S235357

IN THE SUPREME COUT OF THE

STATE OF CALIFORNIA

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DOMINIQUE LOPEZ,

Plaintiff, Appellant, and Petitioner,

vs.

SONY ELECTRONICS, INC.,

Defendant and Respondent.

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After A Decision By The Court Of Appeal,
Second Appellate District, Case No. B256792;
Los Angeles County Superior Court, Case No. BC476544

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PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUE FOR REVIEW

Is an action for injuries based on prebirth (*in utero*) exposure to toxic chemicals governed by the statute of limitations in Code of Civil Procedure section 340.8,[1] which applies to "any civil action for injury or illness based upon exposure to a hazardous material or toxic substance," (Code Civ. Proc., § 340.8, subd. (a)), or the statute of limitations in section 340.4, which applies to "[a]n action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth"? (*Id.*, § 340.4.)

INTRODUCTION

This action arises out of severe birth defects and injuries suffered by Plaintiff, Appellant, and Petitioner Dominique Lopez (Dominique) from prebirth (*in utero*) exposure to toxic chemicals at an electronics manufacturing facility operated by Defendant and Respondent Sony Electronics, Inc. (Defendant Sony or Sony), where Dominique's mother worked while she was pregnant with her. Sony moved for summary judgment on the ground that this action was barred by the statute of limitations in section 340.4, which provides a six-year limitations period for "[a]n action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth," and which does not permit tolling for minority under section 352. (Code Civ. Proc., § 340.4.) In

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[1] Unless stated otherwise, all undesignated statutory references are to the Code of Civil Procedure.

opposition, Dominique argued that the applicable statute of limitations was section 340.8, which provides a two-year limitations period for "any civil action for injury or illness based upon exposure to a hazardous material or toxic substance." (*Id.*, § 340.8, subd. (a).) Dominique argued that this action was timely filed under section 340.8 because, unlike section 340.4, the limitations period in section 340.8 is subject to minority tolling under section 352 and she was a minor when her claim accrued and when this action was filed. Agreeing with Sony that Dominique's claim was subject to and barred by the limitations period in section 340.4, the trial court granted Sony's motion for summary judgment.

On appeal, the judgment was affirmed by a divided panel of the Second District Court of Appeal. The majority held that the applicable statute of limitations was section 340.4 and that Dominique's claim was time-barred under it. (Typed maj. opn. at pp. 2, 4-13.) In so holding, the majority disagreed with *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522 (*Nguyen*), in which the Sixth District Court of Appeal, considering the same limitations issue, unanimously held that "claims based on birth or pre-birth injuries that are due to exposure to hazardous materials or toxic substances are subject to the limitations period in section 340.8," not section 340.4.[2] (*Id.* at pp. 1528, 1539-1540, 1543-1551; see typed maj.

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[2] *Nguyen* was decided on September 25, 2014, approximately six months after the trial court's summary judgment ruling in this case. On

opn. at p. 2 [disagreeing with *Nguyen*].)

The dissent disagreed. Finding the statutory analysis and holding in *Nguyen* to be correct, the dissent concluded that Dominique's claim was subject to and timely filed in accordance with the limitations period in section 340.8. (Typed dis. opn. at pp. 1-2, 4-13.)

The majority's decision was erroneous because, as both the dissent and court in *Nguyen* correctly concluded, under the plain meaning of its clear language, the statute of limitations applicable to an action for prebirth injuries based on exposure to a hazardous material or toxic substance is section 340.8, not section 340.4. As discussed below, section 340.8 is a later, more specific statute that was enacted to establish a separate statute of limitations applicable to *all* civil actions for injury based on exposure to a hazardous material or toxic substance, *regardless of age*. The only exceptions are actions for injuries based on exposure to asbestos or the professional negligence of a health care provider, neither of which is applicable here.

Accordingly, the judgment of the Court of Appeal should be reversed, as should the judgment entered in favor of Defendant Sony, because this action was timely filed under section 340.8.

December 17, 2014, this Court denied the petition for review filed by the defendant in *Nguyen* (S222377).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Dominique was born on April 13, 1999. (1 Appellant's Appendix (AA) 154 [fact no. 7], 176 [¶ 1], 178 [¶ 21]; 3 AA 636 [fact no. 7]; see also 1 AA 136:10-12; typed maj. opn. at p. 2.) Her mother, Cheryl Lopez, worked for Defendant Sony at a Sony electronics manufacturing facility in San Diego, California, from 1978 to 2000, including while she was pregnant with Dominique. (1 AA 153-154 [fact nos. 4, 6], 177-178 [¶¶ 15, 17-19, 21]; 3 AA 635 [fact nos. 4, 6]; see also 1 AA 136:5-10; typed maj. opn. at p. 2.) During the pregnancy, Cheryl was allegedly exposed to teratogenic[3] and reproductively toxic chemicals at the Sony manufacturing facility, resulting in Dominique's exposure to the same toxic chemicals *in utero*.[4] (1 AA 154 [fact no. 6], 177-180 [¶¶ 17-19, 21, 28-30]; 3 AA 635

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[3] "'Teratogenic' means 'tending to cause developmental malformations . . . .'" (*Nguyen, supra*, 229 Cal.App.4th at p. 1529, fn. 3; see *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App. 4th 1549, 1556 ["A teratogen is a chemical that can cause birth defects."].)

[4] The teratogenic and reproductively toxic chemicals to which Dominique was allegedly exposed include:

a. Ethylene glycol ethers and their acetates, propylene glycol monomethyl ether (PGME), propylene glycol monoethyl ether acetate (PGMEA), ethylene glycol, 2-butoxyethano;

b. Toluene;

c. Chlorinated polyvinyl chloride resin;

[fact no. 6]; see also 1 AA 136:7-10; typed maj. opn. at pp. 2-3.) As a result of these exposures, Dominique alleges that she suffered severe birth defects and injuries, including chromosomal deletion, fusion of cervical vertebrae, facial asymmetry, dysplastic nails, diverticulum of the bladder, a misshapen kidney, and developmental delays. (1 AA 154-155 [fact no. 8], 180-181 [¶¶ 32-33]; 3 AA 636 [fact no. 8]; see also 1 AA 136:10-12; typed maj. opn. at pp. 2-3.)

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d. Bisphenol A fumarate resin;

e. Cyclohexanone;

f. Molybdenum disulfide;

g. Zinc pyrophosphate and zinc compounds;

h. Isopropanol (IPA), isopropyl alcohol and acetone; and

i. Methyl ethyl ketone (MEK), methyl alcohol and methyl isobutyl ketone;

j. Xylene;

k. 2-ethylhexoanic acid;

l. Ethoxylated alcohol;

m. Tetrapotassium pyrophosphate;

n. Lead; and

o. Petroleum distillates, including white spirits, lacquer petrol, mineral spirits, solvent naptha and Stoddard solvent.

(1 AA 154 [fact no. 6], 177-180 [¶¶ 17-19, 21, 28-30]; 3 AA 635 [fact no. 6]; see also 1 AA 136:7-10.)

II. PROCEDURAL SUMMARY.

A. Proceedings In The Trial Court.

The original complaint in this action was filed on January 6, 2012, when Dominique was 12 years of age. (1 AA 1, 153-154 [fact nos. 1, 7], 176 [¶ 1], 178 [¶ 21]; 3 AA 634 [fact no. 1], 636 [fact no. 7]; see also 1 AA 135:27 - 136:1, 136:10-12; typed maj. opn. at p. 2.) On June 6, 2012, an amendment naming Defendant Sony in place of fictitious defendant Doe 1 was filed. (1 AA 28.) The operative third amended complaint was filed on March 15, 2013, (*id.* at p. 89), alleging claims against Sony for negligence, strict liability, willful misconduct, intentional misrepresentation, negligent misrepresentation, deceit by concealment, and premises liability. (*Id.* at pp. 102-122.)

On or about July 12, 2013, Defendant Sony filed a motion for summary judgment on the ground that Dominique's "claim [wa]s barred by the statute of limitations set forth in California Code of Civil Procedure section 340.4." (1 AA 128-129.) Sony argued that Dominique's claim accrued no later than the year 2000, when her mother suspected that Dominique's birth defects had been caused by *in utero* toxic exposures at the Sony manufacturing facility where she worked, and that this action was barred by the six-year limitations period in section 340.4 because it was filed on January 6, 2012, more than six years after the accrual of Dominique's claim. (*Id.* at pp. 133-144; typed maj. opn. at p. 3.)

Anticipating Dominique's argument that the applicable statute of limitations is section 340.8, Defendant Sony argued that section 340.8 was inapplicable because section 340.4 is more specific and applies specifically to claims for prebirth injuries. (1 AA 144-148.) Additionally, Sony argued that it would contravene the intent of the Legislature to apply section 340.8, rather than section 340.4, because the limitations period in section 340.8 is subject to tolling for minority under section 352, whereas the limitations period in section 340.4 is not. (*Id.* at pp. 146-148.)

In her opposition to Defendant Sony's motion, Dominique argued that the applicable statute of limitations was section 340.8, not section 340.4, because section 340.8 was a later-enacted, more specific statute that was intended by the Legislature to apply to all actions for injury based on exposure to a hazardous material or toxic substance, except actions arising out of exposure to asbestos or involving medical malpractice. (2 AA 400-410.) Dominique argued that even if her claim accrued on the day she was born (April 13, 1999), the earliest possible time of accrual, it was not time-barred under the six-year limitations period in section 340.4 when section 340.8 became operative on January 1, 2004. (*Id.* at pp. 402-403, 409.) As such, she argued that her claim became subject to section 340.8 at that time (January 1, 2004), and that because the limitations period in section 340.8 allows tolling for minority and/or mental incapacity under section 352, this action was timely filed under section 340.8 because she was both a minor

and mentally incapacitated when the original complaint was filed. (*Id.* at pp. 409-411.)

In its reply, Defendant Sony again argued that the applicable statute of limitations was section 340.4, and that this action was time-barred under section 340.4 because it was filed more than six years after the accrual of Dominique's claim. (2 AA 487-497.)

Defendant Sony's motion for summary judgment was noticed for hearing on September 27, 2013, but the hearing was continued to October 23, 2013. (1 AA 128-129; 2 AA 393.) The parties appeared for the hearing on that date, but it was again continued, this time to March 14, 2014. (2 AA 558.)

Based on this lengthy continuance, Dominique filed an updated opposition on February 28, 2014, in which she argued that her claim was subject to the limitations period in section 340.8, rather than section 340.4, based on the plain meaning of section 340.8's clear language and because it was a later-enacted, more specific statute. (3 AA 569, 571-585.) In addition, she argued that although it was unnecessary to consult the legislative history of section 340.8, because the statute is clear and unambiguous, that history, if considered, supported her position because it showed that section 340.8 was enacted to establish a separate statute of limitations for all civil actions for injury based on exposure to hazardous material or toxic substance, except actions arising out of exposure to

asbestos or involving medical malpractice. (*Id.* at pp. 582-585; see also *id.* at pp. 569, 571-575.) Accordingly, because her claim was not time-barred under section 340.4 when section 340.8 became operative, Dominique argued that her claim became subject to section 340.8 at that time, and that this action was timely filed under section 340.8 based on tolling for minority and mental incapacity under section 352. (*Id.* at pp. 575-576, 586-587.)

Defendant Sony filed an updated reply, in which it argued, as before, that section 340.4 was the applicable statute of limitations, and that this action was time-barred under section 340.4 because it was filed more than six years after the accrual of Dominique's claim. (3 AA 701-711.)

Defendant Sony's motion for summary judgment was heard, argued, and taken under submission on March 14, 2014. (3 AA 781; Reporter's Transcript of Proceedings, Mar. 14, 2014, pp. 4-22.) Later that day, the trial court issued an order granting the motion. (3 AA 782-800.) The trial court ruled that the applicable statute of limitations was section 340.4, not section 340.8, because section 340.4 "is the more specific statute," (*id.* at pp. 782, 794-798), and that this action was barred by section 340.4 because Dominique's claim accrued no later than the year 2000 and this action was filed more than six years later. (*Id.* at pp. 782, 788-794; typed maj. opn. at p. 4.)

Judgment was entered in favor of Defendant Sony on April 8, 2014.

(3 AA 801-802; typed maj. opn. at p. 4.) Notice of entry of judgment was served on April 11, 2014. (3 AA 803-810.) Dominique filed a timely notice of appeal from the judgment on June 6, 2014. (*Id.* at pp. 811-815; Cal. Rules of Court, rule 8.104(a)(1)(B).)

B. The Court Of Appeal's Decision.

In a published opinion filed on May 13, 2016, a divided panel of Second District Court of Appeal affirmed the judgment in favor of Defendant Sony. The majority (Justice Grimes joined by Presiding Justice Bigelow) held that Dominique's claim was governed and barred by the statute of limitations in section 340.4. (Typed maj. opn. at pp. 2, 4-13.) In so holding, the majority disagreed with the decision in *Nguyen, supra*, 229 Cal.App.4th 1522, where the Sixth District Court of Appeal, considering the same limitations issue, unanimously held that "claims based on birth or pre-birth injuries that are due to exposure to hazardous materials or toxic substances are subject to the limitations period in section 340.8," not section 340.4. (*Id.* at pp. 1528, 1539-1540, 1543-1551; see typed maj. opn. at p. 2 [disagreeing with *Nguyen*].)

The dissent (Justice Rubin) disagreed. Agreeing with the analysis and holding in "*Nguyen* that the plain language of section 340.8 shows that it supersedes section 340.4 where an action for prenatal or birth injuries is based on exposure to toxic or hazardous substances," (typed dis. opn. at p. 7), the dissent would have reversed the judgment because Dominique's

claim was timely filed under section 340.8. (*Id.* at pp. 1-2, 4-13.)

LEGAL DISCUSSION

I. STANDARD OF REVIEW.

Summary judgment is properly granted only "if all the papers submitted show there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Martinez v. Combs* (2010) 49 Cal.4th 35, 68.) When moving for summary judgment, a defendant has the "burden of showing . . . that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); accord, *Aguilar v. Atlantic Richfield* Co. (2001) 25 Cal.4th 826, 849-850.) Only if the defendant has satisfied its initial burden does the burden shift to the plaintiff to show the existence of a triable issue of material fact. If the defendant does not satisfy its burden, the burden does not shift and summary judgment should be denied. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at pp. 849-850.)

"In reviewing an order granting summary judgment, [the appellate court] must assume the role of the trial court and redetermine the merits of the motion." (*S.M. v. Los Angeles Unified Sch. Dist.* (2010) 184 Cal.App. 4th 712, 716; accord, *Palm Springs Villas II Ass'n, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 278.)

"'The determination of the statute of limitations applicable to a

cause of action is a question of law [that an appellate court] review[s] independently.'" (*Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1491, quoting *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156, 1164.)

II. THE POTENTIALLY APPLICABLE STATUTES OF LIMITATIONS.

A. Section 340.4: The General Statute Of Limitations For Actions Based On Prebirth Or Birth Injuries.

Section 340.4 provides that "[a]n 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."[5]

Section 340.4 was enacted in 1992 and became operative on January 1, 1994. (Stats. 1992, ch. 163, §§ 16, 161, pp. 731, 842; *Nguyen, supra,* 229 Cal.App.4th at pp. 1539, 1545.) It "continues the last part of former Civil Code Section 29 without substantive change." (22 Cal. Law Revision Com. Rep. (1992) p. 750, reprinted in West's Ann. Code Civ. Proc. foll. § 340.4; accord, *Nguyen,* at pp. 1539, 1545.) Former Civil Code section 29

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[5] Section 352 states in pertinent part that "[i]f a person entitled to bring an action . . . is at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for commencement of the action." (Code Civ. Proc., § 352, subd. (a).)

was originally enacted in 1872 and was amended in 1941 to include a six-year limitations period and "to state expressly that section 352 tolling did not apply to actions brought under that statute." (*Young v. Haines* (1986) 41 Cal.3d 883, 889, 892; accord, *Nguyen*, at p. 1545.)

Section 340.4 has been judicially construed to incorporate the discovery rule, under which a cause of action does not accrue, nor does the statute of limitations begin to run, until the plaintiff discovers, or should have discovered, the negligent or wrongful cause of his or her injury. (*Young, supra*, 41 Cal.3d at pp. 890, 892-893 [construing former Civ. Code, § 29]; *Nguyen, supra*, 229 Cal.App.4th at pp. 1539, 1545.) "Where the plaintiff is a minor, it is the knowledge or lack thereof of the parents which determines when the cause of action accrues." (*Young*, at p. 890, fn. 4.)

B. Section 340.8: The Statute Of Limitations For Injury Actions Based On Exposure To A Hazardous Material Or Toxic Substance.

Section 340.8 sets forth the limitations period for "any civil action for injury or illness based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a).) It provides that "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." (*Ibid.*) Unlike section 340.4, the limitations period in section 340.8 is subject to tolling for minority and/or mental incapacity under section 352. (*Id.*, §§ 340.8, 352, subd. (a); see *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1540-1541 ["we conclude that the tolling provision in section 352 for minority and insanity applies to section 340.8"].)

Pursuant to its express language, only two types of actions are excluded from the limitations period in section 340.8: (1) actions "subject to Section 340.2," the statute of limitations for asbestos-related injury claims; and (2) actions "subject to Section . . . 340.5," the statute of limitations for injury claims based on the professional negligence of a health care provider. (Code Civ. Proc., § 340.8, subd. (c)(1);[6] *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1540, 1546.) In addition, the statute provides that "[m]edia reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another." (Code Civ. Proc., § 340.8, subd. (c)(2).)

Further, the language of section 340.8 shows that it was intended to

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[6] Section 340.8, subdivision (c)(1), states: "For purposes of this section . . . [¶] A 'civil action for injury or illness based upon exposure to a hazardous material or toxic substance' does not include an action subject to Section 340.2 or 340.5."

change existing law as to the limitations period for injury actions based on exposure to a hazardous material or toxic substance, but not other types of actions. In this regard, the statute states: "Nothing in this section shall be construed to limit, abrogate or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (d); see *Nguyen, supra*, 229 Cal.App.4th at p. 1548 ["This language [in section 340.8, subdivision (d),] supports the conclusion that section 340.8 was intended to change existing law regarding the limitations periods for actions 'based upon exposure to a hazardous material or toxic substance,' but not other types of actions."]; accord, typed dis. opn. at p. 8.)

Section 340.8 was enacted in 2003 and became operative on January 1, 2004. (Stats. 2003, ch. 873, § 1, p. 6398; Cal. Const., art. IV, § 8, subd. (c)(2); *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8; *Nguyen, supra*, 229 Cal.App.4th at p. 1540.)

III. SECTION 340.8 IS THE APPLICABLE STATUTE OF LIMITATIONS BASED ON THE PLAIN MEANING OF ITS CLEAR LANGUAGE.

Based on its clear and unambiguous language, the statute of limitations applicable to a claim for prebirth injuries based on exposure to a hazardous material or toxic substance is section 340.8, not section 340.4. This was the determination of the Court of Appeal in *Nguyen*, after a careful analysis of the two statutes. (*Nguyen, supra*, 229 Cal.App.4th at

pp. 1528, 1539-1540, 1543-1551.) It was also the conclusion of the dissent in the Court of Appeal in this case. (Typed dis. opn. at pp. 1-2, 4-13.) It was not, however, the conclusion reached by the majority, which held that section 340.4 is the applicable statute of limitations. That determination was erroneous and should be reversed.

A. The Rules Of Statutory Construction.

The "well-established rules of statutory construction" provide that, in construing a statute, the court "must ascertain the intent of the drafters so as to effectuate the purpose of the law." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.)

> Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context. [Citation.] When statutory language is clear and unambiguous, "'there is no need for construction and courts should not indulge in it. [Citation].'"

(*Ibid*; accord, *Klein v. United States* (2010) 50 Cal.4th 68, 77; *Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709, 715 ["The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context."].) "'If no ambiguity appears in the statutory language, we presume that the Legislature meant what it said, and the plain meaning of the statute controls.'" (*People v. Gray* (2014) 58 Cal. 4th 901, 906, quoting *People v. Stanley* (2012) 54 Cal.4th 734, 737; see *Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 326 ["Where the

statute is clear, courts will not 'interpret away clear language in favor of an ambiguity that does not exist.'"]; *Brandon S. v. State ex rel. Foster Family Home & Small Family Home Ins. Fund* (2009) 174 Cal.App.4th 815, 825 (*Brandon S.*) ["When the statutory language is clear, it governs."].)

"[R]esort to a statute's legislative history is appropriate only if the statute is reasonably subject to more than one interpretation or is otherwise ambiguous." (*Ste. Marie v. Riverside County Reg'l Park and Open-Space District* (2009) 46 Cal.4th 282, 290; accord, *People v. Farell* (2002) 28 Cal. 4th 381, 394; see *Esberg*, *supra*, 28 Cal.4th at p. 269 [if the language of a statute "is unambiguous, we need not consider various extrinsic aids, such as the purpose of the statute, the evils to be remedied, the legislative history, public policy, or the statutory scheme encompassing the statute"]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29 ["resort to legislative history is appropriate only where statutory language is ambiguous"].) "Although legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language." (*In re Steele* (2004) 32 Cal.4th 682, 694; see *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 ["A court may not, 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.'"]; *People v. Dunbar* (2012) 209 Cal.App.4th 114, 117 [courts will not "countenance efforts to *create* an ambiguity by reference to extrinsic

evidence; outside sources simply do not come into play when the language of a statute is clear and unambiguous"]; *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 993 [legislative history cannot be used to rewrite a statute "[w]hen the language of the statute is clear and unambiguous"].)

Applying the above rules, as the court in *Nguyen* and the dissent in the Court of Appeal in this case did, the statute of limitations applicable to a claim for prebirth injuries based on exposure to a hazardous material or toxic substance is section 340.8, not section 340.4.

B. The Clear Language Of Section 340.8 Establishes That It Is The Applicable Statute Of Limitations.

According to its clear language, section 340.8 applies to "*any* civil action for injury or illness based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a), italics added; see *Nelson v. Indevus Pharms., Inc.* (2006) 142 Cal.App.4th 1202, 1209 ["When we look to the clear language of the statute [citation] we see that it applies to 'any' civil action 'for injury or illness based upon exposure to a hazardous material or toxic substance.' Nothing in the statute limits its provisions to environmental hazards, or provides that they do not apply to cases alleging injury from prescription drugs, and we cannot import such a provision into the law."].)

"The word 'any' is not ambiguous." (*Brandon S.*, *supra*, 174 Cal. App.4th at p. 825; accord, *People v. Dunbar*, *supra*, 209 Cal.App.4th at

pp. 117-118.) "From the earliest days of statehood [this Court] ha[s] interpreted 'any' to be broad, general and all embracing." (*California State Auto. Ass'n Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 196.) This Court has "declared the word 'any' means every," (*ibid*), and that it "means without limit and no matter what kind." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; accord, *Nguyen, supra*, 229 Cal.App.4th at pp. 1545-1546; *Dunbar*, at pp. 117-118.) "[T]he ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application." (*California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 737; accord, *Nguyen*, at pp. 1545-1546; *Dunbar*, at pp. 117-118; *Brandon S.*, at p. 825.)

In *Delaney v. Superior Court, supra*, 50 Cal.3d 785, this Court construed the provision of California's newsperson shield law "that a newsperson shall not be adjudged in contempt for 'refusing to disclose *any* unpublished information.'" (*Id.* at p. 798.) The parties seeking disclosure argued that the provision "applie[d] only to unpublished information obtained *in confidence* by a newsperson." (*Ibid.*) The Court disagreed, explaining that "[s]uch a construction might be possible if the voters had used the phrase 'unpublished information' without the modifier 'any[,]'" but "[t]hey did not do so." (*Ibid.*) The Court held that the "use of the word 'any' makes clear that [the shield law] applies to *all* information, regardless of whether it was obtained in confidence." (*Ibid*, italics added.) "To

restrict the scope of [the shield law] to confidential information would be to read the word 'any' out of the section," which the Court "decline[d] to do" because "[s]ignificance should be given, if possible, to every word of an act." (*Ibid.*)

The same reasoning applies here. The use of the term "any civil action" in section 340.8, subdivision (a), makes clear that the statute applies to *all* actions "for injury or illness based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a).) As discussed in greater detail immediately below, the only actions excluded from the scope of section 340.8 are "action[s] subject to Section 340.2 or 340.5." (*Id.*, § 340.8, subd. (c)(1).) Actions subject to section 340.4 are *not* excluded. (*Ibid.*) Thus, "[t]o restrict the scope of" the statute, by creating an exclusion for actions subject to 340.4, "would be to read the word 'any' out of the" statute, (*Delaney, supra*, 50 Cal.3d at p. 798), or, as the dissent in the Court of Appeal put it, would be to change the word "'any' to 'some.'"[7] (Typed dis. opn. at pp. 7-8.)

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[7] Numerous other appellate decisions have recognized and applied the longstanding view that the statutory use of the term "any" evinces a clear legislative intent for the statute to have a broad and all encompassing application. (See, e.g., *California Highway Patrol, supra*, 158 Cal.App.4th at p. 736 ["Thus, the phrase 'any infraction' indicates that the Legislature did not intend to restrict the type of equipment infractions in the enumerated divisions that could be potentially correctable; rather, that phrase means exactly what it says: Any – and thus every – equipment infraction in the enumerated divisions is potentially correctable – i.e., the subject of a 'fix-it' ticket."]; *Regents of Univ. of California v. East Bay*

As just mentioned, pursuant to its express language, section 340.8 excludes only two types of actions from its scope: (1) actions "subject to Section 340.2," the statute of limitations for asbestos-related injury claims; and (2) actions "subject to Section . . . 340.5," the statute of limitations for injury claims based on the professional negligence of a health care provider. (Code Civ. Proc., § 340.8, subd. (c)(1); *Nguyen, supra*, 229 Cal. App.4th at pp. 1540, 1546.) It does *not* exclude actions subject to section 340.4, i.e., actions for prebirth or birth injuries. (Code Civ. Proc., § 340.8, subd. (c)(1); see *Nguyen*, at p. 1546 ["While subdivision (c)(1) expressly excludes those two types of claims from section 340.8's reach, it does mention actions for birth or prebirth injuries 'based upon exposure to a hazardous material or toxic substance.'"].)

It is well settled that "[t]he Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." (*People v. Harrison* (1989) 48 Cal.3d 321, 329; see *Voters for Responsible Ret. v. Board of Supervisors* (1994) 8 Cal.4th 765, 779, fn. 3 ["the Legislature is presumed to be aware of all laws

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Mun. Util. Dist. (2005) 130 Cal.App.4th 1361, 1373 [statutory phrase "'*any* nondiscriminatory charge'" covered all types of nondiscriminatory charges without limitation]; *Souza v. Lauppe* (1997) 59 Cal.App.4th 865, 873 ["We discern no such ambiguity in the phrases 'any changed condition' and 'in or about the locality.' That the phrases encompass countless varieties of change in all manner of conditions in the general area surrounding the alleged nuisance does not mean the language of the statute is ambiguous. To the contrary, the word 'any' expresses an unambiguous legislative intent to broadly apply the statute."].)

existent at the time it passes a statute"].) Thus, the Legislature was presumably aware of section 340.4 when it enacted section 340.8, just as it was presumably aware of sections 340.2 and 340.5. Had the Legislature wanted to exclude actions subject to 340.4 from the scope of section 340.8, as it did for "action[s] subject to Section 340.2 or Section 340.5," (Code Civ. Proc., § 340.8, subd. (c)(1)), it could have easily done so. (See *California Fed. Savs. & Loan Ass'n v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 ["Had the Legislature intended to exempt local public entities only from the provisions under Code of Civil Procedure, part 2, title 9, division 2, it could readily have done so. . . . [¶] 'We must presume that the Legislature knew how to create an exception if it wished to do so ....'"]; *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 882 ["If the Legislature wanted to limit the reach of section 340.6 to malpractice actions between clients and attorneys, it could easily have done so."].) By not doing do so, the Legislature demonstrated its intent that actions for prebirth injuries based on exposure to a hazardous material or toxic substance are to be governed by section 340.8, not section 340.4. (See *Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal.4th 381, 389 ["'[I]f exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary.'"]; *In re Michael G.* (1988) 44 Cal.3d 283, 291 ["Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified

by statute, other exceptions are not to be implied or presumed."]; *Vafi*, at p. 881 ["There is no language in the statute which exempts malicious prosecution claims from the limitations period. . . . Indeed, 'if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.'"]; *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, 327 ["[I]t is presumed that the Legislature knows how to create an exception to the provisions of a statute, and that where it does not create an exception, it is presumed that it did not intend to do so."]; *Geertz v. Ausonio* (1992) 4 Cal.App.4th 1363, 1370 ["We presume the Legislature included all the exceptions it intended to create."].)

Further, subdivision (d) of section 340.8 states: "Nothing in this section shall be construed to limit, abrogate or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance." This provision is significant because it demonstrates that while section 340.8 was not intended to "change the law in effect . . . with respect to actions *not based upon exposure to a hazardous material or toxic substance*," (Code Civ. Proc., § 340.8, subd. (d), italics added), it was intended to "change the law in effect" with respect to actions that *are* based on exposure to a hazardous material or toxic substance, by making such actions subject to the limitations period in section 340.8, rather than the limitations period that previously applied, including section 340.4 to the extent it previously

applied to an action for prebirth injuries based on exposure to a hazardous material or toxic substance.

This was the determination of the Court of Appeal in *Nguyen*, where the court found that subdivision (d) "supports the conclusion that section 340.8 was intended to change existing law regarding the limitations periods for actions 'based upon exposure to a hazardous material or toxic substance,' but not other types of actions." (*Nguyen*, *supra*, 229 Cal.App. 4th at p. 1548.) It was also the conclusion reached by dissent in the Court of Appeal in this case. As the dissent explained,

> the full import of this language [in subdivision (d)] becomes apparent by holding it up to an analytical mirror and examining its corollary obverse: Section 340.8 does "limit, abrogate, and change the law in effect upon the effective date . . . with respect to actions" that *are* based on exposure to toxic substances. That language shows a clear intent to affect section 340.4, albeit by necessary inclusion, if not express iteration.

(Typed dis. opn. at p. 8, italics added.)

Accordingly, based on the plain meaning of its clear language, section 340.8 is an all encompassing statute of limitations that applies to "any" – and thus every – "civil action for injury or illness based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a); *Delaney*, *supra*, 50 Cal.3d at p. 798; *California State Auto. Ass'n Inter-Ins. Bureau*, *supra*, 17 Cal.3d at p. 196.) While the statute excludes certain actions from its broad scope, i.e., actions subject to section

340.2 (asbestos-related injuries) or section 340.5 (injuries based on the professional negligence of a health care provider), it does not exclude actions subject to section 340.4 (prebirth and birth injuries). (Code Civ. Proc., § 340.8, subd. (c)(1).) And the language in subdivision (d) demonstrates that section 340.8 was intended to change existing law regarding the limitations period applicable to actions based on exposure to a hazardous material or toxic substance, by making all such actions subject to its provisions, except for the two exclusions expressly specified in the statute. All of these provisions, read together according to their clear and unambiguous language, demonstrate that section 340.8 was intended by the Legislature to establish a separate statute of limitations having broad application to virtually *all* actions for injuries based on exposure to hazardous materials or toxic substances, *including prebirth injuries*. (See *People v. Blackburn* (2015) 61 Cal. 4th 1113, 1123 [a statute's provisions are to be read in "light of the statute as a whole"]; *City of Huntington Beach v. Board of Admin.* (1992) 4 Cal.4th 462, 468 ["all parts of a statute should be read together"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["In construing the words of a statute . . . to discern its purpose, the provisions should be read together . . . ."].) This was the analysis and conclusion of the Court of Appeal in *Nguyen* and the dissent in the Court of Appeal in this case, (*Nguyen, supra*, 229 Cal.App.4th at pp. 1528, 1539-1540, 1543-1551; typed dis. opn. at pp. 1-2, 4-13), and it

should be the analysis and conclusion of this Court here.

C. The Court of Appeal Majority Erred In Its Analysis Of Section 340.8.

Rather than beginning its analysis of sections 340.4 and 340.8 with a substantive examination of their statutory language, the majority in the Court of Appeal moved almost immediately to a review of each statute's legislative history. (Typed maj. opn. at 4-5.) To be sure, the majority quoted the text of section 340.4 and section 340.8, subdivision (a), and stated that both statutes "are unambiguous on their face under the plain meaning rule" and "may be read to govern plaintiff's action for injuries sustained before her birth and for exposure to toxic substances." (*Ibid.*) But the majority did not actually examine the statutory language, particularly the language of section 340.8, subdivisions (a), (c)(1), and (d), before quickly concluding that "the statutory language does not answer the question which statute of limitations was intended by the Legislature to apply to claims for prenatal injuries caused by exposures to toxic substances," and turning to the legislative history to interpret the statutes to answer that question.

As discussed above, this Court has long recognized that "[b]ecause the statutory language is generally the most reliable indicator of legislative intent, we *first examine* the words themselves, giving them their usual and ordinary meaning and construing them in context." (*Esberg v. Union Oil*

Co., *supra*, 28 Cal.4th at p. 268, italics added; see *State Dep't of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 956 [statutory construction does not begin "with the statutes' purposes," but "with their respective texts"; "'we look first to the words of a statute, "because they generally provide the most reliable indicator of legislative intent"'"].) Legislative history becomes potentially relevant only if, after first examining the statutory language, the language is found to be ambiguous. (See *Ste. Marie v. Riverside County Reg'l Park and Open-Space District*, *supra*, 46 Cal.4th at p. 290 ["resort to a statute's legislative history is appropriate only if the statute is reasonably subject to more than one interpretation or is otherwise ambiguous"; accord, *People v. Farrell*, *supra*, 28 Cal.4th at p. 394; *Esberg*, at p. 269; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, *supra*, 133 Cal.App.4that p. 29.)

Here, it was not until after considering the legislative history of section 340.8 that the majority actually examined the language of the statute's relevant provisions,[8] but rather than reading those provisions together to ascertain the Legislature's intent, it looked at them in a piecemeal fashion. This was erroneous because, as this Court has explained, "[i]n construing the words of a statute . . . to discern its purpose, the provisions should be read together," not individually or in isolation.

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[8] The legislative history of section 340.8 is addressed in part V of the Legal Discussion, *post*, at pages 41 through 48.)

(*City and County of San Francisco v. Farrell*, *supra*, 32 Cal.3d at p. 54; accord, *People v. Blackburn*, *supra*, 61 Cal.4th at p. 1123; *City of Huntington Beach v. Board of Admin.*, *supra*, 4 Cal.4th at p. 468.) As shown above, when that mandate is followed, the statute of limitations applicable to an action for prebirth injuries based on exposure to a hazardous material or toxic substance is section 340.8, not section 340.4.

Turning to the majority's treatment of the language of section 340.8, with respect to the term "any civil action" in subdivision (a), the majority found that use of the word "any" was insufficient to demonstrate an intent for section 340.8 "to supplant section 340.4 in actions alleging prenatal injuries caused by exposure to toxic substances," because it was "not persuaded that the Legislature intended to make such a big change in such an obscure way." (Typed maj. opn. at p. 8.) The majority, however, never addressed the case law, including decisions by this Court, holding that the word "any" has long been interpreted "to be broad, general and all embracing," (*California State Auto. Ass'n Inter-Ins. Bureau v. Warwick*, *supra*, 17 Cal.3d at p. 196), that "'any' means every," (*ibid*), that it "means without limit and no matter what kind," (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 785), and that "its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application." (*California Highway Patrol v. Superior Court*, *supra*, 158 Cal.App.4th at p. 737; accord, *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1545-1546; *People v.*

Dunbar, *supra*, 209 Cal.App.4th at pp. 117-118; *Brandon S.*, *supra*, 174 Cal.App.4th at p. 825.)

With respect to section 340.8, subdivision (c)(1), wherein the Legislature expressly excluded "action[s] subject to Section 340.2 or 340.5" from the term "any civil action" in section of 340.8, subdivision (a), but did not exclude actions subject to section 340.4, the majority acknowledged "the rule of construction *expressio unius est exclusio alterius*, which provides that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presume.'" (Typed maj. opn. at p. 12, quoting *In re Michael G.*, *supra*, 44 Cal.3d at p. 291.) The majority concluded, however, that this rule did not apply with respect to section 340.8 because it """"is inapplicable where its operation would contradict a discernible and contrary legislative intent,""" (*ibid*, quoting *In re Michael G.*, at p. 291), and the majority found that "application of the rule of construction here would be contrary to the plain legislative intent of both statutes." (*Ibid.*) This finding was erroneous because there is no "plain legislative intent" to exclude actions for prebirth injuries based on exposure to a hazardous material or toxic substance from the operation of section 340.8. The Legislature certainly did not express any such intent in the statute itself and, as discussed above, the statute's plain language establishes that it was intended to create a separate statute of limitations applicable to all actions for injury based on exposure to a

hazardous material or toxic substance, regardless of age, except actions for injuries based on exposure to asbestos or the professional negligence of a health care provider. This was the conclusion in *Nguyen*, where the court found no "legislative intent that precludes application of the rule" against implying exclusions beyond those expressly specified in a statute. (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1546 & fn. 10; see also typed dis. opn. at p. 8 ["The Legislature's choice to specifically exempt asbestos exposure and medical malpractice claims from [section 340.8's] reach, but no others, also supports my interpretation" that section 340.8 is the applicable statute of limitations].) Nor, as discussed later in this brief, could the majority use or rely on its interpretation of the legislative history of section 340.8 to "'give the words an effect different from the plain and direct import of the terms used,'" (*DiCampli-Mintz v. County of Santa Clara*, *supra*, 55 Cal.4th at p. 992, quoting *California Fed. Savs. & Loan Ass'n v. City of Los Angeles*, *supra*, 11 Cal.4th at p. 349), or "to make it conform to a presumed intent that is not expressed." (*Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 73-74.)

With respect to section 340.8, subdivision (d), based on its assessment of the legislative history, the majority stated that it "read subdivision (d) to mean only that section 340.8 does not change any law except that it codifies the delayed discovery rule in personal injury cases based on toxic exposures that were previously governed by the two-year

limitations period of section 335.1." (Typed maj. opn. at p. 10.) That is not what subdivision (d) says. Subdivision (d) clearly states that "[n]othing in this section shall be construed to limit, abrogate or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance." As seen from its language, subdivision (d) does not, as the majority concluded, restrict any change in the law effected by section 340.8 to the codification of "the delayed discovery rule in personal injury cases based on toxic exposures." (Typed maj. opn. at p. 10.) Again, "[a] court may not, 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.'" (*DiCampli-Mintz*, *supra*, 55 Cal.4th at p. 992, quoting *California Fed. Savs. & Loan Ass'n*, *supra*, 11 Cal.4th at p. 349.)

As discussed above, the *Nguyen* court, construing the language of the statute as written, found that subdivision (d) "supports the conclusion that section 340.8 was intended to change existing law regarding the limitations periods for actions 'based upon exposure to a hazardous material or toxic substance,' but not other types of actions." (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1548.) Similarly, the dissent in the Court of Appeal in this case found that "the full import of this language" in subdivision (d) shows that section 340.8 was intended to "'limit, abrogate, and change the law in effect upon the effective date . . . with respect to

actions' that are based on exposure to toxic substances," and "shows a clear intent to affect section 340.4, albeit by necessary inclusion, if not express iteration." (Typed dis. opn. at p. 8.)

Citing the principle that "'[w]e do 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,'" (typed maj. opn. at p. 8-9, quoting *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199 (*Zamudio*)), the majority concluded that because the Legislature did not "expressly say[] so," it did not intend for section 340.8 to replace section 340.4 in actions for prebirth injuries based on exposure to a hazardous material or toxic substance. (*Id.* at p. 9.) This argument was addressed in *Nguyen*, where the court concluded that "[w]hile the Legislature did not expressly state that it enacted section 340.8 in denigration of – or as an exception to – section 340.4, we think such a conclusion is necessarily implied from the broad language of section 340.8." (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1547, citing *Zamudio*, at p. 199.) The court then explained as follows:

> As we have noted, section 340.8 applies to "any" action for injury or illness based upon exposure to a hazardous material or toxic substance. It expressly provides for delayed accrual of the cause of action under the discovery rule, and says that media reports alone are not enough to trigger the statute of limitations under the discovery rule. And while it exempts other types of claims from its coverage, it does not exempt birth or pre-birth injuries. All of these provisions in section 340.8 support the conclusion that the Legislature intended

> section 340.8 to have broad application to all claims based upon exposure to hazardous materials or toxic substances, including birth and pre-birth injuries.

(*Id.* at pp. 1547-1548.)

Moreover, a similar argument – that the Legislature was required to expressly state that a statute of limitations was applicable to a particular type of claim – was rejected in *Vafi v. McCloskey*, *supra*, 193 Cal.App.4th 874. In that case, the plaintiff argued that his action for malicious prosecution against an attorney was subject to the general two-year limitations period for malicious prosecution claims in section 335.1, not the one-year limitations period for actions against attorneys in section 340.6. (*Id.* at pp. 877, 879-880.) He argued that section 340.6 was inapplicable because "the Legislature was required to amend [section 340.6] to expressly add malicious prosecution to the reach of the statute." (*Id.* at p. 881.) The Court of Appeal disagreed, holding that section 340.6 was applicable based on its plain language and because, while certain types of actions were excluded from section 340.6, actions for malicious prosecution were not. (*Ibid.*)

> Based on its plain language, section 340.6 applies to all actions, except those for actual fraud, brought against an attorney "for a wrongful act or omission" which arise "in the performance of professional services." [Citations.] There is no language in the statute which exempts malicious prosecution claims from the limitations period. We are not persuaded by Vafi's argument that the Legislature was required to amend the statute to expressly add malicious prosecution to the reach of the statute. Indeed, "if exemptions

> are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." [Citation.] Vafi has submitted no authority which would support a different reading of section 340.6.

(*Ibid*; see also *id.* at p. 882 ["If the Legislature wanted to limit the reach of section 340.6 to malpractice actions between clients and attorneys, it could easily have done so."].)

The same is true here with respect to section 340.8. There is no language in section 340.8 excluding actions for prebirth injuries based on exposure to a hazardous material or toxic substance, and the Legislature was not required to expressly state that section 340.8 is applicable to such actions, when the plain language of the statute clearly shows that such actions fall within its scope. Moreover, even if the Legislature did not contemplate the factual scenario presented in this case, the plain language of the statute cannot be disregarded. (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 89; see *Steven S. v. Deborah D.*, *supra*, 127 Cal.App.4th at p. 327 ["The courts are often called upon to construe statutes in factual settings not contemplated by the Legislature, and in doing so, may not disregard the statute . . . ."].)

The majority also cited the rule that when "'called upon to interpret two seemingly inconsistent statutes to determine which applies under a particular set of facts, our goal is to harmonize the law [citation] and avoid an interpretation that requires one statute to be ignored.'" (Typed maj. opn.

at p. 5, quoting *Chatsky & Assocs. v. Superior Court* (2004) 117 Cal.App. 4th 873, 876; see *id.* at p. 9 [addressing "our mandate to harmonize conflicting statutes"].) But as this Court recently explained, "the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach. . . . This canon of construction, like all such canons, does not authorize courts to rewrite statutes." (*State Dep't of Pub. Health, supra*, 60 Cal.4th at p. 956; see *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 827 [it is a "cardinal rule [of statutory construction] that courts may not add provisions to a statute"]; accord, *DiCampli-Mintz, supra*, 55 Cal.4th at p. 992.)

Here, the majority did not harmonize sections 340.4 and 340.8 by interpreting the statutes "in a way that rendered the text of the two acts consistent." (*State Dep't of Pub. Health, supra,* 60 Cal.4th at p. 956.) Rather, it harmonized the statutes by disregarding the plain language of section 340.8 and effectively rewriting it to add an exclusion for prebirth injury actions under section 340.4. That was erroneous. The two statutes cannot be harmonized because they "are in conflict" as to which is applicable to an action for prebirth injuries based on exposure to a hazardous material or toxic substance, "and thus one must be interpreted as providing an exception to the other." (*Ibid.*) For the reasons set forth above, section 340.8 is the applicable statute of limitations based on the

intent reflected in its clear language, and because it is a later-enacted, more specific statute, as discussed in the next part of this brief.

IV. SECTION 340.8 IS THE APPLICABLE STATUTE OF LIMITATIONS BECAUSE IT IS A LATER, MORE SPECIFIC STATUTE.

When two statutes of limitations are potentially applicable to an action, but one was enacted later and is more specific, "it is the later, more specific statute which must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation." (*Young v. Haines*, *supra*, 41 Cal.3d at p. 894; accord, *Woods v. Young* (1991) 53 Cal.3d 315, 324-325 [applying the "rule of statutory construction that a later, more specific statute controls over an earlier, general statute"]; *Vafi v. McCloskey*, *supra*, 193 Cal.App.4th at pp. 880-881 [same].) In addition to its clear statutory language, this rule provides further support that section 340.8, not section 340.4, is the statute of limitations applicable to claim for prebirth injuries based on exposure to a hazardous material or toxic substance.

In *Young v. Haines*, *supra*, 41 Cal.3d 883, the issue was whether "an action for injuries incurred during birth as a result of medical malpractice" was governed by the statute of limitations for prebirth and birth injuries in former Civil Code section 29, the predecessor of section 340.4, or the medical malpractice statute of limitations in section 340.5. (*Id.* at p. 889.) This Court reviewed each statute and found that both "appear[ed] to govern

this case." (*Id.* at pp. 891-894.) The Court cited the "general rule" in section 1859, "that 'when a general and particular [statutory] provision are inconsistent, the latter is paramount to the former,'" but noted that this "rule d[id] not offer any guidance" because "[t]he two statutes on their face are equally specific." (*Id.* at p. 894.) "Section 29 governs all actions for prenatal and birth injuries, regardless of their cause," whereas "[s]ection 340.5 governs all actions for injuries caused by medical malpractice, regardless of the nature of the injury." (*Ibid.*) The Court, however, concluded that section 340.5 was ultimately more specific because it was "a later-enacted statute, intended to cover all personal injury claims arising from medical malpractice," and because it evinced "a plain legislative intent . . . to treat all malpractice victims differently from other personal injury victims." (*Ibid.*) Thus, the Court held that section 340.5 prevailed under the rule that a "later, more specific statute . . . must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation." (*Ibid.*)

The same analysis applies here. As in *Young*, the two competing statutes of limitations – sections 340.4 and 340.8 – are equally specific on their face. Section 340.4 applies to actions for prebirth injuries, regardless of their cause. (Code Civ. Proc., § 340.4; *Young*, *supra*, 41 Cal.3d at p. 894.) Section 340.8 applies to "any civil action for injury or illness based upon exposure to a hazardous material or toxic substance," regardless

of the nature of the injury. (Code Civ. Proc., § 340.8, subd. (a).) However, as discussed above, based on its clear and unambiguous language, section 340.8 was intended to establish a separate statute of limitations covering *all* actions for injury based on exposure to a hazardous material or toxic substance, regardless of age. The only two exceptions, as specified in the statute, are actions subject to section 340.2 or section 340.5; there is no exception for actions subject to section 340.4. (*Id.*, § 340.8, subd. (c)(1).) In addition, subdivision (d) establishes that section 340.8 was intended to change existing law regarding the limitations period applicable to actions for injuries based on exposure to a hazardous material or toxic substance, by making such actions subject to its provisions, rather than the limitations period that previously applied. Thus, just as *Young* held that section 340.5 controlled over former Civil Code section 29 in an action for birth injuries caused by medical malpractice, because it was a later-enacted, more specific statute intended "to deal specifically with all medical malpractice claims," (*Young*, at p. 894), section 340.8 controls over section 340.4 in an action for prebirth injuries based on exposure a hazardous material or toxic substances, because it is a later-enacted,[9] more specific statute that, except for the two exclusions specified therein, was intended to cover *all* claims for injury "based upon exposure to a hazardous material or toxic

[9] There is no dispute that section 340.8 is a later-enacted statute, as it was enacted many years after section 340.4. (See, *ante*, at pp. 12-15.)

substance." (Code Civ. Proc., § 340.8, subd. (a).)

This was the analysis of the Court of Appeal in *Nguyen*. Although "section 340.8 is not part of an 'interrelated legislative scheme enacted to deal with' claims involving exposure to hazardous material and toxic substances," the court found that "subdivision (d) of section 340.8 evinces a legislative intent to treat victims of toxic substance exposures 'differently from other personal injury victims.'" (*Nguyen*, *supra*, 229 Cal.App.4th at pp. 1549-1550, quoting *Young*, *supra*, 41 Cal.3d at p. 894.) Accordingly, "[b]ased on [its] plain language analysis of section 340.8 and the breadth of the language used in that section, [the *Nguyen* court] conclude[d] that like section 340.5 in *Young*, 'it is the later, more specific statute which must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation.'" (*Id.* at p. 1550.)

The majority in the Court of Appeal in this case tried to distinguish *Young*, on the grounds that the prevailing statute in that case – section 340.5 – "was part of a comprehensive and 'interrelated legislative scheme enacted to deal specifically with all medical malpractice claims' and 'to treat all malpractice victims differently from other personal injury victims,'" (typed maj. opn. at p. 11, quoting *Young*, *supra*, 41 Cal.3d at p. 894), and because section 340.5 "contains express language pertaining to claims by minor plaintiffs." (*Ibid.*) The majority did not find a similar purpose in section 340.8 because it "was not enacted as part of a

comprehensive legislative scheme" and because it "contains no express language concerning minor plaintiffs." (*Ibid.*) In addition, the majority found that the legislative history of section 340.8 showed that it "was only intended to codify the delayed discovery rule as to toxic exposure cases . . . and to reject the holding of *McKelvey v. Boeing North American, Inc.* [(1999) 74 Cal.App.4th 151]" that media reports could give rise to inquiry notice. (*Ibid*; see *id.* at p. 8.)

The majority's rejection of *Young*'s application to the issue here does not stand scrutiny for the reasons discussed above. Based on the clear language of its statutory provisions, including subdivisions (a), (c)(1), and (d), read together as a whole, section 340.8 was intended to establish a separate statute of limitations applicable to all actions for injury based on exposure to a hazardous material or toxic substance, regardless of age, except actions based on exposure to asbestos or the professional negligence of a health care provider. This conclusion cannot be avoided by taking a constrained or piecemeal view of the statute's language. Nor, as discussed in the next part of this brief, can the statute's plain meaning be changed or disregarded by resorting to its legislative history.

As noted, the court in *Nguyen* acknowledged that "section 340.8 is not part of an 'interrelated legislative scheme enacted to deal with' claims involving exposure to hazardous material and toxic substances," but it found, based on its statutory language, including subdivision (d), that

"section 340.8 evinces a legislative intent to treat victims of toxic substance exposures 'differently from other personal injury victims.'" (*Nguyen*, *supra*, 229 Cal.App.4th at pp. 1549-1550, quoting *Young*, *supra*, 41 Cal.3d at p. 894.) Similarly, the dissent in the Court of Appeal in this case found that subdivision (d) showed that section 340.8 was intended to "'limit, abrogate and change the law in effect upon the effective date . . . with respect to actions' that are based on exposure to toxic substance," and that the language in that subdivision "show[ed] a clear intent to affect section 340.4, albeit by necessary inclusion, if not express iteration."[10] (Typed dis. opn. at p. 8; see also *id.* at p. 13 ["As I see it, section 340.8 is just another extension of the Legislature's intent to treat toxic tort cases differently from other personal injury actions"].)

Accordingly, because it is a later-enacted, more specific statute, section 340.8 is the statute of limitations applicable to claim for prebirth injuries based on exposure to a hazardous material or toxic substance.

V. SECTION 340.8 CANNOT BE JUDICIALLY REWRITTEN BASED ON ITS LEGISLATIVE HISTORY.

As discussed above, based on its summary conclusion that "the statutory language does not answer the question which statute of limitations was intended by the Legislature to apply to claims for prenatal injuries

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10 Like the court in *Nguyen*, the dissent "acknowledge[d] that section 340.8 is not part of a comprehensive scheme," but also aptly pointed out that "nor is section 340.4 part of a comprehensive scheme." (Typed dis. opn. at p. 6, fn. 5.)

caused by exposures to toxic substances," the majority in the Court of Appeal turned immediately to "the legislative history of both statutes." (Typed maj. opn. at p. 5.) Based on its review of that history, the majority concluded that section 340.8 was enacted merely "to incorporate the two-year limitations period of section 335.1 for toxic exposure cases, to codify the delayed discovery rule for those cases, and to disapprove the holding in *McKelvey v. Boeing North American, Inc.*" regarding inquiry notice based on media reports. (*Id.* at p. 10.) According to the majority, "[t]he legislative records reveal a narrow and specific purpose for the enactment of section 340.8 having nothing to do with prenatal injuries," (*id.* at pp. 7, 11), and it found nothing in the statute or its legislative history demonstrating an intent for section 340.8 to supplant section 340.4 for prebirth injury actions based on exposure to a hazardous material or toxic substance. (*Id.* at pp. 6-11.)

The majority's analysis and conclusion are flawed because the plain language of section 340.8 cannot be contravened by using its legislative history to effectively rewrite the statute to add an exclusion for actions subject to section 340.4, when the Legislature chose not to include such an exclusion itself. As previously noted, "resort to a statute's legislative history is appropriate only if the statute is reasonably subject to more than one interpretation or is otherwise ambiguous." (*Ste. Marie v. Riverside County Reg'l Park and Open-Space District*, *supra*, 46 Cal.4th at p. 290;

accord, *People v. Farell*, *supra*, 28 Cal. 4th at p. 394; *Esberg v. Union Oil Co.*, *supra*, 28 Cal.4th at p. 269; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, *supra*, 133 Cal. App.4th at p. 29.) "Although legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language." (*In re Steele*, *supra*, 32 Cal.4th at p. 694; see *DiCampli-Mintz v. County of Santa Clara*, *supra*, 55 Cal.4th at p. 992 ["A court may not, 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.'"]; *Cornette v. Department of Transp.*, *supra*, 26 Cal.4th at pp. 73-74 ["A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed."]; *Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 827 [it is a "cardinal rule [of statutory construction] that courts may not add provisions to a statute"]; *In re Marriage of Hokanson*, *supra*, 68 Cal.App.4th at p. 993 [legislative history cannot be used to rewrite a statute "[w]hen the language of the statute is clear and unambiguous"].) Moreover, as this Court has explained, it is a statute, not its legislative history, that is enacted. "It is the former that 'must prevail over' the latter, and not the opposite." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 854, citing and quoting *In re Cervera* (2001) 24 Cal.4th 1073, 1079-1080.)

As shown above, section 340.8 is clear and unambiguous. According to its plain meaning, it applies to *any* action for injury based on

exposure to a hazardous material or toxic substance, except actions subject to section 340.2 or section 340.5. (Code Civ. Proc., § 340.8, subds. (a), (c)(1); *Nguyen, supra*, 229 Cal.App.4th at pp. 1543-1551.) Because section 340.8 is clear and does not exclude actions subject to section 340.4, its legislative history is irrelevant to its construction and cannot be used to judicially create such an exclusion.

The court in *Nguyen* recognized it was unnecessary to consider the legislative history of section 340.8, explaining that because "our analysis is based on the plain text of section 340.8, we need not resort to legislative history materials as an aid to construction." (*Nguyen, supra*, 229 Cal.App. 4th at p. 1550.) The court nevertheless took judicial notice of and reviewed the statute's legislative history, concluding that "it does not contain anything that persuades us that our analysis of section 340.8 is incorrect." (*Ibid*, fn. omitted.) As the court explained:

> The legislative history [of section 340.8] does not mention section 340.4 (pre-birth injuries), section 352, or the age of the plaintiff. Nothing in the legislative history states that by enacting section 340.8 (toxic exposures) the Legislature intended to create an exception to section 340.4 (pre-birth injuries). But, *more importantly*, the legislative history does not indicate that in enacting a new statute of limitations for civil actions for injury or illness based on exposures to toxic substances, the Legislature intended that a different limitations period apply if the exposure occurred before or during the plaintiff's birth. In other words, there is no indication that the Legislature intended, and it makes no sense, for there to be a different discovery rule (e.g., regarding inquiry notice and media reports) depending on whether the toxic exposure occurred before or after birth.

> Nothing in the legislative history suggests that the Legislature intended that section 340.4 (prebirth injuries), rather than section 340.8 (toxic exposures), should apply to prenatal toxic exposure cases, or that section 352 should not apply to such cases.

(*Id.* at pp. 1550-1551, italics added.)

Like the court in *Nguyen*, the dissent in the Court of Appeal in this case found that "[g]iven the plain language analysis" of section 340.8, "the legislative history has no interpretative effect." (Typed dis. opn. at p. 9.) But even if the legislative history were considered, the dissent explained that "it would still point us in the same direction." (*Ibid.*) The dissent "agree[d] with the majority that the legislative history of section 340.8 never mentions section 340.4 and focuses on the goal of codifying the delayed discovery rule," but, "[b]y the same token, . . . it also does not mention an intent to restrict section 340.8 to toxic substance exposure cases to minors and adults." (Typed dis. opn. at pp. 8-9.) The dissent cited the Legislative Counsel's Digest for the bill to enact section 340.8,[11] which

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[11] "'The Legislative Counsel's Digest is printed as a preface to every bill considered by the Legislature.' [Citation.] The Legislative Counsel's summaries 'are prepared to assist the Legislature in its consideration of pending legislation.' [Citation.] Although the Legislative Counsel's summaries are not binding [citation], they are entitled to great weight. [Citation.] 'It is reasonable to presume that the Legislature amended those sections with the intent and meaning expressed in the Legislative Counsel's digest.' [Citation.]" (*Jones v. Lodge at Torrey Pines P'ship* (2008) 42 Cal. 4th 1158, 1169-1170; see *Mt. Hawley Ins. Co. v. Lopez* (2103) 215 Cal. App.4th 1385, 1401 ["The Legislative Counsel's digest 'constitutes the official summary of the legal effect of the bill and is relied upon by the

states that the statute "was intended to create 'a *separate* statute of limitations for a civil action for injury or illness based upon exposure to a hazardous material or toxic substance *other than asbestos, as specified.*'" (*Id.* at p. 9, quoting Legis. Counsel's Dig., Assem. Amends. to Sen. Bill No. 331 (2003-2004 Reg. Sess.), Sept. 8, 2003, first italics added.)[12] This statement supported the dissent's conclusion that "section 340.8 created a new statute of limitations for all toxic exposure actions except for those types of action specifically excepted." (*Ibid.*)

As further support for its conclusion, the dissent cited a Senate

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Legislature throughout the legislative process,' and thus 'is recognized as a primary indication of legislative intent.'"].)

[12] The Legislative Counsel's Digest for the bill to enact section 340.8 (Senate Bill No. 331) is available at <http://www.leginfo.ca.gov/bilinfo.html> (as of November 22, 2016).

The Legislative Counsel's Digest for the final version of Senate Bill No. 331, as chaptered by the Secretary of State, states:

> Existing law sets forth the statute of limitations applicable to various causes of action, including a civil action for injury or illness based upon exposure to asbestos, as specified.
>
> This bill would establish a separate statute of limitations for a civil action for injury or illness based upon exposure to a hazardous material or toxic substance other than asbestos, as specified. The bill would also state the intent of the Legislature to codify and disapprove the rulings in specific court cases.

(Legis. Counsel's Dig., Stat. 2003, ch. 873, Sen. Bill No. 331 as chaptered Oct. 12, 2003.)

committee analysis of the bill to enact section 340.8, which "clarified that it 'does not apply to actions [relating to asbestos exposure or medical malpractice] and specifies that the bill does not limit, abrogate, or change the law in effect on the effective date of the bill with respect to actions not based upon exposure to a hazardous material or toxic substance.'" (Typed dis. opn. at p. 9, quoting Sen. Com. on Judiciary, 3d reading analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Sept. 8, 2003, p. 3.)[13] The dissent found that "[b]y tying together those two provisions – the exceptions for asbestos and medical malpractice actions and the effect on existing laws – this analysis shows that section 340.8 was designed to have a broad effect and apply to all other toxic substance exposure cases."[14] (*Id.* at pp. 9-10.)

Additionally, the dissent in the Court of Appeal "observe[d] that if the Legislature had intended to adopt only a discovery rule for toxic tort cases," as the majority concluded, "it could have simply amended section 335.1 which deals generally with personal injuries and which at that time

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[13] The cited Senate committee analysis is available at <http://www.leginfo.ca.gov/bilinfo.html> (as of November 22, 2016).

[14] In addition, consistent with the codified language in section 340.8, subdivision (a), Senate committee analyses stated that the statute would apply to "*any* civil action for injury or illness based upon exposure to a hazardous substance." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003, p. 2, italics added; Sen. Com. on Judiciary, May 6, 2003, analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003 at p. 2, italics added.)

applied to toxic torts." (Typed dis. opn. at p. 10.) But the Legislature did not do that. "Instead, the Legislature adopted a new statute of limitations for exposure to hazardous materials and toxic substances, stated its intent that the new statute apply to any action for such exposure, and excluded from its ambit [only] asbestos and medical malpractice causes of action."[15] (*Ibid.*)

Accordingly, it is unnecessary to consider the legislative history of section 340.8 because its language is clear and unambiguous. If, however, the legislative history is considered, that history supports the intent reflected in the statute's language: that it was intended to create a separate statute of limitations applicable to all actions for injury based on exposure to a hazardous substance or toxic material, regardless of age, except actions based on exposure to asbestos or professional medical negligence.

VI. THE APPLICATION OF SECTION 340.8 WILL NOT LEAD TO "ABSURD RESULTS."

In support of its holding in favor of section 340.4, the majority in the Court of Appeal found that applying section 340.8 to an action for prebirth injuries based on exposure to a hazardous material or toxic substance "would lead to absurd results" because it would provide a different and

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[15] Referring to the inquiry notice provision in section 340.8, subdivision (c)(2), the dissent also recognized that it would make no sense to have one inquiry notice rule for toxic exposure claims based on post-birth injuries and a different rule for toxic exposure claims based on prebirth or birth injuries. (Typed dis. opn. at p. 10.)

potentially longer limitations period for those actions compared to other types of prebirth injury actions. (Typed maj. opn. at pp. 12-13.) This argument was considered and rejected in *Nguyen*, with the court there explaining that it was "not persuaded that our construction of section 340.8 will lead to absurd results." (*Nguyen, supra*, 229 Cal.App.4th at p. 1548.)

Nguyen noted that in *Young v. Haines*, this Court recognized that "the six-year rule in section 340.4 is not absolute since claims for birth and prebirth injuries are subject to delayed accrual under the discovery rule." (*Nguyen, supra*, 229 Cal.App.4th at p. 1548, citing *Young v. Haines*, *supra*, 41 Cal.3d at pp. 892-893.) Thus, even under section 340.4, it is possible for a prebirth injury action to be timely filed many years, even decades, after the plaintiff's birth, with "each case turning on facts related to its delayed accrual." (*Nguyen, supra*, at p. 1548; see *Samuels v. Mix* (1999) 22 Cal.4th 1, 9 ["The common law discovery rule, where applicable, indefinitely delays accrual of a cause of action until the plaintiff discovers or reasonably has cause to discover the facts constituting it."].) *Nguyen* also observed that "*Young* . . . held that section 340.4 does not apply to claims for birth and pre-birth injuries based on medical malpractice. [Citation.] Thus, it is clear that section 340.4 does not apply to all claims alleging birth or pre-birth injuries," and that the law already recognizes differences in the treatment of some prebirth injury claims. (*Nguyen*, at p. 1548.)

Like the court in *Nguyen*, the dissent in the Court of Appeal in this

case was not persuaded by the "absurd results" argument:

> The majority rejects the application of section 340.8 to prenatal injuries because, among other things, it would produce an absurd result – various prenatal injuries would be subject to different statutes of limitations depending on the nature of the injury. [Citation.] Absurd results are indeed to be avoided in statutory construction, but the result described by the majority is consistent with the general framework of our statutes of limitations. Different wrongs are governed by different periods of limitation. That is what our Supreme Court recognized in *Young* when it excluded prenatal and childbirth medical malpractice claims from section 340.4. It strikes me as no more absurd to exclude toxic claims from the prenatal statute of limitations than to exclude medical malpractice claims from the prenatal statute of limitations. In both instances the unborn and just born are subject to the same rules as minors and adults.

(Typed dis. opn. at p. 10, fn. omitted.) In addition, the dissent found it "neither surprising nor absurd," due to the insidious nature of toxic exposure injuries, "that the Legislature would conclude that toxic tort claims should be subject to a period of limitation different than the general personal injury statute of limitation (§ 335.1) and other statutes."[16] (*Id.* at pp. 11-13.)

While most personal injury actions are subject to the general personal injury statute of limitations in section 335.1, there are several

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[16] The dissent also made clear that "[u]nder the interpretation I propose, section 340.4 still has much life left to it. Prenatal and birth injuries can occur through many forms of negligent and intentional acts that fall outside the scope of medical malpractice or toxic substance exposures, and those acts remain subject to section 340.4. Automobile accidents, premises liability, and assaults all come to mind." (Typed dis. opn. at p. 10, fn. 7.)

types of personal injury claims that have their own statutes of limitations. (E.g., Code Civ. Proc., §§ 337.1 [injury or death from deficient planning or construction of improvements to real property], 340.1 [injury based on childhood sexual abuse], 340.2 [injury or death based on exposure to asbestos], 340.4 [general statute of limitations for prebirth or birth injuries], 340.5 [injury or death based on professional negligence of health care provider], 340.8 [injury or death based on exposure to hazardous material or toxic substance].) While these latter actions could all fall within the scope of section 335.1, the fact that they have their own separate statute of limitations has not created "absurd results."

Accordingly, the application of section 340.8 to an action for prebirth injuries based on exposure to a hazardous material or toxic substance will not lead to "absurd results," as there is nothing absurd about having one statute of limitations for that type of toxic exposure prebirth injury claims, with other statutes of limitations for other types of prebirth injury claims.

VII. THIS ACTION WAS TIMELY FILED UNDER SECTION 340.8.

After deciding that section 340.8 was the statute of limitations applicable to an action for prebirth or birth injuries based on exposure to a hazardous material or toxic substance, the court in *Nguyen* addressed whether the plaintiff's claim in that case was time-barred. (*Nguyen, supra,*

229 Cal.App.4th at pp. 1551-1554.) Although the plaintiff was born on August 11, 1994, the court found delayed accrual of her claim until December 31, 1998. (*Id.* at pp. 1527-1528, 1551-1554.) Thus, while section 340.4 was the statute of limitations applicable to the plaintiff's claim when it accrued on December 31, 1998, it was "not barred by the six-year limitations period in section 340.4 (pre-birth injuries) on January 1, 2004 when section 340.8 (toxic exposures) went into effect," because the plaintiff "had until December 31, 2004 to file suit" under section 340.4. (*Id.* at pp. 1528, 1541-1543, 1554.) Therefore, section 340.8 became the statute of limitations applicable to her claim on January 1, 2004, "[a]nd although section 340.8 (toxic exposures) contains a two-year statute of limitations, it effectively provides for a 'longer limitations period' since, unlike section 340.4 (pre-birth injuries), it is subject to tolling for minority and insanity (§ 352)." (*Id.* at pp. 1528, 1542-1543, 1554.) Accordingly, because the plaintiff was 16 years of age when the original complaint was filed, the court held that her action was timely filed under section 340.8 based on minority tolling under section 352. (*Ibid.*) The result should be the same here.

Defendant Sony argued in its motion for summary judgment and the trial court, in its order granting the motion, found that Dominique's claim accrued no later than the year 2000. (1 AA 133-144; 3 AA 782, 788-794.) In its brief in the Court of Appeal, Sony argued that Dominique's claim

accrued on the day she was born (April 13, 1999) because her "mother, Cheryl Lopez, had an actual suspicion upon Dominique's birth that the chemicals to which she was allegedly exposed had caused Dominique to incur birth defects." (Sony's Respondent's Brief at pp. 1, 13.) It does not matter, however, whether Dominique's claim accrued at birth or in 2000, because even if it accrued at birth, which is the earliest possible time of accrual, her claim was not time-barred under section 340.4 when section 340.8 became operative on January 1, 2004, since she would have had six years, or until April 13, 2005, to file suit under section 340.4.

Accordingly, because Dominique's claim was not (and could not have been) time-barred under section 340.4 on January 1, 2004, when section 340.8 went in to effect, it became subject to section 340.8 at that time. (*Nguyen, supra*, 229 Cal.App.4th at pp. 1528, 1542-1543, 1554; see *Quarry v. Doe I* (2012) 53 Cal.4th 945, 956 ["As long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment."]; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 596 ["Statutes generally operate only prospectively, and '[a] new statute that enlarges a statutory limitations period [only] applies to actions that are not already barred by the original limitations period at the time the new

statute goes into effect.'"].) Because the limitations period in section 340.8 is subject to tolling for minority under section 352, (Code Civ. Proc., §§ 340.8, 352, subd. (a); *Nguyen*, at pp. 1528, 1540-1541, 1543, 1554), and because Dominique was a minor when her claim accrued and when the original complaint was filed on January 6, 2012, (1 AA 1, 153-154 [fact nos. 1, 7], 176 [¶ 1], 178 [¶ 21]; 3 AA 634 [fact no. 1], 636 [fact no. 7]; see also 1 AA 135:27 - 136:1, 136:10-12), this action was timely filed under section 340.8 based on minority tolling under section 352. (Code Civ. Proc., §§ 340.8, 352, subd. (a); *Nguyen*, at pp. 1528, 1543, 1554; see *West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal. App.4th 935, 947 [unless there is a statutory exception, pursuant to section 352, subdivision (a), "any statute of limitations which applies to the claims of a minor is tolled until the minor reaches the age of 18"]; *Chaney v. Superior Court* (1995) 39 Cal.App.4th 152, 155 [same].) Defendant Sony's motion for summary judgment should have therefore been denied.

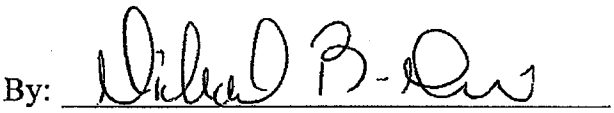
CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeal should be reversed, as should the judgment entered in favor of Defendant Sony, because this action was timely filed under section 340.8.

Dated: November 22, 2016

Respectfully submitted,

WATERS, KRAUS & PAUL

By: 

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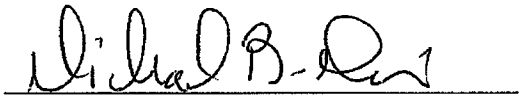
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies that this Petitioner's Opening Brief on the Merits contains 13,702 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Mircrosoft Word word-processing program used to generate it.



Michael B. Gurien
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PROOF OF SERVICE

Dominique Lopez, Plaintiff and Appellant
vs.
Sony Electronics, Inc., Defendant and Respondent
Los Angeles Superior Court Case Number BC476544
Supreme Court Case Number S235357

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Deborah Ristovski, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 222 North Sepulveda Boulevard, Suite 1900, El Segundo, California. I am employed in Los Angeles County, California.

On November 22, 2016, I served a copy of the following document(s):

PETITIONER'S OPENING BRIEF ON THE MERITS

in this action to be served by placing the true and correct copies thereof enclosed in sealed envelopes addressed as stated as follows:

☒ (By Goldenstate Overmight) (CCP §§1013(c), 2015.5) By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by Goldenstate Overnight Service as part of the ordinary business practices of Waters, Kraus & Paul, addressed to Defendant's counsel:

William A. Bossen
Musick, Peeler & Garrett LLP
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017
Attorneys for Defendant Sony Electronics, Inc.

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

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at El Segundo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

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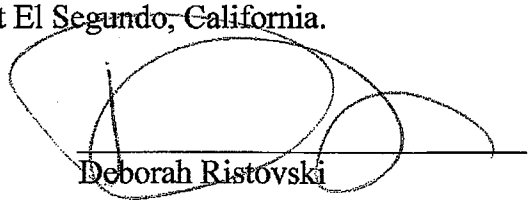

Deborah Ristovski