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December 3, 2014

VIA FEDEX

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: ***Nguyen v. Western Digital Corporation***
California Supreme Court Case No. S222377
Amicus Curiae Letter in Support of Petition for Review and Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under rule 8.500(b)(4) of the California Rules of Court, the Chamber of Commerce of the United States of America (the Chamber) respectfully requests this Court to vacate the Court of Appeal's judgment in *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522 (*Nguyen*) and remand for reconsideration in light of this Court's recent decision in *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 (*Tuolumne Jobs & Small Business Alliance*). In *Nguyen*, the Court of Appeal held that California's six-year statute of limitations for prenatal and birth-related injuries—which *is not* subject to tolling for a plaintiff's minority—was implicitly superseded by California's later-enacted statute of limitations for injuries resulting from exposure to toxins, which *is* subject to minority tolling. (*Nguyen*, at pp. 1541, 1549-1550.) In so holding, the Court of Appeal failed to acknowledge the "strong presumption against repeal by implication" of a statute (*Tuolumne Jobs & Small Business Alliance*, at p. 1039), and it failed to cite this Court's recent discussion of the doctrine in *Tuolumne Jobs & Small Business Alliance.*

There is no doubt that the severe birth defects at issue in this case are tragic. No matter the outcome of this case, California businesses have had, and will continue to have, every incentive to promote safe work environments for their employees. At stake in this case, however, is the independent and narrow

legal question of the appropriate standard courts should employ when determining whether a new statute has impliedly repealed an older statute. If left to stand, the appellate court's decision will instruct other courts that it is easy to find an implied repeal and that the rigorous test this Court has endorsed for such a finding is not necessary. Remand to the Court of Appeal is appropriate to ensure that this important doctrine is properly applied in this case.

In the alternative, under rule 8.1125(a) of the California Rules of Court, this Court should depublish *Nguyen* to prevent the Court of Appeal's decision from undermining the presumption against implied repeal of statutes and fostering doctrinal uncertainty in other cases.

The Chamber is the world's leading federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size. The Chamber has many members located in California and others who conduct substantial business in the state. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community. In fulfilling this role, the Chamber has appeared multiple times before this Court and the California Court of Appeal.

LEGAL ARGUMENT

This Court has recently confirmed the longstanding "strong presumption against repeal by implication" of a statute. (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1039.) Implied repeal of a statute is disfavored, and it " 'should not be found unless . . . the later provision gives *undebatable evidence* of an intent to supersede the earlier . . . .' " (*Ibid.*, quoting *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 420.)

Here, the Court of Appeal concluded that the statute of limitations for exposure to toxic substances (Code Civ. Proc., § 340.8) trumps the generally

applicable statute of limitations for prenatal and birth-related injuries (Code Civ. Proc., § 340.4). In doing so, the Court of Appeal failed to engage in the requisite implied repeal analysis, and failed to mention this Court's decision in *Tuolumne Jobs & Small Business Alliance*. Indeed, the Court of Appeal's failure to apply, or even to acknowledge, this Court's precedent regarding the strong presumption against implied repeal pervades its opinion. Relying on a "plain language analysis," (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1550), the Court of Appeal reasoned 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." (*Id.* at p. 1547.) In so holding, the Court of Appeal overlooked this Court's consistent teaching that courts should "find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1039, quoting *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 487 (*Merrill*), internal quotation marks omitted.)[1]

Had the Court of Appeal conducted the implied repeal analysis mandated by this Court's precedent, its disposition of this case could have been different.

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[1] The only case cited in *Nguyen* that even arguably concerns implied repeal is *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, which the Court of Appeal cited for the proposition 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.' " (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1547, quoting *Zamudio*, at p. 199.) But, notwithstanding its citation to *Zamudio*, the Court of Appeal's opinion in *Nguyen* makes no mention of the "strong presumption against repeal by implication" (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1039), nor does it recognize that "statutes must be harmonized, both internally and with each other, to the extent possible." (*Id.* at p. 1037, internal quotation marks omitted, quoting *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

This Court has recently reemphasized that a new law will supersede an earlier one "only when there is no rational basis for harmonizing the two potentially conflicting statutes . . . ." (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1039, internal quotation marks omitted, quoting *Merrill*, *supra*, 26 Cal.4th at p. 487.) Here, there is a potential rational basis for harmonizing the statute of limitations for exposure to toxic substances with the statute of limitations for prenatal and birth-related injuries. Specifically, a claim arising from prenatal exposure to toxic substances is properly governed by the statute of limitations for prenatal injuries, because such a claim is "[a]n action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth." (Code Civ. Proc., § 340.4.) By contrast, claims arising from post-birth exposure to such substances are properly governed by the statute of limitations 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).) Because the Court of Appeal did not conduct the requisite analysis, it failed to consider this "rational basis for harmonizing" section 340.4 and section 340.8. (*Tuolumne Jobs & Small Business Alliance*, at p. 1039, internal quotation marks omitted, quoting *Merrill*, at p. 487.) Thus, whether the Court of Appeal's ultimate holding was correct or not is beside the point. Because *Nguyen* is a published opinion, other courts will follow it regarding the appropriate analysis for determining whether a later statute has implicitly superseded a prior statute.[2]

This Court's decision in *Tuolumne Jobs & Small Business Alliance*—which the Court of Appeal failed to cite in its published opinion—illustrates the

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[2] Moreover, the Court of Appeal's opinion now exposes businesses throughout California to a dramatically expanded statute of limitations and the need to defend against old claims after memories have long since faded and relevant evidence has ceased to exist. Before imposing such uncertainty and cost on an entire class of defendants, courts should be required to engage in the appropriate implied repeal analysis to ensure that the Legislature intended this result. The Court of Appeal's opinion failed do so and should not remain on the books.

rigorous analysis the Court of Appeal should have applied here. In that case, this Court considered whether the California Environmental Quality Act (CEQA)—which generally requires the preparation of a detailed environmental impact report "whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment," (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390)—implicitly overruled Elections Code section 9214, which requires only an abbreviated impact report when a city council adopts a voter-sponsored initiative. (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1033.) Like the Court of Appeal in *Nguyen*, this Court faced an apparent conflict between a broadly worded statute and a "later enacted and arguably more specific statute . . . ." (*Id.* at p. 1039.) In contrast to the *Nguyen* court, however, this Court held that CEQA—the "more specific statute"—did *not* implicitly overrule Elections Code section 9214. (*Ibid.*) Rather, because the two apparently conflicting statutes could be read in harmony, this Court adopted an interpretation that gave effect to both laws. (*Id.* at p. 1037.) Thus, this Court recognized in *Tuolumne Jobs & Small Business Alliance* what the Court of Appeal failed to acknowledge here—that "plain language analysis," (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1550), standing alone, is insufficient to overcome the strong presumption against implied repeal.

Rather than applying this Court's precedent disfavoring repeal by implication, the Court of Appeal instead relied on this Court's opinion in *Young v. Haines* (1986) 41 Cal.3d 883 (*Young*) for the proposition that a " 'later, more specific statute . . . must be found controlling over an earlier statute . . . .' " (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1549, quoting *Young*, at p. 894.) But *Young* does not permit a court to ignore the requirements for finding an implied repeal of a prior statute. In *Young*, this Court held that the statute of limitations for medical malpractice claims, as opposed to the statute of limitations for prenatal and birth-related injuries, governed a claim for injuries incurred during birth as a result of medical malpractice. (*Young*, at pp. 889, 894.) In so concluding, this Court emphasized that the statute of limitations for malpractice claims was "part of an interrelated legislative scheme enacted to deal specifically with *all* medical malpractice claims." (*Id.* at p. 894, emphasis added.) In light of the Legislature's comprehensive reform of medical

malpractice liability, this Court determined that applying the shorter statute of limitations for malpractice claims was necessary to "give effect to the intent of the Legislature." (*Ibid.*) Here, by contrast, as even the Court of Appeal acknowledged, the statute of limitations for exposure to toxins "is *not* part of an 'interrelated legislative scheme enacted to deal with' claims involving exposure to hazardous material and toxic substances." (*Nguyen*, at pp. 1549-1550, quoting *Young*, at p. 894, emphasis added.) In nonetheless applying *Young* here, the Court of Appeal ignored *Tuolumne Jobs & Small Business Alliance* and the requirements for showing an implied repeal.

If the decision of the Court of Appeal remains published, it will be a significant source of confusion for litigants and trial courts, and will pose the risk that other appellate courts will likewise ignore the requirements necessary to overcome the presumption against implied repeal. Thus, this Court should either remand this case back to the Court of Appeal to conduct the appropriate implied repeal analysis, or depublish the Court of Appeal's opinion. As a former member of this Court has explained, this Court depublishes Court of Appeal opinions when "a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent." (Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L.Rev. 514, 514-515; *id.* at p. 520 ["What should the court do when it considers a court of appeal opinion to be 'wrong,' but the circumstances do not warrant either a grant or grant and retransfer . . . ? . . . It is in such situations, typically, that the court resorts to the decertification option."]; accord, *People v. Dee* (1990) 222 Cal.App.3d 760, 764 ["it is generally accepted that most depublication occurs because the court considers the opinion to be wrong in some significant way, usually in reasoning and sometimes in result as well"].) Here, the Court of Appeal fundamentally erred by ignoring the requirements for showing an implied repeal, and its published opinion risks misleading lower courts and litigants in future cases involving competing statutes. The Court of Appeal's published opinion should not remain on the books.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the Court of Appeal and remand for reconsideration in light of this Court's decision in *Tuolumne Jobs & Small Business Alliance*. In the alternative, this Court should order the Court of Appeal's decision not to be published in the official reports.

Respectfully submitted,

HORVITZ & LEVY LLP
JEREMY B. ROSEN
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By: Scott P. Dixler
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Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE
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cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

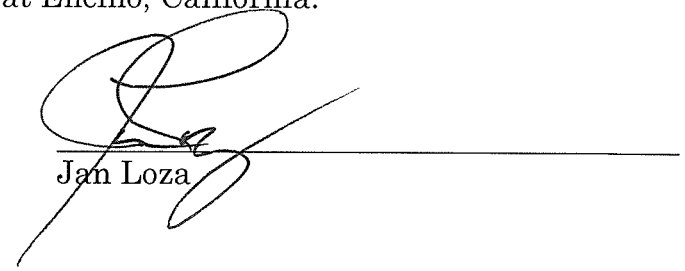
On December 3, 2014, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REVIEW AND DEPUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on December 3, 2014, at Encino, California.



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S222377

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