Case No. S142892

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
v.	Superior Court No. GIC770165
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

REPLY IN SUPPORT OF PETITION FOR REVIEW OF REAL PARTY IN INTEREST GUADLUPE T. BENITEZ

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INTRODUCTION

The theme of defendants' answer to the petition for review is that this case is not yet ready for this Court because a factual dispute exists over whether they discriminated against plaintiff because she is unmarried or because she is a lesbian. (See Answer To Petition For Review, pp. 2, 3, 13, 14, 17, 29.) They say they wish to "tell their story" - and most importantly their religious reasons for their conduct - to a jury. But nothing they say undermines plaintiff's explanations of why the multiple alarming problems created by the Court of Appeal's decision reinstating defendants' religious affirmative defense to ensure they can give such testimony ("the Decision") makes the issues presented worthy of this Court's review.

There is no right to "tell one's story" in defiance of procedural rules that maintain efficient judicial process and protect other litigants' rights. Every grant of summary adjudication and sustained evidentiary objection precludes some part of a litigant's "story." By deeming defendants' testimony about their beliefs to be protected religious exercise warranting special treatment under Code of Civil Procedure ("CCP") Section 437c and exemption from the rules of evidence, the Decision promises mischief for future cases in which litigants advance religious defenses and offer testimony that otherwise would be invalid or inadmissible. Not only does the Decision threaten seriously to frustrate appropriate procedures for streamlining litigation, but it would disfavor the secular interests of the judicial system and other litigants in a manner offensive to the "no religious preference" clause of Article 1, section 4 of the California Constitution.

In addition, the asserted factual dispute about defendants' reasons for discriminating against plaintiff is irrelevant to whether defendants' religious defense is valid. The Unruh Civil Rights Act (Civil Code §51)

prohibits discrimination on many but not all grounds. A business's denial of a discount to non-senior males might inspire a dispute about whether it was premised on a prohibited reason (sex), a permitted one (age), or both. But whether or not the difference in treatment was *religiously* motivated is immaterial and does not warrant suggesting to a jury that religious motivations are somehow privileged.

Yet defendants contend the superior court must conduct a trial to determine their reasons for refusing to perform an intrauterine insemination ("IUI") for plaintiff before answering the purely legal question that, if answered as they desire, would require dismissal of plaintiff's Unruh Act claim without trial. The Court of Appeal agreed with defendants, but the special rule it fashioned to require a trial before legal adjudication promises wasteful, flawed trials whenever individual religious beliefs are asserted in defense.

Moreover, defendants' position altogether fails if they are *judicially estopped* to deny that they refused to treat plaintiff because she is a lesbian – a position they took in their trial court filings for the first two-and-a-half years of litigation. Judicial estoppel, itself one of the issues presented for review, eliminates the factual dispute (whether or not relevant to the defense) and lights this Court's way to the constitutional issue at the heart of this litigation: whether physicians have a right to refuse on religious grounds to provide a lesbian patient medical care they provide to others. Judicial estoppel underscores why this case is ripe for review – on both the scope of judicial estoppel itself and the substantive issues presented.

The Decision also distorts *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, and has narrowed the Unruh Act's protection against such discrimination, with serious implications for the future. As defendants assert in their answer, the Decision construes *Koebke* as having

held that the Unruh Act's protection against marital status discrimination applies only with respect to events after January 1, 2005, and consists only of prohibiting differential treatment of spouses and registered domestic partners. By this reading, the Act would offer nothing to single individuals or couples who have not formalized their relationship under state law. The Decision also improperly narrows the protections afforded to Californians under AB1400, last year's amendment to the Unruh Act specifying marital status and sexual orientation, and codifying the approach this Court used in *Koebke* and before.

I. REVIEW IS NECESSARTY TO RESOLVE WHETHER THE CONSTITUTIONAL PROTECTION FOR RELIGIOUS EXERCISE EXEMPTS DOCTORS FROM THE UNRUH ACT.

A. No Material Factual Disputes Weigh Against Review.

Defendants' main argument against review is that the constitutional question is unripe due to factual disputes requiring trial. But there is no disagreement that defendants' objection to performing IUI for plaintiff was due solely to their religious concerns, and that there was nothing about plaintiff's medical condition or any other legitimate business reason that justified treating her differently.

As discussed in *Catholic Charities v. Superior Court* (2004) 32 Cal.4th 527, 562-66, there are three elements to the test of religious free exercise claims under the California Constitution:

1) Whether the law in question imposes a substantial burden on an exercise of religion;
2) Whether the government has a compelling interest in enforcing the law; and

3) Whether the law is narrowly tailored.

Given this analysis, which is purely legal, the lack of any material factual issues means the important legal question can and should be answered now. Although factual issues remain for trial regarding plaintiff's causes of action for deceit, intentional infliction of emotional distress, and breach of contract, the answer to the religious defense question will simplify the case considerably. If the defense is valid, there will be no need for trial of plaintiff's Unruh Act claim. If the defense is invalid, there will be no need for testimony about the religious nature of defendants' motivations.

B. There Is Confusion About Whether And How This Court's Precedents Apply.

This Court already has addressed religious objections to civil rights laws, most notably in *Catholic Charities v. Superior Court*, 32 Cal.4th at 527, which reexamined *Smith v. Fair Employment & Housing Comm'n* ("FEHC") (1996) 12 Cal.4th 1143. Reaffirming that individual religious beliefs cannot excuse violations of general laws, *Catholic Charities* adopted the U.S. Supreme Court's touchstone: "when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*Catholic Charities*, 32 Cal.4th at 565 (quoting *United States v. Lee* (1982) 455 U.S. 252, 261.)

In support of their writ petition, defendants argued that the special rules that apply in medical settings and protect the conscience rights of doctors distinguish this case from this Court's past precedents. Defendants

also contended that the analysis must be different here because the government does not have the same compelling interest in ending sexual orientation and marital status discrimination that it has in ending sex discrimination. (Petition for Writ of Mandate, at p. 30-32.)

Plaintiff has responded that the government does have a compelling interest in ending all forms of discrimination, including religiously motivated discrimination by a business. (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 379; see also Stats. 2005, ch. 420 (AB1400) (finding that state's interest in preventing arbitrary discrimination is "longstanding and compelling").) Various amici curiae weighed in before the Court of Appeal to support the doctors' views, and proper accommodation of these competing interests has inspired considerable academic commentary.[1] Yet there remains a startling lack of case law to provide guidance. This is an important question that is squarely presented and needs this Court's attention.

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[1] See, e.g., Magid and Prenkert, *The Religious and Associational Freedoms of Business Owners* (Winter, 2005) 7 U. Pa. J. Lab. & Emp. L. 191; Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace* (2002) 16 BYU J. Pub. L. 287; Vaitayanonta, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws* (May, 2001) 101 Colum. L. Rev. 886 (reporting that "there has been an increase in the number of legal challenges brought by religious individuals and institutions against the application of various federal and state civil rights laws, particularly those that prohibit discrimination on the basis of marital status and sexual orientation"); Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry* (March 2001) 89 Geo. L.J. 719; Cruz, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination* (1994) 69 N.Y.U.L. Rev. 1176.

C. Many Californians With Conflicting Views Urgently Need This Question Answered.

In our religiously and culturally diverse society, civil rights laws provide a bulwark against discrimination. These laws recognize "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" when a proprietor of a business turns away members of a particular group, in effect saying, we don't serve your kind here. (See *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, 257 (explaining that public accommodations laws reduce the "moral and social wrong" of discrimination).)

For more than half a century, California law has afforded this protection to our state's lesbian and gay residents. (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 715-16; see also *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289.) Yet only last year the Legislature codified that protection by enacting AB1400, and enforcement remains essential for this population, as anti-gay discrimination persists, often with religious motivation.[2] The problem is acute in medical settings in which patients are

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[2] See, e.g., *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599 (employer offered adequate accommodation to religious employee who posted anti-gay biblical messages in workplace); *Bodett v. Coxcom, Inc.* (9th Cir. 2004) 366 F.3d 736 (Christian supervisor drove lesbian subordinate from workplace with disapproval of subordinate's sexual orientation); *Erdmann v. Tranquility Inc.* (N.D.Cal. 2001) 155 F.Supp.2d 1152 (religious supervisor harassed gay subordinate with warnings he would go to hell and pressure to lead prayer services). Compare *Buonanno v. AT&T Broadband* (2004) U.S.Dist.LEXIS 6218 (awarding damages to religious employee who objected to policy requiring him to "value" all employees' differences, including sexual orientation diversity).

vulnerable, and dignitary harm leads to increased illness because patients avoid care.[3]

As a practical matter, in cases like this one involving reproductive health care and personal family choices, improper religious objections will mean more women experiencing the sort of injustice plaintiff endured here – a year wasted on mood-swing-inducing, cancer-related medications,[4] with the procedure she needed dangled before her month-by-month, only to be sent packing.

II. JUDICIAL ESTOPPEL IS PRESERVED FOR REVIEW AND SHOULD APPLY IN THIS CASE.

By ruling that defendants must be allowed to testify that they discriminated against plaintiff because she was unmarried rather than because she is a lesbian, the Decision divested the superior court of the

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[3] See, e.g., Allen, *Many Lesbians Avoid Doctors For Fear Of A Backlash From Judgmental Practitioners. With Scant Research To Date, New Studies Underscore The Need To Track HIV, Cancer And Other Trends In This Population*, L.A. Times, Health (June 21, 1999) Part S, p. 1; Gay & Lesbian Medical Ass'n, *Healthy People 2010: Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health* (2001) at 49 (reporting that bias against LGBT patients pervades the medical profession, with significant public health consequences) available at http://www.glma.org/policy/hp2010/index.html; O'Hanlan, *Do We Really Mean Preventive Medicine for All?* (1996) 12 Am. J. Prev. Med., No. 5, p. 411, at 414 ("In a survey of nearly one thousand Southern California physicians, one third of physicians in primary care specialties were found to have significantly homophobic attitudes.").

[4] See Brody March 8, 2000 notations in plaintiff's medical chart regarding increased risk of ovarian cancer after twelve cycles of Clomid medication. Writ Petition Appendix, at p.146; see also Benitez Declaration in Opposition to Defendants' Motion for Summary Adjudication, March 24, 2004, Writ Petition Appendix at pp. 87-88, 91, 94, ¶¶ 12, 14, 18, 35, 46.

ability to apply judicial estoppel. This ruling disserves truth and the integrity of the judicial process, and is unfair to plaintiff. Even if defendants had the right they claim to tell their story, they have no right to *change* it by repudiating their sworn, court-filed statements.

A. Judicial Estoppel Is Preserved For Review Because Plaintiff Presented It To The Court Of Appeal In A Successful Petition For Rehearing.

Defendants do not dispute the ground for review here – the glut of published and unpublished Court of Appeal opinions that are in conflict as to whether judicial estoppel requires success in the initial assertion of facts. (See Petition for Review, pp. 19-23.) Defendants' sole reason for opposing review on the judicial estoppel issue is that the issue purportedly was not raised below.

In this case, the judicial estoppel issue *was* raised below and thus *is* properly preserved for review.[5] Defendants claim judicial estoppel "was not an issue *originally* raised in the lower courts." (Answer To Petition For Review, p. 18, italics added.) The key word here is defendants' qualifier "originally." True enough, plaintiff did not "originally" assert judicial estoppel in her brief opposing defendants' writ petition, because the issue was not put at issue in the writ petition or in the questions presented by the

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[5] Even had the issue not been raised below, this Court retains discretion to review any issue presented by a case, and may exercise that discretion for an issue of widespread importance that needs to be addressed – which aptly describes the judicial estoppel issue presented here. (See *People v. Braxton* (2004) 34 Cal.4th 798, 809; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 5-7.)

Court of Appeal in its Order to Show Cause. (See Order dated January 27, 2005.)

The Court of Appeal's initial decision, however, made clear that the issue was appropriate for decision despite not being part of the writ petition. Thus, plaintiff asserted judicial estoppel in her first petition for rehearing (pet. for rehearing filed Dec. 19, 2005, pp. 24-25, fn. 14), which was *granted*, thus placing the issue before the Court of Appeal. When the Court of Appeal issued its second opinion without addressing judicial estoppel, plaintiff called the omission to the Court of Appeal's attention in a second petition for rehearing (pet. for rehearing filed March 29, 2006, p. 10), which is sufficient to preserve the issue for this Court's review. (See Cal. Rules of Court, rule 28(c)(2) [issue preserved for review if petition for rehearing called court's attention to omission of issue from opinion].)[6]

Defendants also argue that review cannot be "necessary to secure uniformity of decision or to settle an important question of law" (Cal. Rules of Court, rule 28(b)(1)) where, as here, the Court of Appeal's opinion did not address the issue. (Answer To Petition For Review, pp. 19-20.) But if that were true, then the Supreme Court would be prohibited from reviewing summary denials of writ petitions, which the Supreme Court is able to do, and the Court of Appeal could prevent Supreme Court review of an issue merely by refusing to address it, which the Court of Appeal should not be able to do. What is important here is that the Courts of Appeal are plagued

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[6] Defendants misstate the trial court record with their claim that the documents showing their admissions are outside the trial court record. All were filed in the superior court on motions brought by one side or the other, and all were offered to the Court of Appeal to correct the appellate court's misimpressions about the doctors' statements. The documents were not in the appellate record because the Court of Appeal repeatedly refused plaintiff's applications to include them. See Orders dated December 20, 2005, February 7, 2006, and April 7, 2006.

with a widespread split of authority on the judicial estoppel issue presented, and this case is a good vehicle for this court to decide that issue (see Petition For Review, pp. 23-24), regardless of whether the Court of Appeal addressed it.

B. Deposition Testimony Is Consistent With Judicial Estoppel and Confirms There Is No Genuine Factual Dispute For Trial About Defendants' Reasons For Discriminating Against Plaintiff.

In March of 2004, the Fourth Appellate District ruled in *Koebke v. Bernardo Heights Country Club* that marital status claims are not cognizable under the Unruh Act. Soon thereafter, the doctors gave their depositions and asserted for the first time that they had refused to perform the IUI for plaintiff because she is unmarried. Both doctors testified, however, that their concern for marriage was not the legal responsibility between the spouses; rather, their concern was "tradition" and heterosexuality.

For example, to the question whether she would perform an IUI for a lesbian who was legally married to another woman, defendant Brody testified that "my objection to performing IUI is on any couple outside of a traditional marriage, meaning, a heterosexual marriage." (See Real Party's Supplemental Request for Judicial Notice ("SRJN"), Exh. 1 (Deposition of Christine Brody, May 13, 2004, pp. 155-157, from Exh. D to Decl. of Carlo Coppo In Support of Defendants' Motion For Summary Adjudication As To Plaintiff's First Cause of Action, dated June 14, 2004).)

Defendant Fenton testified that he has the same "traditional" concept and he only performs IUI for women in a "traditional" marriage, which he defines as "a man marries a woman." (See SRJN Exh. 2 (Fenton Depo.,

May 17, 2004, pp. 51-52, from Exh. E to Coppo Decl. In Support Of Defendants' Motion for Summary Adjudication).)

Despite the doctors' shift from their initial sworn statements that they refused plaintiff because she was in a "homosexual couple," to their later ones that they only do inseminations for married women, the doctors were consistent that they only will perform IUI for patients in a "traditional" heterosexual marriage. In other words, they require both heterosexuality and a legal relationship. Notwithstanding defendants' attempt to cast it so, this is not a disparate impact claim in which a requirement of marriage happens to screen out lesbians as an unintended consequence. (Answer at 16-17.) Rather, as the doctors themselves describe it, they engage in two forms of discrimination simultaneously. Given their own qualification of the term "marriage," there is no factual issue to try.

To try to show a dispute about their own motive, defendants rely almost entirely on the testimony of plaintiff and her domestic partner, Joanne Clark, who recalled in their depositions that defendant Brody had explained that she only will perform an IUI for a patient in a heterosexual marriage. They testified that Brody had told them she objects to performing an insemination for a patient in a lesbian relationship, and also objects to doing so for an unmarried heterosexual one. Their testimony was consistent with that of the doctors, who require both heterosexuality and a legally sanctioned relationship of their patients.

Plaintiff Benitez testified that Brody said she "could not help [me] to bring a child into this world, because *it goes against her religious beliefs because of my sexual orientation*," and "she was referring to the fact that because of our relationship not being a, I guess, *traditional heterosexual relationship*." (See SRJN, Exh. 3 (Benitez Depo., March 1, 2004, pp. 134,

143, from Exh. N to the Decl. of Margaret C. Carroll in Opp'n to Defts' Motion for Sum. Adj., dated August 20, 2004 (emphasis added).)

Plaintiff also testified that Brody told her that "*it went against her religious beliefs due to the fact that me and Joanne were same-sex partners.*" (*Id.* (emphasis added).)

Similarly, Ms. Clark testified that Brody had said "*she could not do it* based on her religious beliefs, *referring to us as a couple, which previously stated to her we were gay.* So did the word homosexual come out of her mouth? No. But *was it implied because we had previously mentioned it? Yes.*" (See SRJN Exh. 4 (Clark Depo., March 4, 2004, pp. 47-48, from Exh. O to Carroll Decl. in Opp'n to Defts' Motion for Sum. Adj., dated August 20, 2004) (emphasis added).)

The deposition testimony of plaintiff, her domestic partner and the defendants all is consistent that defendants communicated explicitly to plaintiff that they objected to performing an IUI for her because she is a lesbian in a same-sex relationship rather than a heterosexual one, and that they *also* object to performing the procedure for unmarried heterosexual women. The defendants' admissions in deposition thus are consistent with those in their declarations. Judicial estoppel should apply here, and the Court should grant review to resolve the longstanding conflict in the governing law.

III. EVEN IF DEFENDANTS WERE NOT BOUND BY THEIR PRIOR ADMISSIONS, *KOEBKE* MAKES THE UNRUH ACT APPLICABLE HERE.

In *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, this Court applied the analysis required for over a decade by *Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, and, as to the first

Harris element, concluded that marital status discrimination claims *are* cognizable under the Unruh Act. Notwithstanding that holding in *Koebke*, defendants' main response to plaintiff's third issue presented is simply to cite the Decision's approval of *Beaty v. Truck Insurance Exchange* (1992) 6 Cal.App.4th 1455, which had held to the contrary. In addition to the obvious error of the Decision's holding that *Beaty* was correct despite this Court's having overruled it in significant part, the Court of Appeal also misconstrued *Koebke* as a change in law based on the new domestic partner law (AB205), which only prohibits treating registered domestic partners differently from spouses with respect to events after January 1, 2005. The Decision's selective and unduly narrow reading of *Koebke* negates important aspects of this Court's *Koebke* analysis that should apply to pending cases involving pre-AB205 events, and should apply as well in future cases under AB1400, last year's codification of marital status protection. Specifically, the Decision improperly narrows and confuses the protections provided for single individuals, as well as for unmarried (and unregistered) couples.

The only response defendants offer to plaintiff's showing that they did not rely on *Beaty*, and thus have no claim of exemption from *Koebke,* is to assert that the documents showing defendants' actual positions are not in the trial court record. That is incorrect. As counsel attested in support of the Request for Judicial Notice, each document as to which judicial notice is requested is in the trial court record as part of defendants' motions for summary adjudication.

The trial court record makes plain that defendants did not, in fact, rely on *Beaty*. Even if they had, however, any such reliance could not have been reasonable in light of the notice given by this Court in *Smith v. FEHC*, 12 Cal.4th at 1160 n. 11. Finally, questions of individual reliance aside, the

Courts of Appeal may not exempt litigants in pending cases from this Court's decisions, in favor of earlier precedents of intermediate courts that this Court previously identified as questionable. (See *Newman v. Emerson Board Radio Corp.* (1989) 48 Cal.3d 973, 986-87.)

IV. THIS COURT SHOULD REVIEW THE COURT OF APPEAL'S DISREGARD OF AB1400.

Defendants offer nothing more to justify the Decision's improper disregard of the Legislature's analysis of what it was accomplishing with passage of AB1400 than they do with respect to the Decision's misapplication of *Koebke*. As discussed above, the misreading of *Koebke* improperly carves much of the marital status protection out of the Unruh Act, including protection just codified by AB1400. The Decision's error in this regard has created multiple conflicts in the law warranting this Court's attention.

To begin with, the Decision appears to make the Unruh Act's marital status protection both unduly narrow and inconsistent with that provided by other statutes that have provided marital status protection explicitly for years. (See, e.g., *Smith v. FEHC*, 12 Cal.4th at 1154-55 (construing the Fair Employment and Housing Act as protecting unmarried couples, not just unmarried individuals).)

More broadly, the Decision improperly negates the role of legislative history concerning what the Legislature believes it is accomplishing when it amends an existing statute and its reasons for taking that action. The Legislature discharges an important responsibility when it codifies this Court's decisions and otherwise clarifies existing laws. Within parameters set by this Court (see, e.g., *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1007-08), the analyses that comprise legislative history of a statutory

amendment frequently are useful references for interpreting that law. The Decision's categorical dismissal of such material as irrelevant to statutory interpretation in this case not only was incorrect here, it has set precedent that will deprive lower courts of helpful information in future cases about the Unruh Act, other civil rights laws, and statutory amendments generally.

Because proper construction of our civil rights laws is a matter of special importance to the public, this Court should grant review to resolve the confusion the Decision has created about the scope of the marital status protection provided by the Unruh Act, and also about the role of legislative history in interpreting AB1400 and other statutory amendments.

CONCLUSION

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

Dated: May 25, 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 4,163 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: May 25, 2006

Jennifer C. Pizer
Counsel for Real Party in Interest

PROOF OF SERVICE

I, TITO GOMEZ, declare:

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

On May 25, 2006 I served a copy of the attached document, described as **REPLY IN SUPPORT OF PETITION FOR REVIEW OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ,** on the parties of record by placing true copies thereof in sealed envelopes to the office of the persons at the addresses set forth below:

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

Dated: May 25, 2006

Tito Gomez

Tito Gomez