

Carolyn B. Kuhl
Superior Court of the State of California
for the County of Los Angeles
111 North Hill Street, Department 1
Los Angeles, California 90012

April 29, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

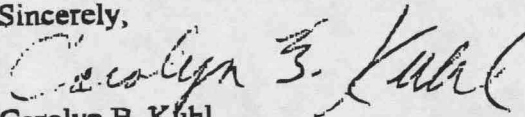
In connection with my hearing of April 1, 2003, I am attaching responses to follow-up questions from Senator Leahy, Senator Kennedy, Senator Biden, Senator Edwards, Senator Durbin and Senator Schumer (second set).

Having reviewed the transcript of the hearing, I want to clarify two matters. First, I want to make sure to explain fully the posture of the *Sanchez-Scott* decision to ensure there is no confusion. The plaintiff filed claims for invasion of privacy rights against the pharmaceutical company and its employee and against the doctor and filed a separate tort claim against the doctor for failure to obtain consent. My decision dismissed the privacy claims under California law which left the tort claim for failure to obtain consent against the doctor remaining for trial. Had my decision been affirmed, the plaintiff presumably would have proved her case at trial against the doctor and recovered her tort damages from the doctor. As it was, the Court of Appeal reinstated the privacy claim and remanded the case for trial against both the doctor and pharmaceutical company. The case then settled with the doctor and pharmaceutical company dividing the payment.

Second, I also want to clarify my role in *UAW v. Brock*. My name was not on the Opposition to the Petition for Certiorari in that case, and that is the brief I reviewed prior to the hearing. On further review of the record in this case, it appears that my name is on the United States' brief on the merits, and I now recall that I did participate in drafting that brief. During the hearing I was confusing *UAW v. Brock* with *EEOC v. FLRA*, which I argued but did not participating in briefing.

My thanks to you and your staff for all of your courtesies during the confirmation process.

Sincerely,


Carolyn B. Kuhl

cc: The Hon. Patrick J. Leahy, Ranking Minority Member

Carolyn B. Kuhl
Superior Court of the State of California
For the County of Los Angeles
111 North Hill Street, Department 1
Los Angeles, California 90012

April 15, 2003

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

Thank you for taking the time to meet with me at the Capitol last week. I realize what a busy day it was for you and I appreciate your providing an opportunity for me to talk about my record as a Judge.

In response to your suggestion that I provide you specific examples of my judicial record concerning the rights of minorities, I am sending you two opinions that I authored.

I wrote the appellate decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), during the three months I sat as a Justice Pro Tempore of the California Court of Appeal. In this case I upheld a jury award of \$500,000 to an African-American employee of the City of Los Angeles who had brought suit for discriminatory treatment on the basis of race and national origin and for retaliation. The defense argued that the evidence offered by the plaintiff at trial was insufficient to support the jury's verdict that Mr. Iwekaogwu had been retaliated against for complaining that he had been discriminated against on the basis of his race. This argument required a careful review of the entire trial record to determine (1) whether the adverse employment decisions occurred after Mr. Iwekaogwu had complained about discrimination and whether the persons who made the decisions knew about Mr. Iwekaogwu's complaints, and (2) whether a large verdict for emotional distress damages alone (over \$450,000) could be upheld in the absence of any evidence that plaintiff had sought psychiatric or psychological counseling.

My review of the record demonstrated that after Mr. Iwekaogwu had complained about being discriminated against, he had been denied two promotions and had been subject to a discriminatory denial of the opportunity to receive overtime pay. The defense argued that there was not sufficient evidence that the relevant decision makers knew of Mr. Iwekaogwu's discrimination complaint and acted in retaliation. I rejected such a "narrow . . . view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual," and relied on Ninth Circuit precedent for a broader standard more favorable to the plaintiff. (*Id.* at p. 816.) I also rejected the notion that individual employment decisions should be analyzed apart from discriminatory statements made in the course of other employment decisions. (*Id.* at 817.) I also rejected the defense argument that the jury could not

consider plaintiff's circumstantial proof to support a finding that the persons who denied promotions to Mr. Iwekaogwu knew about his complaints of discrimination. Finally, I rejected the defense claim that the amount of emotional distress damages was excessive. Even though no doctor testified concerning his emotional distress, I held that the jury could rely on his own and his family's statements about the stress and changes in Mr. Iwekaogwu's personal relationships because of the retaliation at work, and his fear of physical harm from coworkers. Therefore I upheld the entire \$500,000 damages award.

In a case involving the rights of an openly gay police officer, I overturned discipline of that officer for having worn a police department uniform in a gay rights parade and for having conducted recruitment activities aimed at the gay and lesbian community. A copy of my opinion in *Grobesson v. City of Los Angeles*, Case No. BC 150151 is enclosed. I wrote that "California law is clear that a person facing an administrative hearing that could affect his fundamental rights must have clear notice of the charges against him." (Opinion at 15.) Because the Police Department had violated Sergeant Grobesson's due process rights, by failing to give him proper notice of the charges against him, I overturned the Police Department's discipline of Sergeant Grobesson in its entirety. (*Id.* at 18-19.) I am also sending you a *Los Angeles Times* newspaper article that reported on this decision; it noted:

Judge Carolyn Kuhl instructed police to provide [Mr.] Grobesson with pay plus interest to cover 195 days during which he was suspended without salary in two separate disciplinary actions. The judge's order did not specify the amount owed.

She also ordered the LAPD to remove all mention of the disciplinary actions from its records.

Grobesson was charged with wearing his police uniform without permission in various gay-oriented activities such as a gay pride festival and in a magazine advertisement recruiting homosexuals to the LAPD.

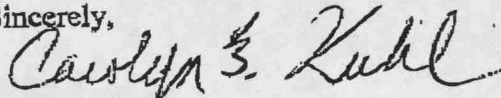
In addition, attached is a list of prominent women and minorities who know my work and support my nomination. I have actively pursued opportunities to mentor women in the law, both practitioners while in private practice and new judges since I have joined the bench. Women continue to be underrepresented in many law firm partnerships and on trial and appellate benches, and I have tried to do my part quietly but effectively to rectify this underrepresentation.

In closing, I want to assure you that I respect the dignity and legal rights of all parties who appear before me, including Ms. Sanchez-Scott. Because I am a woman, because I myself have had, on many occasions, the type of breast examination Ms. Sanchez-Scott underwent, because I have daughters who will undergo that type of medical procedure, I am not insensitive to the feelings of a woman placed in the unfortunate and uncomfortable situation Ms. Sanchez-Scott experienced. I had every reason to be – and was – sensitive to Ms. Sanchez-Scott's situation and claims. I had to determine her rights under California law. California law clearly gave her a tort action against the doctor whose responsibility it was to obtain her consent before he invited any other person into the examining room. It is very important to note that my decision allowed that claim to proceed. Regarding the separate claim against the drug company representative, the law was less clear, as Justice Turner affirms in his letter to you. I am glad that

the Court of Appeal clarified the law regarding the claim for invasion of privacy, and I would apply that ruling without reservation.

I would be glad to provide any further information that would be helpful to you in your review of my nomination. Thank you again for your consideration.

Sincerely,



Carolyn B. Kuhl

cc: The Honorable Orrin G. Hatch, Chairman, Senate Judiciary Committee
The Honorable Patrick J. Leahy, Ranking Minority Member

'Sanchez-Scott' Decision by Kuhl Proves Her Unfitness

By Karl Manhelm

In the fight over Judge Carolyn Kuhl's nomination to the 9th U.S. Circuit Court of Appeals, opponents correctly have focused on her decision to dismiss, on demurrer, the privacy claims of Azucena Sanchez-Scott, a breast-cancer patient. *Sanchez-Scott v. Alza Pharmaceuticals*, BC214585 (L.A. Super. Ct., dismissed Oct. 29, 1999).

Kuhl's decision to dismiss that complaint without leave to amend evinced a cavalier disregard for the privacy rights of a woman undergoing a potentially embarrassing medical examination at a traumatic moment in her life. Kuhl's willingness to summarily dismiss this complaint also revealed either an appalling ignorance of the existing law on privacy or a disturbing willingness to ignore that law.

Sanchez-Scott's doctor brought a male drug company salesman into his private examination room, then allowed the man to observe as Sanchez-Scott was examined. The physician did not inform Sanchez-Scott that the stranger was a salesman. The doctor had her pull the waistband of her skirt partially down so that he could examine her abdomen. He also ordered her to unbutton her blouse and take off her brassiere, so that he could put his hands on, and examine, her breasts.

During all of this time, the drug company salesman was in the examination room. At one point, he and the physician laughed because Sanchez-Scott became so hot and flushed that she needed to be fanned.

Just reading the facts of this complaint should have made it clear that Sanchez-Scott had a cognizable claim for an egregious invasion of her privacy. A woman being treated for breast cancer is in the middle of a stressful life struggle involving a very private aspect of her person. In that situation, Sanchez-Scott had every right to expect that the only people who would be present in that private examination room as she disrobed, and was probed, would be her physician and medical personnel necessary to her examination and treatment. A drug company salesman does not fit that description.

While this should have been evident as a matter of human decency, it clearly was evident as a matter of state law. Yet Kuhl decided otherwise, without affording Sanchez-Scott any opportunity to develop the facts through discovery. Kuhl sustained the drug company's demurrer that, "as a matter of law, the causes of action for invasion of privacy did not meet the standard of intrusion that is highly offensive to a reasonable person."

In other words, Kuhl agreed with the drug company that having strangers, with either commercial or prurient interests, observe a woman undergoing an intimate breast and abdominal examination by her physician is not "highly offensive to a reasonable person." Nor, apparently, did Sanchez-Scott have any privacy interest in the medical information obtained during the examination.

The 2nd District Court of Appeal, in an opinion written by Justice Paul A. Turner, unanimously reversed Kuhl's decision. *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal.App.4th 365 (2001). That opinion correctly held that Sanchez-Scott's complaint stated a privacy claim on which relief could be granted. The opinion notes, "It

cannot be easily disputed that medical examinations involve private matters ... [A] patient's conversation with a provider of medical care ... carries a traditional and legally well established expectation of privacy."

Later, the court observed, "A breast cancer patient who goes into an oncologist's office to be examined does not, nor should she, take a risk that what goes on in the examination room will be seen or heard by anyone other than medical personnel."

Now that Kuhl's decision is under scrutiny, Turner has written a letter to Sen. Patrick Leahy attempting to minimize the significance of her action. Turner's letter states that the *Sanchez-Scott* decision was a case of a judge making "a tough call in the context of competing legal interests."

It is hard to see any legitimate competing interest in having a drug company salesman observe the examination without Sanchez-Scott's informed consent. While Turner is correct in pointing out that the constitutional right to privacy was not at issue on appeal, his letter overlooks the fact that Kuhl's dismissal also denigrated the plaintiff's common-law privacy rights.

Turner erred when he wrote that this case involved "issues of first impression involving the tort of intrusion ... which even as of this date have not been clearly defined with identifiable bright lines by California courts."

When Kuhl granted the demurrer in *Sanchez-Scott*, the case of *Shulman v. Group W Productions*, 18 Cal.4th 200 (1999), had been decided more than a year earlier. In *Shulman*, a victim of a serious automobile accident alleged that her privacy was violated when a cameraman filmed her rescue and the emergency treatment that she received in the emergency helicopter that transported her to the hospital.

In holding that the plaintiff had a valid cause of action for invasion of privacy, the state Supreme Court stated, "[W]e are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent ... [I]t is neither the custom nor habit of our society that any member of the public at large may hitch a ride in an ambulance and ogle as paramedics care for an injured stranger."

Indeed, the case first recognizing the tort of invasion of privacy, *DeMay v. Roberts*, 46 Mich. 160 (1881), involved facts remarkably similar to *Sanchez-Scott* — third-party intrusion into a patient's home at the request of the physician. California courts long have relied on the reasoning in *DeMay*. Thus, in *Shulman*, our Supreme Court identified intrusion into a "hospital room" as a clearly recognized "affront to individual dignity."

Also, in *Wilkins v. NBC*, 71 Cal.App.4th 1066 (1999), the 2nd District Court of Appeal noted that a "patient's conversation with a provider of medical care in the course of treatment ... carries a traditional and legally well-established expectation of privacy."

With such clear precedent, it should have been evident to Kuhl that a drug company salesman had no right to be present and ogle the treatment of a breast cancer patient in her physician's private examination room. A judge with an appreciation for the right to privacy, and a woman's heightened state of anxiety and sensitivity when being treated for breast cancer, would have recognized that Sanchez-Scott's complaint stated a clear and unremarkable claim for violation of her right to privacy.

On this one, the opponents have it right; the Senate should not confirm Kuhl's nomination.

Karl Manhelm is a professor of law at Loyola Law School in Los Angeles.

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Kuhl's Comments 'Astonish' Former Colleague

By Lawrence Kootnikoff
 Daily Journal Staff Writer

A former colleague of Carolyn Kuhl, the Los Angeles judge nominated for a spot on the 9th U.S. Circuit Court of Appeals, says he was "astonished" to hear her recant the position she put forward in a 1982 brief supporting Bob Jones University.

"I was astonished to hear her say that," said Bruce Fein, who helped Kuhl draft the Reagan administration's brief in *Bob Jones University v. United States*, 461 U.S. 574 (1983).

"She has to explain it to herself," Fein said. "I'm just saying from my participation with her in the exercise I'm astonished by it."

Kuhl's elevation is opposed by some liberals, who characterize as extremist her backing for Bob Jones University, which did not allow interracial dating until two years ago. Thursday, the Senate Judiciary Committee voted 10-9, down party lines, to forward her name to the full Senate, where she may face a filibuster.

Some sources indicated that Democratic senators would meet Tuesday to discuss whether to filibuster Kuhl's nomination; however, they did not meet because many had traveled to Louisiana to attend Sen. Russell Long's funeral.

The brief in question, dated March 3, 1982, argued for maintaining tax-exempt status for Bob Jones University, the South Carolina Christian institution that banned African-Americans until 1975.

Testifying before the Senate Judiciary Committee on April 1, Kuhl apologized for her actions in the *Bob Jones* case, pleading youth and inexperience.

"I regret taking the position I did," she said.

The brief challenged existing Internal Revenue Service policy.

"I should have been defending the position of the IRS, and I was wrong because nondiscrimination should have been put first," Kuhl told senators. "I didn't as a young staffer fully understand that."

Fein is an influential Washington

lawyer, a columnist for the *Washington Times* and active in conservative circles.

At the time, both Kuhl and Fein were special assistants to Reagan's attorney general, William French Smith.

In 1981, Kuhl, Fein and Charles Cooper, the special assistant to the assistant attorney general, successfully lobbied the attorney general to urge the Internal Revenue Service to maintain Bob Jones' tax-exempt status. The IRS had threatened to revoke the university's tax-exempt status.

No one has suggested that Kuhl supported the university's racist policies.

But she and others argued that the IRS was overstepping its authority and that the same argument could be used to deny all-girls' schools their tax exemptions.

In her memorandum on the issue, Kuhl included excerpts from Reagan's campaign speeches and the 1980 Republican platform promising to exempt private schools.

The position was controversial even
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Kuhl's Recanting on 'Bob Jones' Irks Critics

Continued from Page 1

within the Justice Department. The Supreme Court rejected the university's bid for the exemption by an 8-1 vote.

"I had only been in Washington for a few months when this came up," she told the committee. "It was way over my head at the time."

Critics have accused Kuhl of undergoing a "confirmation conversion," changing her mind on the issue on the eve of her Senate confirmation hearing.

Asked whether he thought this was the case, Fein said that speculating would be "unfair."

"I don't know what went into her making that statement," he added. "It may be an astonishment more from ignorance because I don't know what other elements were there ... but it's still astonishment."

But Kuhl told senators that she had reconsidered her stand as early as 1985, when she went to work for Solicitor General Charles Fried.

"Focusing on the narrow legal issue was not the right thing to do in that situation," she said.

Former Assistant Attorney General Douglas Kmiec, who served in the



CAROLYN KUHL

Reagan and Bush administrations from 1985 to 1989, said many of those involved

in the case had reached similar conclusions.

"Carolyn and others involved came to understand that there were two courts that needed to be addressed, the Supreme Court and the court of public opinion," said Kmiec, dean at the Catholic University of America law school in Washington.

"The administrative law issues that were front and center in the briefing really were eclipsed in the public mind by the racial issue," Kmiec said.

Susan Lerner of the Committee for Judicial Independence said she was also "astonished, but from a different point of view."

"I thought it was a very cagey and disingenuous response," said Lerner, whose group has lobbied senators to block Kuhl's nomination.

"Nothing I've heard causes me to feel that [Kuhl has] a true understanding of why she received such criticism, and why the Reagan administration received such criticism [over the case]," she said.

■ E-mail: lawrence_kootnikoff@dai-
 lyjournal.com



CAROLYN B. KUHL:
BRINGING BALANCE TO THE NINTH CIRCUIT

Regardless of which party controls the White House, the American people rightly expect that the President will nominate accomplished, intelligent, fair-minded candidates to fill vacancies in the federal judiciary. Above all, judicial nominees must be committed to the rule of law, and have a keen respect for the limited role of the federal judiciary in our system.

Regrettably, the Ninth Circuit has fallen short of that ideal all too often. Look no further than last year's notorious "Pledge of Allegiance" decision, in which the court ruled that the Pledge is unconstitutional because it contains the forbidden word "God."¹ Of the Ninth Circuit's 25 active judges, fully seventeen were appointed by Democratic presidents, fourteen of them by President Clinton. Just eight of the 25 judges—less than a third of the court's strength—are Republican appointees. No wonder that even Democratic Senator Charles Schumer agrees that the Ninth Circuit is "way out of the mainstream on the left side."²

By all accounts, Carolyn B. Kuhl lives up to the standards of judicial excellence from which the Ninth Circuit would benefit. Nominated by President Bush to the Ninth Circuit in June of 2001—nearly two years ago—Kuhl has proven herself to be an exceptionally skilled lawyer, a dedicated public servant, and a principled, restrained state-court judge. When Carolyn Kuhl takes her seat on the Ninth Circuit bench, she will bring balance to a court that desperately needs it. We urge the Senate to approve her nomination without delay.

A Distinguished Career

Carolyn Kuhl's career has been marked by a wide range of practice in different areas of the law, a commitment to public service, and extensive experience with the business of judging. Judge Kuhl's academic background is top-notch, having graduated from Princeton University in 1974 and from Duke Law School in 1977. Like most everything that Judge Kuhl went on to do, she completed her law school career with distinction—she served as Editor of the *Duke Law Journal*, graduated with honors, and was asked to join the Order of the Coif, the law-school equivalent of Phi Beta Kappa. Following law school she clerked for the Honorable Anthony M. Kennedy, at the time a judge on the Ninth Circuit.

¹ See *Newdow v. U.S. Congress*, 321 F.3d 772 (9th Cir. 2003).

² *Congressional Record* S3694 (March 13, 2003) (statement of Sen. Schumer).

After working a brief time for a firm in Los Angeles, Judge Kuhl left private practice to serve her country as an attorney at the Department of Justice. She began her tenure as a public servant in 1981 as Special Assistant to Attorney General William French Smith. From 1982 through 1985, she served as Deputy Assistant Attorney General in the Justice Department's Civil Division, supervising all of the Department's civil appellate litigation nationwide. In 1985, Judge Kuhl became Deputy Solicitor General, where she argued a number of cases before the United States Supreme Court, as well as supervised other attorneys' work in cases before the Court.

In addition to her outstanding academic credentials and her years of government service, Judge Kuhl has extensive experience in private practice. After leaving the Justice Department, she became a partner in the Los Angeles law firm of Munger, Tolles & Olson. Her practice consisted of civil litigation in both federal and state court, with specialties in appellate litigation, representation of defense contractors in cases brought under the federal False Claims Act, and employment litigation.

In 1995, Kuhl was appointed to be a judge of the California Superior Court for Los Angeles County. Her tenure includes a year and a half of service in the criminal calendar court and over three years in the civil division. In 1999, she served for three months on assignment to the California Court of Appeal. In April of 2000 she was selected to participate in the Complex Litigation Pilot Program, and she became the program's Supervising Judge in January of 2001. She currently is the Supervising Judge for the entire civil division.

This career, which by all accounts is impressive, has well-prepared Judge Kuhl for the federal bench. She embodies all of the necessary prerequisites for a judge: intellect, experience, and respect for the judicial role in our constitutional structure. The American people expect that all federal judges will exhibit this level of excellence, and the Senate should swiftly confirm Judge Kuhl to the Ninth Circuit.

An Outstanding Judicial Record

Each of Judge Kuhl's decisions is characterized by well-reasoned analysis of the law coupled with a respect for the separation of powers. Her judicial record has earned her the respect of both her colleagues and the American Bar Association. Ninety-seven of Judge Kuhl's fellow state-court judges, representing both political parties and all points on the ideological spectrum, wrote in a letter to the Senate Judiciary Committee: "We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand."³ It goes without saying that this bipartisan group of judges speaks about Judge Kuhl's fitness for the federal bench with greater authority than the usual Washington-based special interest groups. In addition to high praise from her colleagues, a large majority of the American Bar Association has rated

³ Letter from 97 judges of the California Superior Court, Los Angeles County (Feb. 28, 2003).

Judge Kuhl well-qualified—a seal of approval that some Democrats in the Senate hail as their “gold standard.”

A review of Judge Kuhl’s decisions since she took the state bench makes clear that she has earned her reputation. In seven and a half years, only 127 of her cases have been appealed. And of those, her rulings have been upheld in their entirety 85% of the time, and upheld in part 7% of the time. This is a record that any judge would be exceedingly proud of. No wonder the special-interest groups, even after two years of dredging through Judge Kuhl’s record, have failed to find any mud to sling—not even mud that would satisfy their low standards of believability. (One group’s seven-page report managed to cite as problematic *just two cases* from Judge Kuhl’s seven and a half years on the bench.) This dearth of credible criticism is proof positive that, whatever her personal political, moral, and religious views may be, Judge Kuhl is a principled and restrained jurist—traits that she is sure to bring with her to the Ninth Circuit.

One of the two cited cases, *American National Property and Casualty Co. v. Julie R.*,⁴ is evidence of Judge Kuhl’s commitment to precedent and the text of binding legal authorities. In that case (in which Judge Kuhl was sitting by designation with the Court of Appeal), the court ruled that a woman who was raped in her car was entitled to recover damages from her assailant and from his insurance company, but that her insurance policy did not authorize her to sue her own insurance company.

The policy at issue in *American National* covered only a narrow set of injuries, and read as follows: “We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured or an underinsured motor vehicle. The bodily injury must be caused by accident and result from the ownership, maintenance, or use of the vehicle.” Judge Kuhl and a colleague agreed with the trial judge that the policy did not provide coverage, because there was no relationship between the policyholder’s injuries and the use of the vehicle. Under long-settled California law, an insurance company is liable only if the use of the vehicle is a “predominating cause” or “substantial factor” in causing the injury.⁵ And in this case, the car was not a “substantial factor” in causing the assault; rather, the predominating factors were the intent and actions of the assailant.⁶

Even the lone dissenting judge in *American National* agrees that Judge Kuhl is a fair, impartial jurist who can be counted on to apply the law evenly and without bias. In a letter to the Judiciary Committee, he emphasizes that Judge Kuhl is “a solid and independent judge who is dedicated to and

⁴ 76 Cal. App. 4th 134 (1991).

⁵ See, e.g., *Aetna Casualty & Surety Co. v. Safeco Ins. Co.*, 103 Cal. App. 2d 694, 701 (1980) (“Although the word ‘use’ must be given an all inclusive connotation, there must be a causal connection between the use and the injury. The automobile is so much a part of American life that there are few activities in which the ‘use of an automobile’ does not play a part somewhere in the chain of events.” (quoting *Truck Ins. Exch. V. Webb*, 256 Cal. App. 2d 140, 145 (1967))).

⁶ 76 Cal. App. 4th at 141.

follows the law. . . . She will reason to a conclusion based on our Constitution, statute, and established precedent, rather than reason backward from some predetermined result.”⁷

Predictably, the usual Washington special interests have twisted the meaning of the *American National* case in an effort to portray Judge Kuhl as somehow hostile to rape victims.⁸ Nothing could be further from the truth. The case was a civil action for money damages, not a criminal prosecution. The victim was not even suing the man accused of raping her. Rather, she was suing her own insurance company. And although Judge Kuhl—like her colleague on the appellate bench and the trial judge before her—held that the victim’s own insurance company was not liable, nothing in that decision prevented the woman from seeking redress from the attacker himself.

The second cited case, *Sanchez-Scott v. Alza Pharmaceuticals*,⁹ likewise reveals Judge Kuhl’s commitment to the rule of law. Judge Kuhl’s detractors evidently believe that, because the plaintiff in *Sanchez-Scott* was a sympathetic figure, Judge Kuhl should have ignored the requirements of the law and ruled in her favor. That would mean the end of the rule of law. In order for judges to apply the law fairly and even-handedly, they must interpret legal rules without regard to their emotions or any sympathy they feel for a party. That is why the appellate judge who later reversed Judge Kuhl has written a letter enthusiastically supporting her nomination, and explaining that her ruling was reasonable and unbiased: “With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.” Indeed, the appellate judge has since conceded that Judge Kuhl’s ruling may have been right, after all: “a strong argument can be made that [Judge Kuhl] correctly assessed the competing societal interests the California Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred.”¹⁰

Everyone agrees that the plaintiff in *Sanchez-Scott* was not treated appropriately by her physician; the doctor admitted as much in a later letter of apology. But the legal issue was not whether the plaintiff was treated badly, but whether she had a legal claim against a third party who was not responsible for the doctor’s misbehavior. During a scheduled appointment, the plaintiff’s doctor entered the examining room with another gentleman, who was introduced as Mr. Martinez, “a person . . . who was looking at Dr. Polonsky’s work.”¹¹ (Martinez was a pharmaceutical salesman who was participating in a mentorship program, which even the appellate court agreed was a “well-established and accepted method of providing

⁷ Letter from Judge Norman Epstein to Senator Boxer (May 24, 2001).

⁸ See NATIONAL WOMEN’S LAW CENTER, CAROLYN KUHLMAN’S PROBLEMATIC RECORD ON REPRODUCTIVE CHOICE AND OTHER WOMEN’S ISSUES 4 (Mar. 2003) [hereinafter NWLC REPORT].

⁹ See NWLC REPORT at 3.

¹⁰ Letter from Paul Turner, Presiding Justice, California Court of Appeal (Mar. 17, 2003).

¹¹ *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365, 369 (Cal. Ct. App. 2001).

training to therapeutic sales specialists.”¹²) The plaintiff alleged in her complaint that during the exam, she became flushed and began to fan herself. The doctor took the fan from her and gave it to Mr. Martinez, explaining that it would “give him something to do.” The plaintiff later explained that she became uncomfortable with the situation. But at the time, she did not inform her doctor of her discomfort, and allowed Mr. Martinez to remain in the room for the entire exam.¹³ Judge Kuhl therefore found that, the presence of the mentorship participant in the exam room did not meet the standard for an invasion of privacy claim against the pharmaceutical company.

Judge Kuhl’s ruling had nothing to do with the claims against the doctor, and would have allowed to go forward the plaintiff’s tort claim against the doctor for failing to obtain informed consent. Nor did *Sanchez-Scott* in any way involve an issue of the constitutional right to privacy. Rather, Judge Kuhl was faced with several issues of first impression under California law relating only to the tort of intrusion. When looking to precedent for guidance, Judge Kuhl found that the California Supreme Court had not established a firm rule on the issue of intrusion. The court had suggested that judges must weigh the facts in each individual case: “privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy.”¹⁴ The appellate judge likewise acknowledged in his letter that, “[i]n ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts.”¹⁵

Ultimately, Judge Kuhl concluded that the pharmaceutical representative did not invade the patient’s privacy for two principal reasons. First, Martinez was participating in a mentorship program, whose purpose was to improve the delivery of health care. Second, the patient had effectively consented to the representative’s presence in the exam room. In so ruling, Judge Kuhl carefully applied governing precedent from the California Supreme Court, which had held:

Moreover, the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant’s conduct will rarely be deemed “highly offensive to a reasonable person” so as to justify tort liability.¹⁶

¹² *Id.* at 370.

¹³ *Id.* at 369.

¹⁴ *Sanders v. American Broadcasting Cos., Inc.*, 85 Cal. Rptr. 2d 909, 915-16 (Cal. 1999).

¹⁵ Letter from Paul Turner, Presiding Justice, California Court of Appeal (Mar. 17, 2003).

¹⁶ *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 26 (1994).

Reasonable people certainly can disagree about whether Judge Kuhl reached the right result in the *Sanchez-Scott* case—indeed, the appellate judge who reversed her now thinks that she may have been correct. But there can be no disagreement that her ruling represents a scrupulous, reasonable effort to apply a complex and ambiguous body of law. The California Supreme Court has recognized that “the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized.”¹⁷ It should come as no surprise that reasonable minds can, and often do, disagree when applying such a shifting standard.

Judge Kuhl’s Commitment to Eradicating Discrimination

Judge Kuhl’s record as a California Superior Court Judge has demonstrated her personal commitment to fair treatment of all persons, to principles of non-discrimination, and to strict enforcement of the civil rights laws. For example, Judge Kuhl upheld a large damage award in *Francis Iwekaogwu v. City of Los Angeles*,¹⁸ an employment discrimination and retaliation case where an employee suffered discrimination because of his race (African-American) and national origin (Nigerian). Leo James Terrell, the plaintiff’s lawyer in *Iwekaogwu*—and an attorney for the NAACP and self-described lifelong Democrat—has written to “vigorously recommend” Judge Kuhl’s nomination. He went on to say that he “found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.”¹⁹ But Judge Kuhl’s own words are the best evidence of commitment to enforcing civil rights laws: “the Federal Government has and should play an aggressive, vigorous role in fighting discrimination. The civil rights laws have had a major impact in changing our society for the better, including by giving the Executive Branch the power to punish unlawful discriminatory conduct in employment, housing, government contracting and federal programs. The Government must continue to be a force for change by rooting out discrimination under its statutory mandates and bringing actions to compensate victims of discrimination.”²⁰

Having failed in their effort to identify decisions that could call into question Judge Kuhl’s fitness for the federal bench, the special-interest groups have been forced to look almost entirely at her work as an advocate. They effectively are making the astonishing argument that Judge Kuhl’s work as a lawyer is a better predictor of how she will rule as a Ninth Circuit judge than are her decisions as a state judge in California. In reality, of course, the groups’ near-uniform focus on her record as a lawyer is proof positive that, whatever her personal views may be, she checks them at the door of the courthouse. And the record simply cannot support a contention that Judge Kuhl is anything less than fully committed to non-

¹⁷ *Hill*, 7 Cal. 4th at 26.

¹⁸ 75 Cal. App. 4th 803 (1999).

¹⁹ Letter from Leo James Terrell to Senators Feinstein and Boxer (May 23, 2001).

²⁰ Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

discrimination and equality before the law.

Take, for example, the *Bob Jones* case.²¹ In 1981, two religious schools argued before the Supreme Court that the IRS had unlawfully revoked their tax exempt status because of their discriminatory admission policies. Everyone agrees that these practices were repugnant. But racial discrimination per se was not at issue in the *Bob Jones* case. Rather, the question was one of administrative law: whether the IRS had the authority to revoke a school's tax exempt status on the ground that it contravened "public policy," or whether only Congress could do so.

Although Judge Kuhl's conclusion that the IRS lacked that power was based on an honest legal analysis, she has long since come to believe that her position was wrong: "The [Attorney General's] decision was wrong because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision." She also came to realize that because the IRS, which was the Justice Department's client, had a defensible legal position, the Justice Department had an obligation to defend it.²² Former Solicitor General Charles Fried confirms that Kuhl had rethought her position on the *Bob Jones* case by 1985: "By the time Kuhl came to the office of the solicitor general as my deputy in 1985, I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan Administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas."²³

Different officials in the United States government took different views of the case. Some believed that the IRS already had the authority to revoke the tax exempt status of discriminatory schools. Others believed that Congress had not yet delegated the IRS that power. The important point, however, was that everyone agreed that the IRS *should* have the power to take away Bob Jones's tax exempt status. One of Judge Kuhl's former colleagues recalls that "all agreed that racially discriminatory private schools should not be tax exempt, and draft legislation to that effect was prepared and proposed to Congress. [Kuhl and others] just believed that if the school was going to lose the tax exemption that it was entitled to under 501(c)(3), Congress and not the IRS should make that decision."²⁴ In fact, within days of announcing their decision in the *Bob Jones* case, the Reagan Administration proposed legislation that would "for the first time, give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-

²¹ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

²² Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

²³ Charles Fried, *Time-Traveling to Thwart a Judge*, L.A. TIMES, Jan. 17, 2003, at 17.

²⁴ Email from Charles Cooper, former Deputy Assistant Attorney General, Civil Rights Division, to David McGinley, Free Congress Foundation (July 9, 2001) (www.judicialselection.org/nominees/kuhl.htm).

exempt status to private, nonprofit educational organizations with racially discriminatory policies.”²⁵

It’s no secret that Judge Kuhl believed that the IRS did not have unchecked discretion to determine which groups were morally deserving of a tax exemption. She was particularly concerned that the IRS might deny tax exempt status to all-girl schools on the ground they discriminated on the basis of sex. (Judge Kuhl had attended an all-girl high school.)²⁶

Nor is it a secret that Judge Kuhl’s views on the IRS’s powers—i.e., that Congress, not unelected tax collectors, must determine that institutions with certain views will not receive tax exemptions—were well within the legal mainstream. Harvard Law Professor Lawrence Tribe, whom no one would mistake for a conservative, indicated in a letter to Attorney General William French Smith that he shared those views: “I have the highest regard for the quality of the brief submitted to the Supreme Court by the Department of Justice in the *Bob Jones* case. I thought it was a powerful and, in most respects, entirely compelling legal document.”²⁷ Like the Justice Department, Professor Tribe believed that the IRS’s policy exceeded its authority and needed to be backed by congressional action. And in his concurrence in the *Bob Jones* case, famously moderate Justice Lewis Powell argued that Congress, not the IRS, should develop national policy regarding tax exemption:

[T]he balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently “fundamental” to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote “public policy.” . . . [T]he contours of public policy should be determined by Congress, not by judges or the IRS.²⁸

There is no merit to the proposition that Judge Kuhl was only “one of two” Justice Department officials who persuaded the Attorney General to reverse the IRS’s policy. At the time of the case, Kuhl was 29 years old, had no decision-making authority, and came to the debate near the end of a process that involved numerous senior Administration officials. As a Special Assistant to the Attorney General, Kuhl was assigned to perform staff work for the Attorney General and other presidentially appointed Justice Department officials. As stated by Chuck Cooper, another young Department attorney, Judge Kuhl

²⁵ *Reagan Proposes Bill to Prohibit Tax Exemption for Discriminatory Schools*, 14 TAX NOTES 218 (Jan. 25, 1982).

²⁶ Letter from Carolyn Kuhl to Senator Boxer (May 29, 2001).

²⁷ Letter from Laurence H. Tribe to Attorney General William French Smith (Feb. 10, 1984).

²⁸ *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring).

“wasn’t making policy, she was taking notes—when she and I were even in the room.”²⁹

With equally little foundation, some have proposed that Judge Kuhl’s participation in *Local 28 of Sheet Metal Workers’ Intern. Ass’n v. E.E.O.C.*³⁰ somehow constitutes evidence of a hostility to affirmative action. It would be difficult to concoct an allegation that has less basis in reality. Although it certainly is true that Kuhl, then the Deputy Solicitor General, was one of eight government attorneys listed on a Supreme Court brief challenging the appropriateness of rigid quotas, the government did not criticize affirmative action as such. (Curiously, Samuel Alito also worked on the *Local 28* brief when he was a government attorney. Yet in 1990 the Democrat-controlled Senate confirmed him to the Third Circuit. Those who raise the issue now are trying to hold Judge Kuhl to an unfair double standard.)

In *Local 28*, the trial court found that the union had violated Title VII by discriminating against minority workers, and therefore ordered various remedies—one of which was a rigid racial quota requiring that by a date certain a specific percentage (29.23%) of the union’s members must be non-whites. In its Supreme Court brief, the United States *supported* each of the affirmative action remedies except for the quotas:

We believe that those who violate Title VII should be made to take specific, affirmative steps to correct their discriminatory practices and ensure equal opportunity in the future. An effective remedial order can and should spell out the specific actions that a union or employer must undertake to reform identified discriminatory practices. It should provide for close monitoring of the future practices of those found to have been ‘proved wrongdoers’ under Title VII, until the court is satisfied that meaningful and permanent changes have been made.³¹

The only area of dispute in *Local 28* concerned the district court’s requirement of membership quotas. And no one should confuse opposition to rigid quotas as opposition to affirmative action in general. Many noted liberals, including former President Clinton and former Vice President Gore have rejected the type of rigid quotas that were at issue in the *Local 28* case:

- **President Bill Clinton:** “I am against quotas, I’m against giving anybody any kind of preference for something they’re not qualified for. . . . I have never supported quotas. I’ve always been against them.”³²

²⁹ Jonathan Groner, *Going After the Bush Bench*, LEGAL TIMES, Feb. 1, 2002.

³⁰ 478 U.S. 421 (1986).

³¹ Brief for Equal Employment Opportunity Commission at 18, *Local 28*, 478 U.S. 421 (1986) (No. 84-1656).

³² Presidential Debate, Oct. 16, 1996 (www.pbs.org/newshour/bb/election/october96/debate/prez11_10-16.html).

- **Vice President Al Gore**: “I’m against quotas. . . . They’re against the American way.”³³
- **Senator Joseph Lieberman**: “We shouldn’t discriminate in favor of somebody based upon the group they represent. . . . It’s an un-American argument because it’s based on averages, not individuals. And that’s the same when we come to group preferences and quotas. . . . I think we all want to say that we’re against quotas and against group preferences, but that there ought to be some room for the kind of outreach that has been part of affirmative action programs without getting into quotas.”³⁴
- **Ismael Rivera** (President of American Association for Affirmative Action): “I’m a proponent of affirmative action, and I’m also against quotas.”³⁵

The government’s brief in *Local 28* is characterized by due deference to binding Supreme Court precedent. Just two years prior, the Supreme Court had held that 42 U.S.C. § 2000e-5(g), the same provision at issue in *Local 28*, forbade racial preferences to individuals who had not been subjected to unlawful discrimination.³⁶ The government’s argument in *Local 28* was based upon this Supreme Court case and the plain language in the statute which explicitly prohibits a court from ordering a union to admit an individual who was “refused admission . . . for any reason other than discrimination.”³⁷

Although Judge Kuhl’s involvement in *Local 28* was as a Department of Justice attorney, and it therefore would be inaccurate to equate the United States’ litigation position with her personal beliefs, it certainly is true that Judge Kuhl has written articles articulating her views on the types of remedies that best serve the purposes of Title VII. In these articles, she has favored a direct remedial approach that “emphasize[s] identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination.” According to Judge Kuhl, such an approach “recognizes individual dignity.” And while Judge Kuhl has indicated that individual remedies are the best approach, she acknowledges that the Supreme Court has made generalized remedies available in certain circumstances. Judge Kuhl should be commended for thoughtfully contributing to the public debate on how to best

³³ Presidential Debate, Oct. 17, 2000 (<http://www.pbs.org/newshour/bb/election/2000debates/3rdebate5.html>).

³⁴ Transcript of Comments Made By Sen. Joe Lieberman to The National Press Club in 1995 (found at www.newmassmedia.com/lieberman/affirm.html).

³⁵ Lynda Guydon Taylor, *Courts Play Role in Future of Affirmative Action*, PITTSBURGH POST-GAZETTE, Apr. 8, 2000, at W-3.

³⁶ *Firefighters v. Stotts*, 467 U.S. 561 (1984).

³⁷ 42 U.S.C. § 2000e-5(g).

overcome America's tragic legacy of racism and discrimination.

A Commitment to the Rights of Women

Judge Kuhl's professional accomplishments—degrees from two of the nation's top universities, dedicated government service, and a successful career in private practice—would be impressive achievements for any lawyer. They are even more remarkable given that the law traditionally has been a male-dominated profession. Judge Kuhl's seven-year tenure on the California bench has been marked by a commitment to protecting the legal rights of all litigants, including women. The Washington special interests have been unable to find anything to disqualify her in her judicial record, and therefore have tried to revisit cases she worked on as a young government attorney more than two decades ago. But again, that only serves to confirm that, whatever Judge Kuhl's policy views may happen to be, she is committed to setting them aside when she dons the black robe.

As an attorney for the United States, Judge Kuhl's obligation was to represent her client—the federal government, and ultimately the American people—to the best of her ability. A lawyer's job is to marshal whatever reasonable arguments can be made in support of her client. Lawyers do not have the luxury of picking and choosing what arguments to advance on the basis of their own personal views. This is especially true of attorneys for the federal government, who often are called on to defend laws and policies in whose development they played no part. Instead, the government lawyer must set aside whatever personal convictions she may have and advance arguments that are consistent with the decisions of her superiors.

Judge Kuhl did just that in *Thornburgh v. American College of Obstetricians and Gynecologists*³⁸—a case in which, by all accounts, she played an exceedingly modest role. In *Thornburgh*, the Department of Justice defended the constitutionality of several states' popular, mainstream laws that preserved the right to abortion and sought to ensure that women were exposed to all relevant information before exercising that right. The laws required abortion providers to give their clients information about alternatives to abortion, as well as the attendant medical risks, before performing an abortion. According to a 1996 Gallup survey, fully 86% of Americans support this policy. Indeed, the Supreme Court upheld such a provision in *Planned Parenthood v. Casey*³⁹—the same decision in which it reaffirmed *Roe v. Wade*.⁴⁰ Second, the laws required minor girls to obtain the consent of a parent before they could have an abortion. A 2000 *Los Angeles Times* poll indicates that 82% of Americans favor parental-consent laws. And the Supreme Court specifically upheld the constitutionality of such a provision

³⁸ 476 U.S. 747 (1986).

³⁹ 505 U.S. 833, 881 (1992) ("Our prior decisions establish that, as with any medical procedure, the State may require a woman to give her written informed consent to an abortion.").

⁴⁰ 410 U.S. 113 (1973).

in the 1979 case of *Bellotti v. Baird*.⁴¹

Third, the laws required that, for post-viability fetuses, abortion providers must use the method most likely to result in a live birth. According to a 2002 Gallup study, fully 82% of Americans oppose abortion in the third trimester. Finally, the laws required abortion providers to inform their clients about the impact abortion would have on the fetus. The Supreme Court has explicitly recognized that states may impose such a requirement: “Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”⁴²

While the laws at issue in *Thornburgh* enjoy the support of the vast majority of Americans, Judge Kuhl does not deserve credit for the Justice Department’s efforts to defend them. For she played only a minor part in drafting the brief that Acting Solicitor General Charles Fried filed in that case. She did not author the brief, and her name is listed third on its cover. The initial draft was written by career lawyers in the Justice Department’s Civil Division. Judge Kuhl, who was their supervisor, forwarded their draft to the Office of the Solicitor General. The Solicitor General’s office then substantially rewrote the brief. In fact, Acting Solicitor General Fried has indicated that he personally wrote the portion of the brief that dealt with *Roe v. Wade*: “I decided to write the overrule-*Roe* part of the brief myself.”⁴³

Judge Kuhl thus was only one of many lawyers to work on the *Thornburgh* brief—and one of the least involved. Even interest groups determined to oppose President Bush’s judicial nominees concede that briefs with multiple contributors shed no light on those individuals’ personal views. People for the American Way recently emphasized that the briefs D.C. Circuit nominee Miguel Estrada authored at the Justice Department reveal nothing about his personal legal views, because “the briefs were documents that many people had worked on.”⁴⁴ Sauce for the goose is sauce for the gander. If Miguel Estrada’s briefs are not evidence of his personal views because “many people had worked on” them, then neither are Carolyn Kuhl’s.

The newfound determination to criticize Judge Kuhl for her modest part in *Thornburgh* represents an unfair double standard. For Democrats have not objected to past nominees who had a much more active role in that case than she did. The first draft of the *Thornburgh* brief was written by Sixth Circuit

⁴¹ 443 U.S. 622 (1979) (“*Bellotti II*”).

⁴² *Casey*, 505 U.S. at 882.

⁴³ CHARLES FRIED, ORDER AND LAW 34 (1991).

⁴⁴ People for the American Way, Press Release, Truth a Frequent Casualty in the Estrada Nomination Battle (Feb. 24, 2003) (www.pfaw.org/pfaw/general/default.aspx?oid=8912).

Judge John M. Rogers, then a career lawyer in the Justice Department's Civil Division. Democrats never asked Judge Rogers about it during his confirmation hearing in 2002. The Judiciary Committee approved him by voice vote, with no Democrat recording a dissenting view. The full Senate confirmed him by voice vote, again with no Democrat opposition. Similarly, Charles Fried, who was Acting Solicitor General, was responsible for determining whether to file a brief in *Thornburgh* and what arguments to make. Yet Democrats gave him a free pass during his subsequent 1985 confirmation hearing to be Solicitor General. Fried was unanimously approved by the Judiciary Committee, and was confirmed by the full Senate by voice vote and without debate. Rogers and Fried were far more instrumental in developing the United States' position in *Thornburgh* than was Carolyn Kuhl. It is not easy to understand why a female nominee would be criticized for the same brief.

Kuhl's suggestion to Acting Solicitor General Fried that it would be appropriate to ask the Supreme Court to rethink *Roe v. Wade* had nothing to do with whether *Roe* was correctly decided as an original matter. Instead, it was based on Judge Kuhl's belief that the Justice Department's court filings should be consistent with the publicly stated positions of the President, and her calculation that alternative litigation tactics were likely to erode the Justice Department's credibility with the Supreme Court.

The President at the time *Thornburgh* was argued was Ronald Reagan, and President Reagan had long been on record with his opposition to *Roe v. Wade*. Judge Kuhl believed that it was appropriate for the briefs of the Justice Department—an arm of the Executive Branch—to reflect the views of the head of the Executive Branch. Reasonable people certainly can disagree about whether *Roe* was correctly decided (although Kuhl's recommendation was not made on this basis). But everyone can agree that Presidents are entitled to have their lawyers advance their views in court.

Second, Judge Kuhl feared that the Justice Department's past efforts to defend popularly enacted laws without directly criticizing *Roe* had undermined its credibility. In previous cases—in which Judge Kuhl was not involved—the Department's briefs seemed to accept *Roe*'s basic premise, but urged the Supreme Court to show extreme deference to legislatures when applying it. This position was not well received by the Supreme Court. During Solicitor General Rex Lee's oral argument in *City of Akron v. Akron Center for Reproductive Health*,⁴⁵ Justice Blackman "waved the brief in his face and, after asking if Lee had written it, demanded to know if he was asking that *Roe* be overruled . . . and, if not, if he was then asking that *Marbury v. Madison* be overruled."⁴⁶ Judge Kuhl did not want the Department's credibility to be further eroded, and believed it was better to be up-front with the Supreme Court about what the President's views were.

In the final analysis, Judge Kuhl's minimal involvement in *Thornburgh* reveals nothing about her personal legal or political views. She was a young attorney at the time, representing a client—the United

⁴⁵ 462 U.S. 416 (1983).

⁴⁶ CHARLES FRIED, ORDER AND LAW 34 (1991).

States and ultimately the American people. She was a low-level official in an Administration led by a President who was avowedly in favor of modest, incremental limitations on the right to abortion, and she had an obligation to advance her client's views. It was not Carolyn Kuhl's place to second-guess the President.

Nor is there any reasonable basis to criticize Judge Kuhl for the fact that, as a Justice Department lawyer, she signed a brief in *Planned Parenthood v. Heckler*⁴⁷ defending Department of Health and Human Services (HHS) regulations that required federal grantees to notify a parent of a minor child before giving him or her contraceptives. Significantly, Congress had expressly endorsed the principle of parental involvement: "To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection."⁴⁸

It's worth emphasizing that the *Heckler* case did not implicate the constitutional right to privacy. The D.C. Circuit decision did not even cite *Roe v. Wade* or *Griswold v. Connecticut*, and stressed that it was "unnecessary to decide . . . whether the regulations . . . violate the constitutional privacy rights of minors."⁴⁹ The *Heckler* case simply presented a rudimentary question of administrative law—i.e., whether Congress had given HHS the power to issue the regulations.

Judge Kuhl had no role in developing the HHS regulation challenged in *Heckler*. She was simply a litigator at the Justice Department, and it was her job to represent HHS, the client agency. Federal agencies are entitled to their day in court, regardless of whether or not their lawyers agree with their policy choices. For years, Justice Department guidelines have made clear that Department lawyers have an obligation to defend acts of Congress and Executive Branch agencies. The Department will present an agency's views to the judiciary "whenever a reasonable argument can be made in [their] support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts."⁵⁰ This duty is no less keen in the case of statutes or regulations that may be controversial.

Make no mistake: HHS's policy views can be attributed to HHS and no one else; a government lawyer's arguments on behalf of a client agency should not be mistaken for her own personal beliefs. This is the teaching of the American Bar Association's legal ethics rules, which instruct that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of

⁴⁷ 712 F.2d 650 (D.C. Cir. 1983).

⁴⁸ 42 U.S.C. § 300(a) (1983 version).

⁴⁹ *Heckler*, 712 F.2d at 654 n.21.

⁵⁰ 5 Op. Off. Legal Counsel 23, 25-26 (1981).

the client's political, economic, social or moral views or activities."⁵¹ This view is shared by the editorial page of the *Washington Post*, which agrees that government lawyers should not be held accountable for the policy choices of their clients: "[The Justice Department] is obligated to defend acts of Congress and government policies where reasonable arguments can be made on their behalf. Those policies aren't always popular There's no merit, however, in opposing a nominee for having, as a government lawyer, represented the position of the United States."⁵²

Criticizing Carolyn Kuhl for doing her job in *Heckler* threatens to produce a chilling effect that would undermine the quality of representation available to all federal entities. Justice Department lawyers would be reluctant to defend controversial acts of Congress or of administrative agencies for fear that their work product would be held against them in the future. The ultimate victim of such a chilling effect, of course, would not be the federal government—though Congress and the Executive Branch undoubtedly would suffer. It would be the American people, who would not be able to count on Justice Department lawyers to defend the policies that their representatives have enacted.

Perhaps the most spurious criticism against Judge Kuhl stems from the amicus brief she filed on behalf of a client in *Rust v. Sullivan*,⁵³ in which she defended the federal government's decision not to use taxpayer funds to subsidize abortion-related counseling. Kuhl became involved in *Rust* because she wanted to break into the male-dominated field of appellate-court advocacy. Her efforts to shatter this glass ceiling should be praised, not censured—especially by groups that purport to seek the advancement of women in American society.

After leaving the federal government and returning to California, Carolyn Kuhl wanted to develop a specialty in appellate law and a practice before the U.S. Supreme Court. She believed that *Rust* was a suitable case to begin doing so, because First Amendment cases are considered particularly prestigious by the nation's appellate bar. By seeking to develop a Supreme Court practice, Carolyn Kuhl was trying to enter a field that even today essentially is a men-only club. Almost all of the country's leading Supreme Court specialists are men: for example, Walter Dellinger, Lawrence Tribe, Larry Robbins, Seth Waxman, and Carter Phillips.

It was an especially difficult task for Carolyn Kuhl to establish appellate and Supreme Court specializations because she was based in Los Angeles, not Washington, DC. She therefore had to be on the lookout for any opportunity to work on any Supreme Court case. Democratic Senators have expressed their appreciation for how difficult it is to establish a Supreme Court practice, and have said that lawyers should not be faulted for seeking out such opportunities. During a February 5, 2003 Judiciary

⁵¹ Rule 1.2(b), Model Rules of Professional Conduct.

⁵² WASH. POST, June 7, 2001.

⁵³ 550 U.S. 173 (1991).

Committee business meeting, Senator Feinstein remarked of Sixth Circuit nominee Jeffrey S. Sutton: "He said something that I have heard all my life from attorneys: well, I was trying to establish a Supreme Court practice and so I picked cases where I might be able to do that. Now, I have heard people say that informally all the time, and so I sort of gave him a mark for candor."

Finally, it is essential to keep in mind the narrow scope of the question presented to the Supreme Court in *Rust*. The case had nothing to do with whether there is a constitutional right to abortion; the amicus brief Judge Kuhl filed on behalf of her client did not even mention *Roe v. Wade*. Moreover, the regulation challenged in *Rust* did not prevent recipients of federal grants from engaging in abortion-related speech. It did no more than prevent them from using federal funds to do so. Grant recipients remained entirely free to discuss abortion with their clients; the regulations simply declined to subsidize that speech with taxpayer dollars.

Equally baffling is the special interest groups' determination to mischaracterize the Reagan Administration's amicus brief in *Meritor Savings Bank v. Vinson*⁵⁴—a case in which the Justice Department took a bold and progressive stance in favor of women's rights in the workplace and against sexual harassment. Prior to 1985, federal law made it clear that sexist behavior was illegal if it caused a woman to lose her job or a promotion. But the Supreme Court had not ruled on whether sexual harassment standing alone violated the anti-discrimination laws. (Indeed, the district court in *Meritor* had dismissed the case because the plaintiff alleged sexual advances that did not involve job-related threats.)

In *Meritor*, Kuhl (as Deputy Solicitor General) and the Justice Department submitted an amicus brief siding with the legal theory of the plaintiff, an African-American woman who had suffered on-the-job sexual harassment when she refused a supervisor's advances. The Department argued that Title VII should not be limited to harassment in which the victim suffers a loss of a job or other economic benefits. Specifically, its position was that Title VII has a broad remedial purpose and seeks to eliminate any discrimination that affects the "terms, conditions, or privileges of employment." Thus "unwelcome sexual advances" by a male co-worker can create a "hostile working environment" for women, and such a showing can create liability under Title VII.⁵⁵ The Justice Department's brief in *Meritor* was in accord with briefs filed by several other amici, including the Women's Bar Association of New York, and a group of state Attorneys General including Joseph Lieberman of Connecticut and Hubert H. Humphrey, III of Minnesota.

In a landmark decision authored by Justice Rehnquist, the Supreme Court accepted the

⁵⁴ 477 U.S. 57 (1986).

⁵⁵ One interest group wrongly proposes that the government's brief adopted the reasoning of the district court. See NWLC REPORT at 4. In reality the cited quotations come from the district court's opinion, and not from the Justice Department's brief. The implication that the government would have required proof of physical force to support a finding of sexual harassment is patently false, and finds no support in the government's brief."

Government's argument and held that pervasive sexual harassment that alters a victim's employment by creating an abusive work environment is actionable under Title VII. At the time, the Court's ruling was "hailed by women's groups as a major victory."⁵⁶ Rosalie Gaull Silberman, a member of the EEOC and Judge Kuhl's client in the case, stated: "This is a tremendous victory for working women. We are particularly pleased that the Court relied so heavily on the commission's guidelines and the government's brief. Today's decision will provide greater protection for women and greater incentives for employers to provide that protection."⁵⁷ Judge Kuhl was on record at the time as stating that "we're very happy" with the decision.⁵⁸

Some interest groups that were pleased with the *Meritor* decision at the time it was handed down now propose that the government's brief did not go far enough. In their view, employers should be liable whenever harassment takes place—even if the employer had no knowledge that it was occurring. The government's position was that employers are not *automatically* liable for the actions of their supervisors, and the facts in each case must be examined in light of traditional agency principles before assigning liability. This, it bears emphasizing, was the position the Supreme Court ultimately adopted. But in the final analysis, Judge Kuhl's participation in *Meritor* represents an effort to ensure that sexual harassment in the workplace was prohibited by Title VII. Former EEOC Commissioner Fred Alvarez puts it best: "Today, we can say that [the government's stand against sexual harassment] was a no-brainer. But it wasn't a no-brainer then."⁵⁹

Judge Kuhl's advocacy in the 1993 Virginia Military Institute case is another example of her efforts to protect the interests of women. In that case, Judge Kuhl, who had left the Justice Department and returned to private practice, was hired by three women's colleges that wanted to preserve the ability of girls and women to attend single-sex schools. The women's colleges feared that courts would hold *all* single-sex educational programs to be unconstitutional, and therefore hired Kuhl's law firm to advocate the benefits of single-sex education for women.

Contrary to one group's assertion that Kuhl's clients "urg[ed] the Supreme Court to uphold the

⁵⁶ Al Kamen, *Court Rules Firms May Be Liable for Sexual Harassment*, WASH. POST, June 20, 1986, at A1. For instance, the National Organization for Women called the decision "on balance a victory for working or employed women." Stuart Taylor, *Sex Harassment on Job Is Illegal*, N.Y. TIMES, June 20, 1986, at A1.

⁵⁷ Richard Carelli, *Court Rules on the Job Sexual Harassment Illegal*, ASSOC. PRESS, June 19, 1986.

⁵⁸ Stuart Taylor, *Sex Harassment on Job Is Illegal*, N.Y. TIMES, June 20, 1986, at A1.

⁵⁹ David Savage, *Thomas Fought Workplace Harassment*, L.A. TIMES, Oct. 10, 1991, at A6 (explaining that Government's substantive position was determined by Solicitor General Charles Fried and Clarence Thomas, then-Chairman of the EEOC). Indeed, Judge Kuhl was the fourth person listed on the amicus brief after then Solicitor General Charles Fried and Assistant Attorneys General Reynolds and Willard.

constitutionality of the exclusion of women from VMI,⁶⁰ the brief focused exclusively on preserving the existence of women's colleges. The women's colleges argued that: "A diverse body of literature suggests that women attending single-sex schools may be even more likely than their peers at coeducational schools to pursue male-dominated careers."⁶¹ The brief at issue did not contain a single reference, either positive or negative, to VMI or any other all-male institution: "This Court should grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education *for women* before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*."⁶²

Judge Kuhl's clients were not alone in their support of single-sex education for women. Representatives of inner-city single-sex academies, as well as other women's colleges—such as Wells College, Randolph-Macon Woman's College, Sweet Briar College, and Hollins College—all filed *amicus* briefs that advocated a position nearly identical to that contained in Judge Kuhl's brief. Susan Estrich, a well-known liberal and Michael Dukakis' presidential campaign manager, went one step further in 1995 and filed a brief in support of VMI's legal position.⁶³ Professor Estrich argued that single sex education benefits both men and women, and that VMI should be allowed to remain exclusively male.

Additionally, Judge Kuhl's brief was limited to the narrow subject of whether the Supreme Court should grant *certiorari* in the VMI case. The three women's colleges favored Supreme Court review because they wanted a clear pronouncement that single-sex women's colleges did not violate the lower court's order. The Court denied VMI's *certiorari* petition, and the merits were not addressed until two years later.⁶⁴ Given the case's procedural posture, and the task Judge Kuhl was hired to perform, there was no need to fully address the merits of the case.

Confirm Carolyn Kuhl Now!

For the past two years, Democrats in the Senate have spoken of the need to bring "balance" to the federal judiciary. Now's their chance to put their money where their mouth is. As Senator Schumer has affirmed, "[s]tandards cannot only apply when they help achieve the desired outcome." The Ninth Circuit—home to the Pledge of Allegiance decision and other notorious jurisprudential outrages—is "way

⁶⁰ NWLC REPORT at 6.

⁶¹ Amicus Brief at 11.

⁶² Amicus Brief at 2.

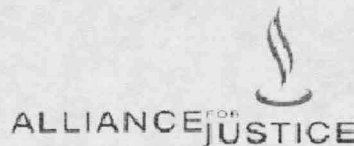
⁶³ Brief for Amici Curiae Kenneth E. Clark at 3, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941).

⁶⁴ As conceded by the NWLC in a footnote, when the Supreme Court took up the merits of the case some two years later, Judge Kuhl did not participate in any of the briefing. See NWLC REPORT at n.2.

out of the mainstream on the left side,”⁶⁵ and it is desperately in need of the balance that a mainstream judge like Carolyn B. Kuhl would bring.

For as a state-court judge in California, Kuhl has established a sterling record of treating all litigants fairly, regardless of their station in life, and regardless of what her own political views may happen to be. Despite having two years to comb through Judge Kuhl’s judicial record, the Washington special interests have been unable to find any disqualifiers, and therefore have been reduced to criticizing the positions her clients took when she was a practicing lawyer. But this cynical tactic only proves that Judge Kuhl is committed to—and does—leave behind her personal views when she takes the bench. We eagerly anticipate the day she joins the Ninth Circuit, and we call on the Senate to confirm her immediately.

⁶⁵ *Congressional Record* S3694 (March 13, 2003) (statement of Sen. Schumer).



**Alliance for Justice Report
In Opposition to the Nomination of Judge Carolyn Kuhl
To the U.S. Court of Appeals for the Ninth Circuit**

Introduction

California Superior Court Judge Carolyn B. Kuhl, nominated by President Bush to a seat on the U.S. Court of Appeals for the Ninth Circuit, has demonstrated hostility toward civil and constitutional claims by women and minorities as deep-seated as that of any of this president's appellate court nominees to date. As a Reagan Justice Department lawyer, Kuhl spearheaded the effort to persuade the administration to reinstate tax-exempt status for schools that discriminate on the basis of race. She also aggressively pushed the Justice Department to argue for a reversal of *Roe v. Wade* in a case in which a woman's fundamental right to choose was not at issue, and sought to limit the scope of sexual harassment suits. As a private attorney and judge, Kuhl continued to take positions, and issue rulings, against legal protections for women.

Kuhl's career has also been marked by repeated efforts to restrict plaintiffs' ability to obtain justice through the courts. At the Justice Department, she fought to limit associational standing and to weaken the Equal Access to Justice Act. As a litigator in private practice, she worked to immunize corporations that defraud the government from claims by whistleblowers and argued that the courts should strictly limit punitive damages for corporate misconduct. And as a judge, she has been reversed repeatedly for rulings that favor corporate defendants and other wrongdoers over injured plaintiffs.

Judge Kuhl lacks the open-mindedness and fairness that are basic prerequisites for any federal judge, especially one who would sit on a court one step below the Supreme Court. Throughout her career as a lawyer, she aggressively promoted positions outside the mainstream on such issues as reproductive freedom and civil rights, going far beyond the zealous advocacy that lawyers owe their clients. Her record contains no evidence that her zeal on behalf of extremist views has abated. The Alliance for Justice strongly urges the Senate to reject her nomination.

Basic Biography

Born in 1952 in St. Louis, Missouri, Carolyn Kuhl received her B.A., *cum laude*, from Princeton in 1974 and her J.D. in 1977 from Duke. Following law school, she clerked for then-Judge Anthony Kennedy of the Ninth Circuit and then spent three years as an associate at the law firm of Munger, Tolles & Olson. From 1981 to 1986, Kuhl worked in the U.S. Department of Justice in the Reagan Administration. She was Special Assistant to Attorney General William French Smith for the first two years, after which she was promoted to Deputy Assistant Attorney General in the Civil Division, and then to Deputy Solicitor General in 1985.

Kuhl returned to Munger, Tolles & Olson, where she became a partner and primarily represented corporate interests including gas and tobacco companies. In 1995, she was appointed by California Governor Pete Wilson to the Los Angeles County Superior Court, where she remains a judge today. Judge Kuhl is a member of the Los Angeles Chapters of both the Association of

Business Trial Lawyers and the Federalist Society¹ and lives in Los Angeles with her husband, fellow Los Angeles County Superior Court Judge William Foster Highberger.

Kuhl's Record

I. Carolyn Kuhl has Exhibited Hostility to the Civil Rights of Racial and Ethnic Minorities

A. Bob Jones University

As a lawyer in the Reagan Justice Department, Kuhl aggressively pushed the Attorney General to reverse the Internal Revenue Service's policy and reinstate the tax-exempt status of Bob Jones University² and other schools that discriminated on the basis of race.³ For eleven years, the I.R.S. had denied Bob Jones and other racially discriminatory schools⁴ tax-exempt status, a position the Reagan administration initially defended in a brief it filed before the Supreme Court in late 1981. However, after internal arguments by Kuhl and others, as well as pressure from members of Congress, including Trent Lott, the administration reversed its position and announced its withdrawal of support for the I.R.S. This prompted confusion within the Justice Department about who would argue the government's position before the Supreme Court.⁵ The Court appointed William Coleman as special counsel to represent the I.R.S.'s position since the Solicitor General would no longer do it.

The Reagan Administration decided to reverse its position "despite arguments by some Justice and Treasury Department lawyers that the step might be illegal and might be seen as a political sop to racists."⁶ More than two hundred staffers in the Justice Department's Civil Rights Division signed a letter expressing their concerns. Indeed, even Ted Olson, who is now the Bush Administration's Solicitor General and was then head of the Office of Legal Counsel, opposed the change of position. The decision also provoked a public outcry that the administration was condoning civil rights violations, with numerous senators and congressmen on both sides of the aisle speaking out against it. Senator Daniel Patrick Moynihan (D-NY) said that the decision was "surely immoral and, in my mind, illegal as well. . . . The great civil rights advances of our times began with the banning of racial discrimination in the schools. . . . A great retreat could well now have begun by the lifting of that ban." Senator Charles McC. Mathias (R-MD) called the decision "outrageous," and Rep. Jack Kemp (R-NY) said: "If it takes tax policy to change discrimination or to protect civil rights for all, then it should be used."⁷

Kuhl argued that the I.R.S. was acting beyond its authority in denying tax exempt status to Bob Jones University. The Supreme Court soundly rejected this argument by an 8-1 vote. As *New*

¹ Judge Kuhl has been an active participant in both organizations, giving three presentations at the Association of Business Trial Lawyers and three others before the Los Angeles and Indiana University School of Law chapters of the Federalist Society.

² Stuart Taylor, "200 in Agency Criticize Decision on Tax Exemptions," *New York Times*, February 3, 1982.

³ The I.R.S. had refused to grant tax exempt status for Bob Jones University and Goldsboro Christian Schools in North Carolina, both of which defended their racially discriminatory practices on religious grounds. Kevin Costelloe, "Supreme Court Asked to Decide Tax Exemption Issue," *Associated Press*, February 26, 1982.

⁴ Bob Jones University, which then prohibited inter-racial dating as contrary to God's intent, now allows it, but only with written parental consent. "Race Dating Plan Needs Parents' OK," *Associated Press*, Greenville, S.C., March 7, 2000. Goldsboro categorically refused to enroll black students. Kevin Costelloe, *supra* note 3.

⁵ Indeed, Lawrence Wallace, a deputy to Solicitor General Rex Lee, who signed the brief, wrote in a footnote that he "fully subscribes" only to the views expressed about the policy's constitutionality." Kevin Costelloe, *supra* note 3.

⁶ Stuart Taylor, *supra* note 2.

⁷ "Democrats Plan to Roll Back Discrimination Stand," *Associated Press*, January 9, 1982.

York Times columnist Anthony Lewis commented at the time, the Supreme Court decision was a serious rebuke to the Justice Department:

It is a long time since an Administration has suffered such a defeat in the Supreme Court. The 8-to-1 decision that racist private schools are ineligible for tax exemptions was worse than an embarrassment for President Reagan and his lawyers. It was a humiliation. The opinion of the Court was by Chief Justice Warren Burger, Mr. Reagan's exemplar of a conservative jurist. It was joined by the one Reagan appointee on the Court, Justice Sandra O'Connor. And the opinion demolished the legal arguments made by the Reagan lawyers. How could any President be given such incompetent legal advice?⁸

Some of Kuhl's current supporters, including Catholic University Dean Douglas Kmiec, who also worked at the Justice Department, defend her position in the *Bob Jones* case as purely a legal one.⁹ If that is the case, however, the strong dissent within the Justice Department and the ultimate 8-1 rejection of the government's position by the Supreme Court raise serious questions about Kuhl's legal judgment.

Moreover, in defending her position in the case, Kuhl and her supporters have been somewhat less than candid. She has cited a 1984 letter by Harvard Law School Professor Laurence Tribe as supportive of her position. In fact, as Professor Tribe explained in a recent letter to Senators Boxer and Leahy, his 1984 letter agreed with only one minor proposition that was tangential to the substance of Kuhl's argument: that Congress's silence on a given issue should not be interpreted as its agreement. On the merits, Tribe emphasized, he strongly disagreed, both then and now, with Kuhl's position, one he described as "quite extreme" and "legally dubious."¹⁰

Professor Tribe's letter also commented on Kuhl's recent responses to written questions from Senator Boxer concerning the *Bob Jones* case, in which Kuhl stated that she now believes that the government's decision to change its position was a bad one, "in part because it appeared insensitive to minorities," and also because the IRS "had a defensible legal position," which she now believes the Justice Department had an obligation to defend. Tribe noted that Kuhl's statements "fall surprisingly short of a straightforward endorsement of the legal correctness of the IRS policy that the Supreme Court upheld."¹¹

B. Affirmative Action

In 1986, Kuhl wrote an article highlighting her personal support for a key part of the Reagan administration's political agenda: opposition to affirmative action.¹² In the article, Kuhl criticized

⁸ Anthony Lewis, "Abroad at Home, the Court Says No," *New York Times*, May 26, 1983.

⁹ David Houston, "Judge's Past May Prove Prologue: 'Bob Jones' Case Preceded Career As Noted Jurist, Law Firm Partner," *L.A. Daily Journal*, May 24, 2001.

¹⁰ January 16, 2003 Letter from Professor Laurence Tribe to Senator Barbara Boxer.

¹¹ *Id.* In two other cases she litigated as a government attorney, Kuhl also took anti-civil rights positions, both of which were ultimately adopted by a sharply divided Supreme Court. In these cases, Kuhl successfully limited the ability of attorneys to obtain compensation for their work on behalf of civil rights plaintiffs, *North Carolina Department of Transportation v. Crest Street Community Council*, 479 U.S. 6 (1986); and exempted airlines from compliance with Section 504 of the 1973 Rehabilitation Act, which prohibits federal funds recipients from discriminating on the basis of disability, *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

¹² Carolyn B. Kuhl, "Affirmative Action Today: A Legal and Practical Analysis," *Bureau of National Affairs Special Report*, pp.157-9, 1996.

Supreme Court decisions upholding programs intended to remedy past discrimination and establish a more level playing field, arguing that only narrow programs intended to assist individual victims of specific incidents of discrimination were defensible.¹³ In discussing Supreme Court doctrine holding that discrimination on the basis of race is illegal but that remedial racial preferences are permissible in some employment and other contexts, Kuhl concluded that “[t]hese two principles cannot be reconciled; they can only be compromised.” She wrote:

Discrimination is not victimless. Real people are denied jobs, refused promotions, fired, or constructively discharged.... A direct remedial approach would emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination. Instead of insisting on such an approach to individual justice, however, courts and litigants have placed primary remedial emphasis on affirmative action, a divisive societal manipulation.

In considering the constitutionality of affirmative action programs, Kuhl emphasized the harm to non-minorities who are denied jobs, implicitly dismissing the far more pervasive and intractable harm to generations of racial minorities. Kuhl’s evident hostility toward affirmative action programs and her opposition to Supreme Court precedent upholding them raise serious concerns about her ability to fairly adjudicate the constitutionality of such programs.¹⁴

II. Throughout her Legal Career, Carolyn Kuhl has Worked to Undermine or Eviscerate Rights and Protections for Women

Kuhl was a true believer in the war waged by the Reagan administration on women’s rights, advocating during her tenure as a government attorney to overturn *Roe v. Wade*, limit teens’ access to contraceptives, and restrict legal protections against sexual harassment in the workplace. She then brought this ideology into her career as a private attorney, where she continued to work to limit abortion rights and defended all-male public institutions. Finally, as a judge, Kuhl has ruled against women’s attempts to protect their privacy and safety.

A. Reproductive Rights

In *Thornburgh v. American College of Obstetricians and Gynecologists*,¹⁵ Kuhl co-authored an *amicus* brief for the government in which she criticized two lower courts for striking down state laws regulating abortion.¹⁶ The brief charged the courts with putting too much emphasis on a

¹³ One of the cases Kuhl criticized was *Local 28, Sheet Metal Workers International v. EEOC*, 478 U.S. 421 (1986), in which, as Deputy Solicitor General, she had co-authored a brief for the EEOC that was rejected by the Supreme Court 5-4. Kuhl argued in the brief that a district court had no authority to order a union with a history of race discrimination to enroll as members a set number of minorities, who were not themselves the actual victims.

¹⁴ In a later article Kuhl wrote about the employment-at-will doctrine, she suggested that civil rights statutes were partly to blame for what she perceived as the erosion of that doctrine and again noted the “disadvantage” at which white men had been placed in the employment context: “Federal labor statutes and federal anti-discrimination laws passed in the 60s and 70s left a minority of the populace – white, male and non-union – with no legal protections in their employment status. State law, and in particular state courts, have moved to fill the ‘gap’ by creating protections for this politically powerful ‘minority’ group.” Carolyn Kuhl, “Employment at the Will of the Court,” *Law, Economics & Civil Justice* (Free Congress Foundation) (1994).

¹⁵ 476 U.S. 747 (1986).

¹⁶ Among the state statutes struck down were Pennsylvania laws mandating that:

- a second physician attend *all* abortions performed after the fetus is viable;

woman's right to have an abortion and giving too little credit to "legislative attempts to balance [other] interests," such as protecting "unborn and future life."¹⁷ It cited for support of its position Chief Justice Burger's "understanding" that "[t]he Court's holdings in *Roe v. Wade*... and *Doe v. Bolton*... simply require that a State not create an absolute barrier to a woman's decision to have an abortion,"¹⁸ a position that, if adopted, would allow for virtually unchecked restrictions on abortion.

Most disturbing, however, is the brief's wholesale attack on *Roe* itself and its request that the Supreme Court allow states to ban all abortions: "The textual history and doctrinal basis of [*Roe*] is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided."¹⁹ Former Solicitor General Charles Fried states in his memoirs that it was Kuhl who urged the government to advance this argument, calling her memo "the most aggressive" he received urging the government to argue for the reversal of *Roe*.²⁰

The Supreme Court rejected Kuhl's arguments, stating that several laws – among them the informed consent provision, the mandate of a particular standard of care for viable fetuses, and the requirement that a second physician be in attendance – unconstitutionally infringed on a woman's right to privacy as expressed in *Roe*.²¹

The Court took particular issue with one law's reporting requirements, which granted public access to the doctor's name as well as information about the pregnant woman, including her age, residence, marital status, and the number of prior abortions she had had. The Court recognized that, although the law did not explicitly call for publicly naming women who had abortions, "[i]dentification is the obvious purpose of these extreme reporting requirements."²²

The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest. . . . A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely.²³

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- the method most likely to produce a live birth be used in *all* post-viability abortions unless it would cause "significantly greater" risk to the mother;
 - pamphlets be published stating that the state "strongly urges you to contact [these public and private agencies] before making a final decision about abortion" to be handed out to all women seeking abortions;
 - the woman's age, residence, marital status, and number of prior abortions be made available to the public;
 - *only* the doctor (not any assistants) may provide information proving "voluntary consent", the information must include "the relative risks, both physical and psychological, of abortion and childbirth," and the information must inform the woman of assistance available if she chooses to give birth; and

an Illinois law that, prior to a partial repeal, described a fetus as "a human being from fertilization until birth."

¹⁷ Brief for the United States as Amicus Curiae, *Thornburgh v. American College*, July 15, 1985.

¹⁸ *Id.*, quoting *Maher v. Roe*, 432 U.S. 464, 481 (Burger, C.J., concurring).

¹⁹ *Id.*

²⁰ Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* 33 (1991).

²¹ 476 U.S. 747 (1986).

²² *Id.* at 767.

²³ *Id.*

Earlier, as Deputy Assistant Attorney General, Kuhl had also argued unsuccessfully before the D.C. Circuit in support of a Reagan administration interpretation of Title X that would have required federally-funded family planning providers to notify parents within ten days that they had prescribed contraceptives to the parents' minor children and would have used the parents' income to assess whether or not minors qualified for free or subsidized services.²⁴ Kuhl argued that the new regulations were consistent with Title X's language and intent, and that they did not violate the Fifth Amendment's Due Process Clause.²⁵ In reviewing the history of Title X, however, the court found an inherent conflict between the government's position and the intent of the legislators who authored and revised the statute:

In light of the breadth of the statutory language and clear congressional intent that *all* persons receive such services, Title X grantees have served the teenage population from the inception of the program. Following enactment of Title X, however, Congress frequently expressed its increasing concern about the still unmet family planning needs of sexually active teenagers in this country.... Ultimately, Congress in 1978 amended the statute itself to require that Title X projects offer "a broad range of acceptable and effective family planning methods and services (including...services for adolescents)." While this amendment simply codified accepted past practice, the added language clearly reflected Congress' intent to place "a special emphasis on preventing unwanted pregnancies among sexually active adolescents."²⁶

The court affirmed the district court's decision to strike down the regulations, noting that they were "fundamentally inconsistent with Congress' intent and purpose in enacting Title X and are therefore beyond the limits of the Secretary's delegated authority."²⁷ Representative Henry Waxman (D-CA), who lauded the decision, accused the government of "deliberately misread[ing] the statute to carry on its long war on family planning." He noted that while "health and medical groups warned that this was bad policy," he was "pleased that the court of appeals has recognized that the administration's action is also illegal."²⁸

Kuhl's assault on women's reproductive rights did not end when she left the Reagan administration; she continued her efforts to restrict abortion rights in private practice. In 1990, she wrote an *amicus* brief for the Supreme Court²⁹ in the case of *Rust v. Sullivan*³⁰ on behalf of the American Academy of Medical Ethics, an organization that represents more than 20,000 doctors who oppose abortion and "adhere[] to the Hippocratic Oath in opposing abortion except to save the

²⁴ *Planned Parenthood v. Heckler*, Sec'y of Health and Human Services, 712 F.2d 650 (D.C. Cir. 1983).

²⁵ During oral arguments, Kuhl stated that "[I]t's entirely legitimate for parents to be involved in family planning decisions of an adolescent child." Judge Edwards interrupted to state that her assertion was "a moral question, an ethical question, not a statutory is sue." Robert Pear, "Administration Presses Court on Teen-Age Contraceptive Rule," *New York Times*, May 10, 1983.

²⁶ 712 F.2d. at 652 (emphases in the original, citations omitted).

²⁷ *Id.* at 651.

²⁸ Robert Pear, *supra* note 24.

²⁹ In her written responses to questions from Senator Boxer about her extensive involvement in anti-choice cases, Judge Kuhl said that she was merely "attempting to develop an appellate practice specialization as part of my work at my private law firm," and that the potential to work on a First Amendment issue before the Supreme Court was particularly interesting. Carolyn Kuhl's responses to Senator Boxer's questions, June 1, 2001.

³⁰ 500 U.S. 173 (1991).

life of the mother.”³¹ Kuhl argued that regulations barring doctors who received federal funding from discussing abortion with their patients did not violate the First Amendment’s protection of freedom of speech. She also asserted that the regulations do not impermissibly express an “anti-abortion ideology,”³² in spite of a provision advising a doctor who is asked by his patient for an abortion referral to respond that, “the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.”³³

The Supreme Court sided with Kuhl 5-4, holding that the regulations were a legitimate construction of Title X that did not violate the First or Fifth Amendments. In a dissent joined in different parts by Justices Marshall, Stevens, and O’Connor, Justice Blackmun accused the majority of allowing the curtailment of free speech only because the topic was abortion:

[T]he Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy.³⁴

B. Sexual Harassment

While serving as Deputy Solicitor General, Kuhl also actively participated in the Reagan Administration’s efforts to limit the scope of sexual harassment suits. She co-authored the government’s *amicus* brief in support of defendant Meritor Savings Bank in a Title VII sex discrimination case – a pivotal case in the development of the law of sexual harassment.³⁵ Plaintiff Mechelle Vinson testified that, under pressure from her supervisor to have sex with him, and fearing that she would lose her job if she refused, she began a sexual relationship with him. The district court dismissed her claim, reasoning that, because the relationship was unrelated to respondent’s ability to obtain promotions, it was “voluntary.”³⁶ The D.C. Circuit reversed, holding that, even if not “forced,” unwelcome sexual advances constitute a hostile working environment in violation of Title VII.³⁷

On appeal to the Supreme Court, Kuhl took the district court’s position that, because the alleged relationship was “voluntary,” the bank was not liable under Title VII, and that, in the alternative, it could not automatically be held liable for a supervisor’s actions in a case involving a hostile environment claim. Kuhl also argued that the Court could consider Vinson’s actions—such as suggestive clothing and speech—as evidence of voluntariness on her part, stating that “the district court’s findings show appropriate sensitivity to the need to ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other.”³⁸

³¹ Brief of Amicus Curiae American Academy of Medical Ethics, *Rust v. Sullivan*, September 7, 1990.

³² *Id.*

³³ 42 C.F.R. § 59.8(b)(5). Kuhl asserted that the provision was not biased, noting that this specific wording is not required “but is merely an illustration of a permissible response.”

³⁴ 500 U.S. at 204.

³⁵ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

³⁶ *Vinson v. Taylor*, 23 FEP Cases 37 (D.C. 1980).

³⁷ *Vinson v. Meritor Savings Bank*, 243 U.S. App. D.C. 323 (1985).

³⁸ Brief for Amicus Curiae United States and Equal Employment Opportunity Commission, *Meritor Savings Bank v. Vinson*, December 11, 1985.

The Supreme Court disagreed with Kuhl, affirming the D.C. Circuit in a unanimous opinion written by now-Chief Justice Rehnquist, and remanded the case for further fact-finding. The Court noted that, under EEOC guidelines, unwelcome sexual harassment causing non-economic injury can create a hostile work environment in violation of Title VII, regardless of whether a *quid pro quo* is involved.³⁹ The Court did agree with Kuhl that an employer is not automatically responsible for a supervisor's actions in the hostile environment context, but may escape liability only if it has taken steps to prevent sexual harassment in the workplace and is unaware of its occurrence. In light of the bank's poor sexual harassment policy, which required a victim of harassment to begin the reporting process with her supervisor, the Court did not find the bank to be immune from liability in this case.

Four Justices—Justices Stevens, Marshall, Brennan and Blackmun—concurred in the decision for Vinson, but asserted that an employer should be *strictly* liable for sexual harassment by a supervisor, since the supervisor is an “agent” of the employer for Title VII purposes. They criticized the stance taken in Kuhl's brief:

The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor “is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim.”... In the latter situation, he concludes, some further notice requirement should therefore be necessary. The Solicitor General's position is untenable...it is precisely because the supervisor is clothed with the employer's authority that he is able to impose unwelcome sexual advances on subordinates.⁴⁰

C. All-Male Schools

While in private practice, Kuhl wrote an *amicus* brief for several private women's colleges in support of Virginia Military Institute's (VMI) fight to remain all-male.⁴¹ The Fourth Circuit had ruled that, unless Virginia could find another way to comply with the Equal Protection Clause, VMI—as a public institution—would have to relinquish its all-male status.⁴² In an apparent attempt to persuade schools that would not otherwise have supported VMI's position to do so, Kuhl asserted that the decision could apply to private women's colleges as well: “Although *amici* all are private women's colleges, the uncertain constitutional status of single-sex education threatens these institutions.”⁴³ Several of the colleges that were solicited declined to sign on to the brief. Some suspected the brief's authors (Kuhl and fellow attorney Andrea Gauthier) of trying to manipulate them into signing on despite the lack of a real threat to their own interests:

Some say the colleges have been duped, persuaded unjustifiably by VMI of a threat to private single-sex institutions. ...Jadwiga Sebrechts, Executive Director for the Women's College Coalition in Washington, said that..., “VMI lawyers came here and

³⁹ 477 U.S. at 64 (1986).

⁴⁰ *Id.* at 76-77.

⁴¹ Brief of Mary Baldwin College, Saint Mary's College, and Southern Virginia College for Women as Amici Curiae in Support of Petitioners, *VMI v. United States*, March 24, 1993.

⁴² *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1993).

⁴³ *VMI Amicus* brief, *supra* note 41, at 16-17.

tried to argue quite vehemently that women's colleges should join this petition to the Supreme Court. [But] not one of [the attorneys we asked] shared the perspective advanced by VMI attorneys that the current opinion of the Fourth Circuit... put women's colleges in jeopardy."⁴⁴

D. Women's Privacy and Safety

Since taking the bench, Judge Kuhl has issued a number of rulings that weakened legal protections for women. In one infamous decision that was reversed by the appellate court, Judge Kuhl dismissed a claim by a breast cancer patient who sued after her doctor allowed a drug salesman to observe her breast exam.⁴⁵ According to the appellate court, Azucena Sanchez-Scott claimed that when she went to see her oncologist, Dr. Polonsky, for a scheduled appointment, he "entered the room with an unidentified man, who appeared to be a professional."⁴⁶ The unidentified man, who she later learned was Robert Martinez, was "introduced [only] as 'a person . . . who was looking at Dr. Polonsky's work.'"⁴⁷

When Ms. Sanchez-Scott grew hot and flushed and tried to fan herself with a pocket fan she had brought, "Dr. Polonsky took the fan from plaintiff and gave it to Mr. Martinez" to fan her. She "became extremely uncomfortable because Dr. Polonsky and Mr. Martinez both started to laugh" but they would not return the fan to her. Dr. Polonsky then told Ms. Sanchez-Scott to remove her blouse and bra for a breast examination, which he performed in Mr. Martinez' presence. After the exam, when Ms. Sanchez-Scott asked the receptionist who the other man was and learned that he was a "drug salesman," she began to "cry from shame and anger."⁴⁸

Ms. Sanchez-Scott sued for invasion of privacy. Kuhl dismissed the suit, holding that, even if her allegations were true, the facts did not amount to an illegal invasion of privacy. She held that plaintiff bore the burden of asking who the man was and found unpersuasive counsel's statement that:

You have a lady who's just finished her chemotherapy. She was there for the first... three-month exam. And literally she's frightened to death. She's waiting to see did the lump come back. So she's not in a position to really say anything. She is in the room, and in comes the doctor with another gentleman and says "This is someone observing my work." She's thinking. "My God. What's he going to tell me? Is it life or death?" She's not into "Who is this person who's wearing a tie and looks like a doctor?"⁴⁹

Kuhl rejected the attorney's argument, stating, "The patient has control over the room to exclude strangers.... Now, who's in the best position to determine offensiveness to her? She is."⁵⁰

⁴⁴ Madelyn Rosenberg and Leslie Taylor, "VMI Case Makes Odd Bedfellows; Women's Colleges Allies," *Roanoke Times & World News*, April 11, 1993.

⁴⁵ *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal.App.4th 365 (2001).

⁴⁶ *Id.* at 412.

⁴⁷ *Id.* at 413.

⁴⁸ *Id.*

⁴⁹ *Sanchez Scott v. Alza Pharmaceuticals*, Los Angeles County Superior Court, Reporter's Transcript, October 12, 1999, at p.5.

⁵⁰ *Id.* at 6.

The appeals court reversed and remanded, reasoning that, if the facts were as plaintiff alleged, she had been subjected to a clear and illegal invasion of her privacy. It compared this case to one decided many years ago in which a doctor invited his "friend" to take part in the delivery of a baby without informing the patient or her husband of the friend's identity, and agreed with the earlier court: "It would be shocking to our sense of right, justice, and propriety to doubt even but that for such an act the law would afford an ample remedy."⁵¹

In another case, Kuhl, sitting by designation on the appeals court, was accused by the dissent of misrepresenting precedent in order to relieve an insurance company of liability in a claim brought by a rape victim.⁵² California courts had consistently interpreted the state's uninsured motorist provision expansively to cover injuries resulting from the use of a motor vehicle, even when the vehicle's use was not the proximate cause.⁵³ Julie R. was raped by her date after he pulled his car over against a guardrail to lock her in and pushed her seat back to prevent her from kicking through the window. Kuhl nonetheless ruled that Julie R. could not recover under her insurance policy. Portraying the car in this case as simply the means of transportation to the site of the crime, Kuhl compared this case to one in which the court refused coverage when a truck was used to transport cardboard boxes that were later used to commit arson.⁵⁴ She stated that the "use of the interior of the vehicle as a confining circumstance during the rape does not rise to the level of a substantial factor in the injury."⁵⁵

In a strongly worded dissent, Judge Epstein accused Kuhl of intentionally misapplying prior caselaw in order to deny relief to the plaintiff. "The majority cite authority to the effect that the mere circumstance that a vehicle is used to transport someone to the site where an injury occurs... is not enough for coverage, and I agree. But that is hardly our case."⁵⁶ Epstein asserted that the question was: "[I]n employing the car as a cage to imprison the woman, was the attacker using it in such a way that the victim's injuries arose out of the 'use of a motor vehicle'?" To ask that question is to answer it. The answer is 'yes.'"⁵⁷

III. Carolyn Kuhl has Sought Repeatedly to Restrict Plaintiffs' Access to Justice Through the Courts

Throughout her legal career, Carolyn Kuhl has worked to make it more difficult for plaintiffs to obtain justice through the courts. She has attempted to restrict the ability of associations to represent their members in court, to invalidate private actions for fraud against the government, to limit the claims that courts may hear, and to impede plaintiffs' counsel from effectively representing their clients. She has also sought repeatedly to limit the scope and availability of punitive damages for corporate wrongdoing. In all of these ways her actions have undermined the core principle of our legal system: equal justice for all.

⁵¹ 86 Cal.App.4th at 375, referring to *De May v. Roberts* (1881), 46 Mich. 160.

⁵² *American National Property and Casualty Co. v. Julie R.*, 76 Cal. App. 4th 134 (1999).

⁵³ Coverage was granted, for example, in cases in which a person was: bitten by a dog trying to exit the car, *Hartford Accident & Indemn. Co. v. Civil Service Employees Ins. Co.* (1973) 33 Cal. App. 3d 26; and injured by a gun that discharged when the driver drove onto an unpaved road, *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal. 3d 94.

⁵⁴ *Truck Ins. Exch. v. Webb* (1967) 256 Cal. App. 2d 140.

⁵⁵ 76 Cal. App. 4th at 142.

⁵⁶ *Id.* at 147-8.

⁵⁷ *Id.* at 145.

A. Standing

In order to bring a lawsuit, a plaintiff must have “standing,” an interest in the matter that will be affected by the suit. Plaintiffs who cannot establish that they have “standing” will lose their suit even before a court will consider the merits. Indeed, conservative judges have increasingly invoked lack of standing to deny litigants their day in court, to the benefit of corporations and other powerful institutional defendants.

Our courts have long recognized that associations – *e.g.*, public interest organizations, unions, business associations – have standing to represent the interests of their members in court.⁵⁸ Nevertheless, in one brief she co-authored as Deputy Solicitor General, Kuhl “launched” what then-Solicitor General Charles Fried described as “a frontal assault” on the doctrine of associational standing.⁵⁹ Kuhl argued that a labor union had no “associational standing” to challenge the Department of Labor’s interpretation of a regulation that prevented the union’s members from obtaining certain benefits.⁶⁰ A split D.C. Circuit panel had reversed a ruling in favor of the United Auto Workers (UAW) and sided with the government, holding that the UAW had no associational standing to bring the suit.⁶¹ The union then appealed to the Supreme Court.

Kuhl argued, first, that the UAW could not bring suit, because its individual union members lacked standing. She then went further, arguing that “[e]ven if individual union members could have brought this suit, the Union did not have representative [i.e. associational] standing to sue on their behalf.” Finally, Kuhl asked the Court to review and limit its position on associational standing, stating: “This case provides the Court an opportunity to reconsider the doctrine of representative standing and to harmonize that doctrine with general principles of standing” and class action requirements.⁶²

Kuhl’s attempt to undermine the doctrine of associational standing was so extreme that it was opposed by numerous *amici* from both the left and the right. The Alliance for Justice organized a joint *amicus* brief in support of the UAW on behalf of eight organizations, including not only the AFL-CIO, the NAACP, and the Sierra Club, but also the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Medical Association, and the Chemical Manufacturers’ Association.⁶³

The Supreme Court rejected Kuhl’s arguments, holding 5-4 that the UAW did have associational standing: plaintiffs had a “live interest in challenging” the Labor Department’s view of the law, and the union’s interest in representing plaintiffs was legitimate.⁶⁴ Regarding the argument that the court should limit associational standing, the Court wrote that the government’s brief:

fails to recognize the special features, advantageous to both the individuals represented and to the judicial system as a whole, that distinguish suits by

⁵⁸ See *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977) (“An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”).

⁵⁹ Charles Fried, *supra* note 20 at pp. 16-17 and n.5.

⁶⁰ *United Automobile Workers v. Brock*, 477 U.S. 274 (1986).

⁶¹ *United Automobile Workers v. Donovan*, 746 F.2d 839 (D.C. Cir. 1984).

⁶² Brief for the Respondent, *United Automobile Workers v. Brock*, February 10, 1986.

⁶³ Brief of *Amici Curiae* Chamber of Commerce of the United States, *et al.*, in support of Petitioners.

⁶⁴ 477 U.S. at 284.

associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. . . . These resources can assist both courts and plaintiffs. . . . [the Secretary's] presentation has fallen far short of meeting the heavy burden of persuading us to abandoned settled principles of associational standing.⁶⁵

B. Qui Tam Actions

In private practice, Kuhl has argued repeatedly on behalf of corporate clients that the *qui tam* provision of the federal False Claims Act – which allows private individuals to sue on the government's behalf for alleged acts of fraud committed against it – is unconstitutional. In one case, a group of former General Dynamics employees sued under the Act, seeking to recover for misrepresentations they claimed General Dynamics had made to the U.S. Navy regarding missile defense systems. The company responded with counterclaims – including breach of duty of loyalty and of fair dealing. The district court dismissed the counterclaims as contrary to the Act's intent, because they discouraged plaintiffs from coming forward to report fraud.⁶⁶ General Dynamics appealed to the Ninth Circuit, asserting that the False Claims Act was unconstitutional and that it had a right to file counterclaims.

In her *amicus* brief on behalf of the Electronic Industries Association (EIA), Kuhl argued that the *qui tam* provision was unconstitutional, because it did not require plaintiffs to prove the injury-in-fact that is necessary to show standing and violated the Appointments Clause and the separation of powers doctrine. She said that it “allow[s] private citizens, lured by the promise of financial reward, to bring civil enforcement actions for the government,”⁶⁷ deflecting attention from the provision's real purpose of encouraging and protecting whistleblowers. A three-judge panel of the Ninth Circuit unanimously rejected Kuhl's arguments and affirmed the lower court.⁶⁸

Kuhl filed similar *amicus* briefs before the Ninth Circuit on behalf of EIA, Rockwell International Corp., and Textron Inc.,⁶⁹ and on behalf of Litton Industries in a related case,⁷⁰ arguing in both that the *qui tam* provision was unconstitutional. And, in a 1996 case Kuhl lists in her questionnaire as one of the ten most significant she litigated, she represented Northrop Corporation in a *qui tam* suit brought by a former employee and argued against the retroactivity of a provision of the Act.⁷¹

⁶⁵ *Id.* at 289-290. That same year, Kuhl successfully argued in the Ninth Circuit that a congressman and two private citizens had no standing to compel the Attorney General to comply with the Ethics in Government Act, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986). All three plaintiffs – a member of the House Armed Services Committee, a U.S. citizen and Nicaraguan resident kidnapped and raped by U.S.-supported paramilitaries, and a Floridian who lived near a training base for paramilitary forces – alleged violations of the Neutrality Act, which prohibits the mounting of military expeditions against nations with whom the United States is at peace. 18 U.S.C. § 960 (1982). Three district courts had held that the Ethics in Government Act imposed mandatory duties on the Attorney General that he had failed to fulfill and had issued injunctions ordering him to investigate the plaintiffs' allegations. The Ninth Circuit reversed, holding that, although the Act imposed duties on the Attorney General, it did not grant private citizens a right of action.

⁶⁶ *United States ex rel. Madden v. General Dynamics Corp.*, 1992 U.S. Dist. LEXIS 21417 (C. Dist. Cal.).

⁶⁷ Brief of Amici Curiae Electronic Industries Association, Rockwell International Corporation and Textron Incorporated, *United States ex rel. Madden v. General Dynamics*, October 22, 1992, at p.1.

⁶⁸ *United States ex re. Madden v. General Dynamics*, 4 F.3d 827, 9th Cir. (1993).

⁶⁹ Brief of Amici Curiae, *United States ex rel. Kelly v. The Boeing Company*, December 23, 1992.

⁷⁰ *United States ex rel. Rohan v. Litton Industries, Inc.*, No.92-55546 (9th Cir.).

⁷¹ *Hyatt v. Northrop Corporation*, 80 F.3d 1425 (9th Cir. 1996).

C. Restricting Access to the Courts

On a number of occasions Kuhl has expressed her opposition to efforts to expand opportunities for injured persons to vindicate their rights in court. While in the Department of Justice, Kuhl testified before Congress in opposition to a proposal to allow judicial review of veterans' claims. She asserted that such a change would not be in the best interests of veterans, since the existing policy, which allowed for only administrative review, gave them full rights and allowed them all the remedies they needed.⁷² She also testified in opposition to a bill that would have expanded the authority of U.S. courts to use international law in rendering decisions, citing a situation in which foreign aliens could sue for human rights violations of international, but not U.S. law.⁷³

While in private practice, Kuhl wrote an article published by the Free Congress Foundation, in which she lamented the recent erosion of the common law doctrine of employment-at-will. She asserted that the result has been a flood of litigation forcing the employer to prove his "fair" treatment of his employees, even though "[w]hat is fair to an employee may or may not be economically rational": "The practical effect of this jurisprudence and of the destruction of the doctrine of employment at will is to inhibit employer action"⁷⁴ Thus, Kuhl would presumably seek to undo such judicially-created exceptions to employment-at-will, which protect employees from egregious employer misconduct.

At least one of Kuhl's rulings as a California Superior Court judge likewise suggests an unwillingness to implement a newly created remedy against corporate wrongdoing. *Liu v. Moore*⁷⁵ involved the application of California's "SLAPP-back" statute. Strategic Lawsuits Against Public Participation (SLAPP suits) are generally brought by businesses in order to intimidate individuals who speak out about pollution, fraud, and other corporate wrongdoing. In order to "encourage continued participation in matters of public importance," California passed a law providing that:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.⁷⁶

The law also required SLAPP suit plaintiffs to pay defendants' attorneys' fees if the motion to strike was granted. In *Liu v. Moore*, however, Judge Kuhl held that Deborah Moore could not recover from Liu the attorneys' fees allowed under the law. Moore, a former employee in the office where Hong Liu worked, had reported Liu for practicing medicine without a license. Liu filed a suit against Moore, apparently in retaliation for blowing the whistle on him. Liu's suit gave every appearance of being a SLAPP suit, and Moore moved to strike. Kuhl, however, allowed Liu to voluntarily dismiss his claim against Moore without ruling on the motion to strike and then held that, absent a ruling on that motion, Moore could not recover for her costs as a defendant.⁷⁷

⁷² Statement of Carolyn B. Kuhl Concerning Judicial Review of Veterans' Claims, July 21, 1983.

⁷³ Testimony on a Bill to Eliminate the Bar of the Act of State Doctrine in Certain Cases, Sep. 14, 1981.

⁷⁴ Carolyn Kuhl, *supra* note 14.

⁷⁵ 69 Cal. App. 4th 745 (1999).

⁷⁶ California Code of Civil Procedure section 425.16 (a) and (b)(1).

⁷⁷ She did this over counsel's objection that, "The fact of the matter is that [Liu] took action only at the last possible

In its unanimous decision reversing Kuhl, the State Court of Appeals called her ruling “a nullification of an important part of California’s anti-SLAPP legislation,”⁷⁸ remanded to determine whether attorney’s fees were due, and awarded costs of appeal to Moore. Moore’s attorney, Allen Kleiman, wrote a letter to Senators Boxer and Feinstein on July 6, 2001, urging them to oppose Kuhl’s nomination and asserting that, after developing an animus toward the False Claims Act as a government lawyer, Kuhl “carried [it] with her to the bench where it extended to outright hostility to the First Amendment rights of whistleblowers.” Kleiman added that he is “fearful that she would use her life appointment to the nation’s largest appellate court to undermine this law at every turn.”⁷⁹

D. Inhibiting Plaintiffs’ Counsel

Kuhl has taken a number of actions to make it more difficult for plaintiffs’ attorneys to most effectively represent their clients’ interests. While in the Reagan Administration, she testified before Congress in favor of weakening the Equal Access to Justice Act. She asserted that the multipliers used by some courts to determine attorneys’ fees under the act were excessive. She suggested that Congress amend the act to require a court to “deny all fees if it finds the initial amount sought to be unreasonably high.”⁸⁰

Similarly, one decision Kuhl rendered as a judge would have made it significantly more difficult for plaintiffs’ attorneys to gather evidence against corporate wrongdoing, had it not been reversed by the court of appeals. Lawrence Truitt, an Atchison, Topeka & Santa Fe Railroad Company (AT&SF) employee, was injured on the job by Slowe, a fellow employee. After communicating extensively with AT&SF, including serving it with notice of the suit, Truitt’s attorney, Feldman, took Slowe’s deposition. AT&SF moved to quash the deposition as an *ex parte* communication barred by the California Rules of Professional Conduct, but Feldman argued that he should be allowed to use it at trial, since only actual knowledge that Slowe was represented by counsel would have violated the rules, and he understood that neither AT&SF’s in-house counsel nor any other lawyer had been assigned to the case at that time: “Every corporation the size of Santa Fe Railway has in-house counsel. And the rule isn’t just because you have an in-house counsel someplace that you are entitled to prevent a plaintiff from taking statements of people.”⁸¹ Kuhl insisted, however, despite the lack of any evidence, that Feldman *did* know that Slowe was represented by counsel when he deposed him, and she quashed the deposition, depriving plaintiff of the use of a critical piece of trial evidence.

The court of appeals unanimously reversed and vacated the decision, finding no proof that any illegal communication took place, or even that AT&SF had counsel at all, and criticized Kuhl’s ruling as dangerous:

A bright line rule is absolutely necessary in this case.... Lawyers should not be at risk of disciplinary action for violating rule 2-100 because they “should have known”

moment to avoid a collision with the law, and that is not behavior which I believe ought to be rewarded by the court.”
⁷⁸ 69 Cal. App. 4th at 748.

⁷⁹ He also wrote that, in another case in which he was representing “a child who had received profoundly disabling injuries at a local hospital,” Kuhl had denied him a needed continuance, despite his documentation of the reasons for his request, and despite the support of defense counsel for the motion.

⁸⁰ Statement Concerning the Reauthorization of the Equal Access to Justice Act, March 14, 1984, at p.3.

⁸¹ *Truitt v. AT&SF Co.*, Los Angeles County Superior Court, Reporter’s Transcript, July 10, 1997 at p.9.

that an opposing party was represented or would be represented at some time in the future.... We find it interesting that AT&SF provided no information concerning the representation "trail" in this matter....[it] did not even establish that it was actually represented by a lawyer at the time of the communication, much less that Truitt's lawyer had knowledge of any such actual representation.⁸²

E. Punitive Damages

Kuhl has long sought to reduce or eliminate punitive damages against corporate wrongdoers. She has litigated against punitive damage awards in a number of cases. Kuhl represented Shell Oil Company in a 1993 fraud case, arguing that the trial court's award of punitive damages was excessive and that California's process for awarding punitive damages was unconstitutional.⁸³ The court of appeals rejected both arguments, summarily affirming the award without publishing an opinion.

That same year, Kuhl represented the Washington Legal Foundation, a conservative, property-rights organization, in a separate suit, argued to the Supreme Court in an *amicus* brief that a different punitive damages award violated the Fourteenth Amendment's Due Process Clause.⁸⁴ Alliance Resources Corp. had sued TXO Corp., alleging that TXO's unsupported claim to a deed for Alliance's valuable oil property constituted slander of title. Based on TXO's lack of any basis for its claim, the land's potentially high worth, and the fact that TXO had committed similar acts in the past, the jury awarded \$10 million in punitive damages against TXO. On appeal to the Supreme Court, Kuhl argued that courts must limit punitive damages and that, "[i]n this case the punitive damages award... left 'too much to be decided' by the jury and reviewing court, and thus was more a product of whim than of objective and clear rules."⁸⁵ She asserted, specifically, that allowing the jury to consider the wealth of TXO's parent corporations without finding them responsible violated due process.

The Supreme Court rejected Kuhl's argument, holding that, while "reasonableness" should be considered vis-à-vis punitive damages, there is no test for it. It found the award reasonable in light of the facts⁸⁶ and held that the jury instructions had not violated procedural due process.

Kuhl later wrote an article criticizing the decision, stating that the Supreme Court had "regressed in its attempt to articulate the basis on which the due process clause of the United States Constitution regulated the award of punitive damages." She cited with approval the Court's earlier statement in *Pacific Mutual Life v. Haslip*, 111 S.Ct. 1032 (1991), that plaintiffs should not "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."⁸⁷ Kuhl also co-authored an article on the need for legislatures to address the issue of punitive damages, writing that, "most punitive damage awards are motivated by passion and prejudice."⁸⁸ In the article, she

⁸² *Truitt v. Superior Court of Los Angeles County*, 59 Cal. App. 4th 1183, 1188-1190 (1997).

⁸³ *Nelson v. Shell Oil Comp.*, No. B067801, Cal. Ct. App. 2nd (1993).

⁸⁴ *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

⁸⁵ Brief of Amicus Curiae Washington Legal Foundation, *TXO Production v. Alliance Resources Corp.*, 1992 U.S. Brief 479, January 22, 1993, citing a law review article by Justice Scalia, "The Rule of Law As a Law of Rules," 56 *U.Chi.L.Rev.* 1175, 1176 (1989).

⁸⁶ "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." 509 U.S. at 462.

⁸⁷ U.S. Supreme Court Roundup, *Daily Journal*, August 6, 1993.

⁸⁸ Alan Bloom, Lyle Swallow, Carolyn Kuhl, Rex Julian Beaber, "The Future of Civil Punishment: Punitive Damages

urged the adoption of legislation severely limiting punitive damages, using as an example the tort reform bill that Republicans proposed as part of the Contract with America. She also argued, however, for even more restrictive measures and for excluding evidence of defendant's financial condition. The legislation she proposed would have been a boon for corporate wrongdoers by limiting punitive damages to the lesser of three times economic loss or \$250,000; assigning to the judge, rather than the jury, the role of setting damages; and eliminating damages altogether for some types of injuries.⁸⁹

On the bench, Judge Kuhl has continued her efforts to limit punitive damages, even in cases of egregious corporate wrongdoing. In one case, she slashed a \$4.5 million punitive damages award against Century Quality Management.⁹⁰ The company had fired its auditor after the auditor asserted his intent to investigate tax irregularities within the company. In spite of clear evidence that defendant employer committed perjury at trial, showed no remorse for its multiple acts of tax evasion, had fired an employee in violation of public policy, and had a net worth of over \$60 million, Kuhl held that, "defendants did not have 'fair notice' of the potential for a \$4.5 million award of punitive damages"⁹¹ and reduced the award to \$245,000, an amount she said comported with defendant's due process rights.

IV. In Private Practice, Carolyn Kuhl Worked to Protect Oil and Tobacco Companies from Financial Responsibility for their Actions

During her years in private practice, Kuhl represented a number of oil and tobacco companies and attempted to shield them from financial responsibility for the environmental and health consequences of their actions. Kuhl represented Shell Oil in its efforts to avoid paying clean-up costs in a case in which it and several other oil companies had collectively arranged for the disposal of toxic acid sludge, resulting in the contamination of the property.⁹² The district court ruled in favor of property owner Western Properties Services Corp., finding that it was an "innocent" non-polluter under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and holding Shell and other companies liable for the pollution.

Tobacco companies were also among Kuhl's private practice clients. In one case, Kuhl was part of a team of attorneys defending Philip Morris against claims brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota, which alleged that tobacco companies were responsible for smoking-related diseases and sought compensation for costs they had accrued as a result. The case was ultimately settled by the tobacco industry for \$6.6 million after Kuhl's appointment to the Los Angeles Superior Court.

In another case, Kuhl represented tobacco distributor Kennedy Wholesale in its attempt to avoid paying a tax required under California's Tobacco Tax and Health Protection Act of 1988, which had been enacted by voter referendum. Kennedy had paid the tax under protest and then sued, challenging the Act's constitutionality under Article XIII A, § 3 of the state Constitution,

from Spilled Coffee to Bone Marrow Transplants," 16 *Whittier L. Rev.* 971 (1995).

⁸⁹ Kuhl gave a presentation on "Punitive Damages Reform Efforts" at a 1995 Whittier Law School Health Law Symposium, and she also moderated a March 23, 2003 panel discussion, "Do Punitive Damages Deter Harmful Conduct," which was sponsored by the Los Angeles Chapter of the Federalist Society.

⁹⁰ *Songco v. Century Quality Management*, L.A. Superior Ct. No. BC 118303 (1997).

⁹¹ *Id.* at 23.

⁹² *Western Properties Service Corp. v. Shell Oil Comp.*, 2001 U.S. Dist. LEXIS 5046 (C.D. Cal.)

which provides that all taxes enacted by the legislature must be passed by a two-thirds vote. Kuhl also argued that, by allocating some tax revenues to health care, the Act violated California's "Single-subject Rule" for referenda. The California Supreme Court rejected both arguments, holding that the public had reserved the right to pass such laws and that the different provisions were sufficiently germane to a single subject to render the statute viable.⁹³

Conclusion

Carolyn Kuhl has compiled a record as a lawyer and as a state trial court judge evincing hostility toward the rights of women and minorities, a restrictive view of standing and the role of the courts in dispensing justice, and opposition to punishing corporate wrongdoing. She has advocated positions on critical issues that are far out of the mainstream, and she has issued decisions leaving injured individuals with no remedy. As a lawyer in the Reagan administration, she successfully pushed on her own initiative for the government to take extreme positions beyond those advocated by other lawyers. Many of her published writings and legal arguments suggest a hard-line conservatism that is inconsistent with the open-mindedness and independence that should be absolute prerequisites for a federal judge.

As further evidence, Kuhl wrote a 1997 Op-Ed for the *New York Times* praising the Reagan administration for selecting judicial nominees who shared its ideology. In criticizing President Clinton for being too open (and, presumably, non-ideological) in his process of selecting judges, Kuhl lauded her former boss's very different method: "President Ronald Reagan knew what he was looking for and how to find what he wanted. He had a clear view of how he wanted Supreme Court jurisprudence to change and had an intelligent, discreet and trusted adviser—William French Smith, his first Attorney General—who knew how to organize a selection process."⁹⁴

Although Kuhl and her supporters argue that, as a government and private practice attorney, she was merely engaging in zealous representation of her clients, her record indicates otherwise. As noted above, Kuhl's boss and mentor, then-Solicitor General Charles Fried, gives Kuhl "credit" for persuading the government to argue that the Supreme Court should reverse *Roe* in a case in which the fundamental right to choose was not at issue. Fried similarly credited Kuhl with aggressively pushing the government to argue that the Court should change the rules to limit associational standing, which is a critical means for groups of injured plaintiffs to obtain relief. And many commentators have ascribed the Reagan administration's about-face on tax-exempt status for Bob Jones University to intense lobbying efforts by Kuhl and two colleagues. Moreover, as noted throughout this report, many of her rulings as a judge mirror the extreme positions she advocated as an attorney.

All of these factors have provoked a wide range of national organizations to join the Alliance for Justice in opposing Kuhl.⁹⁵ Justice for All, an umbrella group of over twenty California and national organizations, also wrote to the Senate Judiciary Committee to express

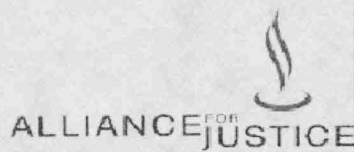
⁹³ *Kennedy Wholesale, Inc. v. State Board of Equalization*, 53 Cal. 3d 245 (1991).

⁹⁴ Carolyn B. Kuhl, "Clinton Dithered. Reagan Didn't," *New York Times*, June 16, 1993.

⁹⁵ These groups include women's rights groups such as NARAL Pro-Choice America, the National Abortion Federation, the National Council of Jewish Women, and the Center for Reproductive Law and Policy; major environmental groups, including the Natural Resources Defense Council and the Sierra Club; and the Leadership Conference on Civil Rights.

serious concerns about her record.⁹⁶ The Alliance for Justice urges the Senate to reject Judge Kuhl's nomination to a lifetime seat on the Ninth Circuit.

⁹⁶ Letter from Justice for All Project to Senators Boxer, Feinstein, and Leahy, July 23, 2001.



**Correcting the Record:
The Alliance for Justice Post-Hearing Report on the Nomination of
Judge Carolyn B. Kuhl to the U.S. Court of Appeals for the Ninth Circuit**

California Superior Court Judge Carolyn B. Kuhl, nominated by President Bush to a seat on the U.S. Court of Appeals for the Ninth Circuit, has a very troubling record: as a government attorney in the Reagan Administration, as an attorney in private practice, and as a state court judge. She has repeatedly demonstrated deep-seated hostility to the rights of women and minorities and has worked to restrict the ability of injured persons to obtain justice through the courts.

Judge Kuhl's testimony at her April 2 Judiciary Committee hearing did nothing to dispel concerns about her troubling record. Rather, Kuhl's evasive and misleading responses to senators' questions served only to reinforce their concerns that, if confirmed to the Ninth Circuit, she would bring her hostility toward the rights of women and minorities and her conservative, anti-plaintiff bias to the bench. Judge Kuhl's answers in a number of areas were less than full and truthful. Although she led the campaign on many of the radical legal positions taken by the Reagan administration, Judge Kuhl claimed that her role in shaping those views was minor. When senators asked Kuhl whether positions she had taken opposing a woman's right to choose, affirmative action, and punitive damages for corporate wrongdoers in both government and private practice represented her personal views, she refused to answer.

Kuhl and her supporters argue that her actions as a government and private attorney should not be factors in senators' decisions to vote to confirm her to the federal appellate bench. But they – along with her record as a state court judge – must be. Kuhl's choices as an attorney – to position herself as one of the most zealous advocates in an administration that tried to dismantle critical protections for women, minorities, and others, and to then devote years to protecting large, corporate clients and promoting right-wing causes – are *very* relevant to senators' decisions as to her fitness for a lifetime seat on a court one step below the Supreme Court. Moreover, her unwillingness to answer questions about her earlier views suggest that she still harbors them, and several of her decisions as a judge strongly indicate that she has brought those biases to the bench.

It is not just relevant, but critical, that senators understand the radical and extreme positions Kuhl has taken as both an advocate and a judge. If confirmed for life to a federal appellate court, her ability and opportunities to shape law and policy according to her personal views would increase dramatically. Since well over 99% appellate court decisions are never reviewed by the Supreme Court, Kuhl's views could become the law for all the citizens of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

MANY OF KUHl'S ANSWERS AT HER HEARING WERE FALSE, MISLEADING, OR EVASIVE.

Kuhl's Testimony About her Involvement in the *Bob Jones* Case Was Misleading.

Kuhl's assertion that she did not play a leading role is belied by the facts.

- When asked at her hearing about her apparent role as a leader in successfully persuading the Reagan administration to reinstate tax-exempt status for Bob Jones University, Kuhl stated that she now regrets having "supported" the government's change of position, and that she welcomed the chance to correct the widespread perception that she had led the campaign. But the facts show her to be a leading advocate, not a supporter. In September 1981, the Reagan administration filed a brief in support of the I.R.S.'s policy denying tax-exempt status to schools that discriminated on the basis of race.¹ In January 1982, only a few months into her job, Kuhl presented her boss, Assistant Attorney General William Bradford Reynolds, with a memo she and colleague Charles Cooper had written, apparently on their own initiative,² in which they argued that the I.R.S. lacked the authority to deny tax-exempt status to racially discriminatory schools and urged the government to change its position.³
- Kuhl asserted her memo was not an important factor in the government's decision to change its position, noting that the Under Secretary of the Treasury had also argued for the reversal. In fact, however, Reynolds cited Kuhl's memo in and attached it to one he wrote that same day to Attorney General William French Smith, in which he argued that the administration's support for the I.R.S. was wrong and should be revoked.⁴ Three days later, the government announced that it would no longer support the I.R.S.'s position in *Bob Jones*.⁵ *New York Times* columnist Anthony Lewis described Kuhl, Cooper, and Bruce Fein as a small "band of zealots"⁶ that persuaded the government to withdraw its support for the I.R.S. Reporter Stuart Taylor identified Kuhl as a member of the small but influential "Bob Jones Team."⁷

Kuhl's assertion that she took the position on a purely legal basis is belied by the facts.

- Kuhl asserted at her hearing that her position on *Bob Jones* was based purely on her legal analysis and was not the result of any political or other influence. Yet the record contains a hand-written note from Kuhl to then-Special Assistant to the Attorney General Ken Starr, sent two weeks before Kuhl submitted her memo to Reynolds, noting that both Reagan-Bush

¹ Brief for the United States, *Goldsboro Christian Schools and Bob Jones University v. United States*, September 9, 1981.

² "A band of young zealots in the department pressed for the legal switch... Among them were... Carolyn Kuhl... and Charles Cooper." Anthony Lewis, "Abroad at Home, the Court Says No," *New York Times*, May 26, 1983.

³ Memorandum for Wm. Bradford Reynolds from Charles J. Cooper and Carolyn B. Kuhl, January 5, 1982. (The date appearing on the memo is 1981, but this appears to be a typographical error.)

⁴ Memorandum to Attorney General from Reynolds re: *Bob Jones University v. United States*, January 5, 1982.

⁵ Memorandum from Treasury Deputy Secretary McNamar to Commissioner Egger ordering granting of exemptions to Bob Jones and Goldsboro Christian Schools, January 8, 1982.

⁶ Anthony Lewis, *supra* note 2.

⁷ "One indication of the trend [toward a much more conservative Justice Department] is what an official who left for private law practice a few months ago calls 'the meteoric rise of the Bob Jones team.'" Stuart Taylor, "Justice Department; Meese's Likely Choices: Young and Conservative," *New York Times*, June 17, 1995.

campaign materials and the Republican party platform advocated for the eradication of the I.R.S. "vendetta" against independent schools.⁸

- Kuhl also testified that, if there *was* a policy motive behind her advocacy on this issue, it was her fear that, under the I.R.S. policy, all-girls' schools might also be deemed discriminatory and denied tax-exempt status. However, as far as we can tell, Kuhl never raised this argument before her hearing. There is no record of it in her memo to Reynolds or her note to Starr, in Fried's account of conversations he had with Kuhl on the topic, or in Kuhl's responses to questions from Senator Boxer.

Kuhl and her supporters' use of Professor Tribe's letter is deceptive.

- Both Kuhl and Reagan administration Solicitor General Charles Fried have asserted that a 1984 letter by Harvard Law Professor Laurence Tribe supports Kuhl's position in *Bob Jones*. Kuhl attached the letter in her responses to written questions from Senator Boxer,⁹ and Fried cited it in a recent Op-Ed he wrote criticizing those who oppose Kuhl.¹⁰ However, Tribe has directly refuted the assertion in a recent letter he wrote to Senators Boxer and Leahy, in which he stated that his 1984 letter dealt only with a narrow, tangential issue and did not support the substance of Kuhl's *Bob Jones* position.¹¹ In fact, as Kuhl and Fried both know, Tribe actually co-authored an *amicus* brief supporting the I.R.S. at the same time that Kuhl was urging the administration to withdraw its support.

Kuhl's assertion that she misunderstood the Justice Department's role is not credible.

- Kuhl tried, at her hearing, to portray herself as an inexperienced young lawyer who did not understand that her proper role was to defend, and not undermine, the I.R.S.'s position: "I had only been in Washington for a few months when this came up and I was a young staff assistant." As Senator Leahy pointed out, however, Kuhl's assertion that she "had never worked for the government before, so it wasn't apparent to me," was simply not believable; any law student knows that the Justice Department's job is to defend reasonable agency positions.

Kuhl's assertion that she now believes that her former position was "wrong" is misleading.

- When asked at her hearing why senators should find credible her assertion that she now believes her 1982 *Bob Jones* position was wrong, Kuhl asserted that she had changed her mind long ago, while she was at the Justice Department. But, in fact, Kuhl has never repudiated that legal position. In response to written questions from Senator Boxer, Kuhl stated only that she now regrets having taken the position because it "appeared insensitive to minorities," and because she now understands that the government had a responsibility to

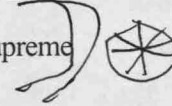
⁸ Note from "Carolyn" to "Ken" on stationery of the Special Assistant to the Attorney General, December 8, 1981, page from 1980 Republican Platform and Reagan/Bush Position Papers attached. The same position taken by then-Congressman Trent Lott in letters and memos to the administration urging it to revoke its support for the I.R.S.

⁹ Carolyn Kuhl's responses to Senator Barbara Boxer's questions, June 1, 2001.

¹⁰ Charles Fried, "Time-Traveling to Thwart a Judge; Her Mistake is Ancient History," *Los Angeles Times*, January 17, 2003.

¹¹ "It is true that I wrote a letter agreeing with the legal analysis of the Justice Department's brief on the narrow question of whether congressional inaction in the face of the IRS decision to deny tax exempt status could properly be treated as adoption by Congress of the IRS policy... But to make much of that issue in this context would be extremely misleading." Letter from Laurence Tribe to Senator Barbara Boxer, January 16, 2003.

support the I.R.S.'s "defensible" legal stance. Apparently recognizing the weakness of that statement and Senator Leahy's negative response to it, Kuhl went further at her hearing, stating that the government should have put protection and enforcement of civil rights first. But as Professor Tribe noted, her statements of regret "fall surprisingly short of a straightforward endorsement of the legal correctness of the IRS policy that the Supreme Court upheld."¹²



Kuhl's Defense of Her Opposition to Affirmative Action Was Vague and Evasive.

- At her hearing, Kuhl failed to respond to Senator Durbin's question as to whether she still believed what she wrote in a 1986 article criticizing the Supreme Court's jurisprudence on affirmative action.¹³ She stated that the Supreme Court's decision in *Adarand* had clarified that the use of race as a factor could be legal, depending on the facts, but she did not explain whether she still believes that such programs are "divisive societal manipulations."
- Kuhl also failed to answer a question about how her anti-affirmative action views played out in a specific case. As Deputy Solicitor General, Kuhl had argued on the EEOC's behalf that Title VII barred a court from ordering a union – which had systemically discriminated against blacks and Hispanics and resisted several court orders to end the practice – to admit a certain number of minorities as members.¹⁴ The Supreme Court rejected Kuhl's argument that courts may not order relief for individuals who were not themselves the specific victims of a discriminatory policy. Rather than answer Senator Kennedy's question about her involvement in the case and whether it might reflect her personal views, Kuhl again noted the need for strong remedies for individual victims and asserted that living in a multicultural city and working in harmony with multicultural juries show her support for "diversity."
- When asked what evidence she could give senators to assuage their concerns that, as a judge, she would approach cases involving affirmative action programs with a bias, Kuhl cited the case of *Iwekaogwu v. City of Los Angeles*¹⁵ as proof of her sensitivity toward and support for the rights of minorities. But this case proved neither. Sitting as an appellate judge, Kuhl had written a unanimous opinion affirming a jury verdict in favor of an African-American plaintiff in a case in which there was irrefutable evidence of both discrimination and retaliation. Upholding a jury's grant of a remedy for one victim does not explain away Kuhl's long record of hostility toward race-conscious civil rights remedies.

Judge Kuhl Was Evasive About Her Views on a Woman's Right to Have an Abortion.

- When asked why, as a government attorney working on *Thornburgh v. American College of Obstetricians and Gynecologists*, she had written what Charles Fried described as "the most aggressive memo" urging the government to ask the Supreme Court to reverse *Roe v. Wade*, Kuhl claimed that she was simply advocating for the administration, which publicly opposed *Roe*. Kuhl stated that, given the frustration the Justices expressed when, in *City of Akron v. Akron Center for Reproductive Health*, the administration struggled to explain how its defense of anti-abortion legislation could be squared with *Roe*, she felt that it would be more

¹² Laurence Tribe, *supra* note 11.

¹³ "Bureau of National Affairs Special Report: Affirmative Action Today: A Legal and Practical Analysis," Carolyn B. Kuhl, pp.157-9, 1986

¹⁴ *Local 28 of the Sheet Metal Workers' International Ass'n. v. EEOC*, 478 U.S. 421 (1986).

¹⁵ 75 Cal. App. 4th 803 (1999).

intellectually honest to argue for *Roe*'s outright reversal, and she thus urged the government to take that route. In other words, Kuhl took the Court's skepticism in *Akron* as an invitation to advocate an even more radical position, rather than as a warning to respect its ruling in *Roe*.

- When Senator Feinstein asked Kuhl why she later chose to represent the American Academy of Medical Ethics (AAME), a group of doctors categorically opposed to abortion on religious grounds, Kuhl stated that it helped her to "build an appellate practice." She asserted that arguing in support of a rule that barred doctors at federally funded clinics from discussing abortion with their patients offered her the opportunity to file a brief on an important First Amendment issue before the Supreme Court. Kuhl's choice to "build" her career through an *amicus* brief on behalf of a radical, anti-abortion group, suggests that, at the very least, Kuhl's desire to advance professionally trumped her concern for a woman's fundamental right to choose.

Judge Kuhl Misrepresented her Position Regarding Sexual Harassment in *Meritor*.

- When asked about her role in arguing in support of defendant employer as an *amicus* in *Meritor Savings Bank, FSB v. Vinson*, a key sexual harassment case, Kuhl claimed that the Justice Department was "very happy" with the Supreme Court's opinion, which sided with the employee. She even went so far as to assert that its decision closely tracked her brief, which was misleading, if not outright false. While the Court's opinion drew on the government's brief in describing the history of Title VII sexual harassment doctrine and explaining the facts of the case, the Court radically departed from Kuhl's brief on the substantive issue, on which it disagreed with her completely.
- ~~The fundamental question in the case was whether or not plaintiff had proven a viable claim~~ of harassment. Kuhl argued in her brief in support of the district court's finding that, "any sexual relationship between Vinson and [her supervisor] Taylor 'was a voluntary one' and that Vinson 'was not a victim of sexual harassment.'" But the Supreme Court rejected that finding, stating that it "was likely based on one or both of two erroneous views of the law" – either that "a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment," or that a "voluntary" relationship precludes a Title VII claim. The Court held that, "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit." Kuhl's assertion that the difference was "a technical issue" is not at all credible.
- Kuhl had argued, in the alternative that, because the bank had enacted a policy to prevent sexual harassment and did not know of the supervisor's actions, it could not be held liable under Title VII. All nine Justices disagreed. Five found the bank's program inadequate to immunize it from liability in this case, while four concurred separately to assert that employers are liable for their supervisors' actions, whether or not they have such a policy.

Judge Kuhl Lied About Her Role in the *UAW v. Brock* Associational Standing Case.

- When asked by Senator Feinstein about her role in the government's aggressive attempt in *UAW v. Brock* to block the ability of organizations to represent their members in court, Kuhl asserted that the government's position "was set before I came to the" Solicitor General's

office, and that she was not even on the brief. Neither is true. In the government's brief opposing the petition for a writ of certiorari, filed before Kuhl joined the office, it stated that the doctrine of associational standing was "well settled."¹⁶ Only after Kuhl became involved in the case did the government change its position. In its brief on the merits, on which Kuhl is named as Deputy Solicitor General, the government urged the Supreme Court to reconsider and generally limit associational standing. Charles Fried credited Kuhl with this change, describing her role in *UAW* as launching a "frontal assault" on the general doctrine of associational standing. He said that it was Kuhl who argued "that groups should not have standing to make claim except as they could show themselves to be representatives of classes of individuals in traditional class actions."¹⁷

Judge Kuhl's Description of her Decision in the Sanchez-Scott Case Was Not Truthful.

Kuhl falsely testified that she had not blocked Ms. Sanchez-Scott's invasion of privacy claim against her doctor.

- After her doctor allowed a drug company sales representative into the examining room to watch him perform a breast examination, the patient, Azucena Sanchez-Scott, sued the doctor and the drug company. When Senator Schumer asked Kuhl how she could have dismissed an invasion of privacy claim in a case with such "unconscionable" facts, Kuhl did not respond directly, but instead noted that she had allowed the negligence claim against the doctor for his failure to obtain her informed consent to stand, implying that she had dismissed only the claim against the drug company. Later, when Senator Hatch tried to rehabilitate her record on the case, Kuhl stated outright that, "the claims against the doctor were tort claims for failure to obtain informed consent." In fact, Ms. Sanchez-Scott sued both the doctor and the drug company for invasion of privacy, and Kuhl dismissed those claims against both defendants.¹⁸

The letter that Kuhl cited for support of her position is refuted by the language of the appellate court decision overturning her ruling.

- When questioned further about her ruling on the privacy claim, Kuhl cited a letter of support from Judge Turner, the judge who wrote the appellate decision that reversed her, in which he stated that he found her opinion to be "reasonable." In fact, Judge Turner's decision had harshly criticized that of Judge Kuhl, stating that "[a] breast cancer patient who goes into an oncologist's office to be examined does not, nor should she, take a risk that what goes on in the examination room will be seen or heard by anyone other than medical personnel. She does not take a risk that a drug salesperson will be a part of the process during which her breasts will be examined.... No decisional authority supports a contrary conclusion."

¹⁶ "It is well settled, as the court below recognized... that 'an association may have standing to assert the claims of its members.'" Brief for the Respondent in Opposition to Petition for Writ of Certiorari, August 14, 1985. The government supported the D.C. Circuit's ruling that, under this well-settled law, the UAW lacked standing.

¹⁷ Charles Fried, *Order and Law: Arguing the Reagan Revolution - A Firsthand Account*, pp.16-17 and n.5 (1991). In the cover letter to her responses to post-hearing written questions submitted by a number of Senators, Judge Kuhl now concedes that her name was on the brief in *UAW v. Brock* and that she did "participate in drafting that brief." Letter from Judge Kuhl to Senator Orrin Hatch, April 29, 2003.

¹⁸ In her recent letter to Senator Hatch, Judge Kuhl now belatedly acknowledges that she did, in fact, dismiss invasion of privacy claims against all defendants. *Id.*

- While it is understandable that Judge Turner, who was appointed and twice elevated by a Republican governor, might want to help his fellow jurist, his letter contrasts sharply with the views he expressed in the *Sanchez-Scott* decision. In his recent letter of support, Judge Turner wrote that the case involved “some issues of first impression under California law. . . which even as of this date have not been clearly defined,” and he quoted the California Supreme Court’s description of the invasion of privacy claim as involving “‘degrees and nuances to societal recognition of our expectations of privacy’ and ‘relative’ concepts,” implying that the law and precedent on this issue were vague. His letter, however, omits a key portion of the state Supreme Court opinion, the language on which he had earlier relied to reverse Kuhl’s ruling: “Privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: *the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.*”¹⁹ In other words, the very language that Judge Turner now misleadingly cites to support Kuhl provided the precedential basis for his decision to overturn her ruling and reinstate Ms. Sanchez-Scott’s privacy claims.
- The unanimous appellate ruling authored by Judge Turner declared that it would be “shocking to our sense of justice” if Ms. Sanchez-Scott had no remedy for invasion of privacy. That ringing declaration further belies his present claim that Kuhl’s decision rejecting that remedy was a reasonable one.

KUHL’S RECORDS AS ATTORNEY AND JUDGE ARE INTERCONNECTED AND RELEVANT.

Kuhl’s Politicization of her Career Renders it Relevant to Her Nomination to the 9th Circuit.

Kuhl praised President Reagan for using judicial selection to change the law.

- In 1997, Kuhl wrote a *New York Times* Op-Ed, in which she praised President Reagan for his “clear view of how he wanted Supreme Court jurisprudence to change,” and for selecting judges accordingly. When questioned about this column, Kuhl asserted that she meant only that Reagan had sought out judges who would interpret, and not make the law. A more plausible interpretation of the column is that Kuhl views the bench as simply another forum in which to carry out her ideological agenda.

Kuhl was actively involved in the Reagan Administration’s politicization of the Solicitor General’s office.

- The Reagan Administration blatantly politicized the Solicitor General’s office and undermined its traditional role as a trusted legal adviser to the Supreme Court. “[The Justices] rely on the Solicitor General more than anyone else to help choose and present the most pressing matters for review. . . [they] regard him as a counselor to the Court. But in every case in which he participates, the Justices expect him to take a long view.”²⁰ Under Reagan, for the first time, that was no longer the Solicitor General’s role:

¹⁹ *Sanders v. American Broadcasting Companies, Inc.*, 20 Cal. 4th 907, 915-916 (1999) (emphasis added).

²⁰ Lincoln Caplan, *The Tenth Justice*, pp.6-7 (1987).

Reagan/Meese first tried to emasculate the office during the tenure of Rex Lee, a kind, smart, and conservative man whom Reagan named to the office in August 1981. Lee toughed it out for four years, trying always to do what was right instead of just what was Right. Finally, he called it quits. "I'm the solicitor general, not the pamphleteer general," Lee [said] in explaining his resignation. He just couldn't take any more pressure 'to press the administration's policies at every turn.²¹

Indeed, Reagan hired Charles Fried to replace Lee because of his willingness to take on a new and radical mission for the Solicitor General's office – *i.e.*, to push the Supreme Court to adopt the administration's extreme, right-wing legal ideology, rather than to make the best and most reasonable case possible for government policies in the public interest.²² Kuhl assisted Fried in this effort, becoming a trusted advisor and one of his most zealous advocates for the Reagan agenda.

Kuhl's Assertion that Her Two Records are Separable is Belied by the Facts.

- When asked why she denied attorneys' fees authorized by California law for the victim of a SLAPP suit, Judge Kuhl stated only that the decision, which was reversed unanimously by the appeals court, involved an issue of first impression.²³ But Kuhl's anti-whistleblower ruling follows naturally from her record in private practice, where she repeatedly sought to have the *qui tam* provisions of the False Claims Act, which protects whistleblowers, declared unconstitutional.²⁴
- Similarly, although Kuhl claims that positions she had taken as a private attorney did not influence her decisions as a judge, her decision to reduce a punitive damages award against a corporate wrongdoer suggests that her strong bias against punitive damages may have been brought with her to the bench. As a lawyer in private practice, Kuhl argued repeatedly for limits on punitive damages.²⁵ On the bench, Kuhl dramatically reduced a punitive damages judgment against a company that had committed both tax fraud and perjury during trial. Kuhl ruled that defendants had not received "fair notice" justifying a \$4.5 million award, and she slashed it to only \$245,000.²⁶

²¹ Michael Gartner, "The President's Man at the Supreme Court," *Washington Post*, October 25, 1987.

²² Charles Fried, *supra* note 17, pp. 29-31.

²³ The court of appeals called her decision "a nullification of an important part of California's anti-SLAPP legislation." *Liu v. Moore*, 69 Cal. App. 4th 745, 748 (1999).

²⁴ As a lawyer in private practice, Kuhl argued on behalf of several different corporate clients that the *qui tam* provision of the federal False Claims Act, which encourages individuals who report corporate fraud against the government to come forward with such claims, was unconstitutional on several grounds. See *United States ex rel. Madden v. General Dynamics Corp.*, 1992 U.S. Dist. LEXIS 21417 (C. Dist. Cal.), *United States ex rel. Kelly v. The Boeing Company*, December 23, 1992, and *United States ex rel. Rohan v. Litton Industries, Inc.*, No.92-55546 (9th Cir.). Every court to which Kuhl made this argument rejected it.

²⁵ Kuhl represented the Washington Legal Foundation in an *amicus* brief on behalf of an egregious corporate wrongdoer, arguing that courts must limit punitive damages, and that the damages that the jury awarded in this case were "more a product of whim than of objective and clear rules." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). Kuhl wrote two articles criticizing federal and California law on punitive damages, one criticizing the Supreme Court's decision in the TXO case, U.S. Supreme Court Roundup, Daily Journal, August 6, 1993, and the other arguing generally for stricter limits on punitive damages and a severely restricted role for the jury in setting them, Carolyn Kuhl et al., "The Future of Civil Punishment: Punitive Damages from Spilled Coffee to Bone Marrow Transplants," 16 *Whittier L. Rev.* 971 (1995).

²⁶ *Songco v. Century Quality Management*, L.A. Superior Ct. No. BC 118303 (1997).

Conclusion

Senator Hatch, Charles Fried, and other supporters of Judge Kuhl argue that her role in *Bob Jones*, *Thornburgh*, *Meritor*, *UAW* and other controversial cases during her work in the Reagan administration should not be considered by senators deciding whether to confirm her to the Ninth Circuit. They assert that Kuhl was just doing the job that was required of her as a lawyer for a client. That is not at all the case. Kuhl distinguished herself as among the most political lawyers in the most radical and extreme Solicitor General's office in the history of the office, which renders her actions there not only relevant, but critical to any review of her record.



Judge Kuhl's troubling record in every stage of her professional life, as a government attorney, as a private attorney, and on the bench, is significantly compounded by her refusal to discuss her personal views on positions she has taken in those capacities. Her extreme lack of candor in responding to the questions and concerns of Senate Judiciary Committee members only reinforces the suspicion that positions she took in prior jobs represent her personal views and renders her unfit for a lifetime appointment to the Court of Appeals. Judge Kuhl's false, misleading, and evasive responses to questions at her confirmation hearing compound the concerns raised by her record. The Alliance for Justice continues to strongly oppose her nomination to the Ninth Circuit.

~~CONFIDENTIAL~~

April 12, 1999

Via Facsimile (818) 986-3162

Steven W. Murray
16055 Ventura Boulevard
Suite 900
Encino, CA 91436

Re: *Susie Sanchez-Scott*

Dear Mr. Murray:

We are in receipt of your letters of March 23, 1999 to ALZA Pharmaceuticals ("ALZA") and of March 9, 1999 to Robert Martinez regarding Susie Sanchez-Scott. This will confirm that Robert Martinez is an employee of ALZA Pharmaceuticals and is represented by legal counsel. As such, we request that any further communications to Mr. Martinez and/or any other ALZA employees be conducted through our Legal Department, directed to my attention.

As you know, Robert Martinez has no legal obligation to discuss any matters with your private investigator. In fact, when Mr. Martinez was initially contacted by your investigator, Helen Duncan, she did not identify herself as working on Susie Sanchez-Scott's behalf. As indicated above, Mr. Martinez will not discuss this matter with your investigator or you unless legal counsel is present and he is served with a properly issued subpoena to testify before a court of law.

We appreciate your client's interest in knowing why our employee was in Dr. Polonsky's office on the date in question. In an effort to be cooperative and resolve any misunderstandings without the need for formal legal action, we are willing to provide the following information to you: Mr. Martinez was at Dr. Polonsky's office on the date in question because he was participating in an oncology mentorship program. A mentorship program is a well-established and accepted method of providing training to therapeutic sales specialists. This program involves the ALZA specialist spending the day with an oncologist to better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office. At no time does the ALZA specialist medically treat patients. It is at the physician's discretion as to what the specialist is allowed to attend. Additionally, it is common practice for the physician to explain this program to any patient at the beginning of an office visit and to

Determined to be an
Administrative Marking
Per E.O. 13526, SEC 3.4(B)

ALZA CORPORATION

950 PAGE MILL ROAD P.O. BOX 10950
PALO ALTO CA 94303-0802

PHONE 650.494.5000
<http://www.alza.com>

EX-11



Steven W. Murray

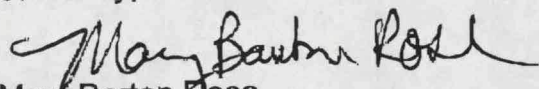
April 12, 1999

Page 2

determine if the patient has any objection to the specialist observing the visit. Mr. Martinez recalls that Dr. Polonsky likewise explained this to Ms. Sanchez-Scott.

We hope this information satisfies your client's inquiries about Mr. Martinez presence at Dr. Polonsky's office. As indicated above, should you have any further questions of ALZA or any of its employees, please contact me directly.

Sincerely,


Mary Barton Rose
Corporate Counsel

05/13/2003

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I have read the foregoing COMPLAINT FOR DAMAGES

and know its contents.

☒ CHECK APPLICABLE PARAGRAPH☒ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.☐ I am ☐ an Officer ☐ a partner ☐ a _____ of _____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on August 2, 1999, at Los Angeles, California.

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

AZUCENA SANCHEZ-SCOTT

Type or Print Name



Signature

PROOF OF SERVICE

1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of _____, State of California.

I am over the age of 18 and not a party to the within action; my business address is: _____

On _____, 19____, I served the foregoing document described as _____

on _____

in this action

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
☐ by placing ☐ the original ☐ a true copy thereof enclosed in sealed envelopes addressed as follows:

☐ BY MAIL

☐ *I deposited such envelope in the mail at _____, California.
 The envelope was mailed with postage thereon fully prepaid.

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

Executed on _____, 19____, at _____, California.

☐ ** (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, 19____, at _____, California.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 22

HON. CAROLYN B. KUHL, JUDGE

AZUCENA SANCHEZ SCOTT,
PLAINTIFF,

VS.

ALZA PHARMACEUTICALS, ETC.,
ET AL.,

DEFENDANTS.

NO. BC 214585

COPY

REPORTER'S TRANSCRIPT

TUESDAY, OCTOBER 12, 1999

APPEARANCES:

FOR THE PLAINTIFF:

STEVEN W. MURRAY, ESQ.
16055 VENTURA BOULEVARD
SUITE 900
ENCINO, CA 91436FOR THE DEFENDANT
DR. POLONSKY:PATTERSON, RITNER, ET AL.
BY: SUSAN E. HONG, ESQ.
3580 WILSHIRE BOULEVARD
SUITE 900
LOS ANGELES, CA 90010FOR THE DEFENDANTS
GREENE & KOEHLER:HEMER, BARKUS & CLARK
BY: JAMIE M. MCCONNELL, ESQ.
550 NORTH BRAND BOULEVARD
SUITE 1800
GLENDALE, CA 91203FOR THE DEFENDANTS
ALZA CORP. & MARTINEZ:ARTER & HADDEN
BY: MOLLIE F. BENEDICT, ESQ.
725 SOUTH FIGUEROA STREET
SUITE 3400
LOS ANGELES, CA 90017-5418VIRGINIA R. ISHIDA, CSR NO. 3784
OFFICIAL REPORTER

1 LOS ANGELES, CALIFORNIA; TUESDAY, OCTOBER 12, 1999 *

2 9:45 A.M.

3 DEPARTMENT NO. 22 HON. CAROLYN B. KUHL, JUDGE
4 (VIRGINIA R. ISHIDA, CSR NO. 3784, OFFICIAL REPORTER.)
5

6 THE COURT: NUMBER 13, SCOTT VERSUS ALZA.

7 MR. MURRAY: GOOD MORNING, YOUR HONOR.

8 STEVEN MURRAY FOR PLAINTIFF SCOTT.

9 MS. HONG: GOOD MORNING, YOUR HONOR.

10 SUSAN HONG ON BEHALF OF DR. POLONSKY.

11 MS. BENEDICT: MOLLIE BENEDICT OF ARTER & HADDEN
12 FOR DEFENDANTS ALZA CORPORATION AND ROBERT MARTINEZ.

13 MS. MCCONNELL: GOOD MORNING, YOUR HONOR.

14 JAMIE MCCONNELL ON BEHALF OF THE MEDICAL
15 PARTNERSHIP OF GREEN & KOEHLER.

16 THE COURT: THIS IS THE DEMURRER AND MOTION TO
17 STRIKE. AND THE DEMURRER IS ON THE FIRST AND SECOND
18 CAUSES OF ACTION, AND I'LL GIVE YOU TENTATIVES.

19 THE TENTATIVE IS TO SUSTAIN THE DEMURRER
20 WITHOUT LEAVE TO AMEND. I THINK BOTH SIDES WOULD AGREE
21 THAT IT'S FOR THE COURT IN THE FIRST INSTANCE TO DETERMINE
22 WHETHER THE FACTS STATED, COULDN'T GIVE RISE TO A CAUSE OF
23 ACTION, FOR EXAMPLE, FOR THE COURT TO MAKE A PRELIMINARY
24 DETERMINATION OF OFFENSIVENESS.

25 WITH RESPECT TO THE FIRST CAUSE OF ACTION
26 FOR INVASION OF PRIVACY, THE ONLY CATEGORY THAT MIGHT FIT
27 THESE FACTS, THE ONLY CATEGORY OF PRIVACY INVASION THAT
28 MIGHT FIT THESE FACTS IS INTRUSION UPON SECLUSION. THE

1 INTRUSION MUST BE HIGHLY OFFENSIVE TO A REASONABLE PERSON.
2 SOME INTRUSION INTO SECLUSION IS INHERENT IN A
3 MEDICAL-PHYSICAL EXAMINATION. IT'S REASONABLE FOR SOME
4 PERSONS OTHER THAN THE MEDICAL DOCTOR TO BE PRESENT, FOR
5 EXAMPLE, NURSES, TECHNICIANS AND THEN IN CERTAIN
6 CIRCUMSTANCES PERHAPS STUDENTS OR RESEARCHERS.

7 THE OFFENSIVENESS OF THE ADDITIONAL
8 INTRUSION FOR MOST PEOPLE WOULD TURN ON THE REASON WHY THE
9 ADDITIONAL PERSON THAT'S PRESENT -- HOWEVER, THIS IS NOT A
10 CASE IN WHICH THE ADDITIONAL PERSON OBSERVED THROUGH A
11 TWO-WAY MIRROR OR SOME OTHER SURREPTITIOUS OBSERVATION
12 DEVICE.

13 HERE THE PLAINTIFF WAS INTRODUCED TO THE
14 THIRD PERSON AND KNEW HE WAS THERE. SHE WAS NOT IN SUCH
15 PAIN OR IN NEED OF EMERGENCY MEDICAL TREATMENT SO AS TO
16 PRECLUDE HER FROM MAKING HER OWN DETERMINATION OF THE
17 REASONS HE WAS THERE AND WHETHER OR NOT GIVEN THOSE
18 REASONS HIS PRESENCE WAS HIGHLY OFFENSIVE TO HER.

19 THE DOCTOR MAY OR MAY NOT HAVE BEEN
20 NEGLIGENT IN SECURING HER CONSENT FROM THE STANDPOINT OF
21 THE STANDARDS OF THE MEDICAL PROFESSION, BUT THIS IS A
22 SITUATION WHERE IF THE PERSON BEING EXAMINED KNOWS OF THE
23 PRESENCE OF THE THIRD PERSON AND IS IN SUCH A POSITION AS
24 TO BE PRECLUDED AND IS NOT IN SUCH A POSITION TO BE
25 PRECLUDED FROM MAKING FURTHER INQUIRY AND THE PERSON DOES
26 NOT OBJECT TO THE THIRD PERSON'S PRESENCE, THEN UNDER
27 THOSE CIRCUMSTANCES THE PRESENCE OF THE THIRD PERSON IS
28 NOT HIGHLY OFFENSIVE AS A MATTER OF LAW.

1 IT ALSO SHOULD BE NOTED THAT HERE THERE'S NO
2 ALLEGATION OF TOUCHING OR THAT THE PURPOSE OF THE THIRD
3 PERSON'S PRESENCE WAS FOR SEXUAL GRATIFICATION. ALSO
4 THERE IS NO PUBLICATION BEYOND THE THIRD PERSON WHO
5 ACTUALLY WAS PRESENT REGARDING THE DEMAY VERSUS ROBERTS
6 CASE, THE KNOWN CALIFORNIA CASE FROM 1881. THE PATIENT
7 THERE WAS IN LABOR, NOT UNDERGOING A MORE ROUTINE MEDICAL
8 EXAMINATION, AND THEREFORE LESS ABLE TO MAKE A
9 DETERMINATION AS TO THE OFFENSIVENESS TO HER OF THE
10 PRESENCE OF THE THIRD PERSON.

11 REGARDING THE SECOND CAUSE OF ACTION,
12 VIOLATION OF CALIFORNIA CONSTITUTION RIGHT TO PRIVACY,
13 THERE MUST BE A REASONABLE EXPECTATION OF PRIVACY IN THE
14 CIRCUMSTANCES, AND THE ANALYSIS IS SIMILAR TO WHAT I
15 ALREADY HAVE STATED. THERE WOULD BE NO REASONABLE
16 EXPECTATION THAT MEDICAL PROCEDURES ONLY WILL BE OBSERVED
17 BY THE MEDICAL DOCTOR. UNDER THE CIRCUMSTANCES PRESENTED
18 HERE WHEN THE PATIENT HAS NOT OBJECTED, I THINK IT CANNOT
19 BE SAID THAT THERE WAS A REASONABLE EXPECTATION OF
20 PRIVACY.

21 ALSO, I DON'T THINK IT CAN BE SAID THAT THE
22 CONDUCT OF THESE DEFENDANTS IN PROCEEDING WHEN THERE WAS
23 NO OBJECTION CONSTITUTED A SERIOUS INVASION OF PRIVACY.

24 REGARDING THE MOTION TO STRIKE, THE
25 TENTATIVE IS TO STRIKE THE PUNITIVE DAMAGES ALLEGATION.
26 THIS WOULD BE ON THE ASSUMPTION THAT THE ONLY REMAINING
27 CAUSE OF ACTION IS THE NEGLIGENCE CAUSE OF ACTION. THE
28 INJURY THAT IS ALLEGED IS DIRECTLY RELATED TO THE

1 PERFORMANCE OF PROFESSIONAL SERVICES BEING PROVIDED.
2 INDEED, I THINK THE GRAVAMEN OF THAT CAUSE OF ACTION IS
3 THE CLAIM THAT THE DOCTOR FAILED TO FOLLOW PROPER
4 STANDARDS IN SECURING CONSENT OF THE PATIENT FOR THE THIRD
5 PARTY TO REMAIN.

6 SO THAT'S THE TENTATIVE AND I'LL HEAR FROM
7 THE PLAINTIFF ON THAT TENTATIVE.

8 MR. MURRAY: THANK YOU, YOUR HONOR.

9 WELL, I THINK THE APPLICABLE PRECEDENT HERE
10 IS THE SANDERS CASE. THE ESSENCE OF WHAT I HEAR YOU
11 SAYING IS "THIS CAN'T BE OFFENSIVE BECAUSE SHE KNEW HE WAS
12 THERE."

13 WELL, MR. SANDERS WAS A TELE-PSYCHIC. HE
14 KNEW THAT STACEY LESCH, THE REPORTER, WAS THERE. SHE GOT
15 A JOB AS A TELE-PSYCHIC AND SHE INTERVIEWED HIM.

16 THE COURT: RIGHT. BUT WE HAVE TO KNOW THAT IN
17 THAT CASE AND IN THE MILLER CASE YOU HAVE PUBLICATION. IN
18 OTHER WORDS, YOU HAVE PUBLICATION. YOU HAVE A REVEALING
19 OF PRIVATE FACTS BEYOND THE PERSON WHO WAS PRESENT. SO
20 IT'S NOT AS THOUGH THIS PERSON WHO WAS PRESENT -- MARTINEZ
21 -- HAD SOME KIND OF SURREPTITIOUS RECORDING DEVICE AND WAS
22 TAKING PICTURES, WHICH HE THEN PUBLISHED IN THE NEWSPAPER.
23 THAT WOULD BE A DIFFERENT STORY.

24 MR. MURRAY: WELL, THAT'S TRUE. YOU'RE ABSOLUTELY
25 CORRECT, BUT I DON'T THINK THE PUBLICATION IS AN ELEMENT
26 OF THE PRIVACY INVASION. I THINK THE PRIVACY IS INVADED.
27 IT'S SCOTT'S PRIVACY BECAUSE THE STRANGER IS THERE.

28 MY POINT ABOUT STACEY LESCH, THE REPORTER,

1 WAS THIS. SANDERS THOUGHT SHE WAS A CO-WORKER SO THEY
2 TALKED. BUT HE KNEW SHE WAS THERE.

3 SCOTT THOUGHT HE WAS A DOCTOR OR SOMEBODY
4 CONNECTED WITH POLONSKY'S MEDICAL PRACTICE. SHE KNEW HE
5 WAS THERE, BUT SHE THOUGHT IT WAS OKAY BECAUSE HE WAS PART
6 OF THE MEDICAL TEAM. HE WAS NOT INTRODUCED.

7 THE COURT: BUT SHE ALSO WAS NOT TOLD HE WAS PART
8 OF THE MEDICAL TEAM.

9 MR. MURRAY: OH, NO. THAT'S TRUE.

10 THE COURT: SHE WAS TOLD "HE'S HERE WATCHING MY
11 WORK.

12 MR. MURRAY: ABSOLUTELY CORRECT.

13 THE COURT: A VERY AMBIGUOUS STATEMENT.

14 MR. MURRAY: VERY. BUT THE CONTEXT --

15 REMEMBER, THIS IS A VERIFIED COMPLAINT. THE
16 CONTEXT IS YOU HAVE A LADY WHO'S JUST FINISHED HER
17 CHEMOTHERAPY. SHE WAS THERE FOR THE FIRST -- I THINK
18 EVERY THREE-MONTH EXAM -- AND LITERALLY SHE'S FRIGHTENED
19 TO DEATH. SHE'S WAITING TO SEE DID THE LUMP COME BACK.
20 SO SHE'S NOT IN A POSITION TO REALLY SAY ANYTHING. SHE IS
21 IN THE ROOM, AND IN COMES THE DOCTOR WITH ANOTHER
22 GENTLEMAN AND SAYS "THIS IS SOMEONE OBSERVING MY WORK."
23 SHE'S THINKING "MY GOD. WHAT'S HE GOING TO TELL ME? IS
24 IT LIFE OR DEATH?" SHE'S NOT INTO "WHO IS THIS PERSON
25 WHO'S WEARING A TIE AND LOOKS LIKE A DOCTOR?" AND THAT'S
26 WHY WE CITED THE DEMAY CASE.

27 THE DEMAY CASE IS CITED IN MILLER, WHICH IS
28 APPROVED BY SCHULMAN, AND IT'S ALSO CITED IN SANDERS. BUT

1 THE REASON IT'S CITED IS THIS. THAT THERE'S AN OBLIGATION
2 ON THE PART OF THE PERSON WALKING INTO THE ROOM TO SAY,
3 "BY THE WAY, THIS IS SUCH AND SUCH," BECAUSE IF YOU DON'T
4 AFFIRMATIVELY SAY THAT, THE PERSON WHOSE PRIVACY IS BEING
5 INVADED IS ENTITLED TO ASSUME THIS IS A NORMAL OCCURRENCE.
6 THERE'S NO CUSTOM HERE.

7 THE COURT: I DON'T SEE THAT IN THE CASES. I DON'T
8 SEE THAT PRESUMPTION IN THE CASES.

9 MR. MURRAY: WELL, JUSTICE WERNER SAID, "IT'S NOT
10 AN ALL OR NOTHING SITUATION." I PERSONALLY THINK THAT IN
11 SANDERS, REALIZING THAT YOUR CO-WORKERS MIGHT OVERHEAR
12 SOMETHING, IF IT'S A QUESTION OF FACT AS THE SUPREME COURT
13 SAYS IN SANDERS, YOU HAVE A MUCH MORE INTRUSIVE SITUATION
14 HERE, BECAUSE THIS IS THE EXAMINING ROOM. THIS ISN'T A
15 HOSPITAL. THIS ISN'T A PUBLIC PLACE. IT'S A PRIVATE
16 ROOM.

17 WE CITED PEOPLE VERSUS BROWN, WHICH ALSO
18 CITES DEMAY. PEOPLE VERSUS BROWN SAYS THAT IN A HOSPITAL
19 ROOM A PATIENT HAS DUAL CONTROL OVER THE ROOM TO EXCLUDE
20 STRANGERS, NOT DOCTORS AND NURSES.

21 THE COURT: RIGHT. BUT, SEE, THAT'S MY CONCEPT
22 HERE. THE PATIENT HAS CONTROL OVER THE ROOM TO EXCLUDE
23 STRANGERS. SO HERE IS THIS PERSON WHO COMES IN -- MR.
24 MARTINEZ. SHE IS GIVEN THIS AMBIGUOUS STATEMENT, "HERE HE
25 IS. HE'S OBSERVING MY WORK." NOW, WHO'S IN THE BEST
26 POSITION TO DETERMINE OFFENSIVENESS TO HER? SHE IS.

27 MR. MURRAY: WELL, THEN WHY DOES SANDERS -- IF I
28 CAN ASK THE COURT A QUESTION. SANDERS SAYS AT PAGE 923:

1 (READING)

2 IF THE QUESTION OF FACT AS TO WHETHER
3 THE PERSON'S EXPECTATION THAT HIS OR HER
4 INTERACTION WITH A NON-PUBLIC WORKPLACE WILL NOT BE
5 VIDEOTAPED.

6 NOW, I UNDERSTAND IT'S ABOUT A VIDEOTAPED
7 PUBLICATION.

8 THE COURT: I THINK THAT'S REALLY A DIFFERENT ARM
9 OF INVASION OF PRIVACY. PUBLICATION OF PRIVATE FACTS ARE
10 AN INVASION OF PRIVACY.

11 HERE WE HAVE AN INTRUSION INTO SECLUSION
12 INVASION OF PRIVACY, SO I DON'T THINK THAT IN SANDERS THE
13 PROBLEM WAS THAT THE CO-WORKER WAS OVERHEARING WHAT WAS
14 BEING SAID. THE PROBLEM WAS THAT THAT WAS SHARED WITH THE
15 REST OF THE WORLD.

16 MR. MURRAY: BUT THE ELEMENT OF OFFENSIVENESS WAS
17 BASED, I THINK THE COURT SAID, ON IF YOU KNEW YOUR
18 CO-WORKERS COULD OVERHEAR IT. WHAT'S THE DIFFERENCE IF
19 OTHER PEOPLE COULD? THE COURT SAYS, "WELL, THAT'S UP TO A
20 JURY TO DETERMINE WHETHER THAT'S HIGHLY OFFENSIVE OR NOT."

21 I HAPPEN TO THINK THAT THE DEMAY CASE IS ON
22 ALL FOURS. I UNDERSTAND THE OPPOSITION SAYS, "WELL, IT'S
23 NOT A CALIFORNIA CASE." BUT WHEN YOU HAVE A LANDMARK CASE
24 LIKE THAT CITED BY FOUR CALIFORNIA COURTS, INCLUDING THE
25 SUPREME COURT AS AN EXAMPLE OF THE TORT OF INTRUSION, IT'S
26 THE SAME THING. SO I THINK THAT IF THE FACTS IN DEMAY ARE
27 GOOD ENOUGH FOR THE SUPREME COURT TO SAY, "THIS IS AN
28 INTRUSION TORT," THEN THAT RULE OF LAW WOULD APPLY HERE.

1 I MEAN, THAT'S THE HEART OF OUR CASE.

2 THE COURT: CLEARLY IT MAKES DEMAY A MUCH MORE
3 IMPORTANT CASE AND OTHERWISE WOULD BE AN 1881 CASE FROM
4 SOMEWHERE IN NORTHWEST REPORTERS. IT'S A MUCH MORE
5 IMPORTANT CASE AND MUCH MORE SIGNIFICANT CASE THAT THE
6 SUPREME COURT -- OUR SUPREME COURT HAS PICKED IT UP AND
7 CITED IT. THERE'S NO QUESTION ABOUT IT.

8 MR. MURRAY: BECAUSE THERE'S REALLY NO DISPUTE THAT
9 THIS IS A COMMERCIAL ENTERPRISE. THE DOCTOR IS ACTING IN
10 TWO FACETS. WHEN HE'S MENTORING -- WHICH IS I GUESS A
11 UNIQUE PROGRAM THIS DRUG COMPANY HAS -- WHEN HE'S
12 MENTORING MR. MARTINEZ, HE'S ACTING AS A TEACHER. THIS
13 HAPPENS BEFORE THE EXAM. SO THE COMMERCIAL ENTERPRISE
14 PART OF WHAT HE'S DOING I THINK THAT DIFFERENTIATES THIS
15 CASE FROM THE AUTHORITIES THAT THE OPPOSITION CITED.

16 I THINK THIS IS REALLY OUTRAGEOUS CONDUCT.

17 THE COURT: WELL, OF COURSE, THAT'S WHERE WE HAVE
18 TO MAKE A DETERMINATION WITH RESPECT TO HOW UNUSUAL THIS
19 IS AND WHETHER THE PERSON IN THE EXAMINING ROOM, THE
20 PLAINTIFF IN THIS CASE, IS IN THE BEST POSITION TO MAKE
21 THE DETERMINATION -- OR CAN MAKE THE DETERMINATION.
22 BECAUSE I THINK WE WOULD PROBABLY AGREE THAT IT WOULD NOT
23 BE UNUSUAL OR INHERENTLY OUTRAGEOUS FOR A DOCTOR WHO WAS
24 TEACHING AT USC TO BRING EVEN A FIRST-YEAR MEDICAL STUDENT
25 INTO AN EXAMINING ROOM AND ALLOW THAT PERSON TO OBSERVE IN
26 A TEACHING CAPACITY.

27 MR. MURRAY: AND ARE YOU GOING TO ADD WITH AN
28 EXPLANATION TO THE PATIENT "THIS IS A MEDICAL STUDENT. DO

1 YOU MIND IF HE OBSERVES MY WORK"?

2 THE COURT: WELL --

3 MR. MURRAY: WITHOUT THAT --

4 THE COURT: WELL, SUPPOSE THERE WAS THAT
5 CIRCUMSTANCE. WHAT WOULD YOU SAY?

6 THE DOCTOR BRINGS THE FIRST-YEAR MED STUDENT
7 IN AND SAYS, "THIS IS MR. SO AND SO, AND HE'S HERE TO
8 OBSERVE MY WORK" PERIOD. DO YOU HAVE A CAUSE OF ACTION?

9 MR. MURRAY: WELL, WHAT'S THE REST OF THE STORY?
10 WHAT DOES THE PATIENT SAY?

11 THE COURT: THE PATIENT DOES EXACTLY WHAT THE
12 PATIENT DID HERE.

13 MR. MURRAY: AND IT'S SAID IT'S A FIRST-YEAR
14 MEDICAL STUDENT?

15 THE COURT: NO. THE SAME THING IS SAID HERE. IT'S
16 JUST THE CHARACTER OF THE PERSON IS DIFFERENT. IN OTHER
17 WORDS, IF THE EXACT SAME THING HAPPENS -- IT'S JUST THAT
18 IT'S NOT MR. MARTINEZ -- IT'S A FIRST-YEAR MED STUDENT, DO
19 YOU HAVE A CAUSE OF ACTION?

20 MR. MURRAY: YES. BECAUSE THE PATIENT --

21 I BELIEVE SINCE THE PATIENT HAS THE RIGHTS,
22 THE PATIENT HAS THE ABILITY TO GIVE HER CONSENT "YES" OR
23 "NO," THEY HAVE TO BE BASED ON INFORMATION --

24 REMEMBER, DEMAY IS A FRAUD CASE.

25 THE COURT: MAYBE I WASN'T CLEAR. YOU BELIEVE,
26 THOUGH, THAT SHE HAS A CAUSE OF ACTION FOR INVASION OF
27 PRIVACY?

28 MR. MURRAY: YES.

1 THE COURT: IN ADDITION TO YOUR CLAIM FOR
2 NEGLIGENCE?

3 MR. MURRAY: OH, YES.

4 AND WOULD IT MAKE A DIFFERENCE TO THE COURT
5 IF THE COMPLAINT WERE AMENDED TO ALLEGE THAT AS A CUSTOM
6 AND PRACTICE THE DOCTOR ALWAYS -- WHEN HE DID THIS OTHER
7 TIMES -- INTRODUCED THE PEOPLE AND WAITED FOR THE CONSENT
8 OF THE PATIENT? OR ARE YOU SAYING AS A MATTER OF LAW IT
9 DOESN'T MATTER?

10 THE COURT: I DON'T THINK IT MATTERS. I THINK THAT
11 FOR PURPOSES OF THE TORT OF INVASION OF PRIVACY SHE WAS
12 SUFFICIENTLY AWARE THAT THERE WAS A THIRD PERSON IN THE
13 ROOM. SHE COULD ASK, BUT WE'RE TALKING ABOUT INVASION OF
14 PRIVACY NOW. I DON'T HAVE AN OPINION WITH REGARD TO YOUR
15 CAUSE OF ACTION ON NEGLIGENCE.

16 MR. MURRAY: NO. NO. JUST INVASION OF PRIVACY. I
17 THINK THAT THE PROFESSIONAL HAS AN OBLIGATION TO OBTAIN A
18 CONSENT. I THINK THE PATIENT HAS PRIVATE RIGHTS,
19 PARTICULARLY IN A COMMERCIAL SITUATION HERE. I MEAN, THEY
20 WERE LAUGHING AT HER BECAUSE SHE HAD THE HOT FLASHES FROM
21 THE CHEMOTHERAPY.

22 THE COURT: BUT THAT'S A LITTLE DIFFERENT. MAYBE
23 YOU'D ALLEGE THAT AS INTENTIONAL INFLECTION OF EMOTIONAL
24 DISTRESS, BUT I DON'T THINK IT WOULD STAND UP ON A
25 DEMURRER EITHER. BUT TO ME THE LAUGHING IS MORE THAT SORT
26 OF THING THAN THE INVASION OF PRIVACY.

27 MR. MURRAY: WELL, OKAY. IT GOES TO THE
28 OUTRAGEOUSNESS OF THE CONDUCT.

1 THE COURT: OKAY.

2 DID YOU WANT TO BE HEARD ON THE MOTION TO
3 STRIKE?

4 MR. MURRAY: AS I RECALL -- AND I'LL JUST BRIEFLY
5 CHECK IT -- THERE ARE NO PUNITIVE DAMAGES. IF YOU'RE
6 SUSTAINING WITHOUT LEAVE ON ONE AND TWO AND THREE IS ALL
7 THAT'S LEFT AND PUNITIVES ARE NOT IN NUMBER THREE, SO IT'S
8 A MOOT MOTION.

9 THE COURT: ALL RIGHT.

10 DEFENSE DOES NOT WISH TO BE HEARD IF I STAND
11 ON MY TENTATIVE?

12 MS. HONG: NO, YOUR HONOR.

13 THE COURT: THE TENTATIVE WILL STAND. DEMURRER TO
14 THE FIRST AND SECOND CAUSES OF ACTION ARE SUSTAINED
15 WITHOUT LEAVE. AND WITH REGARD TO THE MOTION TO STRIKE,
16 IT'S GRANTED INSOFAR AS IT'S NOT MOOT.

17 THEY WERE COMPLAINING THAT THERE WERE SOME
18 REFERENCES TO MALICIOUS CONDUCT THAT MAYBE WERE NOT
19 SPECIFICALLY PART OF THE PRAYER.

20 MS. HONG: THE INTENTIONAL LANGUAGE, YES.

21 THE COURT: ALL RIGHT.

22
23 (PROCEEDINGS IN THE ABOVE-ENTITLED
24 MATTER WERE CONCLUDED.)
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 22

HON. CAROLYN B. KUHL, JUDGE

AZUCENA SANCHEZ SCOTT,
PLAINTIFF,

VS.

ALZA PHARMACEUTICALS, ETC.,
ET AL.,

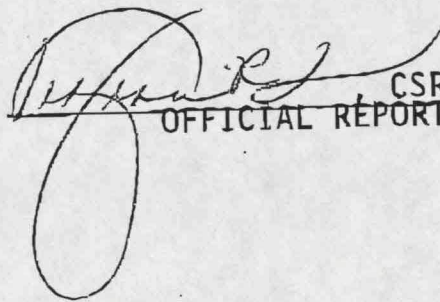
DEFENDANTS.

NO. BC 214585

REPORTER'S
CERTIFICATE

I, VIRGINIA R. ISHIDA, OFFICIAL REPORTER OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY
OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING
PAGES 1 THROUGH 11, INCLUSIVE, COMPRISES A FULL, TRUE,
AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE
ABOVE-ENTITLED MATTER ON OCTOBER 12, 1999.

DATED THIS 13TH DAY OF OCTOBER, 1999



CSR NO. 3784
OFFICIAL REPORTER

103 Cal.Rptr.2d 410
 1 Cal. Daily Op. Serv. 520, 2001 Daily Journal D.A.R. 631, 2001 Daily Journal D.A.R. 1087
 (Cite as: 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410)

H

Court of Appeal, Second District, Division 5,
 California.

Azucena SANCHEZ-SCOTT, Plaintiff and
 Appellant,
 v.

ALZA PHARMACEUTICALS et al., Defendants
 and Respondents.

No. B137678.

Jan. 17, 2001.

As Modified Jan. 29, 2001.

Breast cancer patient sued male drug salesperson and his employer for common-law invasion of privacy based on salesperson's alleged presence during breast examination conducted by oncologist. The Superior Court, Los Angeles County, No. BC214585, Carolyn B. Kuhl, J., dismissed complaint after sustaining defendants' demurrer without leave to amend. Patient appealed. The Court of Appeal, Turner, P.J., held that factual allegations in complaint supported claim for invasion of privacy.

Affirmed in part, reversed in part.

West Headnotes

[1] Appeal and Error 917(2) 30k1078(1) Most Cited Cases

Plaintiff who brought action alleging both common-law and constitutional invasion of privacy claims waived any issue concerning dismissal of constitutional claim, where plaintiff made no effort to argue merits of constitutional claim in opposing defendants' demurrer and failed, on appeal of order sustaining demurrer without leave to amend, to raise any contention as to that claim in opening and reply briefs. West's Ann. Cal. Const. Art. 1, § 1.

[2] Appeal and Error 917(2) 30k917(2) Most Cited Cases

On review of order dismissing complaint following the sustaining of a demurrer without leave to amend, all well-pleaded factual allegations must be assumed as true.

[3] Appeal and Error 917(2) 30k917(2) Most Cited Cases Thereof.

In reviewing a ruling on a demurrer, appellate court assumes the truth of allegations in the complaint which have been properly pleaded and gives complaint a reasonable interpretation by reading it as a whole and with all its parts in their context.

[4] Appeal and Error 917(2) 30k917(2) Most Cited Cases

Assumption as to the truth of allegations in complaint, as applied when reviewing a ruling on a demurrer, does not apply to contentions, deductions, or conclusions of law and fact.

[5] Appeal and Error 917(2) 30k917(2) Most Cited Cases

In reviewing a ruling on a demurrer, any allegations in complaint that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity.

[6] Torts 28 379k28 Most Cited Cases

Whether a legally recognized privacy interest exists, in context of action alleging tort of intrusion, is a question of law to be decided by the court. Restatement (Second) of Torts § 652B.

[7] Torts 28 379k28 Most Cited Cases

Issue of whether there is a reasonable expectation of privacy under the circumstances is a mixed question of law and fact in action alleging the tort of intrusion. Restatement (Second) of Torts § 652B.

[8] Torts 8.5(2) 379k8.5(2) Most Cited Cases

Protection under the tort of invasion of privacy covers "spheres" where an ordinary person in plaintiff's position could reasonably expect that the particular defendant should be excluded. Restatement (Second) of Torts § 652B.

[9] Torts 8.5(2) 379k8.5(2) Most Cited Cases

103 Cal.Rptr.2d 410

1 Cal. Daily Op. Serv. 520, 2001 Daily Journal D.A.R. 631, 2001 Daily Journal D.A.R. 1087

(Cite as: 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410)

In order for an expectation of privacy to be reasonable in the context of tort of intrusion, it is not necessary that there be absolute or complete privacy. Restatement (Second) of Torts § 652B.

[10] Torts 8.5(2)

379k8.5(2) Most Cited Cases

[10] Torts 28

379k28 Most Cited Cases

There is a preliminary determination of "offensiveness" which must be made by the court in discerning the existence of a cause of action for intrusion. Restatement (Second) of Torts § 652B.

[11] Torts 8.5(8)

379k8.5(8) Most Cited Cases

Maxim of law that one "who consents to an act is not wronged by it" applies to the tort of invasion of privacy. West's Ann.Cal.Civ.Code § 3515; Restatement (Second) of Torts § 652B.

[12] Torts 8.5(2)

379k8.5(2) Most Cited Cases

In determining whether offensiveness exists, in an action alleging the tort of intrusion, a court must consider a variety of circumstances including: (1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded. Restatement (Second) of Torts § 652B.

[13] Torts 8.5(4)

379k8.5(4) Most Cited Cases

Allegations that male drug salesperson was present in examination during oncologist's examination of partially disrobed female patient with breast cancer, that salesperson was introduced only as a person who was looking at oncologist's work, and that salesperson and oncologist laughed as salesperson fanned patient with her pocket fan and refused her request to return it to her supported claim against salesperson and his employer for common-law invasion of privacy. Restatement (Second) of Torts § 652B.

****411*367** Martin M. Berman and Steven W. Murray, Encino, for Plaintiff and Appellant.

Arter & Hadden, Michael C. Zellars, and Mollie F. Benedict, Los Angeles, for Defendants and Respondents, Alza Pharmaceuticals and Robert Martinez.

**412 TURNER, P.J.

I. INTRODUCTION

[1] Plaintiff, Azucena Sanchez Scott, a breast cancer patient, appeals from a judgment dismissing her complaint after the trial court sustained without leave to amend a demurrer to her cause of action for common law invasion of privacy against defendants, Alza Pharmaceuticals, Alza Corporation, and Robert Martinez. Plaintiff's claims arise out of the presence of Mr. Martinez, a drug salesperson, during a breast and related examination of her by Dr. *368 Monty B. Polonsky, an oncologist. We reject defendants' arguments that the complaint fails to state causes of action for the tort of intrusion, which is based on a violation of her common law right to privacy. We therefore reverse the judgment of dismissal entered following the sustaining of defendants' demurrers as to the first cause of action. [FN1]

FN1. Defendants specifically demurred on the ground that plaintiff's second cause of action for a violation of her constitutional right of privacy premised on article I, section 1 of the California Constitution failed to state sufficient facts. (See Loder v. City of Glendale (1997) 14 Cal.4th 846, 887, 59 Cal.Rptr.2d 696, 927 P.2d 1200; Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 39-49, 26 Cal.Rptr.2d 834, 865 P.2d 633.) In the demurrer opposition, plaintiff made no effort to argue the merits of her state constitutional claim. On appeal, plaintiff failed to raise any contention in the opening and reply briefs as to the second cause of action based on the constitutional privacy claim. Hence, any issue concerning the second cause of action has been waived. (Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 216, fn. 4, 188 Cal.Rptr. 115, 655 P.2d 317; Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 70, 187 P.2d 686, disapproved on another point in Bailey v. County of Los Angeles (1956) 46 Cal.2d 132, 139, 293 P.2d 449.)

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II. BACKGROUND

A. The Complaint

[2] In reviewing the dismissal, all well-pleaded factual allegations must be assumed as true. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 495, 93 Cal.Rptr.2d 327, 993 P.2d 983; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) The complaint alleged that Dr. Polonsky is a licensed physician and is the employee of Greene & Koehler, a medical partnership. Alza Pharmaceuticals and Alza Corporation (hereinafter referred to collectively as "Alza") are companies in the business of selling medicines, drugs, and medical devices to physicians. Mr. Martinez is employed by Alza as a salesperson. Mr. Martinez's sales territory includes the County of Los Angeles and his customers included Dr. Polonsky and the Greene & Koehler partnership. The complaint contained causes of action against all defendants for invasion of privacy (first) and violation of Article I, section 1 of the California Constitution (second). The complaint also contained a third cause of action against Dr. Polonsky and the Greene and Koehler partnership for lack of informed consent.

The complaint alleged that, prior to October 1998, Alza created and promoted a mentor program whereby its representatives, including Mr. Martinez, were directed to participate in private medical activities of Alza's customers who were health care providers. As part of this program, Mr. Martinez was directed to participate in such a program in connection with plaintiff's medical treatment. Prior to June 1997, plaintiff had been diagnosed as having breast cancer. Dr. Polonsky became her treating oncologist. *369 Her breast cancer was treated with chemotherapy under Dr. Polonsky's direction, control, and supervision.

On October 7, 1998, plaintiff went to the offices of the Greene and Koehler partnership, for an appointment with Dr. Polonsky. She was taken into a private examining room. At the time, she was wearing a skirt and blouse. Dr. Polonsky entered the room with an unidentified man, who appeared to be a professional. Dr. Polonsky **413 introduced the man, who was ultimately identified as Mr. Martinez, to her. The complaint alleges that Mr. Martinez was introduced as "a person ... who was looking at Dr. Polonsky's work." During the examination, plaintiff began to feel extremely hot and flushed. She carried a pocket fan with her for such occasions. She took the

fan out of her purse and began to fan herself to feel cooler. At this point, Dr. Polonsky took the fan from plaintiff and gave it to Mr. Martinez. Mr. Martinez was told, "[I]t would give him something to do." Mr. Martinez began fanning plaintiff, who became extremely uncomfortable because Dr. Polonsky and Mr. Martinez both started to laugh. Plaintiff told Mr. Martinez that she would fan herself. But Mr. Martinez refused her request and continued to fan her.

With Mr. Martinez still in the examination room, Dr. Polonsky then instructed plaintiff to get up on the examining table. Dr. Polonsky told her that he needed to examine her underarms. Plaintiff unbuttoned her blouse, which was too tight for Dr. Polonsky to put his hands inside to conduct the examination. In Mr. Martinez's presence, Dr. Polonsky told plaintiff to take off her bra. This was because Dr. Polonsky needed to examine her breasts. Dr. Polonsky also instructed her to lie down on her back, with her knees up, and to pull down the waistband of her skirt so that he could also examine her abdomen. Plaintiff remained nude from the abdomen up. While all of this occurred, Mr. Martinez was in the examination room, sitting beside the examining table. Mr. Martinez watched Dr. Polonsky examine plaintiff's breasts. As the examination continued in Mr. Martinez's presence, plaintiff continued to become more uncomfortable. As soon as the examination was concluded, plaintiff got up and tried to cover herself because she was embarrassed and uncomfortable. Dr. Polonsky told her she needed a mammogram and chest x-rays. Thereupon, Dr. Polonsky and Mr. Martinez left the examination room.

Plaintiff dressed and asked a receptionist who Mr. Martinez was. The receptionist responded that Mr. Martinez was a "drug salesman." Plaintiff related what had happened in the examination room to the receptionist. Plaintiff explained she had undressed in front of Mr. Martinez. The receptionist indicated, "[T]hat wasn't right." After she left the office, plaintiff *370 began to cry from shame and anger. When she returned to her office, plaintiff called Dr. Polonsky and asked who the man had been in the room during her examination. Dr. Polonsky apologized for not explaining who Mr. Martinez was. Plaintiff told Dr. Polonsky that he had violated the trust that she placed in him. The next day, plaintiff telephoned the doctor's office and asked the receptionist for Mr. Martinez's name. The receptionist transferred the call to Dr. Polonsky, who apologized again and gave her the information she

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requested.

A letter attached to the complaint, prepared by Alza's corporate counsel, explained why Mr. Martinez was present in Dr. Polonsky's office. The letter stated: "Mr. Martinez was at Dr. Polonsky's office on the date in question because he was participating in an oncology mentorship program. A mentorship program is a well-established and accepted method of providing training to therapeutic sales specialists. This program involves the ALZA specialist spending the day with an oncologist to better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office." The letter further indicated: a "therapeutic sales specialist" does not treat patients; the physician decides whether to allow the drug salesperson to be present during an examination; it was common for the physician to explain the "oncology mentorship program" to the patient at the beginning of the office visit; and Mr. Martinez recalled that this explanation was given to plaintiff before the examination.

B. The General Demurrer

Defendants, Alza and Mr. Martinez, filed a general demurrer to plaintiff's common ****414** law privacy claim on the ground that there were insufficient facts to constitute a cause of action against them. They argued that, as a matter of law, the causes of action for invasion of privacy did not meet the standard of intrusion that is highly offensive to a reasonable person. Defendants further argued that there was no intrusion on plaintiff's seclusion because she had no reasonable expectation of privacy given that she knew of Mr. Martinez's presence. Defendants argued there was no emergency and plaintiff could reasonably have objected to Mr. Martinez's presence in the room. Finally, defendants asserted the trial court should make the determination that no reasonable person would have found Mr. Martinez' presence to be highly offensive and that this was nothing more than "a situation which she found socially uncomfortable." Plaintiff opposed the demurrers on the ground that the allegations in the complaint established the tort of intrusion as articulated in Sanders v. American Broadcasting Companies (1999) 20 Cal.4th 907, 911, 914-915, 85 Cal.Rptr.2d 909, 978 P.2d 67; ***371**Shulman v. Group W. Productions, Inc. (1998) 18 Cal.4th 200, 214, 227-228, 231, 74 Cal.Rptr.2d 843, 955 P.2d 469 [lead opn. of Werderger, J.]; Hill v. National Collegiate Athletic Assn., *supra*, 7 Cal.4th at pages 18, 24, 26, 26 Cal.Rptr.2d 834, 865 P.2d 633; Miller

v. National Broadcasting Co. (1986) 187 Cal.App.3d 1463, 1481-1487, 232 Cal.Rptr. 668; and De May v. Roberts (1881) 46 Mich. 160, 9 N.W. 146, 147-149.

The trial court sustained the demurrers to the common law invasion of privacy causes of action without leave to amend. The judgment dismissing the complaint as to Alza and Mr. Martinez was entered on October 29, 1999. This timely appeal followed.

III. DISCUSSION

A. Standard of Review

[3][4][5] An appellate court's " 'only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action.' " (People ex. rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 300, 58 Cal.Rptr.2d 855, 926 P.2d 1042; Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479.) The reviewing court assumes the truth of allegations in the complaint which have been properly pleaded and gives it a reasonable interpretation by reading it as a whole and with all its parts in their context. (Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 558, 71 Cal.Rptr.2d 731, 950 P.2d 1086; People ex. rel. Lungren v. Superior Court, *supra*, 14 Cal.4th at pp. 300-301, 58 Cal.Rptr.2d 855, 926 P.2d 1042; Aubry v. Tri-City Hospital Dist., *supra*, 2 Cal.4th at pp. 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact. (Moore v. Regents of University of California, *supra*, 51 Cal.3d at p. 125, 271 Cal.Rptr. 146, 793 P.2d 479.) Furthermore, any allegations that are contrary to the law or to a fact of which judicial notice may be taken will be treated as a nullity. (Interinsurance Exchange v. Narula (1995) 33 Cal.App.4th 1140, 1143, 39 Cal.Rptr.2d 752; Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal.App.3d 951, 955-956, 199 Cal.Rptr. 789.) The Supreme Court has held: "On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory. [Citations.] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]" ****415**(Hendy v. Losse (1991) 54 Cal.3d 723, 742, 1

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Cal.Rptr.2d 543, 819 P.2d 1; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349, 134 Cal.Rptr. 375, 556 P.2d 737.) For *372 the reasons stated below, we conclude the demurrer of Alza and Mr. Martinez to the first cause of action for common law invasion of privacy should not have been sustained.

B. The Demurrer Should Have Been Overruled

The first cause of action alleged defendants were civilly liable for the tort of intrusion, which is based on a violation of plaintiff's common law privacy rights. California has recognized the four types of common law claims for invasion of privacy which are identified in the *Restatement Second of Torts*, section 652A: "... (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or, [¶] (b) appropriation of the other's name or likeness, as stated in § 652C; or [¶] (c) unreasonable publicity given to the other's private life, as stated in § 652D; or [¶] (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E." (See *Sanders v. American Broadcasting Companies*, *supra*, 20 Cal.4th at p. 914, 85 Cal.Rptr.2d 909, 978 P.2d 67; *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at pp. 230-231, 74 Cal.Rptr.2d 843, 955 P.2d 469 (lead opn. of Werderger, J.); *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at pp. 23-27, 26 Cal.Rptr.2d 834, 865 P.2d 633.)

[6][7] The California Supreme Court has adopted the definition of the tort of intrusion as set forth in *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at page 1482, 232 Cal.Rptr. 668, and in the *Restatement Second of Torts* section 652B. (See *Sanders v. American Broadcasting Companies*, *supra*, 20 Cal.4th at pp. 914-915, 85 Cal.Rptr.2d 909, 978 P.2d 67; *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at p. 231, 74 Cal.Rptr.2d 843, 955 P.2d 469.) Section 652B of the *Restatement Second of Torts* describes the intrusion tort as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." (See *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1075-1076, 84 Cal.Rptr.2d 329; *Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 514, 20 Cal.Rptr.2d 376.) The definition of the intrusion tort consists of two elements: "(1) the intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." (*Sanders v.*

American Broadcasting Companies, *supra*, 20 Cal.4th at pp. 914-915, 85 Cal.Rptr.2d 909, 978 P.2d 67; accord, *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at p. 231, 74 Cal.Rptr.2d 843, 955 P.2d 469.) The Supreme Court has defined the first element as follows: "[T]he plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source. [Citations.]" (*Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at pp. 231-232, 74 Cal.Rptr.2d 843, 955 P.2d 469; accord, *Sanders v. American Broadcasting Companies*, *supra*, 20 Cal.4th at pp. 914-915, 85 Cal.Rptr.2d 909, 978 P.2d 67.) Whether a legally *373 recognized privacy interest exists is a question of law to be decided by the court. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 40, 26 Cal.Rptr.2d 834, 865 P.2d 633; *Feminist Women's Health Center v. Superior Court* (1997) 52 Cal.App.4th 1234, 1245, 61 Cal.Rptr.2d 187.) The issue of whether there is a reasonable expectation of privacy under the circumstances is a mixed question of law and fact. (*Hill v. National Athletic Ass'n.*, *supra*, 7 Cal.4th at p. 40, 26 Cal.Rptr.2d 834, 865 P.2d 633; *Feminist Women's Health Center v. Superior Court*, *supra*, 52 Cal.App. 4th at p. 1246, 61 Cal.Rptr.2d 187.)

**416 In *Shulman v. Group W. Productions*, *supra*, 18 Cal.4th at pages 230-231, 74 Cal.Rptr.2d 843, 955 P.2d 469, the lead opinion explained the intrusion tort as follows: "Of the four privacy torts ..., the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an 'invasion of privacy.' It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, ... [Citation.] It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity. '[A] measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.' [Citation.]" (*Ibid.*)

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[8][9] In this case, the first element of intrusion into a private place, conversation, or matter concerns whether the medical examination room was protected from intruders. Under California law, the protection under the tort of invasion of privacy covers "spheres" where an ordinary person in plaintiff's position could reasonably expect that the particular defendant should be excluded. (*Sanders v. American Broadcasting Companies, Inc.*, *supra*, 20 Cal.4th at p. 916, 85 Cal.Rptr.2d 909, 978 P.2d 67; *Wilkins v. National Broadcasting Co.*, *supra*, 71 Cal.App.4th at p. 1076, 84 Cal.Rptr.2d 329; *Dietemann v. Time, Inc.* (9th Cir.1971) 449 F.2d 245, 249.) As the California Supreme Court stated in *Sanders v. American Broadcasting Companies, Inc.*, *supra*, 20 Cal.4th at pages 915-916, 85 Cal.Rptr.2d 909, 978 P.2d 67: "[P]rivacy, for purposes of the intrusion tort, is not a binary, all- or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Although the intrusion tort is often defined in terms of 'seclusion' [citations], the seclusion referred to need not be absolute. 'Like "privacy," the concept of "seclusion" is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can be *374 legally forced to be subject to being seen by everyone.' [Citations.]" In order for an expectation to be reasonable in the intrusion context, it is not necessary that there be absolute or complete privacy. (*Id.* at pp. 915-923, 85 Cal.Rptr.2d 909, 978 P.2d 67 [employee who had no reasonable expectations of privacy because of presence of co-workers may have an intrusion cause of action premised on covert videotaping].)

In that respect, this case is very much like the 1881 seminal case of *De May v. Roberts*, *supra*, 9 N.W. at pages 147-149 which first recognized a tortious invasion of privacy. *De May* involved a third party intrusion into a patient's home at the request of the physician. This occurred, without objection, because the patient believed that the intruder had medical training. *De May* has been relied on by several California courts, including the Supreme Court, in analyzing propositions concerning the intrusion tort. (See *Sanders v. American Broadcasting Companies*, *supra*, 20 Cal.4th at p. 917, 85 Cal.Rptr.2d 909, 978 P.2d 67; *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at p. 1483, 232 Cal.Rptr. 668; *People v. Brown* (1979) 88 Cal.App.3d 283, 291, fn. 5, 151 Cal.Rptr. 749.)

In *De May*, a physician took a nonprofessional male, identified by name in the opinion only as a Mr. Scattergood, to a patient's home to assist in the delivery of a **417 baby. The physician introduced the gentleman, identified only as Mr. Scattergood, to the patient's husband as "a friend." The *De May* opinion describes these events as follows: "[The doctor] said to him, 'that I had fetched a friend along to help carry my things....' " (*De May v. Roberts*, *supra*, 9 N.W. at p. 147.) Mr. Scattergood had no knowledge about the practice of medicine. However, Mr. Scattergood was allowed to assist in the delivery by taking the patient's hand and holding her during a "paroxysm of pain." The Michigan Supreme Court concluded that both the physician and Mr. Scattergood were liable for the intrusion. *De May* held that the patient had the right to presume that a practicing physician would not take a person who is not connected with the medical profession to assist in a childbirth. (*Ibid.*) *De May* stated: "We are of opinion that the plaintiff and her husband had a right to presume that a practicing physician would not, upon an occasion of that character, take with him and introduce into the house, a young man in no way, either by education or otherwise, connected with the medical profession and that something more clear and certain as to his non-professional character would be required to put the plaintiff and her husband upon their guard, or remove such presumption, than the remark made by [the physician] that he had brought a friend along to help carry his things. The plaintiff was not bound however ... strong it might be considered, but had a right to prove what she supposed was the fact, and this she could do by showing anything said at the time having such a tendency, or in the absence thereof what she actually believed to be the fact." (*Ibid.*)

De May further concluded that the patient was not precluded from recovering damages because she and her husband consented to the third party's *375 presence under the mistaken assumption that he was a physician. *De May* stated: "[The physician] therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury might have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To

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the plaintiff the occasion was a most sacred one and no one had the right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of [Mr.] Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterward ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong does thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendant...." (*De May v. Roberts*, *supra*, 9 N.W. at pp. 148-149.)

It cannot be easily disputed that medical examinations involve private matters. Indeed, with respect to conversations that occur between a physician and patient, our colleague Associate Justice Patti S. Kitching, quoting the lead opinion in *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at page 239, 74 Cal.Rptr.2d 843, 955 P.2d 469, wrote: "[a] patient's conversation with a provider of medical care in the course of treatment, including emergency treatment, carries a traditional and legally well-established expectation of privacy." [Citation.] " *418(*Wilkins v. National Broadcasting Co.*, *supra*, 71 Cal.App.4th at p. 1078, 84 Cal.Rptr.2d 329.)

Similarly, with respect to a hospital room, the Court of Appeal in *People v. Brown*, *supra*, 88 Cal.App.3d at pp. 291-293, 151 Cal.Rptr. 749, explained the expectations of privacy a patient in a hospital room under the Fourth Amendment of the United States Constitution, by comparing it to the tort of intrusion. *Brown* concluded that no Fourth Amendment violation occurred when shoes caked with blood were discovered in the defendant's hospital room; the defendant did not object to a visit by law enforcement officers; and defendant permitted the officers to enter after the nurse explained they were there to see the accused. (*Ibid.*) *Brown* stated: "Moreover, the question of privacy in a hospital does not merely turn on a general expectation of privacy in use of a given space, but to some degree depends on the person whose conduct is *376 questioned. Clearly, although by checking himself [or herself] into a hospital, a patient may well waive his right of privacy

as to hospital personnel, it is obvious that he has not turned 'his' [or her] room into a public thoroughfare. Indeed, the classic example of tortious invasions of privacy involves a hospital room. [¶] ... The patient knows and expects that nurses, doctors, food handlers, and others enter and leave 'his' [or her] hospital room in accordance with the medical needs of the patient and the hospital routine. On the other hand, a hospital room is clearly not a public hall which anyone in the building is free to use as needed. Thus, at least for certain purposes, a hospital room is fully under the control of the medical staff; yet for other purposes it is 'the patient's room....' " (*Id.* at pp. 290-291, 151 Cal.Rptr. 749, fn. omitted.)

Defendants do not cite to any authority which permits a male drug salesperson to be present in an examination room during the examination of a partially disrobed woman. A breast cancer patient who goes into an oncologist's office to be examined does not, nor should she, take a risk that what goes on in the examination room will be seen or heard by anyone other than medical personnel. She does not take a risk that a drug salesperson will be a part of the process during which her breasts will be examined. Therefore, the mere presence of Mr. Martinez, a drug salesman, in the examination room could be deemed by a trier of fact to be both a physical and sensory intrusion into plaintiff's seclusion. Under such circumstances, we conclude that jurors could conclude a breast cancer patient such as plaintiff had an objectively reasonable expectation of privacy in the medical examination room of her oncologist. No decisional authority supports a contrary conclusion.

[10][11][12] Defendants argue though their conduct was not "highly offensive", as a matter of law. There is a preliminary determination of "offensiveness" which must be made by the court in discerning the existence of a cause of action for intrusion. (*Wilkins v. National Broadcasting Co. Inc.*, *supra*, 71 Cal.App.4th at pp. 1075-1076, 84 Cal.Rptr.2d 329; *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at pp. 1483-1484, 232 Cal.Rptr. 668.) Defendants argue their conduct was not highly offensive because plaintiff consented to Mr. Martinez's presence in the examination room. However, the complaint alleges that Mr. Martinez's status as a drug salesperson was never related to plaintiff. The maxim of law that one "who consents to an act is not wronged by it" applies to the tort of invasion of privacy. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 26, 26 Cal.Rptr.2d 834, 865 P.2d 633; Civ.Code, § 3515.) In *Hill*, the Supreme Court stated: "[T]he plaintiff in

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an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, **419 a defendant's conduct will rarely be deemed 'highly *377 offensive to a reasonable person' so as to justify tort liability. [Citations.]" (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 26, 26 Cal.Rptr.2d 834, 865 P.2d 633.) However, in determining whether offensiveness exists, a court must consider a variety of circumstances of the intrusion. (*Ibid.*; *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at pp. 1483-1484, 232 Cal.Rptr. 668; accord, *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at p. 236, 74 Cal.Rptr.2d 843, 955 P.2d 469.) The factors include: (1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th at p. 26, 26 Cal.Rptr.2d 834, 865 P.2d 633; *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at pp. 1483-1484, 232 Cal.Rptr. 668; accord, *Shulman v. Group W Productions, Inc.*, *supra*, 18 Cal.4th at pp. 236-237, 74 Cal.Rptr.2d 843, 955 P.2d 469.)

Defendants contend that what transpired in the examination room was not highly offensive. Defendants argue as follows: "Martinez is a professional therapeutic sales specialist whose objective was to observe Dr. Polonsky's treatment of patients, including Plaintiff, as part of an established mentoring program. Martinez was introduced to Plaintiff by her physician, Dr. Polonsky, at the onset of the examination as someone observing his work. Plaintiff did not object to Martinez' presence or inquire further until after the examination was completed. Given these circumstances, the court properly concluded that Martinez' known presence could not be highly offensive to a reasonable person."

[13] The problem, though, with this argument is that it does not take into account all of the pertinent circumstances. The complaint makes it clear that plaintiff, a cancer patient, never consented to having an examination of her breasts observed by a male drug salesperson. At no time did Dr. Polonsky explain Mr. Martinez's true identity. Further, Mr. Martinez never explained his true identity. Additionally, plaintiff used a pocket fan to cool herself. When plaintiff began to use the fan in order to cool herself, it was taken from her by Dr. Polonsky

and handed to Mr. Martinez. Mr. Martinez was told that this would give him something to do. Mr. Martinez began fanning plaintiff. Mr. Martinez and Dr. Polonsky then began to laugh. Plaintiff asked if she could fan herself, but Mr. Martinez refused to hand the pocket fan back to her. Thereafter, plaintiff was required to disrobe from the abdomen up and was observed by Mr. Martinez during the breast examination. Later, Dr. Polonsky's receptionist indicated that this conduct "wasn't right." Further, Dr. Polonsky admitted he had not explained who Mr. Martinez was and twice apologized to plaintiff. When the totality of the circumstances of the intrusion are examined, not merely the selected facts identified by defendants, we conclude that the complaint alleges highly offensive conduct involving a *378 cancer patient whose breasts were observed by a drug salesperson, whose occupation was never disclosed, during an examination inside the confines of a physician's office. It bears emphasis that there are specific allegations that plaintiff was never advised as to Mr. Martinez's role, other than that he was present to watch.

Further, the present case is different from the scenarios where courts have found consent so as to avoid a privacy violation. The examples described in *Hill v. National Collegiate Athletic Association*, *supra*, 7 Cal.4th at page 26, 26 Cal.Rptr.2d 834, 865 P.2d 633, while the Supreme Court was describing the highly offensive element of the tort of intrusion, are as follows: "(Rest.2d Torts, § 652B, com. c [no liability for public observation of **420 plaintiff 'since he is not then in seclusion, and his appearance is public and open to the public eye']; *Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224, 230 [253 P.2d 441] [plaintiffs waived any right to privacy by a 'pose voluntarily assumed in a public market place']; *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 162 [269 Cal.Rptr. 379] ['One factor relevant to whether an intrusion is "highly offensive to a reasonable person" is the extent to which the person whose privacy is at issue voluntarily entered into the public sphere.']; *Melvin v. Reid* (1931) 112 Cal.App. 285, 290 [297 P. 91] [no right to privacy in matters publicized with consent: 'There can be no privacy in that which is already public.'] ..." Later in *Hill*, the court discussed the diminished expectation of privacy of collegiate athletes as follows: "By its nature, participation in intercollegiate athletics, particularly in highly competitive postseason championship events, involves close regulation and scrutiny of the physical fitness and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep

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(Cite as: 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410)

habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large. Athletes frequently disrobe in the presence of one another and their athletic mentors and assistants in locker room settings where private bodily parts are readily observable by others of the same sex. They also exchange information about their physical condition and medical treatment with coaches, trainers, and others who have a 'need to know.' [¶] As a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external. In recognition of this practical reality, drug testing programs involving athletic competition have routinely survived Fourth Amendment 'privacy' challenges. Drug testing has become a highly visible, pervasive, and well accepted part of athletic competition, particularly on intercollegiate and professional levels. [Citation.] It is a reasonably expected part of the life of an athlete, especially one engaged in advanced levels of competition, *379 where the stakes and corresponding temptations are high. [¶] The student athlete's reasonable expectation of privacy is further diminished by two elements of the NCAA's drug testing program—advance notice and the opportunity to consent to testing...." (*Hill v. National Collegiate Athletic Association*, *supra*, 7 Cal.4th at p. 42, 26 Cal.Rptr.2d 834, 865 P.2d 633, fn. omitted.) Although in this latter quotation from *Hill* the issue involved the general issue of consent, rather than specifically the element of highly offensive conduct, the factors in the present case differ substantially from those where consensual activity has been found so as to forestall a common law privacy claim.

We also disagree with defendants that they may escape liability because they owed no duty to plaintiff. As stated above, the tort of intrusion involves two elements: "(1) the intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. [Citation.]" (*Sanders v. American Broadcasting Companies*, *supra*, 20 Cal.4th at p. 914, 85 Cal.Rptr.2d 909, 978 P.2d 67; *Miller v. National Broadcasting Co.*, *supra*, 187 Cal.App.3d at p. 1482, 232 Cal.Rptr. 668.) Mr. Martinez allegedly intruded into a medical examination room in a highly offensive manner as part of his company's mentor program. The allegations for invasion of privacy against Mr. Martinez and for agency against his employer were sufficient to state a cause of action and to withstand a

demurrer. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 437, 128 Cal.Rptr. 19, 546 P.2d 307; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 663, 109 Cal.Rptr. 269.)

IV. DISPOSITION

The judgment of dismissal and the order sustaining the demurrer to the first cause **421 of action are reversed. The judgment of dismissal and order sustaining the demurrer to the second cause of action is affirmed. Plaintiff, Azucena-Sanchez Scott, is to recover her costs on appeal from defendants, Alza Pharmaceuticals, Alza Corporation, and Robert Martinez.

GRIGNON, J., and GODOY PEREZ, J., concur.

103 Cal.Rptr.2d 410, 86 Cal.App.4th 365, 1 Cal. Daily Op. Serv. 520, 2001 Daily Journal D.A.R. 631, 2001 Daily Journal D.A.R. 1087

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PAUL TURNER
PRESIDING JUSTICE

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION FIVE
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

TELEPHONE
(213) 830-7343
FACSIMILE
(213) 857-5550
E-MAIL
justicepaulturner@judco.gov
SENIOR JUDICIAL ATTORNEYS
LELA J. HUCKABEE
KAREN T. GREY
CAROL A. GREENWALD
JUDICIAL ASSISTANT
TERRI MEADOWS

March 17, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit
Court of Appeals

Dear Mr. Chairman:

The Senate Committee on Judiciary has pending before it the nomination by President George W. Bush of Los Angeles Superior Court Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. As you may know, she has been criticized by certain advocacy groups because an order she entered was reversed by the California Court of Appeal in the case of *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365. That case involved the question of whether tort liability could arise because a drug salesperson was being trained by a physician during the breast examination of a cancer patient. Judge Kuhl's critics have asserted that the reversal of her order sustaining the demurrer without leave to amend is evidence of her bias and prejudice against women.

On appeal, I was the author of the *Sanchez-Scott* opinion. I have been a member of the California judiciary since 1983 and a Court of Appeal Justice since November, 1989. I can tell the difference between a trial judge making a tough call in the context of competing legal interests, on one hand, and bias or prejudice, on the other hand. Judge Kuhl's order sustaining the demurrer without leave to amend was not an act of bias or insensitivity. Several points warrant comment.



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First, there was no issue in the *Sanchez-Scott* case involving the constitutional right of privacy. Footnote 1 of the opinion expressly states that there was no issue of the constitutional privacy right before our court when we considered the *Sanchez-Scott* case.

Second, the plaintiff's tort claim against the doctor himself for failing to obtain his patient's fully informed consent was not at issue before Judge Kuhl and this court. Ms. Sanchez-Scott's claim against the physician was to be litigated in any case even if the drug salesperson and his employer did not remain in the case.

Third, the *Sanchez-Scott* case involved some issues of first impression under California law involving the tort of intrusion as defined in the Restatement Second of Torts, section 652B which even as of this date have not been clearly defined with identifiable bright line rules by California courts. The California Supreme Court has described the tort of intrusion as involving "degrees and nuances to societal recognition of our expectations of privacy" and "relative" concepts. Much of the analysis in our decision was premised upon the 1881 Michigan Supreme Court decision of the *DeMay v. Roberts* (1881) 46 Mich. 160. In ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts.

Fourth, attached to complaint filed in superior court was a letter explaining why the drug salesperson was in the examining room during the breast examination. That letter explained that he was present because he was participating in an oncology mentorship program. The purpose of the program was to allow the salesperson to "better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office." In other words, the purpose of the mentorship program was to ensure better delivery of health care services to breast cancer patients. Under California law, in evaluating whether the tort of intrusion has occurred, a court must weigh the reasons for the intrusive conduct. When Judge Kuhl concluded that the mentorship program, which was designed to improve treatment for breast cancer patients, was a sufficient justification for allowing the drug salesperson to be present during the examination, she did not demonstrate bias or insensitivity. In fact, a strong argument can be made that she correctly assessed the competing societal interests the California



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Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred.

With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.

If either you or staff member have any questions, please do not hesitate to contact me. If you wish to have a copy of the *Sanchez-Scott* opinion sent to you or a staff member, please let my office know and I will insure that one is e-mailed or faxed to you immediately.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Paul Turner", is written over a faint, circular embossed seal.

Paul Turner
Presiding Justice

PT:tm

MARTIN M. BERMAN, ALC (No. 33283)
16055 Ventura Blvd., Ste. 900
Encino, CA 91436
(818) 986-8000

STEVEN W. MURRAY, APC (No. 41493)
16055 Ventura Blvd., Suite 900
Encino, CA 91436-2688
(818) 501-2277

FILED
LOS ANGELES SUPERIOR COURT

AUG 03 1999

JOHN A. CLARKE, CLERK

BY YVETTE GONZALEZ, DEPUTY

Attorneys for Plaintiff AZUCENA SANCHEZ-SCOTT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AZUCENA SANCHEZ-SCOTT

Plaintiffs,

vs.

ALZA PHARMACEUTICALS, a
business entity; ALZA CORPORATION,
a corporation; ROBERT MARTINEZ;
MONTY B. POLONSKY, M.D.;
DOCTORS GREENE & KOEHLER, a
California Medical Partnership; DOES 1
through 50, inclusive,

Defendants.

No.

B C214585

COMPLAINT FOR DAMAGES:

1. INVASION OF PRIVACY;
2. VIOLATION OF CONSTITUTIONAL RIGHTS (Art. I, §1, California Constitution);
3. NEGLIGENCE

Case assigned to
Judge C. KUHL

COMES NOW Plaintiff AZUCENA SANCHEZ-SCOTT (SCOTT) and for
causes of action against Defendants, and each of them, alleges as follows:

PRELIMINARY STATEMENTS

1. The wrongful acts and omissions upon which this action is based
occurred, in part, in the City of Los Angeles, County of Los Angeles, State of
California.

FILED
AUG 03 1999
LOS ANGELES SUPERIOR COURT
CLERK
BY YVETTE GONZALEZ, DEPUTY

1 2. Plaintiff is informed and believes, and thereon alleges, that at all
2 times relevant to this action ALZA PHARMACEUTICALS (AP) was and is a
3 California business entity, doing business in the County of Los Angeles, State of
4 California. Upon information and belief, ALZA CORPORATION (ALZA) was and is
5 a foreign corporation, doing business in the County of Los Angeles, State of
6 California. Hereinafter AP and ALZA are collectively referred to as ALZA. Upon
7 information and belief, Defendant ROBERT MARTINEZ (MARTINEZ) is an
8 individual who is a California resident. Upon information and belief, MONTY
9 POLONSKY, M.D. (POLONSKY) is an individual residing in the County of Los
10 Angeles, State of California, and is a licensed physician having his principal place of
11 business thereat. Upon information and belief, DOCTORS GREENE & KOEHLER
12 (G&K), is a California Medical Partnership, having its principal place of business in
13 the COUNTY of Los Angeles, State of California. POLONSKY is an employee,
14 partner or associate of G&K.

15
16 3. The true names and capacities, whether individual, corporate,
17 associate, or otherwise of the Defendants named herein as DOES 1 through 50,
18 inclusive, are unknown to Plaintiff who therefore sues said parties by such fictitious
19 names. Leave of Court will be asked to amend this Complaint to insert the true names
20 of those Defendants by such fictitious names when they have been ascertained.
21 Plaintiff is informed and believes and thereupon alleges that at all times relevant to this
22 action, Defendants DOES 1 through 50 were and are corporations, partnerships, and
23 other business entities, and individuals who are attorneys, or insurance agents, brokers,
24 adjusters, or investigators who are subject to licensing in California to administer and
25 adjust and investigate claims under policies of property and liability insurance within
26 Los Angeles County, California, and who are not exempted from such licensing
27 provisions and are unlicensed but still perform and engage in such activities.
28

1 4. Plaintiff is informed and believes, and thereupon alleges, that each of
2 the Defendants designated as a "DOE" has committed or is responsible in some manner
3 for the acts herein alleged which caused Plaintiff's injuries, and each such "DOE" is
4 legally liable to Plaintiff for such damages so incurred by Plaintiff.
5

6 5. Said Defendants, and each of them, are sued as principals and/or
7 agents and employees of said principals. At all times herein mentioned, each
8 Defendant was the actual and ostensible agent, servant, representative, and employee of
9 each of the other Defendants. All of the acts and conduct of each of said Defendants
10 referred to herein was done in the course and scope of said agency and employment,
11 and with the concurrence, knowledge, consent, approval, and ratification and under the
12 direction and authority of each of said Defendants.
13

14 6. Upon information and belief, at all times, AP and ALZA were and
15 are companies who sold medicines, drugs and medical devices to physicians. Upon
16 information and belief, MARTINEZ was and is a salesman for AP and ALZA, whose
17 sales territory included the County of Los Angeles, and his customers included
18 POLONSKY, and G&K.
19

20 7. Upon information and belief, prior to October, 1998, ALZA desired
21 to increase its commercial sales of drugs to oncologists. As part of said commercial
22 profit-making program, ALZA created and promoted a "mentorship program" whereby
23 its representatives, including MARTINEZ, were directed to take part in private medical
24 activities of health providers who were customers of ALZA. As is stated in ALZA'S
25 April 12, 1999 letter (attached as Ex. A) MARTINEZ was in the course and scope of
26 his employment and activities for ALZA, in connection with and as part of said
27 "mentorship program," when the acts hereinafter alleged were committed.
28

1 8. Prior to June, 1997, Plaintiff was diagnosed as having cancer, and
2 POLONSKY, on March 7, 1997, in association with G&K, became her treating
3 oncologist. SCOTT'S breast cancer was treated with chemotherapy, under
4 POLONSKY'S direction, control and supervision, and she had developed, and placed a
5 great degree of trust, security and faith in POLONSKY.

6
7 9. On October 7, 1998, SCOTT went to G&K, told the receptionist she
8 was there for her appointment with POLONSKY, and was ushered into a private
9 examining room. SCOTT was wearing a skirt and blouse at the time. POLONSKY
10 entered the room, along with an unidentified man, who appeared to be a professional
11 man. This man was introduced to SCOTT as a person (ultimately identified as Mr.
12 MARTINEZ) who was looking at Dr. POLONSKY'S work. POLONSKY began his
13 examination by asking SCOTT some questions, and she began to feel extremely hot
14 and flushed, and carried a pocket fan in her purse for such occasions. She took the fan
15 out of her purse and began to fan herself in order to feel cooler. POLONSKY took the
16 fan from SCOTT and gave it to MARTINEZ, telling him that it would give him
17 something to do. MARTINEZ started fanning SCOTT, who became extremely
18 uncomfortable because MARTINEZ and POLONSKY both started to laugh. SCOTT
19 told MARTINEZ that she would fan herself, but MARTINEZ refused and said that he
20 would continue to fan her.

21
22 10. POLONSKY told SCOTT to get up on the examining table and told
23 her that he need to examine her underarms. SCOTT'S blouse was too tight for him to
24 put his hands inside same to conduct the examination, so SCOTT unbuttoned it.
25 POLONSKY then informed SCOTT that he needed to examine her breasts, and told
26 her to take her bra off. POLONSKY then told SCOTT to lie down on her back on the
27 examining table, with her knees up, and to pull down the waistband of her skirt so that
28 he could also examine her abdomen. SCOTT followed POLONSKY'S instructions,

1 and she remained nude from the abdomen up. All the meanwhile, MARTINEZ
2 remained in the room, he sat down beside the examining table, and he watched
3 POLONSKY examine SCOTT, who was nude from the abdomen up, and who
4 continued to become more uncomfortable.

5
6 11. As soon as POLONSKY concluded the examination of SCOTT'S
7 abdomen and breasts, SCOTT immediately got up and tried to cover herself because
8 she felt embarrassed and uncomfortable. POLONSKY then said that a mammogram
9 and chest x-rays were necessary. POLONSKY thereupon left the room, and
10 MARTINEZ followed him.

11
12 12. SCOTT dressed, exited the examining room, and on her way out
13 asked the receptionist, who was the man who had been in the examining room with
14 POLONSKY and her. The receptionist responded that the man was a drug salesman.
15 SCOTT told the receptionist that she just had to undress in front of him, and the
16 receptionist responded that that wasn't right.

17
18 13. SCOTT left G&K, and began to cry, feeling shame, humiliation,
19 anger, and a complete sense of abandonment by POLONSKY. When SCOTT returned
20 to her office, she called POLONSKY and asked who the man was, and why he was
21 present during the examination. POLONSKY said he was sorry he hadn't introduced
22 the man in response to SCOTT'S telling him that she had trusted him and that he had
23 violated her trust. The next day, SCOTT called and spoke to same receptionist, asking
24 for the name of the drug representative who had been present during her examination,
25 and the name of the drug company he was from. The receptionist put SCOTT on
26 hold, and transferred the call to POLONSKY. SCOTT asked for the man's name, and
27 the drug company he was from, and POLONSKY responded that his name was
28 MARTINEZ and he was from ALZA. POLONSKY again apologized.

FIRST CAUSE OF ACTION**(INVASION OF PRIVACY by SCOTT against all DEFENDANTS)**

14. Plaintiff incorporates by reference herein paragraphs 1 through 13 of the above Complaint, as though fully set forth hereat.

15. Commencing in June, 1997, and continuing through October 7, 1998, POLONSKY and G&K undertook to provide medical health services to SCOTT in the form of oncological services, including chemotherapy for SCOTT'S breast cancer. SCOTT became dependent on Defendants and reposed great trust and confidence in them as her physicians. This relationship lasted through approximately October, 1998.

16. In or about October 7, 1998, POLONSKY authorized MARTINEZ, without SCOTT'S consent or approval, to observe POLONSKY'S physical examination of SCOTT while she was partially nude. SCOTT expected, and was entitled to, private discussions and examination by POLONSKY.

17. On or about October 7, 1998, Defendants, and each of them, authorized MARTINEZ, ALZA'S drug salesman, to observe and take part in POLONSKY'S private examination of SCOTT, so as to proximately cause the injuries and damages complained of herein.

18. As a direct and proximate result of the acts and omissions of Defendants, and each of them, SCOTT was hurt and injured in her health, strength and activity, sustaining injury to her nervous system and person, all of which injuries have caused SCOTT to suffer great mental anguish and nervous pain and suffering. As a result thereof, SCOTT has suffered general damages in an amount according to proof.

1 19. As a further proximate result of the negligence of Defendants, and
2 each of them, Plaintiff incurred medical and related expenses in an amount according
3 to proof.

4
5 20. In doing the things herein alleged, Defendants, and each of them,
6 acted intentionally, with oppression, fraud, malice and with an intentional conscious
7 disregard for the rights, interests and safety of SCOTT. In addition, the conduct of
8 Defendants was intentionally despicable, entitling SCOTT to punitive damages,
9 according to proof at trial.

10
11 **SECOND CAUSE OF ACTION**
12 **(VIOLATION OF CONSTITUTIONAL RIGHTS**
13 **ARTICLE 1, §1 CALIF. CONST.**
14 **by SCOTT against all DEFENDANTS)**

15
16 21. Plaintiff incorporates by reference herein paragraphs 1 through 13
17 and 15 through 17 of the above Complaint, as though fully set forth hereat.

18
19 22. SCOTT, as a citizen and resident of the State of California, at all
20 times herein mentioned, was a member of the class of persons intended to be protected
21 by *Article 1, §1 of the California Constitution*. The provisions of *Article 1, §1* were
22 intended to prevent the type of injury and damage set forth herein, and to be enforced
23 by Plaintiff in a private right of action against said Defendants.

24
25 23. By the acts and omissions of Defendants as alleged herein, said
26 Defendants, and each of them, have violated SCOTT'S right to privacy by engaging in
27 the unauthorized and improper observation of personal and confidential medical
28 information for a purpose not in keeping with its purpose. POLONSKY and G&K had

1 the right to obtain medical information and to observe and examine SCOTT, but had
2 no right to allow MARTINEZ, or ALZA, to act as an intruder with complete access to
3 SCOTT'S private matters. Defendants had a duty to keep SCOTT'S personal health
4 matters private and confidential.

5
6 24. As a direct and proximate result of the acts and conduct of
7 Defendants, and each of them, SCOTT has suffered general damages, including the
8 infliction of severe emotional and mental anguish, distress and suffering, great anxiety
9 and worry, humiliation, physical injury and other incidental damages, including but not
10 limited to legal fees, professional fees, expenses other economic and consequential
11 damages and other necessary costs, the exact nature and extent of which are unknown
12 to Plaintiff at the present time, but which will be established according to proof at trial.

13
14 25. In doing the things herein alleged, Defendants, and each of them,
15 acted with intentionally, with oppression, fraud, malice and with an intentional
16 conscious disregard for the rights, interests and safety of SCOTT. In addition, the
17 conduct of Defendants, and each of them, was intentionally despicable, entitling
18 SCOTT to punitive damages according to proof at trial.

19
20 **THIRD CAUSE OF ACTION**

21 **(LACK OF INFORMED CONSENT - PROFESSIONAL NEGLIGENCE -**

22 **by SCOTT against POLONSKY, GREENE & KOEHLER**

23 **and DOES 1 through 10)**

24
25 26. Plaintiff incorporates by reference herein paragraphs 1 through 13, 15
26 through 17, and 22 and 23 of the above Complaint, as though fully set forth hereat.

27
28 27. Defendants, and each of them, negligently failed to advise or warn

1 SCOTT that MARTINEZ, acting on behalf of ALZA, was an intruder and stranger,
2 and not a physician or assistant health provider, so that his presence during SCOTT'S
3 examination was improper. Defendants, and each of them, induced SCOTT to not
4 protest or otherwise refuse to allow MARTINEZ to remain during her examination,
5 and while she disrobed, and discussed personal and private matters with Defendants,
6 and each of them. Had SCOTT been properly informed of the true status of
7 MARTINEZ, and ALZA, SCOTT would not have allowed, authorized or otherwise
8 had any contact of any sort with MARTINEZ, or ALZA, as occurred.
9

10 28. As a direct and proximate result of the acts and omissions of
11 Defendants, and each of them, SCOTT allowed MARTINEZ to remain present during
12 her examination, her medical discussions with Defendants, and her disrobing and
13 examination. SCOTT was not able to give a free and informed consent to
14 MARTINEZ remaining in the private examining room and doing the acts herein
15 alleged.
16

17 29. As a direct and proximate result of the acts and conduct of
18 Defendants, and each of them, SCOTT has suffered general damages, including the
19 infliction of severe emotional and mental anguish, distress and suffering, great anxiety
20 and worry, humiliation, physical injury and other incidental damages, including but not
21 limited to legal fees, professional fees, expenses other economic and consequential
22 damages and other necessary costs, the exact nature and extent of which are unknown
23 to Plaintiff at the present time, but which will be established according to proof at trial.
24

25 WHEREFORE, Plaintiff prays for judgment against Defendants, and each
26 of them, as follows:
27

28 A. For general damages according to proof;

1 B. For special damages, including attorney's fees actually incurred,
2 according to proof;

3 C. For punitive damages according to proof;

4 D. For costs of suit incurred herein; and

5 E. For such other and further relief as this Honorable Court may deem
6 just and proper in the circumstances.

7 DATED: August 3, 1999

MARTIN M. BERMAN, ALC
STEVEN W. MURRAY, APC

8
9 by:

STEVEN W. MURRAY, ESQ.
Attorneys for Plaintiff
AZUCENA SANCHEZ-SCOTT