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The Recorder

November 9, 2001 Friday

SECTION: NEWS; Pg. 1

HEADLINE: TERROR COLORS COURT'S VIEW OF SEARCHES

BYLINE: BY Kevin Livingston; RECORDER STAFF WRITER

BODY:
SACRAMENTO - The events of Sept. 11 were not lost on the California Supreme Court on Thursday as four justices appeared ready to allow police officers to search vehicles when drivers fail to show a license or registration.

Newly minted Justice Carlos Moreno, who was sitting at his first oral argument calendar since replacing Stanley Mosk, appeared to be the swing vote that Chief Justice Ronald George needed to cement a majority with Justices Ming Chin and Marvin Baxter.

All four seemed ready Thursday to put safety concerns ahead of the privacy rights of motorists.

If that holds true, it would signal a departure from previous Fourth Amendment rulings where **Justices** Joyce Kennard, **Janice Brown** and Katherine Mickle Werdegar could count on Mosk to help them more heavily scrutinize police conduct. The court heard two combined cases Thursday, both involving whether officers in routine traffic stops were justified in searching the vehicles after the drivers failed to produce either identification or registration.

Both In re Arturo D., SO85213, and People v. Hinger, SO85218, hinged on the degree to which officers can search a vehicle when the driver fails to hand over such documents.

Defense attorneys argued that officers in these cases went too far when, for example, they were looking for a license and discovered methamphetamine under Arturo D.'s seat.

Oakland attorney Alex Green, who represents Arturo D., argued that the attorney general's office was asking the court to allow full searches of cars without probable cause.

Although lawyers for the AG's office told the court those searches would be limited to the immediate driver area, such as the glove box and the visor, Green said leaving it to an officer to define what is a reasonable search gives police too much discretion.

"It's difficult to draw a bright-line rule," he said.

Werdegar, who jousted with George through much of the argument, seemed to agree. "How do we know what a full search means?" she asked.

Kennard cautioned her male colleagues Thursday to avoid drawing a blanket rule since Fourth

Amendment cases often hinge on specific facts.

"It seems there is no [U.S. Supreme Court] case that has sanctioned the kind of blanket rule you are asking for," Kennard told Deputy Attorney General Jeffrey Laurence. "If we were to agree with you, we'd be announcing a pretty new rule, wouldn't we?"

Still, some members of the court seemed more driven by the new realities facing the nation.

"Isn't it imperative for officers to have some idea of who they are [pulling over]?" Chin asked at one point. "In light of the events of Sept. 11, isn't that a valid argument?"

Moreno, too, asked if certain "policy considerations" should be taken into account.

Baxter went so far as to say drivers might be negatively impacted if officers aren't allowed to search their cars. He said if officers stop a driver who doesn't speak English and those officers aren't allowed to search the car for a license, they might have no choice but to arrest that person.

Although previous U.S. and California Supreme Court cases have allowed evidence gleaned from searches for vehicle identification numbers or registration, none has gone so far as to say it's constitutional for officers to search under or behind a seat for them.

For instance, in 1991's People v. Webster, 54 Cal.3d 411, the California Supreme Court said evidence taken from a warrantless search for registration was constitutional because it was limited to the areas where the papers might be found.

San Diego appellate attorney Amanda Doerrer told the court Thursday that to go beyond Webster would be a mistake - war or not.

"People in these times still have a right to privacy," she said.

Reporter Kevin Livingston's e-mail address is klivingston@therecorder.com.

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The Recorder

November 6, 2001

SECTION: No. 216; Pg. p1

LENGTH: 1127 words

HEADLINE: Newest justice forcedto break tie at firstargument calendar

BYLINE: By Mike McKee*RECORDER STAFF WRITER*

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One month you're a federal court judge, quietly overseeing trials in your courtroom in Los Angeles, and the next you're the swing vote in one of your first cases on the California Supreme Court.

That's the position in which Carlos Moreno, confirmed last month as the newest justice on the Supreme Court, finds himself this week.

When Moreno attends his first oral arguments, which begin today in Sacramento, one of the 13 cases on the calendar is *Marks v. Superior Court*, S085224. Already argued once on June 6, the case - which deals with the powers of *habeas corpus* counsel in death penalty appeals - is the only one being reargued after the June death of former Justice Stanley Mosk. The high court has already made it clear that the reason that's happening is because the constitutionally required minimum of four justices has not been attained for the ruling. So Moreno gets to break what appears to be a 3-3 tie.

What that means for the outcome of the case, of course, is anybody's guess. Moreno is a moderate Democrat who's got a reputation as being tougher than Mosk on law-and-order issues.

Moreno's work on the state bench was reviewed once, in 1999, by the colleagues he now joins. In *People v. Rodriguez*, 20 Cal.4th 1, a divided court of appeal panel reversed murder and assault convictions in a gang killing, saying Moreno had prejudiced the defendant by excluding testimony that might have undermined the credibility of the eyewitness. The high court reversed again, affirming Moreno's rulings by a 5-2 vote. Mosk signed a dissent written by Justice Joyce Kennard that said excluding the evidence was indeed prejudicial. The dissent also pointed out that when the prosecution objected to the defense calling the witness, Moreno said that he wanted to move "real quickly" because "my bailiff has a train to catch."

Wednesday's case is unlikely to create much controversy outside of the capital litigation bar, but it could still provide some clues about the newest member of the court.

Marks is nuanced. It's about a death penalty defendant's right to assistance of counsel more than about defendant Delaney Geral Marks' guilt or innocence.

Marks was convicted in 1994 of two counts each of first-degree murder and attempted murder following a 1990 shooting spree in the cities of Oakland and Alameda. The appeal before the

Supreme Court asks whether Alameda County Superior Court Judge Jeffrey Horner erred by refusing to let habeas corpus counsel have standing to correct "extensive errors" in the trial record put together by Marks' separately appointed appellate counsel.

"Mr. Marks' rights to a reliable appeal and the timely litigation of any potentially meritorious habeas corpus claims entitles him to a complete and accurate record," Gary Sowards, a lawyer with San Francisco's Habeas Corpus Resource Center, wrote in papers filed with the court.

Sowards didn't return several telephone calls concerning how the original argument went and what differences Moreno might bring to the equation in comparison to Mosk, who was the court's sole liberal.

Sharon Wooden, the San Francisco deputy attorney general who argued the case in June, said she doesn't know Moreno well enough to speculate. In addition, she said it was hard to tell where the court was going during the original argument, but that Justice Joyce Kennard asked the most questions.

"She was just basically asking me, 'Should there ever be a role for habeas counsel in the records process?' " Wooden said. "And our position is no. That's appellate counsel's job."

A ruling either way would be helpful, she said, in determining the boundaries of each counsel in future cases.

That's because the state, in an effort to speed up the capital appeals process, began an effort a few years ago to appoint the condemned two lawyers: one to pursue the direct appeal, and one to pursue habeas claims. Dividing the work, it was hoped, would help attract lawyers to capital cases.

Of course, it also creates the potential for strategic conflicts, as two lawyers may disagree about the potential of a particular claim in their respective proceedings. Post-conviction relief comes more frequently in federal court, where habeas claims usually wind up, than it does in direct appeals.

As a federal judge himself, Moreno might provide his new colleagues with a different perspective than Mosk. Federal and state court judges occasionally engage in finger pointing as to who bears the blame for the growing backlog of capital cases.

Still, Stephen Barnett, a professor at Boalt Hall School of Law, said that although Moreno will be breaking a tie in the case, it won't make much difference because the case isn't that controversial.

He noted that other **justices** have been in similar situations upon arriving on the court, but in more important cases. **Justices Janice** Rogers **Brown** and Ming Chin turned the tide in a major abortion-rights case, while former **Justice** Joseph Grodin weighed in on a case involving the Medical Injury Compensation Reform Act, which capped pain and suffering damages in medical malpractice suits.

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Moreno volunteered that his favorite U.S. Supreme Court justice was David Souter, a Bush appointee often found at the very center of that court's frequent divides.

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"Judge Moreno's getting much more lead time," George said, "than many of us had."

Associate editor Mike McKee's e-mail address is mmckee@therecorder.com.

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The Recorder

November 6, 2001

SECTION: No. 216; Pg. p1

LENGTH: 1127 words

HEADLINE: MorenointheMiddle

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November 6, 2001 Tuesday

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HEADLINE: MORENO IN THE MIDDLE

BYLINE: BY Mike McKee; RECORDER STAFF WRITER

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BODY:
State Supreme Court Sets Employment Law Standard

CALIFORNIA EMPLOYERS who harass or discriminate are not protected by a one-year statute of limitations if employees can show a pattern of behavior and ongoing attempts to combat the problem, the state Supreme Court has ruled.

The decision came in the case of Lachi Delisa Richards v. CH2M Hill Inc., in which a Sacramento woman suffering from multiple sclerosis sued her former employer for discriminating against her and harassing her due to her worsening disability.

Richards worked as a civil engineer for Greenwood Village, Colo.-based CH2M from 1984 to 1993. In 1988, she was diagnosed with MS, a degenerative nerve disease that eventually confined her to a wheelchair. She strove to remain a productive employee despite her handicap, but the obstacles her employer put in her path made that nearly impossible, her lawyers claimed. Richards sued CH2M, one of the nation's largest engineering firms, in 1994 for disability discrimination and harassment. She sued under the state's Fair Employment and Housing Act, which stipulates complaints must be filed within a year of the discriminatory acts occurring. But Richards' lawyers counted on the continuing violation doctrine, which in the past has allowed some plaintiffs to stretch the limits of their cases well beyond the one-year limit.

Writing for the majority on Aug. 23, Justice Kathryn M. Werdegar described the doctrine as "arguably the most muddled area in all of employment discrimination law."

In ruling on the matter, the Court's majority set out to compose a single standard for the state to follow. Employers, the Court wrote, may be held liable for events occurring before the one-year limit as long as their conduct is largely constant over the entire period; the offending incidents occur with "sufficient frequency" over the period; and the employee or employees in question continue over the period to believe there's a hope of change on the employer's part-in other words, the parties have not reached a stalemate.

The ruling turned out to have something in it for everybody.

Paul Grossman, general counsel for the California Employment Law Council, which filed an amicus brief on behalf of CH2M, says there's actually some good news for employers in this decision.

"Of course, we would've preferred that it say there is no such thing as a continuing violation. But it's

better than what a lot of judges were doing before," he says.

Previously, some judges permitted plaintiffs "to simply ignore the statute of limitations," he says. This left employers vulnerable to liability for events that occurred years before, where witnesses had moved on to other jobs or even died, and for which no record remained of the problem except the plaintiff's own memory, he says.

Under this ruling, the doctrine is limited largely to two types of cases: sexual harassment cases, where a victim may keep silent for years for fear of reprisal, and other kinds of harassment or discrimination cases where there is a record of the parties attempting to reach a reasonable accommodation.

The effect, then, is to narrow the use of the continuing-violation doctrine even while enshrining its place in California employment law. "We view it as a mixed bag," Grossman says.

An attorney for the defendant agrees. "Overall, we're pleased," says Theodore A. Olsen, member and manager of the labor and employment law department at Sherman & Howard in Denver, who represented CH2M before the California Supreme Court. "The approach taken by the trial court was that absolutely anything related to a request of accommodation at any time in the past was admissible evidence which could be used by a plaintiff. That was rejected by the Court."

But the plaintiff, too, felt the law came down on her side, her lawyer says.

"The one-year limit is totally unjust and ignores what really happens in the workplace and how employees strive to keep their jobs and not upset the apple cart," says Oakland, Calif., attorney Ellen Lake, of the Law Offices of Ellen Lake, who argued Richards' case before the Supreme Court.

Employee rights advocates also cheer the new standard.

"This case says to all employees there is a high premium on trying to get things resolved without litigation, and that if they do so, they will not be penalized," says Brad Seligman, executive director of The Impact Fund, a Berkeley, Calif., non-profit organization specializing in public interest cases. "That's in the interest of employers and employees."

A Process, Not an Action

Justice Janice R. **Brown** disagreed with these notions, arguing in her dissent that a flexible statute of limitations will actually hurt employees. Castigating the majority for eviscerating the entire notion of limitations, she wrote, "Complainants may now assert FEHA causes of action in any circumstance involving two or more unlawful practices regardless of how much time separates them, with every incentive to delay claims and maximize recovery."

But in reaching its decision, the Court's majority found that "reasonable accommodation is often an ongoing process rather than a single action."

"As with harassment, an instance of an employer's failure to accommodate that in isolation may seem trivial can assume greater significance and constitute a greater injury when viewed as one of a series of such failures," Judge Werdegar wrote.

That should not mean, however, that employees can wait indefinitely to file claims under the FEHA,

she wrote. The clock starts to run if the employer puts a stop to the problematic conduct, if the employee resigns or if the employee learns that any further efforts at change will be in vain.

As the majority described it in its decision, the seeds of the Richards case were planted in 1988, when Richards was diagnosed with MS.

Both sides apparently agreed that Richards was an "outstanding engineer," who received positive performance evaluations and who remained a dedicated employee throughout her time at the company, Judge Werdegar wrote.

Three years after she began working for CH2M in late 1987, Richards began to notice tremors. By the following April, she was using a wheelchair and in October 1988 was diagnosed with multiple sclerosis.

Initially, she and her supervisors agreed she should only work part time, should not take any assignments involving fieldwork and should transfer from the Redding, Calif., office to the more wheelchair-accessible Sacramento office.

From there, however, Richards' relations with her employer deteriorated, frayed by one disagreement after another over how to best accommodate her disability in the workplace.

One manager refused to move furniture out of a hallway, though it meant Richards had to struggle to maneuver into her own office. When she took it upon herself to move the items, he moved them back, according to the decision.

In another case, Richards, on a doctor's advice, asked a manager, Carol Uhouse, if the company could purchase a bed for her to use on her breaks. Instead, the company allegedly bought a folding army cot and insisted Richards help pay for a mattress and sheets.

Richards resigned in 1993 and filed a claim against CH2M a year later. A trial court found CH2M's conduct constituted a continuing violation and thus allowed Richards to introduce evidence from the entire five-year period of 1988 to 1993. In July 1997, a jury found for Richards, awarding her $ 925,000 in emotional distress damages and $ 476,000 in economic damages.

The appeals court reversed the verdict. It held the trial court misapplied the continuing-violation doctrine and erroneously allowed the jury to award damages to Richards for offenses occurring before the one-year statute of limitations period (which stretched from 1993, a few months before she quit, to 1994, when she filed the claim).

The Supreme Court, in its August opinion, reversed the appeals court's judgment. It remanded the case to the trial court, directing it to reconsider CH2M's motion for a new trial on statute of limitations grounds in light of this latest standard.

GRAPHIC: Photo, "Of course, we would've preferred that it say there is no such thing as a continuing violation. But it's better than what a lot of judges were doing before," says Paul Grossman, general counsel for the California Employment Law Council.

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October 19, 2001 Friday

SECTION: NEWS; Pg. 1

HEADLINE: MORENO TAKES HIGH COURT OATH

BYLINE: BY Greg Mitchell; RECORDER STAFF WRITER

BODY:
In front of a crowd of friends, family, colleagues and cameras, Carlos Moreno was confirmed Thursday as the newest member of the California Supreme Court. He was sworn in by Gov. Gray Davis moments after an hour-long confirmation hearing.

The hearing, before a three-member panel headed by Chief Justice Ronald George, mostly limned the accomplishments of a man friends spoke of as "an American success story," "an inspired choice," and a "man with a mission."

But there were a few hints of what attorneys -- and perhaps Davis -- can expect from the 52-year-old federal judge. In response to questions, Moreno named U.S. Supreme Court Justice David Souter as the justice he most admires, talked about how his experiences as a Latino affect his judging, and identified a ruling in a deportation case as one of his prouder moments on the bench. TV news cameras from English and Spanish language stations rolled as Davis spoke of his reasons for making Moreno the state's 111th Supreme Court justice.

Noting much has been made of Moreno's Latino heritage, Davis said there was "no question his elevation will be a source of great pride to Latinos," and other Californians. But, he said, "I did not pick Judge Moreno because of his ethnicity."

Davis said that in selecting a successor for the late Justice Stanley Mosk, he'd had "one standard: excellence."

Still, each of the four men invited by Moreno to address the confirmation panel -- and two of the panelists -- touched, and in some cases dwelled, on the diversity aspect of the appointment. Wilson Sonsini Goodrich & Rosati partner Fred Alvarez, a friend of Moreno's since they attended Stanford Law School together, said Moreno's appointment to the Supreme Court will "speak to the possibilities to people who may not see those possibilities."

Luis Rodriguez, president of the Mexican American Bar Association of Los Angeles urged the panel to "keep that door open" for a "group that hasn't been at the table for a long time."

Elwood Lui, a retired Second District justice, and Bruce Ishimatsu, an L.A. lawyer who used to practice with Moreno, spoke of his mentoring of kids from his community and his dedication to public service.

Davis, meanwhile, stressed that Moreno had received judicial appointments from two Republican

governors as well as President Bill Clinton.

When asked to name his favorite U.S. Supreme Court justice by Attorney General Bill Lockyer, Moreno offered Justice Souter, who he described as non-ideological -- "at times much to the chagrin of his appointing authority." A 1990 Bush appointee, Souter has lined up with the "liberal" bloc in the court's federalism cases, as well as in last year's _Bush v. Gore_.

Lockyer also asked Moreno to describe a case that had caused him to "intellectually struggle."

Moreno pointed to the case of a young girl who'd been molested by her father and faced deportation to her native Romania. Because authorities had failed to explore the family situation awaiting her there, Moreno spoke of how he was able "literally to stop a plane" to prevent what he saw as an unjust outcome.

Moreno also addressed what he'd bring to the court as its only current Latino member and just its third ever.

After identifying herself as sharing his Latino heritage, Joan Dempsey Klein -- the third member of the Commission on Judicial Appointments and a Second District Court of Appeal justice -- asked Moreno if "it causes us to bring a different dimension to the process of case-deciding."

"Yes --" he began.

"Then tell me what it is," Klein shot back, to approving laughter, "and I'll write it down [for the next time I'm asked]."

Moreno said he didn't see himself as a "Latino justice" and said the impact of his ethnicity was a "bit vague." But, he continued, his experiences, like anyone else's, "inevitably, ineluctably have some play in how I view life, how I view the litigants."

There is, he summed up, "definitely a _there_ there."

At that, Lockyer brought up his appearance before the justices last year, when he unsuccessfully argued in support of an affirmative outreach program in San Jose.

"I certainly wish you'd been there," he told Moreno, drawing a laugh from the crowd of judges and lawyers.

"We remember that day," George told Lockyer with a smile. None of the **justices** took Lockyer's side in that case, and George wrote a concurring opinion distancing himself from what he described as an overbroad and overheated indictment of affirmative action by majority author **Janice** Rogers **Brown.**

Moreno then piped up to suggest a more recent experience -- caring for a young niece who is disabled -- may also affect his perspective.

On a historical note, Moreno pointed out that he'd testified at the confirmation hearing, almost 20 years earlier, held for the court's first Latino justice, Cruz Reynoso. Reynoso, who was on hand Thursday, was an early mentor.

When it was time to vote, the panel was unanimous. "Ay, con mucho gusto," Klein said.

end

LOAD-DATE: October 19, 2001

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Knight Ridder/Tribune News Service
San Jose Mercury News

October 17, 2001, Wednesday

SECTION: STATE AND REGIONAL NEWS

KR-ACC-NO: K0935

LENGTH: 713 words

HEADLINE: Moreno expected to be confirmed to California Supreme Court

BYLINE: By Howard Mintz

BODY:
SAN JOSE, Calif. _ Barring an unforeseen development, Los Angeles federal Judge Carlos Moreno will be confirmed Thursday as a California Supreme Court justice.

In a thick stack of documents released Tuesday, lawyers and judges praised both his legal credentials and personal style, a statewide judicial screening commission branded him "exceptionally well qualified" for the Supreme Court and nobody stepped forward to oppose his nomination by Gov. Gray Davis.

At Thursday's confirmation hearing before a three-member commission, five witnesses will testify for Moreno, including Davis. There is no testimony scheduled against Moreno, nominated to succeed the late Justice Stanley Mosk, who died in June after serving longer on the state Supreme Court than anyone in history. The only trace of controversy in Moreno's personal or professional history is an admission in his background check that he smoked marijuana while attending Yale and Stanford University law school in the early 1970s. But with bipartisan political support, universal backing in the legal community and a moderate's reputation as a judge, Moreno is considered a cinch to become the first Latino justice on the court since 1989.

If confirmed, Moreno, 52, will complete a storybook climb from a modest upbringing in east Los Angeles to one of the most influential state Supreme Courts in the country. Moreno is giving up a federal judgeship with lifetime tenure for the opportunity to become just the third Latino justice in the state's history _ a factor that weighed into his decision to seek the Supreme Court position.

"It was important as a Latino to have a Latino on the Supreme Court," Moreno said in a recent interview with the San Jose Mercury News. "I thought I'd do something that's a bit risky. I wouldn't enjoy the benefits of lifetime tenure until I'm 65, anyway."

While Moreno's heritage played a part in his decision _ as a federal judge, he often lunched with friends and family at Mexican restaurants in his old neighborhood a few blocks from the courthouse _ his credentials were the focus of the documents submitted to the commission. The commission is composed of Chief Justice Ronald George, Attorney General Bill Lockyer and appeals court Justice Joan Klein.

A separate State Bar commission that evaluates judges called Moreno a "very intelligent, learned scholar of the law, a quick study." The commission, which evaluated Davis' four finalists for the court, said Moreno "stands apart from the others based on his personal and professional qualities."

By contrast, the last **justice** to join the court, **Janice** Rogers **Brown,** had to overcome a "not qualified" ranking by the State Bar commission when former Gov. Pete Wilson nominated her in 1996.

Moreno, widely considered a moderate, is joining a conservative Supreme Court with its usual assortment of hot issues on the docket, including the fate of Proposition 21, which made it easier to prosecute juveniles in adult court.

In joining a court known for upholding most death sentences, Moreno will replace Mosk, the court's lone liberal. Most legal scholars predict Moreno is unlikely to have a substantial impact on the court's direction for the foreseeable future. During Senate confirmation hearings for his seat on the federal bench, Moreno, quizzed about the death penalty, said: "I have no reservation about being able to apply the death penalty in an appropriate case. I believe it is constitutional."

However, since becoming a federal judge in 1998, Moreno has shown his independent streak. He sided with environmentalists in a major case that called for the protection of the tidewater goby, barred a southern California jewelry company from moving to Mexico so it could avoid unionization, and took an expansive view of allowing a student to sue a school district over a "racially hostile environment."

For his part, Moreno, asked his ideology, replied: "Reasonable."

"I try to look at all sides of an issue," Moreno said. "I don't have any kind of ideology on any kinds of cases."

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JOURNAL-CODE: SJ

LOAD-DATE: October 17, 2001

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el Nuevo Herald
Found on Miami.com

San Jose Mercury News

October 17, 2001 Wednesday MORNING FINAL EDITION

SECTION: CALIFORNIA NEWS; Pg. 15A

LENGTH: 681 words

HEADLINE: LATINO JUDGE SEEN AS CINCH FOR HIGH COURT

BYLINE: HOWARD MINTZ, Mercury News

BODY:
Barring an unforeseen development, Los Angeles federal Judge Carlos Moreno will be confirmed Thursday as a California Supreme Court justice.

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At Thursday's confirmation hearing before a three-member commission, five witnesses will testify for Moreno, including Davis. There is no testimony scheduled against Moreno, nominated to succeed the late Justice Stanley Mosk, who died in June after serving longer on the state Supreme Court than anyone in history. Bipartisan support

The only trace of controversy in Moreno's personal or professional history is an admission in his background check that he smoked marijuana while attending Yale and Stanford University law school in the early 1970s. But with bipartisan political support, universal backing in the legal community and a moderate's reputation as a judge, Moreno is considered a cinch to become the first Latino justice on the court since 1989.

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"It was important as a Latino to have a Latino on the Supreme Court," Moreno said in a recent interview with the Mercury News. "I thought I'd do something that's a bit risky. I wouldn't enjoy the benefits of lifetime tenure until I'm 65, anyway."

While Moreno's heritage played a part in his decision -- as a federal judge, he often lunched with friends and family at Mexican restaurants in his old neighborhood a few blocks from the courthouse -

- his credentials were the focus of the documents submitted to the commission. The commission is composed of Chief Justice Ronald George, Attorney General Bill Lockyer and appeals court Justice Joan Klein.

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Replaces liberal

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"I try to look at all sides of an issue," Moreno said. "I don't have any kind of ideology on any kinds of cases."

GRAPHIC: Photo;
PHOTO: Carlos Moreno has won praise from lawyers and judges for his legal credentials and personal style. He's expected to be confirmed Thursday to the California Supreme Court.

LOAD-DATE: November 13, 2001

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The Recorder

October 10, 2001 Wednesday

SECTION: COMMENT; Pg. 5

HEADLINE: A SHORT HISTORY OF THE PUBLIC RELATIVE'S OFFICE

BYLINE: BY William W. Bedsworth;

Looking back, it probably should have been obvious that U. S. v. Female Juvenile (00-50306) (9th Cir. 2001) was a watershed decision when it was published in June of 2001.

BODY:
The headline alone in one legal publication, "Feds Must Notify Parent Before Interrogating Child, Panel Says," should have been so obviously a landmark extension of Miranda as to alert the legal community to the impending deluge.

So scholars have been utterly unable to explain the fact that the decision seems to have caused not a ripple outside the rather shallow waters of Assistant U.S. Attorney Wendy Frakes' office. Frakes, who had argued the case before Ninth Circuit Judges Richard Paez, William Canby Jr., and M. Margaret McKeown, did her very best imitation of a woman drowning in appellate obduracy, when she lamented, "There is absolutely nothing in the statute [Federal Juvenile Delinquency Act, Title 18 U.S.C., section 5033] that says what the court says. We're not trying to hide the ball. . . . The ball keeps rolling, and we're just trying to keep up with it." But no one seems to have heard her, and the ball did keep rolling. It rolled first to Michael Guisti, a talented, but hitherto obscure young Santa Ana attorney, who three weeks later obtained a suppression order on the theory that his juvenile client had received a deficient Miranda warning before confessing. As expressed by the Fourth District Court of Appeal, in language somewhat stronger than that employed by Guisti:

"Anyone with the intelligence of a reasonably well-adjusted beagle can see that it is not enough, under U. S. v. Female Juvenile (2001) 251 F.3d 987, merely to advise the minor of the constitutional right to speak to a relative. To so hold would render that decision even more bewildering than the wholly unfathomable section 5033 which it purports to explicate.

"So the only reasonable reading of that opinion, viewed in the light of the statute it interprets, is that the Ninth Circuit in that case discerned a legislative intent to accord the full panoply of Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436) to minors requesting not an attorney, but a relative. We therefore hold that a minor must be advised not only that he has a right to speak to a relative, but also that if he has no relative, one will be appointed for him free of charge." In re David Orin C. (2002) 87 Cal.App.4th 222, 231.

Within a week of the decision in In re David Orin C., five bills were introduced in the California State Assembly providing for the creation of a Public Relative's Office. Although bogged down somewhat by political in-fighting and squabbling over whether the new office would impinge upon the prerogatives of the already existing public defenders, public guardians, public information officers and public restrooms, a compromise bill was ramrodded through by legislators apparently

convinced they were only days away from an $89 billion electricity rebate negotiated by Gov. Gray Davis.

The bill was signed into law by Davis as urgency legislation. On November 21, 2002, the governor appointed Dick Van Patten, 73, as the "Interim Director of the California Office of the Public Relative." While no one ever explained the "interim" designation, the press release indicated the governor had "greatly admired Mr. Van Patten's handling of difficult relational issues on Eight Is Enough" (which he apparently thought was a documentary).

Van Patten ran a reasonably tight ship. He correctly perceived his fledgling department's critical need for early credibility and courageously enforced strict hiring practices. Under Van Patten, no one was hired as a deputy public relative without prior experience as a relative. He was universally praised for enforcing this requirement in the face of considerable political patronage pressures. While department personnel records for those early days are incomplete, office tradition has it that even Willie Aames, Lorne Greene and Florence Henderson were turned down by the fastidious Van Patten, despite their extensive show-business experience as relatives.

There were, of course, growing pains. In 2004, it was held that the right to a public relative could not be denied merely because the juvenile detainee had relatives of his own. An appellate panel stated the rule succinctly: "The fact that the minor has relatives clearly does him no good if they are not present to interfere with his questioning; in such cases the immediate appointment of a public relative is a constitutional imperative." (In re Alicemarie S. (2004) 99 Cal.App.4th 555.) The resultant expansion of the office by a factor of nine caused some grumbling amongst taxpayers.

Later the same year, Michael Guisti resurfaced, again wielding section 5033 to obtain reversal of a conviction. This was, of course, the case which made Guisti famous. Since the police in this case had obtained the juvenile's confession only after first surrounding him with his parents, four siblings, a bemused uncle they'd dragged out of a business meeting, and three thoroughly outraged employees of the Public Relative's Office who insisted they had not been appointed, many had thought his vandalism conviction would probably pass muster.

But Guisti pointed out that the statute requires that "the arresting officer . . . shall immediately notify the Attorney General and the juvenile's parents," whenever a juvenile is taken into custody. Since the police had inexplicably failed to ring up Attorney General John Ashcroft (he was fact-finding in Honduras at the time), the confession was suppressed. (In re Warren F. (2004) 106 Cal.App.4th 1447.) By the time Congress could amend section 5033, Ashcroft and the 697 additional deputies hired to man the phone banks had run up a considerable bill, the payment of which required the temporary closing of the offices of the National Aeronautics and Space Administration and 11 national parks.

Then, in 2005, the office came under fire when the state Supreme Court announced its decision in In re Gary T. (2005), 31 Cal.3d 1150. The high court's ruling that Gary T.'s confession to the machine-gun slayings of his uncle, two neighbors, a cable TV installer, and the entire pitching staff of the San Francisco Giants could not be admitted into evidence against him caused a furor in the non-legal community.1

Most laymen were dismayed to learn that the Supreme Court reversed Gary T.'s conviction because he had asked to talk to an aunt upon his arrest, but the Public Relative's Office had been fresh out at the time and had provided instead a second cousin, twice-removed. Legal commentators, however, were not surprised, pointing out the obviously prejudicial inadequacy of someone who was "relatively

disinterested" in the minor.2 Besides, they noted, the decision had been freely predicted ever since the preceding year's court of appeal decision in In re Juan Kevin C-H. (2006) 119 Cal.App.4th 295.

Juan Kevin Cheng-Hoi had been arrested in July 2005 for the nuclear obliteration of Walnut Creek. While police were somewhat uncertain what Penal Code sections Juan might have violated,3 they were sure they wanted to question him, and were scrupulously careful to have a public relative appointed before doing so.

However, as Juan's public defender successfully argued, the right to a public relative necessarily entails the right to an effective relative. The First District agreed with Juan's contention that a relative who did not share his cultural heritage could not effectively substitute for his family. It reversed Juan's conviction.

Justice Carol Corrigan's agonized yet cogent dissent ("Who in hell shares the cultural heritage of Juan Kevin Cheng-Hoi?"), while still a model for jurists who value brevity, persuaded neither of her colleagues. The Supreme Court refused to hear the case, over an impassioned dissent by **Justice Janice** Rogers **Brown,** whose literally incendiary prose (she threatened to "set fire to the chief **justice's** car if we don't find a way to straighten this mess out soon") may have been responsible for the historic First Annual Supreme Court Retreat and Classic Car Rally which the chief announced a week later.

Public dissatisfaction with the Public Relative's Office culminated, however, very shortly after Martin Sheen was appointed its second director in August, 2006.4 It was Sheen who had the unenviable task of catching all the flak thrown up over In re Nora M. (2007) 133 Cal.App.4th 1227.

At age 15, Nora had become incensed by her parents' refusal to increase her cocaine allowance. She poisoned them both by putting Dr. Pepper into the cleaning solvent they were injecting. No dummy, Nora immediately realized the demise of her parents left her with only one living relative, a cousin Fred, who lived in La Habra. Thinking that only Fred stood between her and the Public Relative's Office - whose involvement in any criminal action had come to mean guaranteed immunity from effective prosecution - Nora stole a neighbor's Lear jet5 and raced toward Southern California to eliminate Fred.

There followed what the California Highway Patrol still refers to as Black Thursday: the now-famous chase in which 64 highway patrol officers were injured trying unsuccessfully to effect a vehicle stop on Nora's Lear jet on Highway 5 between Buttonwillow and La Palma.6 The final report of the State Controller's office7 put the state's cost in damaged vehicles and officers at $4.55 million.

It was at La Palma that Nora finally figured out the control panel, got the jet airborne, and crashed it into Cousin Fred's La Habra ranch-style three-bedroom, thus qualifying not only for the services of the Public Relative's Office8 but also - as the decedent's only living heir - for a Federal Disaster Relief Administration loan to rebuild the house.

Overzealous police rushed into the flaming wreckage and rescued Nora, but it was later determined they had failed to secure a warrant, and that the cockpit of the plane had ended up in the guest bedroom, which police had failed to knock-notice (Pen. Code 844) after entering the inferno. The court explained that no reasonable police officer could have expected there to be any survivors of such a spectacular crash. Since everyone presumably was dead, there was no emergency, hence no excuse for failing to obtain a warrant, much less omitting to knock-notice the conflagration in the

guest bedroom/-cockpit.9

Morale in the office plummeted after Nora M. Subjected to intense public criticism, named a defendant in what was generally conceded to be a slam-dunk class-action suit on behalf of the 37 survivors of the Mozambique nuclear tragedy, and having had its entire fleet of state automobiles confiscated for the use of the badly depleted Highway Patrol, the office was unable to resist total collapse.

Finally, on December 4, 2008, in the wake of heated public abuse heaped upon him by President-elect Davis, U.S. Sen. Arnold Schwarzenegger, and Lt. Gov. Van Patten, Sheen bid adieu to the three brothers, one father, and one aunt still on his staff and submitted his resignation. Thus the doors closed forever on what Ninth Circuit Judge Stephen Reinhardt once called "California's noble experiment," and Arlo Guthrie referred to as "proof positive that the whole goldarned state ought to have rubber walls." n

LOAD-DATE: October 10, 2001

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The Recorder

September 28, 2001 Friday

SECTION: AD HOMINEM; Pg. 4

HEADLINE: WHERE HAVE ALL THE WHITE MEN GONE?

BODY:
For the fourth time in a row, our state government, which formally condemns the practice of favoring women and minorities in hiring, has selected just such a candidate to fill a California Supreme Court vacancy.

For the fourth time in a row, our two most recent governors have used a Supreme Court appointment to create better demographic balance on the court and appeal to a particular political constituency, while swearing up and down that those considerations had nothing to do with the selection.

Don't get me wrong I think it's great to have a California Supreme Court that looks like California. Those three previous choices Kathryn Mickle Werdegar, Ming Chin and Janice Rogers **Brown** have proven themselves capable, and the newest appointee, Carlos Moreno, probably will too. It is simply the hypocrisy and the lying that are staggering. In appointing Moreno on Tuesday, Gov. Gray Davis insisted that Moreno's Hispanic heritage had absolutely nothing to do with his appointment. I have found the best judge for the job, Davis said.

Moreno, a federal judge in Los Angeles, indeed has many good qualities. But he has exactly zero years of experience as an appellate **judge.** There are dozens of **judges** on the California Court of Appeal, including several moderate Democrats, who are at least equally qualified.

Similarly, when Gov. Pete Wilson appointed **Janice** Rogers **Brown** to the California Supreme Court in 1996, he claimed that her status as an African-American woman had absolutely nothing to do with the choice. **Brown** has proven a capable, if occasionally controversial Supreme Court **justice,** but at the time her resume was exceedingly thin: She had no experience as a trial judge, less than two years on the appellate bench, and had been rated not qualified by the State Bar's Judicial Nominees Evaluation Commission. Still, to suggest affirmative action had anything to do with her selection was insulting, according to Wilson.

Wilson's previous two choices were Ming Chin, who is Asian-American, and Kathryn Mickle Werdegar. You have to go back more than 10 years, to July 1991, for the last time a white male Ronald George was added to the state's highest court.

Again, this is not an attack on Chin and Werdegar, who have done fine jobs. But assuming that race and gender had nothing to do with the selections, what are the odds that four in a row would have been women and/or minority?

Let's assume that the candidate pool for the Supreme Court in recent practice, the California Court of Appeal and the state's federal bench has averaged 33 percent women/minority over the last 10 years. It's lower than that, of course, but let's say 33 percent. And assume that neither race nor gender was in

any way a factor in the selections.

The odds, then, of four choices in a row being women or minority would be about 1 in 100.

Quite a coincidence.

How sad that our governors have boxed themselves in from telling the obvious, uplifting truth: They understand that a court of smart, qualified jurists who also reflect the diversity of California is a good thing, that it legitimizes the judicial function and increases public confidence in all our courts.

That, and it will get them more votes in the next election. SCOTT GRAHAM

LOAD-DATE: September 28, 2001

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AIDS Policy and Law

September 14, 2001

SECTION: Vol. 16, No. 17

LENGTH: 85 words

HEADLINE: Dissent

BODY:
In a dissenting opinion, **Justice Janice** R. **Brown** said the court's majority effectively removed any time limit when it comes to enforcing the Fair Employment and Housing Act. "Plainly, the Legislature is capable of expanding the statutory period when it perceives the need," **Brown** said

"The majority offers no principled justification or rationale for displacing this critical component of the FEHA and undermining its goals," she said.

Richards v. CH2M Hill Inc. No. S087484 (Cal. 08/23/2001).

LOAD-DATE: September 14, 2001

Copyright 2001 Orange County Register
The Orange County Register

September 10, 2001, Monday
Correction Appended

SECTION: Local

LENGTH: 463 words

HEADLINE: POLITICAL DATEBOOK

BODY:
Today

Gene Williams will discuss Social Security at the 7 p.m. meeting of the 71st Assembly District Committee of the California Democratic Party, to be held at Coco's at the corner of Holt and Newport, Tustin. An optional dinner begins at 6:30 p.m. The meeting is free and open to all Democrats. For more information, call (714) 731-4730. Tuesday

County Supervisor Tom Wilson will host a public forum on El Toro reuse at 6:30 p.m., Aliso Niguel High School, 28000 Terrace View Drive, Aliso Viejo. For more information, call (714) 834-3550.

Thursday

GOP gubernatorial candidate and Secretary of State Bill Jones will be the guest speaker at the 7:30 a.m. breakfast meeting of the Public Leaders Breakfast Series at the Pacific Club, 4110 MacArthur Blvd., Newport Beach. The cost is $30. For reservations and information, call (949) 222-2999.

Friday

Dean Andal, member of the state Board of Equalization, will be the guest speaker at the 9 a.m. breakfast meeting of Principles over Politics at the Bahia Corinthian Yacht Club, 1601 Bayside Drive, Corona del Mar. Cost is $13. For reservations and information, call (949) 644-7094.

Rep. Christopher Cox, R-Newport Beach, will be the guest speaker at the 7 p.m. dinner of the South Coast Republican Forum at the Irvine Marriott, 18000 Von Karman Ave., Irvine. Cost is $35 for nonmembers. For reservations and information, call (949) 854-2426.

Saturday

Ward Connerly, founder of the American Civil Rights Institute, will discuss Getting Beyond Race" at the 9 a.m. breakfast meeting of the Rush Limbaugh Club, Holiday Inn, 25205 La Paz Road, Laguna Hills. Cost is $15 in advance, $17 at the door. Reservations required by Wednesday. For reservations and information, call (949) 366-1901.

Rep. Ed Royce, R-Fullerton, will hold a 10 a.m. town-hall meeting at La Habra Heights City Hall's multipurpose room, 1245 N. Hacienda Road, La Habra Heights. He will hold a 1 p.m. town-hall

meeting in the Placentia City Council chambers, 401 E. Chapman Ave., Placentia. For more information, call (714) 992-8081.

Sunday

Sept. 17: State Supreme Court **Justice Janice Brown** will be the guest speaker at the 7 p.m. dinner meeting of the Orange County chapter of the Federalist Society for Law and Public Policy at the Irvine Hyatt, 17900 Jamboree Road, Irvine. Cost is $65. For reservations and information, call (714) 731-5572.

Compiled by Register staff writer Martin Wisckol. Notice of events must be received two weeks in advance by fax at (714) 973-4940 or by e-mail at mwisckol@ocregister.com

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CORRECTION:
State Board of Equalization member Dean Andal will speak at the 9 a.m. breakfast of Principles over Politics on Saturday at the Bahia Corinthian Yacht Club in Newport Beach. For more information, call (949) 644-7094. Because of a reporting error, the date was wrong in the Political Datebook that appeared in the Local section of the Sept. 10 edition of the Register.

LOAD-DATE: September 13, 2001

Copyright 2001 The San Diego Union-Tribune
The San Diego Union-Tribune

September 7, 2001, Friday

SECTION: OPINION;Pg. B-9

LENGTH: 744 words

HEADLINE: Another victory for equal rights

BYLINE: Harold Johnson; Johnson is an attorney with Pacific Legal Foundation.

BODY:
'What part of 'No' don't you understand?" That's a good question to put to California Attorney General Bill Lockyer, who still acts as if he doesn't understand Proposition 209, the anti-discrimination initiative passed by California voters in November 1996.

An amendment to the state constitution, Proposition 209 says "No"" to quotas and special benefits because of skin color. It says government may not "discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin" in public employment, education or contracting.

A simple, clear directive. But not clear enough, it seems, for the state's chief law enforcement officer. A year ago this month, Lockyer personally went before the state Supreme Court to ask the justices to read Proposition 209 so as to let San Jose practice race-based favoritism in government contracts. The city was forcing general contractors to hire subcontractors by racial quota or to do special recruiting aimed at minority subcontractors, whether or not those subcontractors were truly disadvantaged. Lockyer argued that this racially skewed policy was legitimate "outreach" -- even though it "reached out" not to the entire community, but only to narrow slices of it, based on race. In a landmark ruling, the state Supreme Court unanimously disagreed.

Justice Janice Brown (who happens to be African-American) gave Proposition 209 a broad and forceful reading. The measure bans not just explicit quotas, she declared, but any "race-conscious governmental decision-making." It represents voters' endorsement of "equal opportunity for all individuals," as opposed to "entitlement based on group representation." Indeed, even race-based "goals and timetables" are illegal; they differ from explicit goals or set-asides "only in degree," wrote Justice **Brown.**

To its credit, San Jose got into line. City officials cleansed their policies of racial bias.

Not so Lockyer. Last month his office was again in court defending race preferences. At issue this time -- in a suit brought by Proposition 209 sponsor Ward Connerly -- were state statutes requiring "goals and timetables" for hiring minorities in community colleges and in the state civil service. Also under attack were race preferences in certain contracts let by the Lottery and the state treasurer's office.

At the hearing before the Third District Court of Appeal in Sacramento, Lockyer's representative tried

to persuade the judges to trust bureaucrats to interpret the laws in a benign way. The court wasn't buying. In a 3-0 ruling on Tuesday, the Third District struck down the challenged laws, noting that race preferences can't be sanitized by calling them "goals."

"[T]he use of a racial classification presents significant dangers to individual groups, racial groups and society at large," wrote Presiding Judge Arthur Scotland.

The Associated Press got it right: "The decision . . . came as little surprise, as voters in 1996 passed Proposition 209 demanding a color-blind state government. Voters said California should not consider race . . . when deciding who to hire or to award contracts."

If the AP so easily grasps the meaning of Proposition 209, why is Bill Lockyer having difficulty? Sad to say, his office didn't reverse its stance even after the appeal-court ruling. A spokesman merely said they were mulling their next move, according to the AP.

Lockyer's ought to start fulfilling his job description. Granted, he's a liberal Democrat who opposed Proposition 209 when it was up for a vote. But the post he now holds requires him to stand up for the state constitution -- rather than supporting those who are trying to evade it.

Government efforts to help disadvantaged individuals or businesses must be race-neutral. Government cannot help some by intentionally harming others on account of race. Government cannot make skin color a proxy for virtue or guilt by awarding bonuses or penalties based on people's pigmentation.

This is the meaning of Proposition 209 -- a mandate against making race the arbiter of anyone's fate. It has been nearly five years since California voters wrote that principle into the state constitution.

It is time that their attorney general started enforcing it.

Johnson is an attorney with Pacific Legal Foundation (www.pacificlegal.org), which represented Ward Connerly in the case decided this week.

GRAPHIC: 1 DRAWING; David Rose

LOAD-DATE: September 9, 2001

Copyright 2001 / Los Angeles Times
Los Angeles Times

August 31, 2001 Friday Home Edition

SECTION: Part A; Part 1; Page 1; Metro Desk

LENGTH: 1057 words

HEADLINE:
Court Says Landlord Can Curb Leaflets

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:
A divided California Supreme Court decided Thursday that tenant associations have no free speech right to distribute newsletters door-to-door in apartment complexes.

The state high court ruled 4 to 3 that landlords can prohibit unsolicited leafleting by tenants in hallways not accessible to the general public--in effect that private property rights trump free speech.

The ruling opens the door to restrictions on leafleting in gated communities and condominium complexes as well as apartment buildings, lawyers on both sides of the case said. Prohibitions could apply to anyone who wanted to distribute literature. **Justice Janice** Rogers **Brown,** writing the lead opinion, said the state Constitution does not protect free speech on private property unless it is "freely and openly accessible to the public."

She cautioned, however, that the decision "does not give apartment owners carte blanche to stifle tenant speech." The court said tenants may still communicate with each other as long as they do not leave unsolicited materials at doorways.

Lawyers for tenants and civil libertarians were disappointed.

"As a result of this ruling, Californians don't have to travel to China or Cuba if they want to be in a place where they can be thrown in jail for leafleting their neighbors," said lawyer Robert De Vries, who represented the tenants.

Others saw the decision as an affirmation of property and privacy rights. Glenn P. Zwang, the lawyer for the building owners, called it "a victory for the right of people to be left alone in their homes."

Case Sharply Divides State Court Justices

Thursday's decision stemmed from a dispute between the Golden Gateway Center, a retail and residential complex in San Francisco with 1,254 housing units, and a tenants association.

The four high-rise apartment buildings have doormen during the day and 24-hour security patrols that

limit access to tenants and their guests, the court observed.

For 11 years, members of the tenants group distributed newsletters to the front doors of their neighbors in the downtown complex.

The owners of the complex sought a court order to prevent the group from leafleting after the tenants sued the owners and distributed literature critical of management. The managers said tenants could still post leaflets on bulletin boards in the laundry rooms.

A San Francisco judge had refused to grant the owners an injunction, a decision that was later overturned on appeal. The dispute will now return to trial court, where the judge will be asked again to grant the injunction against leafleting.

The free speech case sharply divided the high court, with its three most conservative justices generally favoring a broader restriction of rights on private property.

Justices Ming W. Chin and Marvin R. Baxter joined **Brown** in signing the lead opinion.

Chief Justice Ronald M. George gave the conservatives their fourth vote, but limited his agreement to the facts of the case at hand and argued for a more flexible approach.

He said he feared **Brown's** analysis could be used to try to deny tenants the right to hang political posters in their windows and prevent employees and union members from displaying certain bumper stickers in corporate or union parking lots.

"We effectively would remove any state constitutional obstacle to any such action by a landlord, union, or employer," George wrote.

George said the ruling mainly keeps tenants from leaving unsolicited materials at doorways.

"Tenants remain free to speak with each other in the hallways or elsewhere about anything they wish," he wrote. "Tenants may knock on the doors of other tenants and speak with them. They may telephone or fax each other, or correspond by letter or e-mail."

Justice Kathryn Mickle Werdegar, writing for the dissenters, observed that Golden Gateway's property managers had complained that unsolicited leafleting invaded tenants' privacy, but she pointed out that unsolicited mail or telephone calls would be at least as intrusive.

She also noted that the tenants association had agreed not to distribute leaflets to residents who said they didn't want them and to gather all leaflets that were not picked up 24 hours after delivery.

The leafleting prohibition violates the state's "traditionally cherished" protections of written communications, she wrote. Justice Joyce L. Kennard and Court of Appeal Justice Joan Dempsey Klein, sitting in for the late Justice Stanley Mosk, joined Werdegar.

"The ban goes much further than is necessary to address any legitimate concerns Golden Gateway may have . . . ," Werdegar said.

In a groundbreaking decision more than 20 years ago, the California Supreme Court ruled that private

shopping malls could not stop people from distributing political literature or gathering signatures on their premises. Thursday's ruling did not overturn that decision, and instead distinguished an apartment building from a shopping mall.

Alan L. Schlosser, legal director of the American Civil Liberties Union of Northern California, who helped argue the case for the tenants, noted that the state high court ruled only on the constitutional issue in the dispute. There are laws on the books that protect tenant rights, and county boards of supervisors can pass ordinances that give tenants the right to leaflet, he said.

"Door-to-door distribution of literature is a very traditional way that grass-roots groups have reached people," Schlosser said.

He said he was aware of only one tenant who had complained about the leafleting, but Zwang, the landlord's lawyer, said many tenants had objected to it.

"As long as we are talking about a private area that is not open to the public for public discourse, the landlord can enforce its property rights," Zwang said.

De Vries, the lawyer for the tenants, observed that the Chief Justice's opinion stressed that tenants may still receive leaflets if they request them.

But De Vries said there is tenant turnover in the buildings, and it would be difficult for the group to ensure that residents who want the newsletters get them.

Predicting the ruling will affect gated communities and condominium complexes, De Vries said: "If a portion of property adjacent to you is not owned by you, no constitutional protection allows you to leaflet it."

LOAD-DATE: August 31, 2001

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The Recorder

August 31, 2001, Friday

SECTION: NEWS; PG. 1

HEADLINE: COURT LIMITS REACH OF FREE SPEECH RIGHT

BODY:
By Mike McKee RECORDER STAFF WRITER

The state Supreme Court reined in Californians' free speech rights Thursday, ruling that the state Constitution protects them from government oppression, but not private restrictions.

The decision permits private property owners - such as the San Francisco apartment complex landlords in Thursday's case - to ban the unsolicited distribution of pamphlets or leaflets on their grounds unless the site has taken on the characteristics of a public forum.

"Based on the historical evidence suggesting that the framers of California's free-speech clause intended to protect against governmental - and not private - encroachments ... we see no grounds for reaching a different conclusion," **Justice Janice** Rogers **Brown** wrote for a three-member plurality.

Justices Marvin Baxter and Ming Chin concurred, with Chief **Justice** Ronald George concurring separately because he felt **Brown** had ruled too broadly. **Justice** Kathryn Mickle Werdegar dissented and was joined by Justice Joyce Kennard and Second District Court of Appeal Justice Joan Dempsey Klein, filling in for the late Justice Stanley Mosk. In Golden Gateway Center v. Golden Gateway Tenants Association, 01 C.D.O.S. 7627, the owners of a mixed retail and residential apartment complex on the Embarcadero in downtown San Francisco had banned solicitation on their grounds by the on-site tenants' association. The association fought back by claiming the ban violated the group's free-speech rights under the California Constitution.

The high court disagreed, holding that the state Constitution prevents the state from obstructing speech, but does not apply in most instances to restrictions imposed by private parties. Only if the property where free speech is being invoked is freely and openly accessible to the public, the court held, would private property owners have to permit leafleting.

"For example," **Brown** wrote, "our courts of appeal have consistently held that privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free-speech clause because, among other things, they are not freely open to the public.

"Our lower courts," she continued, "have also suggested that an apartment complex does not resemble a traditional public forum because it 'is a place where the public is generally excluded.' "

Thursday's ruling was aimed at clarifying the court's 1979 milestone ruling in Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, which protected speech and petitioning rights in large shopping centers that essentially had taken on the characteristics of traditional town squares. That ruling had

not established whether free-speech rights were protected in private settings such as Golden Gateway, which consists of four high-rise buildings and a group of townhouses containing 1,254 residential units.

While Thursday's ruling followed the thinking of Robins, it also took potshots at it, saying it was "less than clear" and that other states' courts had been "less than kind in their criticism" of it. Indeed, **Brown** hinted that Robins might have come down differently if decided by the current court.

"Whether or not we would agree with Robins' recognition of a state constitutional right to free speech in a privately owned shopping center if we were addressing the issue for the first time," she wrote, "we are obliged to follow it under principles of stare decisis."

In his concurring opinion, George accused the majority of ruling broadly on what should have been a narrow issue. The distinction between government and private obstruction of free speech was irrelevant to the case, he argued.

"Had the apartment complex been owned by the state," he said, "and had the apartment been operated in the same manner as here - that is, by restricting access to interior hallways to tenants and their invitees - the tenants still would have no constitutional free-speech right to distribute unsolicited pamphlets in the buildings' interior hallways."

Werdegar's dissent claimed **Brown** ignored the court's own November decision in Gerawan Farming Inc. v. Lyons, 24 Cal.4th 468, which held that organizations could be violating their members' rights by using mandatory assessments to fund generic advertising.

"The Gerawan majority," she wrote, "cited textual proof that the California Constitution must be counted among those that were drafted to protect against private, as well as governmental, intrusion on constitutional rights." Werdegar pointed out that **Brown** had joined her in signing Mosk's majority opinion in Gerawan.

Alan Schlosser, legal director of the American Civil Liberties Union of Northern California, said Thursday that the ruling is limited and "leaves the recognition by the court that California provides broader protection than the federal Constitution."

Schlosser, who argued the case before the court as an amicus curiae, still expressed some disappointment. "In contemporary society," he said, "one's free-speech rights are often exercised in private settings and we think there should be protections even from private intrusions that try to restrict free- speech rights."

Robert De Vries, the lawyer who argued the case for the tenants' association, was a bit more blunt. "As a result of this ruling ," he said, " people in California need not travel to Cuba or China if they want to be in a place where one could go to jail for leafleting their neighbors."

De Vries and Schlosser both took heart, though, in the majority's statement that the ruling "does not give apartment owners carte blanche to stifle tenant speech."

"It's not open season for landlords to deny free-speech rights to tenants," Schlosser said.

Glenn Zwang, a partner at Bartko, Zankel, Tarrant & Miller who represented the apartment complex's

owners, said the ruling is a victory for people in apartment complexes or condominiums who want to exclude leafleting.

"You can safely say," he said, "that the case reaffirms the proposition put forward in Pruneyard that before free-speech rights can attach you have to have property open to the public on a large scale, so it's turned into a public forum. Clearly, the private hallways of a private apartment complex don't qualify."

George's concurring opinion says a number of questions remain about the scope of private property speech rights, and adds that **Brown's** ruling adds still more. Among them is whether a property owner could ban tenants from putting campaign posters in their windows.

"If we were to hold, as the lead opinion broadly would, that all types of constitutional free speech claims require state action," he wrote, "we effectively would remove any state constitutional obstacle to any such action by a landlord, union, or employer."

Associate editor Mike McKee's e-mail address is mmckee@therecorder.com.

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The San Francisco Chronicle

AUGUST 31, 2001, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A3

LENGTH: 557 words

HEADLINE: Landlord can limit tenant leafleting;

Split in high court over S.F. case

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:
A deeply divided California Supreme Court yesterday dealt a setback to tenants' free-speech rights, ruling that landlords can prohibit residents from distributing newsletters in apartment complexes.

The decision is the first by a state high court to deal with the issue, and it split the courts into three bitter factions. The court could not reach a majority opinion on how broadly the state should protect the free-speech rights of Californians. In the end, four of the seven justices decided only the tenants issue. Balancing property rights against free-speech protections, the court ruled that the owner of the Golden Gateway Center in downtown San Francisco could prohibit a tenants association from leafleting in the building.

But the court was divided over the reasoning. Three justices voted to limit all free-speech rights, one justice said it was unnecessary to consider that fundamental issue, and three others said tenants have broad constitutional rights.

"The decision means that the apartment owner can protect the privacy rights of its tenants and ensure that they're left alone in their homes," said Glenn Zwang, San Francisco attorney for Golden Gateway Center.

ATTORNEY'S REACTION

But the tenants' attorney, Robert De Vries, expressed concern that under the ruling his clients "can be thrown in jail for leafleting their neighbors. That isn't something one would expect in California."

Alan Schlosser, a lawyer with the American Civil Liberties Union, said California still provided greater free-speech protections than the federal constitution, but the court will have to set guidelines in future cases.

With 1,254 residential units, the center is one of the largest apartment complexes in San Francisco. In 1982, a group of tenants formed the Golden Gateway Tenants Association. They would periodically distribute a newsletter. Management didn't object until 1993, but backed off when the tenants

threatened legal action.

In 1996, the management revised the rules, banning all leafleting and notices on bulletin boards, except in the laundry rooms.

SUIT FILED BY LANDLORD

When the tenants continued to leaflet, the landlord sued. San Francisco Superior Court **Judge** John Dearman ruled that the tenants had a contractual right to leaflet. A state appeals court reversed that decision.

Three of the state Supreme Court **justices** agreed with the state appeals court.

Justice Janice Rogers **Brown,** the court's most outspoken conservative, said Californians can rely on free-speech rights only against a government agency. "Here, the complex is privately owned, and Golden Gateway, the owner, restricts the public's access to the complex." Justices Marvin Baxter and Ming Chin joined in the decision.

Chief Justice Ronald George said he agreed with the final result, saying that leafleting should be limited to areas that are open to the public. But he criticized **Brown** for trying to limit free-speech rights, saying her reasoning might allow a landlord to prevent tenants from displaying campaign posters in their apartment windows.

Justice Kathryn Mickle Werdegar dissented, saying the tenants have a right to distribute their newsletter. Joining her opinion were Justice Joyce Kennard and state appeals court Justice Joan Dempsey Klein.E-mail Harriet Chiang at hchiang@sfchronicle.com.

LOAD-DATE: August 31, 2001

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Sun-Sentinel (Fort Lauderdale, FL)

August 31, 2001 Friday Broward Metro Edition

SECTION: NATIONAL; Pg. 13A

LENGTH: 414 words

HEADLINE: CALIFORNIA COURT BARS TENANTS' LEAFLETS

BYLINE: Maura Dolan National Correspondent

DATELINE: SAN FRANCISCO

BODY:
A divided California Supreme Court decided Thursday that tenant associations have no free speech right to distribute newsletters door-to-door in apartment complexes.

The state Supreme Court ruled 4-3 that landlords can prohibit unsolicited distribution of leaflets by tenants in hallways that are not accessible to the general public -- in effect that private property rights trump free speech.

The ruling opened the door to restrictions on leaflets in gated communities and condominium complexes as well as apartment buildings, lawyers on both sides of the case said. Prohibitions could apply to anyone who wanted to distribute literature. **Justice Janice** Rogers **Brown,** writing the lead opinion, said the state constitution does not protect free speech on private property unless it is "freely and openly accessible to the public."

She cautioned, however, "that our decision today does not give apartment owners carte blanche to stifle tenant speech." The court said tenants might still communicate with each other as long as they do not leave unsolicited materials at each other's doorways.

Lawyers for tenants and civil libertarians were disappointed by the decision.

"As a result of this ruling, Californians don't have to travel to China or Cuba if they want to be in a place where they can be thrown in jail for leafleting their neighbors," said lawyer Robert De Vries, who represented the tenants.

Others saw the decision as an affirmation of property and privacy rights.

Glenn P. Zwang, the lawyer for the building owners, called the ruling "a victory for the right of people to be left alone in their homes."

Thursday's decision stemmed from a dispute between the Golden Gateway Center, a retail and residential complex in San Francisco with 1,254 housing units, and a tenants' association formed by residents of the complex.

The four high-rise apartment buildings have doormen during the day and 24-hour security patrols that limit access to tenants and their guests, the court observed.

For 11 years, members of the tenants' group distributed newsletters to the front doors of their neighbors in the downtown complex.

The owners of the complex sought a court order to prevent the group from leafleting after the tenants sued the owners and distributed literature critical of management. The managers said tenants could still post leaflets on bulletin boards in the laundry rooms.

Maura Dolan writes for the Los Angeles Times, a Tribune Co. newspaper.

LOAD-DATE: September 1, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

August 28, 2001, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: PROVOCATIVE ACT THEORY EXPLAINED

BODY:
By Mike McKee RECORDER STAFF WRITER Trying to set guidelines for the proper charges to be filed in gangland killings, the California Supreme Court Monday upheld the murder conviction of one Southern California gang member while reversing the conviction of another in separate shootings in which bystanders were killed. Both rulings examine the state's provocative act murder doctrine. The doctrine, usually invoked in connection with gun battles, essentially allows police to bring murder charges against a person whose actions - like firing a gun - provoke another into inadvertently killing a third person. The justices held that an Orange County defendant couldn't be guilty under the doctrine, while holding that a San Bernardino man could easily be found responsible for murder without even invoking the provocative act theory. The companion cases are People v. Sanchez, 01 C.D.O.S. 7473, and People v. Cervantes, 01 C.D.O.S. 7469. In Sanchez, Julio Cesar Sanchez and Ramon Gonzalez, members of rival gangs in San Bernardino County, had been declared guilty of first-degree murder for the 1996 death of Reynaldo Estrada, an innocent neighbor who was shot in the head during a gun battle between the two defendants. It was never clear whose bullet killed Estrada. Riverside's Fourth District Court of Appeal reversed the convictions, saying the trial court jury had improperly relied on the provocative act murder doctrine. The Supreme Court disagreed, saying the doctrine had little significance because it was an alternate theory that played no role in the murder convictions. There was enough evidence, Justice Marvin Baxter wrote for the court, to convict on the theories of premeditated murder and murder for intentionally firing a gun from a car with intent to kill. "Since sufficient evidence established that Sanchez and Gonzalez premeditated the murder of one another, and that the unlawful conduct of each was a substantial concurrent, and hence proximate, cause of Estrada's death," he wrote, "both could be convicted of first-degree murder." In the other case, however, Baxter wrote that Israel Cervantes, convicted of second-degree murder, had not provoked the Alley Boys gang into killing Hector Cabrera, a fellow Highland Street gang member, in 1994. Cervantes had been convicted of provoking the murder by starting a confrontation at a two- gang party that ended in Cabrera - who was leaving the scene - being shot by five members of the Alley Boys. "The critical fact that distinguishes this case from other provocative act murder cases is that here the actual murderers were not responding to Cervantes' provocative act by shooting back at him or an accomplice in the course of which someone was killed," Baxter wrote. "The fatal shots," he added, "were fired ... at a third party (Cabrera) who was not a party to the initial provocative act." Chief **Justice** Ronald George and **Justices** Joyce Kennard, Ming Chin and **Janice** Rogers **Brown** concurred in both opinions. Kennard issued a separate concurring opinion in Sanchez; **Justice** Kathryn Mickle Werdegar signed it and also issued her own concurring opinion. Werdegar was especially critical of Sanchez, saying that while she agrees with the majority's result, she believes its reasoning was wrong. Estrada was the victim of a sequence of provoked events - not a concurrence of them - that caused his death, she said. "If Sanchez did not directly shoot Estrada, his liability for Estrada's death must rest on conduct that 'induced' or 'prompted' Gonzalez to fire the fatal shot," Werdegar wrote. "While Justice Kennard avoids using the label, this is clearly 'provocative act' liability." Kennard noted that Monday's two rulings show that the courts will not impose what could

be unbounded liability for retaliatory murders. "The court's decisions . . . in these two companion cases," she wrote, " should begin to fix this line of demarcation separating mutual combat killings from retaliatory killings in the context of urban warfare between rival street gangs."

LOAD-DATE: August 29, 2001

Copyright 2001 The New York Law Publishing Company
The National Law Journal

August 27, 2001

SECTION: FEES; Pg. A6

LENGTH: 389 words

HEADLINE: Court: fee means fee

BYLINE: By Sonia Giordani, AMERICAN LAWYER MEDIA NEWS SERVICE

HIGHLIGHT:
Calif. statute authorizes award of money to attorneys, not litigant.

BODY:
THE CALIFORNIA Supreme Court has ruled that a $ 1 million attorney fee award belongs to . . . well, the attorneys.

The justices ruled, 5-1, that a state anti-discrimination statute that authorizes the award of attorney fees does so to compensate for legal services -- not to enrich the litigant further.

"We conclude that, absent proof on remand of an enforceable agreement to the contrary, the attorney fees awarded in this case belong to the attorneys who labored to earn them," wrote **Justice** Kathryn Mickle Werdegar. Chief **Justice** Ronald George and **Justices** Marvin Baxter, Ming Chin and **Janice** Rogers **Brown** concurred in *Flannery v. Prentice,* No. 01 C.D.O.S. 6991. In a dissent, Justice Joyce Kennard said that the plain language of the statute authorized the court to award reasonable attorney fees "to the prevailing party."

"According to the majority, however the statute does not mean what it says: 'prevailing party' does not mean prevailing party but prevailing lawyer," Kennard wrote. "That construction ignores the plain language of the statute as well as persuasive United States Supreme Court precedent construing virtually identical language in the federal civil rights law."

The case stemmed from Leslie Flannery's successful sexual harassment suit against her former employer, the California Highway Patrol. An Alameda County jury awarded her $ 250,000.

The fee dispute arose after now-retired Judge Demetrios Agretelis awarded Flannery's lawyers, John Prentice and John Scott, more than $ 1 million in attorney fees.

Flannery then sued her lawyers for breach of contract, saying she had an oral agreement with her lawyers that called for her to give them "40 percent of the net settlement or net award of the jury." The lawyers countered that the oral agreement called for them to receive 40% of a jury verdict or the entirety of any statutory fees that might be awarded.

California's 1st District Court of Appeal reversed Agretelis, saying that the statutory fees belonged to Flannery as the prevailing party.

Reversing yet again, Werdegar, in her decision concluded that statutory fees "exceeding fees the client already has paid belong, absent a contractual agreement validly disposing of them, to the attorneys for whose work they are awarded."

GRAPHIC: Picture, BIG MONEY: Judge Kathryn Werdegar wrote the opinion.

LOAD-DATE: August 29, 2001

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Business Wire

August 24, 2001, Friday

DISTRIBUTION: Business & News Editors/Government & Legal Writers

LENGTH: 565 words

HEADLINE: As Fifth Anniversary of Prop. 209 Passage Nears, Connerly and PLF Still in Court Fighting to End Illegal Preference Programs

DATELINE: SACRAMENTO, Calif., Aug. 24, 2001

BODY:

The Sacramento-based Pacific Legal Foundation today represented Ward Connerly as a citizen plaintiff before the 3rd District Court of Appeal in a long-running case stemming from state government's failure to comply with California's Proposition 209 -- the state constitutional amendment that prohibits discrimination against or granting preferences to any individual on the basis of race or sex.

"Nearly five years ago, with the passage of Proposition 209, Californians flatly rejected group representation and demanded individual recognition based on personal merit," said PLF attorney Anthony Caso, who argued the case before the court this afternoon.

"Today, we called on the justices to embrace equality of opportunity under the law and to reject programs that provide guaranteed outcomes based on race and sex preferences. For far too long, these programs have been the status quo in state government," said Caso. The oral arguments were heard by the court in Connerly v. State Personnel Board. The litigation challenges laws still on the books that require community colleges and state agencies to develop goals and timetables to hire individuals on the basis of race and sex. Also in question are laws that require contractors with the State Lottery to award a share of their work to businesses owned by specified minorities and women and a requirement that the State Treasurer publish goals for the award of bond sale contract business to minority- and women-owned firms.

In the litigation, the laws are being defended by California Community Colleges, Lottery Commission, State Treasurer, Attorney General and a coalition of activist groups that support minority preferences.

PLF is representing Ward Connerly as a citizen-plaintiff in the litigation. Originally, the case was brought by then-Governor Pete Wilson.

"This case will bring us significantly closer to ensuring full implementation of Proposition 209," said Connerly.

"The voters have waited too long to see their will carried out in some of our state's largest agencies. I would urge this court to heed the California Supreme Court's majority opinion written last fall in Hi-Voltage v. San Jose by **Justice Janice Brown." Justice Brown** said: "The electorate desired to

restore the force of constitutional law to the principle articulated by President Carter on Law Day 1979: @Basing present discrimination on past discrimination is obviously not right.'"

"These lingering programs treat people differently on the basis of race and gender and we must prevail in order to protect individual rights over group entitlements," added Connerly.

Last year, PLF won a major victory in a PLF enforcement action against the City of San Jose (Hi Voltage Wire Works v. City of San Jose) that went all the way to the California Supreme Court. The case challenged preference programs in violation of Proposition 209 and was defended by, among others, California's Attorney General.

In the Hi Voltage case, PLF argued (and the court agreed) that San Jose's ordinance contained quotas disguised as "outreach." In the Connerly case, PLF argues that the statutes in question contain quotas disguised as "goals and timetables." CONTACT: Pacific Legal Foundation
Anthony Caso, 916/362-2833 (Senior VP/General Counsel)
or
ACRI
Ward Connerly, 916/444-2278 (Chairman) URL: http://www.businesswire.com

LOAD-DATE: August 25, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

August 24, 2001, Friday

SECTION: NEWS; PG. 3

HEADLINE: CONTINUING VIOLATIONS EXTEND FEHA'S LIMITS BYLINE:

BYLINE: Mike McKee RECORDER STAFF WRITER

BODY:
California employees won the right Thursday to hold their employers liable in certain circumstances for discrimination that may have occurred years earlier. In a 4-1 ruling, the California Supreme Court held that the Fair Employment and Housing Act's one-year statute of limitations for filing discrimination suits doesn't apply if it can be shown that an employer engaged in a course of unlawful conduct over an extended period of time. In other words, employees don't necessarily have to file a suit within a year of first suspecting that their rights were violated. "We believe," Justice Kathryn Mickle Werdegar wrote for the majority, "that to interpret the FEHA statute of limitations in a way that does not short- circuit the reasonable accommodation process is consistent with both the letter and the spirit of the law." Chief **Justice** Ronald George and **Justices** Joyce Kennard and Ming Chin concurred. **Justice Janice** Rogers **Brown** dissented and **Justice** Marvin Baxter recused himself from the case, after sitting through oral arguments, for undisclosed reasons. Richards v. CH2M Hill Inc., 01 C.D.O.S. 7347, was filed in 1994 by Lachi Delisa Richards, who accused her employer, a nationwide engineering firm, of disability discrimination and harassment for failing to reasonably accommodate her from 1988 until her resignation in 1993. In that time, Richards, a Yolo County resident who has multiple sclerosis and uses a wheelchair, had asked her bosses several times for accommodations, many of which were ignored, denied or implemented long after requested. CH2M argued that Richards could only seek damages for the one year allowed by FEHA's statute of limitations. But Sacramento County Judge Cecily Bond presiding over the case ruled that the company's conduct constituted a continuing violation and allowed evidence of five years of alleged discrimination and harassment. The jury awarded Richards $925,000 in emotional distress damages and $476,000 in economic damages following a six-week trial in 1997. Sacramento's Third District Court of Appeal reversed the trial court, saying most of Richards' claims were time barred. But the Supreme Court said Thursday that the continuing violation doctrine used by the federal courts can toll the statute of limitations if an employer's unlawful actions can be viewed as a "single, actionable course of conduct." Even then, the court held, the alleged discriminatory acts must be similar, occur frequently and not have acquired a degree of permanence that makes it clear to an employee that there will be no further effort to resolve the dispute. "The statute of limitations begins to run not necessarily when the employee first believes that his or her rights may have been violated," Werdegar wrote, "but rather either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain." The Third District, she said, "incorrectly adopted the narrow view that the statute of limitations begins to run as soon as the disabled employee is on notice that his or her rights have been violated." In her dissent, Justice **Brown** accused the majority of fashioning a "broad, standardless variant" that will nullify FEHA's statute of limitations, effectively transforming it into "a statute of non-limitation. "Since the employee need not place the employer on notice of alleged discriminatory acts, the complaint could encompass decades," she

wrote. " Indeed, complainants may now assert FEHA causes of action in any circumstance involving two or more unlawful practices regardless of how much time separates them, with every incentive to delay claims and maximize recovery." **Brown** also criticized the majority for offering "no principled justification or rationale" for making an exception to the statute of limitations. "Just as the Legislature must determine the appropriate limitations period, it is equally for the Legislature to create any exceptions," she wrote. Paul Cane Jr., a partner in the San Francisco office of Los Angeles' Paul, Hastings, Janofsky & Walker, wasn't convinced, though, that the ruling was as disastrous as **Brown** indicated. Cane, who represented the California Employment Law Council as an amicus curiae for CH2M Hill, said the decision was narrow and wouldn't likely affect discrete employer decisions such as promotion denials and discharges, which, he said, constitute the "vast run of cases" in which a continuing violation can be found. "In the disability accommodation and harassment contexts, I think the ruling does open the door for some claims that could be held time-barred to survive," he said. "But I don't think it announced a rule of applicability outside that context." Ellen Lake, the Oakland lawyer who represented Richards, disagreed, saying Thursday that the ruling has a "very broad scope" that will definitely affect other types of discrimination. She also said the ruling balances the rights of both employees and employers. Noting that the case has been remanded, Theodore Olsen, a partner in Denver's Sherman & Howard who represented CH2M Hill, said he is "very confident" the company will eventually prevail.

LOAD-DATE: August 28, 2001

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The San Francisco Chronicle

AUGUST 24, 2001, FRIDAY, FINAL EDITION

SECTION: NEWS; Pg. A1

LENGTH: 868 words

HEADLINE: More time allowed for filing bias suits;

State justices say workers need not rush into court

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:
Expanding the rights of discrimination victims, the California Supreme Court ruled yesterday that employers who harass or discriminate against employees are not protected by a one-year deadline if the violation takes place over years.

By a 4-to-2 vote, the court tossed out a one-year statute of limitations for a disabled woman in Yolo County who claimed that over a five-year period her employer refused to accommodate her disability.

Lachi DeLisa Richards said that after she received a diagnosis of multiple sclerosis, her employer would not remove obstacles from the hallways and in the lunchroom that made it hard for her to get around in her wheelchair. At one point, she contends, she was asked to go on an assignment that involved climbing barbed-wire fences. Employment experts say the ruling will primarily affect sexual harassment cases, in which the offenses can be subtle and build up over time, and suits over an employer's refusal to accommodate a worker's disability.

In yesterday's decision, the court said it is unfair to penalize workers who do not immediately sue and instead try to work out a solution so they can keep their jobs.

"Reasonable accommodation is often an ongoing process, rather than a single action," wrote Justice Kathryn Mickle Werdegar in the majority opinion.

"As with harassment," she said, "an instance of an employer's failure to accommodate what in isolation may seem trivial can assume greater significance and constitute a greater injury when viewed as one of a series of such failures."

If the actions are frequent and similar enough and aren't part of a permanent company practice, Werdegar wrote, a worker can recover damages for violations that occurred more than a year before he or she sues.

But she cautioned that the deadline to sue comes one year after the employee quits or the employer

makes it clear that the situation isn't going to change.

In a dissenting opinion, **Justice Janice** Rogers **Brown** said employers have a right to be given fair notice of any alleged discriminatory practices.

"No one condones discrimination on any invidious basis," she wrote. "The majority, however, submits no rationale for eliminating equitable considerations from the continuing violation doctrine." Justice Marvin Baxter joined in her dissent.

HARASSMENT, DISABILITY CASES

The decision will not affect cases in which there is a specific act of harassment or discrimination, such as a worker getting fired or being denied a promotion or a bonus.

"The bottom line is that in either a sexual harassment or in a disability reasonable accommodation case, the plaintiff doesn't have to rush off and file suit the first time the employer does something rotten," said Brad Seligman, executive director of the Impact Fund, a Berkeley group specializing in public-interest cases.

Ellen Lake, a lawyer for the disabled woman, said the decision protects the rights of both victims and employers.

DEADLINE NOT ABOLISHED

Paul Cane, a San Francisco attorney who represents employers, cautioned that the decision does not give workers carte blanche to sue whenever they want.

"There has to be a current violation," said Cane, who filed a brief for the Employment Law Council. He noted that accommodation suits are distinct because they involve an "interactive process" in which employers and employees discuss what can be done.

Richards, an engineer who does consulting work for Yolo and Sacramento counties, said she was happy with the ruling eight years after she left the company.

"I'm really pleased that the decision will help people in California not be forced to sue every year, but only as a last resort," she said. "I wanted to stay. I couldn't believe we couldn't work things out."

Richards began working in 1984 for CH2M Hill Inc., a nationwide engineering firm based in Greenwood Village, Colo., at the company's Redding office. In late 1987, she began experiencing difficulty walking, and in October 1988, she was told that she had multiple sclerosis.

Her supervisor initially agreed that she could work part time, not do field work and work out of the Sacramento office, which was closer to her doctors. The Redding office was not wheelchair accessible.

OBSTACLES, NOT ACCESS

When she returned to work, she said, she was given a storage room with nothing in it but a rug. Hallways were cluttered with furniture and equipment and when she tried to remove those items, a

manager put them back. She said she had trouble getting access to stacks in the library, vending machines and microwave ovens in the lunchroom and in the supply room.

In 1993, after a manager told her the situation wasn't going to change, Richards left the company. In January 1994, she filed suit.

In 1997, a jury awarded her $925,000 in emotional distress damages and $476,000 in economic damages. But a state appeals court overturned the verdict, saying Richard couldn't use as evidence anything that occurred more than a year before she filed suit.

In yesterday's decision, the state Supreme Court overturned the appeals court ruling and sent the case back to the trial court.E-mail Harriet Chiang at hchiang@sfchronicle.com.

LOAD-DATE: August 24, 2001

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The San Francisco Chronicle

AUGUST 21, 2001, TUESDAY, FINAL EDITION

SECTION: NEWS; Pg. A4

LENGTH: 556 words

HEADLINE: Insurance covers fatal gun accident, state justices rule

SOURCE: Chronicle Legal Affairs Writer

BYLINE: Harriet Chiang

BODY:
A teenage boy convicted of involuntary manslaughter for accidentally shooting a friend is covered by his family's homeowner policy, even though it excludes "illegal acts," the California Supreme Court ruled yesterday.

The justices said Safeco Insurance Co. must provide coverage for a 16-year-old San Fernando Valley boy who was showing friends his mother's gun when he fatally shot another boy. The insurance company's exclusion of illegal acts is "ambiguous" because it can be interpreted in different ways, unlike an exclusion for all crimes, the court concluded. Most insurance companies specifically exclude coverage for criminal acts. "Had Safeco wanted to exclude criminal acts from coverage, it could have easily done so," wrote Justice Joyce Kennard in the court's opinion.

But Kennard noted that Safeco expressly covers injuries caused as a result of an accident.

"Would reasonable insureds expect their homeowners' policy to protect them against liability for accidental injury or death occurring in their home?" Kennard said. "The answer is yes."

The dispute came about after a 1995 tragedy. The teenage boy, identified only as Kelly S., was with friends at his home when he found a .22-caliber Beretta handgun in his mother's coat pocket. Thinking the gun was unloaded, Kelly pulled the trigger and fatally shot his friend, Christopher Mitchell.

A juvenile court judge found Kelly guilty of involuntary manslaughter, a felony, and placed him on probation.

Mitchell's parents brought a wrongful death action against Kelly and his parents, who, in turn, passed it on to Safeco under their homeowner policy. The insurer argued that it shouldn't have to defend or indemnify Kelly and his parents in the lawsuit because of the "illegal acts" exclusion.

A trial judge ruled against Safeco, saying illegal acts could be interpreted as applying only to intentional acts. But a state appeals court reversed that decision, concluding that an illegal act is any violation of a criminal or civil law, regardless of whether it is intentional or not.

Meanwhile, the two families agreed to a confidential settlement of the suit.

In yesterday's opinion, Kennard said the appellate court's interpretation was too broad and would render the policy's liability coverage "practically meaningless."

In a separate opinion, Justice Marvin Baxter agreed that Safeco's policy should cover Kelly's parents, but he disagreed that the boy should be covered for his crime.

"It is undisputed that Kelly brandished the gun, pointed it in the general direction of Christopher's head, and deliberately pulled the trigger," Baxter said, in an opinion joined by **Justice Janice** Rogers **Brown.**

Howard Fox, the lawyer for Kelly and his father, hadn't read the opinion but said the court seemed to be following the general rule that policy exclusions must be "precise and narrowly drawn."

"Obviously, we insure people who run red lights, and yet they commit an illegal act," he said.

Safeco's attorney, Raymond Goettsch, said the facts in this case were clear and the court didn't need to find any ambiguity.

"Kelly committed a criminal act," he said. "I don't think they needed to go that extra step and say (so), but there could be a situation where it would be ambiguous."E-mail Harriet Chiang at hchiang@sfchronicle.com.

LOAD-DATE: August 21, 2001

Copyright 2001 McClatchy Newspapers, Inc.
Modesto Bee

August 20, 2001, Monday, ALL EDITION

SECTION: LOCAL NEWS; Pg. B6

LENGTH: 373 words

HEADLINE: QUESTIONING STUDENTS WITHOUT FEAR OF LAWSUITS

BODY:
Last week the California Supreme Court weighed the vital interest of school authorities to maintain decorum and protect the safety of students on campus against the rights of individual students not to be hassled. They came down on the side of fairness and common sense. School security guards, the court ruled, don't need "reasonable suspicion" to stop and question students on campus. Critics complain that the new rule laid down by the state high court allows police to do on campus what they may not do on the streets. But unemancipated minors have never been afforded the full constitutional rights and freedoms of adults.

As **Justice Janice Brown** concluded for the court, "If the school can require the minor's presence on campus during school hours, attendance at assigned classes during (the) scheduled meeting times, appearance at assemblies in the auditorium and participation in physical education classes out of doors, liberty is scarcely infringed if a school security guard leads the student into the hall to ask questions about a potential rule violation."

Her reasoning is correct. Society has a vital interest in maintaining order in schools. School districts struggling to keep campuses safe ought not to have to fear a lawsuit whenever a school security guard or a teacher, coach, principal or vice principal merely stops and questions a student.

The court did not ignore the threat of possible abuse. When stops are arbitrary and capricious or designed to harass a student, if a student is stopped and questioned every day, for example, or if only Asian students are stopped or only kids wearing the color blue, then that, the court rightly says, is not permissible.

Still, some critics worry the court is laying the groundwork for suspicionless searches -- a worrisome intrusion into a student's privacy. But the majority opinion makes a distinction between a stop and a search. "The mere questioning and detention of a student constitutes a more limited intrusion than a search of his person and affects" the court said. Indeed it does.

Stopping and talking to a kid on campus is one thing. Searching his backpack or pockets is something else and should require some reasonable suspicion of wrongdoing.

LOAD-DATE: October 16, 2001

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The San Francisco Chronicle

AUGUST 19, 2001, SUNDAY, FINAL EDITION

SECTION: INSIGHT; Pg. D5

LENGTH: 846 words

HEADLINE: LAW;

Setting the Court Straight;

Judges who bury their Mistakes

SOURCE: Chronicle Staff Writer

BYLINE: Bob Egelko

BODY:

A newspaper that takes someone's words out of context and distorts their meaning is expected to run a correction, and usually does. A lawyer who does the same thing to a passage from a past court case is lucky to get off with just a reprimand from the judge. But when judges on the state's top court turn a quote upside down -- a quote from a former president of the United States, no less -- and don't own up to it, about all you can do is write an article like this one. It happened in a big case, the California Supreme Court's ruling on Proposition 209 last November. It was the court's first look at the 1996 initiative that banned race and sex preferences in state and local programs, and the result was a ruling that prohibits any targeted recruitment of women or minorities. The opinion was written by Associate **Justice Janice** Rogers **Brown,** who's known to paint with a broad brush. The canvas she chose was the history of civil rights in America, and her theme was that all distinctions based on race -- slavery, segregation and the kind of affirmative action outlawed by Prop. 209 -- are an affront to equality. She wrapped up her argument by declaring that Californians, in passing 209, had decided to return to the principle proclaimed by then-President Jimmy Carter in a 1979 speech. She quoted him: "Basing present discrimination on past discrimination is obviously not right." It's true that Carter said those words. But the text of his speech, readily available from the Jimmy Carter Library in Atlanta, shows his meaning was the opposite of **Brown's.** Midway through a talk delivered at the White House on May 1, 1979, Carter spoke of the need to appoint more women and minorities as federal judges. He said those efforts were thwarted when selection committees told him they couldn't find enough blacks who had served on a state court or had spent 20 years with a distinguished law firm. Accepting those criteria, the president said, would "perpetuate a travesty of justice, because basing present discrimination on past discrimination is obviously not right." Carter was not condemning affirmative action but endorsing it as a remedy for the exclusion of women and minorities. It's the same position he has taken for years. When she wrote the ruling, **Brown** had probably never read Carter's speech. The court's staff does most of the research and even some of the opinion-writing. **Brown's** text didn't cite the actual speech as the source. The reference was to a periodical, U.S. Law Week, that printed a small part of Carter's talk. After discovering the discrepancy, I e-mailed the pertinent lines of the Carter speech to **Brown** and asked if she saw any need to set the record straight. A couple of days later, the answer came from an aide: No comment. Meanwhile, Prof. Clark Kelso of the McGeorge

School of Law in Sacramento did a computer search of court rulings nationwide to see if the same Carter quote had ever turned up before. It had -- in a 1980 dissent by another justice of the state Supreme Court, the late Stanley Mosk. Writing while Carter was still in office, Mosk used the line about present and past discrimination to illustrate his own disagreement with a county's affirmative action program. He also cited U.S. Law Week as his source. If he was familiar with Carter's views on the subject -- which seems likely, since the two had clashed a few years earlier in the Allan Bakke medical school admissions case -- he didn't say so. Mosk signed Justice **Brown's** Prop. 209 opinion last fall. Interviewed before his death in June, he said he had never read the text of the Carter speech before The Chronicle sent it to him. It was "interesting to read," he said, but he wouldn't comment on its content. He added that it was too late to amend the November ruling, which was already final. There was no scandalous miscarriage of justice because the court put a reverse twist on Carter's words. There wasn't any legal consequence. **Brown's** long historical discourse had little apparent connection to her analysis of Prop. 209 and its effect on recruitment programs. Chief Justice Ronald George and two colleagues called **Brown's** treatment of affirmative action and its supporters a "serious distortion of history" but agreed with her on the law. Yet courts don't speak in a political vacuum. **Brown's** opinion, signed by three other justices, was a volley in a debate that started long before Prop. 209 and continues: whether race-conscious measures are a legitimate remedy for discrimination or simply a perpetuation of racism. Judges also write their own versions of history. They can require witnesses to show up, produce documents and testify under oath -- or face jail if they refuse. Mistakes are supposed to be corrected on appeal. Courts are not infallible, but by and large, the public expects them to get it right. One law professor who thought the court should issue a corrected opinion, even at this late date, voiced the fear that the misuse of Carter's words would be perpetuated in the future if no one said anything. Consider it said.

GRAPHIC: PHOTO, **Justice Janice** Rogers **Brown** / Associated Press

LOAD-DATE: August 19, 2001

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CONTRA COSTA TIMES
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Contra Costa Times

August 17, 2001 Friday FINAL EDITION

SECTION: NEWS; Pg. A11

LENGTH: 358 words

HEADLINE: OFFICER HELD RESPONSIBLE FOR INJURIES DURING STOP;
STATE SUPREME COURT RULES THAT HIGHWAY PATROL EXPOSED PASSENGERS TO RISK BY HALTING THEM AT MEDIAN

BYLINE: KIM CURTIS

DATELINE: SAN FRANCISCO

BODY:
Law enforcement officers are required to use "reasonable care" when making traffic stops, the California Supreme Court ruled Thursday.

The decision stems from a 1996 case in which four people were hurt after a pickup truck struck their car, which a California Highway Patrol officer had ordered to stop in the median rather than on the right shoulder.

A lower court said Officer Richard Hedgecock was not responsible for the injuries of a man and three young children caused when the truck rear-ended their car. They were stopped in the median of six-lane state Highway 78 in San Diego County. The CHP Officer Safety Manual says "effective techniques should be used to ensure stopping on the right shoulder rather than in the median."

On the day of the accident, Cecelio Lugtu was driving about 85 mph in the far left lane. It was "dry, visibility was good and traffic was moderate to fairly heavy," according to court documents.

Hedgecock testified that CHP procedures gave him discretion whether to stop a driver in the median or on the right shoulder. He said he thought stopping the vehicle in the median, which was 10 feet wide, was safer than the shoulder, which was about 8 feet wide.

The lower court agreed, ruling in the motorcycle officer's favor.

"Hedgecock had no duty to stop plaintiffs on the right shoulder as a matter of law," the court said.

That decision was overturned by an appeals court, and the high court affirmed it Thursday, saying "a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops. The case may now proceed.

"There was insufficient justification under the present circumstances for Hedgecock to subject plaintiffs to the risks inherent in such a stop," said Chief **Justice** Ronald M. George, writing for the 4-1 court.

In her dissent, **Justice Janice** R. **Brown** said the high court's decision would likely cause more accidents than it prevents because it will reduce officers' ability to use their own discretion and force them to make all traffic stops on the right shoulder, even when it may be safer to stop in the median.

GRAPHIC: AP

LOAD-DATE: November 7, 2001

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Copley News Service

August 17, 2001 Friday

SECTION: CALIFORNIA ONLY

LENGTH: 420 words

HEADLINE: High court OKs suit against CHP officer

BYLINE: Alex Roth Copley News Service

BODY:
California Highway Patrol officers can be sued if they don't take reasonable steps to ensure a motorist's safety when making a traffic stop, the California Supreme Court ruled Thursday in a Vista, Calif., case.

In a case arising from a crash on state Route 78, the court ruled 4-2 that CHP officers have "a legal duty to use reasonable care for the safety of the persons in the stopped vehicle" and must avoid exposing the motorist to "an unreasonable risk of harm."

The ruling revives a lawsuit filed by a family injured when their car was struck by a pickup after a CHP officer pulled them over on the median of Route 78. One man suffered severe brain damage in the crash and will need round-the-clock care for the rest of his life. The family sued several parties, including the CHP.

In reinstating the suit against the CHP, which had been dismissed by Vista Superior Court Judge David Moon, the Supreme Court said a jury should be allowed to decide whether Officer Richard Hedgecock exercised reasonable care during the traffic stop. Chief **Justice** Ronald George wrote the majority opinion.

In a dissent, **Justice Janice Brown** said the family's suit should be dismissed, arguing that the facts show that the officer took proper precautions in the case.

"The CHP welcomes the opportunity to present the facts to a jury," CHP Commissioner D.O. "Spike" Helmick said in a statement Thursday.

Helmick was in Oceanside Thursday for the funeral of CHP Officer Stephen Linen Jr., who was killed Sunday when he was struck by a motorist while writing a speeding ticket on Interstate 5 in Leucadia.

The lawsuit was filed by several family members of Long Beach dentist Michael Lugtu, the driver of a car that was pulled over for speeding by Hedgecock on Aug. 15, 1996. Lugtu was driving in the fast lane and the officer motioned for him to pull over to the median, which was 10 feet wide.

Shortly after the stop, the car was struck. Lugtu's brother, Cecilio, a civil engineer, suffered severe and permanent brain damage, according to attorney Charles O'Reilly, who filed the suit.

Three children in the car suffered serious but not permanent injuries, O'Reilly said. The officer managed to avoid injury by diving over the concrete divider.

O'Reilly praised Thursday's ruling and said he doubted it would "open up the floodgates of litigation."

Deputy Attorney General Karen Walter, who argued the case on the CHP's behalf before the Supreme Court, said the opinion "might encourage lawsuits."

LOAD-DATE: August 17, 2001

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Los Angeles Times

August 17, 2001 Friday Home Edition

SECTION: California; Part 2; Page 1; Metro Desk

LENGTH: 1126 words

HEADLINE:
Court Says People Injured at Traffic Stop Can Sue CHP;
Ruling: State justices find that law officers must ensure the safety of those they pull over. The decision means a case in San Diego County will go ahead.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:
Law enforcement officers have a legal duty to ensure the safety of motorists during traffic stops, the California Supreme Court ruled Thursday.

In a 4-2 decision, the court allowed a man and three children who were seriously injured during a speeding stop to seek compensation from the California Highway Patrol at trial.

The four passengers in the car were hurt after an Oceanside-based CHP officer directed the driver of the speeding car to pull onto a freeway median. Once parked in the center of the freeway, the car was struck by a pickup truck. A CHP safety manual advises officers to try to stop vehicles on the right shoulder of the highway. "A law enforcement officer, in directing a traffic violator to stop in a particular location, has a legal duty to use reasonable care for the safety of the persons in the stopped vehicle," wrote Chief Justice Ronald M. George for the majority.

Lawyers for the victims said the ruling was an important clarification of the law that will help ensure that officers make traffic stops with safety in mind.

"You really don't have a choice to disobey the officer if you are asked to do something unsafe," said attorney Rita Gunasekaran, who handled the appeal for the accident victims. "That is why it is important for the highest court in the state to articulate the policy that the officer must take the safest course of action for the motorist."

The two justices who dissented, however, predicted that the ruling will make officers more reluctant to stop drivers and will reduce road safety.

"The majority will likely cause more accidents than it prevents because its failure to provide officers with any meaningful guidance does nothing to reduce the possibility of such accidents," wrote **Justice Janice** Rogers **Brown,** who was joined by **Justice** Marvin Baxter.

Law enforcement enjoys immunity from lawsuits in other familiar situations. For example, police are

generally protected from liability when injuries occur during chases, and officers are immune under state law for their decisions to stop suspected traffic violators.

But the state Supreme Court said law enforcement can be sued for negligence if officers expose motorists to danger when they pull them over in traffic.

Thursday's case, Lugtu v. California Highway Patrol, S088116, grew out of an accident that occurred on California 78 in San Diego County in August 1996.

Shortly before 5 p.m., Richard Hedgecock, an experienced CHP motorcycle officer, saw a Toyota Camry traveling about 85 mph in the fast lane.

Hedgecock pulled his motorcycle to the right of the Camry, sounded his siren and motioned for the driver to stop in the center median.

The officer gave the driver, Michael Lugtu, a dentist, a speeding ticket and cited the front seat passenger, Lugtu's brother, Cecelio Lugtu, for failing to have placed his two school-age daughters in the back seat in seat belts. The officer also warned the driver to put the third girl, a niece of Michael and Cecelio, in a seat belt. The family members were on their way to see off a relative who was departing on a Navy ship.

As the CHP officer returned to his motorcycle, he saw a pickup truck in the fast lane begin drifting farther and farther into the center of the roadway.

"As the truck approached, Hedgecock waved and jumped up and down, trying to attract the attention of the truck's driver, James Neeb, who appeared to Hedgecock to be looking down inside the truck," the court wrote.

"Just as the truck was about to hit him, Hedgecock dove over the concrete median barrier and heard a very loud crash."

The girls suffered serious injuries, including broken bones, but are now back in school, a lawyer for the victims said.

Cecelio Lugtu, an engineer, received a head injury that has left him with no short-term memory and unable to walk without assistance, the lawyer said. He is confined to a convalescent home. Driver Michael Lugtu, who was outside the car at the time, was uninjured.

Hedgecock said in a court declaration that he stopped the car on the 10-foot-wide median because it would have had to cross two busy lanes to get to the shoulder, which was only 8 feet wide.

He also said CHP procedures give officers the discretion to stop violators in the median or the right shoulder.

The plaintiffs, however, produced a CHP manual that advises officers to direct violators to the shoulder.

A San Diego Superior Court judge ruled for the CHP after determining that the officer had no duty to stop the car on the shoulder. A Court of Appeal in San Diego overturned that decision, ruling that it was up to a jury to determine whether the officer had been negligent.

The California Supreme Court agreed, saying it could find no ruling or law that protects law enforcement officers in such situations. The majority also said Thursday's ruling will not expose law enforcement to hefty damages in litigation.

The closest California case on point involved a person who was pulled over to the right shoulder by the CHP and was then injured when a drunk driver hit the patrol car, the court said. An appeals court in 1979 said the CHP officer could be found liable, but a jury determined that he was not, the court said.

Juries Qualified to Rule, Chief Justice Says

"The various considerations that an officer is required to take into account in deciding when and where to make a traffic stop, and how to conduct an investigation after the stop, are not beyond the understanding or experience of most jurors," George wrote.

He said other states also have recognized that law officers have a legal duty to exercise due care during traffic stops and not to expose the drivers and their passengers to an unreasonable risk of injury by third parties.

Justice **Brown,** however, said the majority failed to consider the policy implications of the ruling.

"If officers may incur liability no matter where they stop a traffic violator, they have less incentive to make stops, resulting in the reduced enforcement of our traffic laws," **Brown** wrote.

Deputy Atty. Gen. Karen M. Walter said being a CHP officer "is a tough enough job" as it is without subjecting them to lawsuits over where they stop violators.

"I think it makes it harder for law enforcement officers to work on a busy road," said Walter, who represented the CHP in the case. "There is a lot more you have to factor in" now.

CHP Commissioner D.O. Helmick said the case will now go to trial. "The CHP welcomes the opportunity to present the facts to a jury," Helmick said.

Steven W. O'Reilly, the trial lawyer for the accident victims, said the decision "gives added insurance that officers will think a little bit more next time--every time--they pull someone over."

LOAD-DATE: August 17, 2001

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The Recorder

August 17, 2001, Friday

SECTION: NEWS; PG. 1

HEADLINE: INJURED CAN SUE CHP OVER TRAFFIC STOPS

BODY:
By Mike McKee RECORDER STAFF WRITER Cops pulling over traffic offenders have always had to worry about someone pulling a gun on them. Now they also have to pay close attention to where they direct a driver to stop. On Thursday, the California Supreme Court ruled that law enforcement officers have a legal duty to use reasonable care for the safety of drivers pulled over for traffic violations. In particular, the justices said, the officers must make sure not to expose drivers to injury by other drivers or passers-by. "Past California cases uniformly hold," Chief Justice Ronald George wrote for a 4-2 majority, "that a police officer who exercises his authority to direct another person to proceed to - or to stop at - a particular location, owes such a person a duty to use reasonable care in giving that direction. "This duty includes the obligation not to expose such persons to an unreasonable risk of injury by third parties," he added. **Justices** Joyce Kennard, Kathryn Mickle Werdegar and Ming Chin concurred with George, but **Justices Janice** Rogers **Brown** and Marvin Baxter dissented. Lugtu v. California Highway Patrol, 01 C.D.O.S. 7124, came out of San Diego County, where CHP motorcycle patrol officer Richard Hedgecock directed the driver of a speeding Toyota Camry to pull over in the median of a six-lane highway on Aug. 15, 1996. Six to eight minutes later, a pickup truck driven by James Neeb drifted off the highway and smacked into the back of the parked vehicle. Front-seat passenger Cecilio Lugtu, two of his daughters and a third young girl were seriously injured. Hedgecock and the car's driver, Michael Lugtu, who had gotten out of the parked vehicle, weren't injured. A year later, Cecelio Lugtu and the three girls sued the CHP, alleging negligence and that Hedgecock owed them a duty of reasonable care. The trial court granted the CHP summary judgment, but San Diego's Fourth District Court of Appeal reversed, concluding that not only did Hedgecock owe a duty of reasonable care, but also should face trial on whether his alleged negligence was a legal cause of the plaintiffs' injuries. The high court agreed on Thursday. It also rejected the CHP's argument that the court should declare, as part of the governing standard of care, that an officer always satisfies the duty of reasonable care as long as a vehicle is stopped at any location off the travel lanes of a highway. "Under the defendants' formulation," George wrote, "a law enforcement officer's conduct would be deemed to satisfy the duty of reasonable care even if the center median of a highway is very narrow and the right shoulder generously wide, and even if there is no barrier to traffic traveling in the other direction, and the officer chooses the sole location that is not readily visible to oncoming traffic." In dissent, Justice **Brown** wrote that the majority should have factored in the particular facts of the accident and also examined whether it was foreseeable. "The foreseeability of harm created by officer Hedgecock's decision to stop plaintiffs in the median area was minimal to nonexistent," she wrote. "The weather was dry and visibility was good. The car occupied by plaintiffs was parked well within the median area. The median area was wider than the right shoulder, and the right shoulder was adjacent to a downward slope." **Brown** also stated that a jury's possible finding that Hedgecock breached his legal duty will do nothing to reduce such accidents in the future. "Instead," she wrote, "such a holding will likely hinder enforcement of our traffic laws and may even increase the number of accidents." CHP officials in Sacramento did not return a telephone call Thursday, but San Diego-based Deputy Attorney General Karen Walter, who

argued the case for the agency, said she was disappointed. "I wish the dissent had been the majority opinion," she said, adding that she worries that law enforcement officers will have to second-guess their decisions "rather than paying attention to the road." Plaintiffs' lawyer Charles O'Reilly, of the Law Office of Steven W. O'Reilly in Marina Del Rey, couldn't be reached for comment.

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The San Diego Union-Tribune

August 17, 2001, Friday

SECTION: ZONE;Pg. NC-1; NI-1

LENGTH: 398 words

HEADLINE: High court OKs suit against CHP officer over freeway stop

BYLINE: Alex Roth; STAFF WRITER

BODY:
California Highway Patrol officers can be sued if they don't take reasonable steps to ensure a motorist's safety when making a traffic stop, the California Supreme Court ruled yesterday in a Vista case.

In a case arising from a crash on state Route 78, the court ruled 4-2 that CHP officers have "a legal duty to use reasonable care for the safety of the persons in the stopped vehicle" and must avoid exposing the motorist to "an unreasonable risk of harm."

The ruling revives a lawsuit filed by a family injured when their car was struck by a pickup after a CHP officer pulled them over on the median of Route 78 near the Sycamore Avenue exit. One man suffered severe brain damage in the crash and will need round-the-clock care for the rest of his life. The family sued several parties, including the CHP.

In reinstating the suit against the CHP, which had been dismissed by Vista Superior Court Judge David Moon, the Supreme Court said a jury should be allowed to decide whether Officer Richard Hedgecock exercised reasonable care during the traffic stop. Chief **Justice** Ronald George wrote the majority opinion.

In a dissent, **Justice Janice Brown** said the family's suit should be dismissed, arguing that the facts show that the officer took proper precautions in the case.

"The CHP welcomes the opportunity to present the facts to a jury," CHP Commissioner D.O. "Spike" Helmick said in a statement yesterday.

Helmick was in Oceanside yesterday for the funeral of CHP Officer Stephen Linen Jr., who was killed Sunday when he was struck by a motorist while writing a speeding ticket on Interstate 5 in Leucadia.

The lawsuit was filed by several family members of Long Beach dentist Michael Lugtu, the driver of a car that was pulled over for speeding by Hedgecock on Aug. 15, 1996. Lugtu was driving in the fast lane and the officer motioned for him to pull over to the median, which was 10 feet wide.

Shortly after the stop, the car was struck. Lugtu's brother, Cecilio, a civil engineer, suffered severe and permanent brain damage, according to attorney Charles O'Reilly, who filed the suit.

Three children in the car suffered serious but not permanent injuries, O'Reilly said. The officer managed to avoid injury by diving over the concrete divider.

O'Reilly praised yesterday's ruling and said he doubted it would "open up the floodgates of litigation."

LOAD-DATE: August 19, 2001

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August 17, 2001, Friday

SECTION: LOCAL;Pg. B-3:7; B-2:2,6

LENGTH: 423 words

HEADLINE: High court OKs lawsuit against CHP officer in Vista traffic stop

BYLINE: Alex Roth; STAFF WRITER

BODY:
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The ruling revives a lawsuit filed by a family injured when their car was struck by a pickup after a CHP officer pulled them over on the median of Route 78 near the Sycamore Avenue exit. One man suffered severe brain damage in the crash and will need round-the-clock care for the rest of his life. The family sued several parties, including the CHP.

In reinstating the suit against the CHP, which had been dismissed by Vista Superior Court Judge David Moon, the Supreme Court said a jury should be allowed to decide whether Officer Richard Hedgecock exercised reasonable care during the traffic stop. Chief **Justice** Ronald George wrote the majority opinion.

In a dissent, **Justice Janice Brown** said the family's suit should be dismissed, arguing that the facts show that the officer took proper precautions in the case.

"The CHP welcomes the opportunity to present the facts to a jury," CHP Commissioner D.O. "Spike" Helmick said in a statement yesterday.

Helmick was in Oceanside yesterday for the funeral of CHP Officer Stephen Linen Jr., who was killed Sunday when he was struck by a motorist while writing a speeding ticket on Interstate 5 in Leucadia.

The lawsuit was filed by several family members of Long Beach dentist Michael Lugtu, the driver of a car that was pulled over for speeding by Hedgecock on Aug. 15, 1996. Lugtu was driving in the fast lane and the officer motioned for him to pull over to the median, which was 10 feet wide.

Shortly after the stop, the car was struck. Lugtu's brother, Cecilio, a civil engineer, suffered severe and permanent brain damage, according to attorney Charles O'Reilly, who filed the suit.

Three children in the car suffered serious but not permanent injuries, O'Reilly said. The officer managed to avoid injury by diving over the concrete divider.

O'Reilly praised yesterday's ruling and said he doubted it would "open up the floodgates of litigation."

Deputy Attorney General Karen Walter, who argued the case on the CHP's behalf before the Supreme Court, said the opinion "might encourage lawsuits."

LOAD-DATE: August 21, 2001

The Associated Press State & Local Wire

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August 16, 2001, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 399 words

HEADLINE: Supreme Court: Officers required to make traffic stops safely

BYLINE: By KIM CURTIS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

Law enforcement officers are required to use "reasonable care" when making traffic stops, the California Supreme Court ruled Thursday.

The decision stems from a 1996 case in which four people were hurt after a pickup truck struck their car that a California Highway Patrol officer had ordered to stop in the median rather than on the right shoulder.

The family sued the driver of the pickup, the driver of the car, the CHP and the officer who stopped them. A lower court dismissed the case, saying Officer Richard Hedgecock was not responsible for the crash that injured three young children and their father when the truck rear-ended the Toyota Camry. They were stopped in the median of six-lane state Highway 78 in San Diego County after a traffic stop. The driver had stepped out of the car and was unhurt.

The CHP Officer Safety Manual specifically says "effective techniques should be used to ensure stopping on the right shoulder rather than in the median."

On the day of the accident, Michael Lugtu, the girls' uncle, was driving the Camry about 85 mph in the far left lane. It was "dry, visibility was good and traffic was moderate to fairly heavy," according to court documents.

Hedgecock testified that CHP procedures gave him discretion whether to stop a driver in the median area or on the right shoulder. He said he thought stopping the vehicle in the median, which was 10 feet wide, was safer than the shoulder, which was about eight feet wide.

The lower court agreed and dismissed the suit.

"Hedgecock had no duty to stop plaintiffs on the right shoulder as a matter of law," the court said.

That decision was overturned by an appeals court, and the high court affirmed it Thursday saying "a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom

the officer stops. The case may now proceed.

"There was insufficient justification under the present circumstances for Hedgecock to subject plaintiffs to the risks inherent in such a stop," said Chief **Justice** Ronald M. George writing for the 4-1 court.

In her dissent, **Justice Janice** R. **Brown** said the high court's decision would likely cause more accidents than it prevents because it will reduce officers' ability to use their own discretion and force them to make all traffic stops on the right shoulder, even when it may be safer to stop in the median.

LOAD-DATE: August 17, 2001

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The Recorder

August 14, 2001, Tuesday

SECTION: NEWS; PG. 1

HEADLINE: JUSTICES: FEE STATUTES ARE FOR LAWYERS

BODY:
BY SONIA GIORDANI RECORDER STAFF WRITER The California Supreme Court ruled Monday that a million-dollar attorney fee award belongs to ... well, the attorneys. The justices ruled 5-1 that a state anti-discrimination statute that authorizes the award of attorneys fees does so to compensate for legal services - not to further enrich the litigant. "We conclude that, absent proof on remand of an enforceable agreement to the contrary, the attorney fees awarded in this case belong to the attorneys who labored to earn them," wrote Justice Kathryn Mickle Werdegar. Chief **Justice** Ronald George and **Justices** Marvin Baxter, Ming Chin and **Janice** Rogers **Brown** concurred in Flannery v. Prentice, 01 C.D.O.S. 6991.

In dissent **Justice** Joyce Kennard said the plain language of the statute authorized the court to award reasonable attorneys fees "to the prevailing party."

"According to the majority, however, the statute does not mean what it says: 'prevailing party' does not mean prevailing party but prevailing lawyer," Kennard wrote.

"That construction ignores the plain language of the statute as well as persuasive United States Supreme Court precedent construing virtually identical language in the federal civil rights law."

The case stemmed from Leslie Flannery's successful sexual harassment suit against her former employer, the California Highway Patrol. An Alameda County jury awarded her $250,000. The fee dispute arose after now-retired Judge Demetrios Agretelis awarded Flannery's lawyers, John Prentice and John Scott, more than $1 million in attorneys fees. Flannery then sued her lawyers for breach of contract, saying she had an oral agreement with her lawyers that called for her to give them "40 percent of the net settlement or net award of the jury." The lawyers countered that the oral agreement called for them to receive 40 percent of a jury verdict or the entirety of any statutory fees that might be awarded. The First District Court of Appeal reversed Agretelis, saying the statutory fees belonged to Flannery as the prevailing party. In her opinion reversing yet again, Werdegar concluded that statutory fees " exceeding fees the client already has paid belong, absent a contractual agreement validly disposing of them, to the attorneys for whose work they are awarded." Werdegar said federal law does not control the state's construction of the attorney fee provision in question, which is part of the California Fair Employment and Housing Act. Rather, Werdegar relied on state precedent, including a 1982 state Supreme Court decision in which the justices ruled that fees from a private attorney general action belonged to the plaintiffs' attorneys rather than to the plaintiffs themselves. Werdegar also said her conclusion followed the legislative intent behind fee statutes, which she said were meant to draw lawyers to cases of public significance that didn't promise large damage awards. "Attorneys considering whether to undertake cases that vindicate fundamental public policies may require statutory assurance that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature and computed by the court,"

Werdegar wrote. Prentice echoed Werdegar's thoughts. "Thousands if not tens of thousands of people in the future," he said, "will be able to find attorneys to take their cases." Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com.

LOAD-DATE: August 16, 2001

The Associated Press State & Local Wire

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

August 9, 2001, Thursday, BC cycle

SECTION: State and Regional

LENGTH: 840 words

HEADLINE: Court clarifies guidelines when life support can be removed

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:

A family is not free to end life support for an incapacitated loved one simply because he had said he would not want to live like a vegetable, the California Supreme Court ruled Thursday in a closely watched right-to-die case.

The justices, ruling 6-0, noted that the incapacitated man in question was not hospitalized in a vegetative state but instead was conscious, albeit seesawing in a twilight state that provided him no means to care for himself following a 1993 auto accident.

The man's wife, Rose Wendland of Stockton, sought to pull the feeding tubes that kept alive her husband, Robert. She said he had told her months before the accident that he never wanted to live like a vegetable. "These two conversations do not establish by clear and convincing evidence that the conservatee would desire to have his life-sustaining treatment terminated under the circumstances in which he now finds himself," Justice Kathryn Mickle Werdegar wrote.

The court cautioned, however, that it was not setting a broad standard when conservators could pull the plug on conservatees. Instead, its decision affects "only a narrow class of persons: conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment for the purpose of causing their conservatees' deaths."

But medical ethicists estimate that 15 percent of U.S. adults have drafted such wills or designated such powers to others. And now some ethicists are uncertain whether someone could ever be explicit enough to carry out their wishes to die.

The case began in 1995, when Rose Wendland thought she was carrying out her husband's wishes when she directed doctors to pull his feeding tubes, two years after the accident left him in a near-vegetative state.

But the woman's wishes were blocked and have been embroiled in the courts ever since, reigniting national debate over when loved ones can make such directives when no will or other written document verifies those wishes.

Robert Wendland died last month in a Lodi hospital from pneumonia, but the justices ruled on the case anyway to clarify unsettled law.

"The court has told us that, if you want to have a say in your end-of-life decision-making, you better put it in an advance, written directive," said Jon B. Eisenberg, an Oakland attorney representing 43 medical ethicists who urged the court to abide by the wife's wishes. "The problem here is: I don't know how you do that in a manner that covers all of the possibilities."

During oral arguments in the case in May, **Justice Janice** Rogers **Brown** alluded to the point Eisenberg has raised. Although she signed Thursday's opinion, she said from the bench that, even had Robert documented his desire to die, there's no way to accurately predict an exact medical condition for which somebody might want to pull the plug.

"How could you ever meet that?" she asked in open court.

Jamie Hickok Siess, the lawyer who fought to remove the feeding tubes, said the case is a wake up call to people to clearly state their wishes in advance so there can be no mistakes.

"It gives guidance in situations like this. It tells people you better be real clear about what you want because you cannot go back an undo it," Siess said.

Rose Wendland assailed the ruling, saying she only wanted to pull the plug to follow her husband's desires.

"Thank God that he died. His pain would be even greater with the decision that was made," she said. "It was Robert's wishes to never be in the state that he was in."

The state high court's ruling came three decades after a New Jersey court said the family of Karen Ann Quinlan had the right to withdraw medical treatment to their comatose daughter, who was classified in a permanent vegetative state.

Wendland's right-to-die case was not the first to come before California's justices. In 1993, the state's high court said mentally competent adults may refuse lifesaving medical treatment. That case came three years after the U.S. Supreme Court, ruling in a Missouri case, said there was a constitutional right to withdraw life-sustaining medical treatment, but left it up to the states to devise the legal framework.

An appeals court said Wendland's statements to his wife, and doctors at a Lodi hospital agreeing with the decision, were all that was necessary to end the life of the father of three.

But Robert Wendland's mother, Florence Wendland, fought removing life support and took her case to California's highest court. She claimed her son was not a vegetable and therefore the feeding tubes should not be pulled because those were not his wishes. Doctors said Robert had some ability to think and to sometimes move in his hospital bed, but had no ability to communicate whether he wanted to live or die.

"I didn't want to see him starve to death. What would you do if it was your son, if somebody wanted to do that to your loved one?" the mother asked.

The case is Conservatorship of Robert Wendland, S087265.

LOAD-DATE: August 10, 2001

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San Jose Mercury News

August 2, 2001, Thursday

SECTION: STATE AND REGIONAL NEWS

KR-ACC-NO: K0683

LENGTH: 610 words

HEADLINE: Davis names 4 finalists for state Supreme Court

BYLINE: By Howard Mintz

BODY:
SAN JOSE, Calif. _ Gov. Gray Davis on Wednesday took the first public step toward naming a new California Supreme Court justice, forwarding four finalists to a State Bar judicial screening commission that will evaluate whether they are qualified to succeed Justice Stanley Mosk, who died in June.

The four candidates are state appeals court Justice Dennis Cornell, 53, of Fresno; Los Angeles U.S. District Judge Carlos Moreno, 52; state appeals court Justice Steven Perren, 59, of Ventura; and Los Angeles Superior Court Judge Dennis Perluss, 53.

Since taking office 2 years ago, Davis has taken a slow and cautious approach to selecting judges, demonstrating a clear preference for law and order judges who will not expose him to political attack down the line. The four finalists appear to fit the Davis mold, and are all experienced and well-regarded with no hint of controversy in their backgrounds. Moreno and Perren are both former prosecutors, a favored feature on the resume of a Davis judicial appointee.

The only candidate who gives Davis a chance to add diversity to the Supreme Court is Moreno, a 1998 Clinton appointee to the Los Angeles federal bench. There are no Latinos on the seven-member state Supreme Court, which has two Asians, one black and three women.

Moreno, if selected, would be the first Latino on the high court since 1989. He was a state court judge for 12 years, originally appointed by former Republican Gov. George Deukmejian.

There is precedent for giving up a lifetime appointment on the federal bench for the California Supreme Court. Former chief justice Malcolm Lucas left a federal judgeship for the state's high court.

Perren, appointed by Davis to the Second District Court of Appeal in 1999, is a former Ventura Superior Court judge who was recognized statewide for his work in juvenile court. Perren is one of the few appointees of former Gov. Jerry **Brown** on the state appellate bench that Davis had to choose from in his search.

Cornell was appointed to the Fresno-based Fifth District Court of Appeal last December, after serving eight years as a Merced Superior Court judge. Originally named to the state bench by former Gov. Pete Wilson, Cornell was a family law specialist before becoming a judge.

Perluss, despite being a partner with a high-powered law firm before Davis named him a judge in 1999, may have the toughest road because he is a trial judge, and it would be a big leap to the Supreme Court. Perluss did clerk early in his career for former U.S. Supreme Court Justice Potter Stewart, as well as for a federal appeals court judge.

Davis sent his list to the state Judicial Nominees and Evaluation Commission, which screens all of a governor's judicial picks. The commission will rate the candidates and report back to the governor within roughly six weeks.

At that point, Davis is expected to choose from the list, providing him with the first Democratic pick for the state Supreme Court in nearly two decades, since former Gov. **Brown** left office.

Davis is not bound by the commission's preferences. The commission in 1996 found current Supreme Court **Justice Janice** Rogers **Brown** not qualified for the job, but Gov. Wilson disregarded the evaluation and went forward with her nomination.

The governor's nominee must be confirmed by a three-member committee made up of Chief **Justice** Ronald George, Attorney General Bill Lockyer and a state appeals court justice.

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JOURNAL-CODE: SJ

LOAD-DATE: August 2, 2001

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San Jose Mercury News

August 2, 2001 Thursday MORNING FINAL EDITION

SECTION: CALIFORNIA NEWS; Pg. 15A

LENGTH: 569 words

HEADLINE: 4 SUPREME COURT FINALISTS NAMED COMMITTEE WILL SCREEN DAVIS' NOMINEES FOR SLOT

BYLINE: HOWARD MINTZ, Mercury News

BODY:

Gov. Gray Davis on Wednesday took the first public step toward naming a new California Supreme Court justice, forwarding four finalists to a State Bar judicial screening commission that will evaluate whether they are qualified to succeed Justice Stanley Mosk, who died in June.

The four candidates are state appeals court Justice Dennis Cornell, 53, of Fresno; Los Angeles U.S. District Judge Carlos Moreno, 52; state appeals court Justice Steven Perren, 59, of Ventura; and Los Angeles Superior Court Judge Dennis Perluss, 53.

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The governor's nominee must be confirmed by a three-member committee made up of Chief **Justice** Ronald George, Attorney General Bill Lockyer and a state appeals court justice.

GRAPHIC: Photo;
PHOTO: Mosk
Death in June created an open position.

LOAD-DATE: November 1, 2001

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Entertainment Law Reporter

August, 2001

SECTION: RECENT CASES; Vol. 23, No. 3

LENGTH: 1029 words

HEADLINE: Artist's royalties from copyright licenses of artwork are partially exempt from sales tax, California Supreme Court holds; decision "disapproves" earlier appellate court rulings requiring record companies to pay sales and use taxes in connection with master tapes

BODY:

Artist Heather Preston has won the right to a refund of California sales taxes assessed against her by the California State Board of Equalization. The taxes she was required to pay were based on royalties she received from two book publishers and a rubber stamp manufacturer in return for licenses to use her artworks. Though relatively little money was involved - just over $2,000 including interest - a significant legal point was at stake; and Preston had to take her case to the California Supreme Court to finally make that point.

Moreover, Preston has won a victory not only for herself and other California-based artists, it is an important victory for California record companies as well. Years ago, in 1984 and 1988, Capitol Records and A & M Records lost cases quite similar to Preston's, and thus they had to pay some $860,000 each in California sales and uses taxes. In its decision in favor of Preston, the California Supreme Court expressly "disapprove[d]" the appellate court decisions in the Capitol and A & M Records cases, thereby relieving record companies of the sales and use tax obligations those cases had imposed. California's Revenue and Taxation Code imposes a sales tax on the sale or lease of tangible personal property (and a use tax on the use of such property, if no sales tax was paid), measured as a percentage of the property's price.

In connection with the licenses Preston granted to book publishers and a rubber stamp manufacturer, she delivered tangible copies of her works to her licensees for their use in creating reproductions. In return, Preston's licensees paid her royalties based on their sales, including advances against those royalties. Preston's licensees also returned her artwork to her, after making whatever reproductions they required to publish and manufacturer their own works.

Preston did not pay sales tax on any of the payments she received from her licensees, and thereby triggered an audit by the Board of Equalization (the California agency that administers that state's sales and use tax law). The Board determined that she owed sales taxes. Preston paid them and then filed a claim for a refund. The Board denied her refund claim; and the California Court of Appeal affirmed. The California Supreme Court, however, finally ruled in her favor.

In a lengthy opinion by **Justice Janice** Rogers **Brown,** a majority of the Court has held that a portion of the amounts Preston received in return for her copyright licenses are exempt from sales tax, for two reasons: first, because Revenue and Taxation Code section 6010(c)(10)(A) provides that taxable sales do "not include . . . The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement"; and second, because "technology

transfer agreement" is defined in the Code to include "any agreement under which a person who holds a . . . copyright . . . licenses to another person the right to make and sell a product . . . that is subject to the . . . copyright interest."

On the other hand, Justice **Brown** - joined by three other members of the seven-justice Court - also held that "the portion of Preston's income attributable to the Agreements' temporary transfer of tangible artwork is taxable." Since her licensing agreements did not specify what portion of her royalties were attributable to the temporary transfer of her artwork, Revenue and Taxation Code section 6012(c)(10)(C) imposes sales tax on "200 percent of the cost of materials and labor used to produce the tangible personal property subject to the tax." The cost of Preston's materials and labor was not part of the record before the Court, so the case has been remanded for a calculation of the sales tax she owes and the amount of the refund she is owed.

Three justices dissented from this result, but not because they would have ruled against Preston. Rather, in an opinion by Justice Joyce Kennard, they indicated that they would have ruled that all of the royalties Preston received were exempt from sales tax. They would have ruled in Preston's favor completely, because a Board regulation provides that "the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation." And Justice Kennard could see no meaningful distinction between a "manuscript" transferred for publication and "artwork" transferred for publication.

Editor's note: The motion picture industry has not been confronted with this issue - even when California-based distributors acquire completed negatives from independent production companies - because Revenue and Taxation Code section 6006(g)(1) exempts leases of motion pictures, including television films and tapes. Note that the result in Preston's case encourages parties to allocate, in their copyright licenses, the portion of the licensor's royalties attributable to the intangible copyright license and the portion attributable to the licensee's right to temporary possession of the licensor's artwork (or master tape) - and it encourages them to place a low value on the right to temporary possession. This possibility was anticipated by the California legislature, and legislative history (discussed in the Preston decision) shows that the legislature was urged to amend the then-pending bill to prevent what the Board contended would be over-allocations to non-taxable copyright rights. The legislature did not amend the bill, however - thus supporting the argument that any plausible allocation will be sufficient for sales tax purposes.

Preston was represented by Nicholas Blonder, Mill Valley. The Board of Equalization was represented by Bill Lockyer, Attorney General, and Paul D. Gifford, Assistant Attorney General. And the Graphic Artists Guild, as amicus curiae on behalf of Preston, was represented by Daniel E. Abraham, and by John E. Mueller and Eric J. Miethke, Nielsen Merksamer Parrinello Mueller & Naylor, Mill Valley.

Preston v. State Board of Equalization, 105 Cal.Rptr.2d 407, 2001 Cal.LEXIS 1813 (Cal. 2001)

LOAD-DATE: August 28, 2001

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The Recorder

July 27, 2001, Friday

SECTION: NEWS; PG. 3

HEADLINE: COURT FINDES IT'S CRIME, NOT AGE. TJAT COUNTS

BODY:
By Sonia Giordani RECORDER STAFF WRITER The California Supreme Court ruled Thursday that a defendant's 1978 conviction as a 15-year-old in Texas should count as a prior-murder special circumstance, even though California law in 1978 didn't allow minors to be tried and sentenced as adults for murder. For the first time since Justice Stanley Mosk's death last month, the justices split the vote 4-2 to rule that the focus should be on the conduct at issue -- and not the age of the defendant. "It is the offense, and not necessarily the offender, that must satisfy statutory requirements for punishment under California law as first- or second-degree murder," wrote **Justice** Joyce Kennard, in _People v. Trevino_, 01 C.D.O.S. 6317. **Justices** Marvin Baxter, Ming Chin and **Janice** Rogers **Brown** concurred. But Chief **Justice** Ronald George and **Justice** Kathryn Mickle Werdegar parted ways with the majority to say the statute is at best ambiguous and should be interpreted in the defendant's favor. In the dissent, George wrote that the majority's conclusion makes the qualification for a prior-murder special circumstance -- a finding that can result in a judgment of death --depend on where the prior offense occurred. "That type of anomaly would be inconsistent with the apparent legislative intent to provide equal treatment of defendants under this provision of the death penalty statute regardless of whether their prior crimes were committed in California or in another jurisdiction," George wrote. Alan Tate, the deputy attorney general who argued the case, said George's dissent appears concerned that the majority's rule would in some way compel prosecutors to file special circumstances. But he countered that it will serve only to "give tremendous discretion to do so in cases where it would be appropriate to do so." Trevino's attorney, San Francisco solo Gail Harper, could not be immediately reached for comment Thursday. The case stemmed from the first-degree murder conviction of Marcos Trevino for a February 1996 argument in his front yard with an unarmed man Trevino allegedly shot to death. Prosecutors noted that Trevino was convicted once before for murder in 1978 when he was 15 and allegedly fatally stabbed another child on a school bus. Trevino moved to strike the qualification of the prior conviction as a special circumstance on grounds that he wouldn't have stood trial as an adult under California law in 1978. Los Angeles Judge Jacqueline Connor denied Trevino's motion to strike. Trevino admitted the allegation and was sentenced to life in prison without parole. But the Second District ruled that the prior-murder special circumstance could not be based on the Texas murder conviction as a minor. The state high court reversed. "Here, defendant murdered one person in Texas in 1978 when he was 15 years old <#201> and another in California in 1996 when he was 33," Kennard wrote. "Under the construction we adopt for the prior-murder special circumstance, it makes no difference, when determining the appropriate sentence for the latter crime committed when defendant was unquestionably an adult, that he could not have been tried as an adult in California in 1978." _Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com._

LOAD-DATE: July 27, 2001

Copyright 2001 American Lawyer Media, L.P.
The Recorder

July 19, 2001, Thursday

SECTION: NEWS; PG. 1

HEADLINE: STATE JUSTICES ADOPT NEW; RULES TO AVOID CONFLICTS

BODY:
By Sonia Giordani RECORDER STAFF WRITER

The California Supreme Court Wednesday adopted new procedures to more effectively flag potential conflicts of interest so justices can recuse themselves where appropriate.

Among other things, the justices will now require corporate litigants to flag for them parent, subsidiary and any other potential interest, as is required in federal court.

Another rule calls on the justices to depend less on an automated conflict catcher introduced last year. Instead, the justices are to work closely and more systematically with their personal staff to identify conflicts. The court's central staff is now directed to detail parties and their interests in conference memoranda prepared for the justices. Court clerks will start manually checking for conflicts by consulting a master list of each justice's financial interests. "I am hopeful these changes will achieve our goal of greatly reducing the instance of a justice unknowingly placing himself or herself in a conflicted position and voting in a case," said Chief Justice Ronald George.

George said the new provisions are an attempt to address conflict-screening problems exposed by newspaper reports that several justices had voted on petitions for review despite conflicts. In one case, two justices -- Marvin Baxter and Ming Chin -- voted to deny review in a toxic tort case against IBM despite owning company stock. The _Daily Journal_ later reported 32 different instances in which George, Baxter, Chin and **Justice Janice** Rogers **Brown** had voted on petitions despite owning stock in a party.

In another change, the court's orders following conference will now indicate whether a **justice** did not participate in a matter and designate whether it was due to recusal or absence.

The provisions, including the new one requiring counsel to file " Certification of Interested Entities or Persons" forms, will take effect immediately. Parties will have 15 days from the grant of review to file the new form.

George said the form isn't intended to shift the responsibility for conflict screening to counsel. "It just gives us the information to exercise our responsibility so we can act more readily," he said, adding that federal courts have for years required corporate litigants to detail their subsidiary and parent company relationships.

Douglas Young, a partner at Farella Braun & Martel and president of the Bar Association of San Francisco, said the forms will not pose much of a burden for attorneys and shows the court takes the problem seriously.

"It certainly reflects a heightened awareness of the issue at hand," Young said. "Having lawyers do this just gives the justices information."

Santa Clara University School of Law professor Gerald Uelmen said it was curious the court has chosen to require counsel to submit the list only after review has been granted.

"A lot of the conflicts that were exposed recently were justices voting to deny review in a case," Uelmen said. "If the purpose of filling out this form is to reveal subsidiary entities that would not be obvious to the court, then the information would be just as useful prior to the granting of a hearing as after." But he praised the court for adopting the procedures: "These certainly represent substantial improvements in the procedure and hopefully will improve the situation." _Reporter Sonia Giordani's e-mail address is sgiordani@therecorder.com._

LOAD-DATE: July 19, 2001

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Insight on the News

July 16, 2001, Monday

SECTION: SYMPOSIUM; Pg. 40

LENGTH: 1723 words

HEADLINE: Q: Has the passage of Proposition 209 been good for California?;
Yes: The racial spoils system is fading away despite the efforts of bureaucrats.

BYLINE: Harold Johnson; SPECIAL TO INSIGHT

BODY:
Five years ago this coming November, voters in the Golden State said "no" to racial spoils in government programs by passing Proposition 209, the California Civil Rights Initiative. It added to the state constitution a clear and simple directive: Government "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."

Opponents called it the "anti-civil-rights initiative," but its language was modeled on the federal Civil Rights Act of 1964, and its spirit was straight out of Martin Luther King Jr.'s "I Have a Dream" address. The initiative's sponsors talked of putting an end to the pigeonholing of people by race; no more government hiring or helping with an eye to someone's ethnicity rather than a person's merit or need; no more dividing of the population into camps defined by chromosomes or color. The goal was that of the original Civil Rights Movement: People shouldn't be judged by their skin but by what's beneath it. More than a few paid a price for hoisting this antidiscrimination banner. Ward Connerly, the African-American businessman who spearheaded the Proposition 209 campaign, found himself vilified as an Uncle Tom and a Benedict Arnold to blacks. The two academics who wrote the initiative publicly were promised a mud bath. A Democratic Party hack said he would investigate whether they had "paid their taxes, inappropriately touched students or ever been involved in lawsuits." He never hit pay dirt.

Considering the venom spewed by the foes of Proposition 209 before the election, maybe it shouldn't be surprising that its victory at the polls didn't halt the drive to kill it. Opponents merely turned to extralegal means. The past four-and-a-half years have called to mind Dixie's era of "massive resistance" - the South's energetic disobedience in the face of desegregation and civil-rights decrees during the 1950s and 1960s.

While by no means universal, obstructionism against the mandate of Proposition 209 for equality is widespread. Public officials in some of the largest jurisdictions - and in some of the smallest - are keeping their eyes tightly closed to their legal obligation to be colorblind.

They are defying not just Proposition 209 itself, but a November 2000 California Supreme Court decision - Hi-Voltage Wire Works Inc. v. City of San Jose - decreeing that, because of the proposition, public entities cannot treat people differently because of race or sex.

Brought by Pacific Legal Foundation (PLF), the Hi-Voltage case challenged San Jose's racially targeted "outreach" program. The program required bidders on city contracts to take steps to contact and recruit minority and women subcontractors but didn't require similar outreach to anyone else. The court unanimously found the policy illegal. **Justice Janice Brown** (who happens to be African-American) wrote the main opinion, which gave Proposition 209 a broad and forceful reading. Proposition 209 bans not just explicit quotas, she declared, but any "race-conscious governmental decision-making." It represents voters' endorsement of "equal opportunity for all individuals," as opposed to "entitlement based on group representation."

In the wake of the court's ruling - and the city's agreement to pay the victors' attorneys' fees of $475,000 - San Jose finally halted its open flouting of Proposition 209. Discriminatory flourishes were edited out of official hiring and contracting policies. If the revised rules are followed, any new outreach efforts in San Jose will be inclusive instead of being aimed only at certain pockets of the population based on sex or race.

But San Jose's reversal didn't exactly start a stampede in the public sector to get on the right side of the law. San Francisco, for instance, still reviews contracting bids by minority-owned firms as if they were as much as 10 percent below their real price. Instead of bringing this rigged policy into line with Proposition 209, the city is busy devising procedural objections to slow a lawsuit against it.

The Sacramento Municipal Utility District also gives bonus points to business owners of the desired color or gender. The discrimination in this case comes with a twist: In the awarding of prime contracts, preferences go to blacks and Latinos but not Asians, while in subcontracts Asians and blacks, but not Latinos, receive official favoritism. Go figure.

At the Los Angeles County Hall of Administration, the racial-preference tool of choice is a "goals and timetables" schedule for hiring nonwhites. ("Goals for minority participation for each trade - 28.3 percent; goals for female participation for each trade - 6.9 percent," reads the policy.) This might sound benign - less rigid than an outright quota - but it's a good bet the county's managers feel an incentive to honor the "goals" by letting race influence hiring and promotions. Indeed, " a participation goal differs from a quota or a set-aside only in degree," wrote Justice **Brown.**

The Los Angeles Unified School District does its part to perpetuate racial stereotyping and discrimination by enforcing an arbitrary racial mix in teaching staffs at magnet schools. Jim Friery, a Van Nuys High School physical-education teacher, was confronted with this policy when he tried to apply for a job at a nearby magnet school a couple of years ago. Because he's white, he didn't fit the racial formula, so he wasn't even allowed to put his name in. He has responded with a lawsuit arguing that Proposition 209 prohibits the district from counting teachers by color.

Proposition 209 passed with a majority of Orange County's votes. But the Huntington Beach Union High School District, one of the county's largest, stubbornly clings to a policy that uses skin color to decide on students' requests to transfer from one high school to another. If a transfer would result in "too few" whites - or too many nonwhites - at a high school, the district can deny the transfer request under this race-obsessed calculus.

Proposition 209 opponents remain oblivious to powerful arguments in favor of the law - arguments that only have grown stronger with time. Beyond the principle of equal justice under law, there is the practical problem with trying to color-code a population as kaleidoscopic as modern California's. The state has more interethnic marriages than any other state and multitudes of immigrants from every

continent. How does one classify the offspring of an Iranian and a Filipino? Or an African-American and a subcontinental Indian?

Last year, the U.S. Census Bureau announced that non-Hispanic whites are less than half - approximately 47 percent - of California's population. When every racial group is a "minority," don't race preferences have less rationale - and more potential for harm - then ever? Isn't the defining of individuals by skin color and appropriating advantages on that basis a formula for pitting people and groups against each other?

Reverse discrimination can be as ugly as the old-fashioned kind. In a lawsuit against the Sacramento Police Department in 1999, it was revealed that a departmental consultant had identified white officers as "bureaucratic barriers to change." The acronym MAWBS was used among department brass as shorthand for "middle-aged white boys." Last year, a business lecturer denied tenure at San Francisco State University was awarded $2.75 million by a jury in his discrimination lawsuit after hearing testimony that a college dean allegedly said a white man would be hired "over my dead body."

The prosaic issue of cost offers a final argument against the quota mentality. A 1996 study by the Claremont Institute found racial favoritism by governments in California costing as much as $677 million. To be sure, some of the edifice of discrimination has fallen since then, but racially targeted set-asides remain in place in enough localities that the overall price tag has to be steep.

One bright spot in terms of Proposition 209 compliance - at least until recently - was the University of California (UC), which eliminated race as an admissions factor even before Proposition 209 was enacted. Systemwide, Latino admissions are at a record high and African-American admissions are up significantly; if the numbers from these two groups have decreased at the two most selective campuses (Berkeley and UCLA), this suggests that students are going to schools more appropriate to their academic qualifications.

Unfortunately, this spring opponents of Proposition 209 persuaded the UC regents to take at least a symbolic step backward. The regents adopted a new admissions policy allowing race to be taken into account. Emboldened by the example of so many cities, counties and other jurisdictions openly violating Proposition 209, university bureaucrats might view the regents' action as permission for some quiet, but determined, defiance of their own.

To identify as many violations as possible, in May, PLF launched a Proposition 209 enforcement project called Operation End Bias. With a toll-free number - 1-866-END BIAS (363-2427) - it allows whistle-blowers to report policies that play favorites by sex or skin color. Tips have arrived at a rate that confirms the seriousness of the problem. No law-enforcement official at the state level is acting to ensure that Proposition 209 is obeyed. Indeed, State Attorney General Bill Lockyer argued before the state supreme court that San Jose's discriminatory contracting program was legal under Proposition 209. He has shown no sign since of understanding or wanting to uphold the law's true meaning. Therefore, it is left to private watchdogs such as PLF to stand up for justice and the voters' will.

It is clear that full compliance will come, if ever, only after additional years of courtroom battles. However, there are few more motivating goals in legal practice than ensuring equal opportunity - and forcing politicians and bureaucrats to obey the law.

Johnson is an attorney with the Pacific Legal Foundation, a Sacramento-based nonprofit group that

focuses on property rights, environmental law, and individual rights.

LOAD-DATE: October 15, 2001

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The Legal Intelligencer

July 9, 2001

SECTION: NATIONAL NEWS; Vol. 225; No. 5; Pg. 4

LENGTH: 365 words

HEADLINE: Court Limits Suits By Contract Workers

BYLINE: By Sonia Giordani*American Lawyer Media*

BODY:
A company that hires an independent contractor cannot be held liable for injuries suffered by the contractor's employees, the California Supreme Court ruled Thursday.

The justices continued a line of cases limiting an employee's remedy to workers' compensation, barring tort remedy whether the employee works directly for a company or for an independent contractor. To do otherwise, wrote **Justice Janice** Rogers **Brown,** would give independent contractors' employees an unfair windfall. "This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation," **Brown** wrote in *Camargo v. Tjaarda Dairy.*

Chief Justice Ronald George and Justices Joyce Kennard, Marvin Baxter and Ming Chin concurred. Justice Kathryn Mickle Werdegar concurred separately.

The decision throws out the lawsuit brought by Eva Camargo and her five children against Tjaarda Dairy after her husband was killed driving a tractor on the dairy farm.

Camargo's husband had been an employee of Golden Cal Trucking. The family could collect workers' compensation from Golden Cal, but Golden Cal couldn't be held liable under state law. But Camargo tried to sue the dairy that hired Golden Cal on a claim of negligent hiring.

In oral arguments, Newport Beach attorney Timothy Black told the court that companies often hire the least expensive workers - with or without the proper qualifications. He said independent contractors should be afforded tort remedy because they are the ones most likely to be injured. He could not be reached Thursday for comment on the court's decision.

In a statement, Stephen McCutcheon Jr., an attorney with the Pacific Legal Foundation who filed an amicus brief on behalf of the dairy farm, praised the high court. He said the Camargos' suit, had it prevailed, "would unfairly burden businesses ranging from farming to construction to high technology - because they often turn to independent contractors precisely for help in areas where they themselves don't have expertise."

This article previously appeared in The Recorder, *an American Lawyer Media publication.*

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The Legal Intelligencer

July 9, 2001 Monday

SECTION: NATIONAL NEWS ; cou; Pg. 4

LENGTH: 361 words

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LOAD-DATE: July 9, 2001

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Los Angeles Times

July 6, 2001 Friday Home Edition

SECTION: California; Part 2; Page 1; Metro Desk

LENGTH: 757 words

HEADLINE:
Suits Over On-Job Injuries Curbed;
Law: State high court says a contractor's employee covered by workers' compensation can't take whoever hired his employer to court.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:
Someone who hires a contractor to perform dangerous work is not liable if employees covered by workers' compensation insurance are hurt or killed on the job, the California Supreme Court decided Thursday.

The court, in a 6-0 vote, said employees or their survivors in such situations can collect only workers' compensation benefits, even if the hirer failed to make sure the contractor was qualified for the work. Workers' compensation usually pays a fraction of what victims could receive in a lawsuit.

"The hirer should not have to pay for injuries caused by the contractor's negligent performance, because the workers' compensation system already covers those injuries," **Justice Janice** Rogers **Brown** wrote for the court. The ruling, like previous state Supreme Court decisions, further restricts the ability of employees of contractors, or their relatives, to sue third parties for workplace injuries.

Thursday's decision in Camargo vs. Tjaarda Dairy, S088632, resulted from a lawsuit brought by the widow and five children of Alberto Camargo, a laborer who died in a 1996 tractor accident in Kern County.

Eva Camargo and her family sued Tjaarda Dairy on the grounds that it had negligently hired a contractor to remove manure. The suit charged that the dairy had failed to determine whether Camargo was qualified to operate the tractor safely. The dairy denied any negligence.

A Superior Court judge had dismissed the lawsuit, but the 5th District Court of Appeal in Fresno reinstated it on the grounds that the state Supreme Court had not specifically barred suits in cases that alleged negligent hiring.

Alberto Camargo died when his tractor rolled over as he was driving over a big mound of manure at the dairy. He was a full-time employee of Golden Cal Trucking, which the dairy had hired to scrape manure out of its corrals and haul it away in exchange for the right to buy the manure at a discount. The manure is sold to farmers for use as fertilizer.

Timothy A. Black, the lawyer who represented the Camargo family, said the tractor was not properly equipped with roll bars and safety restraints, making the contractor unqualified for the job.

"It is not realistic to think the marketplace is going to take care of worker safety, especially now that we have so many day laborers," Black said. "We have to remember that a laborer has the choice of whom they are going to work for but not a choice of whom their employer is going to take a job from."

Black said that he did not know how much Camargo and her children received from workers' compensation, but that it was probably no more than $200,000.

The workers' compensation system bars employees from suing their employers for on-the-job injuries and generally limits their recovery to medical expenses and lost wages.

John F. Petrini, who represented the Kern County dairy, said it would be unfair if the hirer were liable for substantial damages when the firm that employed the worker could not be sued.

"A contractor can be totally negligent and the bulk of the liability could fall on the person who hired that contractor, even though that person might not be negligent at all or hardly at all," Petrini said.

Fred H. Hiestand, general counsel for the Civil Justice Assn. of California, a tort reform group, said the decision should encourage companies to obtain workers' compensation insurance.

"If you get workers' compensation, you can't be sued for injuries to your employees," Hiestand said. "If you don't get it, it is open season on you."

Until 1993, California courts allowed injured workers of contractors to sue firms that hired the contractors for work that was inherently dangerous. The court barred such suits that year and in a similar 1998 ruling. Two other cases that are pending before the court will determine whether there are any exceptions to the rule.

Frederick Baker, a lawyer for the American Chemistry Council, which argued for the dairy, said the ruling would apply even if the contractor lacked workers' compensation insurance because the state would provide benefits under current law.

"The hirer of the independent contractor should still be protected," he said.

Baker noted that the issue has not come up because licensed contractors are required to carry workers' compensation insurance.

The Chemistry Council, a trade group that represents manufacturers of chemicals and chemical products, took part in the case because its members often use contractors to do dangerous work, the lawyer said.

LOAD-DATE: July 6, 2001

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The Recorder

July 6, 2001, Friday

SECTION: NEWS; PG. 1

HEADLINE: COURT LIMITS SUITS BY CONTRACT WORKERS

BODY:
By Sonia Giordani RECORDER STAFF WRITER A company that hires an independent contractor cannot be held liable for injuries suffered by the contractor's employees, the California Supreme Court ruled Thursday. The justices continued a line of cases limiting an employee's remedy to workers' compensation, barring tort remedy whether the employee works directly for a company or for an independent contractor. To do otherwise, wrote **Justice Janice** Rogers **Brown,** would give independent contractors' employees an unfair windfall. "This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily mandated limits of workers' compensation," **Brown** wrote in Camargo v. Tjaarda Dairy, 01 C.D.O.S. 5674. Chief Justice Ronald George and Justices Joyce Kennard, Marvin Baxter and Ming Chin concurred. Justice Kathryn Mickle Werdegar concurred separately. The decision throws out the lawsuit brought by Eva Camargo and her five children against Tjaarda Dairy after her husband was killed driving a tractor on the dairy farm. Camargo's husband had been an employee of Golden Cal Trucking. The family could collect workers' compensation from Golden Cal, but Golden Cal couldn't be held liable under state law. But Camargo tried to sue the dairy that hired Golden Cal on a claim of negligent hiring. In oral arguments, Newport Beach attorney Timothy Black told the court that companies often hire the least expensive workers with or without the proper qualifications. He said independent contractors should be afforded tort remedy because they are the ones most likely to be injured. He could not be reached Thursday for comment on the court's decision. In a statement, Stephen McCutcheon Jr., an attorney with the Pacific Legal Foundation who filed an amicus brief on behalf of the dairy farm, praised the high court. He said the Camargos' suit, had it prevailed, "would unfairly burden businesses ranging from farming to construction to high technology because they often turn to independent contractors precisely for help in areas where they themselves don't have expertise."

LOAD-DATE: July 6, 2001

The Associated Press State & Local Wire

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June 29, 2001, Friday, BC cycle

SECTION: State and Regional

LENGTH: 835 words

HEADLINE: Supreme Court decision cripples assault weapons ban

BYLINE: By DAVID KRAVETS, Associated Press Writer

DATELINE: SAN FRANCISCO

BODY:
The California Supreme Court has ruled that judges cannot declare firearms illegal under the state's assault-weapons ban law in a decision the dissenting chief justice said created a "loophole" in the 1989 act.

In a 4-2 vote Thursday that featured a blistering dissent by Chief **Justice** Ronald M. George, the high court ruled that a semiautomatic rifle is legal if it is not explicitly designated illegal under 1991 amendments to the act.

Justice Janice Rogers **Brown,** agreeing with arguments made in the case by the National Rifle Association, wrote that the 1991 provisions - enacted to ban the proliferation of generic versions of outlawed weapons - was too vague for gun owners to know which of the so-called copycat weapons of the Russian-made "AK series" were illegal.

Without explicitly listing each weapon, **Brown** wrote, "Ordinary law-abiding citizens could suddenly find themselves ... subject to prosecution." The immediate fallout of Thursday's decision is that an untold number of copycat weapons to the AK series are now legal in California.

George wrote that the "Legislature recognized the impossibility of compiling a comprehensive list" of all AK series rifles and therefore chose not to when it wrote the 1991 amendments.

"By refusing to heed the clear statutory language classifying all AK series rifles as assault weapons, whether specifically identified by name or model or not, the majority creates a loophole in California's assault weapons control legislation that the Legislature plainly intended to eliminate," George wrote.

Thousands of people in California have been convicted wrongly for possessing, transporting or using AK series weapons, said Chuck Michel, a lawyer for the National Rifle Association.

"It took years to clarify this mess and in the meantime hundreds or perhaps thousands of accidental felons were created by a law that was pushed through without a full consideration of the

consequences," Michel said.

The state attorney general's office was reviewing the decision Thursday and would not comment on Michel's assertions, spokesman Nathan Barankin said.

Thursday's decision was based on a 1994 confiscation of an AK series rifle from a Delano attorney who was given the gun instead of payment from a client.

Authorities seized the weapon on grounds it was banned under the 1991 amendments. Kings County Superior Court Judge Peter M. Schultz ruled that the weapon was illegal, a decision the high court reversed Thursday.

Still, George wrote that the court's decision may be minimized by amendments the Legislature enacted to the assault-weapons act in 1999.

That year, lawmakers adopted a provision that bans assault-weapons based on a host of features instead of makes and models - a move that makes illegal hundreds of so-called copycat weapons not clearly defined in the law.

That provision has not been tested in California's courts. Gun proponents said the Supreme Court decision gives them fodder to challenge it.

The NRA's Michel said Thursday's decision bolsters arguments that the 1999 amendments are illegal because outlawed guns are not clearly identified.

"A lawsuit will be filed challenging this," he said.

The decision means that some copycat weapons to the AK series will now be legal.

That is because some of the weapons do not have the features that would make them illegal under the 1999 provisions. Those features include semiautomatic rifles having a detachable magazine for bullets, and one of the following: a pistol grip, a stock with a hole for a thumb, a grenade launcher and, among other features, a flair launcher.

"It's conceivable that you have an assault weapon that fell under the 1991 category and isn't covered by the new legislation," said John S. Dulcich, the attorney who won Thursday's case on behalf of Delano lawyer J.W. Harrott.

Under the high court's closely watched decision last year upholding the original assault-weapons law, a majority of justices noted that the state attorney general's office has the discretion to add weapons to the list of the hundreds of weapons already banned.

Gun-control advocates said Thursday that Attorney General Bill Lockyer has greatly expanded the number of illegal weapons, but worried Thursday's decision gives the state's top law enforcement officer too much leeway.

"What if the next attorney general is not as aggressive as Lockyer?" asked Dennis Henigan, an attorney for the Center to Prevent Handgun Violence.

The Roberti-Roos Assault Weapons Control Act of 1989 originally outlawed 75 weapons that are

high-powered and have rapid-fire capabilities. The Legislature passed the nation's first law banning such weapons after a gunman, Patrick Purdy, fired a semiautomatic weapon into a Stockton school yard, killing five children and injuring 30.

Following California's lead, several states and the federal government passed similar or even stricter bans.

The case decided Thursday is J.W. Harrott v. Kings County, S055064.

LOAD-DATE: June 30, 2001

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Los Angeles Times

June 29, 2001 Friday Ventura County Edition

SECTION: California; Part 2; Page 1; Metro Desk

LENGTH: 815 words

HEADLINE:
Challenge to Gun Ban Upheld;
Ruling: State high court says assault weapons are illegal only if they were barred by name or have specific characteristics listed in '99 law revision.

BYLINE: MAURA DOLAN, TIMES LEGAL AFFAIRS WRITER

DATELINE: SAN FRANCISCO

BODY:
Guns that are nearly identical to assault weapons banned in California are legal unless they were outlawed by name or have specific assault weapon characteristics, the California Supreme Court ruled Thursday.

Chief Justice Ronald M. George, in a strongly worded dissent, accused the high court's majority of creating a loophole in the state's assault weapons ban that could allow copycat weapons to circulate.

The 4-2 decision allows the state attorney general to continue adding names of guns to the list of banned weapons. But gun users may not be prosecuted unless their weapons were specifically identified in a 1989 law or covered by a more generic ban added by the Legislature in 1999, the court said. **Justice Janice** Rogers **Brown,** writing for the majority, said a contrary ruling would have left gun owners and law enforcement unsure about which weapons were banned.

"Not only would ordinary citizens find it difficult . . . to determine whether a semiautomatic firearm should be considered an assault weapon, ordinary law enforcement officers in the field would have similar difficulty," **Brown** wrote.

The impact of the ruling will be limited by 1999 revisions to the assault weapons law passed by the Legislature. In an attempt to go after copycat weapons, lawmakers expanded the ban to include not only named weapons but any guns that had specific characteristics.

For example, the manufacture, sale, loan or gift of ammunition magazines capable of accepting more than 10 rounds was outlawed. Military-style semiautomatic firearms also were banned based on generic features, including a protruding pistol grip.

Dennis Henigan of the Center to Prevent Handgun Violence said he was surprised and disappointed by the ruling, because it "could be a problem if you had an attorney general who was hostile to the statute itself and refused to list guns."

Henigan also said some assault weapons that are not on the list may not have the characteristics included in the generic ban and will now be legal under the ruling.

Some gun control advocates charged that former state Atty. Gen. Dan Lungren, a Republican, was not aggressively enforcing the law. Current Atty. Gen. Bill Lockyer, a Democrat, has added many guns to the banned list, they said.

The high court ruling stemmed from a case brought by J.W. Harrott, a Delano lawyer who accepted a gun collection in payment for legal services in a drug trial.

The Kings County Sheriff's Department, which had the gun collection, refused to give Harrott one of the weapons, a semiautomatic rifle, on the grounds that it was an assault weapon banned by the 1989 law. A Superior Court judge ruled that the weapon was banned, but a Court of Appeal overturned that decision.

In its opinion Thursday, the high court majority quoted at length from a brief filed by the National Rifle Assn.

"If allowed to stand, the trial court's decision in Harrott would subject California gun owners, particularly hunters, to whimsical and capricious prosecution," the court quoted the NRA as saying in Harrott vs. County of Kings, S055064.

"Kern County might have no problem with a particular firearm, but a single judge in Kings County could turn a truly innocent citizen . . . into a felon."

George, who was joined by Justice Kathryn Mickle Werdegar in opposing the ruling, complained that the decision "represents a clear and unwarranted frustration" of the Legislature's intention to ban all assault weapons.

He noted that the Legislature added specific language to the law in 1991 that banned all AK series rifles, regardless of whether their particular model was listed.

At least the "detrimental effect" of the decision will be diminished by the 1999 revisions to the law "and the current attorney general's apparent willingness to attempt to keep up with firearm manufacturers' production of new AK models," George said.

Harrott, who practices criminal and family law, said Thursday that he is glad he will finally get his gun. He said he pursued the case for nearly seven years because he had promised his former client "that none of his property would stay in the Kings County evidence locker."

The lawyer has enjoyed hunting and target shooting in the past, but he said he is "not a gun kook."

Even though he won Thursday's case, Harrott said his weapon, which is registered, was banned by the 1999 revisions. However, the gun ban allowed some owners to keep assault weapons if they registered them within a certain time.

John S. Dulcich, who represented Harrott, said the semiautomatic rifle that sparked all the litigation is worth $300 to $900. The legal fight was more about "the principle of the situation" than the weapon, Dulcich said.

The ruling is "important because it gives some more clarity to whether an ordinary citizen is going to be prosecuted as a felon," Dulcich said.

LOAD-DATE: June 29, 2001

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June 29, 2001 Friday Home Edition

SECTION: California; Part 2; Page 1; Metro Desk

LENGTH: 851 words

HEADLINE: The State;
;
Challenge to Assault Gun Ban Upheld;
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The lawyer has enjoyed hunting and target shooting in the past, but he said he is "not a gun kook."

Even though he won Thursday's case, Harrott said his weapon, which is registered, was banned by the 1999 revisions. However, the gun ban allowed some owners to keep assault weapons if they registered them within a certain time.

John S. Dulcich, who represented Harrott, said the semiautomatic rifle that sparked all the litigation is

worth $300 to $900. The legal fight was more about "the principle of the situation" than the weapon, Dulcich said.

The ruling is "important because it gives some more clarity to whether an ordinary citizen is going to be prosecuted as a felon," Dulcich said. He said gun holders can get around the generic ban by modifying their weapons slightly.

The California Supreme Court upheld the constitutionality of the 1989 ban last year but has not ruled on the 1999 revisions.

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