IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA MEDICAL ASSOCIATION, Plaintiff-Appellant, v. AETNA HEALTHCARE OF CALIFORNIA, INC. D/B/A AETNA U.S. HEALTHCARE INC. and AETNA HEALTH OF CALIFORNIA, INC., Defendants-Respondents.	Supreme Court Case No. S269212

Petition for Review of a Decision of the Court of Appeal
Second Appellate District, Case No. B304217

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

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INTRODUCTION

In 2004, Proposition 64 amended California's Unfair Competition Law ("UCL") to limit standing to those who "lost money or property," Cal. Bus. & Prof. Code § 17204, as a result of a defendant's conduct. In 2011, this Court interpreted that amendment "to eliminate standing for those who have not engaged in any business dealings with would-be defendants." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 317 (2011). Plaintiff-Appellant California Medical Association ("CMA") admits it did not have any "business dealings" with Aetna.

Instead, CMA argues that some of its physician-members—in-network physicians who routinely used out-of-network facilities to increase their personal profits at the expense of patients and health plans—were subject to the Aetna Policy that CMA challenges in this case. CMA argues that by choosing to help those physician-members in their private, contractual disputes about Aetna's Policy, CMA created a loss of "money or property" for itself that gives it standing under the UCL.

As the Court of Appeal and the trial court both held, this Court's precedent forecloses CMA's theory. An organization "that has not suffered actual injury under the unfair competition law" may not sue "as an association whose members have suffered actual injury." *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 998 (2009). As the Court of Appeal recognized, this bar against representational standing would be meaningless if helping members respond to a policy

conferred standing on the membership organization to challenge the policy.

The Court of Appeal's decision is an unremarkable application of settled law, and CMA does not identify any persuasive reason for this Court to review it. CMA articulates five purported issues for review, Pet'n 1–2, but they all collapse on the same fundamental request that this Court create "different," *id.* at 15, 20, and broader standing rules for membership organizations than the rules that apply to all other UCL plaintiffs. The Court of Appeal's rejection of CMA's request was consistent with existing California law. Review therefore is not needed to "secure uniformity of decision." Cal. R. Ct. 8.500(b)(1). Nor does CMA's requested exemption from normal UCL standing rules present "an important question of law." *Id.* Membership organizations already can establish UCL standing (and routinely do) under the same rules that apply to all other UCL plaintiffs. Regardless, this case would be an improper vehicle for the Court to consider CMA's requested exemption because even under CMA's preferred rule, it would still lack standing: CMA did not substantiate that it actually expended any "money or property" to help its members respond to Aetna's policy.

STATEMENT OF THE CASE

A. Factual Background[1]

Since 1982, California law has explicitly sanctioned the use of Preferred Provider Organization ("PPO") health plans. *See Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc.*, 148 Cal. App. 4th 1130, 1133 (2d Dist. 2007). Health insurers like Aetna maintain their PPO networks by "contract[ing] with hospitals and providers of medical services for alternative rates of payment for those services, thus permitting insurers to create panels of 'preferred providers' for the insurer's subscribers." *Id.* Aetna thereby "provides health insurance to its subscribers through a network of physicians who are contracted to provide services for discounted rates." Court of Appeal Opinion ("Op.") 2.[2] At all times, "[s]ubscribers may receive services from these in-network physicians, or from out-of-network physicians at a higher share of the cost." Op. 2.

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[1] CMA's factual discussion is completely untethered to the facts as stated in the Court of Appeal's decision. This is contrary to California Rule of Court 8.500(c)(2), which declares that "the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." CMA did not file a petition for rehearing, so its attempts to dispute the Court of Appeal's factual recitation are improper. Although Aetna vigorously disagrees with CMA's characterization of the relevant factual background, it limits its factual summary here to the facts the Court of Appeal found were relevant to the standing issue.

[2] All citations to the Court of Appeal opinion are to the pages of the opinion as issued by the Court, rather than the version that was published at 63 Cal. App. 5th 660.

As a condition of entering Aetna's PPO network, health care providers must sign a contract with Aetna setting forth each party's rights and obligations. Op. 4. Although the form of that contract changed over time, it consistently has required physicians to use in-network facilities for procedures they perform, whenever possible consistent with their sound medical judgment. Op. 4. To ensure that in-network physicians were complying with this obligation—and that patients with Aetna PPO plans were not being subjected to surprise bills for out-of-network rates—"Aetna implemented a policy to restrict or eliminate" improper out-of-network referrals. Op. 2. To do this, the Policy established a multi-step process for communicating with physicians. During this process, Aetna sent letters to physicians who used out-of-network facilities reminding them that this "may be considered non-compliance with your physician agreement in which you agree to use contracted, participating network facilities." Op. 4.[3]

B. Procedural Background

The underlying litigation began as a putative class action filed by an in-network physician, and broadened to include additional plaintiffs, including CMA. Op. 3. "No motion for class

[3] The details of each step under the Policy are not relevant to the standing issues on appeal. In brief, they included multiple informational letters from Aetna to physicians, telephone and other communications, requests for information regarding why the physician used out-of-network facilities, attempts by Aetna to resolve any gaps in its network, and a multi-step reconsideration and appeal process for physicians found to have repeatedly engaged in abusive and unjustified out-of-network referrals.

certification was ever filed," and the case ultimately narrowed in 2019 to a single plaintiff, CMA, and a single claim "for injunctive relief under the UCL." Op. 3. CMA based its allegations of standing on the fact that it is an "organization that represents over 37,000 physicians throughout the state of California," and took action to "support[] its members" against Aetna. Op. 4.

Discovery made clear that Aetna's Policy "did not apply to CMA, which had no contract with Aetna" and that "CMA primarily claimed injury to its physician members for loss of patients and revenue." Op. 5. In addition, CMA was unable to identify or quantify any money the organization spent as a result of the Policy, R.A. 214–15, 223, 228–29, 236, 466–67, 478–79; J.A. 1386–89, 1423–24, and admitted that any "resources" it expended to support its members were in the form of time spent by salaried employees who would have received the same salaries regardless of the work they did, R.A. 213, 224–27, 236, 465–66.[4] Accordingly, Aetna moved for summary judgment and summary adjudication arguing, among other things, that CMA lacked standing under the UCL. Op. 5.

On November 25, 2019, the Superior Court granted Aetna's motion on its first argument—that CMA lacked standing because

[4] The Court of Appeal had no occasion to consider the facts regarding CMA's alleged expenditure the time of its salaried staff because it agreed with the trial court that CMA's legal theory of standing was defective. Aetna provides the relevant factual background from the record that was before the Court of Appeal because it illustrates why, even if this Petition presented a viable issue for this Court's review, this case is a uniquely poor vehicle for deciding that legal issue.

it "had not shown direct injury or loss of money or property." Op. 6. CMA appealed and, on April 28, 2021, the Court of Appeal affirmed on that same ground. Op. 3. The Court of Appeal reached this conclusion by applying two of this Court's precedents. *First*, under *Kwikset*, 51 Cal. 4th 310, "to have standing to bring a claim under the UCL after the 2004 amendments, a plaintiff must be able to show he personally sustained economic harm and that he lost money or property caused by the defendant's misconduct." Op. 8. *Second*, under *Amalgamated Transit*, 46 Cal. 4th at 993, an organization like CMA must "produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL." Op. 9. Based on those settled principles, the Court held that CMA's theory that it had lost money or property by "diverting resources" to help its members in their contractual disputes with Aetna could not establish the requisite economic injury to CMA. *See* Op. 9–12.

ARGUMENT

This Court "may order review of a Court of Appeal decision" under four circumstances, three of which CMA does not contend exist here. *See* Cal. R. Ct. 8.500(b). CMA claims only that review is "necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1). But the Court of Appeal's decision is entirely consistent with existing law regarding standing under the UCL, and, in any event, a routine application of this Court's standing precedents is not "important" enough to warrant review.

I. THE COURT OF APPEAL'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

Under the 2004 amendment to the UCL, CMA must demonstrate that it "lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. CMA asks this Court to create an exemption from this requirement for membership organizations that choose to support their members in private, contractual disputes. *See* Pet'n 15 (arguing for rule that would allow membership organizations to show standing "in a different way"); *id.* at 20 (arguing for "different standards" for membership organizations). The Court of Appeal rejected CMA's argument as foreclosed by this Court's decisions on standing under the UCL, *Amalgamated Transit*, 46 Cal. 4th 993, and *Kwikset*, 51 Cal. 4th 310. CMA tries to muddy the waters with citations to various state and federal decisions, none of which conflicts with the Court of Appeal's decision (and many of which are completely irrelevant, as the Court of Appeal already held).

1. The Court of Appeal followed a two-part analysis to reject CMA's attempt to exempt itself from the normal rules for establishing standing under the UCL. First, it held that "an association such as CMA" must "produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL." Op. 9. Far from a deviation from California law, that is what this Court said about a labor-union plaintiff in *Amalgamated Transit*: An organization "that has not suffered actual injury under the unfair competition law" may not sue "as an association whose members have suffered actual injury." 46 Cal. 4th at 998. Indeed, the 2004

amendment to the UCL was intended "to eliminate standing for those," like CMA, "who have not engaged in any business dealings with would-be defendants." *Kwikset*, 51 Cal. 4th at 317. In other words, the UCL's requirement that a plaintiff "demonstrate some form of economic injury," *id.* at 323, "would be nullified if a person claiming actual injury from some unfair business practice were allowed to assign that claim to one who has suffered no injury" by relying on a representational theory of standing, *Amalgamated Transit*, 46 Cal. 4th at 1002.

In the second part of its analysis, the Court of Appeal held that membership organizations, like CMA, are not exempt from these rules. *See* Op. 9–14. CMA argued that it need not show a personal loss of money or property as a result of Aetna's policy because CMA suffered a "diversion of its resources" when it chose to "advocat[e] on behalf of or provid[e] services to help its members deal with their loss of money or property." Op. 11. But the Court of Appeal saw that claim for what it is: An effort to create a special UCL standing rule for membership organizations, that would permit "any" membership organization to "claim standing based on its efforts to address its members' injuries." Op. 11. As both the Court of Appeal and the trial court recognized, this cannot be "square[d]" with this Court's decision in *Amalgamated Transit*, in which this Court held that a labor union could not establish standing based on having tried "to rectify injury to its aggrieved members," Op. 12, because "[t]he 2004 amendments to the UCL eliminated such representational standing," Op. 11 (citing *Amalgamated Transit*, 46 Cal. 4th at

1005).

2. The Court of Appeal's holding does not conflict with any other California authority. Much of CMA's argument to the contrary relies on a single decision, *Animal Legal Def. Fund v. LT Napa Partners LLC* ("*ALDF*"), 234 Cal. App. 4th 1270 (1st Dist. 2015), which the Court of Appeal distinguished at length. Op. 9–12. Unlike this case, *ALDF* did not concern a membership organization attempting to create an economic injury for itself by advocating for the interests of its members. As the Court of Appeal stressed, *ALDF* (1) did not involve a plaintiff "advocating on behalf of or providing services to help its members deal with their loss of money or property," and (2) "did not distinguish" or otherwise mention *Amalgamated Transit*, "likely . . . because ALDF did not bring a representative action on behalf of aggrieved members like the union in *Amalgamated Transit*, or CMA in this case." Op. 11. Accordingly, there is no conflict between *ALDF*'s recognition of standing for those who ***personally*** "hav[e] to spend money" in order "to combat" a challenged practice, and the Court of Appeal's finding here that those who ***choose*** to expend "resources" to support their members in private contractual disputes do not have standing.

Next, CMA wrongly asserts that two prior Court of Appeal decisions came to the same conclusion as *ALDF*. *See* Pet'n 23. *Hunt v. Time, Inc.*, 158 Cal. App. 4th 847, 855 (4th Dist. 2008), merely rejected a Plaintiff's claim of standing because he "did not allege he suffered an injury in fact under any of" the "definitions" that California courts had given to the term in the four years

since the 2004 amendments had been in existence. *Buckland v. Threshold Enterps.*, 155 Cal. App. 4th 798, 814–16 (2d Dist. 2007), rejected an individual's argument that he could establish "economic injury" by choosing to spend money in preparing to litigate a UCL claim against the defendant. Neither case concerned a membership organization, much less one trying to create "economic injury" by choosing to support its members in their private contractual disputes.

Similarly, CMA is wrong to suggest (Pet'n 28–32) that the availability of "public injunctive relief" under this Court's decision in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), somehow creates standing for membership organizations that did not personally suffer a loss of money or property. *McGill* stated the same rule applied by the Court of Appeal: A UCL plaintiff "has standing" if it "suffered injury in fact and . . . lost money or property." *Id.* at 959. That is why the Court of Appeal held that even "[a]ssuming without deciding CMA seeks to benefit the general public, and not just its members, *McGill* is of no use to CMA because it did not suffer injury in fact or lose money or property as a result of the UCL violations it alleges here." Op. 12.

Nor does any conflict arise from the authority CMA cites regarding class actions under Code of Civil Procedure § 382. *See* Pet'n 15, 25 (citing *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 232 n.4 (2006) and *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783 (1st Dist. 1981)). That authority could not have survived

Amalgamated Transit (from 2009) and *Kwikset* (from 2011) if it even conflicted with those cases. More fundamentally, it is irrelevant because this case is not a class action. *See* Op. 3 ("No motion for class certification was ever filed."). In addition, as the Court of Appeal held about *Raven's Cove*, that case did not "involve[] claims under the UCL or another statute that expressly limited the right to sue to those persons who suffered direct injury in fact and lost money or property." Op. 12.

3. Finally, CMA cannot create uncertainty in California law by citing to federal authorities addressing "organizational standing." *See* Pet'n 16, 23–28. The decisions on which CMA relies addressed standing under Article III of the United States Constitution, not the statutory-standing provisions of the UCL. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *El Rescate Legal Servs., Inc. v. Executive Off. of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991).[5] CMA incorrectly contends that standing under the UCL is coextensive with Article III standing, Pet'n 24, but the Court of Appeal made clear that "UCL standing requirements are far more stringent than the federal standing requirements." Op. 13 (citing *Kwikset*,

[5] The sole exception is a district-court decision from 2005, shortly after the 2004 UCL amendment and well before *Amalgamated Transit* and *Kwikset* were decided. *See S. Cal. Hous. Rights Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1068–69 (C.D. Cal. 2005). As the Court of Appeal held, "[t]he case offers little guidance since there is now current, binding California law that governs UCL standing to bring a representative action." Op. 14.

51 Cal. 4th at 324).

CMA is also wrong to argue that a recent Ninth Circuit decision held "that federal organizational standing rulings equally apply to determining standing under the UCL." Pet'n 27. *Friends of the Earth v. Sanderson Farms*, 992 F.3d 939 (9th Cir. 2021), did not consider the UCL's statutory-standing rules at all. Rather, it affirmed the dismissal of a case on jurisdictional grounds, for lack of standing under Article III. *See id.* at 942–45. A federal court cannot hear any claim unless the plaintiff has Article III standing; only if Article III standing exists would the federal court then need to consider whether the plaintiff also has UCL standing. *Sanderson* mentioned the UCL only to make clear that the same Article III jurisdictional defect it found for other claims required dismissal of the UCL claim as well. *See id.* at 945. Nothing in *Sanderson* purported to address UCL standing, or the standards for establishing a personal loss of money or property.

II. THE PETITION DOES NOT PRESENT ANY "IMPORTANT QUESTION OF LAW" WARRANTING REVIEW.

The Court of Appeal's routine application of this Court's UCL standing precedents does not present "an important question of law." Cal. R. Ct. 8.500(b)(1). Though CMA seeks to manufacture a legal issue by requesting a new, broader UCL standing regime for membership organizations, this Court has already rejected that notion when it held that the UCL does not permit associational standing. Nor is such a new regime necessary or warranted. Membership organizations may

establish standing to sue under the UCL in the same ways as any other putative plaintiff, and CMA does not explain how an organization would be unable to meet those standards. CMA's legal theory would not even be outcome determinative in this case because CMA's evidence does not even establish that it lost money or property through "diverted resources" to help its members respond to Aetna's policy.

1. Under existing law, membership organizations may establish standing by following the rules applicable to any other UCL plaintiff. If they "lost money or property as a result of the unfair competition," Cal. Bus. & Prof. Code § 17204, then they have standing like anyone else. Thus, an organization may establish standing under the UCL if it purchased a product it would not have purchased but for the challenged practice, *Kwikset*, 51 Cal. 4th at 317, was subject to fees or charges as a result of the challenged practice, *Aron v. U-Haul Co.*, 143 Cal. App. 4th 796, 803 (2d Dist. 2005), or suffered "damage to real property and personal property," *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1262 (4th Dist. 2005).

CMA makes hyperbolic claims that the Court of Appeal's decision "would spell the end of the ability of organizations that have members to seek public injunctive relief under the UCL." Pet'n 3; *see also id.* at 14–15 ("membership associations can never bring a UCL claim"); *id.* at 18–19 (membership organizations "would *never* be able to bring a UCL action"), *id.* at 34 ("virtually impossible mountain"). These claims bear no relation to reality.

CMA, like any other UCL plaintiff, may bring a UCL claim so long as CMA "personally sustained economic harm" because it "lost money or property caused by the defendant's misconduct." Op. 8 (quoting *Kwikset*, 51 Cal. 4th at 317).

There is no need for an exemption from these standing rules for membership organizations "diverting resources" to assist their members in private contractual disputes. Indeed, the only membership organization that appears unable or unwilling to bring a UCL claim under the standing rules applicable to every other UCL plaintiff is CMA itself. CMA's amicus admits in its letter to this Court that the Court of Appeal's decision "does not properly apply" to it because it "is not a membership organization." Letter from J. Eisenberg at 2 (June 24, 2021). And the only decisions cited here or in briefs below in which a UCL plaintiff even relied on a representational theory of standing are this Court's decision rejecting the theory in *Amalgamated Transit*, a single federal district-court decision from 2005, and two other cases in which CMA itself tried (and failed) to press the theory. *See Cal. Med. Ass'n v. Aetna U.S. Healthcare*, 94 Cal. App. 4th 151, 169 (4th Dist. 2001) (CMA lacked "standing to challenge" physician contracts to which it was not a party); *Cal. Med. Ass'n v. Blue Shield of Cal.*, 2011 WL 5910115, at *8 (Sup. Ct. Alameda Cty. Mar. 23, 2011) (rejecting CMA's theory of economic injury that "derive[d] solely from [CMA's] choice to fight" an insurer's "initiative"). In any event, if there were a need for expanded standing for membership organizations to bring UCL claims, that is a matter for the legislature to address.

2. Review also is unwarranted because the issue presented in the Petition is not outcome determinative in this case. Assuming that a membership organization may establish UCL standing by choosing to spend money supporting its members in private contractual disputes, CMA set forth no evidence that it did so here. The sole injury CMA claimed was time spent by its staff, not the expenditure of money or property. And CMA admits its staff were all salaried employees who would have been paid the same amount even had Aetna's Policy not existed. R.A. 213, 224–27, 236, 467. Such a "[l]oss of ***time*** is not an economic harm." *Knippling v. Saxon Mortg., Inc.*, 2012 WL 1142355, at *2 (E.D. Cal. Mar. 22, 2012); *accord Ruiz v. Gap, Inc.*, 2009 WL 250481, at *4 (N.D. Cal. Feb. 3, 2009), *aff'd*, 380 F. App'x 689 (9th Cir. 2010); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012). Nor did CMA provide evidence that the loss of time "resulted in a measurable" financial impact. *Bontrager v. Showmark Media LLC*, 2014 WL 12600201, at *9 (C.D. Cal. June 20, 2014). CMA admitted during discovery that it had ***no information*** to quantify the amount of time spent by staff members or its value. *See* R.A. 215, 223, 466–67, 478–79. Accordingly, even if CMA had identified an issue of unsettled California law (it has not) and explained how that issue was sufficiently important to merit review (it has not), this case would still be an improper vehicle for this Court to decide that issue.

CONCLUSION

The Petition for Review should be denied.

Dated: June 28, 2021

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CERTIFICATE OF WORD COUNT

The text of Respondent's Answer to the Petition for Review consists of 4,002 words, as counted by the word processing program used to generate the brief.

s/ Matthew Donald Umhofer
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Jon E. Powell, declare, I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is 615 West 7th Street, Suite 200, Los Angeles, CA 90017. On June 28, 2021, I served a copy of the Respondent's Answer to Appellant's Petition for Review by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail in Los Angeles, California, addressed as set forth below:

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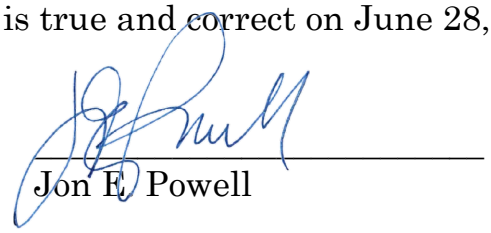
All counsel of record in this matter have been concurrently served with the foregoing via the TrueFiling service required by this Court.

Pursuant to the Office of Attorney General's instructions I served a copy of the Appellant's Opening Brief electronically through the Office website at https://oag.ca.gov/services-info/17209-brief/add.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct on June 28, 2021.



Jon E. Powell

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA MEDICAL ASSOCIATION v. AETNA HEALTH OF CALIFORNIA**
Case Number: **S269212**
Lower Court Case Number: **B304217**

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

6/28/2021

Date

/s/Jon Powell

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