No. S131798

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

v.

MERVYN'S CALIFORNIA, INC.,
Defendant and Respondent.

On Petition for Review After a Denial Of a Motion to Dismiss by the Court of Appeal, First Appellate District, Division Four

ANSWERING BRIEF ON THE MERITS

JAMES C. STURDEVANT, NO. 94551
MONIQUE OLIVIER, NO. 190385
THE STURDEVANT LAW FIRM
475 Sansome Street, Suite 1750
San Francisco, CA 94111-3141
Phone: (415) 477-2410
Fax: (415) 477-2420

SIDNEY WOLINSKY, NO. 33716
MONICA GORACKE, NO. 218758
DISABILITY RIGHTS ADVOCATES
449 15th Street, Suite 303
Oakland, CA 94612
Phone: (510) 451-8644
Fax: (510) 451-8511

ANDREA G. ASARO, NO. 107039
HOLLY M. BALDWIN, NO. 191317
ROSEN, BIEN & ASARO, LLP
155 Montgomery Street, 8th Floor
San Francisco, CA 94104
Phone: (415) 433-6830
Fax: (415) 433-7104

DANIEL S. MASON, NO. 54065
ZELLE, HOFMANN, VOELBEL,
MASON & GETTE, LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Phone: (415) 693-0700
Fax: (415) 693-0770

Attorneys for Plaintiff-Appellant
Californians for Disability Rights

Unfair Competition Case
Service on the California Attorney General and the District Attorney Required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, rules 15(c)(3), 44.5(c)

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I. INTRODUCTION

Because retroactive application of statutes is disfavored, a new law will not apply retroactively unless an intent to apply it to pending cases appears in an "express retroactivity provision" or is "very clear from extrinsic sources." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

> *Since the drafters declined to insert such a provision in the proposition – perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision – it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.*

(*Id.* at 1212.)

On November 2, 2004, the voters of California passed Proposition 64, which amends sections of the Unfair Competition Law, Business and Professions Code section 17200 et seq. ("UCL") and sections of the False Advertising Act, Business and Professions Code section 17500 et seq. ("FAA").[1] Neither the text of Proposition 64 nor the ballot materials presented to the voters suggest that the amendments to the UCL would apply retroactively to pending cases, or that the proposition constituted a "repeal" of all or any part of the UCL.

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[1] Throughout this brief, "UCL" is intended to mean and encompass both the UCL and the FAA.

We – the people and the courts – expect statutes and initiatives to mean what they say. This is the basic starting point of statutory construction. And when statutes are silent or ambiguous on particular matters, certain principles, woven into the jurisprudence of this Court over time, apply.

One of these time-honored principles is that newly enacted statutes are presumed to apply prospectively only, absent unambiguous language to the contrary. (*Evangelatos*, 44 Cal.3d at 1188.) Indeed, in case after case for decades, this Court has articulated this presumption as the starting point for any analysis of statutory retroactivity. If, and only if, retroactivity is clearly intended by the Legislature or electorate, *and* no constitutional impediment exists to retroactive application, will the presumption be overcome.

The instances in which this Court has applied this presumption to determine whether a new law is retroactive are varied. They include statutory amendments passed by the Legislature, initiatives amending statutes passed by the voters, and statutory repeals. In each case, this Court has posed the question: was there clear and unambiguous language that the Legislature or voters intended that the law apply retroactively?

The presumption against retroactivity applies here and compels the

conclusion that Proposition 64's amendments to the UCL cannot be applied to this case. Plaintiff Californians for Disability Rights ("CDR"), a nonprofit disability rights and resource organization, filed this action in 2002 against defendant Mervyn's, LLC ("Mervyn's") asserting a single cause of action under the UCL to redress Mervyn's systematic and unlawful failure to provide full and equal access to its merchandise to customers with mobility disabilities, in violation of California's civil rights laws. Unlike the so-called "frivolous" UCL suits to which Proposition 64 was directed, this action proceeded to a full trial on the merits and resulted in specific findings of discrimination by the trial court. Judgment was nonetheless entered for Mervyn's on an erroneous legal basis, and CDR timely filed and has been pursuing its right to appeal. Citing the so-called statutory "repeal rule," Mervyn's insists that the passage of Proposition 64 terminates this action. As the Court of Appeal recognized, this result cannot be reconciled with the expressed intent of the initiative or the jurisprudence of this Court.

The statutory repeal rule does not alter the basic and time-tested presumption against retroactivity. This Court has applied the repeal rule narrowly in select cases and limited circumstances, and then only when the Legislature or electorate clearly expressed an intent that the new law repeal the old, and that the repeal apply retroactively. The repeal rule simply does

not have the force that Mervyn's contends. Recent decisions by this Court and the United States Supreme Court emphasize that the considerations of fairness and due process underlying the presumption against retroactivity apply to all new statutes and that no exception exists where purely statutory rights are at stake. Even if the repeal rule continues to have some viability today, it does not apply to Proposition 64 which (1) does not involve a repeal of a cause of action or remedy; (2) involves the significant rights of the parties; and (3) amends a statute that contains a two-part savings clause that prohibits retroactive repeals of new terms in the statute.

Finally, Proposition 64 cannot apply to this case on the theory that it merely adopts procedural changes that properly can be applied to cases going forward. As this Court has explained, a new statute that governs the future conduct of litigation operates prospectively when applied to a pending case, because it affects *only* the "procedure to be followed in the future." *(Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288, citations omitted.) In contrast, new laws that have a substantive effect on pending cases operate retrospectively and cannot apply to pending cases absent unambiguous legislative intent. (*Id.* at 287.) Unlike a statute that affects merely modes of procedures, Proposition 64 significantly alters the ways in which UCL claims are brought and litigated by circumscribing the parties

who can bring them. If applied to pending cases such as this one, Proposition 64 would not merely affect how many UCL cases are tried, but would eliminate them altogether. Application of Proposition 64 is a substantive change in the law and cannot be applied to pending cases.

Mervyn's arguments that Proposition 64 should apply to pending UCL cases such as this one are riddled with unresolvable inconsistencies. Mervyn's acknowledges the breadth of the presumption against retroactivity but then claims the presumption is subject to a gaping exception for the repeal of statutory rights. On the one hand, it claims that Proposition 64 effectively repeals the UCL, but on the other it claims that the changes rendered by the initiative are merely procedural and, therefore, apply prospectively to this case. This Court should not countenance Mervyn's innovative twists on stare decisis.

Careful review of the state of the law and the facts of this case leads to the inescapable conclusion that Proposition 64 does not and cannot apply retroactively.

II. STATEMENT OF THE CASE

A. Passage of Proposition 64

On November 2, 2004, the voters of California passed Proposition 64, which amends the UCL. Proposition 64 adds to the UCL (1) a provision

limiting standing to file a representative private suit to enforce Section 17200 or Section 17500 to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition" (Appen. at 1, Prop. 64, § 3);[2] and (2) a provision that a private suit for "representative claims or relief on behalf of others" comply with the requirements of the class action statute, Code of Civil Procedure section 382 (*id.*, § 2).

Two facts regarding Proposition 64 are undisputed: (1) nothing on the face of Proposition 64 or the ballot materials states that Proposition 64, if enacted by the voters, will, or was intended to, apply retroactively to all cases pending on the date of the enactment; and (2) nothing on the face of Proposition 64 or the ballot materials states that the initiative would "repeal" the UCL or any parts thereof.

In addition to the fact that Proposition 64 contains no statement of retroactivity, the text of the initiative and the ballot materials contains language indicative of prospectivity. The measure's findings suggest it was intended to prevent certain *future* actions from being filed, not to terminate or alter the law applicable to pending cases. Section 1(e), for example,

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[2] For the Court's convenience, we have attached hereto a copy of the text of Proposition 64 and the ballot materials as an appendix.

provides: "It is the intent of the California voters . . . to prohibit private attorneys from *filing* lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Appen. at 1, Prop. 64, § 1(e), emphasis added.) Where the findings speak of prospectively barring "filings," Mervyn's wishes the Court to pretend that the findings instead speak of barring "the filing of new cases and the continuation of old cases." This Court should decline the invitation to rewrite the initiative.

Further, the proponents of Proposition 64 affirmatively represented to at least one voter that the initiative would *not* be retroactive. As reflected in news stories in the wake of the day at the polls, and as substantiated in a declaration, a voter specifically inquired of the proponents – before the election – whether the initiative would be retroactive. The proponents replied: "No, it will not." (See Brief of Amicus Consumer Attorneys of California in Opposition to Respondent's Motion to Dismiss, filed in the Court of Appeal in this case, on January 14, 2005, Exhibit 1 at 2 [Declaration of Daniel C. Sigler] ("Sigler Decl.").)

Moreover, contrary to Mervyn's assertions, Proposition 64 did not implicitly "repeal" any cause of action or remedy available under the UCL. The content of the UCL causes of action for "unlawful, unfair, and

fraudulent business practices" is unimpaired. (Appen. at 1, Prop. 64, § 1(a).) Likewise, Proposition 64 did not repeal any of the remedies available for violation of the UCL. In fact, voters were informed that Proposition 64 protects the right to seek redress for unlawful business practices and that actions on behalf of the general public are preserved when brought by public prosecutors. (*Id.*, §§ 1(d)-(f).) Proposition 64 does not change the scope of the liabilities or remedies under the UCL; instead, it adds substantive standing requirements for future UCL actions.

B. The Proceedings in the Trial Court

CDR, a nonprofit disability resource organization, filed this action against Mervyn's in 2002 asserting a single cause of action under the UCL to redress Mervyn's systematic and unlawful failure to provide full and equal access to its merchandise to customers with mobility disabilities. CDR's action is predicated exclusively on violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Disabled Persons Act (Civ. Code, § 54 et seq.).

The case proceeded to a bench trial on the merits in 2003. Over the course of 17 days, the parties presented the testimony of over 25 witnesses. CDR called 18 individuals with mobility disabilities who described the widespread and systematic access barriers they confronted, collectively, at

24 Mervyn's stores throughout California. CDR also called Mervyn's executives, who admitted that Mervyn's has no minimum spacing requirements for moveable display racks and that no one measures pathways or knows the widths of the pathways in Mervyn's stores.

In its Statement of Decision issued after trial, the court made three key findings of discrimination: (1) that Mervyn's has no minimum spacing requirements for the pathways between moveable display racks; (2) that Mervyn's does not measure the pathways or know how wide they are; and (3) that Mervyn's has a discriminatory policy or practice of maintaining narrow pathways that prevent or impede access for persons with mobility disabilities to the merchandise at its stores. (AA 543, 553, 571.) The trial court made its findings of discrimination after considering all of the evidence, some of which was conflicting, and assessing the credibility of the witnesses before it. (*Ibid.;* AA 537)

Rather than order appropriate injunctive relief, however, the trial court erroneously allowed Mervyn's to take advantage of the "readily achievable" and "fundamental alteration" affirmative defenses available under the federal Americans With Disabilities Act (42 U.S.C. § 12182 et seq. (the "ADA")) but not afforded under state law, and then misconstrued and misapplied those defenses. Based solely on its erroneous conclusions

about these federal defenses, the court entered judgment for Mervyn's.

C. The Court of Appeal Decision

CDR timely appealed the judgment against it in April 2004. After CDR filed its opening brief on the merits, Mervyn's filed a motion to dismiss the appeal on the basis of the passage of Proposition 64. After complete briefing by the parties and two amici curiae, and oral argument by the parties, the First District Court of Appeal issued a thoughtful opinion concluding that Proposition 64 does not apply to this case or to any UCL action pending on November 3, 2004, the effective date of Proposition 64. (*Californians for Disability Rights v. Mervyn's* (February 1, 2005, A 106199) (review granted April 27, 2005) ("Slip op.").)

In reaching its conclusion that Proposition 64 does not apply to lawsuits filed before its effective date, the court looked to well-established precedent from this Court. First, the court relied upon the long-settled rule that "a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (Slip op. at 3, quoting *Tapia,* 53 Cal.3d at 287.)

The Court of Appeal then looked to this Court's seminal decision in *Evangelatos*, 44 Cal.3d 1188 and its decision in *Myers v. Philip Morris*

Companies, Inc. (2002) 28 Cal.4th 828. (Slip op. at 4-5.) In those cases, this Court held that an initiative that amended a statute (*Evangelatos*) and a statute that expressly repealed a statutory immunity provision (*Myers*) were to operate prospectively, not retrospectively, absent clear expression of legislative or voter intent to the contrary. (*Evangelatos,* 44 Cal.3d at 1209, 1213-1214; *Myers,* 28 Cal.4th at 841.)

Analyzing the text of Proposition 64 and the ballot materials, the Court of Appeal noted that the language expressed an intention to prohibit the "filing" of lawsuits by private parties and found that, "[i]f anything, the statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits." (Slip op. at 3-4.) The court then concluded that whatever the language of the initiative, it did not contain the clear language of retroactive intent necessary to apply it to pending cases. (*Ibid.*)

Second, the court considered and rejected the argument that the statutory repeal rule mandated dismissal of this case. Following the authority of both this Court and the U.S. Supreme Court, the court concluded that the repeal rule is not "an exception to the prospectivity presumption, but an application of it." (Slip op. at 7.) The court noted that in those cases in which the repeal of a statute was held to terminate a

pending action, the language of the repeal legislation indicated a legislative intent that the statute apply retroactively. (*Ibid.*)

Third, the court considered and rejected Mervyn's argument that Proposition 64 effects only procedural changes to the UCL and thus should be applied prospectively to pending cases. On this point, the court considered whether Proposition 64 "substantially affects existing rights and obligations" (Slip op. at 8, quoting *Elsner v. Uveges* (2004) 34 Cal.4th 915, 937), and concluded that application of Proposition 64 would result in dismissal of CDR's appeal, which would "substantially affect CDR's rights" (Slip op. at 8).

III. ARGUMENT

A. Amendments to a Statute, Such as Those Contained in Proposition 64, are Subject to the Firmly Established Presumption Against Retroactivity

The settled rule of law is that statutes operate prospectively only. When faced with a new statute and the question of retroactivity, this Court has repeatedly instructed that the analysis begins with "the fundamental principle that 'legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.'" (*Evangelatos*, 44 Cal.3d at 1208, citing cases; accord *Elsner*, 34 Cal.4th at 936; *McClung v. Employment Development Dept.*

(2004) 34 Cal.4th 467, 475; *Myers*, 28 Cal.4th at 840; *Tapia*, 53 Cal.3d at 287; *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388, 393.) "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'" (*McClung*, 34 Cal.4th at 475, citations omitted.)[3]

As this Court has recognized, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265; *McClung,* 34 Cal.4th at 475.) As Justice Mosk explained:

> The presumption of prospectivity is not narrowly cabined by constitutional concerns about ex post facto effects, but is broadly based on policy considerations involving fairness. [Citation.] "Retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct. '[S]uch laws disturb feelings of security in past transactions.'" [Citations.] This proposition is firmly established. Otherwise, untenable results would follow. For example, prospectivity would be reducible to the ex post facto prohibition – and would therefore be nothing in itself. Also, prospectivity could not be "presumed" but

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[3] "Various statutes codify this rule of interpretation." (*Tapia*, 53 Cal.3d at 287 fn. 2, citing Code Civ. Proc., § 3; Pen. Code, § 3.)

would in fact be mandated as a result of constitutional compulsion. (*Tapia*, 53 Cal.3d at 305-306 (Mosk, J., dissenting); *Myers*, 28 Cal.4th at 841; *Landgraf*, 511 U.S. at 268.)

There are "dangers inherent in retroactive legislation." (*I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 316.) In particular, "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." (*Landgraf*, 511 U.S. at 266; see *Kaiser Aluminum & Chem. Corp. v. Bonjorno* (1990) 494 U.S. 827, 856 (Scalia, J., concurring), quoting 2 J. Story, Commentaries on the Constitution § 1398 (2d ed. 1851) (retroactive laws are "contrary to fundamental notions of justice, . . . [such] laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact").)

A statute's retroactivity "is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity." (*Myers*, 28 Cal.4th at 841, citations omitted.) Retroactivity, therefore, is initially and fundamentally a question of statutory interpretation. Whether it is a statute passed by the

Legislature or, as in this case, an initiative passed by the voters, the judiciary's goal is to determine and effectuate the intent of those who enacted it. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901; *Evangelatos,* 44 Cal.3d at 1193-1194.) The intent of the voters is "paramount" in interpreting a ballot initiative. (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) As with the usual principles of statutory construction, courts must first review the language of the statute and then, if needed, examine its context, statutory scheme and any legislative history or ballot materials. (*Robert L.,* 30 Cal.4th at 900-901.)

Because retroactive application of statutes is disfavored, if an "express retroactivity provision" does not appear on the face of the statute, it will not be applied to pending cases "unless it is *very clear* from extrinsic sources that the Legislature [or the voters] must have intended a retroactive application." (*Myers,* 28 Cal.4th at 841, quoting *Evangelatos,* 44 Cal.3d at 1209, emphasis in original.) Requiring a clear and unequivocal statement of retroactive intent serves to ensure that the legislative body "has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf,* 511 U.S. at 272-273.) The presumption also furthers another established rule of statutory construction: that courts

"construe statutes to avoid 'constitutional infirmities.'" (*Myers*, 29 Cal.4th at 846-847, citing cases.)

The need for a clear and unambiguous statement of retroactive intent is even more critical when determining the retroactivity of a voter initiative. Propositions are not subject to the rigorous debate of the legislative process. Unlike a legislative act, the language of an initiative is solely within the control of the drafters; voters do not have the opportunity to consider the import of its terms or to seek different or clarifying language. There is no opportunity for debate or even consideration – voters simply go to the polls and cast a ballot. If we cannot be assured that retroactivity, in the absence of a clear statement, was considered by the Legislature, such assurances are even more wanting in the case of the voters. (See, e.g., *People v. Davenport* (1985) 41 Cal.3d 247, 263 fn. 6 ("California initiatives are written and enacted without the benefit of the hearings, debates, negotiation and other processes by which the Legislature informs itself of the ramifications of its actions.").)

In recent years, this Court and the U.S. Supreme Court have emphasized the strength of the presumption against retroactivity. In *Evangelatos*, this Court considered whether Proposition 51, which eliminated joint and several liability for tort defendants, could apply

retrospectively. The Court began its analysis by relying on the "widely recognized legal principle . . . that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Evangelatos*, 44 Cal.3d at 1193-1194.) The Court found that "[t]he drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively." (*Evangelatos*, 44 Cal.3d at 1194; see also *Aetna Casualty*, 30 Cal.2d at 396 ("it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended").) Noting that all parties had acted in reliance on the existing law, the Court found it would be unfair to change "the rules of the game" in the middle by applying new law to pending cases. (*Evangelatos*, 44 Cal.3d at 1194, 1215-1217.) Concluding that "there is nothing to suggest that the electorate considered the issue of retroactivity at all," the Court refused to give the measure retroactive effect. (*Id.* at 1194.)

In reaching its holding, the Court noted that some of its earlier decisions could have been construed as suggesting that "the presumption of prospectivity is to be 'subordinated . . . to the transcendent canon of statutory construction that the design of the Legislature be given effect" and

is to apply only if "it is impossible to ascertain the legislative intent." (*Evangelatos,* 44 Cal.3d at 1208, citations omitted.) The Court also noted that the dissent's approach called for an assessment of the overall purpose of the new legislation and whether or not the statute was "remedial" in nature. (*Id.* at 1208-1215.) The Court emphatically rejected both approaches and held that courts are to follow the "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent." (*Id.* at 1218.)

Several years after *Evangelatos*, the U.S. Supreme Court stressed the importance of the presumption against retroactivity. In *Landgraf v. USI Film Products,* the Court disapproved two of its prior decisions to the extent they appeared to weaken the presumption, and stated that it never "intend[ed] to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." (*Landgraf,* 511 U.S. at 278.) The Court recently emphasized that the retroactive intent required must be "so clear that it could sustain only one interpretation." (*St. Cyr*, 533 U.S. at 317, citation omitted.)

After *Landgraf* and *St. Cyr* were decided, this Court in *Myers* rejected the argument that the Legislature's repeal of a statute that gave

tobacco companies immunity from suit should operate retroactively to revive claims that had accrued while the "immunity statute" was in effect. Noting the "Repeal Statute" was ambiguous on the issue of retroactivity, and reiterating the primacy of the presumption against retroactive application of a statute, this Court held that the ambiguity compelled the construction of the statute as "unambiguously prospective." (*Myers*, 28 Cal.4th at 843.) In other words, this Court held that retroactive application was impermissible because the "Repeal Statute" itself contained no "express language of retroactivity" and there was no other source "provid[ing] a clear and unavoidable implication that the Legislature intended retroactive application." (*Id.* at 884.)

More recently, in *McClung,* this Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposed personal liability for harassment on non-supervisory workers. (*McClung*, 34 Cal.4th at 475-476.) The Legislature had stated that the amendments were expressly meant to clarify existing law, but this Court found that the amendments substantively changed the law. The Court stressed there was "no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect to the extent the amendment did not change the law." (*Id.* at 476.)

Most recently, in *Elsner*, this Court again determined that newly enacted Cal-OSHA provisions could not be applied to the trial in a pending case without clear evidence of legislative intent of retroactivity. (*Elsner*, 34 Cal.4th at 938-939.) Because nothing in the text or legislative history of the bill indicated such intent, the provisions could not apply retroactively. (*Ibid.*)

Accordingly, when courts consider the retroactivity of a newly enacted initiative, the roadmap is clear. The "first rule of [] construction" is that "legislation must be considered as addressed to the future, not to the past." (*Myers*, 28 Cal.4th at 840, citation omitted.) Only if the legislation "clearly intends" that the statute operate retroactively, will it be so applied and, then, only if such retroactivity is not "barred by constitutional constraints." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) "[T]he voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

B. Proposition 64 Cannot Be Applied Retroactively to Pending Cases Because Neither the Text of the Initiative Nor the Ballot Materials Unambiguously Express the Intent That the Amendments to the UCL Apply Retroactively

Although the proponents of Proposition 64 had complete control over its terms, it is undisputed that the text of the initiative contains no

express retroactivity provision. Had the proponents intended that Proposition 64 apply retroactively to pending cases, nothing would have been easier for them to do than to expressly so provide – and so advise the electorate. That they did not means that the initiative lacks the "clear legislative intent" required to apply it retroactively. (*Evangelatos,* 44 Cal.3d at 1193-1194.)[4] In light of the presumption against retroactivity, the "failure to include an express provision for retroactivity is, in and of itself, 'highly persuasive' of a lack of intent." (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 818.)

Further, the fact that the proponents of Proposition 64 affirmatively represented to the public that the initiative would *not* be retroactive is strong evidence that it was not intended to apply to pending cases. (See Sigler Decl., *supra,* at 2.) (See *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551 ("Absent some basis for determining that the intent of the electorate was in conflict with the intent of the drafters, evidence of drafters' intent is an appropriate tool in interpreting the scope of an initiative."); *City of Long Beach v. Department of Industrial*

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[4] This was not a bill negotiated in the Legislature, subject to compromise by various affected parties or groups which frequently results in the lack of an express retroactivity provisions. (Cf., *Myers*, 28 Cal.4th at 844-845; *Landgraf*, 511 U.S. at 253-257.)

Relations (2004) 34 Cal.4th 942-952 (legislator's statement prior to bill's enactment regarding prospective nature of bill was "indicative of probable legislative intent").)

The lack of explicit retroactivity language is even more conspicuous because it stands in marked contrast to previous initiatives that directly addressed retroactive application. For example, eight years ago, the voters passed Proposition 213, which prohibited uninsured motorists and drunk drivers from collecting non-economic damages in certain auto accident cases. The initiative stated: "This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997." (See *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979-980, emphasis omitted (holding, based primarily on the initiative's language, that Proposition 213 applied to a case that had been filed prior to its enactment, but in which the trial occurred after its enactment).)

Indeed, Proposition 64's proponents were fully aware that statutes are presumed to operate prospectively absent express language of intent to the contrary, since one of them submitted an amicus brief in the *Myers* case, arguing exactly that point. (See Brief of Amicus Curiae California Chamber of Commerce in Support of Respondents in *Myers v. Philip*