Case No. _____

IN THE
SUPREME COURT OF CALIFORNIA

NORTH COAST WOMEN'S CARE MEDICAL GROUP, INC., DR. CHRISTINE Z. BRODY and DR. DOUGLAS K. FENTON, **Petitioners,**	Court of Appeal No. DO 45438
	Superior Court No. GIC770165
v.	
SUPERIOR COURT FOR SAN DIEGO COUNTY, **Respondent.**	
GUADALUPE T. BENITEZ, **Real Party in Interest.**	

After a Decision by the Court of Appeal, Fourth Appellate District, Division One, Granting a writ of mandate directed to the Superior Court of California, County of San Diego, Hon. Ronald S. Prager, Judge

PETITON FOR REVIEW OF REAL PARTY IN INTEREST GUADLUPE T. BENITEZ

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PETITION FOR REVIEW

ISSUES PRESENTED

1. Do physicians have a constitutional right to refuse on religious grounds to provide a lesbian patient medical care they provide to others?
2. Does judicial estoppel preclude litigants from changing their assertion of facts, whether or not initially successful, in successive court filings?
3. May a lower court refuse to apply to a pending case a Supreme Court decision clarifying an issue this Court previously had described as unsettled and subject to conflicting appellate opinions, without review of the record to ascertain reasonable reliance and unusual hardship?
4. May a lower court dismiss the Legislature's declaration as to the scope of an existing law when this Court has declared that question unsettled and subject to conflicting appellate decisions?

WHY REVIEW SHOULD BE GRANTED

This petition presents several issues, each independently warranting review. First, there is urgent public need for this Court to resolve persistent confusion over whether the constitutional right to free exercise of religion provides an affirmative defense to an Unruh Civil Rights Act discrimination claim. This Court has determined in other contexts that religious beliefs do not provide a defense to a generally applicable law that serves a compelling interest in protecting third parties from unlawful discrimination. (*Catholic Charities v. Superior Court*

(2004) 32 Cal.4th 527; *Smith v. Fair Employment and Housing Comm'n ("FEHC")* (1996) 12 Cal.4th 1143.) In conflict with these rulings, the Fourth Appellate District reversed an order granting summary adjudication that no such affirmative defense could be raised to plaintiff's Unruh Act claim, concluding that the defendant doctors are "entitled to assert their constitutional right to free exercise of religion" and to testify to a jury about their religious beliefs and motives for discriminating against their patient. (Opn. at 19 ("the Decision").) Flouting controlling rules of civil procedure as well, the Court of Appeal held that the legal question of whether religious beliefs support an affirmative defense to the Unruh Act must remain unanswered until trial of the disputed fact issues regarding liability. The Decision creates confusion and conflict in the law, raising broad, troubling questions such as whether religiously-motivated doctors may refuse to provide lesbian and gay patients the care those doctors offer others. Such discrimination by health care providers against lesbians and gay men – frequently based on religious motives – is an ongoing and serious public health concern. The Decision has been described in the news media as validating a physicians' right of religious refusal. Absent review, harmful discrimination against lesbian and gay patients is likely to proliferate.

Second, this case highlights a persistent problem in the judicial process: Some litigants seem to think they can change the facts they assert in a court filing whenever it suits their litigation strategy. Many courts, however, say otherwise, by virtue of the doctrine of *judicial estoppel*. That doctrine protects the integrity

of the judicial process by precluding a party from asserting a position that is contrary to a position the party previously took in the same or prior litigation.

There is a split of authority, both nationwide and in California, as to whether judicial estoppel requires *success* in asserting the first position and what it means to have such success. A handful of published Court of Appeal opinions, and dozens of unpublished ones, have wrestled with this issue during the past few years and have reached conflicting conclusions – some requiring success, others not.

Here, defendants asserted in an initial motion for summary adjudication that they refused to treat plaintiff because she is a lesbian. The judge expressly adopted that assertion. Later, however, when it became beneficial for defendants to change their story, they claimed in a subsequent motion for summary adjudication that that had not been the reason and that, instead, they refused to treat plaintiff because she is unmarried. Judicial estoppel is designed to prevent this sort of "playing fast and loose" with the facts.

The present case affords this Court an opportunity to resolve the ongoing decisional conflict in the Courts of Appeal regarding the scope of judicial estoppel and to confirm that past facts cannot change at a litigant's convenience.

A third question addresses when decisions of this Court apply to pending cases, which is the usual rule. There is a rare and narrow exception when this Court changes a definitively-settled rule, on which the litigants reasonably relied, when applying the new decision would impose great and unfair detriment. But a

decision interpreting existing law merely clarifies what already was meant and does not change the law; it thus applies immediately, including to pending cases.

At issue here is whether *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, clarified or changed the scope of the Unruh Act by holding that marital-status discrimination claims are cognizable under the Act and whether applying *Koebke* here would be grossly unfair to defendants. The Decision concludes that *Koebke* should not apply because, whether it changed or merely clarified the law, the defendants had relied on prior case law "in pleading and litigating this case." (Opn. at 15.)

Before *Koebke*, this Court had not decided whether marital-status claims were cognizable under the Unruh Act, but had identified this as an open question subject to conflicting appellate decisions. (*Smith v. FEHC,* 12 Cal.4th at 1160, fn.10.) Can reliance on any of those conflicting appellate decisions be reasonable after this Court provided such notice?

In addition, the Court of Appeal refused to accept, and thus could not review, portions of the superior court record bearing on whether the doctors in fact had relied on prior authority, whether any such reliance would have been reasonable in the context of the case, and whether applying *Koebke* would be grossly unjust. Unless courts consider the circumstances of a litigant's case when assessing reliance and unfairness, the exception will swallow the rule.

Fourth is whether a Court of Appeal may disregard the Legislature's view that it has *clarified* existing law left undecided by Supreme Court authority and

determine instead that a statutory amendment has *changed* the law. Here, the Legislature amended the Unruh Act within weeks of this Court's *Koebke* decision by passing AB 1400, the Civil Rights Act of 2005, which made explicit that the Unruh Act prohibits discrimination based on both sexual orientation and marital status. (Stats. 2005, ch. 420.) The Decision concludes that AB1400 cannot apply here because the amendment purportedly changed rather than clarified the law and it would be unjust to apply the amendment because defendants supposedly relied on the prior rule.

This issue is pending before the Court in a different context in *Carter v. California Dept. of Veterans Affairs*, S127921 (review granted Dec. 1, 2004), and *Adams v. Los Angeles Unified School Distric*t, S1279261 (review granted Dec.1, 2004, further action deferred pending disposition of *Carter*), which also implicates the Legislature's authority to interpret an existing statute. That recurring question merits review here for the same reasons as in those appeals.

BACKGROUND FACTS

Guadalupe Benitez and Joanne Clark live in North County, San Diego. In 1999, they had been domestic partners for many years and wanted to start a family. Benitez had been diagnosed as suffering from a common fertility impairment requiring treatment. The treatment she needed was covered by the health benefits she received from her employer, Sharp Mission Park Medical Group ("Sharp").

Benitez's primary physician referred her to North Coast Women's Medical Care Group, Inc. ("North Coast"), which had an exclusive contract to provide infertility services to Sharp's employees.

Benitez first met with Dr. Christine Brody of North Coast in August 1999. Clark accompanied her. Brody told them she provides the care Benitez needed and would provide Benitez some services, but if Benitez did not achieve pregnancy through intra-vaginal self-insemination, after having achieved regular ovulation with medication, Brody would not perform an intrauterine insemination ("IUI") due to her Christian religious objections to performing that procedure for a woman in a same-sex relationship. Brody promised that one of her colleagues who did not share her religious views would perform the IUI at the appropriate time if Benitez had not become pregnant through self-insemination.

Benitez was distressed at Brody's refusal, but decided she had no real choice but to become a patient of North Coast because the clinic was the exclusive "in network" provider of such services to Sharp employees in the area.

Over the next eleven months, Brody prescribed Clomid, a fertility stimulant that caused Benitez to ovulate, and performed many tests on Benitez including exploratory surgery. Benitez did not become pregnant through self-insemination. Instead of asking a colleague to perform the IUI, Brody repeatedly suggested more testing and self-inseminations.

Brody was on vacation when Benitez was ready for her July 2000 cycle. In Brody's absence, Benitez sought a renewal of her Clomid prescription and to have

the IUI performed. Dr. Douglas Fenton, who was covering for Brody, declined to approve the renewal and to perform or arrange for the IUI. Fenton told Benitez that other members of North Coast's staff, in addition to Brody, shared Brody's religious objection to treating Benitez. He said Benitez should go elsewhere because she was never going to receive the care she needed at North Coast.

Benitez was distraught. Having been a North Coast patient for nearly a year, she felt manipulated, betrayed and humiliated. She did not seek treatment from another infertility specialist for months. When she began treatment elsewhere, she had to undergo many of the tests again and she had to pay for the medical care herself. Through the treatment she subsequently received, Benitez became pregnant and gave birth to a healthy baby.

PROCEDURAL HISTORY

Benitez sued for violation of the Unruh Civil Rights Act (Civ. Code, §51), together with breach of contract, deceit and other tort claims. The doctors demurred based on ERISA preemption and moved for sanctions under the anti-SLAPP statute. (Code Civ. Proc., §425.16.) The superior court dismissed the action. Benitez appealed and the Court of Appeal reversed. (*Benitez v. North Coast Women's Medical Care Group, Inc.* (2003) 106 Cal.App.4th 978.)

On remand, the doctors answered and asserted an affirmative defense of constitutionally-protected rights of religion and free speech. They then moved for summary adjudication of five causes of action and a punitive damages claim. The doctors and Benitez both described as undisputed the fact that the doctors'

treatment refusal was because of Benitez's sexual orientation. The judge accepted that fact as undisputed and made an express finding to that effect. (See Attachment 2 ("Att. 2"), page 9, and Exhibit 8 to the Request for Judicial Notice ("RJN") filed concurrently herewith.) In April 2004, the court denied the motion as to causes of action for deceit and intentional infliction of emotional distress, and granted the motion as to three other causes of action and the punitive damages demand. (*Id.*)

In March 2004, the Fourth District Court of Appeal ruled in *Koebke v. Bernardo Heights Country Club* that the Unruh Act does not prohibit marital-status discrimination. (See *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at 824.) The decision received considerable press coverage. (See, e.g., Figueroa, *Same-sex Couple Won't Give Up Battle with Bernardo Heights Country Club*, North County Times (May 4, 2004); Jenkins, *Golfing Legend Resolves Rancho Bernardo Conflict*, San Diego Union-Tribune (Mar. 15, 2004); Egelko, *Lesbian Couple Lose Suit Against San Diego Club*, S.F. Chron. (Mar. 10, 2004), p. A12.)

In June 2004, Benitez moved for summary adjudication of the doctors' religion defense. The doctors moved for summary adjudication of Benitez's Unruh Act claim, newly claiming they had refused to perform the IUI for Benitez because she was not married rather than because of her sexual orientation. In October 2004, the superior court granted Benitez's motion and denied the doctors' motion.

The doctors petitioned for a writ of mandate, and in December 2005 the Court of Appeal ordered the superior court to vacate its decision granting summary adjudication of the doctors' religion defense and allow them to testify to the jury about their religious reasons for refusing to treat Benitez. The Court of Appeal also held that neither this Court's *Koebke* decision nor a newly-enacted amendment of the Unruh Act codifying *Koebke* and other Unruh Act cases could apply to the doctors, and that they were permitted to discriminate based on marital status, because they had purportedly relied on pre-*Koebke* case law in pleading and litigating the case.

On a petition for rehearing, Benitez sought to supplement the record with trial court pleadings showing the doctors had not relied on pre-*Koebke* law concerning marital status either when treating Benitez or in the first three years of litigation. The Court of Appeal denied the application to supplement the record but granted rehearing and ordered supplemental briefing limited to three questions concerning the prohibitions against marital-status discrimination.

With her supplemental brief, Benitez submitted a small selection of documents from the trial court record showing the doctors had objected to Benitez's sexual orientation consistently until after the Fourth District's 2004 ruling in *Koebke* that the Unruh Act does not prohibit marital-status discrimination. The Court of Appeal ordered the supporting documents stricken.

The Decision on rehearing, issued on March 15, 2006, is effectively the same as the December decision, with only minor changes. Benitez filed a second

petition for rehearing on the judicial estoppel issue and an application to file a longer attachment containing selected documents showing the doctors' years of attesting to the sexual-orientation basis of their refusal, and the superior court's order finding that to be an undisputed fact. The Court of Appeal denied that application and petition as well.

LEGAL DISCUSSION

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PHYSICIANS HAVE A CONSTITUTIONAL RIGHT TO REFUSE ON RELIGIOUS GROUNDS TO PERFORM A MEDICAL PROCEDURE BECAUSE THE PATIENT IS A LESBIAN.

A. There Is Widespread Confusion Whether Health Care Providers Have A Constitutionally-Protected Right To Refuse For Religious Reasons To Perform A Medical Procedure Because of Characteristics Covered By The Unruh Act.

The Unruh Act prohibits discrimination by doctors against their patients. (*Washington v. Blampin* (1964) 226 Cal.App.2d 604.) The Act also prohibits discrimination based on sexual orientation. (*Koebke*, 36 Cal.4th at 842.) It is a religiously-neutral law of general application in that it applies to business establishments generally and does not target religious adherents as a class or any particular religious sect. (See *Catholic Charities*, 32 Cal.4th at 550.)

Under the United States Constitution, such a law may trump a constitutional claim of religious free exercise if the law serves a legitimate government purpose in a rational manner. (*Employment Division v. Smith* (1990) 494 U.S. 872, 885.) Under the California Constitution, the standard of review may be higher. Still, the neutral, generally applicable anti-discrimination law at

issue in *Catholic Charities* was enforced over a religious objection because the government has a compelling interest in ending discrimination and the civil rights law was narrowly tailored. (*Catholic Charities*, 32 Cal.4th at 566; see also *Smith v. FEHC,* 12 Cal.4th at 1175 (emphasizing the state's interest in protecting third parties from the dignitary harms of discrimination).) Here the superior court followed *Catholic Charities* and *Smith v. FEHC* and summarily adjudicated that the defendants have no religious defense to plaintiff's Unruh Act claim of sexual-orientation discrimination. It was undisputed that the defendants perform IUI for some patients but would not do so for Benitez due to their religious objections to a personal characteristic with no medical significance. No disputed facts are material to the question whether the right of free religious exercise excuses physicians from the Unruh Act's mandates -- a question which is purely legal, not factual. (See *Catholic Charities*, 32 Cal.4th at 564; *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 391.) Yet the Court of Appeal reversed and remanded for a jury trial on defendants' religious reasons for refusing Benitez before allowing a ruling on their defense.

The Decision has caused troubling confusion and conflict in the law in multiple respects. First, it creates the appearance of an open question whether *Catholic Charities* and *Smith v. FEHC* resolve the religious-defense issue here. As both decisions involved claims for religious exemptions from civil rights laws, and both rejected those claims, they should dictate the same result here. The Court of Appeal's remand for a jury trial suggests that may not be true. The Decision

leaves observers wondering why the Court of Appeal did not apply the usual test; whether the analysis must be different here and, if so, why; and what the Decision means regarding the doctors' ability to discriminate against this patient based on their religion.

The Decision worsens that confusion by stating that the defendants "are entitled to assert their constitutional right to free exercise of religion" as they present their defense to the Unruh Act claim. (Opn. at 19.) This is problematic in at least two ways. First, if evidence of religious beliefs can establish that defendants did not violate the Unruh Act because their refusal was due only to marital status,[1] then any constitutional protection for those beliefs is irrelevant. If the doctors did not violate the law, invoking constitutional protections to shield them from liability is unnecessary because they have no liability. Yet, the Decision's confusing language has inspired a widespread mistaken impression, compounded by inaccurate media coverage, that religious beliefs provide a valid constitutional excuse for refusing to treat lesbian patients.[2] Even Kaiser

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[1] For defendants to be deemed free to discriminate against patients based on marital status, it must be assumed that they are not to be judicially estopped from changing their position about their reason for refusing Benitez, that *Koebke* does not apply, and that AB1400 also does not apply. As discussed below, each of these assumptions is incorrect.

[2] See Simmons, *Doctors Can Argue Beliefs*, LA Daily J., at 3 (March 15, 2006); Buchanan, *Sights Set On State High Court In Case Of Lesbian Refused Treatment; Appellate Judges Said Doctors Could Cite Their Religious Beliefs*, S.F. Chron., p. B3 (Dec. 8, 2005); Heller, *Court Lets Docs Play Faith Card in Bias Case*, Courthouse News Service (Dec. 8, 2005); Perry, Refusal to Treat Lesbian Upheld, L.A. Times (Dec. 3, 2005); Moran, *Court Favors Doctors In Lesbian's*

Permanente, California's largest health care provider, has published a similarly inaccurate description of the Decision to the thousands who work within its system.[3]

Second, although the Decision does not expressly hold there is a religious exception to the Unruh Act, it seems to have created religious exceptions to the Code of Civil Procedure, the Evidence Code, and other rules of pre-trial practice. For example, Code of Civil Procedure section § 437c(c) provides that a motion for summary judgment "shall" be granted if there are no triable fact issues and the moving party is entitled to judgment as a matter of law. Section 437c(f)(2) provides that a motion for summary adjudication "shall" proceed procedurally like a motion for summary judgment. And Section 437c(f)(1) provides that summary adjudication "shall" be granted "if it completely disposes of . . . an affirmative defense...."

This motion *did* dispose of an entire affirmative defense, entitling Benitez to summary adjudication. (See, e.g., *R.J. Land & Assoc. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 428.) She therefore is also entitled to a jury instruction on that point, and to make evidentiary objections by motions in limine or at trial, and to request instructions concerning testimony that fails to meet the applicable

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Suit; 3-Judge Panel Allows Use Of Religious Beliefs In Denying Insemination, San Diego Union Tribune, (Dec. 3, 2005), <www.signonsandiego.com/uniontrib/20051203/news_1n3benitez.html>.

[3] Kaiser Family Foundation, *In The Courts: California Appellate Panel Rules Religious Objection Is Allowable Legal Defense in Case Involving Alleged*

evidentiary standard, such as being more probative than prejudicial or admissible only for a limited purpose. (See, *e.g.*, Evid. Code §§ 352(b) (prejudicial evidence), 355 (limiting instructions), 789 (religious belief may not be used to bolster credibility).)

By characterizing defendants' testimony as an exercise of their constitutionally protected religious rights, before any legal ruling on whether they may assert a religious defense, the Decision effectively creates religious exceptions to these standard pre-trial and trial procedures. The result is a failure to enforce neutral rules that all litigants must follow, and thus a misapplication of the free exercise doctrine. (Compare *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 (religious freedom rights do not warrant misapplication of religiously neutral evidence rules).)

Further, because these exceptions give not just the appearance of a government preference for religion but also an actual advantage to the religious litigant over one asserting secular interests, the Decision will cause violations of the "no preference" clause of Article 1, Section 4 of the California Constitution, and quite possibly the establishment clause of the First Amendment. (See, e.g., *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863; *Texas Monthly v. Bullock* (1989) 489 U.S. 1 (absent free exercise right requiring accommodation,

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Fertility Discrimination (Dec. 6, 2005), <www.kaisernetwork.org/daily_reports/print_report.cfm?DR_ID=34145&dr_cat=2>.

exemption for religious entity violated establishment clause by comparatively disfavoring secular entities without secular purpose).)

Third, the Decision threatens the efficiency of the adjudication rule in holding that summary adjudication of an affirmative defense that presents a purely legal question must be denied because of disputed facts unrelated to that legal question. Often, pre-trial adjudication of an affirmative defense obviates the need to try disputed facts concerning liability. If a defendant has a valid defense, it does not matter which version of the disputed facts might prevail. If the defense is invalid, testimony seeking to establish it may be excluded.

This case illustrates the point. If defendants have a religious exemption from the Unruh Act, there is no need for a trial on whether they refused Benitez because of her sexual orientation (as her complaint alleges) or her marital status (as the doctors began asserting years later). If their defense were valid, plaintiff's Unruh Act claim could be defeated before trial and the case would proceed only on the claims for breach of contract, fraud of emotional distress. If their religious defense is invalid, the jury need not consider it. That is precisely the narrowing that section 473(c) mandates, that judicial efficiency requires, and to which litigants are entitled.

The Decision's creation of a new rule barring summary adjudication of legal questions due to immaterial factual disputes conflicts with basic procedural rules and promises wasteful and unpredictable frustration of the superior courts' responsibility to narrow issues for trial.

B. Health Care Providers Need To Know The Limits Of Their Religious Freedom.

Physicians and other medical professionals need to know whether and when they are at risk of civil sanction. Must they modify their practice if they are unwilling to offer certain procedures free from discrimination? Or may they refer a patient to another doctor when they object to performing what a particular patient seeks? Likewise, employers need to know if they will be liable for discrimination by members of their medical staff.

This case demonstrates the depth of confusion among some who routinely inform doctors about their legal duties and develop practice standards for the state. In May 2005, the California Medical Association ("CMA") filed an *amicus* brief in the Court of Appeal supporting the defendants, saying that physicians should be allowed to refer lesbian patients elsewhere due to a religious objection to treating these patients, as long as the referral comports with applicable standards. CMA then modified its position twice, and finally asked to withdraw the brief entirely. CMA then sought unsuccessfully to file a brief with Kaiser Permanente Health Plan, which took the different position that referrals are *not* permitted to accommodate an objection to the sexual orientation of a patient, whether religiously motivated or not. The fact that groups with the expertise and responsibility to provide guidance to their members and employees have been so confused and inconsistent highlights the public need to settle this important issue.

For lesbian and gay patients who encounter pervasive discrimination in health care settings, the need is equally acute. A growing religious fundamentalist movement seeks religious exemptions through 'refusal clause' legislation and court challenges to civil rights and anti-harassment policies in order to voice and act more fully on their objections to homosexuality, among other objections.[4] This is a matter of not just statewide concern, but also nationwide concern, meriting this Court's review.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL AS TO WHETHER JUDICIAL ESTOPPEL PRECLUDES LITIGANTS FROM CHANGING THEIR ASSERTION OF FACTS IN SUCCESSIVE COURT FILINGS.

A. Judicial Estoppel Protects The Integrity Of The Judicial Process By Precluding Litigants From Changing The Facts They Assert In A Court Filing.

Judicial estoppel is a venerable equitable doctrine that "prevents a party from asserting a position in a legal proceeding that is contrary to a position

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[4] See Stein, *Health Workers' Choice Debated, Proposals Back Right Not to Treat*, Wash. Post, A01 (Jan. 30, 2006); Simon, L.A. Times, *Christians Sue for Right Not To Tolerate Policies*, Part A, p. 1 (April 10, 2006); Baldas, *Attorneys Fear Repercussions of Refusal-to-Treat Trend*, The National L.J. (Feb. 8, 2005) (in 2004, 37 bills were introduced in 14 states to permit pharmacists to refuse to fill any prescription for "personal or moral convictions," and nine states introduced broader bills to permit religiously-based refusal "of any medical procedure or drug for any reason"); Hermann, *Physicians And Pharmacists Receive A License That Obligates Them To Provide Appropriate Care*, Chicago Sun-Times, Editorials, p. 16 (May 7, 2005) ("The trend for expanding the basis for health care providers to refuse to provide medical treatment should be halted. The alternative is simply not acceptable medical practice. Consider a treating physician who refuses to provide antiviral therapy to an HIV-infected gay person

previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, internal quotation marks omitted.)

Judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.' ... It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (*Id.*, internal quotation marks omitted, brackets in original.)

B. There Is A Split Of Authority Nationwide As To Whether Judicial Estoppel Requires Success In The Initial Assertion Of Facts And What It Means To Have Such Success.

Courts typically say that judicial estoppel "should" apply when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at p. 183.)

Courts nationwide disagree, however, as to whether the third factor in this formulation – success in asserting the first position – is *essential* to judicial estoppel. To say that the doctrine *should* apply when all five factors are present is not necessarily to say further that the doctrine applies *only* in such cases.

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because the physicians' religious beliefs hold that AIDS is punishment for homosexuality.").

Some American courts have taken that further step and have required all five factors, including success in asserting the first position. (See, e.g., *Allen v. Zurich Ins. Co.* (4th Cir. 1981) 667 F.2d 1162, 1167; *Edwards v. Aetna Life Ins. Co.* (6th Cir. 1982) 690 F.2d 595, 598.) Other courts, however, have held the opposite, concluding that, given the affront to the integrity of the judicial process when litigants "play fast and loose" by changing positions in mid-litigation, success in asserting the first position is *not* essential to judicial estoppel (See, e.g., *Patriot Cinemas, Inc. v. General Cinema Corp.* (1st Cir. 1987) 834 F.2d 208, 212; *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.* (3d Cir. 1996) 81 F.3d 355, 361.) The courts also disagree as to what it means to be "successful in asserting the first position." Some opinions say it means that the judge *actually adopted* the first position. (See, e.g., *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 601.) Other opinions say it means the party *benefitted as a result of* asserting the first position. (See, e.g., *Ryan Operations G.P. v. Santiam-Midwest Lumber Co., supra,* 81 F.3d at p. 361.) The two approaches can produce different results, for it is possible that a court can adopt a litigant's position without producing any benefit to the litigant.

C. The California Courts Also Are Split As To Whether Judicial Estoppel Requires Success In The Initial Assertion Of Facts.

1. Three published opinions say success is not required, while one says it is.

In California, the law of judicial estoppel is as ambiguous as it is nationwide. (See *Prilliman v. United Air Lines* (1997) 53 Cal.App.4th 935, 957,

960 (describing California law of judicial estoppel as "vague" and "unsettled").) The problem is especially acute when it comes to the question whether judicial estoppel requires success in asserting the first position. On two recent occasions, this Court has restated the typical five-factor formulation of situations where judicial estoppel plainly applies (See *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987), but this Court has not yet said whether the third factor – success in asserting the first position – is *essential* to judicial estoppel. The Courts of Appeal, however, have weighed in – and they, too, are in conflict.

The first published California case to mention the split of authority in other jurisdictions was *Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th 171, which acknowledged the view requiring success in asserting the first position, but said that, because judicial estoppel is an equitable doctrine, "we cannot rule out the possibility that, in a future case, circumstances may warrant application of the doctrine even if the earlier position was not adopted by the tribunal." (*Id.* at 183-184, fn. 8.) Since then, the split of authority has squarely emerged in California's published case law.

On the one hand, three published decisions indicate that success in asserting the first position *is not* required. (*Furia v. Helm III* (2003) 111 Cal.App.4th 945, 958; *Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118-119; *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 958.) On the other hand, one

published decision says success *is* required. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1246.)

2. Numerous unpublished opinions are in conflict on this issue.

The published decisions, however, are just the tip of the iceberg. Just below the surface of published case law lies a huge body of unpublished Court of Appeal opinions that are in conflict on this issue.

A Westlaw search reveals the extent to which judicial estoppel is being litigated in the Courts of Appeal, and the extent to which the split of authority on the success factor permeates the unpublished opinions. Westlaw's KeyCite "citing references" for *Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th 171, show that the part of the opinion prescribing success in asserting the prior position within the five-factor formulation for judicial estoppel (*id.* at 181) has been cited in 71 unpublished opinions since 2002 – 68 positive citations and three negative citations. The KeyCite "citing references" for *Thomas v. Gordon, supra,* 85 Cal.App.4th 113, one of the three published opinions saying success is *not* required (*id.* at 118-119) show that that part of the opinion has been cited in 19 unpublished opinions – 16 positive citations and three negative citations. The KeyCite "citing references" for *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist., supra,* 106 Cal.App.4th 1219, the single published opinion saying success *is* required (*id.* at 1246), show that that part of the opinion has been positively cited in two published opinions.

Thus, nearly two dozen unpublished Court of Appeal decisions have addressed this issue – with conflicting results – during the past few years.

For example, in *Foley v. McAneny* (2002, No. D038615) 2002 WL 339547 at *5, the Fourth Appellate District, Division One, said that "[t]he prior successful assertion of the inconsistent position element is not required when its application would defeat the policy of judicial estoppel."[5] In *Debien v. Countrywide Home Loans, Inc.* (2005, No. B177214) 2005 WL 2375153 at *5, the Second Appellate District, Division Six, said that judicial estoppel has been applied "even if the litigant was ultimately unsuccessful" in the first action.

Yet, in *Katz Communications, Inc. v. Joseph Gamble Stations, Inc.* (2003, No. C040201) 2003 WL 22451725 at *14, the Third Appellate District said that judicial estoppel "only" applies where all five factors in the traditional formulation are present. And in *Harcourt v. Davi* (2004, No. D0402521) 2004 WL 2153791 at *9, the Fourth Appellate District, Division One, quoted *Tuchscher* for the proposition that "[t]he judicial estoppel doctrine 'should be applied only when the person against whom it is asserted 'was successful in asserting the first position.'"

The current state of the law is so confusing that one justice of the Fourth

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[5] Plaintiff discusses this unpublished opinion, and others, not in reliance on them (see Cal. Rules of Court, Rule 977(a)), but only to demonstrate that the judicial estoppel issue presented in this petition is recurring and remains unresolved in the Courts of Appeal. See *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219.

Appellate District has straddled both sides in the conflict, authoring the opinion in *Harcourt v. Davi, supra,* requiring the element of success, yet concurring in the opinion in *Foley v. McAneny, supra,* saying success is not always required.

D. This Issue Is Ripe For Supreme Court Review.

1. The issue has percolated long enough.

Plainly, confusion reigns in the lower courts regarding judicial estoppel. Since *Jackson* in 1997, dozens of published and unpublished opinions have wrestled with the doctrine and have reached conflicting conclusions as to whether it requires success in asserting the first position. This issue has percolated long enough in the lower courts.

2. This case is a good vehicle for review because it squarely presents the question of what it means to have "success" in the initial assertion of facts.

This case is a good vehicle for deciding whether judicial estoppel requires success in asserting the first position, because it squarely presents the corollary question of what such success *means* – i.e., whether it means that the judge *actually adopted* the first position, or that the party *benefited as a result* of asserting the first position. (See *ante*, p. 19.)

The defendants asserted their first position – that they refused to perform IUI for Benitez because of her sexual orientation – in their anti-SLAPP motion and in their first motion for summary adjudication. (See Att. 2, pp. 1-8, RJN Exhs. 1-7.) The judge never ruled on the anti-SLAPP motion. The judge partially granted the first motion for summary adjudication, but not because the defendants

asserted Benitez's sexual orientation as the reason why they refused to perform the IUI. In his written ruling, however, the judge said: "It is undisputed that Dr. Brody informed Plaintiff at the initial consultation that it was against her religious beliefs to perform intrauterine insemination ("IUI") for a homosexual couple." (San Diego County Superior Court, Telephonic Ruling, dated Apr. 12, 2004, Att. 2, pp. 9-10, RJN 8.) Thus, although defendants did not benefit from asserting their first position, the judge nevertheless *adopted* it.

Consequently, if judicial estoppel requires success in asserting the first position, then the resolution of the issue presented here turns on the meaning of such "success." On the one hand, if success means the defendants benefited from their initial factual assertion, then there was *no* success here. On the other hand, if success means the judge actually adopted or accepted the defendants' initial factual assertion, then there *was* success here. Thus, this Court's ruling on the question will constitute a ratio decidendi, not just dictum.

3. This Court should grant review and hold either that (1) judicial estoppel does not require success in the initial factual assertion or (2) if success is required, it means only that the judge actually adopted the assertion.

The better view is that judicial estoppel should not require success in asserting the first position when that position is an assertion of *fact*. It is one thing to change one's *legal* theory as a case makes its way through the judicial process; the law is dynamic and subject to change. But it is quite another thing for litigants to change the *facts* they have asserted in a court filing whenever it suits their

evolving litigation strategy. Past facts are static. What has already happened does not change.

The integrity of the judicial process is undermined whenever a litigant is allowed to "play fast and loose" with the facts by disclaiming a prior factual assertion – whether or not that assertion was successful. It might be acceptable in Alice's Wonderland for words to mean whatever Humpty Dumpty says they mean (See Carroll, *Through the Looking Glass* (1872)), but it should not be acceptable in the California courts for the facts to consist of whatever a litigant says they are, regardless of what that litigant said previously.

If success *is* required, it should mean that, as here, the judge actually adopted the initial factual assertion – which is how success is defined in *Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th at page 183. When that happens, something of jurisprudential significance has occurred – whether or not it produces any particular benefit – in that a court has made a factual determination. That should mean something.

III. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE LIMITED CIRCUMSTANCES IN WHICH A PARTY CAN BE EXEMPTED FROM A DECISION OF THIS COURT.

A. Appellate Decisions Apply To Pending Cases Absent "Compelling And Unusual Circumstances."

The "general rule that judicial decisions are given retroactive effect is basic in our legal traditions." (*Newman v. Emerson Board Radio Corp.* (1989) 48 Cal.3d 973, 978.) "With few exceptions and even after expressly considering

suggestions to the contrary, California courts have consistently applied tort decisions retroactively even when these decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decisions." (*Id.* at 981.) Retroactivity has sometimes been circumscribed because of "unique burdens" and "compelling and unusual circumstances, justifying departure from the general rule," (*id.* at 983), but since *Newman* few cases have met this standard. Exemptions have occurred only because of actual, reasonable reliance on a prior rule. (See, e.g., *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345; *Estate of Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 305.) When the record lacks adequate information on such reliance, remand is proper to permit the litigant desiring exemption to prove both reasonable reliance on the prior rule and the "unusually compelling" harm the new decision supposedly would cause. (See *Propst v. Stillman* (1990) 50 Cal.3d. 448, 464-65.)

It also has been said that reliance and hardship may be found only when this Court makes a "clear break" from a settled rule by adopting a new rule that was not predictable. (*Rae-Venter*, 29 Cal.4th at 372.) Many cases apply the general rule of new-decision applicability, but few find the "unique burdens" test has been satisfied. This has left little guidance regarding when the exemption applies.

Here, the Decision's exemption of defendants from *Koebke* threatens to broaden this "unusual" exception. The Court of Appeal excused defendants from

Koebke based on their claim that they had relied on a ruling in *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, that the Unruh Act does not prohibit marital-status discrimination. But, as explained below, such reliance could not have been reasonable given this Court's prior characterization of the issue, notwithstanding *Beaty*, as an open one. (*Smith v. FEHC*, 12 Cal.4th at 1160 n.11.)

B. The Decision's Application Of *Rae-Venter* Removes Any Limiting Standards.

1. Reliance on an intermediate appellate decision cannot be reasonable when this Court has said the issue is unsettled.

Where *Rae-Venter* required reliance on a prior Supreme Court rule and a sharp, unforeseeable departure from that rule (29 Cal.4th at 372), and *Newman* precludes reliance on a lower court decision unless it has been "longstanding," its rule was "firmly fixed," and there are "compelling additional reasons" (48 Cal.3d at 986-87), the Decision expands the exception immensely by protecting defendants who now claim, without support, that they relied on the intermediate appellate decision in *Beaty*.

Notwithstanding *Koebke*'s holding that "marital status claims are cognizable" under the Act (36 Cal.4th at 831), the Decision holds that defendants were entitled to rely on *Beaty's* contrary conclusion because *Beaty* stated "a settled rule." (Opn. at 14-15.) But this Court previously had noted in *Smith v. FEHC* that whether the Unruh Act prohibits marital status discrimination was an open question, citing *Beaty* as representing one view and other cases giving an opposing

view. (*Smith*, 12 Cal.4th at 1160 n.11.) Review should be granted to resolve whether a litigant's reliance on an intermediate appellate decision can be considered "reasonable" when this Court had declared the issue *unsettled* and identified that decision as one of multiple conflicting rulings.

2. A court cannot find reasonable reliance without reviewing the record.

In *Propst*, this Court explained that the "rare" exception requires proof of actual reliance. (50 Cal.3d at 464-65.) Here, the the Court of Appeal refused to check the record of what defendants actually argued earlier in the case. Plaintiff attempted three times to supplement the appellate record on rehearing to show not only that defendants in fact had not relied on *Beaty* until years into the case when it belatedly became convenient to do so, but also that they should be estopped, not rewarded, for their inconsistency under oath. The Court of Appeal rejected all three submissions. (See *ante*, p. 9-10.)

If lower courts may excuse litigants from this Court's decisions without making any record-based finding of actual reliance on a prior rule, the "rare" exception will become available at the unfettered discretion of those courts.

3. A litigant should not be exempted from a Supreme Court decision when other laws and private contracts imposed the same constraint.

Newman stresses that the rare exception to the rule of retroactivity requires justice interests that are so compelling that they distinguish a case from the "usual run of cases." (*Newman*, 48 Cal.3d at 983.) Here, even if the charge in plaintiff's

complaint had been marital status discrimination (which it was not), and even if defendants had cited *Beaty* from the outset (which they did not), the question still would remain whether, as a matter of law, a litigant may make an extreme hardship and "administration of justice" plea for exemption when the litigant already was subject to multiple independent duties consistent with the Supreme Court's decision. Defendants here were prohibited from discriminating against their patients based on marital status by multiple state laws and the contracts they voluntarily signed to obtain referrals of insured patients like plaintiff. (See, e.g., Bus. & Prof. Code, § 125.6 (prohibiting marital-status discrimination by licensed professionals); Health & Saf. Code, § 1365.5 (prohibiting marital-status discrimination in services provided through a health plan); Ins. Code, § 679.71 (prohibiting marital-status discrimination in insurance); see also, e.g., Professional Services Agreement, dated April 1, 1999 between Christine Brody, M.D. and Greater Tri-Cities IPA Medical Group, Inc. (same).[6]) This Court should clarify what it means for an adequately compelling hardship to exist.

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[6] A true copy of this contract is at pages 232-246 of the doctors' appendix in support of their writ petition. The contract provides in relevant part:

> Nondiscrimination. Professional agrees: 6.14.1. Not to differentiate or discriminate in its provision of Specialty Covered Services to Enrollee because of ... **marital status, sexual orientation**...."

¶ 6.14, p. 8, Petitioners' Appendix, p. 239 (emphasis added).

IV. THIS COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER A COURT MAY DISREGARD THE LEGISLATURE'S DECLARATION THAT A STATUTORY AMENDMENT WAS A CLARIFICATION RATHER THAN A CHANGE OF LAW.

This case presents an issue already pending before this Court in a different context (see *ante*, p. 5) regarding the Legislature's capacity to declare existing law in the absence of controlling Supreme Court authority, yet in the face of conflicting lower court decisions. The issue arises here due to Assembly Bill 1400's recent amendment of the Unruh Act to make clear the inclusion of marital status and sexual orientation. (Stats. 2005, ch. 420.) AB 1400 should apply in this case because the bill clarified, and did not change, the law. (See *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-245; *Murray v. Oceanside Unified School District*, 79 Cal.App.4th 1338.) *Carter* and *Adams, supra,* both involve an amendment to the FEHA. The issue here arises from the Fourth District's disagreement with both this Court and the Legislature about whether the Unruh Act, properly construed, prohibited marital-status discrimination prior to *Koebke*. The Fourth District held that *Beaty*, decided in 1992, was settled law. This Court, in *Smith v. FEHC,* said ten years ago that it was not, and that the marital status question was open. (12 Cal.4th at 1160 fn. 11.)

With AB 1400, the Legislature wrote expressly into the Unruh Act what the Court declared in *Koebke* – that marital-status discrimination claims *are* cognizable under the Act. AB 1400 did not pass until *Koebke* was decided and the

Legislature had confirmed that the bill was consistent.[7] In such circumstances, "the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984.)

The Decision says that AB 1400 cannot apply here in light of *McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467. But the bill at issue in *McClung* directly contradicted a final, definitive Supreme Court decision. (*Id.* at 473.) Here, in contrast, this Court had never ruled prior to *Koebke* on whether marital-status discrimination claims are cognizable under the Unruh Act. (See *Smith v. FEHC*, 12 Cal.4th at 1160 fn. 11.)

The Legislature's role in clarifying existing law is important, and the Supreme Court's authority to determine the ultimate meaning of the law is essential. The lower courts should not so easily dismiss the Legislature's role in the process of clarifying law.

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[7] See the Assembly Judiciary Committee report at <http://www.leginfo.ca.gov/pub/bill/asm/ab_1351-1400/ab_1400_cfa_20050824_165450_asm_floor.html>.

CONCLUSION

For the foregoing reasons, review should be granted to resolve these issues of statewide and national concern.

Dated: April 24, 2006 Respectfully submitted,

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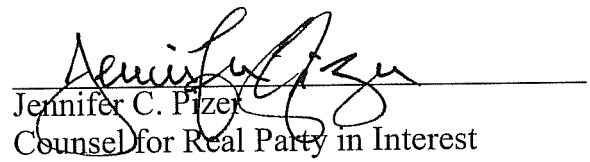
CERTIFICATE OF COMPLIANCE

I certify that the brief is proportionately spaced, has a typeface of 13 points or more, and contains 7,762 words, based upon the word court in Microsoft Word, and is in conformance with the type specifications set forth at California Rules of Court 14.

Dated: April 24, 2006



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