No. S131798

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS

Plaintiff and Appellant

vs.

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

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AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF AND APPELLANT [APPLICATION FOR LEAVE TO FILE INCLUDED]

Service on Attorney General and Alameda County District Attorney Required By Bus. & Prof. Code § 17209

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The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards And Guidelines For Litigating And Settling Consumer Class Actions* may be found at 176 F.R.D. 375 (1998).

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm with over 3000 trial-lawyer members nationwide that specializes in precedent-setting and socially-significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The issues presented in this case implicate the legal rights of consumers who were plaintiffs – or who were represented by plaintiffs – in Unfair Competition Law cases pending on the date Proposition 64 was enacted.

About 150 of NACA's members are California consumer attorneys or non-attorney advocates, and about 800 of TLPJ's members reside in California. Many of NACA's and TLPJ's attorney members presently represent consumer plaintiffs in cases initiated prior to passage of Proposition 64 who will be directly affected by this Court's decision whether that proposition should be given retroactive effect. Therefore, NACA and TLPJ have a substantial interest in resolution of the issues raised by this case. NACA and TLPJ have reviewed the briefs filed by the parties and believes that additional briefing will be helpful to the Court on matters not fully addressed by the parties themselves.

For the foregoing reasons, NACA and TLPJ respectfully request the Court to accept for filing the following brief.

Dated: September 8, 2005

Respectfully submitted,

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP

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ARGUMENT

The central issue to be resolved by this case is whether the so-called "statutory repeal" doctrine governs whether the amendments to the Unfair Competition Law enacted as Proposition 64 apply to cases pending on the date of its enactment. In NACA's and TLPJ's view, this Court should hold that doctrine inapplicable for at least two reasons. First, the doctrine has never been applied in the context of a voters' initiative and the Court should not do so here. Second, the logic underpinning the statutory repeal doctrine is questionable at best and is inconsistent with this Court's modern jurisprudence. There are strong indications in the Court's recent decisions that the doctrine has already been abandoned *sub silentio*. Regardless, it should be expressly overruled by this Court.

A. The "Statutory Repeal" Doctrine Should Not Be Followed Where A Voter Initiative Is At Issue

Proposition 64 was a voter initiative, not an enactment of our Legislature. No case has ever applied the "statutory repeal" doctrine to a voter initiative. The arguments against doing so are compelling.

In deciding whether a particular statute should be given retroactive effect, the intent of the enacting body is paramount. Retroactivity is a policy question to be determined by the legislating body. *Evangelatos v. Superior Court,* 44 Cal.3d 1188, 1206 (1988). By clear statement, any statute can be applicable either retroactively or prospectively-only and the courts will enforce that intent, unless

doing so would be contrary to constitutional due process principles. *Id. See also, McClung v. Employment Development Dept.*, 34 Cal.4th 467, 475-476 (2004).

The question remains, however, how to interpret legislative intent if the legislating body remains silent on the question of retroactivity. In almost every situation, silence is understood as intent that the statute apply prospectively only. *Tapia v. Superior Court,* 53 Cal.3d 282, 287 (1991). If the "statutory repeal" doctrine has vitality, however, then it represents a small subset of situations where the usual presumption is *reversed* – legislative silence (i.e. the lack of a "saving clause") results in retroactive effect.[1] This result is only sensible to the extent that it represents an accurate interpretation of the enacting body's intent – a question which, in turn, depends upon that body's understanding of the results of silence on the retroactivity question. The legislating body must *know* that its silence has different results in different circumstances, so that it can decide whether to include an express statement in the legislation altering the default outcome.

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[1] The principal enunciation of the statutory repeal concept appears in *Callet v. Alioto*, 210 Cal. 65 (1930) and *Southern Service Co. v. Los Angeles County*, 15 Cal.2d 1 (1940). As expressed in those cases, retroactive application of legislation depends in part upon whether the right at issue was rooted in the common law or was instead based only on statutory rights. If the cause of action or remedy was based solely on a previously-enacted statute, then "a repeal of such a statute without a saving clause will terminate all pending actions based thereon". *Southern Service*, *supra*, 15 Cal.2d at 11-12. "[A] cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute." *Callet*, *supra*, 210 Cal. at 67.

Whatever sense it makes to assume our elected legislators' knowledge of judicial doctrines drawing fine distinctions[2], it makes no jurisprudential sense to presume that the *voters* have in-depth knowledge of such matters. There is no conceivable basis for concluding that most – or any – voters understood and intended that Proposition 64 would be (1) "repealing", rather than amending, a prior right; (2) that the right in question was statutory, as opposed to a common law right[3], and that this classification of the prior right would control the question of retroactivity; or (3) that such a repeal would take effect immediately under a rarely cited legal doctrine. The voters know nothing about such obscure legal rules and were not informed of any such possibility in the ballot materials. To apply Proposition 64 retroactively in the absence of evidence that the voters so intended would be inconsistent with the fundamental principle that the legislating body's intent should be given effect, where possible.[4]

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2 *See, Aetna Casualty & Surety Co. v. Industrial Acci. Com.*, 30 Cal. 2d 388, 396 (1947) ("it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation").

3 Adding to the confusion for any interested voter, portions of the UCL represent codified common law concepts, while other portions have less clear common law roots. *See*, Answering Brief On The Merits at 26 n. 6. A voter would have to sort out the precise breakdown of these components in order to predict whether a vote in favor of Proposition 64 might result in retroactive application if the "statutory repeal" doctrine applied to that initiative, given its silence about the issue.

4 *Cf., Lesher Communications, Inc. v. City of Walnut Creek* 52 Cal.3d 531, 543 (1990); *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com*, 51 Cal. 3d 744, 751 n.5 (1990) (noting that goal in reviewing ballot materials is to ascertain the "voters' probable understanding of the measure").

Fictitious and unrealistic expectations about the voters' understanding of the implications of legal doctrines not discussed in the ballot materials should not be presumed. For example, in *Taxpayers to Limit Campaign Spending*, the Court noted:

> In order to further the fundamental right of the electorate to enact legislation through the initiative process, this court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures. Relying on this presumption we attempt to ascertain and implement the purposes of the measure. No case has been called to our attention, however, in which the court has assumed that voters not only recognized that they were approving initiatives with fundamentally conflicting provisions intended to regulate the same subject, but also analyzed the remaining provisions in order to predict which would be implemented if either measure received a lesser affirmative vote. A construction of section 10(b) that obligates the court to implement a fictitious electoral intent would be unreasonable and unjustified.

51 Cal. 3d 744, 768 (1990) (citations omitted).

To the extent that any "informed members of the electorate...happened to consider the retroactivity issue" (*Evangelatos,* 44 Cal.3d at 1212) in voting for Proposition 64, they were likely to believe and intend that the changes in the law would apply prospectively only, given that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) (quoted in *Evangelatos*, 44 Cal.3d at 1206-1207). Even extremely knowledgeable and motivated voters were quite unlikely to be aware of a doctrine which this

Court has not even mentioned for the last 27 years, since *Younger v. Superior Court,* 21 Cal.3d 102, 109 (1978).[5]

NACA and TLPJ recognize the general proposition that the same rules of statutory construction apply to voter initiatives as to statutes enacted by the Legislature. *People v. Lopez*, 34 Cal. 4th 1002, 1006 (2005). However, in some circumstances, the distinctions between voter-enacted initiatives and legislatively-enacted statutes justify differences in analysis. *See, e.g., Taxpayers to Limit Campaign Spending, supra* (finding inapplicable when reviewing voter initiatives, the rule of statutory construction requiring two different measures to be reconciled where possible, in light of provisions of Const., art. II, § 10, subd. (b)). As Justice Baxter noted in *People ex rel. Lungren v. Superior Court,* 14 Cal.4th 294 (1996):

> [T]he voters have no special knowledge of technical meanings the law may attach to particular words or phrases used in such a statute. Moreover, the initiative process provides little opportunity to consider, debate, or modify the language arbitrarily chosen by the drafters of a ballot measure. Extrinsic aids to construction are typically sparse and unreliable. Hence, in ascertaining the purposes of an initiative statute, we should adhere closely to the ordinary, commonsense meaning of its language, as viewed in context and confirmed by the available outside evidence of the voters' intent.

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[5] It is impossible to know what was known by or intended by the *drafters* of Proposition 64. However, given the lack of any explicit statements regarding retroactivity in either the text of the Proposition or the ballot materials accompanying it, the drafters' knowledge is irrelevant. It is the probable understanding of the *voters* which matters. *Robert L. v. Superior Court*, 30 Cal.4th 894, 904 (2003); *Taxpayers to Limit Campaign Spending, supra*, 51 Cal.3d at 764 ("The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent.").

14 Cal.4th at 315-316 (Baxter, J., dissenting).

Many decisions have emphasized the importance, in the voter initiative context, that voters have available to them full and accurate information regarding the proposals presented at the ballot. *See, e.g., Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 181 (2001) (initiative must be invalidated if "the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices"); *People ex rel. Coe v. Los Angeles*, 187 Cal. 56, 63 (1921) (invalidating initiative where the ballot materials failed to describe an important element of the proposed enactment).

From a policy standpoint, the insistence on complete disclosure of all important aspects of a proposed initiative by the sponsoring parties is compelling. Whether Proposition 64 is or is not retroactive is an important issue, as readily demonstrated by the speed at which the issue reached numerous appellate courts. Yet the voters were never informed by the parties sponsoring the proposition that it would or might be applied retroactively. A ruling that Proposition 64 is retroactive would, in effect, reward a lack of candor about the full impact of the proposal to be voted upon.

The Court should not presume "a fictitious electoral intent". *Taxpayers to Limit Campaign Spending*, 51 Cal. 3d at 768. Instead, given the silence in the ballot materials, as well as the wording of the Proposition itself, the Court should find that the voters intended the result called for by a straightforward application

of the well-known presumption that all statutes are presumed to operate prospectively only. *Elsner v. Uveges,* 34 Cal.4th 915, 936 (2004).

> In the case of a voters' initiative statute . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.

Hodges v. Superior Court, 21 Cal.4th 109, 114 (1999).

B. The "Statutory Repeal" Doctrine Should Be Expressly Repudiated

As indicated above, NACA and TLPJ believe that voter initiatives should not be analyzed under the statutory repeal doctrine, even assuming that that doctrine is otherwise viable. In addition, however, NACA and TLPJ urge the Court expressly to repudiate that doctrine in all contexts. It serves no public policy purpose and is based upon distinctions which, if ever significant, have long since lost their relevance.

The "statutory repeal" doctrine has not been cited or relied upon by any decision of this Court for over 25 years, despite the fact that the Court has addressed retroactivity issues at least ten times over that period. Instead, time and again, this Court has reiterated the rule, without exception, that retroactivity is never presumed and that express indications of intent are required before finding retroactive application.[6]

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[6] *Elsner, supra,* 34 Cal.4th at 544 ("New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise"); *McClung v. Employment Development Department,* 34 Cal.4th 467, 475 (2004) ("[I]t has long been established that a statute that interferes with

These decisions have consistently stated this rule with regard to "all statutes" or simply "statutes", not merely "those statutes which affect only common law rights or remedies." NACA and TLPJ believe that the presumption of retroactivity embodied in the statutory repeal doctrine is inconsistent with this case law and does not reflect current California law.

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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" [quoting *United States v. Heth* (1806) 7 U.S. 399]); *Myers v. Philip Morris Companies, Inc.*, 28 Cal.4th 828, 841 (2002) ("California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application'" [emphasis in original, citations omitted]); *Western Security Bank v. Superior Court,* 15 Cal.4th 232, 243 (1997) ("A basic cannon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so."); *Droeger v. Friedman, Sloan & Ross,* 54 Cal.3d 26, 42-43 (1991) (Amendment to Code of Civil Procedure not retroactive absent explicit language so indicating); *Tapia, supra,* 53 Cal.3d at 287 ("It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise."); *People v. Hayes,* 49 Cal.3d 1260, 1274 (1989) ("A new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling indication that the Legislature intended otherwise"); *Evangelatos, supra,* 44 Cal.3d at 1208-1209 (1988) ("California continues to adhere to the time-honored principle codified by the Legislature in Civil Code Section 3 and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."); *Cole v. Fair Oaks Fire Protection District,* 43 Cal.3d 148, 153 (1987) ("'It is an established cannon 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.'" [quoting *Aetna Casualty & Surety Co., supra,* 30 Cal.2d at 393]); *Hoffman v. Board of Retirement,* 42 Cal.3d 590, 593 (1986) ("We will not give retroactive effect to a statute affecting a substantive right unless the Legislature expressly and clearly declares its intent that the statute operate retroactively.").

Indeed, in several cases, the Court discussed retroactivity in settings where, if of any remaining vitality, the statutory repeal doctrine would surely have been at least mentioned. In *Hoffman v. Board of Retirement, supra,* the plaintiff, a disabled employee, sought disability payments but was denied them by the administrative board. She appealed the denial, and while her appeal was pending, the Legislature amended Government Code § 31720 to add an additional requirement to be proven before disability payments became payable. The defendant argued that the new version of the statute should govern, even though plaintiff's disability and her application for benefits occurred prior to enactment. Since the right to disability payments is purely statutory, the statutory repeal doctrine would have required the application of the current form of the law without further analysis. Yet, this Court cited the usual presumption that all statutes operate prospectively only, absent clear expression otherwise; and never mentioned the "statutory repeal" line of cases. 42 Cal.3d at 593.[7]

Similarly, in *Balen v. Peralta Junior College District,* 11 Cal.3d 821 (1974), the plaintiff was a college instructor who qualified under the relevant statute as a "probationary" employee entitled to notice prior to termination. The statute was then amended to classify part time instructors such as plaintiff as "temporary" employees not entitled to any notice prior to termination. The

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[7] Ultimately, the Court concluded that the amendment at issue was merely a clarification of existing law, and hence that immediate application of the amendment would not be retrospective in nature. (*Id.* at 593.)

plaintiff was thereafter terminated and he sued claiming lack of notice and a hearing. Even though the initial classification as "probationary" was a right given to plaintiff solely by statute, the Court addressed the retroactivity question through application of the general presumption against it. Once again, the Court made absolutely no mention of the "statutory repeal" doctrine. Indeed, the Court stated to the contrary:

> Application of a statute to destroy interests which matured prior to its enactment is generally disfavored. (2 Sutherland, Statutory Construction [4th ed. 1973] §4104.) Absent specific legislative provision for retroactivity or other indication of legislative intent, it would manifestly be unjust to interpret the new statute in a manner that would strip petitioner of his previously acquired status."

Id. at 830.[8]

Moreover, as the Answering Brief On The Merits points out at length (pp. 36-38), it seems extremely unlikely that the Court's lengthy opinion in *Myers v. Philip Morris Companies, Inc.*, 28 Cal.4th 828 (2002) – addressing potential retroactivity of the "Repeal Statute," which repealed prior statutory immunity from suit for certain tobacco-related claims -- would have issued without even a mention of the statutory repeal doctrine, if that doctrine had any continuing viability in this State.

In any event, whether or not *past* cases make sufficiently clear that the statutory repeal doctrine no longer has vitality, the Court should use this case to

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[8] The Court immediately thereafter noted that it need not reach the issue whether plaintiff had any "vested" rights. Rather, the question was purely one of statutory interpretation. *Id.* at n. 9.

expressly overrule that doctrine. In NACA's and TLPJ's view, the doctrine lacks logical underpinning and is unsupportable, particularly given modern jurisprudential abandonment of legal distinctions based upon categorization of rights as "common law" or "statutory."

1. The Doctrine's Historical Distinction Between Statutory and Common Law Rights Is Of No Importance In Light Of Modern Jurisprudence

The fundamental premise of the statutory repeal doctrine is that it is significant that a right or remedy arises by statute rather than from historical common law roots. Though several of the Court's older cases relied on this distinction, NACA and TLPJ respectfully submit that it was never – and certainly is not now – an appropriate basis for determining the retroactive effect of statutory enactments.

The early cases discussing the statutory repeal rule believed that the legislature was limited in its ability to abrogate rights which existed at common law. This premise was key to the resulting conclusion that repeal of purely statutory rights, unlike other situations, should be presumed to take effect immediately.

> This [statutory repeal] rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation.

Callet v. Alioto, *supra*, 210 Cal. at 68.

However, this perceived distinction between statutory and common law rights has been repudiated by this Court. *County of Los Angeles v. Superior Court of Los Angeles County,* 62 Cal.2d 839, 844-845 (1965) ("We find no constitutional basis for distinguishing statutory from common law rights merely because of their origin"). While some rights certainly are "vested" in the sense that Constitutional due process prohibits the Legislature from undermine them (*see, e.g., Urban Renewal Agency v. Cal. Coastal Zone Conservation Com*, 15 Cal. 3d 577, 583-584 (1975)), that status depends upon considerations which have little or nothing to do with the question whether the right existed at common law or instead flowed from previous legislation. As this Court stated in *County of Los Angeles*, *supra*:

> [The plaintiff] contends that although the Legislature can retroactively abrogate rights provided by statute, it cannot retroactively change the common law to abrogate a "vested right." (*See Callet v. Alioto,* 210 Cal. 65.) We find no constitutional basis for distinguishing statutory from common law rights merely because of their origin (*see* 5 Cal. Law Revision Com. Rep. 526), and describing a right as "vested" is merely conclusory. (*Flournoy v. State of California*, 230 Cal.App.2d 520, 531.) We must consider instead the reasons advanced to justify retroactive application of a statute to determine if it is constitutionally permissible. Although the Legislature normally legislates prospectively, it can provide for retroactive application of a statute if it has a reasonable basis for doing so.

62 Cal.2d at 844-845.

Even before *County of Los Angeles*, the distinction between common law and statutory rights in this context had been severely criticized. In *Flournoy v. State,* 230 Cal.App.2d 520, 532 (1964), the court properly described the distinction stated in cases such as *Callet* as "rickety reasoning":

> But resting decision upon the distinction between statutory and common law rights is neither justified by reason nor rule. The distinction is based upon rickety reasoning because persons act no more nor less in reliance upon established rules of the common law, or in expectations that they will remain unchanged, than they do upon statutes.

Id. at 532. And both *County of Los Angeles* and *Flournoy* cited approvingly Professor Arvo Van Alstyne's work as consultant to the California Law Revision Commission. 62 Cal.2d at 844; 230 Cal.App.2d at 524-528, 531. In his study, Professor Van Alstyne noted the logical fallacy underlying the distinction between common law and statutory rights drawn by the cases adopting the statutory repeal rule:

> The distinction adverted to in the *Callet* case, between statutory causes of action and common law causes of action, seems exceedingly formal. Manifestly, if a person can be deemed to pursue a statutory right in contemplation of possible repeal of the statute, by the same token he may be taken to pursue any common law right in contemplation of a possible abrogation of that right by legislation. In any event, even the statutory foundation for the court's position that statutory rights are distinguishable from common law rights does not support the distinction. Section 9606 of the Government Code expressly declares that:
>
> > 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. [Emphasis added.]
>
> Taken at face value, this provision simply means that persons acting in pursuit of statutory rights act in contemplation of the fact that the Legislature has power to repeal the statute provided it does not thereby destroy any rights which have become "vested." To rely upon this section as a basis for the distinction noted in *Callet* is surely specious since it really begs the question as to what are the identifying characteristics of a "vested" right.

5 Cal. Law Revision Com. Rep. at 526 (1963).

The premise underlying the statutory repeal rule having been rejected by this Court in *County of Los Angeles*, the only question is whether there is any other logical basis for differentiating between statutory and common law rights when determining the intent of the Legislature (or voters) regarding retroactivity.[9] The only such basis mentioned in any case law is the language of Gov. Code section 9606, noted by Professor Van Alstyne above. This section has been cited in several cases, including *Callet* (in its earlier codification as Pol. Code section 327) and described as a justification for the statutory repeal doctrine. "The justification for this rule is that all statutory remedies are pursued with full that the legislature may abolish the right to recover at any time." *Governing Board of Rialto Unified School Dist. v. Mann*, 18 Cal. 3d 819, 829 (1977) (quoting *Callet*, 210 Cal. at 67-68).

However, this suggested justification mistakes legislative *power* for legislative *intent*. The fact that persons "acting under any statute act in contemplation of this power of repeal," does not support a presumption that the

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[9] Some cases suggest that the statutory repeal doctrine might not involve retroactivity at all, but instead is merely the application of "current law" to a case. *See, e.g., Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal.App.4th 120, 125 (2004). These cases rely on a quote from this Court in *Southern Service*, *supra*, that "[t]he reviewing court must dispose of the case under the law in force when its decision is rendered." 15 Cal.2d at 12. Respectfully, however, this is merely a tautology. The intent of the Legislature determines what "law is in force" with respect to cases pending before enactment of a statute. If that intent is made express, either by affirmatively stating that the statute is to apply prospectively-only (i.e. via a "saving" clause) or by affirmatively stating to the contrary, that determination governs. The pertinent question is what presumption about intent to apply where the legislation is silent.

Legislature (or electorate) *intends* to immediately apply newly-enacted law to pending cases when the legislation does not clearly so indicate. Yet the statutory repeal doctrine leaps to that conclusion in the face of legislative silence.

2. The Statutory Repeal Doctrine Is Inconsistent With The Provisions Of The Major Codes Which Expressly Bar Retroactivity Absent Expressly-Stated Legislative Intent

The concept that a statute is not to be presumed to have retroactive effect is expressly stated in the four original codes. "No part of [this code] is retroactive, unless expressly so declared." Civil Code, section 3; Code of Civil Procedure, section 3; Penal Code, section 3. *See also*, Government Code, section 4 ("No action or proceeding commenced before this code takes effect, and no right accrued, is affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."); Government Code, section 9603 ("The general rules for the construction of statutes are contained in the preliminary provisions of the different codes."). This legislative directive that statutory provisions are not to be deemed retroactive unless clearly so stated applies fully to amendments and additions to the Codes, not merely to the initial enactment of the Codes. *Evangelatos*, 44 Cal.3d at 1207 n. 11 (disapproving a contrary Court of Appeal decision on this point).

The statutory repeal doctrine conflicts with these fundamental commands regarding the effect of new statutes. That doctrine provides that some new statutes – those that repeal prior statutory rights -- *are* given retroactive effect even though

that intent has not been "expressly so declared". For this reason, the cases following that doctrine should be overruled.

Though Proposition 64 amended sections of the Business & Professions Code, rather than one of the four basic codes, the statutory prohibition upon presumed retroactivity applies fully to this case. This Court has previously held that the absence of parallel provisions in some Codes is irrelevant and that the same non-retroactivity presumption applies to *all* legislation. *DiGenova v. State Board of Education,* 57 Cal.2d 167, 172-173 (1962):

> It is specifically provided in three of our basic codes that no part thereof is retroactive "unless expressly so declared." (Civ. Code, § 3; Code Civ. Proc., § 3; Pen. Code, § 3.) This is a rule of construction originally developed by the courts. In *People v. Harmon*, 54 Cal.2d 9, 25, it was said that section 3 of the Penal Code, supra, "is but a restatement of a 'general rule of statutory construction' (*Von Schmidt v. Huntington* (1850) 1 Cal. 55, 65) recognized by the Code Commissioners by their citation of that and kindred cases." Similar statements appear in *In re Cate*, 207 Cal. 443, 448-449, and in *Estate of Potter*, 188 Cal. 55, 65.
>
> Accordingly, where language used by the Legislature has not clearly shown that retroactive application was intended, the rule against retroactive construction has uniformly been held applicable to codes or acts not containing the provision set forth in the Civil Code, the Code of Civil Procedure, and the Penal Code. [Citations.]]
>
> It is thus clear that the absence of the statutory provision from other codes and statutes . . . does not indicate that with respect to those enactments the Legislature has rejected the rule against a retroactive construction or that some different rule is applicable. *The rule to be applied is the same with respect to all statutes, and none of them is retroactive unless the Legislature has expressly so declared.*

Id. (emphasis added). The soundness of this holding on a policy basis is irrefutable. Having the presumption against retroactivity depend on the particular

codification involved would invite consequences never intended by the Legislature.

Second, though the provisions of the UCL now appear in the Business & Professions Code, this was the result of a relatively-recent recodification. In 1977, the provisions of the UCL (including its broad standing provisions) were moved, unchanged, from Civil Code §§ 3369 *et seq.* to their present location at Business & Professions Code § 17200 *et seq.* It would seem absurd to argue that the presumption against retroactivity changed as a result of this re-codification.

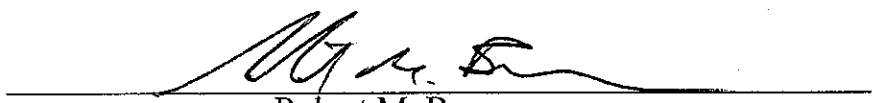
CONCLUSION

For the foregoing reasons, this Court should affirm the opinion of the court of appeal.

Dated: September 8, 2005

Respectfully submitted,

BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER, LLP



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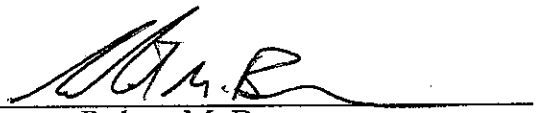
CERTIFICATION REGARDING WORD COUNT

I certify that this brief contains 4,402 words, including footnotes, as established by the word count of the computer program used for the preparation of this brief.



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Amici Curiae

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On September 13, 2005, I served the within documents:

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF AND APPELLANT [APPLICATION FOR LEAVE TO FILE INCLUDED]

☒ by placing a copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope with delivery fees provided for a Federal Express pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ By causing a process server to personally deliver a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by facsimile transmission on that date. This document was transmitted by using a Canon LC 710 facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number (925) 945-8792. The transmission was reported as complete and without error.

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I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the 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 postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, executed on September 13, 2005, at Walnut Creek, California.

Lisa Baker

Lisa Baker