No. S131798

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

v.

MERVYN'S CALIFORNIA, INC.,

Defendant and Respondent.

On Petition for Review After a Denial of a Motion to Dismiss by the Court of Appeal, First Appellate District, Division Four

---

BRIEF OF AMICI CONSUMER ATTORNEYS OF CALIFORNIA, JANICE DURAN AND JULIA RAMOS IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIANS FOR DISABILITY RIGHTS

SHARON J. ARKIN (# 154858)
ROBINSON, CALCAGNIE & ROBINSON
620 Newport Center Dr., 7th Floor
Newport Beach, California 92660
(949) 720-1288
(949) 720-1292 (Facsimile)

H. SCOTT LEVIANT (#200845)
ARIAS, OZZELLO & GIGNAC, LLP
6701 Center Drive West, St. 1400
Los Angeles, California 90045
(310) 670-1600
(310) 670-1231 (Facsimile)

Attorneys for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA,
JANICE DURAN and JULIA RAMOS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

OUT-OF-STATE AND FEDERAL CASES

STATUTES

TREATISES

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962 and its members predominately represent individuals subjected in a variety of ways to consumer fraud practices, personal injuries and insurance bad faith. Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature.

The issue of the enforcement of disability rights laws, and the preservation of the consumer protections provided by the Unfair Competition Law, is of paramount interest to the members of Consumer Attorneys. The issue of whether Proposition 64 can be applied to pending cases is one that can and will affect hundreds of cases in this state and can have an impact on not only disability rights cases such as this one, but on cases involving a wide range of other challenges to unlawful, unfair or fraudulent conduct.

JANICE DURAN and JULIA RAMOS are individuals directly affected by the November 2, 2004 passage of Proposition 64. They are both plaintiffs in the matter entitled *Duran v. Robinsons-May*, San Bernardino

County Superior Court, Case No. RCV 42727. That court ruled that Proposition 64 applied retroactively in that pending matter to bar their representative allegations. As such, they are immediately and directly interested in the issue presented to this Court in this case.

INTRODUCTION

This case addresses whether Proposition 64, passed by California voters on November 2, 2004, applies retroactively to pending actions. The issue is of widespread importance, concern and interest to Californians. Proposition 64 affects a substantial number of cases brought under Business & Professions Code section 17200 ("the Unfair Competition Law" or "the UCL") that are currently pending throughout the state.

The Courts of Appeal, addressing the retroactivity issue that has shadowed Proposition 64 from enactment, have reached conflicting conclusions. *Compare*: *Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal. App. 4th 386 (Proposition 64 does not apply to pending actions), with *Benson v. Kwikset Corp.* (2005) 126 Cal. App. 4th 887, rev. granted and *Branick v. Downey Sav. and Loan Ass'n* (2005) 126 Cal. App. 4th 828, rev. granted (Proposition 64 applies to pending actions).

While the split among the state's trial and appellate courts is stark, it

is without justification. Contrary to the arguments of defendant and its *amici* and the rulings of various courts, the "statutory repeal" doctrine does not control the determination here. That is because Government Code section 9605 unequivocally provides that the mere ***amendment*** of a statute does not in any way constitute a ***repeal*** of the statute. Amendment of a statute does not, therefore, trigger application of the repeal rule. Since Proposition 64 merely amended certain provisions of the UCL, and did not repeal any statute or the statutory scheme itself, section 9605 precludes application of the "statutory repeal" doctrine to resolve the question of whether Proposition 64 can be applied to pending cases. With the "statutory repeal" doctrine eliminated from consideration, the normal presumption that legislation does not apply to pending cases controls.

LEGAL ARGUMENT

1.

THE "STATUTORY REPEAL" DOCTRINE DOES NOT APPLY TO PROPOSITION 64 BECAUSE, PURSUANT TO CONTROLLING RULES OF STATUTORY CONSTRUCTION, PROPOSITION 64 ONLY AMENDED - BUT DID NOT REPEAL - THE UCL

The issue in this case turns on the question of whether Proposition 64 should be applied to cases pending in the courts at the time the proposition was passed. The answer to this question necessarily involves an application of rules of statutory construction and analysis of voter intent. Where an express declaration as to retroactivity is absent, the most frequently-applied tenet of statutory construction is the presumption that statutes apply only prospectively:

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' "

McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 475.[1]

Thus, in the absence of an *express* declaration of retrospectivity, courts must turn to an examination of the *intent* of the electorate:

> As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, supra, 30 Cal.2d 388, 182 P.2d 159—the seminal retroactivity decision noted above—"[i]t is an established canon of interpretation that ***statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent***."

Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1207; emphasis added.

As this Court reaffirmed in *Evangelatos*, the emphasis on *intent* is simply the proper application of the canons of statutory interpretation in instances where silence as to retroactivity creates a lingering ambiguity.

And even a *strong suspicion* of retroactive intent is insufficient to overcome the presumption against the retroactive application of a new law:

> we strongly suspect that, if asked a question about retroactive application, the Legislature would have said the change should apply to past abuse. However, we also suspect the Legislature never considered whether to make the amendment retroactive. We find no clear indication of retroactive intent.

---

[1] Countless decisions by this Court and others echo this fundamental principle. *See, e.g., Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal. 4th 828, 840-841; *Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287; *People v. Hayes* (1989) 49 Cal. 3d 1260, 1274; *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1206-1209; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal. 2d 388, 393 (*Aetna*); *Jones v. Union Oil Co.* (1933) 218 Cal. 775, 777; *In re Estrada* (1965) 63 Cal. 2d 740, 746.

ARA Living Centers - Pacific, Inc. v. Superior Court (1993) 18 Cal. App. 4th 1556, 1561(change in elder abuse law held *prospective* only, despite court's suspicion of retroactive intent).

As part of its "intent" analysis, *Evangelatos* gave weight to the factor of "detrimental reliance" when considering whether an initiative applied retroactively:

> Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law.

Id., at 1215; *see also*, 1215-1218.

This Court held in *Evangelatos* that it would violate principles of statutory construction to presume that the electorate intended unanticipated consequences:

> As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears.

Id., at 1218.

Unlike the appellate court's analysis in this case, the appellate courts

in *Benson* and *Branick* failed to consider or apply the "detrimental reliance" factor analyzed and applied by *Evangelatos*.

Finally, a number of cases, including the *Benson* and *Branick* decisions, assert a bright-line rule for resolving the retroactivity question in cases where statutes are repealed. Sometimes called the "statutory repeal" doctrine, this rule purports to authorize retroactive application of new statutory enactments that repeal strictly statutory causes of action or remedies. However, *Benson, Branick* and other courts have improperly applied this rule to a ballot proposition that merely ***changes***, rather than ***repeals***, existing law. Government Code section 9605.[2]

The briefs of the parties have generally addressed the rules of construction articulated in *McClung*, *Myers, Evangelatos, Tapia*, and others. However, the parties to this case have provided almost no discussion of section 9605, which states a controlling rule of statutory construction.[3] *Amici Curiae* seek to aid this Court's efforts by focusing

---

[2] Moreover, applying the "statutory repeal" rule to Proposition 64 oversteps the ***constitutional*** limitations on retroactive legislation where that legislation merely changes, rather than repeals, existing law. *See, e.g., Santangelo v. Allstate Ins. Co.* (1998) 65 Cal. App. 4th 804, 815; *Aronson v. Superior Court* (1987) 191 Cal. App. 3d 294, 297.

[3] As set forth more fully in subdivision F., below, Mervyn's Reply Brief makes passing reference to Government Code section 9605, offers an incomplete citation to its provisions, and attempts to dismiss it from further consideration. Mervyn's Reply Brief, at 7-8.

proper attention on section 9605.

A. Section 9605 Provides Rules Of Construction For Previously-Enacted Statutes That Are Subsequently Amended

The "statutory repeal" doctrine stems from an old line of cases holding, generally, that the repeal of a statute, without a savings clause, before a judgment becomes final, destroys the right of action. In contravention of Government Code section 9605, *Benson, Branick* and the other courts finding that Proposition 64 has retroactive application have improperly relied upon this narrow collection of cases to support their application of the "statutory repeal" rule. But the application of this rule in the context of Proposition 64's amendments to the UCL disregards the clear instructions of this Court, which has repeatedly held that the intention of voters is "paramount" when interpreting and applying a ballot initiative. *In re Lance W.* (1985) 34 Cal. 3d 863, 889.

Branick and *Benson* both identified Government Code section 9606 as supporting their decision to retroactively apply Proposition 64 to pending

cases.[4] And *Branick* and *Benson* both criticized the appellate decision in this case for not considering that section in its analysis.

But in applying Government Code section 9606 to the Proposition 64 issue, *Branick* and *Benson* failed to address the effect of section 9605, which specifically provides that ***an amendment to part of a statute does not act as a repeal of the statute***:

> "Where ***a section or part of a statute is amended, it is not to be considered as having been repealed*** and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted ***portions*** are to be considered as having been repealed ***at the time of the amendment***."

Government Code section 9605, emphasis added.

Thus, under the statutory scheme outlined in the Government Code, the effect of the ***amendment*** of a statute is controlled by section 9605, while the effect of the ***repeal*** of a statute is controlled by section 9606. And to make it utterly clear, section 9605 expressly provides that the mere ***amendment*** of a statute does not constitute a ***repeal*** of the statute. Thus, the determination of which statute applies here turns on the question of whether Proposition 64 amended a section of the UCL or whether it

---

[4] Government Code section 9606 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."

repealed an entire section of the UCL.

Proposition 64 changed ***portions*** of Business & Professions Code sections 17203, 17204, 17205, 17535 and 17536. And by its own terms, Proposition 64 only "amends sections of the Business and Professions Code. . . ." Because Proposition 64 - by express statement and by clear effect - only worked an amendment to certain sections and in no way repealed any entire section or the entire statutory scheme, section 9605 provides the rule of construction that applies to the amendment of those limited sections of the UCL.

B. The Language of Proposition 64 And Government Code section 9605 Compel The Conclusions That Proposition 64 Does Not Operate Retroactively And The "Statutory Repeal" Rule Does Not Apply Here

The first sentence of section 9605 states the overarching principle that amendments to a section or part of a statute shall not be construed as a ***repeal and re-enactment***:

> "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form."

Because, as discussed in the preceding subsection, section 9605 is

controlling with respect to the construction of Proposition 64, the amendments made ***to*** the UCL by Proposition 64 cannot be considered a repeal ***of*** the UCL.

The second sentence of section 9605 sets forth the rules of construction that apply to a statute that is only amended in "section or part":

> "The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment."

The first clause applies to those statutory parts that remain unchanged after the amendment; thus, as to the majority of the UCL, Proposition 64 has no impact, as those unaltered provisions are construed as having been the law from the time of original enactment.

The second and third clauses specify, respectively, that new provisions are deemed enacted *at the time of amendment*, and omitted ***portions*** - **not** the entire statute - are deemed repealed ***at the time of amendment*** - not before. But applying the repeal doctrine would necessarily violate section 9605 - because it would apply the amendments to claims that arose ***before*** the change in the law occurred, instead of applying the amendments to claims that arose at the time of, or subsequent to, the change in the law.

With respect to Proposition 64, the text of the proposition explains how such amendments are identified:

> "[E]xisting provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new."

And Proposition 64's revision to Business & Professions Code section 17204 states:

> "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or a city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition*."

By the clear terms of Proposition 64, the standing provisions in section 17204 are "new" provisions (identified by italic type). Applying section 9605 to this portion of Proposition 64, the added standing requirements cannot be construed as a repeal, but must be deemed operative "*at the time of amendment.*" Moreover, the deleted or omitted portions, under section 9605, are eliminated ***only*** as of the date of passage, ***not***

before. Applying the statutory repeal rule to say that deleting representative standing on behalf of the general public applies to already-existing actions effectively eliminates the language in 9605 specifically stating that such changes become effective "at the time of the amendment." Obviously, it would be wholly improper to construe and apply the amendments to the UCL embodied in Proposition 64 in such a way as to obliterate a clause in section 9605.

Proposition 64 also amended the requirements for bringing private representative actions under section 17203. The entirely new language states:

> "*Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*"
>
> Proposition 64, italics in original to identify new language.

Again, section 9605 specifies that this new provision ***is not a repeal***; rather, it is an amendment operative on the effective date of Proposition 64 ***and not before***.

Thus, by operation of section 9605, the sections changed by Proposition 64 (17203 and 17204 in particular) are ***not*** to be considered as

having been repealed. Rather, those new provisions are to be considered as having been enacted "at the time of the amendment." Government Code section 9605. And the deletion of representational standing can only be effective as of the date of passage, ***and not before***.

Indeed, to read section 9605 any differently would effectively wipe out the entire first sentence of the statute. That sentence clearly provides that an amendment ***to*** a statute cannot be construed as the repeal ***of*** the statute. (*See,* section 9605; "Where a section or part of a statute is amended, ***it is not to be considered as having been repealed*** and reenacted in the amended form." Emphasis added.) If a deletion of a standing provision like that in Proposition 64 is considered a repeal ***of*** the statute, it would render that sentence superfluous. Yet that is exactly what defendant and its amici necessarily argue. That argument must be rejected - else section 9605 will be rendered meaningless.

C. The Rule Articulated By Government Code section 9605, Namely, That Amendments To Statutes Are Not Deemed Repeals, Has Been In Effect For As Long As The UCL Has Existed In Statutory Form

Before section 9605 was enacted, California recognized that the simultaneous repeal and re-enactment of a statute did not constitute a repeal of any portions of the statute that were reenacted:

> Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the reenactment takes effect at the same time.

Perkins Mfg. Co. v. Clinton Const. Co. of Cal. (1931) 211 Cal. 228, 238; *see also, In re Dapper* (1969) 71 Cal. 2d 184, 189 and *In re Naegely's Estate* (1939) 31 Cal. App. 2d 470, 474.

This result just makes sense. Otherwise, the Legislature could scarcely function for fear of unintentionally terminating rights when intending only to amend statutory schemes such as the UCL.

It was with great wisdom that the Legislature enacted section 9605. The rule of construction set forth in section 9605 ensures that legislative action will not impact existing expectations and rights, ***absent an expressly-declared intention to do so***. Under section 9606, it is only when the

Legislature repeals an entire statute, or affirmatively states its intention to legislate retroactively, that the statutory repeal doctrine becomes relevant. Since the voters here did neither, that rule cannot apply.

D. Decisional Law Confirms That The "Statutory Repeal" Doctrine Does Not Apply To Proposition 64

Krause v. Rarity (1930) 210 Cal. 644, represents the common law analogue to section 9605. In *Krause v. Rarity*, Rarity, a passenger in a car, was killed when the car was struck by a train, and his heirs filed suit. On appeal, this Court addressed whether the California Vehicle Act *repealed* Code of Civil Procedure section 377, thereby extinguishing the wrongful death claim asserted by the heirs. After a detailed analysis of the enactment and operation of the new law, this Court said:

> [T]he legislature did not stop with the enactment of the portions of the statute which would have worked a repeal irrevocably, but added the provision which in effect continued the right of action on account of the death of the guest. In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. ***The only change brought about by the new law was in the nature and character of the proof required in each case.*** There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery.

Id., at 654, emphasis added.[5]

As was the case in *Krause v. Rarity*, Proposition 64 did not operate to repeal any portion of the UCL. Instead, Proposition 64 changed "the nature and character of the proof required" in a UCL action by altering requirements for standing and representative claims.

In sum, the common law and 9605 both confirm that Proposition 64 cannot be said to have "repealed" the UCL. Instead, Proposition 64 "amended" portions of the UCL ***as of the date of its enactment***, and all claims that accrued prior to the amendment continued in full force and effect thereafter. Thus, under both decisional law, *see, e.g.*, *Krause v. Rarity*, and legislative mandate, i.e., section 9605, the "statutory repeal" rule does not support the retroactive application of Proposition 64 to matters pending prior to its enactment.

---

[5] The Court then applied the very same rule of construction later articulated by the Court *Evangelatos*:

> The case, then, falls within the operation of the rule contended for by the plaintiff, namely, that, although the legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute.

Id., at 655.

E. The "Statutory Repeal" Decisions Relied Upon By *Benson, Branick* And Other Courts Are Misapplied

Many of the so-called "statutory repeal" decisions are not actually decided on that basis. For example, *Penziner v. West American Finance Co.* (1937) 10 Cal. 2d 160, articulated the "statutory repeal" rule, but *Penzinger* ultimately held, on facts analogous to this matter, that an amendment to the Usury Law did not operate to repeal it.[6]

And while *Southern Service Co. v. Los Angeles County* (1940) 15 Cal. 2d 1 is also relied upon by *Benson* and *Branick* as a validation of the "statutory repeal" doctrine, it, too, was decided upon another ground: Express legislative intent. *Southern Service*, addressing the repeal of a statute allowing the recovery of certain tax overpayments, ultimately held that the Legislature's clearly *expressed* intent was controlling:

> The legislature, no doubt having in mind the holding of this court in *Krause v. Rarity*, 210 Cal. 644, 654, 655, 293 P. 62, 77 A.L.R. 1327, expressly provided that the withdrawal of the right to refund in the particular class of illegal taxes specified should terminate all pending actions. Its expression in this respect is sufficient to accomplish the declared intent and purpose.

---

[6] *As with Krause v. Rarity* and Government Code section 9605, *Penziner's* analysis indicates that the "statutory repeal" rule does not apply where, as here, a statute is *changed* or *amended*, rather than repealed.

Id., at 13.[7]

Southern Service foreshadows the *Evangelatos* holding that intent *must* be considered as a primary canon of statutory interpretation. More broadly speaking, *Southern Service* underscores the idea that all of the "rules" utilized to determine whether a statute operates prospectively or retrospectively are merely rules of construction. *See, e.g., Callet v. Alioto* (1930) 210 Cal. 65, 67. *Southern Service* utilized an express statement of intent by the Legislature to reach its ultimate decision. Here, section 9605 provides a rule of construction that precludes application of the "statutory repeal" doctrine and leaves the presumption of prospectivity as the decisive canon of interpretation.

Like *Southern Service*, other cases have been incorrectly identified as "statutory repeal" decisions. For example, a collection of recent cases held that changes in the anti-SLAPP suit law (Code of Civil Procedure sections 425.16 and 425.17) applied to pending cases. *See, e.g., Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal. App. 4th 120; *Brenton v. Metabolife Intern. Inc.* (2004) 116 Cal. App. 4th 679. But these decisions turn not on the "statutory repeal" doctrine, but on

---

[7] *Southern Service* and *Krause v. Rarity* demonstrate the differing results when retroactive application is expressly declared. Here, there is no express declaration of retroactive intent in Proposition 64.

the distinction between legislative changes affecting past transactions and those impacting only on future events.[8] See *Aetna*, 30 Cal.2d 388, 393. On this point, *Brenton* said, "The issue is whether applying section 425.17 would impose new, additional or different liabilities on [defendant] MII based on MII's past conduct, or whether it merely regulates the conduct of ongoing litigation." *Brenton, supra*, 116 Cal. App. 4th at 689. The *Brenton* court then concluded that the SLAPP device was merely one of several procedural screening devices, and that a limitation on the use of that device did not impact on the substance of the claims and defenses in a lawsuit. *Physicians* concurs:

> [T]he fact that the anti-SLAPP statute shields litigants from trial of meritless claims arising from the exercise of first amendment freedoms does not alter the fact that it serves as a mechanism for early adjudication of such claims, in other words, as a statutory remedy.

Physicians, supra, at 130.

The "remedy" to which these SLAPP decisions refer is a motion to strike, not a cause of action existing by statute for most of a century and as part of the prior common law.

---

[8] Examples of this latter class of statutes include those involving rules of evidence in future trials, *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal. 2d 764, 768; trial procedure, *Estate of Patterson* (1909) 155 Cal. 626, 638; rules of service of process, *Abrams v. Stone* (1957) 154 Cal. App. 2d 33, 40; or the awards of costs or attorney fees upon entry of judgment, *Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal. App. 3d 5, 12-13.

It has been established that "the Legislature cannot, by a purported change in procedure, cut off all remedy." 7 Witkin, *Summary of California Law, Constitutional Law,* § 493 (9th ed. 1988). In that regard, the *Brenton* court observed that "applying section 425.17 here does not eliminate that purported *right,* but only removes one procedural mechanism for enforcing that right and requires MII to enforce the right to be free of meritless lawsuits by other procedures or remedies." *Brenton, supra*, at 691.

In stark contrast, retroactive application of Proposition 64 *destroys*, mid-stream, the right of plaintiffs to represent others under the UCL as private attorneys general and imposes, mid-stream, new standing requirements.

Proposition 64 was not enacted to protect defendants against meritorious and significant cases. A strong presumption exists against interpreting the measure to achieve this "absurd consequence." It is not only contrary to the solitary focus on "shakedown" lawsuits in Proposition 64, but it is contrary to the interests of the voters themselves.

F. Mervyn's Has Not Adequately Addressed the Meaning, Impact and Application of section 9605

As noted, above, the only mention made by Mervyn's to section

9605 is a fleeting reference in its reply brief. Mervyn's said the following:

> "The change that the voters enacted was substantively identical to a repeal because they struck out former statutory language that gave uninjured private parties a right to enforce the UCL. Government Code section 9605 makes the same point: Where part of a statute is amended, any 'omitted portions are to be considered as having been repealed. . . .' "

Mervyn's Reply Brief, pp. 7-8.

The problem with Mervyn's citation is twofold. First, it omits the overarching principle of section 9605, i.e., the first sentence, which unequivocally states that ***amendments are not to be treated as repeals***. Second, the reply brief's reference to section 9605 snipped off the qualifier at the end of the quote, i.e., the fact that "omitted portions are to be considered as having been repealed ***at the time of the amendment.***" (Section 9605; emphasis added.) This is a significant omission, since a proper application of that clause, as discussed above, mandates that, in the absence of an express declaration, omissions operate only from the date of amendment forward, and not retroactively.

Moreover, the fact that "new provisions are considered as having

been enacted at the time of the amendment" provides an alternative basis for interpreting Proposition 64. The new standing requirements are clearly governed by the "new provision" language of 9605, not the "omitted portions" language. Given the presumption against retroactivity, the "new provision" clause should control. Since "repeal" of the statute as a whole is expressly rejected by 9605, and Proposition 64 adds a "new provision" to section 17204, all rules of construction direct the same outcome: Prospective application only.

Accordingly, Mervyn's incomplete reference to section 9605 should be disregarded and a detailed analysis of the section, as set forth in this brief, should be relied on in concluding that the amendments specified in Proposition 64 cannot properly be applied to pending cases.

2.

HOLDING THAT PROPOSITION 64 SHOULD NOT BE APPLIED TO PENDING CASES IS CONSISTENT WITH DECISIONS OF OTHER COURTS ACROSS THE NATION

California law is clear: Even where a statute contains an express declaration of retroactivity, the principal rule of construction states that a statute cannot be applied retroactively when doing so would unconstitutionally abrogate vested rights. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal. 4th 828, 846 ("An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].'"). In applying Proposition 64, this Court is faced with the question of whether the retroactive application of a statute is unconstitutional because it strips litigants of a fully accrued cause of action.

In evaluating this issue, a natural question for this Court to ask is "How would courts in other states treat this sort of issue?" Indeed, this Court explained in *Evangelatos* that language in its prior decisions regarding retroactivity "should not properly be [] interpreted to mean that California has embraced a unique application of the general prospectivity principle, distinct from the approach followed in other jurisdictions ...."

Evangelatos, at 1208.

In fact, in addressing other questions as to how to handle tort reform legislation that is alleged to be retroactive, this Court has historically looked to the law in its sister states for guidance and insight. For example, in *Evangelatos*, this Court examined the trends in other states relating to tort reform provisions similar to those being addressed in that case. *Evangelatos,* at 1199, footnotes 5-7.

Mervyn's and its *amici* suggest that this Court would be acting in a radical manner if it held that this initiative is not retroactive. But as the plaintiff and other *amici* have established, it is entirely consistent with California law to require that legislation explicitly provide that it is retroactive before it will be given retroactive effect. And this rule is entirely consistent with the law in other states, many of which also presume that legislation is not retroactive unless it expressly declares that it is.

To put the issue here in context, this section will examine the law in a number of other states on a different, but related, issue. Indeed, in a great many - if not most - states, it is unconstitutional for legislation to strip individuals of existing causes of action at all. This fact puts into context just how modest and reasonable the plaintiff's position is in this case. In this case, the plaintiff argues that California jurisprudence requires that

legislation make clear that it is retroactive. In many other states, however, even where laws that strip litigants of causes of action explicitly *say* that they are to be applied retroactively, the courts have held that retroactive application is so inherently unfair that they are unconstitutional. In this context, the ruling sought by the plaintiff here is extremely moderate.

A. Numerous Other State High Courts Have Struck Down as Unconstitutional Legislation Whose Retroactive Application Would Eliminate Pending Lawsuits

In many states, the law is well established that the retroactive application of a law whose effect is to eliminate an accrued cause of action violates state constitutional protections. As a result, many state courts have gone much further than to merely apply a presumption against retroactive legislation, and have actively struck down such tort reform laws as unconstitutional, even where they are expressly made retroactive. For example, in *Dua v. Comcast Cable of Maryland, Inc./Harvey v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.* (Md. 2002) 805 A.2d 1061, the Maryland Court of Appeals (that state's highest court) considered the question of whether the Legislature could constitutionally retroactively reverse two court decisions recognizing causes of action for

consumers. One of the cases placed limits upon the late fees that the cable company could charge consumers, and the other held that HMOs could not seek subrogation against their members' claims against third-party tortfeasors. In each case, the Legislature sought to pass special-interest-supported tort reform measures to retroactively legalize these charges. In both cases, the tort reform statutes – unlike Proposition 64 – were very explicitly and expressly made retroactive.

The Maryland high court had no difficulty in finding that the retroactive statutes violated several provisions of the state's constitution. Among other points made in a long and thoughtful opinion, the court stated:

> [T]here normally is a vested property right in a cause of action which has accrued prior to the legislative action. This Court has consistently held that the Maryland Constitution ordinarily precludes the Legislature from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right. . . .
>
> Similarly, in *Thorp v. Casey's Gen. Stores, Inc.* (Ia. 1989) 446 N.W.2d 457, the plaintiff's son was fatally injured by a drunk driver to whom the defendants had sold liquor. The Iowa Legislature amended the state's Dramshop Act after the son was killed but before the plaintiff filed a suit for recovery under the statute. Under that amendment ("the 1986 amendment"), a defendant was only liable if it both served *and* sold liquor to the defendant. Prior to the 1986 amendment, liability under the statute

could lie on the basis of *either* selling *or* serving liquor.

Based on these facts, the Iowa Supreme Court held, first, that the plaintiff had a vested right in his cause of action under the Act and that the right came into existence at the time of the son's death – i.e., at the time the cause of action accrued. *Thorp*, 446 N.W.2d at 460. The court went on to note that the "effect of the 1986 amendment . . . [would be to] preclude plaintiff's cause of action against a convenience store that only sells beer," *id.* at 462, and that the Iowa Legislature had explicitly provided that the 1986 amendment should have such retroactive effect. Despite this legislative direction, however, the court declined to apply the 1986 amendment to plaintiff's claim, because "the retroactive application of the 1986 amendment destroyed [plaintiff's vested] right in violation of due process under both the federal and state constitutions." *Id.* at 463.

The Kansas Supreme Court, in *Resolution Trust Corp. v. Fleischer* (Kan. 1995) 892 P.2d 497, relied on the Iowa Supreme Court's decision in *Thorp* to reach the same result. Before the court were two certified questions. The Court answered the first by finding that "the holder of accrued tort actions for negligence and breach of fiduciary duty, which have not yet been reduced to judgment, [has] a vested property right in those causes of action." 892 P.2d at 500. Second, it held that the retroactive

application of a state statute to claims accrued prior to the statute's enactment would violate the state constitution's Due Process Clause. *Id.* at 507.

In *Rupp v. Bryant* (Fla. 1982) 417 So. 2d 658, the plaintiff had brought a negligence action in 1979 against a high school principal and another teacher for events that took place in that same year. In 1980, while the suit was pending, the Florida Legislature amended Florida's official immunity scheme in a way that would render the defendants immune from that suit. The Florida Supreme Court explained that, prior to 1980, the plaintiffs did in fact have "a right to seek recovery from both [individual defendants]" and that the 1980 amendments "plainly abolished this right retroactively." *Id.* at 665-66. In light of the constitutional doctrine that there can be no retroactive denial of vested rights, the court held that the 1980 amendment was "unconstitutional [as violative of due process] insofar as it abolishes [plaintiffs'] right to recover from" the principle and other teacher. *Id.* at 666. *See also City of Winter Haven v. Allen* (Fla. App. 1989) 541 So. 2d 128, 135 (relying on *Rupp* and holding that "retrospective application of the statute [at issue before the court] would adversely affect appellee's vested right to recover the policy limits of appellant city's insurance").

The same reasoning is evident in *Faucheaux v. Alton Ochsner Med. Found. Hosp.* (La. 1985) 470 So. 2d 878 (per curiam), in which a plaintiff brought a tort action against the defendant for distributing tainted blood. At the time of the injury, Louisiana law provided for strict liability in the context of blood distribution. After the plaintiff's injury, however, the Louisiana Legislature enacted a statute immunizing physicians, hospitals and blood banks from claims for strict liability. The Louisiana Supreme Court refused to apply this new statute to the defendant, holding that when plaintiff's injury occurred, "he acquired a cause of action in strict tort liability . . . which is a vested property right protected by the guarantee of due process." *Faucheaux*, 470 So.2d at 878. The court went on to hold that the "statutes enacted after the acquisition of such a vested property right, therefore, cannot be retroactively applied so as to deprive the plaintiff of his vested right in his cause of action because such a retroactive application would contravene due process guaranties." *Id.*

Louisiana courts have continued to apply this principle in subsequent cases involving tort reform statutes. *See Crooks v. Metropolitan Life Ins. Co.* (La. Ct. App. 2001) 2001 WL 40567 (a tort reform statute "which prohibits medical monitoring as a cause of action cannot be applied in this case because its retroactive application deprives the plaintiffs of a

previously vested right and is thus unconstitutional. *See, also, Anderson v. Avondale Indus., Inc.* (La. Oct. 16, 2001) 2001 WL 1223176, at *6.

Similarly, in *Pyle v. Webb* (Ark. 1973) 489 S.W.2d 796, similarly, the Arkansas Supreme Court declared unconstitutional the retroactive application of legislation that would extinguish a retired teacher's right to collect annuity payments from a retirement fund because the teacher's contractual right to collect these payments had vested five years earlier. *Id.* at 797. The *Pyle* decision supports the contention put forth by *amici* herein that all accrued causes of action, including those bestowed by statute, are constitutionally- protected property interests:

> 'rights conferred by statute are determined according to statutes which were in force when the rights accrued, and are not affected by subsequent legislation. The Legislature has no power to divest legal or equitable rights previously vested.'

Id., quoting Coco v. Miller (1937) 104 S.W.2d 209, 211.

A similar rule was applied in *Martin v. Wisconsin Health Care Liab. Ins. Plan* (Wis. 1995) 531 N.W.2d 70, where a plaintiff brought a medical malpractice claim against a doctor for failing to notify her of the availability of certain medical tests that could have mitigated her injuries. The alleged injuries occurred in 1985. The Wisconsin Legislature in 1986 enacted legislation capping non-economic damages awards at $1,000,000. In 1990, plaintiffs were awarded over $2.1 million in non-economic damages. In

rejecting the defendant's argument that the award could not stand in light of the 1986 legislation, the court noted: (1) that the plaintiff's cause of action had accrued prior to the enactment of the cap; (2) that, at the time of the accrual of the cause of action, plaintiff had a "substantive right" to unlimited damages; and (3) that application of the 1986 cap to plaintiff's award would be retroactive (and indeed, that the Wisconsin Legislature had, in fact, intended the cap to apply retroactively). Because retroactive application of the cap to the plaintiffs would have extinguished an existing substantive right, the court concluded that such application "would be unconstitutional under the Due Process Clause of the . . . Wisconsin Constitution[,]" *Martin*, 531 N.W. 2d at 93; *see also Browning v. Maytag Corp.* (Ga. 1991) 401 S.E.2d 725, 727 ("The Brownings' cause of action accrued at the time of the injury. . . . Thus, to apply [the statute] retroactively to defeat the Brownings' substantive right to bring their cause of action would be unconstitutional."); *Van Fossen v. Babcock & Wilcox Co.* (Ohio 1988) 522 N.E.2d 489, 498 ("[The statute] would remove appellees' potentially viable, court-enunciated cause of action . . . this result constitutes a limitation, or denial of, a substantive right, and consequently causes the statute to fall within the [state constitutional] ban against retroactive laws. . . ."); *Lewis v. Pennsylvania Railroad Co.* (Pa. 1908) 69

A. 821, 822-23 ("[A] right of action is a vested right within the constitutional protection. . . . All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property.")

Numerous state courts have held that retroactive legislation that interferes with substantive or vested rights is unconstitutional and will not be enforced. *See, e.g., Zaragoza v. Director of Dept. of Revenue* (Colo. 1985) 702 P.2d 274, 276 ("The Colorado Constitution prohibits the enactment of retrospective legislation. . . . The proscription against retroactive legislation prohibits the impairment of vested rights. . . ."); *Metropolitan Dade Cty. v. Chase Fed. Hous. Corp.* (Fla. 1999) 737 So. 2d 494, 503 ("Generally, due process considerations prevent the state from retroactively abolishing vested rights."); *First America Trust Co. v. Armstead* (Ill. 1996) 664 N.E. 2d 36, 40 ("The legislature is without constitutional authority to enact a law that is truly retroactive, in that it impairs vested rights even if that is its expressed intention."); *Aurora & Laughery Turnpike Co. v. Holthouse* (1855) 7 Ind. 47, 50 ("If [the statute] has [created a new cause of forfeiture], then its operation must be held prospective; otherwise it would be a retroactive infringement of a vested right, and therefore in conflict with the constitution."); *Merrill v. Eastland*

Woolen Mills, Inc. (Me. 1981) 430 A.2d 557, n.7 ("The legislature has no constitutional authority to enact retroactive legislation if its implementation impairs vested rights. . . ."); *City of Detroit v. Walker* (Mich. 1994) 520 N.W. 2d 135, 145 ("The constitutional prohibition of the passage of retroactive laws refers . . . to retroactive laws that injuriously affect some substantial or vested right. . . ."); *In the Matter of the Transfer Tax upon the Estate of Walden Pell* (N.Y. 1902) 63 N.E. 789, 790 ("Legislation which impairs the value of a vested estate is unconstitutional."); *Bielat v. Bielat* (OH. 2000) 721 N.E.2d 28, 32 ("Section 28, Article II of the Ohio Constitution . . . protects vested rights from new legislative encroachments."); *State ex rel. Crawford v. Guardian Life Ins. Co. of Am.* (Okla. 1998) 954 P.2d 1235, 1238 ("[T]o have attempted to have the statute destroy vested rights . . . would have raised serious constitutional issues"); *Commonwealth ex rel. Zimmerman v. Officers & Empl. Retirement Bd.* (Pa. 1983) 469 A.2d 141, 142 ("It is that attempt to divest previously vested rights . . . by subsequent legislative judgment that we find to be a constitutionally impermissible retroactive divestment of vested rights."); *Barshop v. Medina Cty. Underground Water Conservation Dist.* (Tex. 1996) 925 S.W.2d 618, 633 ("Under our state charter, retroactive laws affecting vested rights that are legally recognized or secured are invalid.");

School Bd. of Norfolk v. U.S. Gypsum (Va. 1987) 360 S.E.2d 325, 328 ("'substantive' rights, as well as 'vested' rights, are included within those interests protected from retroactive application of statutes . . . because such a retroactive application . . . would violate . . . due process rights and would be invalid.") (internal quotations and citation omitted); *Caritas Servs. v. Department of Soc. & Health Servs.* (Wash. 1994) 869 P.2d 28, 41 ("We find that the retroactive amendments deprived Caritas of vested rights protected by the due process clause.").

While federal law is often less protective of individual rights on the subject of retroactive legislation than the law of many states discussed above, even federal law on constitutional challenges to retroactive laws shows how appropriate the plaintiff's position is here. Although not all retroactive legislation is unconstitutional under federal law, a statute's retroactive application requires independent justification above and beyond that which would support the statute's prospective regulation. *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 16-17. In other words, federal law raises constitutional limits on retroactive laws, even where the laws are explicitly retroactive. The U.S. Supreme Court has explained that limitations on retroactive lawmaking fortify the security interests of individuals which underlie constitutional protections:

> If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern Enterprises v. Apfel (1998) 524 U.S. 498, 548-49 (Kennedy, J. concurring in the judgment).

B. This Court's Jurisprudence Similarly Precludes Retroactive Application of a Statute Where Doing So Impairs Existing Rights

This Court has itself repeatedly stressed the importance of assuring that a retroactive application of a statute does not impair constitutionally-protected interests. In *Myers*, for example, this Court echoed the same principles expressed by these other state and federal courts:

> Generally, statutes operate prospectively only. In the words of section 3 of California's Civil Code: "No part of [this code] is retroactive, unless expressly so declared." (Italics added.) . . . In the words of the United States Supreme Court, "The 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " (*Landgraf v. USI Film Products, supra*, 511 U.S. at p. 265,

> 114 S.Ct. 1483; *accord, Hughes Aircraft Co. v. U.S. ex rel. Schumer* (1997) 520 U.S. 939, 946, 117 S.Ct. 1871, 138 L.Ed.2d 135.)
>
> As the United States Supreme Court has consistently stressed, the presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. [¶] It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto clause flatly prohibits retroactive application of penal legislation.... The Fifth Amendment's Takings Clause[, and] [t]he Due Process Clause also protect[ ] the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the [Due Process] Clause 'may not suffice' to warrant its retroactive application." (*Landgraf v. USI Film Products, supra*, 511 U.S. at pp. 265-266, 114 S.Ct. 1483, italics added; accord, *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347.)

Myers, at 840-841.

Nor does this constitutional analysis merely protect a defendant from retroactive application of laws. Rather, as the cited out-of-state and federal cases make clear, the vested right to maintain a cause of action is similarly entitled to constitutional protection. This principle was addressed by this Court in *Evangelatos*. There, supporters of Proposition 51 argued that application of the measure to trials conducted after its effective date would be a prospective application. This Court disagreed:

> Decisions of both the United States Supreme Court and the courts of our sister states confirm that the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute.

Evangelatos, at 1206.

This Court explained that the application of Proposition 51 to pre-existing causes of action "would have a very definite substantive effect on ***both plaintiffs and defendants*** who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law. *Evangelatos*, 44 Cal.3d at 1225, fn. 26; emphasis added.

It cannot seriously be argued that Proposition 64 does not attach "new legal consequences to events completed before its enactment." The measure clearly deprives certain individuals and groups who had standing prior to its enactment of the right to pursue their claims, thereby reducing defendants' exposure to liability and limiting the general public's ability to obtain protection from false, fraudulent and illegal conduct.

Application of this measure to pending cases would be similar to a case involving an amendment to the Federal Water Pollution Control Act that had barred private suits. In *Proffitt v. Municipal Authority of the Borough of Morrisville* (E.D. Pa. 1989) 716 F. Supp. 837, 844, the district court held that the amendment could not be applied retroactively to revoke a

private citizen's standing to maintain an action commenced prior to the effective date of the action.

As is so often the case, Professor Witkin neatly summarized why concepts of standing are substantive and not procedural:

> The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations.

4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 104, p. 162.

The grant of representational standing determines *who* may conduct the litigation as or on behalf of the real party in interest. Thus, when the Legislature grants representational standing as it did to plaintiffs willing to sue on behalf of the public under Section 17200, that grant of standing is a substantive right that cannot be impaired or restricted without constitutional implications.

After Proposition 64 there are arguably UCL cases that can now never be brought by any individual or private attorney general and which will be unlikely to be brought by a law enforcement officer because of insufficient resources. For example, if Proposition 64 is interpreted narrowly, no private individual or organization could bring UCL injunctive relief claims to stop the dumping of toxic waste before injury occurs. Similarly, no private individual or organization could bring a UCL

injunctive relief claim to stop the unlawful disclosure of private information before identity theft occurs. These represent the loss of substantive rights that had already accrued prior to Proposition 64's enactment. Obliterating those rights by now applying the statutory changes retroactively violates constitutional precepts.

And the fact that Proposition 64 has constitutional implications is conclusively demonstrated by defendant's own argument in this very case. Assuming Proposition 64 applied retroactively, and accepting defendant's arguments as to its impact, that would mean that the plaintiff in this case cannot meet the standing requirements defendant says are imposed by the statute. And what would be the consequence of that - according to defendant? Defendant argues that the consequence would be that Proposition 64 would require the dismissal of the claims in this case. That is as substantive an impact as it is possible to have. And such an application of the statute would - retroactively and unconstitutionally - relieve defendants in most, if not all, pending UCL cases of all liability for their wrongful conduct.[9] Thus, the very argument defendant asserts as to

---

[9] Notably, in other UCL/Proposition 64 cases now pending before this Court, the result is even more extreme because restitutionary relief has been sought in those cases. *See, e.g., Benson*, at 896; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392, 1399; *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455, 1460. Since the statute of limitations has passed on some, if not all, of the underlying UCL causes of action and the

the effect of Proposition 64 in this case means that the initiative has constitutional implications which defeat retroactive application.

Consistent with the decisions of California's sister states and the federal courts, then, Proposition 64's standing limitations cannot constitutionally be applied retroactively.

CONCLUSION

Government Code section 9605 and numerous decisions of this Court, including *Evangelatos*, indicate that the presumption of prospectivity applies to Proposition 64, given the absence of an express declaration of retroactive intent. Furthermore, consistent with the holdings of numerous other courts in other states and the federal system, stripping this plaintiff of the right to pursue its claims by applying Proposition 64 retroactively would be unconstitutional.

---

conduct upon which it is based in these cases, no one - not the Attorney General, not the District Attorney, no one - would be able to enforce the UCL in a new action against those defendants for that past conduct.

For the foregoing reasons, the *Amici Curiae* respectfully request that the Opinion of the Court of Appeal in this case be affirmed.

Dated: September 21, 2005.

Respectfully submitted,

H. Scott Leviant
ARIAS, OZZELLO & GIGNAC, LLP

Sharon J. Arkin

ROBINSON, CALCAGNIE & ROBINSON

Attorneys for Amici Curiae

CONSUMER ATTORNEYS OF CALIFORNIA, JANICE DURAN, and JULIA RAMOS

CERTIFICATION AS TO LENGTH

Line Spacing: This brief was double spaced, except for indented quotations and footnotes, which were all single spaced.

Typeface and Size: The typeface selected for this Brief is 13 point Times New Roman. The font used in the preparation of this Brief is proportionately spaced.

Word Count: The word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service, Verification and this Certification is approximately 9,231 words. This count was calculated utilizing the word count feature of Corel WordPerfect.

Dated: September 21, 2005.

Respectfully submitted,

By: _____
SHARON J. ARKIN
Attorneys for Amici Curiae

S131798 *Californians for Disability Rights v. Mervyn's California, Inc.*

PROOF OF SERVICE
1013a (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 620 Newport Center Drive, 7th Floor, Newport Beach, CA 92660; (949) 720-1288.

On September 22, 2005, I served the within document described as:

Brief of Amici Consumer Attorneys of California, Janice Duran and Julia Ramos in Support of Plaintiff and Appellant Californians for Disability Rights

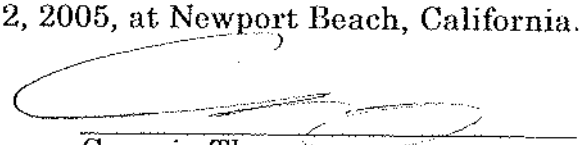
on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth below and on the attached mailing list.

X	By Personal Service:	By placing the document listed above in a sealed envelope and by causing personal delivery of the envelope to the person at the address set forth below :
	Original + 14 copies	CALIFORNIA SUPREME COURT 300 South Spring Street, Fl 2 Los Angeles, CA 90013-1213
X	Mail Service:	By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California addressed as set forth below. I am familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
		Attorneys/Courts: Party Represented:
	1 copy	CLERK, COURT OF APPEAL OF THE STATE OF CALIFORNIA First Appellate District, Division 4 350 McAllister Street San Francisco, CA 94102
	1 copy	Clerk of the Court Alameda County Superior Court 1225 Fallon Street Oakland, CA 94612

1 copy	Linda E. Shostak Gloria Y. Lee Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105-2482	Defendant Respondent Mervyn's
1 copy	David F. McDowell Morrison & Foerster LLP 555 West Fifth Street, Suite 3500 Los Angeles, CA 90013-1024	Defendant Respondent Mervyn's
1 copy	State Solicitor General Office of the Attorney General 455 Golden Gate, Suite 11000 San Francisco, CA 94102-7004	
1 copy	Ronald A. Reiter Supervising Deputy Attorney General Consumer Law Section 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102	
1 copy	Thomas J. Orloff, District Attorney Alameda Co. District Attorney's Office 1225 Fallon Street, Room 900 Oakland, CA 94612	
1 copy	James C. Sturdevant Monique Oliver The Sturdevant Law Firm 475 Sansome Street, Suite 1750 San Francisco, CA 94111-3141 Telephone: (415) 477-2410 Facsimile: (415) 477-2420	California for Disability Rights
2 copies	Larry Paradis Disability Rights Advocate 449 15th Street, Suite 303 Oakland, CA 94612 Telephone: (510) 451-8644 Facsimile: (510) 451-8511	California for Disability Rights
1 copy	Andrea G. Asaro /Holly M. Baldwin Rosen, Bien & Asaro, LLP 155 Montgomery Street, 8th Floor San Francisco, CA 94104 Telephone: (415) 433-6830 Facsimile: (415) 433-7104	California for Disability Rights
1 copy	H. Scott Leviant Arias, Ozzello & Gignac LLP 6701 Center Drive West, Suite 1400 Los Angeles, CA 90045 Telephone: (310) 670-1600 Facsimile: (310) 670-1231	Consumer Attorneys of California, Janice Duran and Julia Ramos

1 copy	Daniel S. Mason Zelle, Hofmann, Voelbel, Mason & Gette, LLP 44 Montgomery Street, Suite 2400 San Francisco, CA 94104 Telephone: (415) 693-0700 Facsimile: (415) 693-0770	California for Disability Rights
1 copy	Barbara Jones AARP Foundation Litigation 200 South Los Robles, Suite 400 Pasadena, CA 91101 Telephone: (626) 585-2628 Facsimile: (626) 583-8538	Amicus Curiae AARP
1 copy	Thomas Osborne AARP Foundation Litigation Michael Schuster AARP 601 E. Street, N.W. Washington, D.C. 20049 Telephone: (202) 434-2060	Amicus Curiae AARP
1 copy	Lexington Law Group, LLP Mark N. Todzo/Eric S. Somers/ Lynne R. Saxton 1627 Irving Street San Francisco, CA 94122 Telephone: (415) 759-4111 Facsimile: (415) 759-4112	California League for Environmental Enforcement New
1 copy	Robert M. Bramson Bramson, Plutzik, Mahler & Birkhaeuser, LLP 2125 Oak Grove Road, Suite 120 Walnut Creek, CA 94598 Telephone: (925) 945-0200 Facsimile: (925) 945-8792	National Association of Consumer Advocates and Trial Lawyers for Public Justice
1 copy	Leslie A. Brueckner Trial Lawyers for Public Justice 1717 Massachusetts Ave., N.W., Suite 800 Washington, D.C. 20036 Telephone: (202) 797-8600 Facsimile: (202) 232-7203	National Association of Consumer Advocates and Trial Lawyers for Public Justice
X State	I declare under penalty of perjury under the laws of the State of California that the above is true and correct.	

Executed on September 22, 2005, at Newport Beach, California.



Capazin Thornton