact conscience clauses in response to these events. *Id.* Of note, some of these states, such as Mississippi, later adopted a conscience clause provision. *See, e.g.*, MISS. CODE ANN. § 41-107-5 (2008) (enacted 2004). New Mexico and Oregon had conscience clauses for "therapeutic abortions" prior to *Roe v. Wade*. *See* N.M. STAT. § 30-5-2 (2009) (enacted 1969); OR. REV. STAT. § 435.485 (2008) (enacted 1969).

[57] *See, e.g.*, MICH. COMP. LAWS. § 333.20182 (2008); NEV. REV. STAT. § 632.475 (2008).

[58] *See* N.J. STAT. ANN. § 2A:65A-1 (West 2009); R.I. GEN. LAWS § 23-17-11 (2008).

After the early 1970s, the scope of conscience clauses continued to expand due to three factors impacting the health care system. First, in the mid-1970s, state legislatures reacted to a public outcry for living wills in response to the case of Karen Quinlan[59] and began passing the "Natural Death Acts."[60] Included in many of these Acts are provisions permitting health care providers to forego complying with a patient's health care decision regarding end of life care if it is "contrary to the individual provider's sincerely held religious beliefs or sincerely held moral convictions."[61] Second, in the mid-1990s, a second wave of conscience clauses was prompted by the Clinton Administration's promise of universal health coverage that would afford individuals a right to a basic set of health care services.[62] Religiously affiliated health care systems sought protection to avoid being required to provide some of the services included in the proposal.[63] Although the push for universal health coverage failed and American citizens—who are not inmates in the federal prison system—have no federal right to health care coverage,[64] the debate over conscience clauses remains.

The third factor creating the push to expand the scope of conscience clauses was the Supreme Court decision of *Employment Division v. Smith*,[65] which eroded the ability of health care providers to claim a religious exemption for refusing to treat a patient based upon a First Amendment freedom of

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[59] *See In re* Quinlan, 355 A.2d 647, 651 (N.J. 1976) (noting that the issue before the court involved parents of a woman in a persistent vegetative state seeking discontinuance of all medical procedures sustaining her life).

[60] These provisions allowed individuals to prepare living wills that directed their care providers regarding their desired end-of-life wishes. *See* Swartz, *supra* note 42, at 282.

[61] W. VA. CODE § 16-30-12(b) (2008); *see also* ALASKA STAT. § 13.52.060(e) (2008); N.H. REV. STAT. ANN. § 137-J:7(II) (2008).

[62] CATHERINE WEISS ET. AL., ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 1 (2002), http://www.aclu.org/FilesPDFs/ACF911.pdf.

[63] *Id.*

[64] *See* Patsner, *supra* note 3, at 3.

[65] 494 U.S. 872, 881–82 (1990) (establishing that a neutral law of general applicability would not be struck down as a violation of the Free Exercise Clause unless a "hybrid" claim was asserted); *see infra* text accompanying notes 139–141 (discussing the *Smith* case and "hybrid" claims).

religion claim.[66] With less constitutional protection, religious organizations sought additional statutory protection from their state legislatures.

Currently, almost every state has enacted a conscience clause that covers abortion or sterilization procedures,[67] and many include services related to contraception.[68] Other types of treatment included in state conscience clauses include assisted reproduction,[69] euthanasia,[70] and termination of life support.[71] Many conscience clauses provide protection for health care providers and not just physicians.[72] The broadest category of conscience clauses, which permit health care providers to refuse to participate in any type of health care procedure, has fueled the most debate.[73] To appreciate the true scope of these conscience

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[66] *Smith*, 494 U.S. at 882.

[67] *See* GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1, http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (last visited Apr. 25, 2009) (delineating the state policies allowing providers to refuse to perform certain services and noting that, "46 states allow some health care providers to refuse to provide abortion services," and "17 states allow some health care providers to refuse to provide sterilization services").

[68] *Id.* ("13 states allow some health care providers to refuse to provide services related to contraception.").

[69] *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2009) ("A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy.").

[70] *See, e.g.*, S.D. CODIFIED LAWS § 36-11-70 (West 2009) ("No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to . . . [c]ause the death of any person by means of an assisted suicide, euthanasia, or mercy killing.").

[71] *See, e.g.*, N.H. REV. STAT. ANN. § 137-J:7(II) (2008).

[72] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420(a) (West 2009) (including within the protective scope of its conscience clause "a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic"). Many state conscience clauses have expanded from permitting only individual providers from refusing to provide a service to permitting an institution or insurer to refuse to provide a service based on a religious or moral belief. *See* Rachel Benson Gold & Adam Sonfield, *Refusing To Participate in Health Care: A Continuing Debate*, 3 GUTTMACHER REP. ON PUB. POL'Y, Feb. 2000, at 8, 9, *available at* http://www.guttmacher.org/pubs/tgr/03/1/gr030108.pdf.

[73] *See, e.g.*, 745 ILL. COMP. STAT. 70/3(a) (2008) (defining health care to include "any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons"); MISS. CODE ANN. § 41-107-3(a) (2008) (permitting refusal for "any phase of patient medical care,

clauses, an examination of what constitutes a religious or moral objection is required.

B. *Defining a Religious or Moral Objection*

States differ as to what is required to justify a religious or moral refusal to provide medical treatment, prompting critics to call them "refusal statutes."[74] As of 1993, more than one-third of the jurisdictions in the United States did not define what constituted an acceptable conscientious objection.[75] Many states require no explanation as to why the health care provider refuses to participate in treatment.[76] West Virginia's conscience clause pertaining to end-of-life treatment raises the bar and requires a "sincerely held religious belief[]" or a "sincerely held moral conviction[]."[77] While some states like New York and South Carolina require written notice of the moral or religious objection, only New York requires that the reasons for the objection be included in the notice, whereas South Carolina does not.[78]

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treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions"); WASH. REV. CODE ANN. § 70.47.160 (West 2009) ("No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.").

[74] *See* Swartz, *supra* note 42, at 292–93.

[75] *See id.*

[76] *See, e.g.*, ALASKA STAT. § 18.16.010(b) (2008) (stating "[n]othing in this section requires a hospital or person to participate in an abortion"); N.J. STAT. ANN. § 2A:65A-1 (West 2009) (declaring that "[n]o person shall be required to perform or assist in the performance of an abortion or sterilization").

[77] *See* W. VA. CODE. § 16-30-12 (2008).

[78] See N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 2008) (stating that "any person . . . may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital, person, firm, corporation or association"); S.C. CODE ANN. § 44-41-50(a) (2008) (instructing that notice of objection "will suffice without specification of the reason therefor").

III. *NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC. V. SAN DIEGO COUNTY SUPERIOR COURT*: A CLASH BETWEEN THE FIRST AMENDMENT FREEDOM OF RELIGION AND ANTIDISCRIMINATION LAWS

The problem this Note addresses—the conflict between a health care provider's right to refuse to provide medical treatment based on a religious or moral belief and a patient's ability to access fertility treatment without facing sexual orientation discrimination—is exemplified in a recent Supreme Court of California case, *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*.[79] *North Coast* was decided without reference to California's conscience clause because, unlike other states such as Mississippi[80] and Illinois,[81] which afford health care providers broad statutory immunity for refusing to provide any type of medical treatment based on a provider's religious or moral belief, California's conscience clause only insulates health care providers from liability for refusing to perform abortions[82] and was inapplicable to a case involving fertility treatment. The case, therefore, demonstrates the level of constitutional protection afforded to physicians at a secular group medical practice when their conscience refusal falls outside the protective scope of a state conscience clause. As elaborated upon in Part V.A.3 of this Note, the outcome of this case would be the same if the legislative recommendations set forth in Part V are adopted by state legislatures because the suggested statutory provision excludes from its protective scope health care practitioners who work for a secular group medical practice and refuse to provide a fertility treatment because of a patient's sexual orientation.

A. *The Case of Guadalupe Benitez*

In *North Coast*, a patient, Guadalupe Benitez, sued North Coast Women's Care Medical Group ("North Coast") and two of its physicians, Drs. Brody and Fenton, for damages and injunctive relief, claiming that she was discriminated against and refused infertility treatment based on her sexual

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[79] 189 P.3d 959 (Cal. 2008).

[80] *See* MISS. CODE ANN. § 41-107-5(2) (2008).

[81] *See* 745 ILL. COMP. STAT. 70/2 (2008).

[82] CAL. HEALTH & SAFETY CODE § 123420(a) (West 2008).

orientation—a violation of California's Unruh Civil Rights Act.[83] Defendants asserted as an affirmative defense their rights of freedom of religion and free speech under federal and state constitutions.[84] The Supreme Court of California held that these defenses would not exempt the defendants from complying with the Unruh Civil Rights Act, which prohibits sexual orientation discrimination.[85]

Ms. Benitez was a lesbian woman who lived with her partner, Joanne Clark.[86] After deciding that they wanted to raise a family, Ms. Benitez began performing intravaginal self-insemination, "a nonmedical process in which a woman inserts sperm into her own vagina"[87] using sperm from a sperm bank.[88] After intravaginal self-insemination proved unsuccessful,[89] she sought fertility treatment at defendant North Coast.[90] North Coast was selected as a treatment facility because it was covered under Ms. Benitez's employee health plan.[91] Ms. Benitez notified defendant Dr. Christine Brody, an obstetrician and gynecologist, during their first patient-physician meeting that Ms. Benitez was a lesbian.[92] Dr. Brody informed Ms. Benitez and her partner that intrauterine insemination ("IUI")[93] might become necessary if Ms. Benitez wanted to conceive.[94] Allegedly, Dr. Brody also

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[83] *N. Coast*, 189 P.3d at 964. Although the Unruh Civil Rights Act did not expressly list sexual orientation as a prohibited basis for discrimination during the relevant time period from 1999–2000, the court noted that "California's reviewing courts had, in a variety of contexts, described the Act as prohibiting sexual orientation discrimination." *Id.* at 965. The Unruh Civil Rights Act was later amended to expressly include marital status and sexual orientation as protected groups. *See* N. Coast Women's Care Med. Group, Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 643 n.9 (Cal. Ct. App. 2006), *rev'd*, 189 P.3d 959 (Cal. 2008).

[84] *N. Coast*, 189 P.3d at 964. California's Constitution provides in part, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." CAL. CONST. art. I, § 4.

[85] *N. Coast*, 189 P.3d at 970.

[86] *Id.* at 963.

[87] *Id.*

[88] *Id.*

[89] Ms. Benitez "was diagnosed with polycystic ovarian syndrome, a disorder characterized by irregular ovulation." *Id.*

[90] *Id.*

[91] N. Coast Women's Care Med. Group, Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 639 (Cal. Ct. App. 2006), *rev'd*, 189 P.3d 959 (Cal. 2008).

[92] *N. Coast*, 189 P.3d at 963.

[93] IUI occurs when a physician inserts semen into a women's uterus via a catheter that is threaded through a patient's cervix. *Id.*

[94] *Id.*

stated that her religious beliefs would preclude her from performing this procedure on Ms. Benitez because Ms. Benitez was a lesbian.[95] Importantly, there was a factual dispute over whether Dr. Brody refused to perform the IUI because Ms. Benitez was unmarried (as Dr. Brody claimed) or because Ms. Benitez was a lesbian (as Ms. Benitez claimed).[96] This dispute was significant because at the time of the alleged discrimination, California's Unruh Civil Rights Act prohibited discrimination based on sexual orientation, but it did not prohibit discrimination based on marital status.[97] Dr. Brody was, however, willing to provide other obstetrical and gynecological care aside from IUI.[98] According to Dr. Brody, she informed Ms. Benitez that two other physicians in her practice, Drs. Stoopack and Langley, did not hold the same religious beliefs and would be willing to perform the IUI procedure on Ms. Benitez if she required the procedure to become pregnant.[99] According to Ms. Benitez, however, Dr. Brody informed her that " 'all other members of her practice—whom she believed lacked her bias—would be available' " to perform the IUI.[100]

Ms. Benitez continued to receive fertility treatment with Dr. Brody.[101] Eventually, IUI became the next step in the treatment plan.[102] Due to a miscommunication among the North Coast physicians over the type of procedure Ms. Benitez desired, Dr. Fenton ultimately referred Ms. Benitez to an outside physician so she could receive IUI treatment—he did not believe that any capable physician at North Coast would be willing to perform the desired procedure on Ms. Benitez because it would violate their

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[95] *Id.* at 963 & n.1.

[96] *Id.* at 963 n.1.

[97] *Id.*

[98] *See* N. Coast Women's Care Med. Group, Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 639 n.2 (Cal. Ct. App. 2006), *rev'd*, 189 P.3d 959 (Cal. 2008).

[99] *N. Coast*, 189 P.3d at 963.

[100] *Id.*

[101] *Id.* During this period of continued treatment, Ms. Benitez received Clomid (an ovulation-inducing medicine), had a hysterosalpingiogram to determine if her fallopian tubes were blocked, and underwent a diagnostic laparoscopy surgical procedure to evaluate her for potential endometriosis. *Id.* " 'Endometriosis is a condition in which tissue similar to the lining of the uterus' occurs on the ovaries, the fallopian tubes, or elsewhere in the body. Between [thirty] and [forty] percent of women with this condition may suffer from infertility." *Id.* at 963 n.2.

[102] *Id.* at 963–64.

firmly held religious or moral beliefs.[103] This refusal to treat was not only emotionally troubling for Ms. Benitez but also financially troubling because the treatment she received under the care of her new physician was not covered by her insurance policy.[104] Her financial concerns were mitigated, however, after her insurance company made an exception and allowed her to receive treatment with an out-of-network provider.[105]

Ms. Benitez moved for summary adjudication on defendant's affirmative defense of constitutional free exercise of religion.[106] The trial court granted summary adjudication, "ruling that neither the federal nor the state Constitution provides a religious defense to a claim of sexual orientation discrimination under California's Unruh Civil Rights Act."[107] The court limited the adjudication of plaintiff's claim to sexual orientation discrimination, allowing the defendants to offer evidence at trial that the physicians refused to treat Ms. Benitez on other grounds, such as marital status.[108] The defendants appealed the decision to the court of appeals, where the motion was denied on the grounds that summary adjudication was improper because there was a dispute over a material issue of fact—whether Ms. Benitez was refused treatment by North Coast physicians because of her sexual orientation or her marital status[109]—and granting the motion would, therefore, be contrary to the statutory requirements for summary adjudication because it did not completely dispose of the affirmative defense.[110]

The case was eventually appealed to the Supreme Court of California, where the issue was framed as whether "the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, *exempt* a medical

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[103] *Id.* Dr. Brody did make a notation that Ms. Benitez opted for the sperm bank sperm instead of the fresh sperm, but this documentation was placed in Dr. Brody's inbox, instead of Ms. Benitez's medical chart, by Dr. Brody's secretary who was awaiting Dr. Brody's return from vacation. *Id.* As a result of this, Dr. Fenton was unaware of this information. *Id.*

[104] *See* N. Coast Women's Care Med. Group, Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 641 (Cal. Ct. App. 2006), *rev'd*, 189 P.3d 959 (Cal. 2008).

[105] *Id.* Ms. Benitez ultimately became pregnant using in vitro fertilization while under the care of the out-of-network provider. *Id.*

[106] *N. Coast*, 189 P.3d at 962–63.

[107] *Id.* at 964.

[108] *Id.* at 968.

[109] *N. Coast*, 40 Cal. Rptr. 3d at 647–48.

[110] *See N. Coast*, 189 P.3d at 962–63.

clinic's physicians from complying with the California Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation."[111] The court answered with a unanimous "no"[112] and held that the defendants' "constitutional rights to free speech and the free exercise of religion [did not] exempt them from complying with the Unruh Civil Rights Act's prohibition against sexual orientation discrimination."[113] The defendants remained free to present evidence at trial that their religious objection was based on Ms. Benitez's marital status as a single woman and not her sexual orientation.[114]

The concurring opinion suggested in dicta that if the defendant was a sole practitioner, rather than a group medical practice, the physician's right of religion may outweigh the state's interest in preventing sexual orientation discrimination.[115] The outcome should be different because requiring the sole practitioner to provide treatment against his religious or moral beliefs would not be the means " 'least restrictive' on religion of furthering the state's legitimate interest," "[a]t least where the patient could be referred with relative ease and convenience to another practice."[116]

B. Constitutional Challenges to the Free Exercise of Religion

In determining the appropriate scope of state conscience clauses, an in-depth examination of the religious protections afforded by the First Amendment is necessary. The First Amendment is often the source of religious protection afforded to health care providers in states where the scope of the state's conscience clause does not include protection for refusals to perform the type of treatment at issue.[117] This Section will

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[111] *Id.* at 962.

[112] *Id.*

[113] *Id.* at 970. In rejecting defendants' claimed violation of their right to free speech, the court determined that "[Ms. Benitez's] conduct as complained of by defendants does not fall within the ambit of the First Amendment." *Id.* at 968.

[114] *Id.* at 970.

[115] *Id.* at 971 (Baxter, J., concurring).

[116] *See id.*

[117] *See id.* at 968–69 (implementing the First Amendment constitutional standard to determine the level of protection the California Constitution provided because there was no standard set forth by the state). Of note, some state constitutions may be additional sources of protection for right of religion claims; however, that discussion is beyond the scope of this Note. For a more complete discussion of state constitutions as sources of religious protection, see Michael W.

discuss how the United States Supreme Court has interpreted the First Amendment right of religion in determining whether this constitutional right should prevail when it conflicts with state law.

The Free Exercise Clause of the First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[118] This provision is applicable to the states by its incorporation into the Fourteenth Amendment.[119] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[120] This prohibits "any governmental regulation of religious beliefs."[121]

An individual's right to perform or to refuse certain physical acts of religion is treated differently than an individual's right to believe: The right to believe is always constitutional, while the right to perform or refuse to perform physical acts of religion must withstand additional analysis to determine whether the act is constitutionally protected.[122] The Supreme Court elaborated on this principle and asserted in *Reynolds v. United States*[123] that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[124] Laws that restrict physical acts performed or objected to because of a religious belief are divided into two categories: "valid and neutral law[s] of general applicability,"[125] where the prohibition of the exercise of religion is "but merely the incidental effect of a generally applicable and otherwise valid provision,"[126] and laws that target the exercise of religion.[127] This is an important distinction because courts treat

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McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455–66 (1990).

[118] U.S. CONST. amend. I.

[119] *See* Employment Div. v. Smith, 494 U.S. 872, 876–77 (1990). This case was superseded by the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, which was later invalidated by *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), thereby restoring the validity of *Smith* on this point of law. *See also infra* notes 148–53 and accompanying text.

[120] *Smith*, 494 U.S. at 877.

[121] *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[122] *See Smith*, 494 U.S. at 877–78.

[123] 98 U.S. 145 (1878).

[124] *Id.* at 166.

[125] *Smith*, 494 U.S. at 879 (internal quotation mark omitted).

[126] *See id.* at 878.

[127] *See id.* at 877–78.

them very differently under a First Amendment analysis. State laws that target the exercise of religion will always be unconstitutional,[128] but neutral state laws of general applicability are analyzed under the standard set forth in *Employment Division, Department of Human Resources v. Smith*.[129]

The initial standard for determining when the First Amendment right of religion can trump a neutral law of general applicability was set forth in *Sherbert v. Verner*.[130] Under this standard, a state had to show a "compelling state interest" to justify infringing on a general law that burdens "certain overt acts prompted by religious beliefs or principles."[131] A compelling interest would not be demonstrated by "showing merely . . . a rational relationship to some colorable state interest . . . ; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' "[132]

Under the "compelling interest" standard established in *Sherbert*, the Court held that it was a violation of the Free Exercise Clause to require a Seventh-Day Adventist to abandon her religious convictions and work on Saturday, her Sabbath, in order to be eligible for state unemployment benefits.[133] The Court considered three factors in its analysis: (1) whether the restriction imposed on the employee impinged on her free exercise of religion; (2) whether the restriction served a compelling state interest; and (3) whether the restriction was sufficiently tailored to minimize the intrusion on the employee's First Amendment right of religion.[134] Applying these factors, the Court determined that the unemployment ineligibility provision impermissibly impinged on the employee's right to exercise her religion freely, even though it did so indirectly.[135] After

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[128] *Id.*

[129] *See id.* at 876–79 (describing the standard used for assessing the constitutionality of neutral state laws).

[130] 374 U.S. 398, 403 (1963). A discussion of this earlier "compelling interest" standard set forth by the Court in *Sherbert* is important for understanding the subsequent case discussions in Part D of this Section.

[131] *See id.* at 403 (internal quotation mark omitted).

[132] *Id.* at 406 (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[133] *Id.* at 409–10.

[134] *See id.* at 403, 406–07.

[135] *Id.* at 403–04.

establishing that there was no compelling state interest, the court ruled that the provision was unconstitutional.[136]

The level of First Amendment protection afforded to individuals under the *Sherbert* standard was diminished in *Smith*.[137] Following *Smith*, for an individual who is charged with violating a "neutral, generally applicable law" successfully to assert a Free Exercise Clause defense, they must assert a "hybrid" claim, meaning that they must assert another constitutional protection in conjunction with the Free Exercise Clause in order to prevail.[138] For example, a hybrid claim can prevail if a violation of the Free Exercise Clause is demonstrated in conjunction with a violation of free speech or freedom of the press.[139] The state, however, is not required to provide religious accommodations for neutral laws of general applicability that do not infringe on other constitutional rights.[140]

Although the ruling in *Smith* limited the amount of constitutional protection afforded under a right of religion claim against a neutral law of general applicability, the Court expressly noted that because an action is not constitutionally protected, it does not follow that the act is undesirable or should not be permitted.[141] Instead, the Court noted that religious accommodation should be left to the political process.[142]

In *Smith*, the claimants failed to assert a hybrid claim as a defense to a neutral law of general applicability; therefore, the First Amendment Free Exercise Clause did not excuse the claimants from violating a controlled substance law.[143] The claimants in *Smith* were two employees who applied for and were refused unemployment benefits with Oregon's Employment Division after they were fired from a drug rehabilitation organization for ingesting peyote, a hallucinogenic drug, for

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[136] *Id.* at 410; *see also* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (upholding Amish parents' First Amendment right of religion defense to excuse them from complying with a compulsory school attendance law that required all children to attend public or private school until the age of sixteen because the schooling requirement was against the parents' religious beliefs and the state's interest did not carry sufficient weight to justify infringing on the Amish's religious beliefs).

[137] Employment Div. v. Smith, 494 U.S. 872 (1990).

[138] *See id.* at 881–82.

[139] *See id.* at 881.

[140] *See id.* at 882.

[141] *Id.* at 890.

[142] *See id.*

[143] *Id.* at 882.

sacramental purposes at a religious ceremony at their Native American Church.[144] Their unemployment benefits were refused because the firing was classified as "work-related 'misconduct' "—ingestion of peyote violated Oregon's controlled substance law.[145] The Court concluded that Oregon's controlled substance law was a neutral law of general applicability.[146] Based upon this conclusion, and the failure of the employees to assert a hybrid claim, the Court determined that the employees' right of religion did not provide protection for violating Oregon's controlled substance law, and therefore, no religious accommodation was necessary.[147]

In response to *Smith* and in an effort to increase the amount of religious protection, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA") in an attempt to reinstate *Sherbert's* "compelling interest" standard.[148] Congress's findings, set forth in the Act, acknowledged that in *Smith* the United States Supreme Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and asserted that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[149]

The United States Supreme Court, in *City of Boerne v. Flores*,[150] ruled that RFRA was unconstitutional, at least in its application to state and local law, because the Act violated the separation of powers doctrine.[151] Court precedent, as established in *Smith*, was declared the proper framework for analyzing a freedom of religion claim.[152] Justice O'Connor, however, in her

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[144] *Id.* at 874.

[145] *Id.* at 874–75.

[146] *See id.* at 878, 880.

[147] *Id.* at 882.

[148] Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[149] (107 Stat.) at 1488.

[150] 521 U.S. 507 (1997).

[151] *Id.* at 536. Separation of powers is a doctrine that allocates government authority between the three branches of the federal government. *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 333 (2d ed. 2005).

[152] *See Flores*, 521 U.S. at 536.

dissenting opinion in *City of Boerne*, asserted that *Smith's* interpretation of the Free Exercise Clause was incorrect and should be reexamined.[153]

As these cases demonstrate, the United States Supreme Court has essentially removed any constitutional protection under the Free Exercise Clause for individuals who violate a neutral law of general applicability. This is because the *Smith* standard requires an individual to successfully demonstrate a hybrid claim to receive protection; therefore, the individual could just assert the other constitutional protection claim and prevail without even asserting a Free Exercise claim.

C. Relevant Antidiscrimination Laws

The right of lesbian or gay individuals to be free from discrimination based on their sexual orientation is protected, if at all, by state or municipal statutes. Both the Civil Rights Act of 1964[154] and the Congressional Accountability Act of 1995 [155] provide a federal remedy for discrimination, but neither provision prohibits discrimination based on sexual orientation.[156] States and municipalities, however, are increasingly adding sexual orientation provisions to their civil rights acts to protect homosexual individuals against discrimination in places of public accommodation.[157] At least fifteen states now prohibit this type of discrimination.[158]

As the need to protect lesbians from discrimination based on their sexual orientation is increasingly being recognized by states as a compelling interest, the question becomes how states with

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[153] *Id.* at 544–45 (O'Connor, J., dissenting).

[154] Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2006)).

[155] Pub. L. No. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. §§ 1301–1438 (2006)).

[156] *See id.* (failing to include a provision within the statute covering discrimination based on sexual orientation); Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4th Cir. 1996) (stating that the Civil Rights Act does not prohibit discrimination based on sexual orientation); Centola v. Potter, 183 F. Supp. 2d 403, 414 (D. Mass. 2002) (same).

[157] *See, e.g.*, CAL. CIV. CODE § 51 (West 2009); MASS. GEN. LAWS ch. 272, § 98 (2008); MINN. STAT. § 363A.02 (2008); N.Y. CITY, N.Y., ADMIN. CODE § 8-107 (2008); N.J. STAT. ANN. § 10:5-12 (West 2008).

[158] *See* John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 354 & n.116 (2004) (discussing and listing the state statutes that prohibit this type of discrimination).

these antidiscrimination provisions will handle a violation of these provisions when an individual asserts protection under the First Amendment Free Exercise Clause as an affirmative defense. Courts applying the earlier *Sherbert* "compelling interest standard" and the currently applied *Smith* test have split on this issue.[159]

D. How Courts Have Balanced the Right of Religion Against Discrimination Claims in Other Settings

An analysis of how states have balanced their governmental interest in avoiding sexual orientation or marital status discrimination vis-à-vis their interest in protecting an individual's right of religion in other practice areas[160] is helpful in considering the scope of statutory protection that states should afford health care providers under their conscience clauses because it demonstrates the relative value that courts have assigned to these interests. The fields of employment and property law provide an interesting comparison.

1. Employment Law

In the setting of employment law, courts have consistently upheld a right of religion defense against a sexual orientation claim when the defendant is a religious organization and the form of the relationship between the parties is religious. In *Walker v. First Orthodox Presbyterian Church of San Francisco*,[161] the plaintiff sued for damages under a state statute prohibiting employment discrimination based on sexual

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[159] *Compare* Dignity Twin Cities v. Newman Ctr. & Chapel, 472 N.W.2d 355, 356–57 (Minn. Ct. App. 1991) (finding that the defendant's right of religion under the First Amendment was violated), *and* Walker v. First Orthodox Presbyterian Church of S.F., No. 760-028, 1980 WL 4657, at *4 (Cal. Super. Ct. Apr. 3, 1980) (same), *with* Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman, 99 F.3d 101, 103–05 (3d Cir. 1996) (finding that the antidiscrimination provision did not violate the defendant's right of religion under the First Amendment), *and* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. 1987) (same). The court noted in *Georgetown* that "[t]he District of Columbia's interest in enforcing the Human Rights Act's prohibition of discrimination based on sexual orientation substantially outweighs whatever burden the Act places on Georgetown's exercise of [its] religious beliefs." 536 A.2d at 62 (Ferren, J., concurring in part) (alterations in original) (internal quotation marks omitted).

[160] The field of medicine is not analyzed because, aside from *North Coast*, it does not appear that courts have been called upon to balance these interests in that setting.

[161] No. 760-028, 1980 WL 4657 (Cal. Super. Ct. Apr. 3, 1980).

orientation.[162] He was fired from his position as church organist after he disclosed to the church reverend that he was a homosexual and refused to repent.[163] After determining that the antidiscrimination provision was too great an infringement on the defendant's free exercise of religion, the court granted the defendant's motion for summary judgment.[164] The court, applying a *Sherbert* analysis, did not find the state's interest in preventing discrimination sufficiently compelling to overcome the right of religion when the defendant was a religious organization.[165] The court noted that "[f]reedom of religion is so fundamental to American history that it must be preserved even at the expense of other rights which have become institutionalized by the democratic process."[166] In *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*,[167] however, the court asserted that the state's interest in preventing sexual orientation discrimination was "compelling."[168] Similar to *Walker*, this case involved a religious organization that claimed a provision protecting homosexuals from discrimination impinged on its right to adhere to its religious beliefs by preventing it from "aiding and abetting discrimination."[169] Unlike in *Walker*, the appellants in *Florio* facially challenged the New Jersey provision and claimed that it violated their First Amendment right to freedom of speech.[170] The challenged provision prohibited discrimination based on "affectional and sexual orientation" in employment, public accommodations, and business dealings.[171] Despite the court's

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[162] *Id.* at *3.

[163] *Id.* at *1.

[164] *Id.* at *4.

[165] *Id.*

[166] *Id.* at *5.

[167] 902 F. Supp 492 (D.N.J. 1995), *aff'd*, 99 F.3d 101 (3d Cir. 1996).

[168] *Id.* at 521. (noting that the state of New Jersey had not only a substantial interest, but a "compelling" interest in eliminating discrimination on the basis of sexual orientation).

[169] *Id.* at 500.

[170] Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman, 99 F.3d 101, 103 (3d Cir. 1996). The appellants alleged that the law was unconstitutionally overbroad and restricted their First Amendment right to free speech. *Id.*

[171] *See id.* (internal quotations omitted).

finding that the state had a compelling interest in preventing sexual orientation discrimination, it opted to apply the *Pullman* abstention doctrine and abdicated the obligation to decide the case.[172]

2. Property Law

An individual's right to religious freedom and the right to be free from discrimination often clash in property law when a landlord refuses to rent property to an unmarried couple based on a religious objection and claims that the First Amendment Free Exercise Clause provides protection from liability against a housing law prohibiting discrimination on the basis of marital status.[173] Courts applying the *Smith* analysis have consistently rejected a landlord's right of religion as a defense to these antidiscrimination laws because the claimed right of refusal does not involve a hybrid constitutional claim.[174] Courts applying the previous *Sherbert* "compelling interest" test are split as to whether the state's interest in preventing marital status discrimination is sufficiently compelling to defeat a right of religion claim.[175]

In one property case, *Dignity Twin Cities v. Newman Center and Chapel*,[176] the court upheld a defendant's right of religion defense against a discrimination claim when the defendant was a religious organization and refused to rent its religious facilities to a predominately homosexual organization.[177] Dignity Twin Cities, an organization mostly comprised of gay Catholics (unaffiliated with the Roman Catholic Archdiocese), rented space

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[172] *See id.* at 107. Of note, religious organizations in New Jersey generally were statutorily exempt from complying with the Law Against Discrimination in hiring employees. *See id.* at 104. In light of the statutory protection that was already afforded to religious organizations, the court was probably more likely to deny religious organizations additional exemptions.

[173] *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 946–47, (Alaska 2004) (rejecting the landlord's claim that the discrimination law violated his First Amendment right to free exercise of religion); Smith v. Fair Employment & Housing Comm'n, 913 P.2d 909, 912 (Cal. 1996) (same).

[174] *See, e.g.*, Smith v. Fair Employment & Housing Comm'n, 913 P.2d 909, 921.

[175] *Compare* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 285 (Alaska 1994) (finding that preventing marital status discrimination was a compelling state interest), *with* State by Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990) (finding the need to protect the right of religion "paramount" to preventing discrimination based on marital status).

[176] 472 N.W.2d 355 (Minn. Ct. App. 1991).

[177] *Id.* at 356.

from a chapel run by the Roman Catholic Archdiocese.[178] Other secular groups, such as Weight Watchers, also rented space from the church.[179] After the chapel refused to renew Dignity Twin Cities' lease because they would not sign a document stating that they agreed with the Catholic Church's position on homosexuality, Dignity Twin Cities filed a discrimination complaint with the Minnesota Department of Civil Rights.[180] In deciding whether the Commission Appeals Board appropriately granted Dignity Twin Cities relief, the Minnesota Court of Appeals noted that the outcome was dependent on whether the relationship between the tenant renting the space and the Church was religious or secular.[181] When the antidiscrimination provision was applied to use of the facilities by a religious organization, the right of religion would prevail over the antidiscrimination provision; if applied to the secular organizations renting the church space, however, the plaintiff's discrimination claim would prevail over the defendant's right to religious freedom.[182] Applying this rule to the facts of the case, the court decided that the church's right to religious freedom shielded it from liability against a discrimination claim because Dignity Twin Cities was a religious organization, and state action would constitute excessive entanglement with the church's First Amendment right.[183]

These cases reveal the varying level of importance that courts have assigned to the right of religious freedom as compared to an individual's right to be free from sexual orientation or marital status discrimination, especially when the relationship between the parties is secular. When the relationship between the parties is religious, *Dignity Twin Cities* and *Walker* reveal the additional weight courts have afforded to the right of religion defense over a sexual orientation discrimination claim. The court's difficulty in balancing these

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[178] *Id.*
[179] *Id.*
[180] *See id.*
[181] *Id.* at 357 (citing Lemon v. Kurtzman, 403 U.S. 602, 614–15 (1971)).
[182] *See id.*
[183] *Id.*

interests reinforces the need to ensure practitioners at least some limited protection for conscience refusal in a fertility conscience clause, even when the relationship between the parties is secular.

IV. DIVERGENT POSITIONS ON CONSCIENCE REFUSAL ANALYZED UNDER *NORTH COAST WOMEN'S MEDICAL GROUP, INC. V. SAN DIEGO SUPERIOR COURT*

States currently disagree over the appropriate balance that state conscience clauses should strike between affording protection for an individual's right to religious freedom vis-à-vis an individual's right to be free from discrimination. "Legislatures have only recently begun to address this type of [patient] selectivity based on the status of the patient rather than on the type of procedure requested."[184] The divergent views adopted by Mississippi and the American Medical Association (AMA) as compared to Illinois emphasize the need to evaluate how states should balance these interests.

Some provisions, like Mississippi's conscience clause and the AMA's ethical policy, discourage physicians from discriminating against a patient based on sexual orientation regardless of a physician's claimed protection under the right of religion.[185] The AMA's ethical policy, which is very similar to Mississippi's conscience clause, describes the creation of patient-physician relationships as contractual, whereby physicians may decline to enter into the relationship.[186] Despite the contractual nature of the physician-patient relationship, the AMA policy specifically provides that "physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination."[187] Under this policy, it "may be ethically permissible for physicians to decline a potential patient when . . . [a] specific treatment sought by an individual is incompatible with the physician's personal,

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[184] *See* Swartz, *supra* note 42, at 295.

[185] *See* MISS. CODE ANN. § 41-107-5 (2008); COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS § 9.12 (2007), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/opinion/opinion912.html.

[186] *See id.*

[187] *Id.*

religious, or moral beliefs," but this provision is not an exception allowing a physician to refuse to treat patients based on their sexual orientation.[188] Thus it appears that under the AMA's ethical guidelines, a physician may refuse to perform a fertility treatment on any patient because of a religious or moral objection but cannot refuse to provide fertility treatment specifically to homosexual patients based on a personal, religious, or moral belief—this would be discrimination based on a patient's characteristic.[189] Presumably, it would, therefore, be permissible under the AMA guidelines for a physician to deny fertility treatment to a female who the physician does not morally believe would be a suitable mother but impermissible to deny treatment to a patient based on their sexual orientation, race, or marital status.

The AMA's ethical policy mirrors Mississippi's conscience clause, which provides in part:

> (1) **Rights of Conscience.** A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.
>
> (2) **Immunity from Liability.** No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience. However, this subsection does not exempt a health care provider from liability for refusing to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.[190]

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[188] COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS § 10.05 (2003), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/opinion/opinion1005.html. The policy explicitly states that refusal based on a religious belief only applies in situations that are not covered above in opinion 9.12, forbidding a physician from accepting a patient based on his or her sexual orientation. *Id.* § 10.05(b).

[189] *See* COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS §§ 9.12, 10.05(3)(c) (2007), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/toc.html.

[190] § 41-107-5.

In a jurisdiction with this type of conscience clause, the defendants in *North Coast* would not be protected under the right of religion for refusing to treat patients based on their sexual orientation; they would, however, be protected if their refusal was based on Ms. Benitez's marital status because marital status is not a protected class within the statute.

In contrast, other states, like Illinois, favor the right of religion over the right to be free from sexual orientation or marital status discrimination[191] and would afford the defendants in *North Coast* statutory protection for refusing to treat Ms. Benitez.[192] This outcome appears likely under Illinois law because, unlike Mississippi's conscience clause, Illinois's conscience clause, in part, provides that:

> The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.[193]

The Act explicitly states that it is intended to supersede all other Acts inconsistent with the terms or operation of the Act.[194] Therefore, although Illinois declares it public policy "[t]o secure for all individuals within Illinois the freedom from discrimination against any individual because of his . . . sexual orientation . . . in connection with . . . the availability of public accommodations," [195] its legislature clearly believes that the right of religious freedom trumps its interest in preventing sexual orientation discrimination in the health care setting.

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[191] *See* 745 ILL. COMP. STAT. 70/2 (2008).

[192] *See* N. Coast Women's Care Med. Group, Inc. v. San Diego, 189 P.3d 959, 963–65 (Cal. 2008).

[193] 70/2 § 2.

[194] *See id.*

[195] 775 ILL. COMP. STAT. 5/1-102 (2008).

V. LEGISLATIVE RECOMMENDATIONS—DISTINGUISHING AMONG HEALTH CARE PROVIDERS AT SOLE PRACTITIONER PRACTICES, GROUP MEDICAL PRACTICES, AND NON-SECULAR FACILITIES

An ideal statute would permit citizens to exercise their religious beliefs without restrictions while also preventing discrimination, but these interests cannot fully coexist and must, therefore, be balanced, especially in the field of medicine. Although the First Amendment does not constitutionally require a religious accommodation in these circumstances, the United States Supreme Court noted that the political process is the appropriate sector to determine the extent to which religious accommodations should be afforded to citizens.[196]

This final Section suggests that state legislatures adopt a conscience clause that includes fertility treatment within its scope but prohibits conscience refusal based on a patient's sexual orientation by most, but not all, classes of heath care providers. The suggested provision distinguishes the level of statutory protection afforded to practitioners in a group medical practice or a secular facility from that afforded to sole practitioners or practitioners who work in a religiously controlled health care facility. Under this suggested statutory framework, practitioners working in association with a religiously controlled health care facility would be included under the scope of the conscience clause and would be shielded from liability for exercising a firmly held religious or moral belief that results in sexual orientation discrimination. Sole practitioners would also be included within its protective scope but only when a patient can access fertility treatment with another willing provider with relative convenience. In contrast, practitioners who work in association with a secular health care institution or a group medical practice would be excluded from statutory protection and would be limited to religious protections afforded by afforded by the federal constitution or individual state constitutions. There are many reasons why the level of statutory protection afforded to practitioners working at a group medical practice or a secular facility should be distinguished from that provided to practitioners working at a religious hospital or as sole

[196] *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

practitioners. These reasons are explored in depth in Parts A through C in a practical context after an examination of the proposed legislation.

A suggested statutory provision[197] that incorporates these exclusionary provisions might read as follows:

> (1) **Rights of Conscience.** A health care provider has the right not to perform, and no health care provider shall be required to perform, a fertility treatment that violates his or her conscience. This subsection does not, however, allow a group medical practice or a secular health care facility, or a practitioner working at such a facility, to refuse to perform a fertility treatment on a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed, marital status, gender identity, or sexual orientation. Nor does it allow a sole practitioner to refuse to provide fertility treatment on a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed, marital status, gender identity, or sexual orientation if the patient cannot be referred with relative ease and convenience to another willing practitioner.
>
> (2) **Immunity from Liability.** No health care provider shall be civilly, criminally, or administratively liable for declining to perform a fertility treatment that violates his or her conscience. This subsection does not, however, exempt a group medical practice or a secular health care facility, or a practitioner working at such a facility, from liability for refusing to perform fertility treatment on a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation. Nor does it exempt a sole practitioner who refuses to provide fertility treatment on a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed, marital status, gender identity, or sexual orientation if the patient cannot be referred with relative ease and convenience to another willing practitioner.
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> Definitions:
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> (3) **"Secular Health Care Facility"** means any public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, infirmary, dispensary, ambulatory surgical treatment center, or other institution where health care services are provided and is not governed by an express set of religious directives.

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[197] This suggested statutory provision uses Mississippi's conscience clause as a statutory basis. *See generally* MISS. CODE ANN. § 41-107-5 (2008).

(4) **"Group Medical Practice"** means a group of two or more health care practitioners who are formally organized as a legal entity in which business and clinical facilities, records, and personnel are shared.[198] Religious health care facilities that are governed by an express set of religious directives are excluded from this definition.

(5) **"Sole Practitioner"** means a health care practitioner not in a group medical practice who operates independently.

A. *Applying the Proposed Statute*

1. Sole Practitioners

Under the proposed statutory provision, a health care practitioner working as a sole practitioner may refuse to provide fertility treatment to a lesbian patient if doing so will violate a firmly held religious or moral belief and the health care provider, by referring the patient, can assure the patient access to another willing provider with relative convenience to the patient. Applying this provision to the hypothetical scenario presented in the introduction, where the sole practitioner was the only care provider in the area, the physician would not be afforded statutory protection for refusing to perform the requested fertility treatment. She would, therefore, be subject to liability for discrimination if she refused to perform the requested treatment. If the defendant in *North Coast*, however, was a sole practitioner, the defendant would be shielded from liability under the proposed statute because Ms. Benitez was referred to another willing provider with relative ease and convenience.[199]

Sole practitioners should not fall within the same protective sphere as health care practitioners at group medical practices because this would not be the least restrictive means that could be employed to minimize impinging on an individual's right of religion and avoiding discriminatory treatment. This position is supported by Judge Baxter in his concurring opinion in *North Coast*.[200] Judge Baxter likely determined that there were other

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[198] This definition was modified from the American Medical Association's definition of a "group medical practice" as a group of three or more health care practitioners. STEVEN JONAS, AN INTRODUCTION TO THE U.S. HEALTH CARE SYSTEM 153 (5th ed. 2003).

[199] *See supra* text accompanying notes 102–105.

[200] *See* N. Coast Women's Care Med. Group, Inc. v. San Diego, 189 P.3d 959, 971 (Cal. 2008) (Baxter, J., concurring).

less restrictive means available for a group medical practice, as compared to a sole practitioner, because the partnership arrangement of a group medical practice allows physicians to seek out partners that do not share the same religious or moral objections. The group medical practice could, therefore, ensure patients access to fertility treatment by having at least one willing practitioner on staff, while also avoiding any physician requirement to perform procedures on patients that the physician has religious or moral objections to performing.

Another reason sole practitioners warrant special protection is because if all sole practitioners were required to perform fertility treatment on every patient despite a religious or moral objection, many fertility specialists with firmly held religious or moral beliefs would likely abandon their present fertility practices. They would choose another field of medicine where they would not be forced to violate their religious or moral beliefs. This could further impede a woman's ability to access fertility treatment. This provision also allows sole practitioners to protect their right to refuse treatment based on their religious or moral beliefs by positioning their office near another willing practitioner to ensure that a client denied treatment by them has access to treatment from another provider with relative convenience.

2. Religious Health Care Facilities

Under the proposed statutory provision, a practitioner at a religious facility that follows express religious directives, such as a Catholic-run hospital governed by the Ethical and Religious Directives for Catholic Health Care Services,[201] is afforded statutory protection for refusing to provide fertility treatment to any type of patient if doing so would violate a religious directive. If the defendants in *North Coast* practiced at a Catholic-run facility, they would have been shielded from liability for sexual orientation discrimination. This would hold true even if Ms. Benitez was unable to access fertility treatment and had to endure a significant burden to access treatment.

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[201] *See* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 24 (Directives Nos. 40, 41, 45, 53), *available at* http://www.usccb.org/bishops/directives.shtml#partfour.

Practitioners working at religiously controlled health care facilities that are governed by an express set of religious directives should be statutorily protected from refusing to perform fertility treatment on otherwise protected classes of patients if rendering the treatment violates the facility's religious directives. As *Dignity Twin Cities*[202] suggests, this would be considered excessive government entanglement with religion and would violate the Establishment Clause of the First Amendment.[203] To determine whether there is a violation of the Establishment Clause, courts "examine the character and purposes of the institutions that are benefited [by the provision], the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[204] Court decisions from the field of property law, such as *Dignity Twin Cities*,[205] evidence how in a practical sense courts have found excessive government entanglement with religion and upheld a First Amendment right of religion defense to a discrimination claim when a religious based organization acted in accordance with its religious directives and refused to rent church space to a predominately homosexual organization.[206]

Additionally, as *Walker* demonstrates, courts deciding employment discrimination cases have found that a state's interest in protecting a *religious* organization's right to religious freedom can trump a state's interest in preventing sexual orientation discrimination.[207] Crucial to the outcome of *Walker* was the fact that the organization claiming protection under the Free Exercise Clause was a church.[208] The obvious religious nature of the church and its firmly established religious beliefs contributed to the court's determination that the church's right to

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[202] *See supra* text accompanying notes 176–183.

[203] *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (establishing the *Lemon* test to determine whether a statute is valid under the Establishment Clause).

[204] *Id.*

[205] *See* Dignity Twin Cities v. Newman Ctr. & Chapel, 472 N.W.2d 355, 356–57 (Minn. Ct. App. 1991) (finding that the defendant's right of religion under the First Amendment was violated).

[206] *See supra* text accompanying notes 176–183.

[207] *See supra* text accompanying notes 161–166.

[208] *See* Walker v. First Orthodox Presbyterian Church of S.F., No. 760-028, 1980 WL 4657, at *2 (Cal. Super. Ct. Apr. 3, 1980) (discussing the Holy Bible's clear position on homosexuality, the established religious beliefs of the church, and the local and national belief that the congregation's organist is part of the worship team).

free exercise of religion outweighed the employee's right to be free from sexual orientation discrimination.[209] Applying this notion to conscience clauses, it follows that hospitals run by religious organizations with established religious directives, such as the *Ethical and Religious Directives for Catholic Health Care Services*,[210] should be afforded additional religious protection under the First Amendment as compared to secular facilities.

A beneficial effect of this statutory protection for religious facilities is that these health care practices will serve as a safe haven for health care practitioners with firmly held religious beliefs. A practitioner could seek employment with a religious organization to avoid liability for sexual orientation discrimination provided that the requested treatment is against the facility's religious directives. This would include protection for refusing to refer a patient to another willing practitioner. Practitioners could then practice medicine in accordance with their strongly held religious or moral beliefs.

Theoretically, this provision would impose a significant burden on a lesbian's ability to access fertility treatment due to the prevalence of religiously controlled health care systems.[211] This restriction, however, is limited in a practical sense because many Catholic-run facilities already refuse to perform most types of fertility treatments, not just on lesbian patients but on any patient.[212] Antitrust provisions, which can limit the continued expansion of these religious health care facilities, can also curb the negative impact of this provision on a lesbian's ability to access treatment.[213]

3. Group Medical Practices and Secular Health Care Facilities

Under the proposed statutory provision, practitioners at a group medical practice or a secular health care facility would not receive statutory protection for providing discriminatory fertility treatment despite a physician's right of religion defense. This scenario would mirror the outcome of *North Coast* where the

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[209] *See id.*

[210] *See supra* note 24.

[211] *See supra* text accompanying notes 30–34.

[212] *See supra* notes 24–29 and accompanying text.

[213] *See* Monica Sloboda, Recent Development, *The High Cost of Merging with a Religiously-Controlled Hospital*, 16 BERKELEY WOMEN'S L.J. 140, 148–51 (2001) (discussing legal approaches used to challenge hospital mergers in order to retain or restore a woman's access to health services).

court ruled that the defendants' right of religion would not shield them from liability for refusing to treat a patient based on the patient's sexual orientation.[214] If, however, one of the health care providers at *North Coast* was willing and able to perform the fertility treatment Ms. Benitez requested, all the defendants would be shielded from liability for discrimination.

Excluding group medical practices from the scope of a fertility conscience clause still allows individual practitioners to adhere to their religious or moral beliefs and practice medicine while allowing patients access to care. The size of a group medical practice is sufficiently large such that if one practitioner within the group is unwilling to perform a fertility treatment on a lesbian patient, the organization can ensure that another practitioner will. This requires that physicians with religious or moral objections seek out partners that do not share the same religious or moral objections.

Patient autonomy and HMO considerations are driving factors that necessitate this outcome. Patients should not pay for medical services that they are not able to access.[215] Excluding group medical practices and secular health care facilities from the scope of a fertility conscience clause helps to increase patient autonomy by ensuring that patients retain sufficient ability to select their health care practitioner and access the full range of services offered by their HMO provider.

CONCLUSION

Society has a compelling interest in preventing discriminatory treatment of its citizens and an equally compelling interest in allowing health care providers to practice their profession without violating a sincerely held religious or moral belief. Striking the appropriate balance between these competing interests is a difficult task that requires compromise from both sides. Under the proposed statutory scheme, a practical solution can be reached that helps ensure access to fertility treatment without driving practitioners out of their chosen fields of medicine or forcing them to violate their

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[214] *See* N. Coast Women's Care Med. Group, Inc. v. San Diego, 189 P.3d 959, 970–71 (Cal. 2008).

[215] *See* Bassett, *supra* note 36, at 470 (explaining the limitations HMOs and conscience refusals place on a patient's ability "to participate meaningfully and freely in the religious restriction of medical choices for their care").

consciences. Reaching an accord between these interests may also encourage states that do not have sexual orientation discrimination laws to adopt such provisions within a statutory framework that provides additional religious protection for the rights of health care practitioners. Although this balance is suggested for the field of fertility medicine, such a statutory scheme is readily adaptable to other controversial areas of medicine, such as cryogenics and human cloning, where a similar clash between antidiscrimination statutes and conscience objections will likely arise as technological advancements create new ethical dilemmas.