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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.

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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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

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[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-

tolling rule for prenatal or birth-related injury claims arising from toxic exposure with section 340.8's open-ended statute of limitations with minority tolling under section 352, in effect, tacked on. That is a far cry from the "undebatable evidence" this Court has required to surmount the high bar to finding a repeal by implication.

The strong presumption against repeals by implication accordingly supports the conclusion that section 340.4's statute of limitations and prohibition on minority tolling apply to claims for prenatal or birth-related injuries arising out of toxic exposure in utero.

C. The policy goals of section 340.8 will not be harmed by continuing to apply section 340.4's statute of limitations to prenatal or birth-related injury claims due to toxic exposure.

As explained *ante*, pages 20-24, the Legislature's principal purpose in enacting section 340.8 was to ensure that claims of injury due to toxic exposure would receive the benefit of tolling under the delayed discovery doctrine. Applying section 340.4's six-year statute of limitations to claims like plaintiff's will not affect that goal in any way because tolling under the delayed discovery rule is permitted under section 340.4 as well. (See *Young*, *supra*, 41 Cal.3d at pp. 890, 892-893 [explaining that delayed discovery tolling applies to claims for prenatal or birth-related injury under predecessor to section 340.4]; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 885 [same]; *Myers v. Stevenson* (1954) 125 Cal.App.2d 399, 402, 406-

407 [same].) Thus, regardless of which statute of limitations applies, plaintiffs asserting claims for prenatal or birth-related injuries due to toxic exposure will continue to benefit from tolling for delayed discovery.

In fact, given that the six-year statute of limitations under section 340.4 is three times longer than the two-year statute of limitations under section 340.8, many plaintiffs would be better off under section 340.4 than under section 340.8. Consider a plaintiff who is exposed in utero to toxic substances and is born with birth defects, but whose parents do not receive inquiry notice that the defendant's allegedly wrongful act could have caused the injury until three years later and then do not follow up on that information until three years after that, at which point they file suit. If section 340.8's two-year statute of limitations applies, the plaintiff's claims would be time-barred, even taking into account tolling for delayed discovery. But if section 340.4's six-year statute of limitations applies, the plaintiff's claims would remain timely.

It is only in the relatively rare situation like the instant case that the distinction between sections 340.4 and 340.8 could make a difference. That is because plaintiff here cannot claim tolling for delayed discovery because her mother was put on at least inquiry notice as to the alleged cause of plaintiff's injuries by February 2000 at the latest—over a decade before she filed suit against Sony. (See ABOM 6 & fn. 2.) The unique facts and procedural posture of this case mean that whether plaintiff's claim is timely depends entirely on whether she can claim the benefit of minority tolling, not delayed discovery tolling. But these idiosyncrasies do not change the fact

that, regardless of whether section 340.4 or section 340.8 applies to prenatal or birth-related injury claims arising from toxic exposure, the Legislature's goals in enacting section 340.8 will be accomplished.

By contrast, embracing plaintiff's position—that minority tolling applies to her claims under sections 340.8 and 352—would eviscerate the Legislature's clear purpose in enacting section 340.4 to prohibit minority tolling of prenatal or birth-related injury claims. The principal purpose of statutes of limitation is to bar the assertion of claims as to which memories have faded, witnesses have died or otherwise become unavailable, and documentary evidence has been lost or destroyed. (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) By lengthening the effective limitations period for prenatal or birth-related injury claims due to toxic exposure from 6 to 20 or more years, plaintiff's position would encourage litigants to sit on their rights and would foster, rather than prevent, the litigation of stale claims. Over the course of 20 years, memories will fade, and witnesses will die or move away. Moreover, most corporate document retention policies do not require documents to be preserved for 20 years. Retroactively more than tripling the length of the limitations period at issue here would thus impose a tremendous and unwarranted burden on defendants.

II. EVEN IF SECTION 340.8 PROVIDES THE STATUTE OF LIMITATIONS FOR PRENATAL OR BIRTH-RELATED INJURY CLAIMS ARISING FROM TOXIC EXPOSURE, MINORITY TOLLING IN SUCH CASES REMAINS BARRED BY SECTION 340.4.

A. Section 340.4 specifically bars minority tolling for prenatal or birth-related injury claims, and nothing in section 340.8 conflicts with that prohibition in toxic exposure cases.

In the event this Court decides that section 340.8, rather than section 340.4, provides the statute of limitations for prenatal or birth-related injury claims arising from toxic exposure, that should not change the outcome of this case. That is because section 340.4's clear prohibition on minority tolling for all prenatal or birth-related injury claims applies here regardless.

Section 340.4 consists of two independent clauses, only the first of which creates the six-year statute of limitations for prenatal or birth-related injury claims. The second clause states that "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." (§ 340.4.) Section 352, subdivision (a) tolls the statute of limitations for any action "mentioned in Chapter 3 (commencing with Section 335) [of the Code of Civil Procedure]" if the plaintiff "is, at the time the cause of action accrued . . . under the age of majority." Section 340.4 and section

340.8 are both found in Chapter 3 of the Code of Civil Procedure, so section 352's general minority tolling provision would—all else being equal—apply to any claim falling within either statute of limitations. However, section 340.4's second clause confirms that the Legislature intended to bar minority tolling for prenatal or birth-related injury claims. (*Ante*, pp. 18-20.)

Section 340.8 does not mention minority tolling, and there is no indication that the Legislature even considered whether minority tolling would apply to prenatal or birth-related injury claims arising from toxic exposure in enacting that statute. (See § 340.8; Stats. 2003, ch. 873, §§ 1-2; 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, *supra*, as amended June 26, 2003, pp. 1-7; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 331, *supra*, as amended Sept. 8, 2003, pp. 1-5.) Thus, the only way that minority tolling could apply to toxic exposure claims is through section 352.

From these premises, it becomes clear that there is no conflict between section 340.4 and section 340.8 itself regarding whether minority tolling applies to prenatal or birth-related injury claims arising from toxic exposure.

B. Section 340.4's specific prohibition on minority tolling for prenatal or birth-related injury claims prevails over the earlier-enacted, general minority tolling rule of section 352 in prenatal or birth-related injury cases arising from toxic exposure.

Section 352, the general minority tolling provision in Chapter 3 of the Code of Civil Procedure, is in irreconcilable conflict with section 340.4 regarding whether minority tolling applies to prenatal or birth-related injury claims arising from toxic exposure. Section 352 excludes the time during which a plaintiff is under the age of majority from the time limited for commencement of a lawsuit and broadly applies this minority tolling rule to any type of claims "mentioned in Chapter 3 (commencing with Section 335)" of the Code of Civil Procedure (§ 352, subd. (a))—a range that would, absent any provision to the contrary, include both prenatal or birth-related injury claims (mentioned in section 340.4) and toxic exposure claims (mentioned in section 340.8). But significantly, the second clause of section 340.4 applies narrowly to "action[s] by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth" (§ 340.4), and specifically mentions section 352 in prohibiting minority tolling of the limitations period for such claims. There is no way that both of these provisions can coexist because they are mutually exclusive as applied to prenatal or birth-related injury claims arising from toxic exposure.

This Court has clearly articulated the rules that govern how to address situations where two statutes are in irreconcilable conflict. " 'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].' [Citation.] But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence. [Citations.]" (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961; see also § 1859 ["[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."].)

Applying these rules here can have only one outcome: section 340.4's prohibition on minority tolling for prenatal or birth-related injury claims prevails over section 352's general minority tolling rule. First, section 340.4 is the later-enacted statute. Section 352, subdivision (a)'s minority tolling rule was enacted in 1872 (*Young*, *supra*, 41 Cal.3d at p. 892) and has been in continuous effect without substantive change since that time. Section 340.4's prohibition on minority tolling for prenatal or birth-related injury claims was first enacted as part of former Civil Code section 29 in 1941 (*ibid.*; *ante*, pp. 18-20)—almost 70 years after section 352 was enacted—and was re-enacted in 1992 in its current form (Stats. 1992, ch. 163, § 16; *ante*, p. 20, fn. 4). Second, and most importantly, section 340.4 is the more specific provision. It narrowly addresses whether minority tolling applies to the

limitations period for prenatal or birth-related injury claims, whereas section 352 applies to all claims brought by minors. Moreover, section 340.4 specifically addresses section 352 by name, explicitly declaring that "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." (§ 340.4, emphasis added.) It would be hard to conceive of how the Legislature could express its intent to override section 352's minority tolling rule for prenatal or birth-related injury claims in a more direct and explicit manner.[5]

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[5] Plaintiff also relies on the canon of construction that, when two statutes irreconcilably conflict, the later-enacted and more specific statute prevails over the earlier and more general one, but she does so in making a different and incorrect argument—that section 340.8 impliedly repealed section 340.4 as applied to prenatal or birth-related injury claims due to toxic exposure. (OBOM 36-41; RBOM 25-29.) As discussed earlier, sections 340.4 and 340.8 are not irreconcilable for a number of reasons, including that they can be harmonized by applying section 340.4 to all prenatal or birth-related injury claims, regardless of whether they involve toxic exposure, while section 340.8 can apply to all other toxic exposure claims, except as otherwise provided—an interpretation that honors the Legislature's intent. (See *ante*, pp. 24-26.) Conversely, this same canon of construction helps resolve the interplay between sections 340.4 and 352 because the minority tolling provisions in those two statutes are indeed in irreconcilable conflict: minority tolling either does or does not apply to any given claim for prenatal or birth-related injury due to toxic exposure. Given this irreconcilable conflict, section 340.4 applies to such claims, and bars plaintiff's claim here, because it is the more specific and more recent provision. (See *ante*, pp. 31-33.)

C. Section 340.4's plain language barring minority tolling of prenatal or birth-related injury claims controls because it is severable from the first clause of the statute that plaintiff claims is displaced by section 340.8.

If section 340.8 displaces section 340.4's first clause to provide the statute of limitations for prenatal or birth-related injury claims arising from toxic exposure, the implied repeal of section 340.4 should be as narrow and limited as possible, consistent with California law's strong presumption against repeals by implication. (See *Even Zohar*, *supra*, 61 Cal.4th at p. 838; *Tuolumne Jobs*, *supra*, 59 Cal.4th at p. 1039.) Thus, section 340.4's second clause prohibiting minority tolling of prenatal or birth-related injury claims should remain in effect, notwithstanding any implied repeal of section 340.4's first clause by section 340.8. And since the no-minority-tolling rule of section 340.4's second clause prevails over section 352's general minority tolling rule (*ante*, pp. 31-33), the only remaining question is whether section 340.4's second clause is severable from its first clause.

This Court applies settled rules in determining whether an invalid or superseded portion of a statute is severable from the remainder of the statute. It first looks to any severability clause, the existence of which creates a presumption in favor of severability. (*California Redevelopment Assn.*, *supra*, 53 Cal.4th at p. 270.) Here, no such severability clause exists in section 340.4. It then considers

> three additional criteria: "[T]he invalid provision must be grammatically, functionally, and volitionally separable." [Citation.] Grammatical separability, also known as mechanical separability, depends on whether the invalid parts "can be removed as a whole without affecting the wording" or coherence of what remains. [Citations.] Functional separability depends on whether "the remainder of the statute ' "is complete in itself . . . ." ' " [Citation.] Volitional separability depends on whether the remainder " 'would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.' " [Citations.]

(*Id.* at p. 271.)

Section 340.4's two independent clauses meet all three of these tests for severability. First, the first clause is grammatically separable from the second clause because removing the first clause does not affect the wording or coherence of the second clause. The first clause states that "An action by or on behalf of a minor sustained before or in the course of his or her birth must be commenced within six years after the date of birth," while the second clause states that "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." (§ 340.4.) Striking out the words in the first clause does not change the meaning or coherence of the second clause.

Second, the second clause is functionally separable from the first clause of section 340.4 because the second clause is complete in itself, in the sense that it can stand on its own and be given full effect without the first clause. The first clause creates a six-year statute of limitations for prenatal or birth-related injury claims,

while the second clause independently bars minority tolling of whatever limitations period applies to such claims. Eliminating the six-year statute of limitations provision does not have any effect on the provision prohibiting minority tolling for prenatal or birth-related injury claims. Even if such claims are subject instead to a different limitations period, such as the two-year period specified by section 340.8, that limitations period is still subject to the independent operation of the second clause of section 340.4 prohibiting tolling of the limitations period during the plaintiff's minority.

The functional separability of section 340.4's second clause from its first clause is driven home by the language the Legislature used, which indicates that the second clause was meant to have independent significance. The second clause speaks of "the time limited for the commencement of the action," rather than "this time period" or "the time so limited." While the Legislature could have employed those different formulations if it had wished to signal an intent that the second clause operate in tandem with the first clause and that the two clauses be inseparable, the language the Legislature chose powerfully indicates that it instead intended the two clauses to have independent functions and to each stand on their own.

Finally, the second clause of section 340.4 is volitionally separable from the first clause because the Legislature would still have enacted the second clause, prohibiting minority tolling for prenatal or birth-related injury claims, even without the first clause's six-year statute of limitations. As explained *ante*, pages 18-

20, the entire impetus for the Legislature's enactment in 1941 of the statutory predecessor to section 340.4 was the Court of Appeal's indication in *Scott* that section 352's general minority tolling rule would apply to prenatal or birth-related injury claims. The Legislature specifically intended to disapprove that dictum by clearly stating that minority tolling does not apply to prenatal or birth-related injury claims, and it separately imposed a statute of limitations on such claims. (Stats. 1941, ch. 337, § 1; *Young*, *supra*, 41 Cal.3d at p. 892.)

This makes logical and public policy sense because the Legislature did not want claims for prenatal or birth-related injury—the existence and cause of which are frequently apparent at or shortly after the injured child's birth—to be tolled for 18 years, thereby effectively creating a 20-year or longer limitations period for such claims. This is especially true given that, by 1941, courts had already recognized tolling for delayed discovery (*Young*, *supra*, 41 Cal.3d at pp. 892-893), and the Legislature would have known this doctrine would apply to the limitations period for prenatal or birth-related injury claims as well. Given this history, it is clear the Legislature would still have wanted to bar minority tolling for prenatal or birth-related injury claims, even without the six-year statute of limitations on such claims.

All of these indicia amount to powerful evidence that the no-minority-tolling provision of section 340.4 has independent force and should continue in effect for all prenatal or birth-related injury claims, both those arising from toxic exposure and those arising from other causes, even if section 340.8's statute of limitations

replaces section 340.4's statute of limitations for prenatal or birth-related injury claims arising from toxic exposure.

D. Since plaintiff's claim is timely only if minority tolling applies, the continued vitality of section 340.4's no-minority-tolling rule means that plaintiff's claim is time-barred.

Plaintiff effectively concedes in her opening brief on the merits that her claims are timely only if she can claim the benefit of minority tolling. (OBOM 51-54; see also RBOM 39.) She does not contend that the delayed discovery rule tolled the limitations period for her claims, and she admits that section 340.4's six-year statute of limitations governed her claims until section 340.8 became operative on January 1, 2004, at which point section 340.4's limitations period had not yet expired. (OBOM 52-54.) After that point, her argument for timeliness depends on the application of section 340.8's two-year statute of limitations to her claims, and in particular on the application (through section 340.8) of section 352's minority tolling rule to those claims. (*Ibid.*) Accordingly, if minority tolling does not apply to plaintiff's claims, they are indisputably time-barred.

As explained *ante*, pages 29-38, even if section 340.8 provides the statute of limitations for plaintiff's claims, minority tolling of that limitations period remains barred by the still-extant second clause of section 340.4. Accordingly, plaintiff's claims are time-barred.

CONCLUSION

For the foregoing reasons and for the reasons expressed in Sony's answering brief on the merits, the Court of Appeal's decision should be affirmed. This Court should disapprove the Court of Appeal's contrary decision in *Nguyen* to the extent it is inconsistent with this Court's holding.

May 16, 2017

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CERTIFICATE OF WORD COUNT
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The text of this brief consists of 6,137 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

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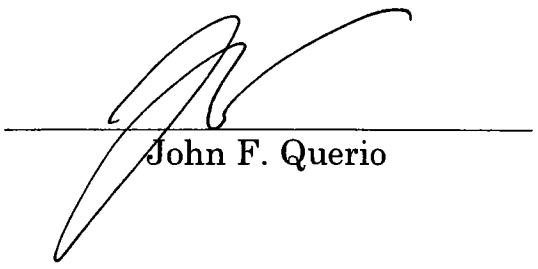

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

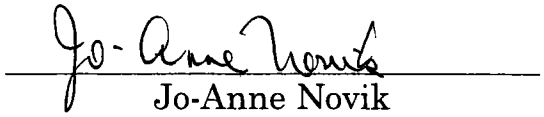
On May 16, 2017, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN INSURANCE ASSOCIATION, ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF RESPONDENT SONY ELECTRONICS, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 16, 2017, at Burbank, California.



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