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COPY

IN THE SUPREME COURT OF CALIFORNIA

DOMINIQUE LOPEZ, by and through her guardian ad litem, Cheryl Lopez,
Plaintiff and Appellant,

v.

SONY ELECTRONICS, INC.,
Defendant and Respondent.

SUPREME COURT
FILED
MAY 1 9 2017
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Deputy

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B256792

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT SONY ELECTRONICS, INC.

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Under California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (U.S. Chamber), the American Insurance Association (AIA), the Association of Southern California Defense Counsel (ASCDC), and the Civil Justice Association of California (CJAC) request permission to file the

attached amici curiae brief in support of defendant and respondent Sony Electronics, Inc.[1]

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, from every sector, and in every geographic region of the country. In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the State and have a significant interest in the sound and equitable development of California law regarding civil procedure and statutes of limitation. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of similar vital concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court, the California Courts of Appeal, the United States Supreme Court, and the supreme courts of various other states.

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[1] The U.S. Chamber, AIA, ASCDC, and CJAC certify that no person or entity other than the U.S. Chamber, AIA, ASCDC, CJAC, and their counsel authored this proposed brief in whole or in part and that no person or entity other than the U.S. Chamber, AIA, ASCDC, CJAC, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

The American Insurance Association is the leading national trade association representing major property and casualty insurers writing business in California, nationwide, and globally. AIA members, including companies based in California and other states, collectively underwrote over $19 billion in direct property and casualty premiums in this State in 2015, including more than 35 percent of the commercial insurance market. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

The Association of Southern California Defense Counsel is the preeminent regional organization of lawyers who specialize in defending civil actions. It is comprised of approximately 1,100 leading attorneys in California. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae in courts across the state in cases involving issues of vital concern to its members. ASCDC has appeared as amicus curiae numerous times before this Court, including on several cases involving statute of limitations issues. (See, e.g., *Lee v. Hanley* (2015) 61 Cal.4th 1225; *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185; *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503.)

The Civil Justice Association of California is a 38-year-old organization of businesses, professional associations, and financial institutions. CJAC's principal purpose is to educate the public about the critical need for clear, fair, and economical laws governing liability and compensation for injuries occasioned by the wrongful acts of others. Toward that end, CJAC frequently petitions the three coordinate and coequal branches of government for redress on a variety of civil liability issues, including the scope and application of statutes of limitation. (See, e.g., *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363.)

The U.S. Chamber, AIA, ASCDC, and CJAC agree with and support Sony's position that the Court of Appeal correctly concluded that Code of Civil Procedure section 340.4, rather than Code of Civil Procedure section 340.8, provides the correct statute of limitations for claims of prenatal or birth-related injury due to exposure to toxic substances in utero. As Sony explained in its answering brief on the merits, and as the U.S. Chamber, AIA, ASCDC, and CJAC further discuss below, an analysis of statutory purpose, well-established canons of statutory construction, legislative history, and public policy support this view.

Should this Court disagree with Sony's position, however, and conclude that Code of Civil Procedure section 340.8 provides the correct statute of limitations for prenatal or birth-related injury claims arising from toxic exposure, then the U.S. Chamber, AIA, ASCDC, and CJAC believe their amici curiae brief can assist this Court by offering a different perspective on how to reconcile the various statutory provisions at issue in a way that honors the

Legislature's intent. In particular, in enacting the statutory predecessor to Code of Civil Procedure section 340.4, the Legislature made its intent very clear that minority tolling should not apply to prenatal or birth-related injury claims. In short, no matter which statute of limitations this Court decides governs the claims at issue, this Court can benefit from the additional briefing here showing that the prohibition on minority tolling contained in Code of Civil Procedure section 340.4 should apply to such claims.

The U.S. Chamber, AIA, ASCDC, and CJAC sympathize with the personal adversity plaintiff and her family have suffered. At the same time, they recognize the importance to everyone of the need to have clear rules governing the scope and extent of defendants' liabilities and responsibilities under the laws of this State. In particular, they are deeply concerned that plaintiff's position would eviscerate the Legislature's clear prohibition on minority tolling for prenatal or birth-related injury claims, exponentially lengthening the limitations period for such claims and impairing the fundamental purpose of statutes of limitation to bar the assertion of stale claims founded on faded memories, deceased or unavailable witnesses, and lost or degraded evidence.

Accordingly, the U.S. Chamber, AIA, ASCDC, and CJAC respectfully request that this Court accept and file the attached amici curiae brief.

May 16, 2017

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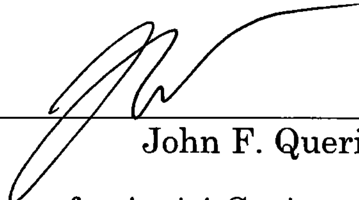

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AMICI CURIAE BRIEF

INTRODUCTION

The dispositive question in this appeal, and the crux of the issue this Court granted review to decide, is whether the limitations period for claims of prenatal or birth-related injury caused by exposure to toxic substances is subject to tolling during the period of the plaintiff's minority. Plaintiff's claims in this case rise or fall on the answer to this precise question. (See OBOM 51-54; RBOM 39.) In accordance with the Legislature's clear expression of its intent dating back to 1941, the correct answer to this question is an unequivocal no.

When the Legislature first created a cause of action for prenatal or birth-related injuries, it did not specify a statute of limitations for that claim. Eventually, some courts suggested that the general rule that limitations periods for most claims are tolled during the plaintiff's minority (see Code Civ. Proc., § 352, subd. (a))[2] should apply to prenatal or birth-related injury claims. The Legislature responded swiftly by enacting the statutory predecessor to section 340.4 to specifically clarify that the general minority tolling rule does not apply to such claims, and it also for the first time created a uniform six-year statute of limitations for such claims. (Stats. 1941, ch. 337, § 1; *Young v. Haines* (1986) 41 Cal.3d 883, 892 (*Young*).) When the Legislature later enacted section

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

340.8's statute of limitations for toxic exposure claims, it made clear its narrow intent to modify and codify the delayed discovery tolling rule for such claims, and nothing more. (Stats. 2003, ch. 873, § 2.) Section 340.8 says nothing about minority tolling; to the extent minority tolling applies to claims within its ambit, it could only be through the operation of section 352's general minority tolling rule.

This Court should hold that section 340.4, rather than section 340.8, provides the correct statute of limitations for prenatal or birth-related injury claims arising from toxic exposure. An examination of statutory purpose, legislative history, well-established canons of statutory construction (such as the rule against implied repeals), and public policy lead to the conclusion that section 340.4 provides the correct statute of limitations for prenatal or birth-related injury claims arising from toxic exposure, not section 340.8. The fact that delayed discovery tolling will remain available no matter which statute of limitations is held to apply ensures that plaintiffs bringing such claims are protected if section 340.4's six-year statute of limitations applies.

Alternatively, even if section 340.8's two-year statute of limitations applies to prenatal or birth-related injury claims arising from toxic exposure, minority tolling still does not apply to such claims. Section 340.4 consists of two independent clauses: the first provides the six-year statute of limitations for prenatal or birth-related injury claims (the only clause that could be displaced by section 340.8's two-year statute of limitations), and the second specifically prohibits minority tolling for such claims. (§ 340.4.) While section 352 generally provides for minority tolling for "an

action . . . mentioned in Chapter 3" of the Code of Civil Procedure (§ 352, subd. (a)), and sections 340.4 and 340.8 are both found in Chapter 3, section 340.4 expressly overrides section 352's minority tolling rule for all prenatal or birth-related injury claims, and nothing in section 340.8 addresses minority tolling at all. There can thus be no minority tolling for actions—like the instant case—asserting prenatal or birth-related injury claims.

This conclusion is consistent with well-established principles of statutory construction. Section 340.4's no-minority-tolling provision is the more recent and more specific provision, having been enacted almost 70 years after section 352 and applying only to prenatal or birth-related injury claims (as opposed to section 352's general application to all claims). Indeed, the Legislature explicitly referenced section 352 in section 340.4 and clearly prohibited application of its minority tolling rule to prenatal or birth-related injury claims.

Further, there can be little question that, by its plain terms, the second clause of section 340.4 is severable from its first clause. Thus, section 340.4's second clause prohibiting minority tolling retains independent force and stands alone, even if section 340.8 displaces section 340.4's first clause regarding the limitations period for prenatal or birth-related injury claims arising from toxic exposure.

In sum, while this Court should hold that section 340.4's six-year statute of limitations governs prenatal or birth-related injury claims arising from toxic exposure, it should hold that minority tolling does not apply to such claims under any

circumstances, regardless of which statute of limitations applies. Since plaintiff's claims in this case are timely only if minority tolling applies to them, plaintiff's claims are accordingly time-barred. This Court should therefore affirm the Court of Appeal's decision in this case and disapprove the contrary decision in *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522 (*Nguyen*) to the extent it is inconsistent with this Court's holding.

LEGAL ARGUMENT

I. CODE OF CIVIL PROCEDURE SECTION 340.4 IS THE GOVERNING STATUTE OF LIMITATIONS FOR CLAIMS OF PRENATAL OR BIRTH-RELATED INJURY DUE TO TOXIC EXPOSURE.

A. Code of Civil Procedure section 340.4 was enacted to prohibit minority tolling for prenatal or birth-related injury claims, while Code of Civil Procedure section 340.8 was enacted to codify delayed discovery tolling for toxic exposure claims.

1. The statute that became section 340.4 was specifically aimed at prohibiting minority tolling for prenatal or birth-related injury claims.

Section 340.4 sets out the statute of limitations for claims of prenatal or birth-related injury and prohibits minority tolling of such claims. It provides:

> An action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth must be commenced within six years after the date of birth, and the time the minor is under any disability mentioned in Section 352 shall not be excluded in computing the time limited for the commencement of the action.

This statute traces its origin to former Civil Code section 29, which was first enacted in 1872 to abrogate the common law rule that no

cause of action existed for prenatal or birth-related injuries.[3] (*Young, supra*, 41 Cal.3d at p. 892.) Former Civil Code section 29 did not contain a statute of limitations, such that the applicable limitations period for prenatal or birth-related injury claims was supplied by other statutes depending on the nature of the claim at issue. (*Ibid.*)

In *Scott v. McPheeters* (1939) 33 Cal.App.2d 629, 631 (*Scott*), the Court of Appeal suggested in dictum that the limitations period(s) for prenatal or birth-related injury claims under former Civil Code section 29 could be tolled during the plaintiff's minority pursuant to Code of Civil Procedure section 352. That statute embodies a general minority tolling rule, applicable to a wide swath of claims, as follows:

> If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or lacking the legal capacity to make decisions, the time of the disability is not part of the time limited for the commencement of the action.

(§ 352, subd. (a).)

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[3] Resort to the legislative history and statutory purpose of sections 340.4 and 340.8 is necessary because the statutory language of those two provisions alone does not resolve the question of which statute of limitations the Legislature intended to apply to prenatal or birth-related injury claims due to toxic exposure. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 388 [" 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]"].)

In reaction to *Scott*, the California Legislature amended former Civil Code section 29 in 1941 to create a six-year statute of limitations for prenatal or birth-related injury claims and to specifically preclude section 352 minority tolling of such claims.[4] (Stats. 1941, ch. 337, § 1; *Young, supra,* 41 Cal.3d at p. 892.) This history makes clear that one of the Legislature's principal purposes in amending former Civil Code section 29 in this fashion was to specifically bar the application of section 352 to prenatal or birth-related injury claims and thereby prevent tolling of such claims of minor plaintiffs during the period of their minority.

2. Section 340.8 merely codifies the delayed discovery tolling rule for toxic exposure claims, but says nothing about minority tolling and prenatal or birth-related injury claims.

Section 340.8 contains a statute of limitations for claims of injury due to toxic exposure. Its main provision states:

> In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance,

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[4] As originally enacted, former Civil Code section 29 stated: " 'A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.' " (*Young, supra,* 41 Cal.3d at p. 892, fn. 6.) In 1992, the Legislature split this substantive provision from the statute of limitations and no-minority-tolling provision, codifying the former as Civil Code section 43.1 (Stats. 1992, ch. 163, § 4) and the latter as Code of Civil Procedure section 340.4 (Stats. 1992, ch. 163, § 16).

> the time for commencement of the action shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later.

(§ 340.8, subd. (a).)

The Legislature enacted this provision in 2003 to "codify the doctrine of 'delayed discovery' as it applies to the statute of limitations for filing a lawsuit for illness, injury or death caused by exposure to hazardous waste." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003, p. 1.) Indeed, the Legislature made its intent crystal clear in an uncodified section of the bill that enacted section 340.8:

> It is the intent of the Legislature to codify the rulings in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, and *Clark v. Baxter HealthCare Corp.* (2000) 83 Cal.App.4th 1048 [decisions which developed and applied the delayed discovery tolling rule in toxic exposure product liability cases] . . . , and to disapprove the ruling in *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151 [holding that media reports alone are sufficient to provide inquiry notice for purposes of delayed discovery tolling and thus begin the running of the limitations period in toxic exposure cases], to the extent the ruling in *McKelvey* is inconsistent with . . . this measure.

(Stats. 2003, ch. 873, § 2.)

Throughout the legislative process, the Legislature consistently articulated its singular focus on ensuring that personal injury claims due to toxic exposure benefit from tolling under the delayed discovery rule. (See, e.g., Sen. Com. on Judiciary, Analysis of Sen. Bill No. 331, *supra*, as amended Apr. 29, 2003, pp. 1-6; Assem. Com. on Judiciary, Rep. on Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended June 26, 2003, pp. 1-7; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Sept. 8, 2003, pp. 1-5.) Referencing the then-recent enactment of Senate Bill No. 688 (SB 688), which extended the general personal injury statute of limitations from one year to two years (see § 335.1), the Senate Judiciary Committee's report on Senate Bill No. 331 explained:

> With this bill, CAOC [the bill's sponsor] seeks to build on SB 688's extended limitations period by codifying the "delayed discovery" doctrine as it applies to suits for personal injury caused by hazardous substances. CAOC argues that the "delayed discovery" doctrine is particularly important in these cases since, unlike injuries sustained in accidents or traceable to other obvious causes, illnesses and injuries from exposure to toxic substances can take years to discover and to trace to a negligent act. The difficulty comes in determining exactly when a person "had reason" to know that his or her injuries were caused by negligence or wrongdoing.

(Sen. Com. on Judiciary, Analysis of Sen. Bill No. 331, *supra*, as amended Apr. 29, 2003, p. 3.) In particular, "[t]he sponsor state[d] that codifying the [delayed discovery tolling rule] would help courts to focus on the process by which a plaintiff becomes aware of potential wrongdoing in a specific case, instead of simply imputing

knowledge to a plaintiff that he or she could not reasonably have possessed." (*Id.* at p. 4.)

As this history shows, in enacting section 340.8, the Legislature was exclusively focused on ensuring that the statute of limitations for claims based on exposure to toxic substances allowed for tolling in cases of delayed discovery. At no point during the legislative process did the Legislature consider whether or indicate that section 340.8 would apply to prenatal or birth-related injury claims. More significantly, the Legislature never so much as mentioned minority tolling or the possibility that the enactment of section 340.8 could impliedly repeal section 340.4's prohibition on minority tolling for prenatal or birth-related injury claims, thereby potentially extending the effective limitations period for such claims from 6 to as many as 20 or more years.

This utter silence is significant because the absence of legislative history supporting such a result is powerful evidence that the Legislature did not intend it, and that section 340.8 therefore should not be construed to reimpose minority tolling on prenatal or birth-related injury claims in contravention of section 340.4. It is "highly unlikely that the Legislature would make such a significant change . . . without so much as a passing reference to what it was doing. The Legislature 'does not, one might say, hide elephants in mouseholes.' " (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171, quoting *Whitman v. American Trucking Associations* (2001) 531 U.S. 457, 468 [121 S.Ct. 903, 149 L.Ed.2d 1]; accord, *In re Christian S.* (1994) 7 Cal.4th 768, 782 ["We are not persuaded the Legislature would have silently, or

at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law"].) This Court "do[es] not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199; accord, *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 260-261 (*California Redevelopment Assn.*).) Construing section 340.8 to impose minority tolling in prenatal or birth-related injury cases would accomplish precisely this prohibited result, and should therefore be rejected.

B. The rule against repeals by implication requires that section 340.4 continue to apply to prenatal or birth-related injury claims arising from exposure to toxic substances.

"[A]ll ' " ' "presumptions are against a repeal by implication" ' " ' [citation], including partial repeals that occur when one statute implicitly limits another statute's scope of operation [citation]. Thus, ' " 'we will find an implied repeal "only when there is no rational basis for harmonizing . . . two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " ' " ' " (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838 (*Even Zohar*); accord, *Tuolumne Jobs & Small Business Alliance v. Superior Court*

(2014) 59 Cal.4th 1029, 1039 (*Tuolumne Jobs*) ["There is a strong presumption against repeal by implication"].)

Plaintiff's position does violence to this presumption. By interpreting section 340.8 to apply to prenatal or birth-related injury claims arising from toxic exposure in utero, and by assuming that section 340.8 overrides section 340.4's express prohibition on minority tolling for such claims, plaintiff's position would impliedly repeal both clauses of section 340.4 in toxic exposure cases. First, it would impliedly repeal section 340.4's six-year statute of limitations in favor of section 340.8's two-year statute of limitations (which, due to minority tolling, would in practice be longer than section 340.4's six-year period). Second, it would impliedly repeal section 340.4's clear prohibition on minority tolling for prenatal or birth-related injury claims in favor of section 340.8's purported incorporation of section 352's general minority tolling rule. (See *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1540-1541 [holding minority tolling under section 352 applies to section 340.8's statute of limitations for toxic exposure claims].) Thus, the strong presumption against implied repeals prohibits applying section 340.8 to prenatal or birth-related injury claims due to toxic exposure in place of section 340.4.

This conclusion is only reinforced by the fact that " '[c]ourts have also noted that implied repeal should not be found unless ". . . the later provision gives *undebatable evidence* of an intent to supersede the earlier . . . ." [Citation.]' " (*Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1039.) Here, as explained *ante*, pages 20-24, the Legislature gave no indication whatsoever that it intended to displace section 340.4's statute of limitations and no-minority-