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 BRIEFS OF AMICI CURIAE

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INTRODUCTION

Wrong on the merits of this case, CMA's amici offer vague concerns that UCL violations will go unremedied unless organizations are permitted to create standing for themselves by "diverting resources" to advocate against business practices they disagree with. Those concerns are entirely misplaced. The UCL's standing rule holds organizations to the same standard as every other UCL plaintiff: If they personally suffered a loss of money or property as a result of the practice they challenge, they may sue. Only when an organization has no connection to the dispute except by its own choice to advocate against a practice would the organization lack standing.

CMA's amici give no reason to think this would leave even a single UCL violation without a remedy. Rather, every single example cited across the amicus briefs filed in support of CMA, including the examples recited by the Attorney General, could have been brought by a plaintiff with valid UCL standing. Every case in which an organization like CMA could claim that a business practice caused ephemeral harm to its "mission" or "advocacy" could be brought by a proper plaintiff. In each, the plaintiff would need to be a person or entity that was actually subject to the practice or otherwise lost money or property because of it. The only limitation is the one the voters passed when they "eliminate[d] 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).

At the same time, all of CMA's amici confirm that ruling for CMA would contravene Proposition 64 by granting standing to precisely the types of plaintiffs the voters intended to bar from filing UCL suits. As the Attorney General—and some of CMA's other amici—recounts at length, the voters passed Proposition 64 to put a stop to myriad examples of abusive UCL litigation filed by individuals and organizations with no connection to the defendants they sued.

Not one of CMA's amici even responds to Aetna's argument that a ruling for CMA would mean that any individual person who is unaffected by a business practice they would like to challenge in court could create standing for themselves by "diverting" their charitable giving or volunteer time to engage in non-litigation advocacy against that business practice. This would grant standing to the precise individuals Proposition 64 meant to bar: those who have "not used the defendant's product or service" or "not . . . viewed the defendant's advertising, or had any other business dealing with the defendant." Proposition 64 § 1(b)(3). (Even CMA had no response to this argument, except to admit that this would be the result of the rule it proposes. *See* CMA Reply 28–29.)

CMA's theory of standing-via-"diverted resources" would similarly grant standing to the very organizations that the voters targeted in Proposition 64. None of CMA's amici can dispute that CMA's three vague, fact-intensive "safeguards" would give every organization an avenue to plead its way into discovery. That alone destroys Proposition 64's purpose of "curbing shakedown

suits," *Kwikset*, 51 Cal. 4th at 335 n.21, that sought to "extract individual settlements from those desperate to avoid what was threatened to be lengthy and costly litigation," American Medical Association ("AMA") Br. 8.

Nor would the "safeguards" succeed at weeding out abusive cases *after* discovery. CMA's amici even resist the idea that meaningful discovery would be allowed to probe the veracity of allegations concerning the inner workings of would-be organizational plaintiffs. The "safeguards" therefore would require little more than a handful of rote allegations, shielded from any real scrutiny. And even if meaningful discovery were permitted, CMA's amici cannot defend the "safeguards" on their merits. They have no response to Aetna's argument that the "safeguards" could easily be satisfied, even after discovery and at trial, by any organization seeking to manufacture standing.

Rather than entertaining atextual, ineffective "safeguards" that would do nothing to honor Proposition 64, the Court should subject CMA to the same standing rule faced by every other UCL plaintiff. If the Court does so, it will find that CMS lacks standing to sue Aetna because CMA was not subject to Aetna's policy, admittedly has no business dealings with Aetna at all, and suffered no loss of money or property as a result of Aetna's policy.

ARGUMENT

I. PROPOSITION 64 FORECLOSES CMA'S THEORY OF STANDING

CMA's amici cannot dispute that Proposition 64 removed UCL standing for those private plaintiffs who (1) did not suffer a personal loss of money or property because of the business

practice they challenge, or (2) rely on someone else's loss of money or property to create standing. Nor do CMA's amici dispute that CMA admitted it is not subject to the Aetna policy it challenges, has no business dealings with Aetna at all, and is instead seeking to sue based on "injuries" that "derive from its efforts to serve its members." Br. 49. Instead, they defend CMA's attempt to create a new exception to Proposition 64 for organizations that sue as a means to advocate against business practices with which they disagree. CMA's amici identify no textual basis for this exemption, and have no meaningful response to Aetna's argument that such an exemption would allow standing in the precise scenarios where the Proposition 64 voters intended to forbid it.

A. Proposition 64 Requires UCL Plaintiffs To Show They Personally Lost Money or Property

Proposition 64 limits standing to those who "lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. CMA's amici agree that this means that "a private plaintiff filing suit now must establish that he or she has *personally* suffered such harm." *Kwikset*, 51 Cal. 4th at 323 (emphasis added); AMA Br. 12; Consumer Watchdog ("CW") Br. 15; AIDS Healthcare Foundation ("AIDS Foundation") Br. 10; *see also* CMA Reply 14 (admitting same). Nor do they dispute Aetna's argument (Aetna Br. 12) that CMA has admitted that (1) Aetna's policy does not apply to CMA's activities at all, and (2) CMA neither competes with Aetna in any way, nor engages in any other form of business with Aetna. That should be the end of it, as this Court has held that the 2004 amendments "eliminate

standing for those who have not engaged in any business dealings with would-be defendants." *Kwikset*, 51 Cal. 4th at 317. As one of CMA's amici writes, this requirement is dictated by Proposition 64's text: "[I]t is hard to see how a person could lose money or property without having any dealing—at least indirect—with the entity that caused the loss." Labor Organizations ("Labor") Br. 14–15.

Unable to argue that CMA actually engaged in any business with Aetna, CMA's amici attack this Court's decision in *Kwikset*. They argue, directly contrary to *Kwikset*, that Proposition 64 *allows* standing for those who have not engaged in any business dealings with would-be defendants. CW Br. 14, 31–35; Attorney General ("AG") Br. 20; Labor Br. 14–15. Never mind that the voters made their intent clear in Proposition 64, expressing their "Findings and Declarations of Purpose" as rectifying that the UCL "had been 'misused by some private attorneys who' . . . 'file lawsuits for 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***.'" *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 228 (2006) (quoting Proposition 64 § 1(b)(2)–(4) (emphasis added; alterations omitted)). As one of CMA's amici admits, the whole point of Proposition 64 was to ensure that those who "had no business relationship with or connection to" the business they later sued would no longer have standing. AIDS Foundation Br. 16.

In support of their position, CMA's amici raise a handful of

examples that only prove Aetna's point. One amicus claims that business dealings are not required because standing exists based on "merely viewing an advertisement." Labor Br. 15. That is incorrect. This Court held that advertisement-based standing under the UCL requires not only that the plaintiff viewed the advertisement, but also "actual reliance on the deceptive advertising and misrepresentations as a result of which the loss of money or property was sustained." *In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (2009). Multiple amici point to cases involving business "competitor[s]" or indirect "supplier[s]" in a product's distribution chain. AG Br. 20; CW 33–35; *see also* CMA Reply 9. But those cases involved plaintiff-entities who had a business connection with the defendant. A competitor's standing under the UCL is based on a direct "loss of market share" as a result of a business competitor taking that market share for itself. *Law Offices of Mathew Higbee v. Expungement Assistance Servs.*, 214 Cal. App. 4th 544, 556, 561 (2013); *see also Allergan, Inc. v. Athena Cosmetics, Inc.*, 640 F.3d 1377, 1382 (Fed. Cir. 2011). And a supplier, even if a few levels removed from a defendant in a distribution chain, is a prime example of one "who *had* business dealings with a defendant" and can sue where it paid "overcharges" that were passed on to it as a result of conduct of an indirect supplier. *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010). In each case, the UCL plaintiff had a clear business-related connection to the defendant. Here, CMA admits it has none. Aetna Br. 12; R.A. 466, 470.

B. Proposition 64 Forbids UCL Plaintiffs from Relying on Someone Else's Economic Injury

CMA's amici also agree that this Court's *Amalgamated Transit* opinion made clear that CMA cannot base standing on injuries allegedly suffered by its members. *E.g.*, Labor Br. 18; AG Br. 16. Nor do they dispute that a rule allowing a plaintiff to create standing based on injuries suffered by others would "nullif[y]" Proposition 64's requirement that a plaintiff suffer a personal loss of money or property. Aetna Br. 14 (quoting *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 1002 (2009)). Yet CMA admitted that its "injuries derive from its efforts to serve its members." Br. 49. As Aetna argued (Aetna Br. 14), both the trial court and Court of Appeal correctly recognized that such a theory cannot be "square[d]" with *Amalgamated Transit*'s holding that standing cannot be based on a plaintiff's attempt "to rectify injury to its aggrieved members." Op. 11–12.

Lacking any answer to this fundamental contradiction, CMA's amici make inaccurate claims about the Court of Appeal's opinion. Some assert that the Court of Appeal foreclosed UCL standing for all organizations under any circumstances. *E.g.*, AIDS Foundation Br. 13; AG Br. 26. Others claim that organizations would largely be foreclosed from suing. *E.g.*, AMA Br. 5; CW Br. 7, 11. As Aetna explained when CMA made a similar argument (Aetna Br. 14–15), that is wrong. All the Court of Appeal held is that CMA must satisfy the same standing rules as every other private plaintiff. Op. 9.

Other amici foresee a "parade of horribles," where a ruling

for Aetna would put an end to important UCL litigation. Some assume without explanation or example that UCL violations would go unremedied. *E.g.*, Local Prosecutors Br. 10–12. Others cite cases they wrongly claim could not be brought if organizations were required to show a personal loss of money or property. CW Br. 29; AG Br. 21; Labor Br. 21–22.[1] But not one of the cited cases would have been foreclosed by a ruling in Aetna's favor here:

- A defrauded union could sue the person who defrauded it. *Operating Engineers Local Union No. 3 v. Wilson*, 2019 WL 11254766, at *1–2 (N.D. Cal. Sept. 30, 2019).

- A health clinic whose property is invaded by protestors can sue the trespassers. *Planned Parenthood Federation of Am., Inc. v. Ctr. for Med. Progress*, 2020 WL 2065700, at *10–12, 28 (N.D. Cal. Apr. 29, 2020).

- The entity that lost a "business opportunity" can sue the parties that caused that loss. *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 243 (2010).

- A healthcare plan that paid for medications can sue the company whose marketing caused increased use of those medications. *Ironworkers Local Union No. 68 v. Amgen,*

[1] One amicus worries that it may be unable to sue, but admits that it operates health clinics and pharmacies. AIDS Foundation Br. 13–15. It is unclear why, as a provider of medical care, this amicus would be unable to show that allegedly unfair practices regarding "proper care and treatment" caused its own operations an economic harm. *Id.* at 14. Nor does the possibility that there are those who might be "reluctant to identify themselves" as plaintiffs justify a massive expansion of UCL standing. *Id.* Indeed, there are procedures for plaintiffs with highly sensitive concerns to proceed anonymously in litigation, as demonstrated by the same brief's citation to an amicus submission it made in a "Doe" plaintiff case. *Id.* at 6.

Inc., 2008 WL 312309, at *1 (C.D. Cal. Jan. 22, 2008).

- Tenants can sue landlords who engage in unfair practices. *Los Angeles Tenants Union: Hollywood Local v. CRE-HAR Crossroads SPV, LLC*, 2020 WL 6253697, at *4 (Cal. Ct. App. Oct. 23, 2020); *Housing Rts. Comm. of San Francisco v. HomeAway, Inc.*, 2017 WL 2730028, at *9 (Cal. Ct. App. June 26, 2017).

- Employees subjected to unfair or unsafe working conditions can sue their employer. *SEIU-United Healthcare Workers West v. HCA Healthcare*, 2021 WL 2336947, at *1 (C.D. Cal. June 7, 2021); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, 2010 WL 582134, at * 1 (S.D. Cal. Feb. 11, 2010); *United Steel, Paper & Forestry, Rubber Manufacturing Energy, Allied Industrial & Service Workers Int'l Union, AFLCIO v. Shell Oil Co.*, 2009 WL 10718751, at *1 (C.D. Cal. Nov. 9, 2009).

- A union whose members' dues obligations are tied directly to their compensation could sue those whose policies directly reduced the amount the members were paid. *William Morris Endeavor Entmt., LLC v. Writers Guild of Am.*, 478 F. Supp. 3d 932, 942–43 (C.D. Cal. 2020).

The same is true of this case. Contrary to the claim of one amicus, AMA Br. 7, a ruling for Aetna would not insulate Aetna's policy from review. If any doctor or medical practice lost money or property as a result of Aetna's policy, they would have standing under the UCL. Indeed, the trial court held as much at the demurrer stage here, when a handful of doctors *were* plaintiffs in the case. Aetna Br. 13.

Accordingly, a ruling for Aetna would not leave any UCL violation without a remedy. In every case, if the alleged act of unfair competition actually created an economic impact of any kind, then there are potential UCL plaintiffs. If none of these

potential plaintiffs wishes to sue, however, an uninjured organization cannot swoop in and create standing for itself because it alleges some injured persons are its members.

C. Proposition 64 Does Not Allow Plaintiffs To Create Standing by Choosing to "Divert Resources"

CMA's amici do not offer a single textual basis for reading Proposition 64's reforms to allow standing whenever a UCL plaintiff chooses to "divert resources" to oppose something it disagrees with. Nor do CMA's amici grapple with the fact that a ruling for CMA would effectively repeal Proposition 64 by granting standing in the precise circumstances that the voters intended to forbid it.

1. Proposition 64's Text Bars CMA's Theory

CMA's amici agree with Aetna (Aetna Br. 16) that the text of Proposition 64 is "the first and best indicator of intent." *Kwikset*, 51 Cal. 4th at 321; *see, e.g.*, CW Br. 31; Labor Br. 10–11. Aetna identified three textual reasons why Proposition 64 forecloses the "diverted resources" theory (Aetna Br. 16–21), while CMA's amici do not offer a single textual basis for it:

a. CMA's theory of standing holds that a UCL plaintiff's independent "choice" (Br. 30) creates an actionable "loss of money or property" for itself. CMA's amici do not dispute (Aetna Br. 16) that "Proposition 64 makes no mention of voluntary advocacy." Rather, as Aetna argued (Aetna Br. 16–17), Proposition 64 requires that the claimed loss of money or property was "a result of" the challenged practice, Cal. Bus. & Prof. Code § 17204, and California law presumes that the phrase "as a result of" implies

"proximate or legal cause." 4 Witkin, Cal. Proc. 6th Pleading § 581 (2021); *see also, e.g.*, Riehle, et al., California Antitrust and Unfair Competition Law § 14.03 (2021) ("California courts have equated the term 'by reason of' with proximate cause"); *Ennabe v. Manosa*, 58 Cal. 4th 697, 707 (2014) (discussing history of a California statute and equating "proximate cause" requirement with use of "as a result of" or "resulting from" language).

CMA's amici argue that this causation standard can be met whenever a plaintiff chooses independently to spend money or property. CW Br. 35–38; AG Br. 17–20; Labor Br. 12–13; *see also* CMA Reply 33–36. But their principal authorities are two decisions from this Court that expressly limited their holdings to UCL claims premised on misrepresentations, which this case is not. *See Tobacco II*, 46 Cal. 4th at 327 n.17; *Kwikset*, 51 Cal. 4th at 327 n.9. In any event, those decisions only prove Aetna's point.

In *Tobacco II*, this Court explained that Proposition 64's causation requirement must be construed strictly: "[B]ecause it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions." *Tobacco II*, 46 Cal. 4th at 326. For that reason, this Court rejected the idea that "as a result of" only "requires 'a factual nexus' between a defendant's conduct and a plaintiff's injury." *Id.* at 325. Instead, for the misrepresentation-based claims at issue there, "reliance is the causal mechanism of fraud," so a UCL plaintiff must "show[] actual reliance on the

deceptive advertising and misrepresentations as a result of which the loss of money or property was sustained." *Id.* at 325–326.

Subsequently, in *Kwikset*, this Court again addressed a misrepresentation-based claim and held that the phrase "as a result of" "requires a showing of a causal connection or reliance on the alleged misrepresentation." 51 Cal. 4th at 326 (quotation marks omitted). In so doing, this Court quoted from the same page from the decision in *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 855 (2008), on which Aetna relied (Aetna Br. 16) for the proposition that Proposition 64's causation requirement is akin to the "causation element of a negligence cause of action." *Hall*, 158 Cal. App. 4th at 855 n.2. The Court also explained that its "reading of" the as a result language "mirrors" how this Court interpreted "the same language in other consumer protection statutes such as the Consumers Legal Remedies Act." *Kwikset*, 51 Cal. 4th at 326. That law imposes a proximate-cause requirement. *See Terpin v. AT&T Mobility, LLC*, 399 F. Supp. 3d 1035, 1042–44 (C.D. Cal. 2019); *Moore v. USC Univ. Hosp., Inc.*, 2009 WL 10675631, at *3 (C.D. Cal. Sept. 8, 2009), *aff'd*, 416 F. App'x 640 (9th Cir. 2011).

Far from permitting a showing of causation based entirely on the plaintiff's own "choice," Br. 30, this Court's prior decisions reflect that any loss of money or property must be a direct result of the plaintiff's reliance on the truth of the alleged misrepresentation. A plaintiff who knows that a representation is false, but chooses to incur a loss of money or property anyway lacks standing under these decisions. *See Kwikset*, 51 Cal. 4th at

327 n.10 (causation requirement would be satisfied only if a plaintiff "was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made," as distinct from "a party who had bought a product suspecting it was mislabeled in order to pursue a UCL fraud action"). The same must be true for a plaintiff that is unaffected by allegedly "unlawful" or "unfair" conduct, but chooses to incur a loss of money or property because it wants to advocate against that conduct. California law generally recognizes that a party's own "choice . . . was the proximate cause of her damage," not the defendant's unrelated conduct. *Moua v. Pittullo, Howington, Barker, Abernathy, LLP*, 228 Cal. App. 4th 107, 118 (2014); *see also Cal. Med. Ass'n v. Blue Shield of Cal.*, 2011 WL 5910115, at *8 (Sup. Ct. Alameda Cty. Mar. 23, 2011) (rejecting CMA's "diverted resources" theory of UCL standing because it relied on an injury "derive[d] solely from [CMA's] choice to fight this initiative").[2]

CMA's amici—like CMA—also attempt to import the causation standard applicable to standing under Article III of the U.S. Constitution. *E.g.*, CW Br. 36–38 & n.15; *see also* CMA Reply 35. But this Court rejected that argument in *Tobacco II*, holding that "we are certain that if the proponents of the initiative had intended some other standard of causation to apply, they would have said so directly instead of using an

[2] *See also Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 271 (1992) (proximate cause under federal RICO law cannot be established through effect of challenged practice on later choices and conduct of third parties).

elliptical reference to federal standing." 46 Cal. 4th at 325 n.16.

Finally, the Attorney General argues that the causation standard is more lenient because it requires that the defendant's conduct be an "immediate cause" of the loss of money or property. AG Br. 19; *see Kwikset*, 51 Cal. 4th at 327 ("[A] plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct."). If anything, an immediate-cause requirement *heightens* a plaintiff's burden. An immediate cause is "[t]he last event in a chain of events." Black's Law Dictionary, *Immediate Cause* (11th ed. 2019); *see also Sabella v. Wisler*, 59 Cal. 2d 21, 34 (1963) ("[T]he immediate cause of the loss is that which is immediate in time to the occurrence of the damage." (quotation marks omitted)). Aetna's policy is not the immediate-in-time cause of CMA's claimed loss of money or property. At the time that Aetna enacted and enforced its Policy, CMA had lost nothing because the Policy does not affect it. Aetna Br. 12; R.A. 466, 470. The "immediate cause" of CMA's loss was its own subsequent decision to "divert resources."

b. Only one of CMA's amici even responds to Aetna's argument (Aetna Br. 18–19) that the "diverted resources" theory is foreclosed because Proposition 64 *deleted* the statutory text that had authorized a plaintiff to sue when "acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code § 17204 (1993). None of CMA's amici dispute that the voters' express deletion of this language must be given effect. *See People v. Mendoza*, 23 Cal. 4th 896, 916 (2000). Just one amicus addresses that deletion. And it argues that the deletion allows a

plaintiff to sue after choosing to incur a "loss" in order to vindicate the interests of others. Labor Br. 11–12. That is a circular interpretation. If "economic loss" can be created based solely on a plaintiff's desire to vindicate the interests of others, then any plaintiff would have standing to sue when "acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code § 17204 (1993). But the voters specifically *deleted* that language.

c. Finally, CMA's amici—like CMA itself—take mutually contradictory positions in response to Aetna's argument (Aetna Br. 19–21) that CMA's theory of standing would impose different standing rules on different private plaintiffs. CMA said so expressly in its petition for review, Pet'n for Rev. 15, 20, its opening brief, Br. 27–28, and parts of its reply, CMA Reply 18, where it argued that individuals cannot establish standing based on "lost 'time,'" but organizations can. Some of CMA's amici also appear to advocate for an organization-specific rule. *E.g.*, CW Br. 39 (advocating for standing whenever an organization "acts to address or respond to member concerns"). At other times, the same amici—and CMA itself—admit that this would be impermissible and advocate that the "diverted resources" theory be extended to all private plaintiffs. CW Br. 25; CMA Reply 28. Either theory contradicts the UCL's text.

Under the first position, organizations would be allowed to show standing "in a different way." Pet'n for Rev. 15. This contradicts Proposition 64, which applies the same standing rules to any "person," which the UCL defines to include all types of

private plaintiffs. *See* Cal. Bus. & Prof. Code §§ 17201, 17204. The Attorney General's brief makes clear that the rules for all private plaintiffs must be the same, and CMA later admits that this is required. AG Br. 10–11, 16; CMA Reply 28–29.

Under the position that many of CMA's amici now adopt—and which CMA adopted in parts of its reply—*all* private plaintiffs may show standing via "diverted resources." That theory would contradict Proposition 64's text in two other ways:

First, as Aetna argued (Aetna Br. 20), the only litigants that face different standing rules under Proposition 64 are "*only* the California Attorney General and local public officials," who are "authorized to file and prosecute actions on behalf of the general public." Proposition 64 § 1(f) (emphasis added)). As the Attorney General argues, "[o]nly the Attorney General and other specified prosecutors retained authority to bring UCL claims on behalf of the general public." AG Br. 10. And none of CMA's amici—nor CMA itself—disputes Aetna's argument (Aetna Br. 22) that CMA's theory "would give organizations the broad standing to sue on behalf of the public that Proposition 64 reserved to the Attorney General and local public prosecutors." Yet CMA's amici urge that organizations should be able to sue as if they were the Attorney General. One amicus even claims, inaccurately, that "[t]his Court . . . already held that they could do so." CW Br. 17 n.3.[3] This ignores that Proposition 64 *deleted*

[3] This amicus appears to suffer from the same confusion as CMA (Br. 38, 48), reading this Court's decision in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), to carve an exception to Proposition

the language that previously gave them that standing. *See supra* at 14–15.

Second, as the Chamber of Commerce observes, allowing private plaintiffs to establish standing whenever they "divert resources" would make it *easier* for private UCL plaintiffs to establish standing than it is for some local government entities. Chamber of Commerce ("Chamber") Br. 4. Because Proposition 64's reforms apply only to the standing of private UCL plaintiffs, the Attorney General and local government entities are authorized to sue under separate statutory language. That language allows county counsels to sue only if the county contains "a city [with] a population in excess of 750,000" *or* is "authorized by agreement with the district attorney in actions involving violation of a county ordinance." Cal. Bus. & Prof. Code § 17204. A county counsel who cannot meet those requirements cannot create standing for itself by "diverting resources." Thus, "diverted resources" standing would turn Proposition 64 on its head, giving private plaintiffs *more expansive* powers to sue as private attorneys general than some of the government attorneys themselves.

2. Proposition 64's Intent Bars CMA's Theory

CMA's amici do not dispute Aetna's argument (Aetna Br. 16) that Proposition 64's Voter Guide is an "extrinsic source[]" of voter intent that bears on the Court's resolution of this case. *E.g.*, AMA Br. 8–11; AG Br. 11–13; Labor Br. 13. Aetna offered

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64's standing rules. As Aetna argued (Aetna Br. 15), *McGill* has no bearing on standing. *See* 2 Cal. 5th at 959.

two reasons why the "diverted resources" theory would directly contradict the expressed intent of the voters who enacted Proposition 64. Aetna Br. 21–25. CMA's amici fail to grapple with the implications of one and entirely ignore the other:

a. As CMA's amici discuss at length, the voters enacted Proposition 64 to put a stop to UCL litigation that had been brought by lawyers where "'no client has been injured in fact' or in which the purported client 'ha[s] not used the defendant's product or service, viewed the defendant's advertising, or had any business dealings with the defendant.'" AG Br. 11 (quoting Proposition 64 § 1(b)). "Unscrupulous attorneys took advantage" of the UCL's formerly broad standing rules, filing lawsuits and then seeking "to extract individual settlements from those desperate to avoid what was threatened to be lengthy and costly litigation." AMA Br. 8. "[I]n many cases, they created new organizational entities solely for UCL litigation purposes." AG Br. 12.

One such scheme, involving the Trevor Law Group, operated as follows:

> Attorneys form a front 'watchdog' or 'consumer' organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business (often owned by immigrants for whom English is a second language), and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest. For the Trevor Law Group, the usual targets

were auto repair shops.

AMA Br. 9 (quoting *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (2004)). The Trevor Law Group did this through an organization called "Consumer Enforcement Watch Corp," which "had no business relationship with or connection to" the businesses it later sued. AIDS Foundation Br. 16. The voters enacted Proposition 64 to prevent such plaintiffs from having standing. *E.g.*, AMA Br. 10–11; CW Br. 16; AG Br. 13.

CMA's "diverted resources" theory of standing would allow the same plaintiffs the voters sought to bar via Proposition 64 to create standing by "diverting resources." CMA's amici would have the Court solve this problem of their creation by applying CMA's three "safeguards." Yet they identify no statutory basis for imposing these "safeguards." And they admit that, at best, the "safeguards" would give plaintiffs a pleading roadmap, at which point the case "would be subject to discovery to test the veracity of these allegations." Animal Legal Defense Fund ("ALDF") Br. 18. But keeping such cases from ever getting to discovery was one of Proposition 64's main purposes. *See* AMA Br. 8 (Proposition 64 put an end to suits to "extract individual settlements from those desperate to avoid what was threatened to be lengthy and costly litigation").

Some of CMA's amici undermine the "safeguards" even further. One resists the idea that any meaningful discovery should be permitted into the inner workings of organizational plaintiffs, even if discovery would be necessary to test the truth of organizational-standing allegations. Labor Br. 20. Another

amicus proposes that discovery would focus on wholly unworkable standards, such as differentiating between impermissible "manufacture[d] standing" and permissible standing "where a diversion is organic, reasonable, and done in good faith." ALDF Br. 17.

Even after meaningful discovery, the "safeguards" would not stop any of the organizations that CMA's amici themselves highlight as epitomizing what Proposition 64 intended to bar. Another "Consumer Enforcement Watch Corp," with no business relationship with any car-repair shop, could sue every car-repair shop for "ridiculously minor" violations, *Brar*, 115 Cal. App. 4th at 1317, and extract settlements across the State. It could satisfy CMA's "safeguards" by (1) having a broadly defined mission, such as "advocating for consumers and car enthusiasts and protecting the safety of public roadways";[4] (2) expending some resources to further that mission in the ordinary course of its operations; and then (3) "diverting" those resources by, for example, writing letters to car-repair shops it believes violated the law. *See* AG Br. 25 (describing what the three "safeguards" would require). A lawyer seeking to file the exact same shakedown suits against travel agencies that the voters decried in Proposition 64 could follow the same roadmap. *See* Chamber Br. 10.

Any organization could create a broad mission and then "divert" resources in this way to file suit, no matter that the organization has "not used the defendant's product or service,

[4] *Compare* CMA Reply 24 (stating CMA's affected mission as "advocat[ing] for physicians and patients and to protect the public health").

viewed the defendant's advertising, or had any other business dealing with the defendant." Proposition 64 § 1(b)(3). CMA itself cannot say that its "safeguards" would ultimately bar even the most obvious of sham plaintiffs. *See* CMA Reply 27 (calling it "debatable" whether a sham, newly created organization that engaged in a brief stint of advocacy could satisfy the "safeguards").

Lacking any workable "safeguards" to prevent CMA's "diverted resources" theory from repealing Proposition 64 entirely, CMA's amici claim this effect is irrelevant because they are not aware of abusive litigation that has yet been brought under a "diverted resources" theory since the enactment of Proposition 64. AMA Br. 19–20; ALDF Br. 20; Labor Br. 10, 21. This is mere sleight of hand. There is no such thing as a "diverted resources" theory and CMA is trying in this case to invent it. This Court should not adopt a standing theory that effectively repeals Proposition 64, even if litigants have not yet brought shakedown suits, en masse, using that yet-unrecognized theory. To do so would open the floodgates to what the voters intended to forbid.

CMA's amici, moreover, are wrong. Even the handful of "diverted resources" cases that have been brought under the UCL to date include prime examples of the kinds of cases the voters meant to forbid. California chefs and restaurants, for example, should not be subjected to frivolous lawsuits and years of expensive litigation to defeat claims from organizations that "diverted resources" to file suit claiming that the restaurant was

selling a product it was not offering for sale. *See* Chefs Br. 4–12. And CMA itself is a pioneer in the abuse of "diverted resources" standing, having tried and failed before to use this theory over a decade ago to bring unnecessary litigation. *See Cal. Med. Ass'n*, 2011 WL 5910115, at *8.

CMA's amici are also wrong to say that "[n]o one can seriously claim this to be a 'frivolous' or 'shakedown' lawsuit" or that "the UCL is being misused here as a means of generating attorney's fees without a corresponding public benefit." AMA Br. 20; ALDF Br. 20. That is exactly what this case is.

CMA seeks to enjoin an Aetna policy aimed at stopping a small number of in-network doctors from directing their patients to out-of-network facilities (often without the patient's knowledge), in which the doctors had an ownership interest (also often without the patient's knowledge), which frequently left patients and their employers' health plans with high-dollar, surprise bills. In recent years, stopping such surprise out-of-network billing has been a focus of both public outcry and state and federal regulation. *See* California Association of Health Plans Br. 18–21. Aetna's policy, moreover, was submitted to both of the California agencies that regulate health insurance, which reviewed the policy for compliance with many of the laws CMA now claims the policy violates. *See id.* 10–15. One of those agencies then formally approved the policy, while the other took no action and allowed the policy to go into effect. *Id.*

The discovery record in the case was so clear that the individual doctors, who initially brought the case, dropped their

claims entirely. Unsurprisingly, those who were actually subject to Aetna's policy—the doctors contracted with Aetna—were unwilling to pursue a claim that they be permitted to surprise bill their patients using facilities in which they have ownership interests. Yet, CMA has been able to persist in pursuing this case for three additional years and take this case all the way to this Court. If this Court were to recognize "organizational standing," CMA will be just one of many organizations appointing themselves a private attorney general and filing similarly frivolous lawsuits in the hopes that some may result in quick settlements or generate attorney-fee awards.

b. Although they take contradictory positions, CMA's amici and CMA itself appear to agree, at least now, that the "diverted resources" theory would also have to be extended to all private UCL plaintiffs. CW Br. 25; CMA Reply 28–29. As Aetna argued (Aetna Br. 24–25) doing so "would allow any creative plaintiff's attorney to create standing for any conceivable UCL plaintiff," in contravention of the voters' intent. Even CMA admitted that its (inadequate) safeguards for organizations would not work as applied to individuals. *See* CMA Reply 28–29. And CMA's amici have no response to the argument that CMA's rule would allow any individual person to create standing to sue about anything they want to. It is therefore undisputed that a ruling for CMA would allow any individual person to create standing by "diverting" their charitable giving or volunteer time to engage in non-litigation advocacy against the business practice they later challenge in court.

As a result, an individual "who ha[s] not used the defendant's product or service," and whom the voters expressly intended to deprive of UCL standing, Proposition 64 § 1(b)(3), could manufacture standing for themselves. So too could an individual who "ha[s] not . . . viewed the defendant's advertising, or had any other business dealing with the defendant," whom the voters also singled out. Proposition 64 § 1(b)(3). Neither CMA's amici nor CMA itself can dispute that a ruling in their favor would overturn Proposition 64 in this way.

D. Proposition 64 Does Not Silently Import Broader Federal Standing Rules for Organizations

CMA's amici largely retreat to citing federal case law applying "organizational standing" under Article III of the U.S. Constitution. But none of them addresses the analysis this Court has applied to determine whether federal doctrines should govern a California statute. (CMA ignored it as well.) As Aetna argued (Aetna Br. 27), this Court made clear in *Amalgamated Transit* that federal Article III doctrines should *not* be imported when they are "inconsistent with" Proposition 64. 46 Cal. 4th at 1004.

CMA's amici—like CMA—assume that federal case law must apply without conducting this analysis. Some do so based on inaccurate statements that there is little difference between Proposition 64 and Article III. CW Br. 13 ("the only difference between UCL standing and Article III standing is that a UCL plaintiff must show they personally 'lost money or property'"). Others do so based on a misinterpretation that Aetna is somehow arguing that Proposition 64 "forbade all cases permitted under

federal standing requirements." Labor Br. 17. And others rely on the Voter Guide's statement that Proposition 64's economic injury requirement was intended to borrow the "injury in fact" concept from Article III. AG Br. 21–24; *see also* CMA Reply 12–13. Each of these arguments ignores the many ways in which Proposition 64 is inconsistent with Article III:

1) Proposition 64 limits standing to "economic" injuries, which makes standing under the UCL "*substantially narrower* than federal standing under article III." *Kwikset*, 51 Cal. 4th at 324 (emphasis added).

2) Proposition 64 forecloses the federal doctrine of "associational standing" entirely. *Amalgamated Transit*, 46 Cal. 4th at 998.

3) Proposition 64 does not import Article III's lenient causation requirement and instead imposes a more traditional causal requirement associated with tort law. *See Tobacco II*, 46 Cal. 4th at 325 n.16.

4) Proposition 64 expressly repealed a prior statute that authorized standing for any private plaintiff "acting for the interests of itself, its members or the general public." Cal Bus. & Prof. Code § 17204 (1993).

5) Proposition 64 was enacted to prevent specific types of plaintiffs from having standing when they had not "used the defendant's product or service," "viewed the defendant's advertising, or had any other business dealing with the defendant." Proposition 64 § 1(b).

Applying the federal "organizational standing" doctrine to the UCL would contradict each of these UCL-specific points. *See supra* Parts I.A–I.C. Indeed, extending federal organizational standing to the UCL would repeal Proposition 64 by giving standing to each of the individuals and organizations that

Proposition 64 meant to preclude. *See supra* Part I.C.2. The doctrine is therefore just as "inconsistent with" Proposition 64 as the federal associational-standing doctrine this Court rejected in *Amalgamated Transit*. 46 Cal. 4th at 1004.

Rather than engaging in this analysis, CMA's amici follow CMA's lead and cite a host of decisions applying federal organizational standing, as if that doctrine must apply to Proposition 64. Nearly all of these decisions analyzed the issue under Article III and made no mention of Proposition 64's requirements (or the UCL, for that matter). These are irrelevant because, as discussed above, Article III is "inconsistent with" Proposition 64 on this point.[5]

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[5] One of CMA's amici misrepresents various cases as having applied organizational standing under Proposition 64 when, in fact, they did not. CW Br. 21, 29–30. This amicus suggests (at 21) that *Fair Hous. of Marin v. Combs*, 285 F.3d 899 (9th Cir. 2002), ruled on standing related to a "UCL" claim, when the analysis was entirely under Article III and, in any event, before Proposition 64. It states (at 29) that *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210 (2010), is a "UCL direct organizational standing" case, when the decision found standing based on "a loss of business opportunity" because the defendant helped a third party "violate" a "judgment." It cites (at 30) *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939 (9th Cir. 2021), as having "found it proper to apply direct organizational standing in the UCL context," when that decision assessed a Rule 12(b)(1) challenge to the court's jurisdiction under Article III, did not even purport to apply Proposition 64, and affirmed the dismissal of a UCL claim on entirely different grounds. Another of CMA's amici implies the same about *Galliano v. Burlington Coat Factory of Cal.*, 67 Cal. App. 5th 953 (2021), which said nothing about "diverted resources" and found standing was alleged because "the promissory note" at issue "obligated" the plaintiff "to pay . . . and subjected her to debt

CMA's amici cite just a handful of decisions that actually applied "organizational standing" under Proposition 64. But CMA's amici—like CMA—have no response to Aetna's argument (Aetna Br. 28–31) that *none* of these decisions grappled with *any* of the ways in which organizational standing is inconsistent with Proposition 64's text, with its intent, and with this Court's decisions in *Tobacco II*, *Amalgamated Transit*, and *Kwikset*. As Aetna argued (Aetna Br. 3, 30), applying those decisions to membership organizations like CMA cannot be "squared" with this Court's decision in *Amalgamated Transit* and would have dictated a different result in that case. The only new decision that any CMA amicus cites is *Carijano v. Occidental Petroleum Corp.*, 686 F.3d 1027, 1032 (9th Cir. 2012) (cited in CW Br. 22), in which a panel concurred in the denial of rehearing en banc as to an opinion that did not assess Proposition 64 at all, stated that the panel "need not—indeed, could not" address standing, and then hypothesized that organizational standing might be found on remand. Nothing in that opinion considered any of the reasons why such a doctrine is inconsistent with Proposition 64.

Finally, some of CMA's amici argue that, despite all of the inconsistencies between Proposition 64 and federal organizational standing, the doctrine must apply to the UCL because of a vague reference in the Voter Guide. Specifically, they note that opponents of Proposition 64 argued that it should be rejected because it would "block health organizations from

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collection efforts and possible legal liability." *See* AIDS Foundation Br. 7.

enforcing the laws against selling tobacco to children." Voter Guide at 41; *see* AIDS Foundation Br. 17; Labor Br. 9, 13. CMA's amici reason that because the argument in *favor* of Proposition 64 stated generally that it "would permit ALL the suits cited by its opponents," the voters must have specifically intended to create standing for health organizations to sue as plaintiffs, using a "diverted resources" theory, to enforce laws against selling tobacco products to minors. AIDS Foundation Br. 17; Labor Br. 9, 13. Nothing in the Voter Guide suggests that *either* ballot argument was referring to any instance in which an organization had itself served as a plaintiff in a tobacco case. Indeed, CMA's amici highlight a sham tobacco-related UCL case as one of the lawsuits that Proposition 64 was intended to foreclose. AMA Br. 9–10 (citing *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998)). Regardless, plaintiffs (often supported by health organizations) have had no trouble bringing tobacco-related UCL suits without needing to rely upon organizational standing. *E.g.*, *Tobacco II*, 46 Cal. 4th 298.

II. THERE IS NO EVIDENCE THAT CMA HAS STANDING EVEN UNDER ITS THEORY

CMA's amici also lend support to Aetna's argument that, even if this Court extends "diverted resources" standing to the UCL, CMA cannot meet its own legal standard.

1. CMA's amici agree with Aetna's argument that organizational standing should be limited to situations in which the challenged practice already "impaired the organization's ability to provide services it normally provides," (Aetna Br. 31), before any voluntary "diversion" of resources. *E.g.*, CW Br. 37

(doctrine "requires an organization to show a perceptible impairment in its ability to perform its services or activities because of the defendant's conduct" (quotation marks omitted)); AG Br. 23 (requiring "a concrete and demonstrable injury to" the organization's "activities" (quotation marks omitted)).

This requirement flows directly from the case that originated "diverted resources" standing under Article III. As CMA admitted (CMA Reply 26), that decision recognized diverted-resources standing based on a "concrete and demonstrable injury to the organization's activities." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). CMA's amici rely on other decisions imposing a similar requirement. *See La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (organization must show that it would have suffered "some other injury if it had not diverted resources to counteracting the problem" and "cannot manufacture injury by . . . choosing to spend money fixing a problem that otherwise would not affect the organization at all"); *Two Jinn, Inc. v. Government Payment Serv., Inc.*, 233 Cal. App. 4th 1321, 1335 (2015) (no standing where UCL plaintiff claimed only to have "spent money to investigate" but had no evidence that the "allegedly unfair business activities had any independent economic impact on" it). But CMA's amici do not dispute that Aetna's policy did not cause CMA *any* cognizable economic injury before CMA chose to divert resources to advocating against it. And CMA, notably, admitted that the policy does not apply to its activities at all. R.A. 466.

2. CMA's amici also do not dispute Aetna's argument (Aetna Br. 32) that the sole "loss" of "money or property" that CMA even claims to have suffered is lost "time." Nor do they dispute that this "time" was spent entirely by salaried staff members, such that no incremental "money or property" was expended. That alone should dispose of any claim that CMA lost "money or property." Cal. Bus. & Prof. Code § 17204. One of CMA's amici appears to recognize this, arguing that this Court should hold that "out-of-pocket expenses that would not otherwise have been made such as paying outside personnel to combat the challenged practice and mailing educational materials on the contested practice are sufficient." Labor Br. 19. As Aetna argued (Aetna Br. 33–34), CMA has no evidence of any such incremental expenditures.

Another amicus does claim that organizations suffer the kind of "tangible economic harm" that Proposition 64 requires (Br. 30) when they divert staff time from one project to another without spending a single additional cent. It argues that this is dictated by this Court's holding in *Kwikset* that a plaintiff could establish standing even if it technically received the benefit of its bargain. *See* CW Br. 23–24. But the entire point of that holding was that the plaintiff paid more than he or she actually valued the product because the plaintiff bought the product relying on alleged misrepresentations about it, and it was "[t]hat increment, the extra money paid" that was the "economic injury." *Kwikset*, 51 Cal. 4th at 330. CMA paid no "extra money" here.

A third amicus argues that staff time should be recognized

as "economic injury" because it is an important resource that could otherwise "be spent advancing the organization's other preexisting priorities." ALDF Br. 12–16. But the question is not whether an organization's staff time is important. Rather, it is whether loss of time is a "tangible economic harm." Br. 30. It does not matter that lost time may be compensable as a remedy or considered an "expenditure" in other contexts. ALDF Br. 14–15; *see also* CMA Reply 20. The UCL limits standing to losses of money or property, foreclosing plaintiffs from basing standing on various injuries that may be compensable under other laws.

In truth, this amicus is arguing that organizations suffer "economic injury" whenever they could have spent their time advancing "other . . . priorities." ALDF Br. 13. But it cannot be that Proposition 64 grants standing to anyone whose "other priorities" are somehow impaired. That is apparent from the ways in which CMA's amici describe the "injury" and priorities that are actually at issue in this case. *See, e.g.*, *id.* at 16 (arguing that standing arises whenever a practice would "diminish" an organization's "good will"); AMA Br. 17 (arguing for standing based on CMA's "mission of promoting the science and art of medicine"). Impairments of these "priorities" are precisely the "non-economic injuries" to "abstract social interests" that CMA itself admits cannot suffice under Proposition 64. *See* CMA Reply 17–18 (listing "'recreational and aesthetic harms,' 'impairment of whale watching and damage to 'environmental interests'" (quoting *Kwikset*, 51 Cal. 4th at 324 n.6)).

Despite advocating that lost time is an economic injury,

CMA's amici do not have any meaningful response to Aetna's citation (Aetna Br. 33) of extensive case law making clear that loss of time is *not* an economic injury. Their only response—the same as CMA's—is to say that the cited decisions were about individuals, and organizations must be subject to different rules because they pay their staff. ALDF Br. 15; *see also* CMA Reply 18. That is not a viable distinction, as CMA and its amici admit that Proposition 64 did not create different standing rules for organizations and individuals. CW Br. 25; CMA Reply 28.

III. THE COURT SHOULD NOT ADDRESS CMA'S MUSINGS ON THE APPROPRIATE REMEDY

CMA's amici spend little time addressing CMA's attempt to present an entirely unrelated issue for this Court's review: whether CMA is seeking public injunctive relief and, if so, whether it can obtain such a remedy. Br. 37–48. CMA retreated from this issue in its reply after Aetna argued (Aetna Br. 35–36) that no issue of remedies is properly before this Court. Regardless, CMA's amici appear to agree on the only point that matters for purposes of the standing issues presented in this appeal: Whether CMA is seeking public injunctive relief (it is not for the reasons stated in Aetna's Brief at 36–40), or private injunctive relief, the same standing rules apply to it as would apply to any other private plaintiff.

As the Attorney General put it in the heading to this section of his brief: "A UCL Plaintiff's Standing Does Not Depend on the Scope of Injunctive Relief the Plaintiff Seeks." AG Br. 26; *see also, e.g.*, Local Prosecutors Br. 12. That has always been Aetna's argument. *See* Aetna Br. 15. It is also what the Court of

Appeal held. Op. 12 ("[a]ssuming without deciding" that CMA was *correct* that it sought public injunctive relief, and holding only that this would not result in different standing rules). And it is what this Court has held. *See McGill*, 2 Cal. 5th at 959. CMA therefore cannot use creative framing of the remedy it is seeking as a means of evading Proposition 64's standing requirements.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: August 22, 2022

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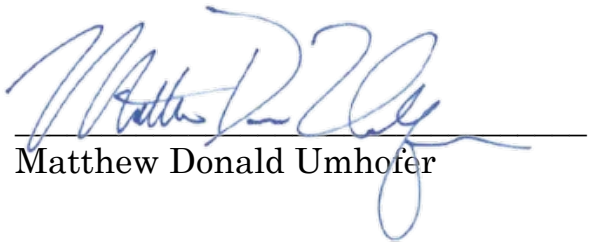

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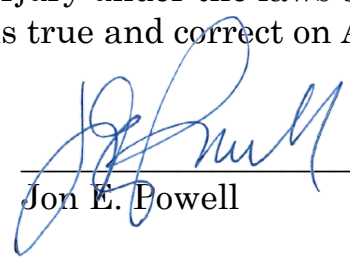

Jon E. Powell

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Supreme Court of California

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8/22/2022

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/s/Jon Powell

Signature

Umhofer, Matthew (206607)

Last Name, First Name (PNum)

Spertus, Landes & Umhofer LLP

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