Case No. S269212

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA MEDICAL ASSOCIATION,

Petitioner,

v.

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

Respondents.

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

PETITIONER'S OPENING BRIEF

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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STATEMENT OF ISSUES PRESENTED

1. Whether an organization that expends resources and diverts them from other activities in response to a defendant's alleged violations of the Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.) suffers injury in fact and a loss of money or property sufficient to establish standing to seek relief under the UCL.

2. Whether an organization that otherwise satisfies the requirements for UCL standing loses that standing if it has members who are also injured by the defendant's challenged practices and who would also benefit from the relief requested by the organization.

3. Whether an organization that pursues injunctive relief under the UCL on behalf of the general public or on its own behalf is seeking "representative" relief that requires compliance with Code of Civil Procedure section 382.

I. INTRODUCTION

In 2004, the voters of this State enacted Proposition 64, which amended Business and Professions Code Sections 17203 and 17204 to add two requirements for standing under the Unfair Competition Law ("UCL"): first, the plaintiff must show injury in fact and lost money or property; and second, if pursuing "representative" claims for relief on behalf of others, the plaintiff must also satisfy the requirements of Code of Civil Procedure Section 382. In *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993 ("*Amalgamated Transit*"), this Court held that Proposition 64's standing requirements precluded two membership organizations from pursuing claims under the UCL after they conceded having suffered *no* injury or loss of their own money or property, even though the organizations' members had suffered injury and had purported to assign their individual claims for relief to those organizations. (*Id.* at p. 998.)

This case presents a different question: whether Proposition 64 also eliminated the UCL standing of associations or organizations that show they *have* suffered injury in fact and a loss of money or property simply because they have members who were also injured by the practices at issue and who would also benefit from the requested relief. There is no indication in Proposition 64's language or history that the voters meant to foreclose such standing. Quite the opposite: the voters left intact Section 17201's definition of "persons" entitled to bring UCL actions to include "associations and other organizations of

persons." The Court of Appeal erred in holding otherwise.

For the reasons set forth below, this Court should conclude that an organization that has suffered injury in fact and a loss of money or property—like CMA here—has standing to seek statutory remedies under the UCL. This Court should further hold, consistent with *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, that an organization that satisfies the UCL's standing requirements, like CMA, may seek public injunctive relief without having to satisfy Section 382's class certification requirements, and finally, that an organization with UCL standing may seek injunctive relief on its own behalf as a "person" under the UCL.

II. STATEMENT OF THE CASE

Petitioner CMA brought this action to challenge implementation of a policy adopted by Respondents Aetna Healthcare of California, Inc. d/b/a/ Aetna U.S. Healthcare Inc., and Aetna Health of California, Inc. ("Aetna") that effectively precluded physicians enrolled in Aetna's physician network from referring patients to out-of-network providers, even after the physicians had determined that the referrals were consistent with their sound medical judgment. CMA contended that Aetna's policy of directing or controlling where and from whom patients were eligible to receive services violated numerous state laws and was designed to discourage physicians in Aetna's network from delivering medical services in a manner they thought appropriate and to interfere with the medical judgment of Aetna healthcare providers. CMA further alleged that

Aetna's continued implementation of this policy was forcing CMA to divert organizational resources in order to investigate Aetna's unlawful practices, to advise CMA's member and non-member physicians about how to respond to those practices, and to advocate for measures to counteract Aetna's conduct.

By way of background, CMA is a 165-year-old organization, established to advance the art and science of medicine for the benefit of physicians, patients, and the public health. It is a membership organization, comprised of nearly 40,000 California physicians. (Joint Appendix transferred to this Court on June 9, 2021 ("JA") 379, 958.) CMA's mission is not only to advocate for physicians and patients throughout the State, but also to protect the public health of California residents. (*Id.*)[1]

Aetna sells health insurance and health benefit plans to individuals and businesses in California and represents in its plan documents that its member patients may obtain healthcare from physicians of their choice through Aetna Preferred Provider Organization ("PPO") and Point of Service ("POS") plans. These PPO/POS plans typically differentiate between coverage for medical treatment provided by: (a) in-network providers, who agree to accept discounted rates from insurers such as Aetna, and (b) out-of-network providers. (JA 4, 9, 373.)

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[1] Documents containing or discussing specific examples of Aetna's implementation of its Non-Par Intervention Policy are set forth in CMA's Appellant's Supplemental Appendix ("ASA"), which was filed under seal in the Court of Appeal on January 29, 2021.

Aetna typically charges more for these plans than for plans with more restrictive coverage, such as Health Maintenance Organization ("HMO") plans. (JA 373.)

Aetna's standard provider agreements with in-network physicians authorize those physicians to recommend to Aetna members with PPO or POS benefits that they may have their surgeries or other services performed at out-of-network ambulatory surgery centers if the referral is "consistent with [the physician's] sound medical judgment." (JA 218-219, 255, 383, 388, 412, 422.) Member patients then decide whether to accept the referral in reliance on their physician's professional medical judgment. (JA 206-207, 253, 375-376, 420, 465, 483, 659, 741.)

Despite contracting to provide these out-of-network benefits, Aetna began to restrict or eliminate out-of-network referrals in 2008 when it adopted and began implementing its "Non-Par Intervention Policy"—the policy at issue. Pursuant to that policy (as originally drafted and then as modified in 2011), Aetna sent letters to many in-network physicians, threatening them with termination and/or actually terminating them from Aetna's physician network solely because those physicians, in the exercise of their sound medical judgment, referred patients to out-of-network providers or ambulatory surgery centers. (JA 4, 6-7, 11-13, 46-51, 118-132, 205-208, 214-217, 223-225, 393-395, 1182-1188.) Aetna took these adverse actions even when the affected physicians informed Aetna of the sound medical reasons supporting their out-of-network referrals. (See ASA

127-151, 152-157, 158-166, 167-173.)

Aetna also sent threatening letters to member patients who had elected to use their out-of-network benefits, pressuring them to change their election or risk losing coverage for their upcoming surgeries. (JA 38, 163-164, 224-226, 376, 394-396.)

Several years before CMA became a party to this lawsuit, it began undertaking efforts to combat the adverse impacts that Aetna's Non-Par Intervention Policy was having on CMA itself, on its members, on other physicians who do not belong to CMA, and on Aetna's California patient population. (JA 958-959.) Despite CMA's efforts, Aetna refused to modify or revoke its challenged policy or otherwise to ameliorate the policy's adverse impacts.

III. PROCEDURAL HISTORY

In June 2012, several physicians, including Marc Kerner, M.D., and later Bryant Lum, M.D., filed a lawsuit asserting claims against Aetna, including a claim for relief under the UCL, to remedy the harms they suffered as the result of Aetna's implementation of its Non-Par Intervention Policy. In July 2012, several professional membership and public interest organizations, including CMA, filed a related action seeking relief pursuant to California Business and Professions Code Section 17203. (JA 1-34, 957-960.)

Plaintiffs in these actions alleged that in violation of multiple provisions of California law, Aetna's Non-Par Intervention Policy interfered with Aetna's in-network physicians' exercise of sound medical judgment and with its

member patients' right to rely on that judgment. (JA 374-400, 1086-1095, 1160-1162, 1182-1188).[2] Plaintiffs further alleged that Aetna's adoption and implementation of its Non-Par Intervention Policy constituted an "unlawful" and "unfair" business practice that entitled Plaintiffs to injunctive relief and other remedies under the UCL.[3]

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[2] For example, plaintiffs alleged that Aetna's policy violated Insurance Code section 10133 (prohibiting insurers "to direct, participate in, or control the selection of the hospital or health facility or physician and surgeon…from whom the insured secures services or exercise medical…professional judgment"), Business & Professions Code section 2056.1 (prohibiting insurers from "enter[ing] into contracts with physicians and surgeons or other licensed health care providers that interfere with any ethical responsibility or legal right of physicians and surgeons…to discuss with their patients information relevant to their patients' health care", including "communications regarding treatment options"); Business & Professions Code sections 2056 and 510 (providing "protection against retaliation for physicians [for] advocat[ing] for medically appropriate health care for their patients," or from "prohibit[ing], restrict[ing], or in any way discourag[ing] a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care"); and Health and Safety Code sections 1363.5 and 1367 (requiring plans to disclose to network providers the processes used "to authorize, modify, or deny health care services under the benefits provided by the plan."). (JA 403-406.)

[3] See *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1250 ("By statute, under both the Insurance Code and the Health and Safety Code, postclaims underwriting is an unlawful practice and thus may be enjoined under the UCL."); *Community Hospital of Monterey Peninsula v. Aetna Life Insurance Co.* (N.D. Cal. 2015) 119 F.Supp.3d 1042, 1051 (upholding challenge to Aetna's unlawful business practices

Aetna filed a demurrer, arguing that *Amalgamated Transit* precluded CMA and other public interest organizations from proceeding under the UCL. (JA 284.) On December 9, 2013, the trial court overruled Aetna's demurrer. (JA 341, 368.)

On January 6, 2014, the individual and organization plaintiffs jointly filed a consolidated Fifth Amended Complaint. (JA 372-435.) On April 24, 2014, Aetna filed an Answer and a cross-complaint against Drs. Kerner and Lum, both of whom Aetna had previously terminated from its network. (JA 440-452, 453-497.)

After seven years of litigation, discovery, and unsuccessful settlement negotiations, Aetna agreed to dismiss its cross-claims against Drs. Kerner and Lum in exchange for Plaintiffs' agreement to limit this lawsuit to CMA's claims for injunctive relief under the UCL. (JA 545-576.) In the parties' Stipulation of Dismissal (JA 564-566, 571), CMA agreed to pursue only "its claim for injunctive relief" under the UCL and not any claims for restitution on its own behalf or on behalf of its members. (JA 558.) The trial court set the case for trial on December 9, 2019. (JA 547.)

On August 6, 2019, the parties filed cross-motions for summary judgment or summary adjudication. (JA 590-1430.) On the issue of standing, CMA presented evidence that it had suffered an "injury in fact and has lost money or property" (Bus. & Prof. Code, § 17204) as a result of Aetna's unlawful practices.

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under UCL based on violation of provisions of Health and Safety Code).

(See JA 1145-1158, 1163-1166, 1314-1316.) For example, Francisco Silva, CMA's General Counsel and Senior Vice President, submitted a declaration stating that CMA had diverted staff resources from other projects and responsibilities in order to investigate and counter Aetna's Non-Par Intervention Policy and, that in response to Aetna's termination and threatened termination of physicians, CMA also devoted staff resources to advising physicians and the public about how to address Aetna's threats and actions; to preparing public educational resources pertaining to that policy, including articles, a resource guide, and talking points; to communicating with individual CMA members about how to respond to Aetna's actions most effectively; and to direct interactions with Aetna in an effort to persuade it to withdraw its policy and stop terminating or threatening to terminate physicians who issued out-of-network referrals when, in the exercise of their professional judgment, those referrals were medically appropriate. (JA 957-960.) CMA also expended staff time and other resources to urge the state agencies responsible for overseeing Aetna to investigate Aetna's Non-Par Intervention Policy and to take appropriate action to put a halt to Aetna's practices and bring it into compliance with its legal obligations. (JA 1154, 1182-88.) Silva estimated that CMA diverted between 200 and 250 hours of staff time to address these issues. (JA 959-960, 1150-1151, 1155.)[4]

[4] Aetna did not file any objections to the admissibility of any of this evidence on the standing issue, but asserted in

After conducting two hearings on the parties' cross-motions for summary judgment (see JA 1546-1567), the trial court on November 25, 2019, reversed its prior demurrer ruling and held that CMA lacked standing as a matter of law to seek relief under the UCL because *Amalgamated Transit* "foreclose[d] CMA from bringing a UCL action as an association." (JA 1542-1543, 1558-1559.) CMA timely appealed. (JA 1601.)

On April 28, 2021, the Second District Court of Appeal affirmed the trial court's summary judgment ruling. (*California Medical Ass'n v. Aetna Health of Cal.* (2021) 63 Cal.App.5th 660 (Grimes, J.).) Construing *Amalgamated Transit* as holding that a membership organization like CMA can never pursue any claims for relief under the UCL if that relief would benefit the organization's members, even if that relief would also benefit the organization itself and even if the organization presented evidence of its own Proposition 64 injury in fact, the panel concluded that CMA lacked standing as a matter of law and that the trial court had properly entered judgment for Aetna.

The panel rejected CMA's reliance on *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270 ("*ALDF*"), which held that an association's diversion of resources to combat an unlawful practice is an injury that confers UCL standing. The panel suggested that *ALDF* was inconsistent with *Amalgamated Transit*. (63 Cal.App.5th at p.

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response to CMA's Statement of Undisputed Facts that material facts concerning CMA's standing were "disputed." (JA 1314-1316.)

669). It also sought to distinguish *ALDF* on the ground that, unlike the plaintiff association in *ALDF (*which according to the panel may not have been a membership organization),[5] CMA's requested injunctive relief would inevitably benefit not only CMA but also CMA's members. The panel thus concluded that this potential benefit to CMA's members made plaintiff's lawsuit a "representative action seeking to rectify injury to [CMA's] aggrieved members," whether or not CMA would itself benefit from the requested injunction and regardless of whether other members of the public would also benefit from that injunction. (*Id.* at p. 669 ["[L]ike the union in *Amalgamated Transit,* CMA brought this representative action to rectify injury to its aggrieved physician members."].)

Ignoring that CMA also sought to rectify the injury in fact to its own money and property (and that the plaintiffs in *Amalgamated Transit* had disclaimed any organizational injury to themselves), the panel warned that if a membership organization could obtain UCL standing by showing that its efforts to combat an unlawful or unfair practice caused it to suffer economic injury, "any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries," a result the panel believed was precluded by Proposition 64's prohibition against

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[5] The panel was not sure, stating that "[t]he *ALDF* opinion does not even say whether ALDF had members or who they might be." (*Id.* at p. 668.)

purely "representational standing." (*Id.* at p. 668, citing *Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1005.)

Finally, the panel held that because CMA did not have UCL standing, it could not rely on the holding of *McGill* that any plaintiff with UCL standing may seek public injunctive relief (a *non*-representative remedy) without complying with Code of Civil procedure Section 382. (63 Cal.App.5th at pp. 668-669.)

CMA timely filed its Petition for Review on June 9, 2021, which this Court granted on July 28, 2021.

IV. DISCUSSION

A. Proposition 64 Did Not Eliminate the UCL Standing of Associations that Suffer Injury in Fact and Loss of their Money or Property.

Before Proposition 64, UCL actions could be brought "by any person acting for the interests of itself, its members or the general public." (Bus. & Prof. Code, former § 17204.) Thus, individuals and organizations could bring UCL actions and seek broad relief, including injunctive relief and restitution, without having suffered any injury of their own. (*Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1000.) In enacting Proposition 64, the voters modified the UCL to limit such standing.

Proposition 64 amended the UCL in two respects. First, it amended Business and Professions Code Section 17204 to prevent private "persons" (defined to include "associations and other organizations of persons," Bus. & Prof. Code, § 17201) from bringing UCL claims unless they "suffered injury in fact and … lost money or property as a result of the unfair

competition." Second, it amended Business and Professions Code Section 17203 to require a plaintiff seeking to "pursue representative claims or relief on behalf of others" to "meet[] the standing requirements of Section 17204 and compl[y] with Section 382 of the Code of Civil Procedure."

By enacting Proposition 64, the voters sought to prevent plaintiffs who had suffered no injury at all from pursuing UCL claims as roving private attorneys general, by "prohibit[ing] private attorneys from filing lawsuits for unfair competition *where they have no client who has been injured in fact*." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228, brackets in original, emphasis added, quoting Prop. 64, § 1, subd. (e) ["Findings and Declarations of Purpose"].) The principal purpose of Proposition 64 was to "close[]a loophole" that had allowed "frivolous shakedown lawsuits" by lawyers whose clients suffered no actual injury. (Motion for Judicial Notice, Ex. A at p. 6; see also *id.* ["Allows individual or class action 'unfair business' lawsuits only if actual loss suffered …."]; *id.* [describing "yes" vote as meaning that private persons cannot bring UCL lawsuits "unless the person has suffered injury and lost money or property" and "no" vote as allowing such lawsuits "without having suffered injury or lost money or property"].)[6]

[6] See also Motion for Judicial Notice, Ex. A at p. 38 ["Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice."]; *id.* ["This measure prohibits any

At the time Proposition 64 was adopted, a long line of cases had authorized organizational plaintiffs to seek relief on behalf of their injured members (or others) without having to show any injury to themselves. In *Californians for Disability Rights, supra*, 39 Cal.4th 223, this Court cited many of those authorities and characterized the effect of Proposition 64 as having "withdraw[n] the standing of persons who have not been harmed to represent those who have." (*Id.* at p. 232.) Proposition 64 accomplished this objective by incorporating federal Article III standing jurisprudence into the UCL and adding the requirement that the injury be economic in nature. "The text of Proposition 64 establishes expressly that in selecting this phrase [injury in fact,] the drafters and voters intended to incorporate the established federal meaning." (*Kwikset Corp. v. Superior Ct.* (2011) 51 Cal.4th 310, 322; see also Prop. 64, § 1, subd. (e) ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."].)

Nothing in Proposition 64's language or the accompanying ballot materials gave any indication that California voters were being asked to displace the well-settled principle that an organizational plaintiff, like any other "person," had standing to

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person, other than [certain public officials], from bringing a lawsuit for unfair competition unless the person has suffered injury and lost money or property."].

obtain relief under the UCL if it demonstrated sufficient injury to itself. To the contrary, Proposition 64 left untouched the language in the UCL specifying that a membership association is a "person" that may be entitled to bring UCL claims. (Bus. & Prof. Code, § 17201.) The Court of Appeal's holding below that Proposition 64 deprived all membership associations of UCL standing, even if they could demonstrate injury to their own money or property, reads the word "association" out of the definition of "persons" who have standing under Business and Professions Code Sections 17201 and 17203, in derogation of the settled principle of statutory construction that all words in a statute must be considered in determining the Legislature's intent. (*Levin v. Winston-Levin* (2019) 39 Cal.App.5th 1025, 1036 ["Our high court has repeatedly stressed that 'interpretations that render statutory terms meaningless as surplusage are to be avoided.'"], citing *People v. Hudson* (2006) 38 Cal.4th 1002, 1010; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253 ["In construing [a] statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does."].)

B. *Amalgamated Transit* Does Not Foreclose Organizational Standing.

Amalgamated Transit is entirely consistent with CMA's analysis. In *Amalgamated Transit*, this Court construed Proposition 64 as foreclosing the UCL standing of two unions that *conceded* having suffered no injury to themselves and that sued solely as the assignee of their members, who had their own

individual claims based on injuries they had individually suffered. (46 Cal.4th at pp. 998-99.) The unions sought monetary recovery for those members on the theory that, as membership organizations, they could "sue in a representative capacity," either as the assignees of their members or through a theory of pure associational standing. (*Id.* at p. 1001.) The question presented in that case was whether "a plaintiff labor union that has *not* suffered actual injury under the unfair competition law … [may] nevertheless bring a representative action under [the UCL] (1) as the assignee of employees who have suffered an actual injury …, or (2) as an association whose members have suffered actual injury …?" (*Id.* at p. 998.)

Answering in the negative, this Court held that "an injured employee's assignment of rights cannot confer [UCL] standing on an *uninjured* assignee," because "[t]o allow a *noninjured assignee* of an unfair competition claim to stand in the shoes of the *original, injured claimant* would confer standing on the assignee in direct violation of the express statutory requirement in the unfair competition law, as amended by the voters' enactment of Proposition 64, that a private action under that law be brought exclusively by a 'person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" (*Id.* at p. 1002, first emphasis added, quoting Bus. & Prof. Code, § 17204.) The Court further explained that Proposition 64's requirement "that an unfair competition law action can be brought only by a person who has suffered '*injury in fact*' … is inconsistent with the federal

doctrine of associational standing" under the line of cases following *Hunt v. Washington State Apple Advertising Commission* (1977) 432 U.S. 333, which recognize the Article III standing of an association whose members have suffered cognizable injury but that has not itself suffered independent injury. (*Id.* at p. 1004, emphasis in original, quoting Bus. & Prof. Code, § 17204.)

Amalgamated Transit does not in any way undermine the standing of an organizational plaintiff that sues under the UCL as long as its own injuries satisfy the "injury in fact" and "loss of money or property" requirements in Proposition 64.

The Court of Appeal's analysis confused two independent ways that organizational plaintiffs have historically been able to establish standing: (1) through associational standing (sometimes called "representative standing"), in which the institution stands in the shoes of its members to assert those members' claims based on those members' injuries; and (2) organizational standing, in which the institution asserts its own claims based on its own injuries (typically, though not always, in the form of resources expended to address the legal violation at issue).

Associational standing is a "doctrine [that] applies only when the plaintiff association has *not* itself suffered actual injury but is seeking to act on behalf of its members who have sustained such injury." (*Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1004, emphasis in original). Generally, an institutional plaintiff seeking to establish associational/representative standing must demonstrate that:

(1) its members would have standing to sue in their own right; (2) the interests sought to be protected in the case are germane to its institutional purposes; and (3) neither the relief requested nor the claim asserted would requires the individual members' participation. (*Hunt*, *supra*, 432 U.S. at p. 343.)[7] If these factors are satisfied, the institutional plaintiff may stand in the shoes of its members to assert those members' claims, based on those members' injuries, and may seek redress for those injuries on behalf of its members.

For an association to establish *organizational* standing, by contrast, it must show that it suffered *its own* injuries. An injury to its members does not suffice. Such organizational injury can take many forms. Most commonly, organizational plaintiffs establish such standing by demonstrating that they were required to divert institutional resources to counteract the

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[7] Many California cases outside the UCL context or pre-Proposition 64 recognize such purely representational or associational standing. (See, e.g., *Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 232, fn. 4 ["Section 382 has also been interpreted as permitting associations to sue on behalf of their members."], citing *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 793–795 [recognizing that organizations can have standing to sue in a representative capacity and that not all representative suits are necessarily class actions]; see also *Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1006 (conc. opn. of Werdegar, J.) [suggesting that an organization that satisfies Section 17204 may be able to rely on Section 382 to represent its members in a UCL action]; *Market Lofts Community Assn. v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 933 [leaving open the potential for a homeowners' association to satisfy the requirements of Section 382].)

defendant's unlawful actions, as in *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 379 (the principal authority cited in *ALDF*, 234 Cal.App.4th at p. 1281). Under the diversion-of-resources basis for establishing standing, the plaintiff must demonstrate that it diverted resources from other institutional activities or otherwise expended resources in response to the defendant's challenged activity, separate and apart from any direct expenditure of funds or resources on the litigation itself or on its preparation for litigation. (See, e.g., *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1124, fn. 3; *Fair Hous. of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 905.) Nothing in Proposition 64 or *Amalgamated Transit* called into question this substantial body of case law allowing plaintiffs to establish injury in this manner.

This Court in *Amalgamated Transit* had no need to cite *Havens* or the post-*Havens* authority establishing the standards for establishing injury-in-fact for organizational standing because the "plaintiff unions *concede*[*d*] that they d[id] not satisfy the[] requirements" of having suffered an injury. (46 Cal.4th at p. 1001, emphasis added.) Instead, the Court appropriately focused only on the applicability of the *Hunt* line of associational/representative standing cases, and identified the question presented as whether "a plaintiff labor union that has not suffered actual injury under the unfair competition law" could "nevertheless bring a representative action" under the UCL. (*Id.* at p. 998.) Justice Werdegar's concurring opinion similarly confirmed the limited reach of the majority's holding. (*Id.* at p.

1006 (conc. opn. of Werdegar, J.) ["I do not understand the majority opinion to hold that an association that *has* suffered injury in fact and lost money or property (see Bus. & Prof. Code, § 17204) may not represent its members as the plaintiff in a UCL action."], emphasis in original.)

The Court's opinion in *Amalgamated Transit* concluded by stating, in "summar[y, that] *a plaintiff has standing to bring an unfair competition law action only if the plaintiff has suffered 'injury in fact'* (Bus. & Prof. Code, § 17204)," and it emphasized that "[a]ssociations suing under [the UCL] are not exempt from [Proposition 64's] express statutory standing requirements." (*Id*. at p. 1005, emphasis added.) The issue raised by the Court of Appeal's decision below is whether an organizational plaintiff like CMA is nonetheless precluded from establishing UCL injury based on proof of economic harm to itself if that organization has members to whom the defendants' challenged conduct *also* caused economic harm. Nothing in the language of either Proposition 64 or the ballot materials require or permit such an exception.

C. Contrary to the Court of Appeal's Stated Concern, Continuing to Permit Organizational Standing Based on Diversion of Resources Would Not Allow Plaintiffs to Circumvent Proposition 64.

Proposition 64's injury-in-fact requirement was borrowed from the "standing requirements [of Article III] of the United States Constitution," (Prop. 64, § 1, subd. (e)) which has historically allowed organizations to establish standing by

demonstrating that they devoted organizational resources to combatting the alleged harms caused by a defendant's challenged policies or practices, including by diverting such resources from other programs or purposes. (*Havens*, *supra*, 455 U.S. at p. 378.) That same diversion of institutional resources analysis should enable an organizational plaintiff like CMA to satisfy the injury-in-fact requirements of the UCL.

To the extent the Court of Appeal's holding rested on a perceived concern that this well-established approach to permitting injury-in-fact standing would allow membership organizations to circumvent Proposition 64, that concern is unwarranted. Adequate safeguards are already in place to prevent organizations from establishing UCL standing in contravention of those voter-approved requirements.

First, state and federal courts have consistently held that to establish standing, an organizational plaintiff must show not only that it expended resources in response to a defendant's conduct, but that these resources were diverted from other purposes and were not expended in furtherance or anticipation of litigation. In other words, a plaintiff "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." (*La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest* (9th Cir. 2010) 624 F.3d 1083, 1088.)

Second, an organization cannot establish injury-in-fact merely by demonstrating that it diverted resources from other

purposes if the defendant's challenged activities would not otherwise have caused injury to the organization, such as frustration of its mission. (See *Two Jinn, Inc. v. Government Payment Service, Inc.* (2015) 233 Cal.App.4th 1321, 1335.) Instead, the "organizational plaintiff must show that the defendant's actions run counter to the organization's purpose, that the organization seeks broad relief against the defendant's actions, and that granting relief would allow the organization to redirect resources currently spent combating the specific challenged conduct to other activities that would advance its mission," i.e., redirect the expenditure of money or property. (*Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3d 1123, 1134.)

Third, an organization must show that it acted in response to the defendant's challenged conduct. In *Friends of the Earth v. Sanderson Farms, Inc.* (9th Cir. 2021) 992 F.3d 939 ("*Sanderson*"), the Ninth Circuit distinguished between organizations that disseminated literature or started new campaigns in response to the challenged action and those that merely continued their existing operations without change. (*Id.* at p. 942). The organizational plaintiffs in *Sanderson* sought to enjoin the defendant's misleading advertisements, but the record demonstrated that even after they became aware of those advertisements, plaintiffs "simply continued doing what they were already doing," campaigning against the general use of antibiotics in animal agriculture rather than responding more directly to the defendant's allegedly false advertising. (*Id.* at

943 ["The question, then, is whether the [plaintiffs'] activities were 'business as usual' and a continuation of existing advocacy, or whether they were an affirmative diversion of resources to combat Sanderson's representations."].) The Ninth Circuit concluded that the plaintiffs lacked UCL standing, but only because the evidence in the record showed that they had not diverted *any* organizational resources to combat the effects of those advertisements. (*Id.* at p. 945.)

While Article III organizational standing already requires a showing of injury, the UCL's requirement that the plaintiff must have suffered a loss of "money or property" (Bus. & Prof. Code, § 17204), requires UCL plaintiffs to demonstrate tangible economic harm, not just political or other non-economic impact on the organization's stated policies or purposes. To be sure, an organization can establish standing under Proposition 64 by making the affirmative decision to devote resources that it would otherwise expend on other activities to mitigate an allegedly unlawful practice that is frustrating the organization's mission. But that is a choice Proposition 64 allows UCL plaintiffs to make, and it authorizes them, having made that choice, to pursue equitable relief under the statute in addition to whatever other ameliorative efforts they may have undertaken.

D. CMA Has Standing Because it Demonstrated that Aetna's Challenged Policy Caused CMA to Suffer Injury in Fact and to Lose Money or Property.

As noted above, CMA demonstrated in response to Aetna's summary judgment motion that it had satisfied the UCL's

standing requirements based on its expenditure of resources to investigate and counteract Aetna's Non-Par Intervention Policy. Those expenditures diverted resources from other organizational purposes and activities and frustrated CMA's mission. (See JA 957-960; 1154-1157; 1182-1188.)

CMA devoted significant resources to respond to Aetna's Non-Par Intervention policy. CMA and its General Counsel estimated that CMA dedicated between 200 and 250 hours of staff time to that effort, responding to telephone calls and other communications from members who were subject to the policy, collecting and reviewing documents provided by those physicians, and advising members of their options for responding to Aetna's threats of termination and terminations. (JA 959-960, 1150-1151, 1155.) At CMA's direction, several of its staff members began working directly with Aetna in an effort to facilitate the reinstatement of terminated physicians back into the Aetna network. (JA 1156.) CMA also instructed its staff to create a new publicly available resource—the "Aetna Termination Resource Guide"—that CMA made available to provide outreach and to educate and address commonly asked questions about Aetna's policy. (JA 959, 1157, 1164-1166.)

CMA's injuries are similar to those the Ninth Circuit has repeatedly held are sufficient to establish Article III standing based on an organization's diversion of resources. In *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* (9th Cir. 2012) 666 F.3d 1216, for example, the plaintiff organization "investigated Roommate's alleged violations" of the

Fair Housing Act and California Fair Employment and Housing Act and, "in response, started new education and outreach campaigns targeted at discriminatory roommate advertising." (*Id.* at 1219.) Because "[t]he resources spent on those campaigns were not associated with litigation" and were devoted to responding to conduct that "frustrated [the organization's] central mission," the Ninth Circuit concluded that the organization had standing. (*Id.*)

Similarly, in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (9th Cir. 2011) 657 F.3d 936, 943 (en banc), the court held that organizational plaintiffs working to support day laborers had standing to challenge a city ordinance prohibiting solicitation of work from stopped vehicles. One employee testified that she "met with workers at the intersections targeted by Redondo Beach to discuss enforcement of the ordinance" and "went to the police station to assist day laborers who had been arrested." (*Id.*) The court concluded that the plaintiffs had established standing by presenting evidence that, consistent with the plaintiffs' mission, their staff had devoted "time and resources" "to strengthen and expand the work of local day laborer organizing groups" that "would have otherwise been expended toward [the organization]'s core organizing activities." (*Id.*)

Aetna's policy frustrated CMA's mission of advocating for physicians and patients and protecting public health. To respond to Aetna's interference with physicians' exercise of discretion to make out-of-network referrals based on their sound

medical judgment, CMA diverted resources that it would otherwise have devoted to other programs and policies into instead providing assistance to those member physicians and their patients who were, or were in a position to be, adversely affected by Aetna's discretion-stripping policy. Those redirected efforts, like the assistance provided to the day laborers in *Comite de Jornaleros* and the education campaign created in *Roommate.com*, were undertaken for the specific purpose of mitigating the adverse effects of Aetna's unlawful policy and were neither a continuation of CMA's normal activities independent of Aetna's actions nor actions taken solely in anticipation of litigation. (Cf. *Sanderson*, *supra*, 992 F.3d at p. 942.)

CMA's efforts to prepare materials for its members and to advise physicians about what they could and could not do to mitigate the impacts of Aetna's policy were not undertaken in the prosecution of this lawsuit. CMA's organizational mission requires it to provide support to its member physicians, a number of whom were at risk of termination from Aetna's physician network and most of whom had to balance the risks of termination against their professional obligation to exercise the independent professional judgment they deemed to be in the best interest of their patients. The assistance that CMA provided to advise and counsel those members, develop general guidance materials and protocols for members and non-members alike, and assist in pursuing reinstatement remedies for physicians Aetna wrongfully terminated for violating its

unlawful policies, was independent of CMA's efforts in this litigation to obtain an injunction against Aetna's future enforcement of that policy. (Cf. *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, overruled on other grounds by *Kwikset*, *supra*, 51 Cal.4th 310.)

The amount of resources that CMA diverted from other programs in furtherance of its efforts to minimize the adverse effects of Aetna's unlawful policy is sufficient to establish injury in fact. This Court has held that Proposition 64 did not increase "the quantum of lost money or property necessary to show standing" beyond the "specific, 'identifiable trifle' of injury" required by federal courts. (*Kwikset*, *supra*, 51 Cal.4th at p. 324, quoting *Danvers Motor Co., Inc. v. Ford Motor Co*. (3d Cir. 2005) 432 F.3d 286, 294 (Alito, J.).) Two hundred or more hours of staff time are far from a trifle. CMA has thus demonstrated "injur[y] in fact under the standing requirements of the United States Constitution," as incorporated into the UCL through the adoption of Proposition 64. (Prop. 64, § 1, subd. (e); see Bus. & Prof. Code, § 17204.)

CMA's diversion of staff time and dedication of resources to response to Aetna's Non-Par Intervention Policy also satisfies Proposition 64's "lost money or property" requirement. (Bus. & Prof. Code, § 17204.) While the UCL requires "that a plaintiff now must demonstrate some form of economic injury," this Court has noted that "[t]here are innumerable ways in which economic injury from unfair competition may be shown," and strongly suggested that diversion of staff resources was one of

those ways. (*Kwikset*, *supra*, 51 Cal.4th at p. 323, cited in *ALDF*, *supra*, 234 Cal.App.4th at p. 1281.) This Court in *Kwikset* approvingly cited *Hall v. Time* (2008) 158 Cal.App.4th 847, 854–855, as "cataloguing some of the various forms of economic injury," (*Kwikset*, *supra*, 51 Cal.4th at p. 323), and *Hall* explicitly included in that catalogue of economic injuries an injury to an organizational plaintiff that "lost financial resources and diverted staff time investigating case against defendants." (*Hall*, *supra*, 158 Cal.App.4th at p. 854, citing *Southern Cal. Housing v. Los Feliz Towers Homeow. Ass'n* (C.D. Cal. 2005) 426 F.Supp.2d 1061, 1069 [housing advocacy organization satisfied Proposition 64's requirements "based on loss of financial resources in investigating [a] claim and diversion of staff time from other cases to investigate the allegations"].) The Court of Appeal below rejected any reliance on *Southern California Housing* because "[t]hat case predates *Amalgamated Transit* and *Kwikset* by four and six years, respectively." (63 Cal.App.5th at p. 670.) But neither subsequent case disapproved of *Southern California Housing*, and in fact *Kwikset* "express[ed] some approval" for its reasoning "through its approving citation to *Hall*." (*ALDF*, *supra*, 234 Cal.App.4th at p. 1281.)

CMA's efforts to respond to Aetna's unlawful actions required it to divert staff from performing work they would otherwise have performed in furtherance of the organization's mission, thus devoting financial resources to counteract those actions. Under *ALDF*, *Southern California Housing*, and *Hall*,

and as suggested by *Kwikset*, this is sufficient economic injury to confer standing under the UCL.[8]

Although the distinction between economic and non-economic injury is not dispositive for Article III standing and therefore not often explicitly discussed, *Havens* supports the conclusion that diversion of resources provides the requisite economic injury, even if injury to the accomplishment of an organization's mission by itself could be sufficient to establish Article III standing. As *Havens* explained, "[t]hat the alleged injury results from the organization's noneconomic interest in encouraging open housing does not [a]ffect the nature of the injury suffered." (*Havens*, *supra*, 455 U.S. at p. 379, fn. 20.) *Havens* characterized the nature of the injury at issue as "concrete and demonstrable injury to the organization's activities—*with the consequent drain on the organization's resources*." (*Id.* at p. 379, emphasis added.) That drain on resources—itself a form of economic loss—was crucial to Supreme Court's analysis, as the Court distinguished the organizational standing approved in *Havens* from the "mere 'interest in a problem'" that the Court rejected as insufficient for

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[8] The Court of Appeal below may have attributed some significance to the fact that CMA expended internal resources while ALDF "paid a private investigator" to confirm that the challenged practices at issue were actually occurring. (63 Cal.App.5th at p. 668.) But there is no indication that this specific expenditure was dispositive of the standing issue in *ALDF* and there was no indication in *ALDF* or the cases it cited that, to support standing, an organization's expenditures must be made to a third party rather than to its own staff or for its own materials.

standing in *Sierra Club v. Morton* (1972) 405 U.S. 727, 739. The Second Circuit has also endorsed this economic-based-injury reading of *Havens*, explaining that "the Supreme Court has stated that so long as the economic effect on an organization is real, the organization does not lose standing simply because the proximate cause of that economic injury is 'the organization's noneconomic interest in encouraging [a particular policy preference].'" (*Nnebe v. Daus* (2d Cir. 2011) 644 F.3d 147, 157, citation omitted, alteration in original.)

For these reasons, the evidence before the trial court (including on CMA's cross-motion for summary adjudication) was sufficient to establish the required injury-in-fact for CMA's organizational standing.[9]

E. CMA is Entitled to Pursue its Claim for Injunctive Relief Under the UCL Without Having to Satisfy the Requirements of Code of Civil Procedure § 382.

1. The Relief Sought by CMA Is Public Injunctive Relief

[9] Nonetheless, if any issue remains about the sufficiency of CMA's injury in fact (perhaps based on Aetna's argument that material factual disputes remained concerning standing, see *supra* at p. 16, fn. 4). The Court could direct the trial court on remand to allow the parties to supplement the record and to complete pre-trial discovery into the standing issue, including by permitting the submission of evidence from CMA's General Counsel whose deposition Aetna took off calendar after CMA made a written proffer concerning the monetary value of the non-litigation resources CMA was required to devote to counter Aetna's Non-Par Intervention Policy. (See Appellant's Opening Brief in the Court of Appeal at p. 26 n.6.)

Proposition 64 provides that "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure." (Bus. & Prof. Code, § 17203.) In *McGill*, this Court held that a claim for public injunctive relief brought by a plaintiff who otherwise satisfies the UCL's standing requirements is *not* a "representative claim[]" and does *not* seek "relief on behalf of others"—and thus does not require compliance with Section 382. (2 Cal.5th at pp. 958-961.)

McGill explained that "[California law] distinguished between private injunctive relief—i.e., relief that primarily resolves a private dispute between the parties and rectifies individual wrongs and that benefits the public, if at all, only incidentally—and public injunctive relief—i.e., relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." (*Id.* at p. 955, internal quotations, brackets omitted.) The Court further held that a plaintiff with UCL injury-in-fact standing need not satisfy the requirements of Code of Civil Procedure Section 382 as a precondition to obtaining a public injunction because, in the words of Justice Chin, such claims are *not* "representative actions" but are rather private actions seeking a remedy that benefits the public. (*Id.* at pp. 959-961.)[10]

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[10] The term "representative action" is used differently in different contexts. For example, in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, this Court used the term to describe an action in which the plaintiff sought

While the Court of Appeal stated that it was "assuming without deciding" the issue, it suggested that the injunctive relief sought by CMA in this case was not "public" as that term was used in *McGill,* because an order prohibiting Aetna from continuing to implement its Non-Par Intervention Policy would principally benefit CMA's members—presumably by enabling them to exercise their independent professional medical judgment when considering whether to offer an out-of-network referral, and to be protected from termination if they decided to follow their own judgment rather than Aetna's directive. (63 Cal.App.5th at p. 669.) The Court of Appeal was mistaken about this issue as well.

What constitutes "public injunctive relief" was first addressed in *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, and later in *Cruz v. PacifiCare Health Systems, Inc*. (2003) 30 Cal.4th 303, in the context of false and deceptive advertising claims. *Broughton* explained that "[w]hatever the individual motive of the party requesting injunctive relief [under the CLRA], the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered." (*Broughton*, *supra*, 21 Cal.4th at p. 1080.) *Cruz* extended *Broughton*'s holding to

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restitution and disgorgement—which were also sought in *Amalgamated Transit* —but which CMA does not seek here. (*Id.* at p. 126, fn. 10.)

claims brought under the UCL. (See *Cruz*, *supra*, 30 Cal.4th at p. 315.)

As in *Broughton,* the claim in *Cruz* arose in the context of health care. Similar to the allegations at issue here, the plaintiff in *Cruz* alleged that PacifiCare "has been aggressively engaged in implementing undisclosed systemic internal policies that are designed, *inter alia*, to discourage PacifiCare's primary care physicians from delivering medical services and to interfere with the medical judgment of PacifiCare healthcare providers." (*Cruz*, *supra*, 30 Cal.4th at p. 308.) This Court determined that an injunction under the UCL enjoining PacifiCare's deceptive advertising was "clearly for the benefit of health care consumers and the general public" and thus constituted "public" injunctive relief. (*Id.* at p. 315.) By contrast, as an example of injunctive relief that would *not* benefit the public, the Court in *Cruz* described claims brought "primarily to redress injuries to competing businesses and only incidentally for the public benefit." (*Id.*)

Aetna's implementation of its Non-Par Intervention Policy adversely affected a broad range of Californians, including not only CMA members, but also non-CMA patients and physicians throughout the State. For example, while the immediate impact of Aetna's policy was to prevent Aetna physicians from making out-of-network referrals, the effect of that policy was also felt by other Aetna in-network and out-of-network physicians—regardless of whether those physicians were CMA members. The impacts of Aetna's policies on California's patient

population were arguably even greater. Aetna's policy prevented nearly a million patients covered under Aetna's California healthcare plans from obtaining medically appropriate out-of-network referrals they paid for when selecting a PPO/POS plan over an HMO plan, and thus distorted the market for medical services throughout the State. (JA 373, 834, 1160-1161; Motion for Judicial Notice, Ex. B; see also ASA 152-157, 167-171, 270-72, 296, 301-307, 392-394.) Just as in *Cruz*, *Broughton*, and *McGill*, an injunction prohibiting Aetna from continuing to commit unlawful and unfair business practices through implementation of its Non-Par Intervention Policy is a "public" injunction under California law.

CMA requested an injunction that would have beneficial impacts extending far beyond the immediate interests of CMA and its members, while the economic benefits of that injunction to CMA would be minimal. The injunction would benefit Aetna network physicians throughout California by prohibiting Aetna from continuing to interfere with their professional medical judgment about when to refer patients to out-of-network providers. It would benefit those out-of-network physicians and medical providers by enabling them to treat Aetna patients. It would benefit all current and future employers that contract with Aetna (or may in the future contract with Aetna) to provide healthcare services to their employees. And it would benefit the enormous number of Aetna's patient members, current and future, by enabling them to obtain the medical benefits that they (or their employers) paid for, to be provided by the

physician of their choice, including where an out-of-network referral is medically appropriate.

The injunctive relief that CMA seeks is more closely related to the public injunctive relief sought in *Cruz*, which benefited health care consumers and the general public, than to the type of private injunctive claim that, for example, might be brought by an injured business competitor principally seeking private economic benefit. Because the relief sought by CMA will have the "'primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," it would properly be held to constitute public injunctive relief. (*McGill*, *supra*, 2 Cal.5th at p. 955.)

Recent Court of Appeal decisions provide further support for the conclusion that CMA is seeking public injunctive relief, and therefore may pursue its claim for injunctive relief without having to comply with the requirements of Code of Civil Procedure section 382.

Mejia v. DACM Inc. (2020) 54 Cal.App.5th 691, review denied (Dec. 23, 2020) involved a plaintiff seeking an injunction to require a motorcycle dealership to comply with state law and "provide its customers with a single document setting forth all the financing terms for motor vehicle purchases made with a conditional sale contract." (*Id.* at p. 695, emphasis omitted.) *Mejia* held that such an injunction, which was not limited to relief for class members or a small group of individuals, was nonetheless "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to

the general public." (*Id.* at p. 698, quoting *McGill*, *supra*, 2 Cal.5th at p. 951.)

In *Maldonado v. Fast Auto Loans, Inc.* (2021) 60 Cal.App.5th 710, review denied (Apr. 28, 2021), the plaintiffs requested an injunction requiring the defendant lender, among other things, to "cease charging an unlawful interest rate on its loans exceeding $2,500." (*Id.* at p. 715.) The Court of Appeal held that the plaintiffs were seeking public injunctive relief, even though "Lender could not possibly advertise to, or enter into agreements with, every person in California," because "[i]t is enough that the requested relief has the purpose and effect of protecting the public from Lender's ongoing harm." (*Id.* at p. 722.) Here, while not every member of the public is an Aetna member, the requested relief has the purpose or effect of protecting the California public as a whole from Aetna's harm, rather than simply benefiting CMA (or its members).

A recent Ninth Circuit decision makes it critical for this Court to clarify that the relief requested by CMA, like that requested in *Mejia* and *Maldonado*, qualifies as "public injunctive relief." That decision, while purporting to apply California law as this Court would construe it rather than as the Courts of Appeal in *Mejia* and *Maldonado* construed it, rejected those cases and imposed such draconian limits on what qualifies as "public injunctive relief" under California law as to effectively preclude such relief in future cases.

In *Hodges v. Comcast Cable Commc'ns, LLC* (9th Cir. 2021) 12 F.4th 1108, a split Ninth Circuit panel (Collins,

VanDyke, JJ., with Berzon, J., dissenting), purported to distinguish *McGill*, *Broughton*, and *Cruz* from *Mejia* and *Maldonado*, concluding that the latter cases did not involve true public injunctive relief because the requested injunctions would only benefit "the class of persons who actually purchased motorcycles" or "who actually sign lending agreements," not the general public as a whole. (*Id.* at pp. 1117-1118.) As Judge Berzon explained in dissent, however, the requested injunction in those two cases would actually benefit many current and future customers. (*Id.* at pp. 1123-1124 (dis. opn. of Berzon, J.).) Judge Berzon also noted that even *McGill*'s paradigmatic public injunction against false advertising could not possibly benefit the entire California population, given the targeted nature of even the most ubiquitous advertising. (*Id.*)

Aetna's policies and programs directly and indirectly affect a huge number of health care consumers throughout California, and potentially far more in the future. To eliminate the unnecessary uncertainty injected by the Ninth Circuit's decision into the scope and application of a doctrine that had previously been relatively straightforward to apply, the Court should clarify that, as long as the other requirements of *McGill*, *supra*, 2 Cal.5th at pp. 956-958, are satisfied, an injunction restraining a business's unlawful conduct that threaten future injury to the general public qualifies as "public" injunctive relief.

2. Even if the Requested Relief Does Not Constitute a Public Injunction, CMA Should be Entitled to Pursue that Relief for Itself

This Court should also clarify, in the alternative, that even if the relief sought by CMA was not "public" injunctive relief within the meaning of *Cruz*, *Broughton*, and *McGill*, CMA may nonetheless pursue a private injunction under the UCL to prevent Aetna from continuing to enforce its Non-Par Intervention Policy, because such relief is necessary to redress CMA's demonstrated injury. The fact that CMA's members and many others would *also* benefit from that injunction does not transform CMA's claim into a "representative claim" or "relief on behalf of others" that, under Proposition 64, would require CMA, an organizational plaintiff, to satisfy the requirements of Code of Civil Procedure 382.[11]

Institutional plaintiffs have long been permitted to pursue injunctive relief on their own behalf, whether or not that relief would also inure to the benefit of others. (See e.g., *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir.1996) 92 F.3d 1486, 1501–1502 [affirming injunction prohibiting highway patrol from enforcing helmet safety law against motorcyclists without reasonable suspicion of violation, because officers would be unlikely to inquire whether motorcyclist was a plaintiff or a

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[11] Although CMA agrees with Justice Werdegar's concurrence in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 988, which concluded that an organization that has suffered injury-in-fact under Proposition 64 can satisfy Code of Civil Procedure section 382 without class certification by pursuing relief in a representational capacity, the argument here is limited to the scope of an organization's right to pursue non-representative private injunctive relief on its own behalf under the UCL (as well as public injunctive relief, discussed in the previous section, see *supra* at p. 37).

member of the plaintiff organization before issuing citation].) "[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*." (*Bresgal v. Brock* (9th Cir. 1987) 843 F.2d 1163, 1170–1171, emphasis in original.)

Here, for the reasons explained above, CMA has standing to bring this UCL claim for injunctive relief because it suffered economic injury as a result of the adoption and implementation of Aetna's Non-Par Intervention Policy. The *only* remedy that would provide CMA the relief necessary to prevent ongoing injury and the need to continue diverting resources to counter the adverse effects of Aetna's challenged policy is an injunction prohibiting Aetna from continuing to implement that policy.

To construe Proposition 64 as requiring an organizational plaintiff to satisfy the class certification requirements of Code of Civil Procedure 382 as a prerequisite to obtaining relief *for itself* would impose an enormous limitation on the ability—indeed, the right—of organizational plaintiffs to obtain relief for injuries suffered.

The scope of injunctive relief available to organizations that establish standing based on the injury to themselves resulting from their diversion of resources was recently addressed by the Ninth Circuit. In *East Bay Sanctuary Covenant v. Garland* (9th Cir. 2020) 994 F.3d 962, nonprofit organizations that assisted asylum seekers challenged a new

rule denying asylum to persons arriving at the Mexican border who had not been denied asylum in another country through which they had traveled. The court explained that under the new rule, the plaintiff "East Bay Sanctuary Covenant, which focuses on filing affirmative asylum applications, would have to 'overhaul' its affirmative asylum practice into a removal defense program, diverting resources to develop new materials and train existing staff"; would have to file separate applications for each applying family member; and would file fewer applications, reducing its funding. (*Id.* at p. 974.) The court then addressed the appropriate scope of relief, explaining that "[c]omplete relief" for the plaintiffs had to remedy both the harms to their mission and funding. (*Id.* at p. 986.) Although the organizations were suing on their own behalf, the Ninth Circuit held that it was appropriate for the district court to enter an injunction prohibiting application of the challenged rule anywhere along the southern border, as the organizations' harms were caused by the government's broad application of the challenged rule. (*Id.*)

The Ninth Circuit has specifically noted that "[c]lass-wide relief may be appropriate even in an individual action." (*Bresgal*, *supra*, 843 F.2d at p. 1171.) That the relief needed to remedy CMA's individual injury may also benefit CMA's members and non-members does not mean that CMA's claim for injunctive relief is pursued "on behalf of others" under Business and Professions Code section 17203. Otherwise, any injunctive relief needed to remedy a plaintiff's injury that incidentally benefitted a third party would be precluded in the absence of

otherwise unnecessary class certification proceedings under Section 382. That conclusion would be inconsistent with the express statutory language of the UCL, which provides that "[a]ny person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition." (Bus. & Prof. Code, § 17203.)

McGill's reasoning also supports the conclusion, even outside the public injunction context, that an individual plaintiff's claim for relief that benefits itself (because the plaintiff will no longer need to devote resources to addressing the underlying wrong) as well as third parties is not a claim pursued "on behalf of others" or a "representative action" within the meaning of Proposition 64. *McGill* distinguished between an individual action by a party with UCL standing that sought a broader injunctive remedy (in that case, public injunctive relief) and the pursuit of relief on behalf of others. (*McGill*, *supra*, 2 Cal.5th at pp. 959-960.) The scope of the remedy does not transform an individual action into a "representative action" under the UCL.

F. There Is No Basis for the Court of Appeal's Distinction Between Associations Pursuing Injunctive Relief That Will Benefit Members and Associations Pursuing Injunctive Relief Serving More Abstract Interests.

The Court of Appeal made another fundamental error in its efforts to distinguish this case from *ALDF*, concluding that

whether CMA had standing under the UCL depended upon its status as a membership organization. Because CMA has members, while according to the Court ALDF perhaps did not, see *supra* at p. 18 & fn.5, the Court held that CMA was necessarily pursuing its claim as a "representative action seeking to rectify injury to its aggrieved members" rather than to itself. (63 Cal.App.5th at p. 669.) According to the Court, "ALDF was not advocating on behalf of or providing services to help its members deal with their loss of money or property.... [whereas] CMA was founded to advocate on behalf of its physician members." (*Id.* at p. 668.) "[L]ike the union in *Amalgamated Transit*, CMA brought this representative action to rectify injury to its aggrieved physician members." (*Id.* at p. 669.) In so holding, the panel concluded that any claim brought by an organizational plaintiff is necessarily a "representative claim[] … on behalf of others" under Business and Professions Code § 17203 if that organization has members who might benefit from the requested relief.

This logical leap is unwarranted. When a membership organization is the plaintiff and its injuries derive from its efforts to serve its members, it will often be the case that its members would benefit from the requested relief. When an organization seeks public injunctive relief, moreover, that requested relief, by definition, will also benefit others. The scope of those beneficial effects and who may be affected by them should not undermine the plaintiff's standing, as long as its asserted standing is based on its own injuries and the relief

it seeks will redress those injuries by obviating the need to divert further resources to counteract the defendant's challenged conduct – even if a byproduct of that relief is some benefit to others as well.

Under the panel's reasoning, a membership association like CMA could *never* bring a UCL action, even if it could establish standing in its own right under Proposition 64, if its mission included serving the interests of its members or others and the relief it sought furthered that mission. (See 63 Cal.App.5th at p. 663.) By contrast, where the requested relief would have only an indirect effect on the organization's members or others, or where the requested relief would principally support, for example, the environment or the rights of animals (as in the *ALDF* case), the organization *would* have UCL standing.

No court has ever accepted such an impractical and illogical distinction for determining standing, i.e., treating an organization that has a discrete group as its members differently than an organization whose purpose is to benefit that discrete group. For example, consider how the distinction drawn by the Court of Appeal would operate in a voting rights case brought by a membership association that had expended resources at the expense of other projects to educate and otherwise aid individuals to avoid deprivation of their right to vote. Would the association's standing depend on whether its members were among the voters affected by the voting rights' violation, or would it have organizational standing under the UCL because its members' interest in protecting voting rights is non-economic in

nature? What about a case brought by a nurses' union that had re-directed its resources to address a hospital's violation of nurse-to-patient staffing ratios? Would that count as an expenditure in service of a general interest in adequate health care (akin to ALDF's interest in animal safety)? Or would that lawsuit be prohibited, like the Court of Appeal prohibited CMA's lawsuit, because the requested relief would benefit the union's nurse members economically by requiring the hospital to increase those nurses' hours of employment? Would a group fighting anti-homeless policies lack UCL standing if it had homeless members, but have standing if it advocated on issues of homelessness but lacked homeless members? Standing to pursue vindication of public law rights should not turn on whether an organizational plaintiff had members who would directly benefit from the relief requested, as compared to not having such members.

The standing requirement ensures that both sides of a legal dispute have "such a personal stake in the outcome of the controversy as to assure [the] concrete adverseness" on which the judiciary's analysis of difficult questions depends. (*Baker v. Carr* (1962) 369 U.S. 186, 204.) This was also the purpose of Proposition 64. (See *Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1004 [intent of Proposition 64 was to "prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*"], emphasis in original.)

The rule devised by the Court of Appeal—that organizations may demonstrate UCL injury only if they lack members who might financially benefit from the remedies sought in the lawsuit—violates the very principles that the standing doctrine is designed to protect. That rule would turn standing principles on their head, precluding lawsuits by organizations composed of individual members who may be among those most directly affected by an illegal course of conduct (in this case, in-network Aetna physician members who are also members of the CMA) while only permitting lawsuits by organizations that represent more abstract interests. Such a rule would also deny standing to organizations that have been "injured in fact" and have "a personal stake in the outcome of the controversy" simply because they share those injuries or that stake with their members. Legitimate public interest groups throughout California whose missions are to protect patients, represent victims of discrimination, refugees, immigrants, persons facing issues with securing housing, consumers, patients, and environmental and animal rights advocates would all have their rights as "persons" to seek public injunctive relief under the UCL undermined or eliminated. The Court should reject that ill-considered and insupportable approach to determining UCL standing.

This Court should clarify what *Amalgamated Transit* could not because of the concessions made by the plaintiff unions in that case: that an association that suffered injury in fact and lost

money or property can, in an appropriate case such as this satisfy the standards for UCL standing.

V. CONCLUSION

As this Court stated in *Kwikset*, *supra*, 51 Cal.4th at p. 324, "injury-in-fact is not Mount Everest." However, the Court of Appeal's opinion makes standing under the UCL a nearly impossible mountain to climb for a whole host of legitimate non-profit organizations, including CMA, that seek injunctive relief to stop illegal conduct after their efforts to mitigate or eliminate the impacts of that conduct short of litigation have failed.

For the above reasons, this Court should reverse the rulings below and remand this matter to the trial court for further consideration of the parties' cross-motions for summary judgment and, if appropriate, for trial.

Dated: October 27, 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 11,136 words, as counted by Microsoft Word, which is within the 14,000 words permitted.

By: */s/Alan M. Mansfield*
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I, Dolores Williams declare: I am a citizen of the United States and employed in San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, California 94108. On October 27, 2021, I served a copy of the Petitioner's Opening Brief 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 Plaintiff/Appellant's 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 California that the above is true and correct. Executed on October 27, 2021 at San Francisco, California.

/s/ Dolores Williams

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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