KEYNOTE ADDRESS: A CONVERSATION WITH THE HONORABLE KATHRYN MICKLE WERDEGAR, JUSTICE OF THE CALIFORNIA SUPREME COURT

Panelists: Cheryl Lee Johnson and Kathleen J. Tuttle[1]

For the second year in a row it has been our good fortune to have a justice of the California Supreme Court as our keynote speaker. At this year's GSI we welcomed Justice Kathryn Mickle Werdegar. The justice agreed to a question and answer format. The questioners were two former chairs of the Antitrust Section, Cheryl Lee Johnson and Kathleen Tuttle. Johnson and Tuttle began the presentation with a brief introduction, followed by questions posed to Justice Werdegar. What follows is an edited transcript of the conversation.

Johnson: We're very pleased and honored to have with us Justice Kathryn Werdegar who has been on the California Supreme Court since 1994.

First, a few words about her background. After graduating from U.C. Berkeley, she went to Boalt Hall School of Law where she was one of two women in a class of 350. She was first in her class, and she was the first female elected Editor-in-Chief of the California Law Review. One of her classmates, Pete Wilson, our former governor, remarked that in the first semester, "everybody wanted to carry her books." After the first semester, "everybody wanted to see her notes."

After her second year, she married her physician husband, and they went to Washington, D.C. so that he could pursue his career. There, she enrolled in George Washington University School of Law where, once again, she graduated first in her class, was on Law Review and Order of Coif. While in Washington she joined the Civil Rights Division of the Department of Justice. Among other things, she worked on speeches for Attorney General Robert F. Kennedy, and assisted in writing an amicus brief urging the release of Martin Luther King, Jr., from jail.

Tuttle: After the Werdegars returned to California, Justice Werdegar became director of the criminal division of the California Continuing Education of the Bar, senior staff attorney with the California Court of Appeal and the California Supreme Court, and Professor and Associate Dean at the University of San Francisco School of Law.

In 1991, California had a new governor: Pete Wilson. His very first judicial appointment sent Werdegar to the First District Court of Appeal in San Francisco. That made her the only woman among 19 justices. When she was elevated to the California Supreme Court three years later, Justice Werdegar was only the third woman to serve on the high court. Justice Werdegar has long been on the radar of the California State Bar Antitrust Section. Among other things, in 2008, as many of you in this room remember, she contributed to the special issue of our *Competition* journal that celebrated

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1 Cheryl Lee Johnson is the Deputy Attorney General of the Office of the Attorney General's Antitrust Law Section in Los Angeles. Kathleen J. Tuttle is the Deputy-in-Charge of the Antitrust Section in the Los Angeles District Attorney's Office. Both panelists are former Chairs of the California State Bar Antitrust and Unfair Competition Law Section.

the Cartwright Act's centennial. We, and many Court observers, view Justice Werdegar as the go-to justice on UCL[2] and Cartwright Act cases. She wrote the majority opinions in *Clayworth*[3] and *Kwikset*[4].

Justice Werdegar, we're very lucky to have you here today. Thank you for coming and sharing with us your experiences.

Hon. Werdegar: Thank you very much. I'm delighted to have this conversation with two such distinguished women attorneys. I'm very happy to see all of you here today.

Johnson: Well, let me start. Now, you attended two law schools at a time when opportunities for women in the law were quite limited. Can you tell us what inspired you to pursue a law degree and where you saw that law degree taking you?

Hon. Werdegar: To answer this question and some others, you have to understand what time period we're talking about. It's a long time ago. I entered law school in 1959. So you have to dial the clock back.

As to the question of what inspired me to go to law school—

I was working at U.C. San Francisco Medical Center where I met my future husband. I had never heard of a woman lawyer. But there, I met two women physicians. This was an absolute revelation to me that women could do things beyond what, at the time, were traditional career paths if a woman was going to work at all. Those were teaching, nursing, secretarial, some others. But a woman physician?

Well, happily for all of you and me, I knew medicine was not going to be my path. But those women doctors inspired me to think more seriously about what I might want to do. I considered some graduate programs, but I ultimately chose law.

As to where I thought my law career was going to take me? I had no idea. The first thing was to go to law school and see how that worked out.

Johnson: You were first in your class at two prestigious law schools and Editor-in-Chief of the California Law Review. Did these stellar credentials open a lot of doors for you when you sought a job in the legal sector?

Hon. Werdegar: I started out in Washington where, I would say, my credentials meant something. I was not given the federal clerkship that I applied for, but I was accepted to the U.S. Department of Justice attorney honors program in the civil rights division. This was in the Kennedy administration, and it was a thrilling beginning to a law career.

Coming back to California, I can't say that my record noticeably opened any doors. I applied to the State Attorney General, and I applied for a couple of judicial clerkships,

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2 Acronym stands for "Unfair Competition Law."

3 *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758 (2010).

4 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011).

and nothing was forthcoming. Boalt called me one day and said there's a law firm in San Francisco that is contemplating hiring its first woman, and this is a quote: "If they can persuade the senior partner. Would you be willing to interview?" Nothing materialized.

Boalt called again to say there was an opportunity for research and writing with the California College of Trial Judges, which is now CJER.[5] By that avenue, I started my career, which evolved into one of research, writing and teaching. As it turned out, that was a career that was very congenial to me.

Johnson: When you joined the Supreme Court in 1994, I understand the halls were adorned with portraits of every Supreme Court Justice that had been appointed since 1850. Every one of those is, of course, a man except for two. And three years ago, with the appointment of our new chief justice, we now have a majority of women on the Supreme Court. How do you think the gender composition of the Court affects its proceedings and decisions?

Hon. Werdegar: Well, I know one impact it had: On the restrooms.

(Laughter.)

In other respects, I can discern no impact. I do recall one time when there were three women and the three of us dissented or voted in opposition to our four male colleagues. That case, a civil matter, had absolutely no implications for gender. So I just don't see that there's been any impact, internally. Externally, to those in the bar and to women students and attorneys, it might be a wonderful impact.

Johnson: You've spoken frequently about the role of women in the law. Can you share some of your thoughts about the progress that women have made, or not made, as the case may be, in the profession since the time you joined?

Hon. Werdegar: Going back to the early 1960s when I entered the profession, of course the changes have been dramatic. When I got out of law school, I believe it's accurate to say only three percent of attorneys in California were women. In my class at Boalt, we started out with four women, and only two of us actually graduated. My second year at Boalt, a woman professor joined the faculty. There were ripples of excitement among the students, as the idea of a woman professor was such a novelty. It was just a different time.

When I was appointed to the Court of Appeal, I would typically be the only woman in the courtroom when we had oral argument. One morning when I had been on the Supreme Court for several years, we had a case where women represented both sides. When we got off the bench, Justice Stanley Mosk made a comment that "this is quite a morning for females." Now, of course, such a thing would be unremarkable.

I'm told that currently more than fifty percent of law school classes are women. And as you all know, women in the law are doing and can do anything, including United States Attorney General, deans, justices of the Supreme Court, managing partners,

5 Acronym references the California Center for Judiciary Education and Research.

corporate counsel, sole practitioners, D.A.s, public defenders. All avenues are open. It's not exceptional to see women in those positions.

I do understand that there are still issues for women pursuing a career in law. And comments are made in the paper that there's not a sufficient percentage of women partners, perhaps, or managing partners. I think time is going to take care of that. And I also think, and hope, that firms are sensitive to the special needs of women who are still usually the primary caregivers in the family, as mothers and daughters. You want to retain, I would assume, women attorneys because they are among the best and most talented.

So, the changes I've seen have been almost incredible.

Tuttle: It's interesting that all six women who have been appointed to the California Supreme Court came from government service backgrounds to one extent or another, and that possibly reflected the more limited opportunities in the private sector going back in time. Does that background give justices a different judicial outlook than those from, say, the private sector?

Hon. Werdegar: I would back up a little bit and say studies have suggested (not just in my Court but generally) that many women justices that were appointed did have government backgrounds, and the supposition was maybe that did reflect more opportunities in government service. As to whether attorneys from government service bring a different perspective, I'm not sure that's true. A government attorney might bring a broader perspective on an antitrust question or a criminal question because, serving in the government, you may have broader exposure than someone who represents individual clients. But I think you do come to the bench with the perspective that you've been advocating in your prior practice life. And, of course, you understand when you assume the bench that you put that perspective aside. I would say that an array of different perspectives on the bench is all for the better in the shaping of the law.

Tuttle: For well or ill, you are among a room full of litigants here today, some of whom have sought or will seek review of the California Supreme Court. Last year the Court received more than 4,000 petitions for review, yet issued 87 written opinions. What is the Court looking for in considering whether to accept a case? And are there specific things a petitioner can do to improve chances for review?

Hon. Werdegar: Not so long ago, I would say to audiences that we get 10,000 petitions a year, and we can only accept 2 or 3 percent. That the numbers have dropped is in large part a reflection of the funding crisis in our courts. You're right, that we only grant a small percentage of cases, and we recently have issued about 87 opinions. We used to issue about 110 when we had a full complement of justices. Our former chief, Ron George, was always proud to point out that although we have seven justices, our output was far greater than the United States Supreme Court with their nine justices. One wonders what they are doing. Well, we know they go abroad during the summer.

(Laughter.)

Hon. Werdegar: And we never close. So what are we looking for? Well, the first thing you want to do if you want the Court to take your case is get your petition on the A list. You all know we have an A list and a B list. It used to be a secret, but it's not anymore. That procedure is published. We meet at conference every Wednesday morning at 9:00, to vote on petitions for review, whether to grant or deny. The A list are the petitions that we talk about. The B list (as the former chief calls it in his wonderful book), is the consent agenda. We have central staffs who write conference memos on every petition. And the cover sheet tells us what the issue is, who the trial court judge was, who the Court of Appeal was, what the Court of Appeal held, who is petitioning, and the significance of the issue. So the cover sheet, which can continue on a second page, is really very valuable. Our very experienced central staff separates these petitions into the B list and A list. If a justice wants a B list petition to go on the A list, he or she can say so and that change will be made.

So what determines which list a case is on? I think you all know the rules. First thing is: Is there a published conflict among the courts of appeal? That's really one of the major things we're here to do, to resolve conflicts so that the law is clear. And I said, "published" conflict because you all know that unpublished opinions cannot be precedent. But don't be discouraged because if there are unpublished cases that are in conflict, even though you can't cite them in argument, you can tell us they exist. It does make us realize that the courts need guidance even if they are not publishing their conflict. So we want to straighten that out.

The other consideration is whether it's a significant issue of statewide importance. And you have to persuade us that although there may not be a conflict, as the highest court in the jurisdiction, we should address this issue. It has a broad impact beyond the parties. How do you bring that to our attention? This is where amicus *letters,* supportive of a review, can be very helpful. I'm not talking about another attorney who has a similar case who may want the issue resolved, especially her way. I'm talking about larger entities—trade unions, employer groups, hospitals, drug companies—large parts of the public that are impacted by this issue and really would appreciate our resolving it.

So those are the two ways that your petition will be placed on the A list. Now, sometimes you might think that your petition met those criteria, so why was it not granted? One reason is the Court might conclude that it's a little premature. We often hear around the conference table on a Wednesday morning, "Let's let the issue percolate. Let's get a little more input from our courts of appeal and get the benefit of their reasoning."

A major injustice will not really carry the day. Once in a very rare while, we will do a rescue mission where the injustice seems so egregious that we'll take the case, but this is an exception. As you all know, the courts of appeal correct for error. We cannot do so given our resources and how extensive the judiciary is in the State of California.

Tuttle: When it comes to preparation of a merits brief, your colleague Justice Goodwin Liu said: "Do let perfection be the enemy of the good." What makes for a persuasive or effective brief? And are there any approaches or styles that you would recommend?

Hon. Werdegar: Did my esteemed colleague explain what he meant?

(Laughter.)

Tuttle: He probably did, but I don't remember it.

Hon. Werdegar: In any case, I will tell you what I think many of us would agree would make an effective brief. First of all, focus on the important issues—two or three of them. Don't give us a scatter-shot brief. There may be a lot of things you, the petitioner, don't like about the Court of Appeal opinion, but please focus on the important issues. You don't want the wheat to get lost in the chaff.

Give us your strongest possible presentation of the authorities that are in your favor. This would include cases, certainly in the State Court of Appeal, but also those out of state and law review articles. We do conduct our own research, but point us in the direction you want us to go.

Scrupulous accuracy in recitation of the facts and characterization of your authorities. I know I needn't tell this group that your credibility is the coin of your realm. What I mean is, if a brief shades, misstates the record or what a case holds, you've lost your reader. Your credibility is so important.

Avoid excessive footnotes. I know the type is smaller and the lines are closer so maybe you get more pages that way, but avoid excessive footnotes.

Avoid hyperbole or emotionalism. Respond to your opponent's points. Now, when I say avoid hyperbole or emotionalism, I don't mean to ignore policy arguments. Although we classically say that policy is for the legislature, not the courts, we are concerned about the implications of our opinions, so you're free to mention the policy implications.

If you abide by those classic rules, you will write an effective brief. Make it as short as you effectively can.

Johnson: You've touched on the importance of the amicus briefs. And in a lot of the matters before the Supreme Court, we see a dozen, sometimes scores of amicus briefs. Do the justices actually read them? And what would you recommend to make that amicus brief more appealing and more likely to impact the decision to put it in the A pile or the B pile?

Hon. Werdegar: Well, by the time we get the actual briefs, the case has been granted. As I say, when you're writing an amicus letter in support of review, that doesn't have to be extensive. In fact, please not. As for amicus briefs, I recently saw a photograph in an article, either the *Daily Journal* or other publication, about how to make your briefs effective. It depicts an attorney or one of the justices, you can see only his shoes, and he's drowning in paper, the amicus briefs.

You're right that sometimes we receive an enormous amount. Some amicus briefs are useless, and some are very helpful. The very helpful ones are perhaps less usual than the ones that are useless, but I'll tell you what the helpful ones contain.

They are ones submitted by associations or entities that are concerned about the statewide importance of the issue, and that perhaps give the Court a different perspective or a fresh perspective on the implications of a rule in the case, one that maybe the parties haven't mentioned. The parties' interest can very well be different than an amicus interest. On occasion, we will find an amicus point of view or analysis to be what the Court ultimately wants to adopt, and it's not one that the parties necessarily wanted us to adopt. So a different slant on the issue, a statement of the impact of the opinion either way, can be very important. Fresh authorities are also useful.

What's useless are what we call the me-too briefs where the amicus just echoes what the parties said or what other amici said. If your point of view is the same as other amici, then join together because otherwise there is a lot of paper.

Sometimes we get the sense that amicus briefs are written by organizations who want to go back to their supporters and cite in their newsletter or the annual report that they participated in resolving the case. That's not too helpful to the Court.

Do we read them? That would depend on the justice's interest or whether he or she feels the need or has the time available. Our staff attorneys read every single one of them. So they are definitely read.

Johnson: Over the last 20 years, you've heard a lot of oral argument before the Supreme Court. Could you share some of your ideas for "must do" and "must not do" for appellate advocates in oral argument?

Hon. Werdegar: Well, I'm sure no one in this room needs that kind of guidance.

Johnson: But they would appreciate it.

Hon. Werdegar: It's very hard to be original on that subject, but I would be happy to give you my thoughts. On the "do" side: Anticipate interruptions. You all know the old adage that there are three oral arguments: The one you plan and prepare, the one you actually give, and the one afterwards you wish you had given.

So anticipate interruptions. Answer a justice's questions. Now, I know if you're standing before us and you're making this beautifully shaped, focused argument, and some justice says, "Counsel," and asks a question, you might think, "where has she been? I just said that," or you might think that's not the point. You don't want to stop. But you have to.

Sometimes attorneys—and as a member of the bench of course I like this—will say "Excellent question..."

(Laughter.)

Sometimes one's colleague's questions can be annoying to oneself because you want to hear what the attorney is saying at that moment, and it's interrupted. But that's how it goes. Answer the questions. Don't say "I'll get to that later."

Recognize softballs. Sometimes members of the Court will throw you a question that's meant to help you. Attorneys just don't anticipate this. They can't believe it, so they

are in their adversarial mode and get all tangled up in this friendly question, whereupon the justice will sometimes say "it was supposed to be a softball; you know you can say yes or no."

Of course, be prepared. Be prepared with record citations, if they seem to be at all relevant to the legal point that you're arguing. Know your cases; know your opposition's cases. Concede when you have to, but don't concede when you don't have to. Of course I can't tell you when it's one and when it's the other; but just concede if you have to, but don't give away what you don't have to.

If you have authorities against you, be prepared to distinguish them; if you can't distinguish them, be prepared to say why they were on the wrong track.

Do think of the larger ramifications of your case. As I said, we're not there to correct error. We're there to announce rules of law that will guide people in the future and will operate going forward. Often a justice on the bench will say: What rule would you have us fashion? And attorneys might be so busy arguing their client's case that they haven't really thought of how they can articulate a general rule that will be good for their case.

On the "don't" side: Don't share argument unless you have to. In the early days on the Court we might have—because we hadn't thought it through—amicus counsel argue three minutes at a time. It was useless to the Court. So we have adopted a rule. I think the minimum time you can yield to another attorney is 10 minutes. But don't share it unless it's of clear benefit to you. For instance, you might want to argue the particulars of your client's case and then yield time to someone who is looking at the larger ramifications of the issue. You want them to present the larger perspective.

But attorneys will also stand up and say I'm So-and-So, I'm going to argue points A, B, C; my colleague is going to argue D, E, F. Well, the justices might want to be talking about D, E, F while the attorney is arguing A, B, C. The Court prefers if we don't have a disjointed argument. So don't do it unnecessarily, even though in some cases you might think it's the most effective and appropriate way.

Don't talk over a justice. Again, this goes back to the questions. When these questions come, don't keep going. You have to stop. "Yes, Your Honor."

And, finally, I know none of you would ever do this, but don't address the bench "You guys." It has happened. Justice Kennard one time responded, "Does that include me?" Of course you all know you're not arguing to a jury, you're arguing to an appellate court. And we do notice the difference.

When I started out, there really wasn't a specialty bar handling appellate law. Some individuals were starting to specialize, some pioneers. Now, of course, there's a well-established large appellate bar, and we benefit from that.

Sometimes we'll get off the bench and say, "He must have been the trial attorney."

(Laughter.)

So I hope that's helpful to all of you.

Johnson: Recently, California's 90-day rule for judicial decisions has been criticized. One UCLA professor has said that it really diminishes the importance of oral argument and effectively forces the judges to confer prior to oral argument and even draft tentative opinions before oral argument. Do you have a reaction to that? Do you find your own decisions are persuaded by oral argument?

Hon. Werdegar: Well, Professor Bussel, I believe it was, indeed took real umbrage with our procedures, which are described as front-loading. It does do what he claimed. It forces us to look at the case before oral argument. It forces us to consider our views, to consider the tentative opinion of the assigned justice, and to come to a tentative conclusion. Yes, it does.

I don't think that's a bad thing. I disagree with his concerns and criticisms. I think we arrive on the bench a more focused group. We know what the tentative is; we know where our colleagues stand and I know where I stand. Sometimes, of course, I'm not sure and that's part of the value of oral argument. But we know where each of us tentatively stands. That gives counsel the best opportunity to address the Court's concerns, to correct misunderstandings that emerge as the Court asks questions. As a member of the bench myself, oral argument gives me the opportunity to test some of my tentative thoughts and to address some of my concerns.

I will often ask a question about something that's troubling me, and I'll get an answer that will assure me that where I think I'm going is the right way to go. Any one of us will often ask a question that will challenge what we know one of our colleague's points of view is, and we hope the attorney will illustrate to that colleague how wrong he or she is.

We are considered an active bench. Not every case is the same. Sometimes we sit there like dullards, but sometimes I wish that the 30 minutes for each side could be greatly extended. So I disagree. Compare our Court to the United States Supreme Court's oral argument. As I understand it, when they come to the bench, they don't know where their colleagues stand and don't know what the tentative resolution is going to be. And I'm told they often just talk at each other, barely giving counsel an opportunity to put forth his or her position.

Whether that's an accurate characterization, I can't say. But I do disagree with the idea that our so-called front-loading makes oral argument just a charade. Absolutely not.

Part of your question was: After oral argument, what has the impact of oral argument been? Well, rarely does oral argument completely turn around the tentative majority opinion so that the attorney that came in to argue, possibly winning, loses. Rarely. I was on the bench one time when the assigned justice got up and we went into the conference room and he said, "Whoa." We completely reversed our case. So argument can do that. But not often.

Oral argument can change the shape of the opinion. We might add something; we might take something out. It can change the mind of a justice who was with the opinion who then might write separately, or it can bring into the fold a justice who was doubtful. So enjoy your oral argument and know that it's beneficial to the Court.

Hon. Werdegar: I'll tell you how our post-argument conference goes. We get off the bench, and we immediately conference. And this has been a rigid rule. We often have lunches scheduled in advance with one lawyers group or another, especially in Los Angeles. Even though they are waiting for us, we don't yield to anything until we resolve that morning's cases. The assigned justice after oral argument will speak first. "Well, I haven't heard anything new," might be said. But that's not the end of it. If there is somebody in a dissent mode, that individual speaks next and presents his or her view. And then we go around the table, each justice speaking in turn. Sometimes there will be a string of "concurs." Other times, we'll discuss for 40 minutes.

So it's not always the same. It really depends on the case. And the chief speaks last. That's our tradition.

Tuttle: We've gotten into this just a little bit in your last answer. Do you and your colleagues influence each other during conferences after oral argument? We're really curious, can decisions be significantly altered in these conferences?

Hon. Werdegar: Occasionally they can. We go around the conference table and everybody gets a chance to talk and air their concerns or their views. Rarely at that stage does one justice, speaking to an issue, change everybody's mind, but he might change a colleague's mind or change the analysis of an issue. Anything can happen. Our pre-argument views are tentative, notwithstanding that we have a calendar memo and our colleagues' preliminary responses. The discussion can be very valuable, and it might prompt a justice to change his or her mind.

Tuttle: When you were appointed to the Supreme Court in 1994, the pundits expected you to follow a largely conservative course with flashes of independence on women's issues. Yet fast forward to 2012, a Stanford study classified you as more liberal than the average California justice. Have your views evolved over the last two decades, or has society changed the way we define liberal and conservative? Or maybe some of both?

Hon. Werdegar: Well, I take each case as it comes, so I can't agree that I have some general views that might have changed. I appreciate your recitation of how I was characterized when I was appointed. At that time, I had a limited track record. I was largely an unknown quantity, and I think a lot of what was written about me was speculation, supposition, and so forth. I've now been on the Court 20 years, and I have a record. It's there for people to extract whatever they want to extract as to what my views are. But as I say, I take each case as it comes. I am who I've always been.

Tuttle: The work of a California Supreme Court justice is, one might say, rather rarefied and far above the fray of trial courts and the gritty disputes they handle. Some critics might even say that justices' heads are in the clouds, consumed with precedent, arcane footnotes. Shortly before your re-election in 2002, you were quoted as saying: "I want to understand the impact of what we're doing. I start with the law, but I'm never blind to the human element," which I happen to think was a very nice statement. Can you expand on the role that the human element plays in our high court's decision-making?

Hon. Werdegar: I'll try, but actually there's no definitive answer. I think every justice is concerned about the real-world impact of our decisions. I mentioned amicus

can help us there. But I've often been frustrated that we send these opinions out, and I, at least, don't know how it really worked out for the parties, for the industry, for the entity, for the interested personality, unless you read a law review article or the *Daily Journal* tells you what you did and how it will work. And they are not always right down the road. So that is a frustrating part of our work.

I think the human element is part of the real-world impact. One can be sensitive to the human element—we are impacting the lives of people—and that might alter the lens through which you're looking at the law and where the law should go. But in the end, it has to be the law that drives the resolution of the case. The balance between those two is really sort of existential, and I don't think quantifiable.

Johnson: I need to give you a soft ball. Can you tell us what decisions you're most proud of?

Hon. Werdegar: It's interesting. I reflected on that. I wouldn't say "proud" because I don't think I bring pride to it, but the ones I'm most fond of, interestingly, without doing in-depth research, the ones that come to mind are some of my dissents. Now, why would that be? Well, if you're going to dissent, you're parting from the company of the majority. So you really have to think: Why am I doing this? Also, is it worth the resources? Because where does a dissent go? You hope maybe a future court or legislature or generations will see it your way. But basically, dissents usually just end where they are in that opinion.

My dissents are the opinions that I have felt strongly about. I'll name two or three of them. One was the *Merrill v. Navegar*[6] case, the 101 California shoot-out case. You might be familiar with it. Used in that massacre were TEC9/ DC-9s. Rapid-fire assault weapons. The majority viewed the case through the legislation that governed design defect. And the legislature basically immunized manufacturers from design defect in this area. I viewed it through the tort of negligent marketing. My opinion, if any of you have read it, said that the gun was marketed to the general civilian population, and it was marketed as being a rapid-fire assault weapon, rapidly assembled, fingerprint resistant. The point of my dissent was that there was no place in the civilian population for this kind of a weapon. There may be in law enforcement or the military. But there arguably was some negligence on the part of the manufacturer in not being more discriminating in who its market would be. That's one case.

Another one: The recent case *(Iskanian)*[7] which related to the impact of the FAA (Federal Arbitration Act), on class-action waivers in the area of employment and labor disputes. I dissented there saying that, yes, the FAA does allow class action waivers, but the majority is overlooking the federal law on collective bargaining and the rights of workers to act collectively, which I don't think the FAA trumps.

Then there was the cell phone case *(People v. Diaz)*.[8] I was rather fond of that dissent because the classic rule that we all know, the search incident to arrest exception to the

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6 *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465 (2001).

7 *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

8 51 Cal. 4th 84 (2011).

warrant requirement, just didn't seem to fit the kind of search that occurred there given that there's so much personal data on a cell phone. I said a new paradigm is probably required. It was gratifying that the United States Supreme Court, although not citing my case, came to a similar conclusion. But I don't always expect to be vindicated by the United States Supreme Court.

(Laughter.)

Johnson: You're up for re-election in a few weeks. I think a lot of us remember Justices Bird, Reynoso, and Grodin, who were ousted in 1986 as a result of a fairly brutal campaign that targeted specific rulings of theirs. Do you have any views on re-election campaigns? And do you think they have a chilling impact on the Court's rulings?

Hon. Werdegar: Do I have any views? Yes, I do. I think California so far has been largely immune. Because ours is a retention election, we have been spared some of the acrimony, the out-of-state money, and the disparaging campaigning that occurs in contested elections in many other states. I think our system is excellent because it does allow the electorate to vent if they really are exercised about something, but the judiciary is not politicized by contested elections.

Johnson: What about a chilling impact—

Hon. Werdegar: I'm not the first to think about that. Justice Otto Kaus spoke about the dilemma judges face when deciding controversial cases while facing a retention election. "It's like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." His point was you don't want to think about it, but you can't help but do so. I doubt that he ever let it impact his decisions. I think of any justice I've ever known, it would have no impact in their ruling on a particular case.

Johnson: News reports of the appointment of Mariano-Florentino Cuellar has emphasized that he kind of represents an infusion of youth on the Court that has been more chronologically privileged and more moderate.

(Laughter.)

Do you think age brings a different perspective to the Court?

Hon. Werdegar: I anticipate that it certainly will. But more broadly, any new justice brings changes to the Court, brings a new perspective. Youth is certainly a perspective, whatever that entails. Professors have a different background. We will have two at least. We're waiting for a third appointment. They certainly have a different look at the law than practitioners, perhaps. They have been examining, approaching the law from a more abstract, academic point of view. This Court is going to have three new members early next year, and it's going to be very, very interesting. And I'm looking forward to seeing how that plays out.

Tuttle: You obviously can't discuss any pending cases but thinking down the road a little bit more broadly, what do you think might be some of the most prominent legal issues in California the next few years?

Hon. Werdegar: First, I'm going to mention privacy. I've just read this morning about drones that can float around your house and see what you're doing inside. Drones, cell phones. The Internet. Tracking of your activity on the Internet. Dissemination of the private information that you're required to give to your bank or your medical provider. The privacy issues are vast.

Alternative dispute resolution. The impact of mandatory arbitration and the restrictions that are imposed through mandatory arbitration. Consider what that is going to do to our civil courts and our right to jury trial.

Water law. Water law is going to be of major significance.

CEQA[9] cases I think are with us forever. And I think antitrust issues will continue in the near future.

Tuttle: Thank you.

Johnson: Now, we've been wondering what a Supreme Court justice does to mount a reelection campaign other than asking your spouse to vote.

(Laughter.)

Can you tell us what you've done, or do you have anything you want to tell this group of voters?

Hon. Werdegar: Well, unfortunately, twelve years ago I did mount a campaign. It was a very painful experience. You raise money, and how do you raise money? You give speeches to various groups. And where does that money go? This is a statewide election. It goes to mailers. I don't know how many of you get mailers in your box, Citizens For an Effective Democracy, etc., etc. You pay to have your name on mailers to counter the negativity that may come from other quarters.

It's unusual for an appellate justice in this state to mount a campaign. I'm not mounting a campaign this time. Anybody who is interested, please, find your way to the bottom of the ballot —because I think we are at the bottom of the ballot—and if you can find it in your heart to vote "yes," do so. For all the justices, unless you have reason to believe otherwise, give them a yes.

Johnson: Okay. Our final question is a real hard ball: Do you have a favorite baseball team? And who is going to win the World Series?

Hon. Werdegar: Now, Cheryl, I actually do recognize a soft ball when I get one. The Giants. I lost faith much earlier in the season. I thought they were having a bad year. But it's going to be the Giants. And won't that be wonderful for us?

(Applause.)

EMCEE: Thank you, conversationalists. And especially thank you, Justice Werdegar. We very much appreciate your informing us and enlightening us.

Hon. Werdegar: It's been a great pleasure. Thank you.

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9 Acronym stands for the California Environmental Quality Act.