CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

No. _____

FOUNDATION AIDING THE ELDERLY,
On Behalf of the General Public,
Petitioner,
vs.
THE SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent,
COVENANT CARE CALIFORNIA, INC., et al.,
Real Parties in Interest.

On Petition for Writ of Mandate from the Alameda Superior Court
The Honorable Ronald M. Sabraw
Superior Court No. RG0387211

PETITION FOR WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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Service on Attorney General and District Attorney required by Bus. & Prof. Code, §17209

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STATUTES, RULES AND REGULATIONS

I. WHY THE WRIT SHOULD ISSUE

Just a few weeks ago, this Court issued its opinion in *Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386 (*Californians for Disability Rights*). That decision, the first on the issue, held that recently enacted Proposition 64 does not apply to cases pending on its effective date. In the action below, however, the trial court declined to follow *Californians for Disability Rights*. Instead, the court engaged in its own retroactivity analysis, holding that Proposition 64 does apply to pending cases. The court described its analysis as "different in approach but identical in effect" to Second and Fourth Appellate District opinions on the retroactivity issue in *Branick v. Downey Savings & Loan Assn.* (Feb. 9, 2005, B172981) 126 Cal.App.4th 828 [2005 Cal.App. Lexis 201] (*Branick*) and *Benson v. Kwikset Corp.* (Feb. 10, 2005, G030956) 126 Cal.App.4th 887 [2005 Cal.App. Lexis 208] (*Benson*). (2 Exhibits in Support of Petition for Writ of Mandate [Exs.] 408.)[1]

The trial court's order requires immediate review by writ of mandate. In addition to disregarding this Court's opinion, the order has promptly generated the undesirable consequences that partially animated the outcome in *Californians for Disability Rights.* Indeed, this case illustrates why there is properly a strong presumption against applying new laws retroactively.

The effects of the trial court's order are immediate and far-reaching. Already, petitioner Foundation Aiding the Elderly (FATE), a non-profit organization representing the interests of elderly persons, has been forced to provide notice regarding the nature and status of this case to the Attorney

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[1] All exhibits accompanying this petition are true copies of original documents on file in superior court. The exhibits, which are consecutively paginated, are incorporated by reference as though fully set forth in this petition. Page references are to the consecutive pagination.

General and Alameda County District Attorney. Those public agencies, which are not even a party to these proceedings, must then evaluate FATE's claims and decide whether to intervene in this action on or before May 6, 2005. If neither of the public enforcers intervenes, the court will dismiss FATE's claims on behalf of the general public under the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq.) This includes UCL restitution claims on behalf of elderly residents of nursing homes operated by defendants and real parties in interest Covenant Care California, Inc., et al. (collectively Covenant). Should the UCL claims be dismissed, these residents' restitution claims will be time-barred. Even if a public official does move to intervene, this would only add further confusion and complexity to the proceedings. Making matters worse, the court issued its ruling on Proposition 64 retroactivity in an omnibus order that will affect the course of 13 separate UCL actions now pending in Alameda County Superior Court.

The other alternative given by the trial court is for FATE to move for leave to file an amended complaint to add plaintiffs who meet the new standing requirements of Proposition 64. In addition to the disruption caused by adding new parties now, the amendment option is particularly problematic under the facts of this case. In effect, the court has required the elderly residents of Covenant's nursing homes to come forward as named plaintiffs – even though these residents rely on Covenant for their health care, are under the constant supervision of Covenant's agents and fear retaliation. These are precisely the type of unanticipated effects that drove this Court's holding – not followed by the trial court – that Proposition 64 should not be applied to pending cases.

In short, by applying Proposition 64 to preexisting litigation, the trial court has injected chaos and upset the parties' reasonable expectations – contrary to the teachings of *Californians for Disability Rights*. Nothing in

Branick or *Benson* calls into question this Court's opinion. The petition, therefore, should be granted to review the important issues presented.

II. PETITION FOR WRIT OF MANDATE

FATE hereby petitions this Court for a writ of mandate directed to the respondent Superior Court of the State of California for the County of Alameda. By this verified petition, petitioner alleges:

1. This action was filed in March 2003. There has been one prior writ petition, which was assigned to Division Four of this District. (See Ct. App., First Dist., Local Rules, Policy Statement A.) That petition, filed by Covenant, sought to challenge orders overruling a demurrer and denying a motion to strike. Covenant's writ petition on those issues was summarily denied. (*Covenant Care California v. Superior Court* (Oct. 2, 2003, A104017).)

2. Founded in 1982, plaintiff and petitioner FATE is a Sacramento-based non-profit corporation. (1 Exs. 4.) FATE's mission is to ensure that elders are treated with care, dignity and respect in their final years when they can no longer care for themselves. (*Ibid*.) FATE provides information, counseling, advice, resources and referrals to those who need help in caring for the elderly. (*Ibid*.)

3. Covenant owns and operates skilled nursing facilities in California. (1 Exs. 4.) Covenant's facilities provide skilled nursing care to patients who need such care on an extended basis. (*Ibid*.)

4. Stated concisely, the complaint seeks relief for Covenant's systematic failure to provide adequate staffing in its nursing homes as required by law. (1 Exs. 3.) FATE asserts three causes of action on the general public's behalf under the UCL (unlawful, fraudulent and unfair business practices) and one cause of action under Health and Safety Code section 1430 (based on violations of Health and Safety Code section 1276.5). (1 Exs. 17-19.)

5. As discussed in *Californians for Disability Rights*, Proposition 64 amended the UCL. (1 Exs. 155-156 [text of Proposition 64].) This petition

concerns whether the Proposition 64 amendments apply retroactively to cases pending on its effective date of November 3, 2004.

6. On November 10, 2004, the trial court ordered briefing on this issue. (1 Exs. 21-24.) This action eventually became the lead case of 13 UCL cases pending before the respondent court when Proposition 64 became effective, in which retroactive application was presented as an issue.

7. As directed by the November 10 order, FATE and Covenant filed briefs on the retroactive application of Proposition 64. (1 Exs. 26-244; 2 Exs. 245-350.) On February 1, 2005, the trial court issued a tentative ruling granting Covenant's motion for judgment on the pleadings. On February 9, after *Californians for Disability Rights* was handed down but before *Branick* and *Benson*, the court issued a revised tentative ruling denying the motion. Oral argument was heard on February 10. (2 Exs. 375-405.)

8. On February 17, the trial court entered the omnibus order that is the subject of this petition. (2 Exs. 407-441.) The court used the order to resolve possible retroactive application of Proposition 64 in all 13 UCL cases before it in which the issue was presented. (2 Exs. 407.)

9. With respect to FATE's UCL claims on behalf of the general public, the trial court reversed course again, granting Covenant's motion for judgment on the pleadings. (2 Exs. 438.) The court ordered FATE to "provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005." (*Ibid*.) FATE has already complied with this mandate. The court further instructed: "If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed." (*Ibid*.)

10. The trial court gave FATE permission to seek leave to amend to add new plaintiffs asserting UCL claims in their own interest. (2 Exs. 431, 439.) The court disregarded, however, that this effectively requires

Covenant's nursing home residents to come forward despite their fear of retaliation and their complete dependence on Covenant for medical care. In response to the court's order, FATE expects to file a motion for leave to amend by the end of this month proposing new plaintiffs.

11. The trial court did not dismiss FATE's fourth cause of action under Health and Safety Code section 1430 because that claim is unaffected by Proposition 64. (2 Exs. 438.) The court has injected confusion and uncertainty on that claim also, however, by suggesting that FATE should amend its complaint on that cause of action. (2 Exs. 439.) This timely writ petition followed.

III. PRAYER

WHEREFORE, and for the reasons stated more fully below, petitioner prays that this Court:

1. Grant the petition and issue a peremptory writ of mandate directing the respondent court to vacate its February 17, 2005 order;

2. Direct the respondent court to enter a new and different order denying Covenant's motion for judgment on the pleadings;

3. Alternatively, issue an alternative writ of mandate directing the respondent court to show cause why it should not be so directed, and upon return to the alternative writ, issue a peremptory writ as set forth in the prior paragraph; and

4. Grant such further relief as may be just and proper.

IV. VERIFICATION

I, Kevin K. Green, am a member of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, one of the law firms representing petitioner. I make this verification as petitioner's counsel because I am more familiar with the facts relevant to this petition. The facts referred to in this petition are true based on my personal knowledge from my review of the pleadings, briefs and other documents filed in the superior court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on March 10, 2005, at San Diego, California.

KEVIN K. GREEN

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. Writ Review Is Appropriate

Whether Proposition 64 applies retroactively has vexed and divided trial courts, and now the courts of appeal, since the initiative was enacted last year. Trial judges, and the litigants appearing before them, would benefit from this Court's additional guidance on the matter. As when *Californians for Disability Rights* was decided, the retroactivity question remains of "widespread interest" (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816) and of "general interest to the bench and bar." (*Valley Bank v. Superior Court* (1975) 15 Cal.3d 652, 655; see also *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657.) This is a case "where general guidelines can be laid down for future cases," making writ review proper. (*Oceanside Union School District v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4.)

The conflicting trial court interpretations in this area continue, moreover. (See http://www.17200blog.com/Prop64Orders.html [website collecting decisions on Proposition 64 retroactivity].) The ongoing discord in the superior courts underscores the need for writ review. (See *Mowrer v. Appellate Department* (1990) 226 Cal.App.3d 264, 266-267; *Corbett v. Superior Court, supra,* 101 Cal.App.4th at p. 657.) The trial court here anticipated review of its order, commenting: "The Court explains its analysis for whatever assistance it may be to the Court of Appeal." (2 Exs. 408.)

In addition, the trial court's ruling deprives FATE of a substantial portion of its case. Although this action was filed over 18 months before Proposition 64 was adopted, the court's order bars FATE from suing on behalf of the general public under the UCL. (2 Exs. 408.) The three UCL claims on behalf of the general public will be dismissed entirely if a public official does not intervene in the action to assert these claims. (*Ibid*.) FATE cannot challenge the court's ruling by appeal until after final adjudication of its only remaining cause of action under the Health and Safety Code. This is a

woefully inefficient way to proceed, as a retrial might be required if FATE prevailed on appeal on the retroactivity issue. The gutting of FATE's case at an interlocutory stage further supports writ review. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894; *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 148; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1370, fn. 4.) A "writ must be issued" where, as here, "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.)

B. *Californians for Disability Rights* Correctly Held that Proposition 64 Is Not Retroactive and Should Have Been Followed by the Trial Court

The trial court noted that because there are other appellate decisions on Proposition 64 retroactivity, it was not bound as such by *Californians for Disability Rights*. (2 Exs. 408.) The court's choice to follow a different approach, however, disregarded that "[a]s a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so." (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) Because this Court's opinion in *Californians for Disability Rights* is sound, the trial court should have followed it.

To summarize briefly, *Californians for Disability Rights* held that Proposition 64 does not apply to pending UCL actions because there is a strong presumption against retroactive application of new laws and there is no clear intent here that the amendments be applied retroactively. Quoting *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828 (*Myers*), this Court noted that "[a] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." (*Californians for Disability Rights, supra*, 126 Cal.App.4th at p. 393, internal quotation marks omitted.)

It was also significant to this Court that retroactive application would substantively alter the rights and liabilities of parties to existing UCL actions. The "disruption" to pending cases, this Court stressed, "should not be

minimized." (*Id*. at p. 397.) "Application of Proposition 64 to cases filed before the initiative's effective date would deny parties fair notice and defeat their reasonable reliance and settled expectations." (*Ibid*.) As our Supreme Court has stated, it is unfair to change "the rules of the game" midstream by applying new laws to pending cases absent explicit notice in the legislation. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194.) This is particularly so in actions like this one whose merit has been demonstrated. As noted, the trial court has already overruled a demurrer. In another order, the court found that FATE has presented "persuasive evidence" that Covenant committed unlawful acts under the UCL. (1 Exs. 168.)

In its opinion, this Court properly rejected reflexive application of the so-called "statutory repeal rule" to apply Proposition 64 retroactively. Discussing *Evangelatos*, this Court observed that "cases applying the repeal or amendment of statutes retroactively do not displace the general principle of prospectivity applicable to all legislation." (*Californians for Disability Rights, supra*, at p. 395.) Even for statutory repeals, legislative (or in this case voter) intent remains the appropriate lens. (*Id*. at pp. 395-396.) When interpreting a voter initiative, voter intent is "the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889; see also *In re Littlefield* (1993) 5 Cal.4th 122, 130.) As the Supreme Court said with respect to another tort reform initiative, "the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

C. A Fuller Discussion of the Statutory Repeal Rule Confirms the Soundness of *Californians for Disability Rights*

Unable to glean clear retroactive intent from the measure itself, UCL defendants have seized on the statutory repeal rule as a basis for finding Proposition 64 retroactive. Indeed, the Second and Fourth Appellate Districts found this argument persuasive. The origins and evolution of the rule thus merit additional discussion. The analysis reveals, as this Court concluded, that

the rule does not bear the weight UCL defendants and some courts have given it. The rule's long history – from its common law origins and widespread application in the criminal context to the most recent repeal case law – demonstrates that the rule is firmly grounded in legislative intent.

At the outset, Proposition 64 is not even a true "repeal" provision. It does not repeal any UCL cause of action or remedy, or any portion thereof. The measure left untouched the familiar grounds for UCL liability (the fraudulent, unlawful and unfair prongs) as well as all UCL remedies (principally restitution and injunctive relief). (See Bus. & Prof. Code, §§ 17200, 17203.) Proposition 64 merely added standing requirements and class-action procedures in UCL cases brought by private plaintiffs. (1 Exs. 155; see *Californians for Disability Rights*, *supra*, 126 Cal.App.4th at p. 392.)

Even if Proposition 64 were a repeal provision, the repeal rule is simply a canon of construction, just like the presumption against retroactivity. (See *Callet v. Alioto* (1930) 210 Cal. 65, 67.) The repeal rule states that "where a cause of action unknown at the common law has been created by statute and no vested or contractual rights have arisen under it [,] the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action." (*Department of Social Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 320; see also *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819, 829 (*Mann*); *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*).)[2]

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[2] The repeal rule does not apply for the additional reason that the unfair competition cause of action was not "unknown at the common law." (*Department of Social Welfare v. Wingo*, *supra*, 77 Cal.App.2d at p. 320.) Rather, the UCL originally derives from the common law tort of unfair business competition between business competitors. (See *People ex rel. Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765, 770.) Subsequent court decisions expanded the UCL's scope to include consumers victimized by

Government Code section 9606 is often referred to as codifying the repeal rule, but it does no such thing. It provides: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." (Gov. Code, § 9606.) By its terms, then, this section merely confirms the Legislature's power to repeal previously enacted statutes. It does not purport to address judicial power to interpret a purported repeal statute and, in particular, to determine whether, in repealing a prior law, the Legislature intended to terminate all non-final actions brought under that law.

Indeed, canons of statutory interpretation like the repeal rule are intended to guide the judiciary in the process of statutory construction, not to muzzle the voice of the voters or the Legislature. "'[A] rule of construction . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent.'" (*People v. Jones* (1988) 46 Cal.3d 585, 599, quoting *In re Estrada* (1965) 63 Cal.2d 740, 746.) As our Supreme Court has often noted, "such rules shall always 'be subordinated to the primary rule that the intent shall prevail over the letter.'" (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539, citations omitted.) Hence, even if Proposition 64 were a repeal provision (as

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unfair business practices. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570; *People ex rel. Mosk v. National Research Co., supra*, 201 Cal.App.2d at pp. 770-771.) While the modern UCL claim may no longer closely resemble the common law definition (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264), this does not detract from the fact that the claims now embodied in the UCL are derived from the common law. Indeed, our Supreme Court has recognized that the right to restitution under Business and Professions Code section 17203 is a codification of inherent equitable powers of a court that existed at common law. (See *Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 131.)

explained above, it is not), the rule establishes at most a presumption of legislative intent that can be rebutted with evidence of a contrary intent.

The repeal rule originated at common law and was developed largely in criminal jurisprudence. (See *People v. Collins* (1978) 21 Cal.3d 208, 212 (*Collins*), citing *Spears v. County of Modoc* (1894) 101 Cal. 303, 305.) The cases dealing with repeals in the penal context hold that when the Legislature repeals a criminal statute or removes or mitigates a sanction for certain conduct, and does so without a savings clause, the repeal applies to all criminal prosecutions not yet reduced to final judgment. (See *Collins*, *supra*, 21 Cal.3d at pp. 212-213; *People v. Rossi* (1976) 18 Cal.3d 295, 298-302 (*Rossi*); *In re Estrada*, *supra*, 63 Cal.2d at pp. 747-748.)

These criminal law decisions make clear that the repeal rule rests on a declaration of legislative intent. (See also *Sekt v. Justice's Court of San Rafael Township* (1945) 26 Cal.2d 297, 304, 308 (*Sekt*); *People v. Alexander* (1986) 178 Cal.App.3d 1250, 1260.) The Legislature, in acting to remove the statute proscribing the conduct, demonstrates an intent to decriminalize the conduct. In the case of statutory changes to punishments, establishing a lesser sanction or eliminating punishment altogether declares the Legislature's view that certain conduct is no longer condemned as it once was. When there is no savings clause, the presumption is that the Legislature intended to have the new law applied to all non-final prosecutions. (See *Rossi, supra*, 18 Cal.3d at pp. 299-303; *Sekt*, *supra*, 26 Cal.2d at pp. 308-309.)

This general line of reasoning has been extended to civil matters. (See *Mann, supra*, 18 Cal.3d at pp. 829-830.) As *Mann* makes clear, however, its application is still governed by a determination of legislative intent. In that case, the Supreme Court applied the repeal rule only after considering the history of and reasons for the new law that prohibited public entities from terminating employment based on marijuana arrests and convictions. (*Id*. at pp. 827-828.) The subsequent decision in *Younger* is to like effect. The law at

issue there originally provided that superior courts may order destruction of official records of marijuana arrests and convictions. The real party in interest obtained an order of destruction from the superior court. The Attorney General challenged the order through a writ petition. While that petition was pending, the Legislature changed the law to vest authority to order record destruction in the Department of Justice. The real party in interest sought an order from the Attorney General, who refused to act on the application. (*Younger*, *supra*, 21 Cal.3d at p. 108.)

Relying principally on *Mann*, the Supreme Court held that the new law revoked the jurisdiction of the courts to authorize record destruction. (*Id*. at p. 109.) However, the court acknowledged the potential for proof of a contrary legislative intent. In response to the Attorney General's assertion that the new legislation had the same intent as the old, and that the repeal was simply a matter of form over substance, the court responded: "The only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by such cases as *Mann*. But no such intent appears." (*Id*. at p. 110.) Plainly, then, if there had been evidence of a different intent, the repeal rule would not have applied.

The most instructive modern case on the repeal rule is *Myers*, decided just three years ago. There, the Supreme Court majority did not mention the rule at all, yet unequivocally reaffirmed that the effect of a statutory repeal depends on legislative (or voter) intent. The court held that repeal of a statute giving tobacco companies immunity from suit could not impose liability on the companies for conduct that occurred during the ten-year period the immunity statute was in effect. (*Myers*, *supra*, 28 Cal. 4th at p. 832.) Beyond question, *Myers* addressed the repeal of a purely statutory right – the right to be exempt from tort liability. In fact, the court repeatedly referred to the repeal provision there as the "Repeal Statute." (*Id*. at pp. 837-845.) But the Supreme Court did not rely upon the repeal rule. Instead, its holding rested

squarely on the familiar precept that "'a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*Id*. at p. 841, emphasis deleted, quoting *Evangelatos*, *supra*, 44 Cal.3d at p. 1209.) That intent was lacking in the statute modifying tobacco company immunity. (*Id*. at pp. 841-842.) Dissenting in *Myers*, Justice Moreno urged that the repeal rule be applied – a resolution the six other justices in the majority rejected. (*Id*. at p. 853 (dis. opn. of Moreno, J.).)

Lest there be any doubt, the Supreme Court reaffirmed the appropriate inquiry recently in *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 (*McClung*). Quoting liberally from *Myers*, the court wrote: "'[A] statute may be applied retroactively only if it contains express language of retroactiv[ity] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.'" (*Id*. at p. 475, quoting *Myers*, *supra*, 28 Cal.4th at p. 844.) The court reaffirmed "the strong presumption against retroactivity." (*McClung*, *supra*, 34 Cal.4th at p. 475.) A "statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*Ibid*., internal quotation marks omitted.)

In *Californians for Disability Rights*, this Court followed the modern approach exemplified in the Supreme Court's most recent decisions. As this Court stated, the repeal rule "is not an exception to the prospectivity presumption, but an application of it." (126 Cal.App.4th at p. 388.) This is so precisely because, as the above precedent illustrates, a true repeal statute evinces a clear intent that it be applied to all non-final actions based on the prior law. (*Ibid*.) This Court correctly concluded that no such intent is clearly expressed in Proposition 64. (*Id*. at pp. 392-393.)

D. *Branick* and *Benson* Do Not Undermine This Court's Analysis

Unpersuaded by *Californians for Disability Rights*, the trial court instead followed the Second and Fourth Appellate Districts on the scope of the repeal rule. The trial court described the analysis of the repeal rule in *Branick* and *Benson* as "compelling." (2 Exs. 423, 428.) With all due respect to those courts, however, their analysis is not compelling. It gives the repeal rule a pernicious bite at the expense of voter intent – and this Court should grant this petition to say so.

Branick and *Benson* held Proposition 64 retroactive under an unduly sweeping application of the repeal rule. Neither decision concluded, because the intent does not exist, that voters here intended retroactive application. This is the insurmountable problem with these decisions. They fail to grapple with the question of legislative intent as required by the Supreme Court's repeal rule precedents and, in particular, *Myers*.

Indeed, the rationale driving *Branick* and *Benson* more closely resembles the argument made in the *Myers* dissent. To no avail, Justice Moreno expressly invoked the repeal rule in *Myers*, contending: "[S]tatutory rights, unlike common law rights, [are] not vested for purposes of retroactive application of a statute because 'all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.'" (*Myers*, *supra*, 28 Cal.4th at p. 853 (dis. opn. of Moreno, J.).) The dissent here quoted *Callet v. Alioto*, *supra*, 210 Cal. at p. 68 – a case central to the analysis of the *Branick* and *Benson* courts. (See *Branick*, *supra*, 2005 Cal.App. Lexis 201, at pp. *18-*21; *Benson*, *supra*, 2005 Cal.App. Lexis 208, at p. *15.)

The Second and Fourth Appellate Districts did seek to distinguish *Evangelatos* (and perhaps, by extension, *Myers*) on the ground that the statute at issue in *Evangelatos* affected a common law, and thus "vested," right. (See, e.g., *Branick*, *supra*, 2005 Cal.App. Lexis 201, at pp. *20-*21.) But *Myers* did

not turn on whether the right at stake was vested. As noted, the right there (immunity from suit) did not exist at common law. Nonetheless, the Supreme Court focused on the intent question, holding that retroactive application of a statute is impermissible "unless there is an express intent of the Legislature" to make it retroactive. (*Myers*, *supra*, 28 Cal.4th at p. 840.)[3]

To the extent there is any consideration of voter intent in *Branick* and *Benson*, it begins and ends with the acknowledgment that Proposition 64 does not contain a savings clause. (See *Branick*, *supra*, 2005 Cal.App. Lexis 201, at p. *24; *Benson*, *supra*, 2005 Cal.App. Lexis 208, at pp. *15-*16.) The absence of an express savings clause, however, does not end the inquiry. As illustrated by the Supreme Court's decision in *In re Pedro T.* (1994) 8 Cal.4th 1041, an express savings clause is not required to demonstrate legislative intent that a new law not be applied retroactively.

In that case, the defendant was sentenced under a provision that temporarily increased the penalty for car theft. (*Id*. at p. 1044.) Before the conviction was final, the increased penalty provision expired pursuant to a "sunset provision" and the penalty for car theft reverted to a lesser one. The defendant asserted that he was entitled to the benefit of the lesser punishment. (*Ibid*.) The Supreme Court, however, held that the sunset clause did not have retroactive effect, and instead applied the temporary higher penalty in effect

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[3] The trial court attempted to grapple with *Myers*, but it misread that decision. "*Myers* is distinguishable," the court concluded, "because the new legislation in that case would have increased the defendants' liability for past conduct, whereas applying Proposition 64 to pending cases would arguably decrease defendants' liability for past conduct." (2 Exs. 430.) But *Myers* did not turn on who benefited from retroactive application. To be sure, the Supreme Court discussed "[c]onstitutional considerations" implicated when a defendant's liability is expanded retroactively. (See *Myers*, *supra*, 28 Cal.4th at p. 845.) But the court did so only as a ground to "reinforce" its retroactivity analysis, which unquestionably focused on legislative intent. (*Id*. at pp. 840-841, 845.)

when the crime was committed. (*Id*. at pp. 1046-1047.) The majority disagreed with the dissent's contention that "the omission [of a savings clause] creates a virtual presumption of retroactivity." (*Id*. at p. 1056 (dis. opn. of Justice Arabian).) The Court focused instead on the intent of the Legislature "at the time of the enactment." (*Id*. at p. 1048.) It concluded that there was no evidence to suggest that the Legislature's purpose in enacting higher penalties had ceased to operate as of the sunset date with respect to conduct occurring during the temporary period. (*Ibid*.) Rather, "the very nature of a sunset clause, as an experiment in enhanced penalties, establishes – in the absence of evidence of a contrary legislative purpose – a legislative intent [that] the enhanced punishment apply to offenses committed throughout its effective period." (*Id*. at p. 1049.)

Thus, contrary to what *Branick* and *Benson* assumed, a savings clause is not the only relevant marker of legislative intent on retroactivity. Proposition 64 does not contain an express savings clause, but it does contain unequivocal expressions of intent to preserve UCL claims and remedies for the benefit of consumers and businesses. For example, the initiative's findings and declaration of purpose begin: "This state's unfair competition laws . . . are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (1 Exs. 155 [Proposition 64, § 1(a)]; see also *id*. [Proposition 64, §§ 1(d), (f), (g), 2, 3].) This is inconsistent with an intent to apply the initiative to terminate arbitrarily all preexisting "private attorney general" actions, regardless of how meritorious.

In short, *Branick* and *Benson* cast no doubt on *Californians for Disability Rights*. This Court's emphasis on legislative intent and the presumption against retroactive application was, and remains, the proper

focus. FATE's petition should be granted to underscore the appropriate rule for trial courts in this state.[4]

E. The Order Here Should Be Vacated for the Further Reason that the Trial Court Adopted an Approach that Is Unsupported by Any of the Appellate Decisions

Finally, the trial court's order must be vacated because the court did not follow any of the three approaches set forth in the appellate decisions on Proposition 64 retroactivity. When courts of appeal are in conflict, and there is no Supreme Court authority, trial judges must "make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) Here, however, the court did not make a choice. It basically did its own thing. Although claiming to follow *Branick* and *Benson*, the court engaged in an independent analysis that bears little resemblance to the respective appellate decisions.

Indeed, the trial court went far afield. As explained at the beginning of its order: "The analysis in [*Californians for Disability Rights*], *Branick*, and *Benson* focused on how Proposition 64 affected the named plaintiff in those cases. This Court focuses on the different issue of how Proposition 64 affects the real parties in interest." (2 Exs. 409.) Based on this framework, the court then undertook extensive analysis of Proposition 64 for 15 pages without even citing any of the three appellate decisions. (2 Exs. 409-423.) This might be

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[4] Most recently, the Fourth Appellate District, Division One, issued an opinion essentially following *Branick* and *Benson*. (*Bivens v. Corel Corp.* (Feb. 18, 2005, D043407) _____ Cal.App.4th _____ [2005 Cal.App. Lexis 256]; see also *Lytwyn v. Fry's Electronics, Inc.* (Feb. 22, 2005, D042401) _____ Cal.App.4th _____ [2005 Cal.App. Lexis 267] [decisions by same Division following *Bivens*].) Because *Bivens* relied on the same flawed ground as *Branick* and *Benson* – an overly broad application of the repeal rule – that decision also does not undermine this Court's opinion. Like *Branick* and *Benson*, the *Bivens* court failed to come to grips with the Supreme Court's repeal rule precedents. These include *Myers*, which is not even cited in *Bivens*.

no cause for alarm, except that certain aspects of the discussion are either unsupported or flatly contradicted by the binding precedent the court was supposed to follow. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

For example, the trial court gleaned retroactive intent from the language of the measure itself and the supporting ballot materials. (2 Exs. 421-423.) After parsing the language, the court concluded: "[T]he electorate intended that after November 2, 2004, only public officials would prosecute UCL claims in the interest of the general public. Given that the Court's purpose is to implement the intent of the electorate, the Court thinks that this is the soundest basis for its decision." (2 Exs. 423, citation omitted.) However, neither *Branick* nor *Benson*, which the court purported to follow, found any retroactive intent in Proposition 64's text or ballot materials. Those decisions rested entirely on the repeal rule, divorced from any reading of voter intent. In *Californians for Disability Rights*, this Court specifically rejected the trial court's conclusion: "When read as a whole, the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate." (126 Cal.App.4th at pp. 392-393.) "If anything, the statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits." (*Id*. at p. 392.)[5]

The trial court also inappropriately found the Proposition 64 amendments to have only procedural effect. The court concluded that "the new standing requirement for private parties pursuing private claims is procedural in nature" and, thus, "should be applied to cases pending on

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[5] The trial court acknowledged *Californians for Disability Rights*, noting this Court held there that "'isolated' references to 'filing' in the ballot arguments are 'far from decisive.'" (2 Exs. 423.) The trial court, however, then mistakenly found different isolated snippets decisive. (*Ibid*.)

November 2, 2004." (2 Exs. 428.) This rationale enjoys no support in any of the three appellate decisions. In relevant part, *Branick* states: "We need not determine the voters' intent, nor whether the amendments are procedural or substantive, because we hold that under Government Code section 9606 the amendments have immediate effect in all pending cases alleging claims under sections 17200 or 17500." (2005 Cal.App. Lexis 201, at p. *16.) Even *Benson* acknowledged that the revisions have a substantive impact on pending litigation, but held that the repeal rule applied nonetheless. (2005 Cal.App. Lexis 208, at pp. *16-*18.)

For its part, this Court left no doubt that it regarded the impact of Proposition 64 as substantive. (*Californians for Disability Rights, supra*, 126 Cal.App.4th at pp. 396-398.) Again, this Court emphasized that retroactive application "would deny parties fair notice and defeat their reasonable reliance and settled expectations." (*Id*. at p. 397.) Disregarding this unambiguous authority, the trial court ruled that in the 13 UCL cases before it, "'unexpected and potentially unfair consequences'" would ***not*** result if Proposition 64 were applied. (2 Exs. 425.) Along the same lines, the court wrote: "The continuing ability to pursue common law claims substantially limits any prejudice to the interests of the named plaintiffs." (2 Exs. 430.) This effort to downplay the impact of retroactive application cannot be squared with this Court's guidance.

Californians for Disability Rights cautioned that applying Proposition 64 to pending cases would raise "a host of difficult questions," including the scope of leave to amend, relation back and potential statute of limitations issues. (126 Cal.App.4th at p. 397.) The trial court, however, did not heed the caution. Rather, by applying the measure retroactively, it has engendered the problematic consequences that this Court sought to avoid.

VI. CONCLUSION

For the reasons given, this Court should grant the petition and issue a peremptory writ of mandate directing the respondent court to vacate its

February 17, 2005 order. The respondent court should be instructed to enter a new and different order denying Covenant's motion for judgment on the pleadings.

DATED: March 10, 2005

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RULE 14(C) CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the **PETITION FOR WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 6,297 words according to the word count provided by Microsoft Word word-processing software.

DATED: March 10, 2005

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