No. S217896
(Court of Appeal No. F065450, consolidated with F065451 and F065689
(Kern County Superior Court Nos. CV-276959 and CV-276961)


**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**



PEOPLE OF THE STATE OF CALIFORNIA
*Plaintiff/Respondent*

v.

KIRNPAL GREWAL, *et al.*,
*Defendant and Appellant*

# OPENING BRIEF ON THE MERITS OF APPELLANTS GREWAL AND WALKER

**WESTON, GARROU & MOONEY**
John H. Weston (SBN 46146)
johnhweston@wgdlaw.com
G. Randall Garrou (SBN 74442)
randygarrou@wgdlaw.com
Jerome H. Mooney (SBN 199542)
jerrym@mooneylaw.com
12121 Wilshire Boulevard, Suite 525
Los Angeles, CA 90025
Telephone: (310) 442-0072
Facsimile: (310) 442-0899

*Attorneys for Defendants/Appellants Kirnpal Grewal* (F065451)
*and Phillip Ernest Walker* (F065452)

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jerrym@mooneylaw.com
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Telephone: (310) 442-0072
Facsimile: (310) 442-0899

*Attorneys for Defendants/Appellants Kirnpal Grewal* (F065451)
*and Phillip Ernest Walker* (F065452)

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## ISSUES PRESENTED

1. By rejecting the authoritative construction of Penal Code § 330b's definition of "slot machine" rendered by the 3rd District Court of Appeal over a decade ago in *Trinkle v. California State Lottery*, did the 5th District Court of Appeal in *Grewal* (hereafter "the Court of Appeal") violate the doctrine of implied legislative adoption, given that the Legislature has amended the statute three times since *Trinkle,* all without making any substantive changes in the relevant provisions as construed by *Trinkle*?

2. Did the Court of Appeal violate principles of either stare decisis and/or due process by affirming the ruling *of the superior court* below, since the superior court, under *Auto Equity,* was required to follow and apply the then-definitive court of appeal decision in *Trinkle II*? At *most,* should not the Court of Appeal, instead, have held that the superior court erred, and that the Court of Appeal's construction will apply prospectively only?

3. Did the Court of Appeal prejudicially err in the *reasons* it gave for rejecting Appellants' rule of lenity argument?

4. By re-interpreting the definition of "slot machine" to no longer require "chance operation," thus making a "slot machine" of *any* device providing a game with potential prizes where the outcome is unpredictable to the user, did the Court of Appeal violate the principle that statutes should not be construed to produce results obviously unintended by the Legislature, given that the Court of Appeal's new definition unquestionably makes criminal the placement and operation of the State Lottery's Scratchers Vending Machines?

5. By also re-interpreting the definition of a "slot machine" to no longer require insertion of any physical object, thereby criminalizing the possession of any computer, smart phone, tablet or Smart television capable of being used to participate in sweepstakes and other contests with prizes via the Internet, did the Court of Appeal likewise violate the principle that statutes should not be construed to produce results obviously unintended by the Legislature?

## INTRODUCTION

This case presents the important question of whether a court of appeal is free to construe a criminal statute as though a matter of first impression where that court of appeal's construction irreconcilably conflicts with a prior construction of the same statute in a published court of appeal decision rendered more than a decade earlier, and notwithstanding three amendments to the statute during that period, none of which took issue with the earlier court of appeal's ruling. As Appellants will demonstrate, the Court of Appeal below clearly erred by construing the meaning of the statute as though it were free to do so as a matter of first impression.

This case also asks the Court to address and clarify the scope of the stare decisis and due process protections for businesses which assume the validity of published decisions of the courts of appeal. The Court of Appeal's ruling obliterates due process protections for those who conduct business activities based on presumably settled principles of stare decisis.

This case also presents the important question of whether the construction which the Court of Appeal placed on Penal Code § 330b(d)

(defining a prohibited "slot machine"), even if abstractly not an unreasonable interpretation of the statute's facial language, violated the principle against construing a statute in a manner obviously not intended by the Legislature. The construction rendered by the Court of Appeal below would not only make criminals of every person possessing a computer, smart phone, or television with Internet access, but would make the California State Lottery's Scratchers Vending Machines ("SVMs") illegal slot machines and make criminals of all who possess or provide space for SVMs. Given these obviously unintended and far-reaching consequences, the Court of Appeal below was not free to adopt such a construction.

## STATEMENT OF FACTS

The materially significant facts are accurately set forth in the opinion of the Court of Appeal below (*People v. Grewal,* 224 Cal.App.4th 527, 534-536, 168 Cal.Rptr.3d 749, 754-756 (5th Dt. 2014) (hereafter "*Grewal*").[1] Appellants Grewal and Walker owned similar businesses which sold "computer and Internet access" as well as other services.[2] They

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[1] Hereafter, all page references will be to *Grewal's* pagination in West's California Reporter since the official reports version was removed online when it was automatically vacated by this Court's grant of review.

[2] The past tense is used here because the businesses were closed by the preliminary injunction here appealed. Importantly, the injunction also prohibits Appellants from opening any similar business in the future. Additionally, the statutory construction rendered by the Court of Appeal has the potential to significantly affect them on remand where they face claims for crippling monetary penalties under the state's unfair competition statutes, BPC § 17200, *et seq.* In short, they retain a very significant stake in the outcome of the Court's ruling herein notwithstanding the closure of their businesses.

"promote[d] the sale of Internet time and other products with a sweepstakes giveaway that [was] implemented through a software system." *Id.* at 754.

At each location, Internet time could be purchased for $10 per hour. *Id.* "When Internet time [was] purchased, a personal identification number [was] assigned to that customer . . . by which the customer may access the computers and Internet as well as play sweepstakes computer games." *Id.* "At the time of purchase, the customer receive[d] 100 'sweepstakes points' for each dollar spent." *Id.* There were also a number of options for customers to obtain sweepstakes points without making any purchase whatsoever. *Id.* Sweepstakes points could be "used to draw the next available sequential entry from a sweepstake contest pool." *Id.* Importantly, there was no random operation of any of Appellants' computers. Sweepstakes results were always the result of merely turning over the next available sequential entry in whichever sweepstakes pool the customer entered.

A sweepstakes entry could be drawn, and the result revealed, by any of three different methods: "(i) asking [a store] employee to reveal a result, (ii) pushing an instant reveal button at the computer station, or (iii) playing [simulated] computer sweepstakes games 'that have appearances similar to common games of chance' at the computer terminals." *Id.* at 755. "[N]o purchase [was] necessary to enter the sweepstakes." *Id.* Customers were also informed that playing of the simulated sweepstakes games would "'have no effect on the outcome of the prizes won,' but are merely an 'entertaining way to reveal [the customer's] prizes and [he] could have them instantly revealed and would have the same result.'" *Id.*

In short, and as found by the Court of Appeal, "[t]here is no random component" to the operation of Appellants' computers. *Id.*[3]

Additionally, no physical object was inserted into Appellants' computers by any customer, nor did Appellants' computers have any magnetic cards readers.[4] Activation was solely accomplished by a customer inputting a personal identification number (PIN) at the computer keyboard.[5] The People's complaint alleged that Appellants had violated each of the state's three slot machine statutes (i.e., Penal Code §§ 330a, 330b and 330.1) as well as the statutory lottery prohibition (Penal Code § 319) and sought interim and permanent injunctive relief, and monetary penalties under BPC §17200 et seq.

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[3] Technically, the court found that there was no random component to the *simulated sweepstakes games*. *Id.* However, there was *no* evidence or finding of *any* random operation of any component or feature of Appellants' computers, and in fact there was none. All sweepstakes results were pre-loaded in a fixed sequence, so it was predetermined that, e.g., the 11th person selecting from a particular pool would necessarily get a predetermined result. *See* ¶ 6 of Grewal Declaration filed July 13, 2012 (CT 62) and ¶ 6 of Walker Declaration filed July 13, 2012 (CT 66).

[4] As found by the Court of Appeal's opinion (hereafter "*Grewal*"), computer access at the Grewal and Walker stores was accomplished via a unique PIN assigned to each customer, which they would type in to obtain computer access. *Id.* at 754 (Grewal) and 756 (Walker). Unlike the computer terminals at any of the other stores in these appeals, the Grewal and Walker stores did not have magnetic card readers or anything else into which any object was inserted to activate them. *See* ¶ 9 of Declaration of Kirnpal Grewal filed on June 27, 2012 (stating that "the customer receives no card" and that "no card is ever swiped on, or inserted into, a machine" and ¶¶ 5 and 8 noting that "logging on" precedes participation). To the same effect *see* ¶¶ 5, 8 and 9 of the Declaration of Kimball Walker filed on that same date.

[5] *Ibid.*

At a hearing on Temporary Restraining Order, Appellants argued that their businesses were not lotteries because of the numerous methods provided for free participation,[6] and were not slot machines under any of the charged statutes because their businesses were entirely lawful under the slot machine statutes as authoritatively construed by the court of appeal in *Trinkle v. California State Lottery*, 105 Cal.App.4th 1401 (3rd Dist. 2003) (*"Trinkle II"*). Specifically, in construing the definition of "slot machine" in both Penal Code § 330b and § 330.1, *Trinkle II* stated:

> "[T]he elements of a slot machine are (1) the *insertion* of money or other *object* which causes the machine to operate, (2) the *operation* of the machine is unpredictable and governed by *chance*, and (3) by reason of the *chance operation* of the machine, the user may become entitled to receive a thing of value." *Id.* at 1410. (Emphases added.)

Appellants argued that their computers met *none* of these three elements because no physical object of any type was ever *inserted* into the machines to operate them, and there was no *chance operation* of their machines. Appellants explained that: (1) as a necessary part of its holding in finding that the California State Lottery's SVMs were not slot machines, *Trinkle II* held that the "chance operation" element is not to be measured from the perspective of the user; (2) had it been otherwise, the "chance operation" element would certainly have been met because users of an SVM never know, in advance, whether they are purchasing a winning or losing ticket; (3) from the customers' perspective, the SVMs always produce a chance result; and (4) *Trinkle II* had rejected an asserted

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[6] Appellants relied on this Court's decision in *California Gasoline Retailers v. Regal Petroleum*, 50 Cal.2d 844 (1958), holding that a free entry option distinguishes legal from illegal lotteries.

construction of these statutes which based the determination of chance on the *user's* perception, and held, instead, that in order for a device to be a slot machine, "the machine itself [must] determine the element of chance," *id.* at 1410, i.e., that the statutes are only violated if "the operation of the machine is . . . governed by chance." *Id.*

Appellants additionally maintained, relying on *Trinkle II's* slot machine definition, that their computers were not slot machines because no physical object was ever inserted in order to activate them.

The Superior Court denied the Temporary Restraining Order but ultimately reversed itself, issuing a preliminary injunction forcing the closure of Appellants' businesses and prohibiting them from reopening anywhere in California.

On appeal, Appellants argued the issues described above and additionally that slot machines were necessarily house banked games but that their sweepstakes program was not.

The Court of Appeal addressed only the issue of whether Appellants' computers were "slot machines," finding it unnecessary to consider whether they were used to operate a lottery. *Id.* at 765.[7]

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[7] The state Legislature, as well, appears to presume that the lottery statute is inapplicable. The summary of "Existing Law" contained in the Staff Analysis prepared for the Senate Committee on Governmental Organization, June 16, 2014, in connection with its consideration of AB 1439, states (in a paragraph entitled "Are these Internet sweepstakes operating illegal lotteries?"):

> "As long as there is a legitimate free method of entry into the sweepstakes or promotion, the consideration element is absent, and the "sweepstakes" is not an illegal lottery. Thus, it would appear that most Internet cafes are not operating illegal lotteries under California law."

Concluding that the broadest "slot machine" definition was found in Penal Code § 330b, the Court of Appeal chose to analyze the claims solely under the elements of that statute, ignoring the charges under Penal Code §§ 330a and 330.1. *Id.* at 759.

With respect to Appellants' argument that their computers were not slot machines because activation was not accomplished by insertion of any physical object, the *Grewal* opinion, as a legal conclusion, disagreed with *Trinkle II's* requirement of insertion of a *physical object*, stating that "the insertion of a PIN . . . at the computer terminal in order to activate or access the sweepstakes games and thereby use points received upon paying money at the register . . . plainly came within the broad scope of the statute." *Id.* at 760-761.

With respect to Appellants' argument that their computers did not meet the "chance operation" requirement, which was the *raison d'etre* for the *Trinkle II* holding (and the only reason the State's SVMs escaped being found to be slot machines), the *Grewal* opinion again rejected *Trinkle II's* legal test, concluding that it is not necessary that the machines *operate* in a chance manner, but only that the *user* cannot predict whether he or she will win anything. *Id.* at 760-762.

*Grewal's* rejections of the holdings of *Trinkle II* were explicit and emphatic:

> "*Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II, supra,* at p. 1411, 129 Cal.Rptr.2d 904.) As will be explained below, *we think that holding was in error.* . . . [W]e adopt a different approach here than what was articulated in that case." 168 Cal.Rptr.3d at 760 (emphasis added).
>
> *Grewal* held that, rather than requiring proof of random operation of

the *machine itself* (as was critical to the ruling in *Trinkle II*):

> "this element of the statute (commonly referred to as the chance element) can be satisfied [merely] by showing that a prize may be won by reason of an "outcome of operation unpredictable " to the *user*." *Id.* (Emphasis added.)

Next, although *Trinkle II* explained (albeit in dictum) that a required element of the statute is insertion of some type of physical "object,"[8] *Grewal* rejected that as well, concluding that use of a PIN is sufficient to satisfy the insertion requirement (thus expanding the scope of the statute to reach computers, smart phones and smart televisions, something obviously never contemplated by the Legislature in 1950). *Id.* at 760-761.

Finally, after thoroughly rejecting all of *Trinkle II's* legal rulings, *Grewal* alternatively related several "factual" differences between SVMs and Appellants' computers which the court thought distinguished Appellants' case from *Trinkle II.* However, with all due respect, the Court of Appeal's point is unclear to Appellants. As best Appellants can discern, *Grewal* believed either that: (1) *Trinkle II's* test exempts only "passive" vending machines like SVMs from § 330b, but not machines offering more customer interactivity (described as those which "actualize" "the trappings and experiences involved in playing traditional slot machines", *id.*), even if they have no randomly operating components;[9] (2) *Trinkle II's* test would not exempt machines which are connected to any *other* machines; or (3) *Trinkle II's* test would not exempt a vending machine if connected to a

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[8] *See* 105 Cal.App.4th at 1410: "[T]he elements of a slot machine are (1) the insertion of money or other *object* which causes the machine to operate." (Emphasis added.)

[9] Appellants will refer to this as the "look and feel" test.

*randomly-operating* machine (though there was no evidence of such a connection in this case).

In any event, based both upon its express holding emphatically *rejecting Trinkle II's* construction of all of the required elements of a "slot machine" offense, and its alternative attempt to distinguish *Trinkle II, Grewal* affirmed the issuance of the preliminary injunction (168 Cal.Rptr.3d at 765) and, more importantly, plunged Penal Code § 330b(d) into legal chaos.[10]

[10] Subsequent to the decision below and this Court's grant of review, the State Legislature adopted a "sweepstakes" bill (AB 1439) designed specifically to make illegal the types of businesses at issue herein. Assuming it becomes law, it would not moot this appeal, because the issue of whether Appellants operated "slot machines," in violation of Penal Code § 330b, still has enormous potential consequences for them, given the underlying complaint below for virtually unlimited monetary penalties under the unfair competition laws based on their past conduct. It also has huge ramifications for several other similar suits pending throughout the state, as well as SVMs and countless companies' online sweepstakes and other contests.

## ARGUMENT

## I

## *TRINKLE II*

Because this appeal turns, in large part, on the construction of the definition of "slot machine" in Penal Code § 330b(d)a rendered by the court of appeal in *Trinkle v. California State Lottery* (*Trinkle II*), *supra,* a thorough understanding of its facts and holding is essential.

*Trinkle II* [11] involved a declaratory judgment action challenging the legality of the California State Lottery's (CSL's) Scratchers Vending Machines (SVMs) brought by a private party who, in an earlier published opinion (*Trinkle v. Stroh, supra*) had been found to be operating a business using illegal slot machines.[12]

In *Trinkle II,* the plaintiff asserted that the State's SVMs were illegal slot machines under both Penal Code §§ 330b and 330.1 because they were devices into which money was inserted in hopes of winning a prize which, from the user's perspective, was entirely a matter of chance.

The court of appeal noted that although the Legislature had exempted SVMs from Penal Code § 319's ban on "lotteries", it had not similarly exempted them from the category of illegal slot machines.[13]

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[11] So named to distinguish it from an earlier court of appeal decision involving Mr. Trinkle, *Trinkle v. Stroh*, 60 Cal.App.4th 771 (3d Dt. 1997).

[12] The earlier decision involved an ABC seizure of Mr. Trinkle's devices as illegal "slot machines" and his unsuccessful action, filed under Penal Code § 335a, for the return of these devices as lawful items.

[13] "The constitutional and statutory grant of authority to CSL is limited to lotteries. The CSL may not conduct games other than lotteries." 105 Cal.App.4th at 1406.

Consequently, the court had to determine whether SVMs were slot machines as defined in those two Penal Code sections.

First, it examined the statutory language of § 330b:

> "The use or possession of a slot machine is prohibited by Penal Code section 330b which defines a slot machine in pertinent part as any device 'that is adopted . . . for use in such a way that, as a result of the insertion of any piece of money or coin or other object . . . such machine or device is caused to operate or may be operated, and *by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him,* the user may receive or become entitled to receive any . . . thing of value . . . .'" 105 Cal.App.4th at 1409 (emphasis in original).

Then it observed the principle of statutory construction that "courts should give meaning to every word of a statute and avoid a construction making any word surplusage." *Id.* at 1410. It concluded that "such operation unpredictable by him" referred to random or chance operation of the machine, and therefore that a machine must operate in a random manner to be an illegal slot machine.

After noting that a similar "slot machine" definition was provided by Penal Code § 330.1, the court construed the elements of a slot machine for *both* statutes[14] as follows:

> "Thus, the elements of a slot machine are (1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation

[14] The complaint in *Trinkle II* did not allege that the SVMs were slot machines under Penal Code § 330a, the third of the state's criminal slot machine statutes. However, that statute had a narrower scope than § 330b so *Trinkle II's* construction of §§ 330b and 330.1 established an outer limit on conduct prohibited by § 330a as well.

> of the machine, the user may become entitled to receive a thing of value." *Id.* at 1410.

*Trinkle II* reviewed the leading cases involving the "slot machine" definition, *Trinkle v. Stroh* ("*Stroh*"), *supra*, and *People ex rel Lockyer v. Pacific Gaming Technologies*, 82 Cal.App.4th 699 (2d Dt. 2000). *Stroh* involved, *inter alia*, jukebox machines which, for the price of a song also gave a chance to win a cash prize. *Pacific Gaming Technologies* involved vending machines which dispensed five-minute phone cards for $1 along with a sweepstakes feature that randomly paid out money. Both courts found the devices to be "slot machines."

After careful analyses of both *Stroh* and *Pacific Gaming Technologies, Trinkle II* concluded that the machines in those cases were akin to traditional one armed bandits and different from SVMs because:

> "in both *Trinkle* [*v. Stroh*] and *Pacific Gaming Technologies,* the machines in question were found to be slot machines . . . because the outcome was dependent upon the element of chance *that was generated by the machines themselves.*" 105 Cal.App.4th at 1410-1411 (emphasis added).

In contrast to the machines at issue in *Stroh* and *Pacific Gaming Technologies*, *Trinkle II* noted that "[t]he SVMs do not have computer programs that generate random numbers or symbols, nor do they have any capability of conducting a process of random selection or any other kind of chance selection." *Id.* at 1411-1412. Instead, the element of chance "is built into the game at the time of manufacture, not at the time of purchase or play." 105 Cal.App.4th at 1412. Long before the customer ever uses the machine, the winning tickets are placed "in a predetermined sequence among the other tickets." *Id.*

*Trinkle II's* distinction of *Lockyer* and *Stroh*, and its construction of § 330b, were also supported by its "review of the history of slot machines," including one commentary which observed:

> "a 'one-armed bandit clearly exhibited all three elements of gambling: the coin inserted by the player amounted to consideration, *the spinning wheels rendered a result based on chance,* and the winning gambler received a reward when coins fell into the receptacle." *Id.* (emphasis added).

*Trinkle* II's historical analysis also included the following law review article, noting:

> "[T]he vending machines used to dispense candy, fortunes, music, and other forms of consideration, were converted into gambling devices by adding the element of chance to *the operation* of the machine and the promise of cash payouts. (Rychlak, *Video Gambling Devices* (1990) 37 UCLA L.Rev. 555, 558-559.) These machines were referred to as slot machines." 105 Cal.App.4th at 1411 (emphasis added).

Based on its review of both *Stroh* and *Pacific Gaming Technologies, Trinkle II* concluded that it was the first California case in the state required to decide whether chance operation was a necessary element of a slot machine and, articulating the three element test described above, provided a unifying definition which would guide future conduct. *Trinkle II* concluded that there was a legally significant difference between the manner of operation of SVMs and the machines in *Stroh* and *Pacific Gaming Technologies* and that to be an illegal "slot machine," a machine must itself operate in a chance manner in order to generate a potential prize. 105 Cal.App.4th at 1410. Consequently, it rejected Mr. Trinkle's assertion that SVMs (which themselves did not operate in a chance manner) were slot machines merely because, from the user's perspective, they produced a chance result.

This ruling was necessary to avoid criminalizing SVMs because, for at least two reasons, SVMs were not exempt from Penal Code § 330b under the "vending machine exemption" of Penal Code § 330.5.

First, § 330.5's vending machine exemption applies only to the slot machine offense found in Penal Code § 330.1; it peculiarly does not likewise provide an express vending machine exemption to § 330b's very similarly defined slot machine prohibition.

Second, Penal Code § 330.5 provides an express exemption from Penal Code § 330.1's "slot machine" prohibition, but only for traditional vending machines. That exemption would not benefit SVMs which vend lottery tickets whose cash value may be learned only after purchase based on chance as measured from the user's perspective. *See, e.g., Pacific Gaming Technologies*, 82 Cal.App.4th at 703-707, and *Trinkle v. Stroh*, 60 Cal.App.4th at 781-783, both of which held that vending machines which dispense goods or services and, in addition, a potential prize, do not qualify for this exemption under § 330.5 because, by its express terms, that statutory exemption applies only to "machines 'in which there is deposited an *exact consideration* and from which in every case the customer obtains that which he purchases.'" *Stroh*, 60 Cal.App.4th at 781 (emphasis added). Both *Stroh* and *Pacific Gaming Technologies* held that when a vending machine gives the customer a chance at a prize *in addition* to the item paid for, it does not satisfy the "exact consideration" requirement of § 330.5 and is ineligible for automatic exemption.

Thus, the SVMs in *Trinkle II* would not have been exempt under § 330.5, because the ultimate value of a purchased SVM Scratchers card is unknown until after it is purchased, thereby not providing exact

consideration for the purchase price as found dispositive in *Pacific Gaming Technologies* and *Stroh.*

In short, *Trinkle II* could not invoke § 330.5's "vending machine exemption" to save the SVMs, nor could it find any other express legislative exemption from the slot machine statutes which did so.

Finally, although not discussed in the opinion, the *Trinkle II* court must have wrestled with whether the Legislature intended the slot machine statutes to prohibit SVMs particularly since the relevant statutes were enacted in 1950, long before the Legislature had formally sanctioned the California Lottery as a lawful form of gambling. The *Trinkle II* panel almost certainly concluded that holding SVMs illegal would be a result inconsistent with legislative intent.

In sum, having taken into account the relevant statutory language, the existing case law, the history of slot machines, and the likely legislative intent, *Trinkle II* established the authoritative three-part unifying definition of "slot machine" which controlled California courts for over a decade, until the decision of the Court of Appeal here under review.

## II

## THE DOCTRINE OF IMPLIED LEGISLATIVE ADOPTION SHOULD HAVE BEEN APPLIED BY THE COURT OF APPEAL

The Court of Appeal's decision herein should be reversed because it ignored the rule of statutory construction which Appellants will describe herein as the doctrine of implied legislative adoption. Specifically, in an unbroken line of precedent, this Court and the courts of appeal have consistently held that:

> "'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it *must* be presumed that the Legislature is aware of the judicial construction and approves of it.' (*People v. Hallner*, 43 Cal.2d 715, 719 (1954); *People v. Fox*, 73 Cal.App.3d 178, 181 1977).)" *Wilkoff v. Superior Court,* 38 Cal.3d 345, 353 (1985) (emphasis added).

*Accord: Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1156 (2006); *People v. Leahy*, 8 Cal.4th 587, 604 (1994); *People v. Fox*, 73 Cal.App.3d 178, 181-182 (1st Dt. 1977).

As stated in *Big Creek Lumber*, "[t]he Legislature's failure to amend section 4516.5(d), while not conclusive, 'may be presumed to signify legislative acquiescence' in the [earlier] decision." 38 Cal.4th at 1156, quoting from *Leahy*.

The doctrine is recognized as having particular force where the Legislature has affirmatively amended the relevant statute since the time of the earlier decision construing it, and has not amended it so as to indicate disapproval of the earlier decision. *See, e.g., Wilkoff v. Superior Court,* 38 Cal.3d at 353, stating:

> "'There is a *strong* presumption that when the Legislature *reenacts* a statute which has been judicially construed it adopts the construction placed on the statute by the courts.' (*Armstrong v. Armstrong*, 85 Cal.App.2d 482, 485 (1948).)" (Emphasis added.)

The circumstances here are fully within the scope of this doctrine. Penal Code § 330b has been amended *three* times since *Trinkle II* was

decided in February of 2003,[15] without substantive amendment changing its scope regarding any of the issues addressed in *Trinkle II*.[16]

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[15] The original statute, enacted in 1950, was amended by Stats. 2003, c. 264 (A.B.360), § 1; Stats. 2004, c. 183 (A.B.3082), § 267; and Stats. 2010, c. 577 (A.B.1753), § 2.

[16] *One* of the three amendments, at first blush might *appear* to be substantive, but it is very clear that it was *not* intended to effect a substantive change. Specifically, the 2003 amendment (Stats. 2003, c. 264, AB 360) was passed primarily to exempt those supplying slot machines lawfully to Indian tribes. (*See* Assembly Floor Analysis of May 8, 2003, attached as Exhibit A-3 to the Declaration of G. Randall Garrou in Support of Motion to Take Judicial Notice submitted to this Court under separate cover.) It also enacted a number of other minor amendments, all of which were described by the office of Legislative Counsel as making "various technical, nonsubstantive changes." (A copy of the final summary of the statute appearing in the Legislative Counsel's Summary Digest is attached as Exhibit A-8 to the Garrou Declaration.) As pointed out by *Grewal*, one of these technical changes was the removal of the word "such" from the phrase "such operation," but the court of appeal, no doubt in light of the clear legislative history, adopted Legislative Counsel's summary that this was a technical, "nonsubstantive" change intended merely as "housekeeping legislation." 168 Cal.Rptr.3d at 761, n. 20. Further support for this conclusion appears in the redlined version of AB 360 as originally introduced (attached as Exhibit A-1 to the Garrou Declaration). It shows that the word "such" was actually removed simultaneously from *five different places* within the § 330b(4)'s "slot machine" definition, all as part of an apparent technical cleanup of perceived *unnecessary* verbiage. (Note that at the time of *Trinkle II*, the definition was found in § 330b(2). *See Trinkle II*, at fn. 6. Subdivision (2) was moved to subdivision (4) by the 2003 amendment and the 2004 amendment renumbered it as subdivision (d).)

Other factors also make clear that the court of appeal was correct in characterizing this change as "non-substantive" and mere "housekeeping legislation." First, had the Legislature intended this change to be substantive, the legislative history would surely have reflected some disagreement with, or at least discussion of, the ruling in *Trinkle II,* as well as some intent by the Legislature to give the statute a significantly broader scope than that identified in *Trinkle II*, so that neither "random or chance operation of the machine" nor insertion of a physical object (both of which

The Legislature did not substantively change *any* aspect of *Trinkle II's* definition of a "slot machine." This not only includes its retention of *Trinkle II's* holding recognizing a "chance operation of the machine" requirement, but also its lack of change of *Trinkle II's* pronouncement (albeit in dictum) that to meet the statutory insertion requirement, there must be insertion of "money or other *object* which causes the machine to operate." (Emphasis added.)

*None* of the three amendments of § 330b modified the insertion language of that section in any way, so the Legislature "must"[17] be presumed to have accepted and adopted *Trinkle II's* construction of the insertion requirement as requiring insertion of, at least, some type of *physical object*. Typing in a PIN is not the insertion of any physical object.

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*Trinkle II* recognized as necessary elements of the offense) would remain as requirements. No such discussion can be found in the legislative record.

Second, if the 2003 amendment had been intended to eliminate *Trinkle II's* recognition of the statutory requirement for chance operation of the machine, the Legislature would have realized that it would then be necessary to expressly exempt the SVMs from the revised statute. It neither provided nor even *considered* such an amendment. Copies of *all six* of the legislative analyses prepared for the floor and committees of each house in connection with AB 360 are provided as exhibits to the Garrou Declaration. None even *mentions* the State's SVMs, nor do any even *hint* at any intent to effect a substantive change in the definition of slot machine nor any dissatisfaction with *Trinkle II*.

Consequently, although the phrase "such operation" was found significant in *Trinkle II*, the Legislature clearly did not intend to overrule *Trinkle II's* definitive construction by adopting this mere "housekeeping" amendment.

[17] *Wilkoff*, 38 Cal.3d at 353.

Accordingly, *Grewal* clearly erred not only in rejecting the "chance operation of the machine" requirement, but also in construing Penal Code § 330b to apply to a device which is not activated by physically inserting any tangible object. The Legislature's consistent decade-plus election not to repeal *Trinkle II's* construction, even after amending the statute three times, is controlling under the doctrine of implied legislative adoption.

## III

## TO THE EXTENT IT FAILED TO LIMIT ITS HOLDING TO CONDUCT OCCURRING AFTER ITS ISSUANCE, *GREWAL'S* PURPORTED NEW CONSTRUCTION OF THE "SLOT MACHINE" DEFINITION VIOLATED STARE DECISIS AND APPELLANTS' FUNDAMENTAL DUE PROCESS RIGHTS

### A. Stare decisis.

In issuing its preliminary injunction, the trial court failed to follow the holding in *Trinkle II*, notwithstanding that it was urged to do so by Appellants. Because *Trinkle II* was the only published decision which, as part of its essential holding, ruled on whether the "chance" element of the slot machine statutes must be met by random or chance operation of the machine, or may instead be met simply if the result is unknown in advance to the user, the trial court was bound to follow that decision under the stare decisis doctrine as articulated by this Court in *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450 (1962):

> "Under the doctrine of *stare decisis, all* tribunals exercising inferior jurisdiction are *required* to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. . . . Decisions of *every division* of the district courts of appeal are *binding* upon *all* the justice

and municipal courts and upon *all the superior courts* of this state . . . ." *Id.* at 455. (Emphases added.)

Even assuming, *arguendo*, that the Court of Appeal, *itself*, was free to disagree with *Trinkle II*,[18] the *superior* court had no discretion to do so prior to receiving such an instruction from the Court of Appeal.

Consequently, because Appellants' businesses were forced to be closed for the entire time between the issuance of the preliminary injunction and its affirmation by the Court of Appeal,[19] the closure during that time interval caused actual injury and violated stare decisis. To prevent such recurrences, the Court of Appeal should have clearly stated that the superior court erred by failing to accord *Trinkle II* stare decisis effect under *Auto Equity*, even though it believed that the Court of Appeal itself was free to reach its own differing conclusion.

Under stare decisis, Appellants were entitled to operate under *Trinkle II* until such time as a duly authorized court announced a change in the applicable law. By affirming the preliminary injunction, the Court of Appeal essentially held that it was lawful for the superior court to ignore the black letter law of this Court's *Auto Equity* ruling and close Appellants' business prior to the decision of the Court of Appeal itself, i.e., it essentially held that the operation of Appellants' business would have been unlawful *even before* the Court of Appeal announced a new construction of the statute. Under stare decisis, *at most*, the Court of Appeal should have

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[18] *But see* n. 21, *infra.*

[19] "[W]e affirm the trial court's orders granting preliminary injunctions." 168 Cal.Rptr.3d at 765.

held that Appellants were restrained, *prospectively only*, from the time of the Court of Appeal's decision.

Moreover, this is not an insignificant nuance. This violation may also have severe *prospective* consequences unless corrected by this Court. If the Court of Appeal was correct in affirming the preliminary injunction, it necessarily means that it found that operation of Appellants' businesses would have been unlawful even *prior* to the Court of Appeal's decision herein. In any remand that might be ordered, Respondents would then surely argue that if such conduct would have been unlawful even prior to the ruling of the Court of Appeal, it was also necessarily unlawful *ab initio*, i.e., before issuance of the preliminary injunction, and they have already so alleged in their Complaint. That would mean that, on remand, the Court of Appeal's failure to fault the superior court's issuance of the preliminary injunction as a violation of stare decisis could cause Appellants to potentially be found liable for vast monetary penalties for all conduct occurring prior to the decision of the Court of Appeal.[20]

Indisputably, stare decisis exists not just for *judicial* economy and certainty, but to provide *citizens* with certainty in their affairs. Until such time as a law may be changed by the Legislature or by a decision of an appellate court with *at least*[21] coequal authority, stare decisis entitles parties

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[20] The Complaint seeks monetary penalties under the state's unfair competition laws, e.g., BPC §17200, *et seq.* *See* ¶ 1 of the Prayer of the Complaint, which seeks $2,500 per "each violation" of that statute and "in no event less than $250,000.00." The amount for which Appellants are at risk is potentially far greater than the minimum being sought, depending upon what the courts ultimately conclude constitutes a "violation." The People could potentially seek *several millions* of dollars in such penalties.

[21] There is also precedent establishing that a court of appeal opinion not only has stare decisis impact on all *lower* courts, but on all other courts

to rely on the holdings of the courts of appeal, so long as there are no court of appeal decisions with conflicting *holdings*. *See, e.g., People v. Fox, supra,* 73 Cal.App.3d at 181-182.[22] This means that they cannot be penalized for reliance on a prior more strict construction of a criminal statute for any conduct occurring prior to a subsequent appellate construction expanding the scope of the statute.

The People, repeating an argument they made below, may argue that there was a conflict in the courts of appeal which freed the superior court to

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of appeal as well. In *Cole v. Rush*, 45 Cal.2d 345, 351 (1945), this Court stated that the judgment of a state court of appeal "stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved **by *this* court** or until change of the law by legislative action." (Emphasis added.) Appellants, accordingly, alternatively assert that stare decisis not only barred the *superior* court from ignoring *Trinkle II,* but the court of appeal as well. However, since *Auto Equity* is this Court's more recent pronouncement, and it does not reassert the doctrine in the same manner stated in *Cole* (though neither does it expressly refute it), Appellants' primary stare decisis argument here is based on *Auto Equity* and pertains to the impropriety of the *superior court* in disregarding *Trinkle II.*

[22] *Fox* recognized the application of stare decisis in a very similar situation, where there had been a prior judicial construction of a statute followed by several years of legislative inaction:

> "The *Olf* court's reasoning reflects an application of the settled principle of statutory interpretation that '(w)here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' (*People v. Hallner* (1954) 43 Cal.2d 715, 719; *People v. Stamp* (1969) 2 Cal.App.3d 203, 210 (fn. 3); *People v. Obie* (1974) 41 Cal.App.3d 744, 754.) ***The reasoning also reflects an application, generally, of the doctrine of stare decisis***. (See 6 Witkin, California Procedure (2d ed. 1971) Appeal, s 653, pp. 4570-4571.)"

73 Cal.App.3d at 181-182 (emphasis added).

disregard the holding in *Trinkle II*. This would presumably be based upon language in *Pacific Gaming Technologies v. Lockyer* and other decisions which stated, in *dictum,* that the chance element of a slot machine was met because the result was unknown to the user. However, as noted below, none of those cases stated that principle as part of its *holding*, since each of the machines in those cases in fact operated randomly.[23]

The People's reliance on these cases to assert that *Trinkle II* should not be afforded stare decisis effect is unavailing for two reasons. First and foremost, under the doctrine of stare decisis, lower courts are bound only by the *holding*, but not the *dictum*, of higher courts. *See, e.g., Hess v. Whitsitt,* 257 Cal.App.2d 552, 556 (1967) ("The doctrine of stare decisis does not apply to dictum"); *Childers v. Childers,* 74 Cal.App.2d 56, 61-62 ("The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed"); *Ball v. Rodgers,* 187 Cal.App.2d 442, 449-450 (3d Dt. 1960) ("There is no kinship between *stare decisis* and *obiter dictum.* Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as

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[23] The three cases which the People have cited at various times for their asserted construction of the "chance" element in the slot machine definition are *Pacific Gaming*, *supra, Trinkle v. Stroh, supra,* and *Score Family Fun Center, Inc. v. County of San Diego*, 225 Cal.App.3d 1217 (4th Dt. 1990). *Trinkle II* itself noted that the machines at issue in *Pacific Gaming* and *Trinkle v. Stroh* "were found to be slot machines under Penal Code § 330b because the outcome was dependent upon the element of chance that was generated by the machines themselves." 105 Cal.App.4th at 1410-1411. The same is equally true of the machines at issue in *Score* (where the operation of video machines produced unpredictable individual results, even though it was mathematically possible to predict the *odds* of winning or losing a game).

mere dictum. . . . The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of *stare decisis* to be followed [citing cases], no matter how often repeated"). *See also Landers v. Bolton,* 26 Cal. 393, 398 (1864) ("We have been unable to find any decisions in our State which have settled this point in opposition to our views. There are some dicta looking that way, but nothing which can be considered as binding on this Court on the principle of *stare decisis*").

*No* published decision prior (or subsequent) to *Trinkle II* (other than the decision here under review), had ever involved slot machine charges in a case where the machine in question lacked any random operating component. Neither did any of those prior decisions specifically state that the "chance" element could be met by a machine operating entirely non-randomly. To the extent the People rely on gratuitous language unnecessary for the decision of any of those cases, they rely on nothing more than *obiter dictum.* In contrast, *Trinkle II required* a ruling on that issue as its *ratio decidendi.* Consequently, only *Trinkle II* had stare decisis effect on this issue of law and, under stare decisis, the trial court was not free to pick and choose between competing appellate decisions.

Second, in the unfortunate event that this Court were to engage in a precedent setting change of direction and conclude that a conflict between the holding of one court of appeal and dictum in another court of appeal decision frees a trial court from the doctrine of stare decisis, thereby equating holding and dictum, the trial court below *still* would have erred because, in addition to its holding on the chance operation point, *Trinkle II*, albeit in *dictum*, announced that insertion of an actual "object" was required

to meet the "insertion" element of a slot machine,[24] and no other court of appeal, in holding *or* dictum, had ever ruled to the contrary.

Thus, even if it could be said that stare decisis is established by *dictum* from higher courts, the trial court below *still* should have followed *Trinkle II* because of *Trinkle II's* pronouncement that insertion of an actual "object" is a required element of a slot machine.

Accordingly, no matter which legal test is used for stare decisis, the trial court's decision violated stare decisis as established in *Auto Equity*.

Consequently, entirely apart from whether the Court of Appeal itself was free under stare decisis to reject *Trinkle II's* statutory construction of Penal Code § 330b and render its own radically different construction, and entirely apart from whether it violated various other principles of statutory construction in so ruling, it clearly erred by failing to rule that the ***superior court*** erred by ruling contrary to *Trinkle II*. At *most*, the Court of Appeal should have ruled that an injunction could and would be granted only prospectively from the date of the issuance of its own opinion.

Had it so ruled, it would have honored stare decisis and safeguarded Appellants from the potential prospect of crippling monetary penalties on remand based upon an impermissible retroactively-applied "re-construction" of the statute.

## B. Due process.

The ruling of the Court of Appeal not only violated clear principles of stare decisis, but also violated Appellants' state and federal

[24] As noted *supra, Trinkle II* stated: "[T]he elements of a slot machine are (1) the insertion of money ***or other object*** which causes the machine to operate . . . ." 105 Cal.App.4th at 1410.

constitutional rights to due process of law. Where, as here, a prior published appellate decision authoritatively construes a criminal law in a comparatively narrow manner, due process requires that the benefits of that construction be conferred on all those whose conduct occurred after the narrowing construction and before any subsequent judicial expansion of the scope of the statute. *Marks v. United States*, 430 U.S. 188 (1977).

*Marks* is remarkably apposite to the present case. There, an earlier Supreme Court ruling, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), had significantly judicially narrowed the 90 year old federal obscenity statute. Seven years later, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), re-interpreted it in a more expansive manner significantly *less* favorable to defendants. The question before the Court was whether defendants were entitled to the benefits of the earlier, narrower (and more favorable) *Memoirs* construction for all conduct occurring prior to the later, more expansive (and less favorable to defendants) *Miller* construction.

*Marks* noted that:

> "The Ex Post Facto Clause is a limitation upon the powers of the Legislature and does not of its own force apply to the judicial branch of government. But the principle on which the Clause is based, the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." *Id.* at 191-192 (citations omitted).

*Marks* concluded that application of the *Miller* court's more expansive construction of the federal obscenity standards, rather than the

narrower *Memoirs* construction, to any conduct occurring prior to the ruling in *Miller,* would violate a defendant's due process rights.[25]

Similarly, Appellants were and are entitled to the narrower (and more favorable to them) construction of the slot machine statutes rendered by *Trinkle II,* under which all of their charged conduct was *entirely lawful* (even if *Grewal's expansive* re-interpretation were *prospectively* adopted by this Court).[26] The Court of Appeal erred in affirming the superior court's preliminary injunction since it was based on the unconstitutional application to Appellants of a judicially expanded slot machine definition much broader than the one authoritatively rendered by *Trinkle II,* which was in effect at the time of Appellants' charged conduct.

Moreover, the issue of whether Appellants' conduct was lawful prior to the date of the *Grewal* opinion is of great importance to both the parties

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[25] As support, *Marks* noted a similar, but not identical, situation in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), where a statute which was facially very clear was given an unexpected and more expansive construction by a state appellate court. *Bouie* held that application of that more expansive judicial construction to conduct occurring before that construction issued violated the constitutional guarantee of due process. *Marks* noted that it faced a situation "not strictly analogous to *Bouie"* because "[t]he statutory language there [in *Bouie*] was narrow and precise," unlike the statute involved in *Marks.* However, it found the principles articulated in *Bouie* equally applicable because those relying on an earlier clear judicial construction were no different than those relying on facially clear statutory language. They were both entitled to "fair warning that their [conduct] might be subjected to the new standards." 430 U.S. at 195.

[26] Notably, as a matter of *due process* (as opposed to stare decisis), Appellants were entitled to rely on *both* key rulings of *Trinkle II* (e.g. that the insertion element requires a physical "object" *and* that the "chance" element requires that the machine must itself operate in a random or chance manner), even though the insertion ruling was only *dictum* in *Trinkle II.*

and numerous others throughout the state.[27] The erroneous and *severely* prejudicial ruling of the Court of Appeal affirming the preliminary injunction should be reversed by this Court.

## IV

## THE COURT OF APPEAL ALSO ERRED IN ITS DISCUSSION OF THE APPLICABLE PRINCIPLES UNDER THE RULE OF LENITY DOCTRINE.

Under the judicially created "rule of lenity," a court must give a defendant the benefit of the more favorable interpretation of a statute if the statute is reasonably subject to two interpretations. The Court of Appeal concluded that the rule of lenity did not apply because the statute was *not* reasonably subject to two interpretations (even though the statute was given a very different construction by the *Trinkle II* court). It erred by failing to acknowledge that a prior Court of Appeal interpretation rendered in a final published opinion left intact by this Court must be treated as *a per se* reasonable interpretation.

The fundamental error of the Court of Appeal was to apply the rule of lenity doctrine as if it were the first court in the state to construe the relevant statute. It was not. Had there been no prior constructions of § 330b's slot machine definition, its rejection of the rule of lenity might, at

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[27] As noted *supra,* if *Grewal's* greatly expanded definition of slot machine may be retroactively applied to Appellants, they will be subject to enormous penalties in the pending unfair competition action. Moreover, that issue is also hugely significant to others throughout the state who engaged in similar businesses prior to the date of the Court of Appeal's decision in *Grewal,* and who are now defendants in pending misdemeanor prosecutions for such conduct.

least arguably, have been appropriate. The court's discussion of this principle is set forth below:

> "Under the rule of lenity, which defendants argue should be applied here, any doubts as to the meaning of a criminal statute are ordinarily resolved in a defendant's favor. However, that rule of statutory interpretation is only applied where the statute is reasonably susceptible of two constructions that are in relative equipoise—that is, resolution of the statute's ambiguity in a convincing manner is impracticable. "Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." As recently stated by our Supreme Court, "'[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. [Citation.] Rather, the rule applies "'only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule.'
>
> "No such ambiguity exists in this case, as will become apparent in the discussion that follows and, therefore, the rule of lenity does not apply." 168 Cal.Rptr.3d at 757-758 (citations omitted, emphasis added).

Surprisingly, the Court of Appeal chose not to deem *Trinkle II*, the prior court of appeal published decision construing the same statute, as a *per se* reasonable interpretation. A final published court of appeal decision is authoritative and thereafter defines the parameters of the statute. What *Grewal should have* analyzed under the rule of lenity was not merely the facial language of the statute, but also the statute as construed and narrowed 11 years earlier by *Trinkle II*. Thus, even if *Trinkle II* were not controlling of the superior court's decision making (and Appellants believe it was under stare decisis and due process), it was a *per se* reasonable interpretation of the statute to which, under the rule of lenity, Appellants were entitled the benefit.

A perfect example of this principle appears in *Wooten v. Superior Court,* 93 Cal.App.4th 422 (4th Dt. 2002). The defendant, a manager of a strip club, was charged with pimping and pandering based on two dancers' alleged "prostitution" involving their having been paid by a patron to engage in lewd acts with each other. Neither dancer ever touched the patron. The pivotal issue was whether the dancers had engaged in "prostitution" under Penal Code § 647(b).

Rather than considering only the facial language of the prostitution statute, § 647(b), *Wooten* noted that it had previously been authoritatively construed in several appellate decisions[28] and invoked the rule of lenity after considering *both* the statute's facial language *and* the prior judicial constructions. This Court denied review.

*Wooten* observed that although the statute *facially* defined prostitution as a lewd act for money, it did not otherwise define a lewd act. It further noted that *Hill* had construed the prostitution statute to require "bodily contact between the prostitute and the customer . . . to be a lewd act." 93 Cal.App.4th at 430.

In determining whether a "lewd" act for purposes of the prostitution statute included sexual acts between two dancers at the request of a physically uninvolved patron, *Wooten* applied the rule of lenity after comparing the facial language to *Hill's* prior authoritative construction of the statute.

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[28] Including *People v. Hill,* 103 Cal.App.3d 525 (2d Dt. 1980), and *People v. Freeman*, 46 Cal.3d 419 (1988).

Specifically, it stated:

"***b. The Rule of Lenity***

> "The People argue that the sexual conduct that occurred at the Flesh Club constitutes prostitution, as defined under section 647, subdivision (b), because the statute does not state that there must be touching between the customer and the prostitute. Section 647, subdivision (b) simply states that prostitution "includes any lewd act between persons for money or other consideration." Defendants, however, argue that the conduct does not satisfy the statutory definition of prostitution ***because courts have defined "lewd act,"*** which was not defined by the Legislature, as requiring the touching between a customer and a prostitute.
>
> "Hence, it appears that, *under the current status of the law in California*, ***the definition of prostitution is susceptible to different interpretations***." 93 Cal.App.4th at 428-429. (Emphases added.)

*Wooten* also noted that there had been other relevant decisions interpreting the statutory term "lewd" in a variety of other contexts, including this Court's decisions in *Pryor v. Municipal Court*, 25 Cal.3d 238 (1979), and *People v. Freeman*, 46 Cal.3d 419 (1988), as well as two decisions of the courts of appeal, *People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, 75 Cal.App.3d 523 (2d Dt. 1977) and *People v. Fixler,* 56 Cal.App.3d 321 (2d Dt. 1976) (both of which were expressly disapproved by this Court in *Freeman*).

*Wooten* concluded that the defendant *was* entitled to the benefit of the rule of lenity *as a result of the prior judicial constructions of the charged statute*, and that the court should not confine itself to the statute's facial language in determining whether the rule of lenity applied:

> "**Given the different definitional interpretations the courts have adopted for 'prostitution,' the rule of lenity applies.** Hence, defendants are "entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." 93 Cal.App.4th at 436 (emphasis added).

This is in sharp contrast to what was done by *Grewal,* which refused to *consider Trinkle II's* prior construction, failing to acknowledge it as a *per se* reasonable construction, the benefits of which must be extended to Appellants under the rule of lenity.

Consequently, in its treatment of Appellants' rule of lenity argument, the Court of Appeal erred in failing to address the status of the law *as it existed following Trinkle II's construction.* It was reasonable for Appellants to follow *Trinkle II*'s more narrow definition of "slot machine" even if this Court should ultimately conclude that *Trinkle II* was wrongly decided. Under the rule of lenity, Appellants were entitled to the benefit of *Trinkle II's* significantly more narrow construction.

Finally, since the present cases arose solely in the procedural context of a preliminary injunction appeal, the Court of Appeal might *arguably* have rejected Appellant's' rule of lenity argument solely on the very narrow ground of prematurity.

However, *Grewal* reached the merits and rejected Appellants' rule of lenity argument, erroneously concluding that the rule could not apply to Appellants because, in the *Grewal* court's opinion, *Trinkle II* did not reasonably interpret the statute. In so doing, the Court of Appeal erred, because it failed to recognize that a final published court of appeal opinion authoritatively construing a statute is *always* a *per se* reasonable construction, and a defendant is entitled the benefit of that construction unless or until it is reversed or legislatively overruled.

Appellants urge the Court to clarify this issue and hold that final published court of appeal opinions construing a criminal statute constitute *per se* reasonable statutory interpretations for purposes of the rule of lenity.

## V

## *GREWAL'S* EXPANSIVE CONSTRUCTION OF THE "SLOT MACHINE" DEFINITION DISPENSING WITH *TRINKLE'S* REQUIREMENT OF INSERTION OF A PHYSICAL OBJECT AND RANDOM OPERATION, WOULD CRIMINALIZE POSSESSION OF ANY COMPUTER, SMARTPHONE OR TELEVISION WITH INTERNET ACCESS, VIOLATING THE PRINCIPLE THAT EVEN FACIALLY CLEAR STATUTES SHOULD NOT BE INTERPRETED SO AS TO PRODUCE ABSURD RESULTS THE LEGISLATURE COULD NOT HAVE INTENDED

*Trinkle II* aside, *Grewal* ignored a critical principle of statutory construction that even *clear* statutory language should not be given a literal reading if doing so would produce absurd consequences that could not have been intended by the Legislature.[29] *See, e.g., People v. Thomas*, 4 Cal.4th 206, 213 (1992) ("a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature could not have intended"). *Accord: In re D.B.*, 58 Cal.4th 941, 946 (2014), *In re J.W.* 29 Cal.4th 200, 210 (2002); *People v. Broussard*, 5 Cal.4th 1067, 1071 (1993); *Younger v. Superior Court*, 21 Cal.3d 102, 113 (1978). Stated differently, "[i]f the [statutory] language is clear, courts must generally follow its plain meaning *unless a literal interpretation would result in absurd consequences the Legislature did not intend." Metcalf v. County of San*

[29] Of course, *ambiguous* statutory language may not be construed in such manner either.

*Joaquin*, 42 Cal.4th 1121, (2008) (emphasis added). *Accord Los Angeles Unified School District v. Garcia*, 58 Cal.4th 175, 186 (2013); *Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal.4th 733, 737 (2004).

*Grewal's* construction of Penal Code § 330b would make criminals of every person possessing a computer, smart phone or smart TV, *unquestionably* a consequence that could not have been intended by the Legislature.

Specifically, under *Grewal's* expanded interpretation of Penal Code § 330b, "slot machine" no longer requires *either* the insertion of any tangible physical object *or* a device that operates in a random or chance manner. Inputting a PIN constitutes "insertion," making a slot machine of any smart phone, computer or other Internet-accessible device which, by inputting a code or PIN, can be operated to entitle one to a prize where the result is unknown and unpredictable to the user. Nothing need be physically inserted into the device. Consequently, any computer, cell phone or "Smart TV" with Internet access is necessarily such a device since, by inputting a code or PIN, they all can be used to participate in now-ubiquitous Internet-based sweepstakes programs providing chance prizes, offered by companies such as Coca-Cola, McDonald's, and numerous others, both large and small.[30]

Numerous businesses now run not only sweepstakes promotions in which customers become entitled to win potential prizes, but also other forms of online contests or games with unpredictable outcomes and

[30] *See* Appellants' accompanying Motion for Judicial Notice and supporting Declaration of G. Randall Garrou.

potential prizes, all of which would likewise make any device on which they can be played a slot machine, even though the only "insertion" required to participate is the inputting of a code or PIN. *Ibid.*

Moreover, to be actionable, such device need not actually be *used* as a slot machine. Under § 330b(a), mere *possession* of such a device is an offense.[31] Moreover, a "slot machine" is defined in § 330b(d) as one that *could* be so used or adapted.[32] Clearly personal computers, cell phones, tablets, laptops and televisions with Internet access can readily be used or adapted to play sweepstakes or other games with unpredictable outcomes and prizes and, thus, meet the statutory definition.

Finally, when the statute was enacted in 1950, neither the Internet nor personal computers were known or contemplated. The 1950 Legislature was familiar with self-contained randomly operating devices requiring insertion of money or tokens in order to win money or other prizes including free games. They never contemplated a world where ubiquitous items carried or possessed by everyone, with no randomizing features and requiring neither consideration or insertion of any physical

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[31] Interestingly, Penal Code § 330b was enacted in 1950 precisely for the purpose of criminalizing mere possession (without use). Prior to the 1950 enactment of § 330b, the only slot machine statute was Penal Code § 330a. However, *Chapman v. Aggeler*, 47 Cal.App.2d 848 (2d Dt. 1941), held that § 330a did not prohibit mere *possession* of slot machines absent their actual *use* for gambling purposes. Intending to close that loophole, the Legislature adopted the ban on mere *possession* in § 330b(a).

[32] As construed in *Grewal,* Penal Code § 330b(d) defines a "slot machine" to mean any "device that is *adapted, or may readily be converted, for use* in a way that . . . by *any* . . . means, the . . . device . . . may be operated, and by reason of any . . . outcome of operation unpredictable by him or her, the user may . . . become entitled to receive . . . any . . . thing of value." (Emphases added.)

object would be contraband, possession of which would make criminals of virtually everyone in California.

In short, even if the facial language of § 330b at least arguably supported *Grewal's expanded* construction, the court erred by ignoring the resultant absurd consequence of making criminals of virtually every Californian over the age of 10.

## VI

## *GREWAL'S* EXPANSIVE REINTERPRETATION OF § 330b'S "SLOT MACHINE" DEFINITION TO DISPENSE WITH *TRINKLE'S* "CHANCE OPERATION OF THE MACHINE" REQUIREMENT CRIMINALIZES THE CALIFORNIA STATE LOTTERY'S SCRATCHERS VENDING MACHINES, AGAIN VIOLATING THE PRINCIPLE THAT EVEN FACIALLY CLEAR LANGUAGE SHOULD NOT BE INTERPRETED TO PRODUCE OBVIOUSLY UNINTENDED RESULTS

As discussed in Point V, *supra*, even *clear* statutory language may not be read literally if doing so would produce absurd consequences clearly unintended by the Legislature.

A major flaw in the *Grewal* opinion is its failure to address the consequences for the California State Lottery's (CSL's) Scratchers Vending Machines (SVMs) under *Grewal's* expanded construction of § 330b.

Under *Grewal*, the SVMs would *unquestionably* be illegal slot machines. *Trinkle II's* requirement that a slot machine must itself have *chance operation* is all that saved SVMs from being found illegal in *Trinkle II*. By removing that requirement, *Grewal* makes SVMs unlawful.

The question then is whether construing § 330b to criminalize the State's SVMs is an absurd consequence unintended by the Legislature. For

*several* reasons, it is clear that the Legislature could not have intended this result. First, given that *Trinkle II* was decided in 2003, SVMs have now been producing money for the state for well over a decade. It is inconceivable that the Legislature would have intended a construction of § 330b which would make state-sponsored SVMs illegal and deprived the State of funding which the Legislature had generated by passing other statutes. Ironically, *Grewal's* construction exposes the State and all SVM vendors to the very BPC 17200 violations Appellants face herein. At a minimum, the *Grewal* re-construction would open a Pandora's box of private actions under the State's unfair competition laws. [33]

Second, given that the Legislature amended § 330b three times since *Trinkle II*, it is inconceivable that, had it intended § 330b to read as construed by *Grewal,* that it would not have immediately amended it to so read following *Trinkle II.* [34]

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[33] Under *Grewal*, the mere presence of an SVM in a store would violate § 330b and be an unlawful business practice. Under BPC §17203, purchasers of Scratchers tickets could presumably sue *at least* the merchants housing SVMs (if not the CSL itself) for *restitution*. Also, store owners without SVMs could harass competing merchants with SVMs by suits under BPC §17204 for *injunctive* relief based on unfair competition, particularly since the statute awards attorneys fees to the prevailing party.

[34] Had the Legislature disagreed with *Trinkle II's* interpretation of § 330b, the obvious remedy would have been to delete that statute's reference to any "element of hazard or chance" and "of operation," leaving it, instead: "by reason of any . . . outcome . . . unpredictable by him or her." This would have clarified that *Trinkle II* was wrong and changed the law to what *Grewal* held it is! *Grewal's* interpretation of the statute now makes the words "element of hazard or chance" and "of operation" *entirely superfluous* because chance or hazard operation will *always* be unpredictable to the user.

Third, had the Legislature thought *Trinkle II* misconstrued the meaning of § 330b, it would certainly have acted to exempt SVMs from that section. However, the legislative record of the three post-*Trinkle II* amendments to § 330b (*see* the Garrou Declaration) shows *no discussion of* SVMs *whatsoever*, much less the creation of any exemption![35] The absence of any such legislative activity makes abundantly clear that the Legislature did not disagree with *Trinkle II's* construction of § 330b and surely did not even *contemplate* eliminating SVMs as would be required by *Grewal.*

In short, once a widespread revenue-generating practice benefiting and previously endorsed by the State is declared to have been illegal, there are myriad potential absurd consequences, and it would be inconceivable, given those consequences, that what spawned them would or even *might* be consistent with legislative intent – all the more so since the legislative record of the three post-*Trinkle II* amendments to § 330b appears to contain *no discussion of SVMs whatsoever.*

[35] Indeed, as far as counsel has been able to tell, the legislative record of the three post-*Trinkle II* amendments to § 330b does not even appear to contain any references to the *Trinkle II opinion.*

## VII

## *GREWAL'S* ATTEMPT TO *FACTUALLY DISTINGUISH TRINKLE II* WAS NOT ONLY BARRED BY BOTH IMPLIED LEGISLATIVE ADOPTION AND DUE PROCESS, BUT WOULD PROSPECTIVELY RENDER THE STATUTE IMPERMISSIBLY VAGUE, LACKING OBJECTIVE CRITERIA FOR DETERMINING A VIOLATION

As an alternative to its rejection of *Trinkle II's* authoritative construction of § 330b's slot machine definition (which provided three clear statutory elements defining *all* illegal slot machines), *Grewal sought* to distinguish *Trinkle II,* 168 Cal.Rptr.3d at 763-764, but failed to do so in any material or legally cognizable way. *Grewal's* hodgepodge of purported factual distinctions fails to convey any meaningful guidance to those who, charged with knowledge of "the law," must conform their conduct accordingly, or to courts which must determine whether they have succeeded. *Trinkle II* brought great clarity to 50 year old legislation; *Grewal's* perplexing departure muddies the water, leaving the law in confusion and disarray – to the great prejudice of those many businesses in California whose method of operation has been reasonably based on the clear roadmap of *Trinkle II's* authoritative construction. Additionally, and as explained below, *Grewal's* attempt to factually distinguish *Trinkle II* is barred both by the doctrine of implied legislative adoption and due process. For each of these reasons, *Grewal's* attempted distinction must be rejected.

First, under the doctrine of implied legislative adoption, *Grewal* was not free to expand the statutory scope beyond the well-defined elements of *Trinkle II. Trinkle II* supplied a definitive, authoritative construction of the statute, clearly articulating its three distinct statutory elements and stating

that it should apply in *all* litigation involving slot machine charges. Had the Legislature been dissatisfied with *Trinkle II's* overall construction or any individual part of it, the legislative record (*see* the Garrou Declaration accompanying Appellants' Judicial Notice motion) would have reflected that and the Legislature would have passed appropriately responsive amendatory legislation. That the Legislature amended the statute three times after *Trinkle II* without rejecting *Trinkle II's* construction or even *referencing Trinkle II*, constituted legislative approval and precluded *Grewal* from expanding *Trinkle II's* statutory definition by factual "distinctions," much less adopting a new definition which makes opaque that which *Trinkle II* made so clear.

Second, *Grewal's* attempt to distinguish the facts in *Trinkle II* is also barred by Appellants' rights to due process of law. *Trinkle II* authoritatively established a clear three part test to control *all* cases involving alleged slot machines, not just *some*. *Grewal's* attempted factual distinction proclaims that *Trinkle II's* test does *not* apply in *all* slot machine cases, but only in those with facts almost identical to *Trinkle's*. Since *Trinkle II* held that its test applied in *all* cases involving slot machine charges, *Grewal* cannot posit factual distinctions and thereby deprive Appellants of their due process notice rights to rely on the earlier test. Again, *see Marks v. United States, supra.*

Given that *Grewal's* referenced factual differences between Appellant's machines and those in *Trinkle II* are not material under the slot machine statutes as construed and defined by *Trinkle II*, the due process principles articulated in *Marks, supra*, do not permit denying Appellants the benefit of *Trinkle II's* definitive narrow construction with respect to their past conduct.

Third, the exact basis upon which *Grewal* sought to distinguish *Trinkle II* is, respectfully, not even clear. While *Grewal* used such terms as "passive" (168 Cal.Rptr.3d at 763),[36] "feel and anticipation of a slot machine" (*id.*) and "value added" (*id.* at 764, n.26) in attempting to establish differences between the SVMs in *Trinkle II* and Appellants' computers, its apparent main thrust is that the SVMs did not involve an integrated system of machines, one of which, by random operation, produced the chance result. 168 Cal.Rptr.3d at 763-764.

*Grewal* stated (and Appellants do not dispute) that under *Trinkle II, chance operation* of machines *connected* to an alleged slot machine (i.e., "integrated" devices) could be cognizable even if there was no chance operation in the charged machine itself.[37] However, there is nothing in the

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[36] Importantly, *Trinkle II* did not exempt SVMs from § 330b as so-called "passive" vending machines, nor *could it have.* Although Penal Code § 330.5 exempts "vending machines" from "slot machines" under Penal Code § 330.1, that exemption expressly applies *only* to § 330.1 but *not* to § 330b. Moreover, in both *Pacific Gaming Technologies* and *Stroh*, the exemption in § 330.5 was held to be unavailable for any devices where a customer puts in money and has a chance to win a prize, even if that chance is in addition to any other fixed product or service provided. *See Stroh,* 60 Cal.App.4th at 781 (*Pacific Gaming* simply followed *Stroh* on this point). Consequently, *Trinkle II* could not have exempted SVMs as being mere vending machines, *nor did it.*

Nor do the slot machine statutes themselves create an exemption for any *other* type of vending machines. Obviously, the Legislature considered the potential defense of a passive vending machine and created § 330.5 to set forth the boundaries of that exemption. *Grewal* was not free to re-write the scheme established by the Legislature.

[37] *Grewal* appeared to rely on an unpublished federal district court decision, *Lucky Bob's Internet Café, LLC. v. Cal. Dpt. Of Justice*, S.D. Cal., No. 11-CV-148 BEN, Order of May 1, 2013, where the federal court speculated that Penal Code § 330b could be violated if a collection of integrated machines, working together, functioned as a slot machine. That

record pointing to random operation by *any* device connected to Appellants' computers (nor *is* there any such randomly operating device). Consequently, *Trinkle II* cannot be distinguished on this basis either.

Finally, *Grewal's* attempt to distinguish the facts in *Trinkle II* would leave the statute with no objective standards to provide guidance to businesses, prosecutors, judges and juries.[38] That would be undesirable in the extreme, and surely not a test meriting ultimate judicial approval.

If the clear and narrow three part test of *Trinkle II* is to be jettisoned for a more expansive definition of "slot machine," that is a task for the Legislature, not the courts.[39]

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case, however, apart from being a federal case and unpublished, is further of no import here because of its facts. Unlike here, the computers there at issue had random number generators and would have met the elements of *Trinkle II*. *See Lucky Bob's Internet Café, LLC. v. Cal. Dpt. Of Justice*, S.D.Cal., No. 11-CV-148 BEN, Order of March 25, 2013 ("*Lucky Bob's I*"), Doc. No. 79, Order Granting Defendant Key's Motion for Summary Judgment, at p. 3, lines 7-11, stating that the World Touch software system "randomly generated numbers." It then concluded (at p. 6, lines 16-17) that "the *operation* of [defendant's] machine was . . . 'unpredictable and governed by chance.'" [Emphasis added] There is no such evidence in the present case; Appellants' system does not utilize any random number generators nor does it have any other type of chance operation.

[38] *See Kolender v. Lawson*, 461 U.S. 352 (1983).

[39] Indeed, the Legislature has now spoken on this by passing A.B. 1439 (which is awaiting the Governor's signature at this time). The Legislature elected not to pass any language amending the statutory definition of slot machines but, instead, adopted entirely separate legislation prohibiting businesses primarily devoted to sweepstakes. Once again, the Legislature intentionally declined an opportunity to criticize *Trinkle II's* slot machine definition.

## CONCLUSION

For all the reasons set forth above, it is clear that the Court of Appeal materially erred on many fronts.

First, and most importantly, it erred in disregarding *Trinkle II*:

(1) *Grewal* violated the principle of implied legislative adoption by rejecting a prior judicial construction of a statute which the Legislature amended on several subsequent occasions, in none of which it questioned or disagreed with the earlier judicial construction.

(2) In affirming the issuance of a preliminary injunction *by the superior court*, *Grewal* erred in failing to hold that the superior court had violated stare decisis, even if the Court of Appeal itself, was free from the requirements of that doctrine in issuing any prospective injunction.

(3) *Grewal* ignored the due process principles explained in *Marks v. United States* by affirming the superior court's preliminary injunction. The superior court's ruling prohibited conduct lawful under *Trinkle II* prior to any authoritative change in that doctrine by *Grewal* and, as such, violated Appellants' state and federal constitutional rights to due process of law.

(4) *Grewal* also erred in its determination of the rule of lenity issue. While application of the rule of lenity arguably was premature, it was error to reject it on the grounds given, i.e., that there is no ambiguity in the statute and no reasonable interpretation under which Appellants' conduct might be lawful. *Wooten* and other cases make clear that when a court applies the rule of lenity doctrine, it must consider not only the *face* of a statute, but also any prior

authoritative judicial constructions of the statute. This the Court of Appeal failed to do.

Second, even should this Court conclude the Court of Appeal was permitted to construe Penal Code § 330b as a matter of first impression, the Court of Appeal erred by violating the well-settled principle that even facially clear statutory language may not be construed in a manner that would lead to absurd consequences. For at least two separate reasons, the *Grewal* construction creates absurd consequences which could not have been intended by the Legislature:

(1) it makes possession of any computer or smart phone with Internet access a crime; and

(2) it would establish a test under which the California State Lottery's SVMs would have been operating for over a decade as illegal slot machines, and there is no suggestion the Legislature ever contemplated or intended such a possibility.

For each and all of the reasons above, the judgment of the Court of Appeal should be reversed and the trial court should be ordered to strike all allegations in the Complaint alleging operation of illegal slot machines.

Respectfully submitted,

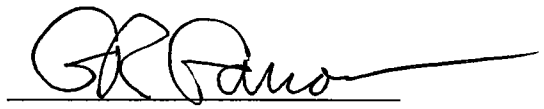
Dated: September 24, 2014

John H. Weston
G. Randall Garrou
Jerome H. Mooney
**Weston, Garrou & Mooney**

by _____
John H. Weston
Attorneys for Appellants

## CERTIFICATE OF WORD COUNT BY APPELLATE COUNSEL

I am one of the attorneys who participated in preparation of this Petition for Review and hereby certify, per the requirements of CRC 8.504(d), that it consists of 12,916 words, exclusive of the cover, tables, signature blocks, proof of service and appendices.



G. Randall Garrou

## PROOF OF SERVICE AND MANNER OF FILING

[Pursuant to C.C.P. Section 1013(a) and Rule 8.212(c)(2)]

I am a resident of and also employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to the within entitled action. I work at the law firm of Weston, Garrou & Mooney located at 12121Wilshire Boulevard, Suite 525, Los Angeles, CA 90025.

I am readily familiar with this law firm's practice for the collecting and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, any correspondence delivered to our firm's mail room employee(s) is routinely stamped with postage and then deposited for mailing on the same day with the United States Postal Service.

**OPENING BRIEF ON THE MERITS OF APPELLANTS GREWAL AND WALKER**

☒ **SERVICE BY U.S. MAIL.** On the date shown below, I served the foregoing document on the interested parties in this action by delivering to our firm's mail room employee a true copy thereof in a sealed envelope for delivery by U.S. Mail, addressed as follows:

**See attached service list.**

☒ **ELECTRONIC FILING.** On the date shown below, in satisfaction of the requirements for service of Appellate Briefs in the State of California, a true copy of the foregoing document has been served on the Supreme Court of California via its California government website, in an area specifically designated for Electronic Service of Civil Appellate Briefs. Per CRC 8.212(c)(2), such service also constitutes full service on the Court of Appeal.

☒ **FILING PARTIALLY BY FEDERAL EXPRESS.** On the date shown below, in satisfaction of the requirements for service of Appellate Briefs in the State of California, an original of the foregoing document and eight copies have been sent to the Supreme Court of California for filing via Priority Federal Express.

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

Dated: September 24, 2014

Judy Kushner

Judy Kushner

**Service List (for Mailed Service)**

Lisa S. Green, District Attorney
Gregory A. Pulskamp, Deputy District Attorney
Kern County District Attorney's Office
1215 Truxtun Avenue
Bakersfield, California 93301

Tory E. Griffin
Hunt Jeppson & Griffin LLP
1478 Stone Point Dr., Suite 100
Roseville, CA 95661
(Counsel for Consolidated Appellant Stidman)

**Courtesy Service List (sent by email only)**

Steven Graff Levine
1112 Montana Avenue #309
Santa Monica, CA 90403
By email only to: stevengrafflevine99@gmail.com
(Counsel for Appellants Nasser and Elmalih in S17979)