Case No. S269212

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA MEDICAL ASSOCIATION,

Petitioner,

v.

AETNA HEALTHCARE OF CALIFORNIA, INC. D/B/A AETNA U.S. HEALTHCARE INC.; and AETNA HEALTH OF CALIFORNIA, INC.,

Respondents.

After a Decision by the Court of Appeal
Second Appellate District
Case No. B304217
(Los Angeles County Superior Court No. BC487412)

PETITIONER CMA'S RESPONSE TO AMICUS BRIEFS

Service on the Attorney General and District Attorney required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

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Pursuant to California Rule of Court 8.520, subd. (f), Petitioner California Medical Association ("CMA") submits this combined response to the ten amicus curiae briefs filed in this matter.[1]

INTRODUCTION

All amici in this case acknowledge, as do the parties, that an organization that has suffered an injury in fact and a loss of money or property has standing to bring UCL claims. (Bus. & Prof. Code, §§ 17201, 17204.) Aetna's three amici, however, argue that an organization's decision to reallocate institutional resources to redress harms caused by a defendant's unfair or unlawful business practice cannot satisfy the UCL's standing requirements, principally because they contend that would interfere with Proposition 64's general goal of restricting standing.

Those amici (the Chamber, CAHP, and the Chefs) ignore Proposition 64's text and accompanying ballot materials, just as

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[1] Amicus briefs in support of Respondents Aetna Healthcare of California, Inc. and Aetna Health of California, Inc. (collectively "Aetna") were filed by the Chamber of Commerce of the United States of America ("the Chamber"), California Association of Health Plans and Association of California Life and Health Insurance Companies ("CAHP"), and Chefs Ken Frank and Sean "Hot" Chaney ("the Chefs"). Amicus briefs in support of Petitioner CMA were filed by the California Attorney General, the City Attorneys of San Francisco, Oakland, San Diego, and San Jose ("Local Prosecutors"), the American Medical Association ("AMA"), Animal Legal Defense Fund ("ALDF"), AIDS Healthcare Foundation ("AHF"), Consumer Watchdog, and five labor organizations ("Labor Organizations").

they ignore the UCL's broad remedial purpose. The economic injury requirement that Proposition 64 added to the UCL expressly incorporated federal injury-in-fact case law. Nothing in the text or history of the Proposition suggests that the voters intended to deprive organizations of their ability to pursue UCL claims if they suffered such injury in fact and the injury was economic in nature. To the contrary, the ballot materials affirmatively assured voters that organizational plaintiffs would continue to be able to bring lawsuits challenging conduct that frustrated their institutional missions.

The Chamber separately contends, without any basis in the text of Proposition 64, that the initiative's causation requirement limits the plaintiffs entitled to pursue a UCL claim only to those that engaged in a "direct" business transaction with the defendant. (See Chamber Br. at 3.) While Proposition 64's ballot materials expressed concern about "uninjured" plaintiffs bringing freestanding UCL claims against defendants whose challenged conduct had no impact on them, the initiative addressed that concern by imposing the economic-injury and causation-in-fact requirements, not by demanding that every UCL plaintiff must establish, in addition to those two requirements, a direct business dealing with the defendant. (CMA Reply Br. at 31-32). To the extent the Chamber is suggesting that a plaintiff must have purchased or used a defendant's goods or services to have standing, nothing in the text or ballot materials for Proposition 64 supports such a conclusion. Nevertheless, the record here demonstrates that there were substantial direct interactions

between the CMA and Aetna in which CMA attempted to redress the imposition of Aetna's illegal policy before initiating this action (See, e.g., JA 959, 1155-1156).

Aetna's amici also insist that CMA's construction of Proposition 64 would eliminate all meaningful limitations on organizational standing. Yet they make little or no effort to engage with CMA's cited cases, which demonstrate the factors courts have relied upon to determine when an organization's diversion of resources to counter conduct that interferes with its mission may establish injury in fact for purposes of satisfying Proposition 64's standing requirements. The requirements under state and federal case law for establishing organizational standing based on the diversion or expenditure of institutional resources are longstanding. They require an organizational plaintiff to show that: (1) the defendant's challenged conduct interfered with the organization's stated mission and purposes; (2) the organization's expenditure or diversion of resources was in response to that conduct (rather than merely a continuation of the organization's existing resource allocation); and (3) the resources were not expended exclusively on litigation activities or litigation preparation. (See CMA Opening Br. at 28–30.)

The record demonstrates that CMA has met these requirements. Aetna's Non-Par Intervention Policy interfered with CMA's mission and purposes, and CMA suffered an economic injury in fact when, *inter alia*, it diverted between 200 and 250 hours of paid staff time and related institutional resources from work in furtherance of its mission to counter the

adverse impacts of Aetna's challenged policy on CMA's mission and members. (JA 958–960, 1150–1152, 1155–1159; CMA Opening Br. at 31.)

Instead of responding specifically to the history and application of these established safeguards or their application to CMA, two of Aetna's amici mostly focus on the burdens they believe the UCL has imposed on small businesses (see Chefs' Br. at 4) and the health insurance industry (see CAHP Br. at 7). But those are policy arguments directed against the UCL in general, not statutory construction arguments designed to elucidate the intended meaning of Proposition 64. General grievances about past or threatened UCL litigation cannot transform the text of Proposition 64, as adopted by the voters, into a means of addressing specific policy disagreements with the UCL.

CMA's previous briefs also demonstrated that, under Proposition 64, it was entitled seek public and private injunctive relief in this case without having to satisfy the class certification requirements of California Code of Civil Procedure Section 382, because a plaintiff seeking such relief is not acting in a "representative" capacity within the meaning of Proposition 64. (CMA Opening Br. at 37-48; CMA Reply Br. at 36-39.) None of Aetna's amici address that argument so we do not discuss it further, except to note that as we have previously shown, and as the California Attorney General further explains, "the court may order[] injunctive relief that would benefit non-parties; doing so does not make the UCL claim representative in nature" or

require CMA to bring this case as a class action. (Attorney General Br. at 26; see also *id.* at 27-31.)

ARGUMENT

I. Organizational Standing Based on Diversion of Institutional Resources Is Consistent with the UCL's Standing Requirements Under Proposition 64

"[U]nder the UCL [as amended by Proposition 64], standing extends to 'a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.' " (*Kwikset v. Superior Court* (2011) 51 Cal.4th 310, 321–322, quoting Bus. & Prof. Code, § 17204). All amici acknowledge, as does Aetna, that an organization that has suffered an injury in fact and a loss of money or property has standing to bring UCL claims. (Bus. & Prof. Code, § 17201 ["associations and other organizations of persons" are "persons" entitled to pursue UCL claims]; see, e.g., Chamber Br. at 8.) The principal issue in this case is therefore whether CMA's expenditure of staff time and other organizational resources to respond to Aetna's implementation of its Non-Par Intervention Policy constitutes the type of injury sufficient to meet the injury and economic loss requirements of Proposition 64.

As this Court held in *Kwikset*, Proposition 64 established a "simple test": a party seeking to establish UCL standing must show an economic injury that qualifies as an "injury in fact," and that economic injury must have been "caused by" the defendant's alleged unfair business practice. (51 Cal.4th at 322.) An organization that establishes that it expended organizational resources as a result of an unfair practice, including resources

that would otherwise have been dedicated to other projects, satisfies both prongs of that test.

A. Diversion of resources as injury in fact

As CMA and its supporting amici have shown, this case is controlled by the plain text of the UCL, as amended by Proposition 64. By using the well-defined term of art "injury in fact" in Proposition 64, "the drafters and voters intended to incorporate the established federal meaning" of that term. (*Kwikset*, 51 Cal.4th at 322; see also Prop. 64, § 1, subd. (e) ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."].)

Ignoring that the preamble to Proposition 64 expressly incorporates federal injury-in-fact case law arising under Article III of the U.S. Constitution, the Chamber insists that this Court should not consider *any* federal case law in determining the intended scope of UCL standing under Proposition 64. (See Chamber Br. at 11 & fn. 2 [complaining that "[a]lmost every case cited by Petitioner is a federal case applying Article III standing principles."].) While it is true that Proposition 64 made standing under the UCL more limited than federal court standing under Article III, it did *not* do so by changing the established definition of injury in fact but by limiting UCL standing to *economic* injury in fact. Stated different, the threshold inquiry under Article III *and* the UCL is whether the plaintiff has been injured at all, i.e., suffered injury in fact; while the UCL requires a further inquiry into whether that injury in fact is economic in nature. For the

threshold inquiry, Proposition 64 expressly endorsed the applicability of federal injury-in-fact case law.[2]

When Proposition 64 was adopted in 2004, it was well settled under federal case law that an organization's reallocation of resources from other institutional activities in response to a defendant's challenged conduct was sufficient to establish injury in fact. (See, e.g., *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 379; *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1124 fn. 3; *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899; see also Attorney General Br. at 24.) The federal injury-in-fact requirement incorporated by Proposition 64 therefore necessarily included the diversion-of-resources theory upon which CMA's standing rests in this case. As the AMA and other amici supporting CMA demonstrate, federal courts have continued to apply that same theory in finding organizational standing. (AMA Br. at 16, citing *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Vilsack* (9th Cir. 2021) 6 F.4th 983, 987–988, *cert. denied* (U.S. June 27, 2022) No. 21-

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[2] The Chamber completely misinterprets *Kwikset*'s warning that "[t]here are sound reasons to be cautious in borrowing federal standing concepts, born of perceived constitutional necessity, and extending them to state court actions where no similar concerns apply." (51 Cal.4th at 322 fn. 5; Chamber Br. at 11-12.) *Kwikset*'s warning was about state courts importing federal standing *limitations* on access to the courts where no state statute or constitutional provision requires such restrictions. Here, Proposition 64 created a new statutory standing requirement and expressly incorporated federal injury-in-fact case law into the required analysis. Incorporating federal standing case law in the manner required by Proposition 64 thus does not present the same concerns.

918, 2022 WL 2295243 ["[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." [Citation.]"].) An organization that has been injured in fact under Article III by having to divert resources to respond to the defendants' challenged policies or practices therefore has been injured in fact for purposes of Proposition 64 standing as well.

Aetna's amici mischaracterize this longstanding, non-controversial theory of standing as a scheme concocted by CMA and others to "circumvent the UCL's built-in standing limitation" (CAHP Br. at 7) that would "open the floodgates to any activist entity." (Chefs' Br. at 2). That alarmist rhetoric ignores that plaintiffs in federal court have long been permitted to prove injury in fact by demonstrating that they reallocated resources from one project to another in response to a defendant's challenged conduct. This same approach has been adopted by the California appellate courts as well. Most notably, in *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270 ("*ALDF*"), the First District Court of Appeal concluded that ALDF had established standing based on a factual showing that was materially indistinguishable from the showing that CMA made here. (*Id.* at 1279-1280; ALDF Br. at 13-14; see also CMA Opening Br. at 48-52.)

Several of Aetna's amici point to CMA's status as a membership organization and seem to argue that CMA is seeking to establish associational standing based on injury to its

members rather than organizational standing based on injury to itself. That characterization is plainly wrong and merely repeats the Court of Appeal's error. (*Compare* CAHP Br. at 18 [describing CMA's claim as a "representative UCL claim on behalf of" its members]; *and* Chamber Br. at 7-8 [suggesting that CMA's theory would allow necessarily representative claims] *with* CMA Opening Br. at 24-27; *and* CMA Reply Br. at 14-16.).) CMA has never asserted that UCL claims brought in a purely representational capacity, without evidence of injury in fact to the plaintiff itself, are permitted by Proposition 64.[3]

That confusion about the nature of CMA's claimed injury was one reason the Court of Appeal erred in its effort to distinguish *ALDF*. The Court of Appeal below recognized that a *non*-membership organization could establish standing on a diversion-of-resources theory, but because it mistakenly assumed that ALDF had no members, it distinguished *ALDF* as a case in which the plaintiff mut have suffered injury to itself because it had no members who could have been injured. (*Cal. Med. Ass'n v. Aetna Health of Cal. Inc.* (2021) 63 Cal.App.5th 660, 669.) That could not have been the basis for the Court of Appeal's standing analysis in *ALDF*. As ALDF explains in its amicus brief in this case, the Court of Appeal in *ALDF* was well aware that ALDF *was* a membership organization that that it had more 110,000

[3] Here, unlike in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, CMA's standing is based on evidence of its own direct organizational injury—a type of injury that the plaintiff in *Amalgamated Transit* tellingly did *not* assert or establish. (JA at 859-860, 1083-1085, 1196-1198, 1486-1487; CMA Opening Br. at 24-27).

members. (ALDF Br. at 20.) No meaningful factual distinction exists between *ALDF* and this case.

B. Diversion of resources as economic injury

An organizational plaintiff's diversion of economic resources (including staff time and salary) constitutes economic injury within the meaning of Proposition 64's "lost money or property" requirement. Aetna's amici largely ignore the text of Proposition 64 in arguing otherwise, perhaps because this Court has made clear that Proposition 64 did not "purport to define or limit the concept of 'lost money or property'" and has declined to "supply an exhaustive list of the ways in which unfair competition may cause economic harm." (*Kwikset*, 51 Cal.4th at 323.) Yet *Kwikset* and its cited cases provide many examples of economic harm that fully support CMA's showing that the loss suffered by an organization that reallocates its resources in response to a defendant's unfair business practices is an economic loss for UCL standing purposes. (See CMA Reply Br. at 16-18; Consumer Watchdog Br. at 20.) For example, those cases confirm that economic injury includes situations in which a plaintiff is "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary" (*Kwikset*, 51 Cal.4th at 323); and the catalogue of economic injuries approvingly cited in *Kwikset* included a case in which an organization showed standing through "lost financial resources and diverted staff time investigating case against defendants" (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854, citing *S. Cal. Housing Rights Center v. Los Feliz Towers Homeow. Ass'n* (C.D.Cal. 2005) 426 F.Supp.2d 1061, 1069.)

None of Aetna's amici challenge CMA's argument that injury resulting from diversion of resources looks nothing like *Kwikset*'s examples of *non-economic* injury, i.e., the sorts of injuries in fact that are *not* sufficient to establish standing. (See CMA Reply Br. at 17-18.) Those non-economic injuries include "recreational and aesthetic harms," "impairment of whale watching" and damage to "environmental interests." (*Kwikset*, 51 Cal.4th at 324 fn. 6.)

Aetna's amici rely on a misreading of Proposition 64's history and purpose as the basis for arguing against *any* application of diversion-of-resources standing.

As most amici discuss and all agree, Proposition 64 was enacted to stop so called "shakedown" lawsuits, in which a handful of lawyers filed thousands of UCL lawsuits against small business owners. (See e.g., AHF Br. at 15; AMA Br. at 9-10; Chefs' Brief at 4-5.) The goal of these lawyers and their firms was to force the businesses into quick monetary settlements and collect attorneys' fees. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 178 fn.10.) Aetna's amici contend that to allow organizational standing to membership organizations like CMA would undercut Proposition 64's purpose of eliminating uninjured persons' or organizations' ability to bring UCL claim on behalf of the general public without limitation. (See, e.g., CAHP Br. at 9 ["CMA seeks to create the type of standing the UCL sought to avoid."]; Chamber Br. at 7 ["Proposition 64 was enacted to preclude precisely this sort of "uninjured, volunteer plaintiff" from enforcing the UCL."].) This contention ignores the sharp

differences between the "shakedown lawsuits" Proposition 64 sought to eliminate and cases like this, where the plaintiff has a direct organizational interest in countering the defendant's challenged conduct and can point to specific economic harms that it suffered as a result of having allocated institutional resources to that challenge.

As the Labor Organizations and AIDS Healthcare Foundation amici have explained, the Proposition 64 ballot materials fully support CMA's position here by providing two examples of the types of UCL lawsuits that organizational plaintiffs could continue to pursue after adoption of Proposition 64. Those amici point out that the opponents of Proposition 64 asserted that the initiative would prevent "consumer groups from enforcing privacy laws protecting our financial information" and would prevent "health organizations from enforcing the laws against selling tobacco to children." (Petitioner's MJN, Ex. A at 41.) In response, the proponents of Proposition 64 reassured voters that the initiative "*would permit ALL the suits cited by its opponents*." (*Ibid.*, emphasis in original.)

The only way a consumer group or a health organization could bring these suits after Proposition 64 would be through organizational standing based on a diversion-of-resources theory, as here. After all, a defendant's disclosure of its customer's financial information would not cause economic harm to a consumer privacy organization unless it allocated resources to counter that disclosure, just as a company's sales of tobacco to children would not cause economic harm to a health organization

dedicated to protecting the medical well-being of children unless that health organization shifted resources in an effort to take actions to counter that conduct.

Consistent with these ballot materials, organizations like CMA, ALDF, the AIDS Healthcare Foundation, Consumer Watchdog, various labor unions, and others have appropriately limited their UCL lawsuits to cases—like this—in which they have a direct organizational stake and have suffered actual economic injury. (See, e.g., Labor Organizations Br. at 21-23; AMA Br. at 20.)

The broad, public-protective purposes of the UCL also support CMA's construction of that statute. The UCL is "a sweeping consumer protection statute" that serves a broad remedial purpose. (Local Prosecutors Br. at 8.) The Legislature enacted the UCL with the intent that it would "permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181.) The Local Prosecutors emphasize that they are constrained by limited resources to enforcing "only a subset of meritorious enforcement actions . . . that involve the most egregious practices and the broadest potential impact on the public." (Local Prosecutors Br. 11.) To limit the ability of private organizations to further their missions by pursuing UCL actions in cases where they incur economic harm responding to a defendants' unfair business practices by diverting organizational resources would surely undermine the UCL's broad remedial purposes.

All of Aetna's amici, particularly the Chefs, express concern that CMA's construction of Proposition 64 could result in a proliferation of UCL cases that would harm small businesses (presumably referring to small business that have *not* engaged in the types of unlawful or unfair practices that the UCL prohibits). (See Chefs' Brief at 8, 10.) Neither Proposition 64 nor any other limitation on standing can ensure that every lawsuit filed by a plaintiff with standing will be meritorious. Sometimes a plaintiff's theory of liability does not succeed; sometimes the allegations in a complaint cannot actually be proved. But Proposition 64 limits the universe of potential UCL plaintiffs to those likely to have a stake in the outcome because they suffered injury in fact that is economic in nature. CMA satisfied those requirements here, just as ALDF satisfied those requirements in *ALDF*—and despite the Chefs' contention, there is no indication in either case that those plaintiffs brought their lawsuits for any purpose other than to further their missions and remedy the harms they suffered. Whatever concerns the Chefs may have about the potential proliferation of "small-injury" UCL cases is just a reflection of their preference for a different statutory scheme. But of course, Proposition 64 did not increase "the quantum of lost money or property necessary to show standing" beyond the "specific, 'identifiable trifle' of injury" required by federal courts. (*Kwikset*, 51 Cal.4th at 324.)

Demonstrating a causally related reallocation of organizational resources is simply one way an organization—which Proposition 64 expressly states is a "person" entitled to

bring UCL claims—can demonstrate its own economic injury in fact. Allowing standing in this case is thus fully consistent with the text, history, and purpose of Proposition 64 and the UCL.

C. A reallocation of organizational resources in response to challenged conduct can satisfy the causation requirement of Proposition 64

Aetna's amici contend that even if an organization can show economic injury by demonstrating that it reallocated resources in response to a defendant's challenged conduct, there is still no causal relationship because the organization may have voluntarily chosen to incur that injury. (See Chamber Br. at 7; Chefs' Brief at 2.) That argument has no basis in the text of Proposition 64 and has squarely been rejected in a broad range of federal and state cases.[4]

Under Article III, an "injury has to be 'fairly … trace[able] to the challenged action of the defendant." (*Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, 560, alterations in original.) The U.S. Supreme Court recently cited *Havens* in rejecting an argument that a plaintiff voluntarily acted to create its own injury, explaining that "we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." (*Federal Election Commission v. Ted Cruz for Senate*

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[4] None of Aetna's amici adopt Aetna's argument that Proposition 64 requires a showing of proximate cause, as opposed to the causal connection described in *Kwikset*. CMA therefore does not reiterate the points made on that subject in its Reply Brief. (See CMA Reply Br. at 32-36.)

(2022) __ U.S. __, 142 S.Ct. 1638, 1647, citing *Havens Realty*, 455 U.S. at 374; see Labor Organizations Br. at 16.)

Although the Proposition 64 ballot materials did not expressly incorporate Article III's causation case law, the same principles apply, as this Court has held that the "phrase 'as a result of' [in Proposition 64, construed] in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection." (*Kwikset*, 51 Cal.4th at 326, quoting *Hall*, 158 Cal.App.4th at 855.) It was therefore appropriate in cases like *ALDF* for the courts to cite federal cases in holding that "[w]here the economic injury is diversion of resources, the proper focus of the inquiry is not the 'voluntariness or involuntariness' of the expenditures. [Citation.] Instead, the proper focus is on whether the plaintiff 'undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [misconduct] rather than in anticipation of litigation.' " (234 Cal.App.4th at 1283–1284, quoting *Equal Rights Center. v. Post Properties, Inc.* (D.C. Cir. 2011) 633 F.3d 1136, 1140.)

Amici's characterization of CMA's expenditures as "voluntarily spending money to challenge a business practice," (Chamber Br. at 1) also ignores the practical realities faced by organizations harmed by unfair practices. As ALDF explains in its amicus brief in support of CMA, "organizations in the position of CMA and ALDF find themselves stuck between a rock and a hard place when their missions or activities are frustrated by someone else's unlawful business practice." (ALDF Br. at 16.). When an organization responds to an illegal practice that harms

its mission with an expenditure of resources it would not otherwise have expended in that manner or to that end, the expenditure is made "as a result of" that challenged practice.

As Amicus California Attorney General explains, the UCL "require[s] the defendant's conduct to be an 'immediate cause' of the plaintiff's injury, but not 'the only cause.' " (Attorney General Br. at 18-19, citing *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326-330.) Citing deceptive business practices cases as an example, the Attorney General explains that even where the plaintiffs ultimately make their own choice—for example, about what to buy or whether to begin smoking—UCL's causation requirement is satisfied if the plaintiffs were influenced at all by the defendants' deceptive practices. There is no basis in federal or state case law to foreclose standing for plaintiffs who suffered economic injury in fact as a result of the defendant's actions simply because they could have chosen to ignore those actions—especially in a case like this, where those actions directly threatened CMA's long-established institutional mission.

D. The UCL does not include a "direct business dealing" requirement

Despite *Kwikset*'s "commonsense reading" of the "as a result of" language in Proposition 64 (51 Cal.4th at 326), the Chamber argues that this language should be interpreted to impose a requirement that the plaintiff must have had "business dealings" with the defendant. (Chamber Br. at 3.) That argument finds no support in the text or purpose of Proposition 64. Even if Proposition 64 somehow incorporated an implicit business

dealings requirement, the record demonstrates that CMA *did* have business dealings with Aetna.

The text of an initiative is "the first and best indicator of intent." (*People v. Mentch* (2008) 45 Cal.4th 274, 282, *as modified* (Dec. 17, 2008)). The text of Proposition 64 added two specific requirements: (1) economic injury in fact, (2) caused by the defendant. It made no reference to business dealings. "The language is clear on its face and contains no requirement that the plaintiff must have engaged in business dealings with the defendant." (*Law Offs. of Mathew Higbee v. Expungement Assistance Servs.* (2013) 214 Cal.App.4th 544, 563; see also *Allergan, Inc. v. Athena Cosmetics, Inc.* (2011) 640 F.3d 1377, 1383; Consumer Watchdog Br. at 31-35.)

As Consumer Watchdog explains, courts imposing a business dealings requirement have relied on a passing reference in *Californians for Disability Rts. v. Mervyn's, LLC* (2006) 39 Cal.4th 223, that was subsequently quoted in *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, and *Kwikset*. (Consumer Watchdog Br. at 32.) All three cases referenced language in the Proposition 64 ballot materials that offered examples of prior misuse of the UCL by lawyers filing suit on behalf of "clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (*Kwikset*, 51 Cal.4th at 321; Prop. 64, § 1, subd. (b)(3).) These examples demonstrate several common, but not exclusive, ways individual consumer plaintiffs might meet the economic injury and causation requirements of Proposition 64.

Different categories of plaintiffs, in different situations, may suffer different types of injuries as "as result of" a UCL defendant's wrongful practices or policies. (See Attorney General Br. at 20.) For example, this Court has already held that business competitors and suppliers can have UCL standing to sue other businesses for unfair business practices without establishing that they had direct business dealings with them. (*Clayworth*, 49 Cal.4th at 788 ["indirect business dealings" are sufficient for UCL standing]; see also *Higbee*, 214 Cal.App.4th at 562, 564.) Nothing in the ballot materials requires that plaintiffs that have suffered economic injury caused by defendants' actions *also* must demonstrate direct business dealings with defendants.

Even if direct business dealings were required under Proposition 64, CMA would satisfy that requirement. CMA dealt directly with Aetna in response to Aetna's Non-Par Intervention policy, including by engaging in "dialogue with Aetna" (JA 1155) "in an effort to get Aetna not to proceed with its threats to terminate and/or to rescind its terminations" of certain physician members (JA 959; see also CMA Opening Br. 31.) Proposition 64's text and its purpose of ensuring that plaintiffs had a real stake in UCL claims are satisfied by CMA's allocation of resources to combat these illegal practices, including by directly negotiating with Aetna.

II. The Requirements for Organizational Standing Already Imposed by Courts Are Sufficient to Protect the Purposes Underlying Proposition 64.

All of Aetna's amici follow its lead in warning that if organizational plaintiffs can base UCL standing on a reallocation

of resources theory, the floodgates will be opened to an "anyone-can-sue-anyone-for-anything" situation. (Chefs' Br. at 12; see also CAHP Br. at 9; Chamber Br. at 7.) That is hardly a logical conclusion. Aetna and its amici either ignore or completely discount the long-established safeguards on organizational standing in federal and state courts, which ensure that standing cannot be manufactured by a plaintiff whose claimed injury is not sufficiently immediate and concrete to satisfy Proposition 64.

CMA's merits briefing identified three common-sense "safeguards" on injury-in-fact standing that have already been applied in the federal courts and have been repeatedly cited by California courts applying allocation-of-resources standing. (See *ALDF*, 234 Cal.App.4th at 1281.)

First, to establish standing, an organization must show that its efforts were in response to conduct that actually frustrated the organization's pre-existing, stated mission, helping to ensure that the expenditure was made in a good faith effort to further the organization's purposes and mission. (See *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3d 1123, 1134–1135.) The Ninth Circuit reiterated as recently as August 2022 that this requirement ensures that "organizations cannot 'manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.' [Citation.]" (*Sabra v. Maricopa Cnty. Cmty. Coll. Dist.* (9th Cir., Aug. 10, 2022, No. 20-16774) __ F.4th __, 2022 WL 3222451, at *7 [advocacy organization committed to protecting the civil rights of Muslims had standing where it

diverted resources to respond to and counter Islamophobic information].)

Second, the organization's allocation of resources must actually have been triggered by the defendant's conduct, rather than being a continuation of existing activities. The Ninth Circuit has held that this requirement is not satisfied by general public messaging, even if that messaging is related to the mission frustrated by defendant's conduct, without some evidence that it was in response to the challenged conduct. (*Friends of the Earth v. Sanderson Farms, Inc.* (9th Cir. 2021) 992 F.3d 939, 942.)

Third, the organization's dedication of staff time or institutional resources must be independent of litigation. In *Two Jinn, Inc. v. Gov't Payment Serv., Inc.* (2015) 233 Cal.App.4th 1321 and *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, for example, the courts expressly accepted the proposition that "funds expended independently of the litigation to investigate or combat the defendant's misconduct may establish an injury in fact" under Proposition 64 (while concluding that the plaintiffs in those cases had failed to allege such expenditures). (*Buckland*, 155 Cal.App.4th at 815; *Two Jinn*, 233 Cal.App.4th at 1336.)

The Chamber characterizes these common-sense protections as "Petitioner's proposed conditions" or "suggested safeguards," and objects that they derive from federal standing law. (Chamber Br. at 10-11.) This objection is entirely meritless given the express incorporation of federal injury-in-fact case law into Proposition 64. As CMA has shown, federal courts routinely

consider these requirements in determining whether an organizational plaintiff has demonstrated injury in fact under Article III. Those requirements are equally applicable to the state courts' UCL standing analysis. (See *ALDF*, 234 Cal.App.4th at 1281.)

The Chamber further contends that these safeguards are "illusory and would fail to prevent the very abuses that led to Proposition 64." (Chamber Br. at 10.) The Chamber crafts an elaborate hypothetical in which a nefarious shakedown lawyer forms an organization with an exceptionally broad statement of mission, "expend[s] organizational time and resources doing something germane to that mission," diverts those resources to "pre-litigation" or nonlitigation activities, and then files a lawsuit hoping to have met all the standing requirements to show a diversion of resources. (Chamber Br. at 10). Although the Chamber asserts that this hypothetical situation could arise, there is no indication that during the past 30 years it ever has—and of course, neither the Chamber nor Aetna nor any of Aetna's other amici have been able to identify any surge in frivolous shakedown litigation in the federal courts or under the UCL, even in the past seven years since *ALDF* gave express imprimatur to the theory of organizational standing at issue in this case.

Nor does the Chamber's travel agency hypothetical succeed in demonstrating that CMA's theory of standing would open the door to shakedown lawsuits. While perhaps an attorney who "wishes to sue travel agencies" could set up an organization with

a transparency-focused mission (Chamber Br. at 10), each of the other requirements would be far more difficult to meet than the Chamber speculates. In *ALDF*, the court relied on the need for the organizational plaintiff to provide "evidence of a genuine and long-standing interest in the effective enforcement of the statute and in exposing those who violate it" (although there should also be other ways in which a newly formed organization could demonstrate that it is not a sham entity created solely to establish UCL standing for its backers). (*ALDF*, 234 Cal.App.4th at 1282.) The "weeks" of effort hypothesized by the Chamber comes nowhere near that showing. And the Chamber does not explain how a letter-writing campaign entered into to create standing for litigation would be considered independent of litigation. In *Buckland*, for example, the court rejected plaintiff's asserted standing "[b]ecause the costs were incurred solely to facilitate her litigation ... [and] to hold otherwise would gut the injury in fact requirement." (*Buckland*, 155 Cal.App.4th at 816.) To have standing to sue, an organization should be required to demonstrate that it engaged in non-litigation efforts sufficient to establish an actual interest in furthering its stated mission. Courts are well positioned to identify the occasional (and likely rare) sham organization, simply by applying the existing requirements applicable under Article III and Proposition 64.

The Chefs point to several UCL cases they contend are frivolous. But as discussed *supra* at p. 19, their principal concern is not with the plaintiffs' standing in those cases, but with their belief that the UCL's protections sweep too broadly. While the

Chefs assert that recent cases "reflect[] courts' confusion when it comes to UCL standing for advocacy organizations," the cases they cite are not in conflict. (Chefs' Br. at 10.) For example, in *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 144, which the Chefs characterize as holding ALDF had no standing to sue ranchers, ALDF was not bringing a UCL claim, but was trying to assert a private right of action under a criminal statute.[5]

The Chefs' imagined concern that organizational plaintiffs might begin to file meritless UCL lawsuits if CMA is found to have standing are just that: imaginary. The Chefs have not identified any "frivolous shakedown" case pre-dating Proposition 64 that would not have been prevented by the initiative's economic injury-in-fact requirement as construed by CMA (and by the Court of Appeal in *ALDF*). Moreover, as pointed out by

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[5] The cases cited by the Chefs also contradict Aetna's argument that CMA is proposing a form of standing for organizations that is unavailable to individual plaintiffs. (Resp. Br. 19-21.) In *Campbell v. Feld Entertainment Inc.* (N.D. Cal., Apr. 7, 2014, No. 12-CV-4233-LHK) 2014 WL 1366581, an activist who filmed the treatment of circus elephants alleged that she was forced to spend extra money on her camera equipment because she was being unlawfully harassed by the defendants. What the Chefs characterize as exemplifying "the parade of horribles that businesses face in the current legal framework for organizational standing" (Chefs' Br. at 12) does not involve organizational standing at all. Instead, *Campbell* demonstrates a straightforward application of *Kwikset*, as the individual activist was "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (51 Cal.4th at 323.) An organization that similarly expends resources that would have been unnecessary but for a defendant's unlawful action should also have standing to bring a UCL claim.

CMA's amicus Labor Organizations, there have been countless meritorious, important, and hugely beneficial UCL cases brought by organizational plaintiffs over the years in which the organizations challenged a defendant's policies or practices that frustrated the organization's mission, yet rested on the same types of injury to the organization at issue here. (Labor Organizations Br. at 21-22; see, e.g., *SEIU-United Healthcare Workers West v. HCA Healthcare* (C.D. Cal., June 7, 2021, No. 5:20-cv-02054) 2021 WL 2336947, at *1 [UCL claims challenging health and safety practices that increased COVID-19 risks].) To rewrite Proposition 64 to accommodate the Chefs' hypothetical concerns would eliminate such cases going forward and thwart the UCL's important and legitimate objectives, for these are precisely the sorts of cases proponents of Proposition 64 assured voters could still be brought if they voted yes. (See *supra* at p. 17.)

III. CMA Has UCL Standing because Aetna's Policy Caused Economic Injury

Aetna's implementation of its Non-Par Intervention Policy frustrated CMA's long-established mission, which requires it to advocate for physicians and patients and to protect the public health. (See JA 958–960; CMA Opening Br. 32–33). CMA responded by expending its resources on a series of specific projects designed to counter the adverse effects of that policy on itself, its mission, and its members, including by investigating the scope and application of that policy; providing specific advice and support to physicians throughout the state; meeting with Aetna representatives to facilitate reinstatement of physicians

whom Aetna claims violated its policy; and preparing and publishing informational resources for its members and the public. (JA 958–960.)

Two of Aetna's amici question whether CMA actually dedicated any resources to these efforts. For example, CAHP contends that because "[a]dvocacy is the largest component of CMA's program operations," CMA would have made the same expenditures even if Aetna had not implemented its challenged policy. (CAHP Br. at 8 fn.1.) That assertion makes little sense–if Aetna had not adopted its Non-Par Intervention Policy, CMA would have had no reason to address such a policy with Aetna. CAHP cannot broadly define CMA's existing activities as "advocacy" to avoid the conclusion that CMA changed its planned expenditures in response to Aetna's conduct. In *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, for example, the Ninth Circuit determined that Friends of the Earth did not have standing because none of its communications to members, public materials, or protests specifically targeted the defendant's conduct. (*Id.* at 943.) By contrast, CMA was responding directly to Aetna's implementation of its Non-Par Intervention Policy. (JA 958–960, 1150–1152, 1155–1159; CMA Opening Br. at 31.)

The Chefs acknowledge that "[n]o organization has unlimited resources," that CMA's expenditures were consistent with its mission, and that all decisions have opportunity costs (Chefs' Br. at 13-14). Those acknowledgements fully support CMA's standing. They are consistent with CMA's showing that by allocating resources to combat the adverse impacts of Aetna's

wrongful policy, CMA was prevented from expending those same resources on other mission-consistent projects. If Aetna had not engaged in the challenged practices, it could have expended the 200 to 250 hours of paid staff-time work that it devoted to CMA's response to Aetna's policy on other projects that furthered CMA's mission instead. (JA 960.)

For purposes of UCL standing, it should make no difference whether an organizational plaintiff responds to a threat to its mission by reallocating the tasks that it assigned to existing in-house staff rather than having those new tasks performed by third-party independent contractors. It would make little sense to construe Proposition 64 as allowing an organization's payment of a few dollars to a third party to satisfy the "loss of money or property" requirement of UCL standing, while denying standing to an identically situated organization that dedicates tens of thousands of dollars' worth of staff time to implementing its response. Either way, the organization suffers injury in fact that is economic in nature (and the use of staff can be more efficient and effective, given their availability and familiarity with the work and mission of the organization). (See CMA Reply Br. at 18-20; Consumer Watchdog Br. at 20-22; Labor Organizations Br. at 20; ALDF Br. at 14). Moreover, the California and federal courts have repeatedly concluded in related contexts that expenditure of staff time constitutes a compensable injury. This Court, for example, had suggested even before Proposition 64 that staff time was economic, holding that "the mere expenditure of the time of county officers is a sufficient expenditure of public funds to be

subject to injunction under section 526a [of the Code of Civil Procedure]." (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 285–286, fn.21; see also *Pac. Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1166–1167 ["Diverted staff time is a compensable injury"].)

Aetna's amici make two final points that warrant only a brief response.

Amici Chefs seem to suggest that an organizational plaintiff should not have UCL standing unless it was the only person or entity injured by the challenged conduct—which would preclude standing for membership organizations if any of their members were separately injured. (Chefs' Br. at 14.) Nothing in text or purpose of Proposition 64 limits UCL standing to the most injured plaintiff or prevents two or more plaintiffs from suing to challenge the same wrongful practice (either in separate lawsuits or as co-plaintiffs—neither of which would be permitted under the Chefs' curious alternative.) And as CMA explained in its Reply Brief, courts have frequently addressed the organizational standing arguments of membership organizations without regard to whether those practices also—or even primarily—harmed others, including the organization's members or clients. (See CMA Reply Br. at 16; *Nnebe v. Daus* (2d Cir. 2011) 644 F.3d 147; *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.* (9th Cir. 1991) 959 F.2d 742.).

Amicus CAHP urges the Court to create different rules applying to organizational standing in the health care industry, which it describes as having a unique balance of contractual and

regulatory structures. (See CAHP Br. at 10-11.) None of these arguments have anything to do with the circumstances under which organizational standing is permitted or prohibited by the UCL as amended by Proposition 64. Like the Chefs, CAHP is making a policy argument that is for the Legislature, not this Court.

CONCLUSION

For the reasons stated above and in CMA's previous briefs, this Court should reverse the rulings below and remand to the trial court for further consideration of the parties' cross-motions for summary judgment and for trial.

Dated: August 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 7,263 words, as counted by Microsoft Word, which is within the 14,000 words permitted.

By:*/s/Michael Rubin*
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I, Isabella Kearns declare: I am a citizen of the United States and employed in San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 22, 2022, I served a copy of the Petitioner CMA's Response to Amicus Briefs on the interested parties in this action by placing a true copy thereof, via U.S. Mail enclosed in a sealed envelope, postage pre-paid, addressed as follows:

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In addition, all counsel of record in this matter have been concurrently served with the foregoing via the True Filing service as required by this Court.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 22, 2022 at San Francisco, California.

/s/ Isabella Kearns

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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