IN THE SUPREME COURT OF CALIFORIA

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

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

PLAINTIFF/APPELLANT'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

Plaintiff/Appellant California Medical Association submits this Reply Brief in support of its Petition for Review.

Numerous and varied public interest organizations have filed significant *amici* letters with this Court explaining why the standards for this Court granting review are satisfied in this case. These letters further demonstrate the importance of reviewing this issue of first impression. *See* Amici Curiae Letter in Support of Petition for Review filed by American Medical Association, California Society of Anesthesiologists, La Cooperativa Campesina De California, La Casa del Diabetico Gualan and California Rural Legal Assistance Foundation dated June 30, 2021; Amici Curiae Letter in Support of Petition for Review filed by Service Employees International Union California State Council, California Labor Federation, International Brotherhood of Teamsters Joint Council 7, United Farm Workers of America, and Writers Guild of America dated June 29, 2021; and Amicus Curiae letter in Support of Petition for Review filed by AIDS Healthcare Foundation dated June 24, 2021.

These letters further explain why the Court of Appeal decision at issue here is incompatible and irreconcilable with

numerous California Supreme Court and Court of Appeal decisions, most notably *Animal Legal Defense Fund v. LT Napa Partners LLC*, (2015) 234 Cal. App. 4th 1270, *rev. den.* June 10, 2015. As these letters address many of the arguments raised by Respondents in their Answer Brief, Appellant will not repeat their arguments here but instead hereby incorporate the arguments in these letters by reference.

II. GRANTING REVIEW WOULD BE CONSISTENT WITH PROPOSITION 64

Respondents assert granting review would ultimately lead to a result inconsistent with the rationale underlying Proposition 64 for restricting UCL standing to "injured" persons. However, the purpose of Proposition 64 was not to do away with standing for public interest organizations that would otherwise have direct standing under federal Article III jurisprudence to assert claims in their own right that benefit their members and/or the general public. So long as the organization shows it could satisfy federal organizational standing requirements and sustained some form of economic injury that was caused by the illegal practice that formed the gravamen of the claim, it should have standing to assert claims under the UCL, consistent with Proposition 64.

Kwikset v. Superior Court, (2011) 51 Cal. 4th 310, 322 ("The text of Proposition 64 establishes expressly that in selecting this phrase [injured in fact under the standing requirements of the United States Constitution] the drafters and voters intended to incorporate the established federal meaning."). Indeed, in referencing the applicable injury in fact standards to apply in determining whether a person had standing to sue under the UCL, the Court in *Kwikset* cited to both *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* (2000) 528 U.S. 167, 180–181, and *Lujan v. Defenders of Wildlife,* (1992) 504 U.S. 555, 560–561 – decisions discussing the Article III standards for membership organizations to seek various forms of relief, including injunctive relief. *Kwikset*, 51 Cal. 4th at 332. *See also In re Tobacco II Cases*, (2009) 46 Cal. 4th 298, 317 ("Opponents of Proposition 64 argued that the initiative would adversely impact the ability of private groups to enforce consumer protection statutes, including 'enforcing the laws against selling tobacco to children.' In response, the proponents emphasized: 'Proposition 64 doesn't change any of these laws,' and 'Proposition 64 would permit ALL the suits cited by its opponents.' (Voter Information

Guide, Gen. Elec. (Nov.2004) rebuttal to argument against Prop. 64 at p. 41.)"

Thus, it would actually be inconsistent with Proposition 64 and numerous court decisions interpreting it to let the Court of Appeal decision at issue stand and disregard the entire line of authority applying the appropriate standards for organizational standing, including under the UCL.

III. THIS COURT SHOULD ALSO RESOLVE THE CONFLICT BETWEEN THE DECISION AND NUMEROUS DECISIONS FINDING STANDING ISSUES RAISE DISPUTED FACTS

In addition, the Answer Brief either downplays or ignores the conflict of the Court of Appeal's decision with numerous federal authorities. Many of these decisions have already addressed this issue and found standing, or established that the *Havens* line of authorities applies to assess organizational standing under the UCL. *See, e.g., Friends of the Earth v. Sanderson Farms,* (9th Cir. 2021) 992 F.3d 939.

Federal courts have long explained there are two standards to assess Article III "injury in fact" standing for organizations – direct organizational standing and indirect associational standing. This Court has never directly addressed the application

of the former standard to the UCL and only addressed the latter standard in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court,* (2009) 46 Cal. 4th 993.

However, federal courts have done so – including decisions issued after the Supreme Court's ruling in *Amalgamated Transit*. For example, in *In Re Wellpoint UCR Litigation,* (C.D. Cal. 2012) 903 F. Supp. 2d 880, 900 (*see also* prior decision reported at 865 F. Supp. 2d 1002), the trial court specifically addressed the impact of *Amalgamated Transit* on the issue of UCL standing, and found based on that decision and the application of the associational standing rule laid out in *Hunt v. Washington Apple Advertising Comm'n*, (1977) 432 U.S. 333, that certain plaintiffs did not have standing to assert certain claims. However, in addressing the standing of organizational plaintiffs to proceed in a direct capacity to seek relief under the UCL, the Court then cited both *Havens Realty Corp. v. Coleman*, (1982) 455 U.S. 363, and *Southern Cal. Housing v. Los Feliz Towers Homeowners Assoc.*, (C.D. Cal. 2005) 426 F. Supp. 2d 1061, in finding that the associations had UCL standing based on allegations of diversion of internal staff time and resources to combat illegal practices independent of the underlying litigation. *See also Animal Legal*

Defense Fund v. HVFG LLC, (N.D. Cal. Jun. 25, 2013) 2013 WL 324244, *3 (finding standing for Animal Legal Defense Fund ("ALDF") to proceed under UCL, applying *So. Cal. Housing Rights Center* and noting "[n]either our court of appeals nor the California appellate courts have decided whether a public advocacy firm such as ALDF can have standing under Proposition 64 to challenge a business practice inimical to its purpose and against which the firm expends its resources, thus reducing the money and property it would otherwise have for other projects."); *Animal Legal Def. Fund v. Great Bull Run, LLC*, (N.D. Cal. June 6, 2014) 2014 WL 2568685, *5 ("However, when an organizational plaintiff alleges injury from resource diversion, 'standing analysis [does not] depend on the voluntariness or involuntariness of plaintiffs' expenditures.' *Equal Rights Ctr. v. Post Props., Inc.*, (D.C. Cir. 2011) 633 F.3d 1136, 1140. Instead, the focus is 'on whether they undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [unlawful acts] rather than in anticipation of litigation.' Id.")[1]

[1] Both of these decisions were issued prior to the Court of Appeal decision in *ALDF v. Napa Partners, supra*,

Federal courts have consistently applied either the *Havens* or *Hunt* standard (or both) in generally assessing Article III organizational standing based on the diversion of organizational resources. *See, e.g., Service Women's Action Network v. Mattis*, (N.D. Cal. 2018) 352 F. Supp. 3d 977, 983-85 ("Indeed, the Ninth Circuit has specifically found that diversion of resources for 'outreach campaigns' and educating the public establishes a diversion of resources sufficient to establish organizational standing." [citing cases]); *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, (N.D. Cal. 2018) 284 F. Supp. 3d 1005, 1010 ("It is sufficient, however, for the organization to allege defendant's actions caused it to expend additional resources and 'but for' those actions it would have spent those resources to accomplish other aspects of its organizational mission. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040–41 (9th Cir. 2015)"); *Torres v. U.S. Dept. of Homeland Security,* (C.D. Cal. 2019) 411 F. Supp. 3d 1036, 1052-54 (applying the different standards under *Havens* and *Hunt* for assessing standing, and finding direct organizational standing based on a diversion of organizational resources).

The Court of Appeal decision at issue here misses this crucial alternative step followed by numerous federal court

authorities, asserting (as did the trial court) that *Amalgamated Transit* controls the outcome. However, as Appellant noted in the Petition, *Amalgamated Transit* only relied on the *Hunt* standard for indirect associational standing, not the *Havens* standard for direct organizational standing. This was because the *Havens* standard was admittedly not at issue, based on concessions made by the organization that it did not satisfy the requirements for direct organizational standing. *Amalgamated Transit, supra*, 46 Cal. 4th at 998, 1001.

Determination of UCL standing for organizations requires a detailed analysis of the underlying facts. As the Court of Appeal held in reversing the grant of summary judgment on the issue of UCL standing in *Veera v. Banana Republic, LLC,* (2016) 6 Cal. App. 5th 907 (*rev. den*. Mar. 29, 2017), where the issue of standing to proceed under the UCL requires an analysis of disputed facts (as the record demonstrates here) the trial court must deny summary judgment on the standing issue, as this is not a high bar to cross:

> "Our Supreme Court has explained that 'injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, [citations];

> and (b) 'actual or imminent, not "conjectural" or "hypothetical,"' [citation]." [Citations.] "Particularized" in this context means simply that 'the injury must affect the plaintiff in a personal and individual way." [Citation.]' [*Kwikset*, supra, 51 Cal.4th at pp. 322–323, 120 Cal.Rptr.3d 741, 246 P.3d 877.] *The court emphasized that 'injury in fact is not a substantial or insurmountable hurdle.... [Citation.] Rather, it suffices ... to ' "allege[ ] some specific, "identifiable trifle" of injury.' "* [Citations.]' (Id. at pp. 324–325, 120 Cal.Rptr.3d 741, 246 P.3d 877.)" (*Medrazo, supra*, 205 Cal.App.4th at pp. 12–13, 140 Cal.Rptr.3d 20.)

Id. at 917 (emphasis added).

Here, as detailed in Appellant's Petition, Respondents did not challenge the existence of disputed factual issues raised by Appellant on the issue of standing. Yet the trial court never addressed these facts because it simply found *Amalgamated Transit* controlled the outcome and ended its inquiry there. This is yet another reason for the Court to take up this matter -- to

provide courts guidance as to the proper factual analysis they must engage in to consider the issue of organizational standing.

Thus, for the reasons set forth in the Petition and in the numerous supporting *amici* letters, the Court of Appeal's decision presents a critical threshold issue of first impression related to organizational standing that this Court should resolve. This Court should grant review to explain there are two separate analyses courts must apply when determining the threshold issue of organizational standing. The Court should also grant review to explain what form of diversion of resources needs to be demonstrated by an organization to assert UCL standing, and whether internal expenditures of resources such as staff time and educational campaigns are sufficient to establish standing or if the organization needs to show it paid monies to third parties ; how can the organization show its mission is frustrated and/or its members' interests are impacted by the practice, and what the organization has done to counteract that impact independent of litigation, and other factual issues. Otherwise, the law on this important issue will remain conflicted and unsettled.

July 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(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 1,882 words, as counted by Microsoft Word, which is within the 4,200 words permitted.

By: */s/Alan M. Mansfield*
Alan M. Mansfield

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I, Suzanne Perry York declare: I am a citizen of the United States and employed in Jefferson County, Alabama. I am over the age of eighteen years and not a party to this action. My business address is 2001 Park Place North, Suite 1000, Birmingham, Alabama 35203. On July 8, 2021, I served a copy of the Plaintiff/Appellant's Reply Brief in Support of Petition for Review 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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Pursuant to the Office of Attorney General's instructions I served a copy of the Appellant's Reply Brief in Support of Its Petition for Review electronically through the Office website at https://oag.ca.gov/services-info/17209-brief/add.

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 Alabama that the above is true and correct. Executed on July 8, 2021 at Birmingham, Alabama.

/s/ Suzanne Perry York

STATE OF CALIFORNIA
Supreme Court of California

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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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