IN THE SUPREME COURT OF CALIFORNIA

In re the Marriage of SUSAN POSTON NAVARRO (LaMUSGA) Appellant, and GARY LaMUSGA Respondent. _____/	Supreme Court Case No. S107355 Court of Appeal Case No. A096012 Contra Costa County Superior Court Case No. D95-01136

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant, Susan Navarro ("Navarro"), hereby respectfully petitions the Court, pursuant to Rules 25 and 29.5 of the California Appellate Rules of Court, to grant rehearing of its decision in this case filed on April 29, 2004, for each of the following independently sufficient reasons.

I. THE COURT'S DECISION IN THIS CASE REPUDIATES THE CLEAR PRONOUNCEMENT OF LEGISLATIVE INTENT AND POLICY IN FAMILY CODE § 7501, AS AMENDED BY SENATE BILL 156, THAT CUSTODIAL PARENTS HAVE THE PRESUMPTIVE RIGHT TO RELOCATE OUT OF STATE AS DEFINED BY THIS COURT IN *IN RE MARRIAGE OF BURGESS*.

HOWEVER, BY REDEFINING THE LEGAL STANDARD AND UNDERMINING THE HOLDING OF *BURGESS* IN CONTRAVENTION OF THE AMENDED STATUTE, THE COURT'S DECISION IN THIS CASE VIOLATES THE PROVISIONS OF THE CALIFORNIA CONSTITUTION CONFERRING UPON THE LEGISLATURE THE POWER TO ESTABLISH LEGAL DOCTRINES AND PUBLIC POLICY THROUGH ITS STATUTORY ENACTMENTS, AND REQUIRING THE COURTS TO ENFORCE SUCH STATUTES UNLESS THEY ARE UNCONSTITUTIONAL.

In anticipation of the Court's decision in this case, the Legislature enacted Senate Bill 156 ("SB 156")[1] introduced by

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[1] Senate Bill No. 156, amending Section 7501 of the Family Code relating to child custody, as approved by the Governor on October 5, 2003, and filed with the Secretary of State on October 6, 2003, provides:

> *The people of the State of California do enact as follows:*
> SECTION 1. Section 7501 of the Family Code is amended to read:
>
> 7501. (a) A parent entitled to the custody of a child has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.
>
> (b) It is the intent of the Legislature to affirm the decision in *In re Marriage of Burgess* (1996) 13 Cal.

Senator Burton to codify the holding of *In re Marriage of Burgess* (1996) 13 Cal.4th 25, as understood and interpreted in a series of post-*Burgess* appellate decisions including without limitation the *LaMusga* case decided by the 1st Appellate District below; *In re Marriage of Edlund & Hales* (1998) (1st App. Dist.) 66 Cal.App.4th 1454; *In re Marriage of Bryant* (2001) (2nd App. Dist.) 91 Cal.App.4th 789; *In re Marriage of Condon* (1998) (2nd App. Dist.) 62 Cal.App.4th 533; *In re Marriage of Lasich* (2002) (3rd App. Dist.) 99 Cal.App.4th 702; *In re Marriage of Biallas* (1998) (4th App. Dist.) 65 Cal.App.4th 755; *In re Marriage of Whealon* (1997) (4th App. Dist.) 53 Cal.App.4th 132, that custodial parents have the presumptive right to relocate with their children to another state so long as there was nothing in the post-move situation (aside from the move itself) which would be so detrimental to the rights or welfare of the children as to render it essential or expedient to change their custodial arrangement.

SB 156 was enacted explicitly to support the Court of Appeal's decision in *LaMusga* as the correct application of *Burgess* and to disapprove the Superior Court's contrary decision. The amended statute is prefaced by the Legislative Counsel's Digest, which states:

> SB 156, Burton. Custody, residence of the child.

> 4th 25, and to declare that ruling to be the public policy and law of this state.

SB 156 passed both houses of the Legislature by overwhelming margins – 76-1 in the Assembly and 30-5 in the Senate.

> Existing law provides that a parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child. Existing law as established in *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, provides that when a judicial custody order is in place, a custodial parent seeking to relocate bears no burden of establishing that it is necessary to do so.
>
> This bill would state the intent of the Legislature to affirm the decision in the case described above and to declare that ruling to be the public policy and law of this state.

The legislative history and analyses of SB 156 in the Senate and the Assembly confirm the clear legislative intent to codify the *Burgess* decision and its understanding of a custodial parent's right to relocate under § 7501:

> The intent of this bill is to evince legislative intent favoring the *Burgess* decision, in light of pending cases before the California Supreme Court involving similar factual situations which the bill's supporters worry may undermine the *Burgess* approach.
>
> * * *
>
> It is essential that all parents with custody, the majority of whom are women, be allowed to move after a divorce in order to pursue job or educational opportunities, as long as the move is not intended to frustrate contact with the noncustodial parent.
>
> * * *
>
> The Family Law Executive Committee of the State Bar . . . supports the *Burgess* decision for the clarity it has brought to the

> issue of "move-away" cases. Since it was decided, *Burgess* and the cases that have interpreted it have had the effect of significantly lessening the bitter and expensive litigation that used to surround cases in which the custodial parent wanted to relocate.

This intent is unanimously echoed during the readings of the bill in the Senate:

> The author states he introduced this bill in response to the acceptance by the California Supreme Court for review of an unpublished appellate decision, *In re Marriage of Navarro and LaMusga*, which might result in the Court revising the *Burgess* move-away standard. . . .
>
> [U]nder *Burgess*, a non-custodial parent objecting to the custodial parent's relocation has to affirmatively demonstrate . . . that it will result in such a significant detriment to the child that a change in custody is warranted.
>
> The Supreme Court accepted for review an unpublished decision, *In re Marriage of Navarro and LaMusga* [citation omitted], in which the trial court sought to lessen the standard by which a successful objection to relocation can be made.
>
> As the appellate court followed the *Burgess* analysis directly in the *Navarro* case, concerns have been raised that the California Supreme Court's decision to hear *Navarro* may lead to some type of modification of the *Burgess* standard.

Identical language is set forth in the analysis of the bill done by the Assembly Committee on the Judiciary on May 13, 2003, with these statements immediately following in the record:

> In [*Navarro*], mother sought court permission to relocate to Ohio, and in response the father sought a change of

> custody from the mother to himself if the move occurred.
>
> The trial court held that even though the mother's desire to relocate was not motivated by bad faith, her motion to relocate was denied because the "primary importance" was to reinforce the "tenuous and somewhat detached" relationship between the father and the two children. It granted custody to the father if the mother relocated.
>
> The appellate court reversed, reviewing the case under the *Burgess* "move-away" standard. The appellate court determined that the trial court had not adequately examined the situation and had ignored the damaging effect of removing the children from the primary caretaker they had known all of their lives, their mother. The appellate court further held that the trial court had violated the mother's rights by conditioning her continuing custody of the children on not moving the children to another location. The appellate court remanded the case retaining permanent custody in the mother and directed the trial court to determine, in light of the mother's presumptive right to move, whether the change of custody would be detrimental to the children.

Thus, the Legislature adopted SB 156 explicitly to approve the analysis of the Court of Appeal in *LaMusga* and to reject the trial court's approach. The Legislature expressly indicated in SB 156 that the rule recognized in *Burgess* that custodial parents have the presumptive right to relocate to another state constitutes the legislative policy of the State of California.

However, this Court disregarded SB 156 and eliminated the *Burgess* presumption that custodial parents have the right to relocate with their minor children absent substantial detriment to

the children's rights or welfare. The Court's opinion in this case contravened the prescribed policy set forth in SB 156, reversed the Court of Appeal decision, and disapproved several of the other appellate decisions that the Legislature endorsed as correct applications of *Burgess*. In effect, by upholding the trial court's decision and reversing the Court of Appeal, this Court significantly undermined *Burgess* notwithstanding the clear expression of legislative will contained in SB 156.

The Legislature has on other occasions expressed its desire to approve or disapprove the outcome of a particular case pending in the California courts. Historically, this Court has respected legislative pronouncements pertaining to particular court decisions. For example, Justice Werdegar's opinion for the Court in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120-1121, gives effect to a bill analysis stating the Legislature's intent to overrule the Court of Appeal in that case. Furthermore, as Justice Chin explained in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244-245, another case involving a statute designed to overrule an appellate decision, courts generally enforce legislation directed at particular judicial decisions, giving to the statute the effect the Legislature intended.

In SB 156, the Legislature acted to uphold the appellate court's reversal of the trial court in *LaMusga*. There is no valid justification for the Court to dishonor the Legislature's clear statements of its intention here when it followed legislative intent

in the *Briggs* and *Western Security Bank* cases.

In the area of family relationships and child custody, the Legislature has traditionally charted the course of California public policy by enacting a Family Code that contains approximately 20,000 sections. In the *LaMusga* decision, the Court breaks with this long-standing legal tradition.

Negating and nullifying the primary caregiver's role and its importance to the children, and allowing trial courts to change custody by placing "primary importance" on the children's relationship with their noncustodial parent – even a "tenuous and somewhat detached" one – is not only illogical but is contrary to the best interests of children in a post-divorce relocation situation.

Parents who have primary custody of children should have enforceable rights to move their children, as the Legislature provided in Family Code § 7501. The Court's decision will make it practically difficult and enormously expensive, if not impossible, for most of those parents to move. It will thereby impair the opportunities of those parents and their children, most of whom are seeking to move to improve their lives. It should, therefore, be reconsidered and reheard.

II. THE COURT'S DECISION IN THIS CASE IMPERMISSIBLY RESTRICTS CONSTITUTIONALLY-PROTECTED RIGHTS TO TRAVEL, MIGRATE AND RELOCATE WITHIN THE UNITED STATES.

The Supreme Court of the United States has held that there is a fundamental right to travel and to interstate migration within the United States. Therefore, any rule of law which prohibits or

burdens travel or relocation within the United States, such as this Court's decision in this case, must meet strict scrutiny. In other words, the rule announced by the Court in this case is unconstitutional unless it is necessary to achieve a compelling governmental purpose and the State cannot achieve such an objective through any less restrictive means. The rights of children to have meaningful relationships with their parents and of non-custodial parents to visit with their children were effectively protected by the decision in *Burgess* as it was understood and interpreted by the Courts of Appeal since 1996. The Court in its opinion in this case does not articulate any reason why the objectives of protecting the rights and interests of (i) children in parental relationships with both custodial and non-custodial parents, and (ii) non-custodial parents in visitation with their children, could not be achieved by the means mandated by the Legislature in § 7501 and implemented by the Court's decision in *Burgess* that are less restrictive of the custodial parents' constitutional right to travel and relocate.

Justice Potter Stewart described the right to travel and to live where one wishes as "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards [but] a virtually unconditional personal right." *Shapiro v. Thompson*, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring). The central and inescapable point is that neither federal nor state authority can penalize a person merely for

exercising her constitutional right to travel or to relocate to another state. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirements for welfare unjustifiably burden right of interstate travel); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (durational residency requirements for free medical care excessively burden right to travel). As the Supreme Court has held:

> our constitutional concepts of personal liberty . . . require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.

Shapiro v. Thompson, supra, 394 U.S. at 629.

The "unmistakable essence" of a "principle of free interstate migration" is found in the very existence of a "document that transformed a loose confederation of states into one nation." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., joined by Marshall, Blackmun and Powell, JJ., concurring).[2] Although the virtually unrestricted and unrestrictable right of interstate travel is often linked to notions of federalism, it clearly "relates as much to the importance of lifting all artificial barriers to personal mobility as to the virtues of an integrated national economy and society." L.

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[2] The modern cases such as *Zobel, supra*, and *United States v. Guest*, 383 U.S. 745 (1966) (a citizen's right to travel is secured by the Constitution within the meaning of 18 U.S.C. § 242), have consistently differentiated between the "virtually unqualified" right of interstate travel and a lesser "right" of international travel, which "can be regulated within the bounds of due process." *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Haig v. Agee*, 453 U.S. 280, 307 (1981).

TRIBE, AMERICAN CONSTITUTIONAL LAW 1379 (2d ed. 1988).[3]

A rule that operates to lock custodial parents into remaining residents of California by penalizing their decision to relocate to another state is an unconstitutional restriction on the right of travel that is void unless compelling justified. Travel as a means of changing one's place of residence and beginning life anew is an important dimension of personhood. The status of being a custodial parent should not operate as a prison sentence, imprisoning the parent to live in California for the rest of his or her child's minority.

On the other hand, the rule in *Burgess* did not violate the constitutional right to freedom of travel and relocation because it recognized a presumption, consistent with the statutory command of the Legislature in Family Code § 7501, that the custodial parent has a right freely to relocate with the minor children of whom he or she has custody without restriction by the family courts except in those instances in which the children will suffer a sufficient degree of harm or detriment to their rights or welfare as a result of the move that makes it essential or expedient to change their custodial arrangement.

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[3] As Chief Justice Fuller wrote, "the right to remove from one place to another according to inclination is ***an attribute of personal liberty***." *Williams v. Fears*, 179 U.S. 270, 274 (1900) (dictum) (emphasis supplied). For Justice Douglas, the right of interstate travel is an essential attribute of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment. *Edwards v. California*, 314 U.S. 160, 178 (1941)(Douglas, J., joined by Black and Murphy, JJ., concurring). He concluded that "the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Id.* at 177.

III. BY USURPING THE POWERS, AUTHORITY AND PREROGATIVES OF THE LEGISLATIVE BRANCH OF STATE GOVERNMENT, THE COURT'S DECISION VIOLATES THE CONSTITUTIONAL GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT.

Moreover, in a republican form of government, the legislative branch elected by the people makes the laws and establishes the public policies governing the polity. It is impermissible for the judicial branch to legislate; its authority is to interpret and enforce the laws of the jurisdiction, and to exercise the power of judicial review to ensure that the legislative branch is acting in conformity with the state and federal constitutions. It has long been "understood that, in a republican government, the judiciary would construe the legislature's enactments." *Bush v. Gore*, 531 U.S. 98, 141 (2000)(Ginsburg, J., dissenting), *citing* Hamilton, *The Federalist* No. 78.

The Court's disregard of the legislative will expressed in Section 7501 as amended by SB 156 disrupts California's republican regime and, in so doing, violates the constitutional guarantee to the states of a republican form of government. U.S. Const., Art. IV, § 4. The Court should reconsider and rehear its decision in this case to avoid such an unconstitutional entanglement with the legislative process.

IV. THESE CONSTITUTIONAL ISSUES WERE CREATED BY THE COURT'S DECISION FOR WHICH REHEARING IS SOUGHT, AND THUS ARE APPROPRIATE TO BE RAISED NOW FOR THE FIRST TIME.

Although these state and federal constitutional issues were neither raised below nor previously in this Court, they are

nevertheless ripe and appropriate to be raised at this point in the case because no such state and federal constitutional questions were previously implicated by the Court's prior decision in *Burgess*.

Navarro maintained on appeal that the trial court erred in not following *Burgess*. The Court of Appeal reversed following *Burgess*, and Navarro argued in this Court that the Court of Appeal decision should be affirmed. When this Court reversed the Court of Appeal and reinstated the trial court judgment, it announced a radical departure from *Burgess* that creates the federal constitutional issue now raised for the first time.

In other words, it is this Court's decision filed on April 29, 2004, itself that has originated the state and federal constitutional issues in this case. Since the constitutional violation arises from the Court's decision, the issues were not raised previously and can only now be asserted. *Cf. Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*).

V. THE COURT'S DECISION DISREGARDED OR DISTORTED SIGNIFICANT AND MATERIAL FACTS IN THE CASE FOUND BY THE COURTS BELOW AND UNDISPUTED BY THE PARTIES.

Among various material facts that the decision of the Court either omits, ignores or misconstrues, the following findings of undisputed facts directly contradict the factual premises on which the Court's opinion seems to be based:

1. The Father Sees Alienation Where None Exists

In his October 1996 report, Dr. Stahl specifically found that the father "sees alienation where there is none" and wrongfully blames Navarro for his poor relationship with the children:

> . . . it is equally possible that [the father's] distorted perception causes him to see alienation where none exists. In fact, it is this examiner's observation that his projection of blame onto [Navarro] for alienating Tori [LaMusga's daughter from a previous marriage] against him is just that; i.e., blaming her for alienating Tori when he, in fact, is feeling guilt at detaching from Tori. While a different process may be operating with the boys, it is this examiner's opinion that the issues in this case increase the likelihood of his fear of alienation, even when there is no alienation taking place.

(AA 390.)

2. **LaMusga Did Not Seek Physical Custody of the Children in Response to Navarro's Request to Move Away.**

The Court's decision incorrectly states (slip op. at page 6) that LaMusga sought physical custody of the children in response to Navarro's February 2001 motion to relocate. However, the record clearly indicates that LaMusga did not mark the box for child custody on his responsive declaration prepared in the form adopted by the Judicial Council. Instead, under item 8 for "other relief," LaMusga requested that "[Navarro's] request that she be permitted to locate [sic] the parties' two minor children to the State of Ohio be denied, or alternatively that the Court order that both parties submit to a focused evaluation on [Navarro's] issue regarding her move away request." (AA 137-38.)

3. **LaMusga Refused to Attend Therapy with His Children and the Superior Court Refused to Order Him to Attend Therapy.**

LaMusga refused to meet with the children's therapist for four

years following the parties' separation. Navarro sought a court order requiring his participation in therapy with the children, but the Superior Court, while strongly encouraging LaMusga to attend the therapy sessions, declined to order him to do so. (AA 83:28-84:3.) For four years LaMusga chose not to invest any of his time in the therapeutic process with his children. Nevertheless, like LaMusga and Dr. Stahl, this Court makes Navarro the scapegoat and blames her for not doing enough to repair LaMusga's poor relationship with Garrett and Devlen. Without any citation to the record, LaMusga insists that he "was always willing to work through existing problems with a therapist." (RB at 13.) His own sworn testimony in the record, however, demonstrates the exact opposite to be true. (AA 65:3-6.)

4. **Dr. Stahl's Trial Testimony that There Was No Reason to Believe that Navarro Would Not Fulfill the Court's Visitation Orders if She Moved with the Children to Ohio.**

Dr. Stahl testified at the trial of this case in August 2001 that he had no reason to believe Navarro would not continue to comply with court orders for visitation after she moved to Cleveland with the children. (RT 63:22-26.)

5. **Dr. Stahl's Trial Testimony that There Was Nothing More Navarro Could Do to Facilitate the Children's Relationship with LaMusga.**

According to Dr. Stahl, Navarro's contribution to the conflict was in the form of "unconscious alienation" which no amount of effort on her part could improve because it was a matter of her "being different" and "feeling different" about LaMusga. By

ignoring this testimony, the Court punishes Navarro for something she has no power to change. Moreover, it places sole and exclusive responsibility on Navarro for the health of LaMusga's relationship with the children. This is an unfair and impossible burden for any custodial parent to satisfy. It also ignores the unrefuted evidence in the record that Navarro made the children follow through on regularly-scheduled telephone calls with their father, and that she had gone to great lengths to alter her own plans for a Florida vacation with the children in order to accommodate LaMusga's desire to take the children on vacation to Oregon. (RT 70:24-71:8; AA 246:12-18, 278-79.)

6. **The Superior Court Knew Navarro Would Not Move If It Meant She Would Lose Custody of the Children.**

At pages 29-30 of its Opinion filed on April 29, 2004, this Court states:

> The Court of Appeal in the present case further concluded that the Superior Court improperly used the conditional order transferring primary physical custody to the father as a device to restrain the mother from relocating. We agree that the court must not issue such an order for the purpose of coercing the custodial parent into abandoning plans to relocate. Nor should a court issue such an order expecting that the order will not take effect because the custodial parent will choose not to relocate rather than lose primary physical custody of the children. But there is nothing in the record before us that indicates the Superior Court did so in the present case.

Unfortunately, that is exactly what the Superior Court did in this case, and this Court simply ignored the following testimony by

Navarro given just moments before the Superior Court rendered its decision on the record:

> Q: Miss Navarro, if the Court denies your request to relocate the children to the State of Ohio, what are your intentions as far as residency?
>
> A: My intentions would be to remain in California.
>
> * * *
>
> Q: You wouldn't be moving without the kids?
>
> A: No.

(RT 89:12-20.)

CONCLUSION

Accordingly, for the foregoing reasons, the Court should grant this Petition and order rehearing of this case in accordance with Rule 29.5(e) of the Rules of Court.

Dated: May 14, 2004

Respectfully submitted,

_____
Kim M. Robinson
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I, Kim M. Robinson, counsel of record for Appellant, hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that Appellant's Petition for Rehearing was produced using 13-point Century Schoolbook font including footnotes, and contains approximately 5,117 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program, Word Perfect 10, used to prepare this brief.

_____
Kim M. Robinson

PROOF OF SERVICE

THE UNDERSIGNED STATES:

I, Kim M. Robinson, am a citizen of the United States of America. I am over the age of 18 years and not a party to the above-entitled action. On May 14, 2004, I served copies of the following document:

1. Appellant's Motion for Rehearing and Reconsideration

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

XX (**BY MAIL**) I placed a true copy of the aforementioned document(s) in a sealed envelope with postage fully prepaid and addressed as indicated above in a United States Post Office Box at Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 14, 2004, at Oakland, California.

_____
Kim M. Robinson

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