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 REPLY 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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INTRODUCTION

The parties in this case agree that, contrary to the Court of Appeal's ruling, a membership organization that suffers injury in fact and loses money or property as a result of a defendant's alleged UCL violations has standing under Proposition 64, even if the organization's members might *also* have Proposition 64 standing. (See Resp. Br. 14–15, 20–21; Pet. Br. 21–22.) As a result, the principal remaining issue is whether CMA's expenditure of staff time and related organizational resources to respond to Aetna's implementation of its Non-Par Intervention Policy constitutes the type of injury sufficient to establish Proposition 64 standing.

Aetna acknowledges, as it must, that an organization's dedication of otherwise-committed institutional resources to counter the adverse effects of a defendant's wrongful conduct constitutes injury in fact under federal cases analyzing Article III standing. (See Resp. Br. 25.) Aetna nonetheless contends that an organization's decision to reallocate institutional resources to redress the harms caused by a defendant's unfair or unlawful business practice can never satisfy the requirements of Proposition 64 because that would be inconsistent with the proponents' goal of restricting UCL standing. (*Id.* at 26–28.)

In making this argument, Aetna offers no response to CMA's cited cases, which explain the limited circumstances under which an organization's diversion of resources to counter conduct interfering with its mission may satisfy Proposition 64. As CMA has demonstrated, to establish Proposition 64 standing

based on the diversion or expenditure of institutional resources, an organization must show that: (1) the defendant's challenged conduct interfered with, or was contrary to, the organization's stated mission and purposes; (2) the organization's diversion of resources was in response to that conduct (rather than merely a continuation of the organization's ongoing resource allocation); and (3) the resources were not expended exclusively on litigation activities or litigation preparation. (See Pet. Br. 28–30.)

CMA fully satisfied each of these conditions. In the trial court, CMA presented evidence that it had devoted between 200 and 250 hours of paid staff time and related institutional resources (as required, for example, to prepare and publish resource materials) to counter the adverse impacts of Aetna's challenged policy on CMA's mission and members, and that those efforts were independent of this litigation or preparation for this litigation. (JA 958–960, 1150–1152, 1155–1159; Pet. Br. 31.)

Aetna also contends that even if an organization's targeted reallocation of resources may be sufficient to satisfy the "injury in fact" and "lost money or property" requirements of Proposition 64, CMA failed to satisfy two other requirements for UCL standing.

First, Aetna contends that the only plaintiffs who may pursue a UCL claim are those who engaged in a direct business transaction with that defendant. (See Resp. Br. 12.) But that contention finds no support in the text of the UCL or Proposition 64, which focus on whether the plaintiff has suffered an economic injury—not on the precise relationship between the parties. (See

Bus. & Prof. Code, § 17204.) While Proposition 64's ballot materials expressed concern about "uninjured" plaintiffs bringing freestanding UCL claims against defendants whose challenged conduct had no impact on them, Proposition 64 addressed that concern by imposing the economic-injury and cause-in-fact requirements; the associated ballot materials gave as an example a situation in which the causation requirement is satisfied simply by a plaintiff viewing a defendant's misleading advertisements, even in the absence of a relationship between the parties.

Besides, this Court has already held that a plaintiff who had only "indirect business dealings with" a defendant may bring a UCL action as long as the defendant's challenged conduct was a cause in fact of the plaintiff's claimed harms. (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788.) Here, Aetna's implementation of its policy interfered with CMA's ability to fulfill its mission. To mitigate that harm, CMA devoted considerable efforts and staff resources to countering Aetna's policy, including by engaging directly in "dialogue with Aetna" to "try to see if there [were] a way that [a terminated] physician could be reinstated into the network." (JA 1155–1156.) If any "direct business dealings" were required by the UCL—which they are not—those would suffice.

Second, Aetna contends that Proposition 64, in addition to expressly requiring cause in fact (by providing that a plaintiff's injury must be incurred "as a result of" the defendant's challenged conduct) also required UCL plaintiffs to prove "proximate cause." But that additional requirement finds no

support in the statutory text or case law either. Moreover, its imposition would be contrary to this Court's holding in *Kwikset Corp. v. Superior Ct.* (2011) 51 Cal.4th 310 that a "but for" relationship between the challenged conduct and the plaintiff's injury is "sufficient to allege causation." (*Id.* at 330.)[1]

Aetna's proximate-cause argument is based on passing dicta in a footnote in *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, a case that predated *Kwikset* by three years. Aetna insists that the Court of Appeal's general statement in *Hall* that "[w]e use the word 'causation' to refer both to the causation element of a negligence cause of action [citation], and to the justifiable reliance element of a fraud cause of action [citation]" explicitly incorporated negligence causation into the UCL—even though the court never mentioned proximate cause and instead concluded that the UCL requires only "a showing of a causal connection or reliance on the alleged misrepresentation." (*Id.* at 855 & fn. 2.)

Even if Aetna were right that Proposition 64 implicitly required a showing of proximate cause, the record establishes that showing here, as an organization's expenditure of resources to ameliorate the harms caused by a defendant's unfair or unlawful business practice is not of such "independent origin" that it breaks the causal chain between the defendant's actions

[1] Aetna does not dispute that the record presented to the trial court demonstrated that CMA would not have expended such resources but for Aetna's adoption of the illegal policy in question.

and the plaintiff's resulting injury. (*Akins v. Sonoma County* (1967) 67 Cal.2d 185, 199.)

Finally, Aetna challenges CMA's argument that it may seek public or private injunctive relief in this case without having to satisfy the class certification requirements of California Code of Civil Procedure Section 382—the fourth Question Presented in CMA's Petition for Review. As CMA has shown, an organization that has UCL standing may seek public injunctive relief under *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 without having to satisfy Section 382 because, as this Court has held, claims for public injunctive relief are not "representative" actions "on behalf of others." (*Id.* at 958–959.)

Because the UCL permits organizations to seek injunctive relief on their own behalf as "persons" under the UCL, private injunctive relief is also available. While Aetna disputes CMA's entitlement to such injunctive relief and the scope of such relief, those arguments are premature because the issue here is just the threshold question of statutory construction: Does Proposition 64 require a plaintiff seeking injunctive relief on a *non*-representative basis to satisfy the class certification requirements of Section 382? The answer is plainly no.

ARGUMENT

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

Aetna acknowledges that a membership organization that suffers its own injury in fact and loss of money or property resulting from a defendant's conduct may prosecute a UCL claim

on its own behalf. (Resp. Br. 14–15, 20–21.) That conclusion is required by the statutory language, which specifies that "associations and other organizations of persons" are "persons" entitled to pursue UCL claims. (Bus. & Prof. Code, § 17201.) The principal dispute in this case is whether CMA's diversion of staff time and resources from other projects to counteract the adverse impacts of Aetna's implementation of its challenged policy constitutes an injury in fact and a loss of money or property sufficient to confer UCL standing. (*Id.* § 17204).

We begin with the well-settled meaning of "injury in fact" under federal law, which Proposition 64 incorporated. Although Aetna contends that "general federal standing jurisprudence has no bearing on the UCL or Proposition 64" (Resp. Br. 26), "[t]he 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*, 51 Cal.4th at 322; see also Prop. 64, § 1, subd. (e) ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."].)

Federal courts have consistently held that an organization's diversion of resources from other institutional activities in response to a defendant's challenged conduct is sufficient to establish that organization's injury in fact. (See, e.g., *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 379; *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1124 fn. 3.) Diversion

of resources is therefore an "injury in fact" for purposes of standing under Proposition 64 as well.

Proposition 64 restricts UCL standing to a subset of injury-in-fact harms, precluding plaintiffs from relying on purely intangible, non-property injuries (such as to plaintiffs' aesthetic interests in nature or other abstract social interests) and requiring them instead to establish that they suffered some type of "economic injury," which as this Court explained in *Kwikset* "is itself a classic form of injury in fact." (51 Cal.4th at 322–323.) Although the federal case law incorporated into Proposition 64 does not limit injury in fact to economic injury alone, those federal cases are nonetheless highly relevant because they support the conclusion that the type of injury in fact that CMA suffered here—the reallocation of paid staff time and related institutional resources—is a recognized form of *economic* injury. (Cf. *Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1004 [looking to federal doctrine of associational standing in determining Proposition 64's intended meaning].)

As we demonstrate below, federal *and* California case law make clear that an organization's diversion of resources in response to unlawful conduct by a defendant constitutes economic injury "personally suffered" by the organization and caused by the unfair business practice. That injury therefore satisfies Proposition 64's requirements. (*Kwikset*, 51 Cal.4th at 322–323).

A. An organization's diversion of resources is a personal injury suffered by the organization

The parties agree that an organization has UCL standing if it can show that it lost money or property as a result of a defendant's challenged practices. (See Resp. Br. 14–15). Aetna's threshold argument is that CMA did not suffer cognizable economic injury because the harms that CMA sought to ameliorate were felt more directly by CMA's members than by CMA itself. (Resp. Br. 13–14.) It is of course true that any CMA member who personally suffered economic injury resulting from Aetna's policy would also have standing to sue under the UCL. But nothing in Proposition 64 limits standing to the plaintiffs who suffered the comparatively greater harm. Rather, it provides that any person or organization that suffered *any* economic injury as a result of the challenged conduct, however minimal, has UCL standing. (*Kwikset*, 51 Cal.4th at 324 ["'identifiable trifle' of injury" sufficient].)

Aetna contends that CMA is impermissibly seeking to pursue associational or "representative" standing (in which an organization exclusively seeks to assert a claim on behalf of its members who have been injured) rather than organizational standing (in which the organization asserts its own injuries). (See Resp. Br. 24, 30 (quoting Opinion 11–12).) Like the Court of Appeal, Aetna principally relies on *Amalgamated Transit* in making this argument. (Resp. Br. 14.) But in *Amalgamated Transit*, the plaintiff union expressly conceded that it suffered no injury to its own interests and sought *only* "to act on behalf of its members who have sustained such injury." (46 Cal.4th at 1004.)

Here, CMA asserts—and has presented evidence sufficient to create a triable factual issue on summary judgment—that Aetna's policy caused CMA itself to suffer actual economic injury. (See also *Californians for Disability Rts. v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227 ["CDR did not claim to have suffered any harm as a result of Mervyn's conduct."].)

Courts have long recognized that "organizational first-party standing" may be established through evidence that an organization reallocated or diverted staff and other resources in response to a threat to its stated mission. (*Fair Hous. of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 902–903.) Cases such as *Havens Realty Corp. v. Coleman* make clear that an organization that redirects resources from other institutional commitments or otherwise expends resources in response to a defendant's challenged activity (other than for litigation or pre-litigation preparation) has suffered its own concrete, particularized injury. (See, e.g., 455 U.S. at 379; *Animal Legal Def. Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1279–1281 ("*ALDF*"); *S. Cal. Housing Rights Center v. Los Feliz Towers Homeow. Ass'n* (C.D.Cal. 2005) 426 F.Supp.2d 1061, 1069; see also Pet. Br. 25–26.)

The fact that CMA's members were independently harmed by Aetna's policy does not convert CMA's first-party organizational standing into third-party or representative standing. Rather, courts analyzing organizational standing uniformly look to the effects of defendant's challenged practices on the organization itself, without regard to whether those

practices also—or even primarily—harmed the organization's members or clients. For example, the court in *Nnebe v. Daus* (2d Cir. 2011) 644 F.3d 147 held that although the New York Taxi Workers Alliance was barred from bringing a representative action asserting its members' procedural due process claims, the Alliance had organizational standing because it "expended resources to assist its members who face summary suspension by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys." (*Id.* at 157.) Similarly, in *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.* (9th Cir. 1991) 959 F.2d 742, the court held that legal services organizations serving refugees had standing to challenge a federal policy, not only because that policy allegedly deprived their clients of due process rights, but also because the policy "frustrate[d the organizations' own] goals and require[d] the organizations to expend resources in representing clients they otherwise would spend in other ways." (*Id.* at 748.) So too here, CMA is asserting its own institutional economic injuries. (Prop. 64, § 1, subd. (e).)

B. Diversion of resources in response to unlawful conduct constitutes economic injury

The injury to an organization resulting from having to divert staff and other institutional resources to respond to a defendant's wrongful conduct is economic injury within the meaning of Proposition 64's "lost money or property" requirement. Proposition 64 did not "purport to define or limit the concept of 'lost money or property.'" (*Kwikset*, 51 Cal.4th at 323.) Nor did this Court in *Kwikset* "supply an exhaustive list of

the ways in which unfair competition may cause economic harm." (*Ibid.*) Nonetheless, the Court described one such instance in which a plaintiff is "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Ibid.*) The Court also approvingly cited *Hall*, 158 Cal.App.4th at 854–855, as a case that "catalogu[ed] some of the various forms of economic injury" cognizable under Proposition 64, (*Kwikset*, 51 Cal.4th at 323)—a list that included "lost financial resources and diverted staff time investigating case against defendants," i.e., precisely the type of economic injury suffered by CMA in this case. (*Hall*, 158 Cal.App.4th at 854, citing *S. Cal. Housing*, 426 F.Supp.2d at 1069).

Aetna is of course correct that appellate courts do not necessarily "adopt the reasoning" of every case they cite. (Resp. Br. 29.) But *Kwikset* was explicit about the purpose for which it cited *Hall*—to describe representative but non-exclusive examples of the types of "economic" injury that satisfy Proposition 64. *Kwikset*'s approving citation to *Hall* indicates this Court's acknowledgment that those examples were consistent with Proposition 64's intended meaning. Nothing in *Kwikset* or *Amalgamated Transit* is to the contrary.

Kwikset's examples of *non-economic* injuries, i.e., the sorts of injuries in fact that are *not* sufficient to establish standing, further support CMA's position. Those non-economic injuries include "recreational and aesthetic harms," "impairment of whale watching" and damage to "environmental interests." (*Kwikset*, 51 Cal.4th at 324 fn. 6.) None of these injuries have anything to do

with expenditures, costs, or resources. Rather, they all resemble the "abstract social interests" that the U.S. Supreme Court distinguished from the "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources" that the *Havens* plaintiff successfully advanced as the basis for its organizational standing. (*Havens*, 455 U.S. at 379, citing *Sierra Club v. Morton* (1972) 405 U.S. 727, 739; see also *Nnebe*, 644 F.3d at 157.)

The fact that CMA expended staff time to respond to Aetna's policy does not make CMA's injuries "non-economic." No case holds that the expenditure of paid staff time fails to establish organizational standing. While Aetna cites three federal district cases for the proposition that lost "time" is not economic injury (Resp. Br. 33), all three cases involved individuals who spent their personal, non-compensated time responding to the defendants' actions. (*Knippling v. Saxon Mortg., Inc.* (E.D.Cal., Mar. 22, 2012, No. 2:11–cv–03116) 2012 WL 1142355, at *2; *Ruiz v. Gap, Inc.* (N.D.Cal., Feb. 3, 2009, No. 07–5739 SC) 2009 WL 250481, at *4, affd. (9th Cir. 2010) 380 F.App'x 689; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.* (S.D.Cal. 2012) 903 F.Supp.2d 942, 966.) This distinction is crucial. Staff time is inherently compensated time, for which the organization is paying salaries.

The record demonstrates that CMA paid its staff for 200 to 250 hours of work expended in response to Aetna's implementation of its Non-Par Intervention Policy, which prevented them from working on other projects that furthered

CMA's mission. (JA 960.) Organizations typically operate on limited budgets. To require salaried staff to work on a particular project necessarily reduces the organization's ability to have staff devote that time to other budgeted projects. (See *Nat'l Council of La Raza v. Cegavske* (9th Cir. 2015) 800 F.3d 1032, 1040 [the resources an organization would not have spent but for defendant's conduct are "resources they would have spent on some other aspect of their organizational purpose."].)

This payment to staff for an unplanned response to Aetna's policy, which diverted them from working on other priorities, is a loss of money or property under the UCL. Although Proposition 64 did not "purport to define or limit the concept of 'lost money or property,'" (*Kwikset*, 51 Cal.4th at 323), a loss is "[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way." (Black's Law Dict. (11th ed. 2019).) The value CMA received from the labor of its staff was significantly less than expected or budgeted because those efforts had to be repurposed to respond to Aetna's policy.

Aetna nevertheless argues that because CMA's staff were salaried, "CMA did not lose a single cent" so it lacks UCL standing. (Resp. Br. 32.) But the ultimate effect on a plaintiff's finances is not relevant to whether the defendant's conduct caused a loss of money or property under Proposition 64. This conclusion is supported by *Clayworth,* which held in the context of a UCL price-fixing claim that overcharged plaintiffs had standing even though "they were able to mitigate fully any injury by passing on the overcharges" to customers. (49 Cal.4th at 789.)

Moreover, Proposition 64 does not limit cognizable injuries to the loss of money, but also includes the loss of property, which "may often involve … for example, a diminishment in the value of some asset a plaintiff possesses." (*Kwikset*, 51 Cal.4th at 336.) CMA lost the expected value of its staff's labor and institutional assets when it diverted "staff and other resources from other projects" in response to Aetna's policy. (JA 960.)[2] If these responsive efforts had not been required, CMA would have paid its staff to perform other work that furthered its organizational objectives. (*Ibid.*) Outside the UCL or standing contexts, courts have applied a similar analysis in holding that "[d]iverted staff time is a compensable injury," allowing monetary damages even when staff were salaried. (*Pac. Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1166–1167 ("'the issue is not whether [the plaintiffs] would have paid the [employees'] salaries' absent the defendant's wrongdoing, but, rather whether [they] were 'deprived of the services [they] paid for' because of the need for the employees to divert their attention to minimize the damage from the defendant's misconduct. [Citation]," alterations in original).

Southern California Housing and *ALDF* both held that such diversions of staff time were sufficient to establish organizational standing under the UCL. Neither case found it

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[2] Although CMA Vice-President Silva's declaration focuses on reallocation of paid staff time, he also states that CMA expended "other resources"—which makes sense, given that the activities undertaken by CMA also included preparing, producing and disseminating informational materials and other documents, which all cost money. (JA 959–960.)

necessary to quantify the amount of resources and time expended; it was sufficient that the record showed that some quantum of resources were reallocated.

In *Southern California Housing*, the plaintiff's "evidence of actual injury [was] based on loss of financial resources in investigating this claim and diversion of staff time from other cases to investigate the allegations here." (426 F.Supp.2d at 1069.) In *ALDF*, the court's description of plaintiff's diverted resources was more detailed, but still focused on non-quantified diversions of staff time. (*ALDF*, 234 Cal.App.4th at 1279–1280).

Aetna attempts to distinguish *ALDF* on the ground that the plaintiff "*specifically identified* money and resources that it otherwise would not have spent," including "'pa[ying] a private investigator' to investigate potential violations, and then paying staff to investigate those violations to the exclusion of alternative work." (Resp. Br. 28 fn. 6.) But CMA too specified that it had "to divert staff time from other projects and duties" and that "[d]uring the time that they were engaged … CMA staff could not engage in other activities that would better further [its] organizational mission." (JA 960.) The court's analysis in *ALDF* did not turn on the fact that there had been a payment to an outside investigator, which the court mentioned only in passing as one of several activities undertaken by ALDF. Moreover, there would have been no reason for the court to address ALDF's reallocation of in-house staff resources if it were exclusively relying on that single payment. (See *ALDF*, 234 Cal.App.4th at 1280.)

Aetna does not identify any other authority to support its assertion that UCL standing turns on whether an organization's expenditures are made to outside rather than internal staff. Nor would such a distinction be tenable. The UCL's "lost money or property" language draws no such distinction, and its purposes would not be served by denying standing to an organization that, for example, used its own printer, ink, and paper to create public education materials in response to misleading advertising rather than printing those same materials at a local Kinko's.

C. Existing case law imposes practical limitations on organizational standing sufficient to protect the purposes underlying Proposition 64.

Aetna's principal argument against treating CMA's reallocation of institutional resources as economic harm for UCL standing purposes is that such an approach would "effectively overturn Proposition 64 by allowing anyone who wanted to file a UCL lawsuit to create standing for themselves by engaging in advocacy." (Resp. Br. 27.) That argument ignores the well-established restrictions on organizational standing, which ensure that standing cannot be manufactured by a plaintiff whose claimed injury is not sufficiently immediate and concrete to satisfy Proposition 64.

CMA's opening brief identified three common-sense "safeguards" on injury-in-fact standing.

First, to establish standing based on diversion of resources, an organization must show that its efforts were in response to conduct that frustrated the organization's pre-existing, stated mission. Aetna repeatedly refers to CMA's resource-allocation

decisions as voluntary and thus insufficient under Proposition 64. But requiring an organizational plaintiff to establish that its expenditure decisions are in response to an actual threat to its stated mission helps ensure that the expenditure was made in a good faith effort to further the organization's purposes and mission. (See *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3d 1123, 1134–1135.) Organizational plaintiffs that must satisfy this requirement "cannot manufacture the injury" by voluntarily choosing to spend money to respond to something "'that otherwise would not affect the organization at all[.]' [Instead, they must] show they 'would have suffered some other injury' had they 'not diverted resources to counteracting the problem.' [Citation.]" (*E. Bay Sanctuary Covenant v. Biden* (9th Cir. 2021) 993 F.3d 640, 663 (en banc).)

Second, the organization's allocation of resources must actually have been triggered by the defendant's conduct, rather than being a continuation of existing activities—even if those operations relate to the mission frustrated by defendant's conduct. (*Friends of the Earth v. Sanderson Farms, Inc.* (9th Cir. 2021) 992 F.3d 939, 942.)

Third, the organization's dedication of staff time or institutional resources must either precede its litigation activity or at least be independent of litigation, as here, where CMA's efforts to counter the adverse effects of Aetna's policy were principally through non-litigation efforts. (See, e.g., *Two Jinn, Inc. v. Gov't Payment Serv., Inc.* (2015) 233 Cal.App.4th 1321, 1334; *Buckland v. Threshold Enterprises, Ltd.* (2007) 155

Cal.App.4th 798, 816, disapproved on other grounds in *Kwikset,* 51 Cal.4th 310; *Walker*, 272 F.3d at 1124 fn. 3.)

Aetna argues that allowing evidence of resource reallocation to satisfy the economic-injury requirement would enable "an organization with no connection to a would-be defendant [to] create standing" by taking some of the actions CMA took in this case, such as writing and mailing letters to the defendant, conducting meetings and other outreach to advise members of their rights, and devoting resources to investigating the challenged practice. (Resp. Br. 22.) But Aetna's argument ignores the safeguards described above, which CMA's evidence satisfies.

As CMA has shown (Pet. Br. 32–33), Aetna's implementation of its Non-Par Intervention Policy frustrated CMA's long-established mission to advocate for physicians and patients and to protect the public health. In response to that implementation, CMA took specific actions, including investigating the policy, providing specific advice and support to physicians, meeting with Aetna representatives to facilitate reinstatements, and preparing and publishing informational resources for its members and the public. (JA 958–960.)

Aetna contends that CMA failed to demonstrate an actual impairment to its "ability to provide … services" as a result of Aetna's policy. (Resp. Br. 31, quoting *Havens*, 455 U.S. at 379; see also *Fair Hous. of Marin*, 285 F.3d at 903.) But CMA has amply demonstrated that Aetna's policy frustrated its mission. (See JA 958–960; Pet. Br. 32–33.)

Aetna's analysis suffers from the same error that underlies the Court of Appeal opinion: the assumption that a membership organization's own interests cannot be injured by actions that also harm its members. By ignoring any such injury, Aetna frames CMA's action as simply its own choice to advocate. But the cases Aetna cites do not support its position. The court in *Center for Law & Education v. Department of Education* (D.C. Cir. 2005) 396 F.3d 1152 rejected the plaintiffs' organizational standing to challenge federal rules where their only alleged harm was that the organizations were "force[d] … to change their lobbying strategies" to a more expensive state-by-state approach. (*Id.* at 1161.) As the D.C. Circuit subsequently explained, "the plaintiffs in *Center for Law & Education* never 'challenge[d] the substance' of the federal regulations at issue" and "standing failed for lack of a conflict between the challenged conduct and the plaintiffs' stated mission." (*Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.* (D.C. Cir. 2011) 659 F.3d 13, 26 [further noting that "many of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy," *id.* at 27].) In contrast, CMA has alleged a direct conflict between Aetna's implementation of the Non-Par Intervention Policy and CMA's mission to "prevent[] conduct that interferes with the physician-patient relationship." (JA 958.)

As discussed *supra* at 14, an organization can suffer its own injury in fact as the result of an action or policy that frustrates its mission by targeting the organization's members, clients, or beneficiaries. The impairment in *Havens* was to the "counseling

and referral services" that the plaintiff housing organization provided to potential homebuyers. Although the defendants' alleged racial steering policies discriminated directly against those homebuyers, not the organization, the Court held that the organization's services and mission were nonetheless also frustrated. (*Havens*, 455 U.S. at 379.) Similarly, the court in *Nnebe* held that the plaintiff membership organization had standing because it "expended resources to assist its members" facing disciplinary proceedings, a circumstance similar to that faced by CMA and its physician members. (644 F.3d at 157; see also *El Rescate Legal Servs.*, 959 F.2d at 748 [organization expended resources assisting clients subject to challenged policy]; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (9th Cir. 2011) 657 F.3d 936, 943 (en banc) [organization supporting day laborers had standing when it counseled and assisted laborers affected by challenged law].)

Aetna relies on the Court of Appeal's conclusion that in *ALDF*, unlike here, the plaintiff "was not advocating on behalf of or providing services to help its members deal with their loss of money or property." (Resp. Br. 32, quoting Opinion 11.) But there is no basis in the case law or the UCL to differentiate between pure advocacy organizations that lack members and those that provide membership services. (See Pet. Br. 48–51.) If anything, an organization that advocates *and* provides services is likely to have a more concrete stake in a dispute affecting its mission. (Pet. Br. 51–52.) Aetna also fails to address the illogical consequences of its proposed distinction as applied to a broad

range of cases ranging from voting rights challenges to housing policy issues, in which it would make no sense to deprive an organization of standing simply because it has members whose interests it serves. (Pet. Br. 50–51.)

When a defendant's unfair or unlawful conduct interferes with an organization's stated mission and requires it to devote limited resources to combatting the effects of that conduct on itself and its members (see, e.g., *Nnebe*, 644 F.3d at 157), or even where such conduct makes it more difficult for the organization to provide services to those it represents thus requiring allocation of more resources than the organization had budgeted (see, e.g., *El Rescate Legal Servs.*, 959 F.2d at 748), the economic injury-in-fact requirement of Proposition 64 is satisfied.

Aetna next contends that CMA's approach would allow Proposition 64's restrictions to be bypassed by someone who creates an organization with a broad, roving mandate and engages in "a brief stint of advocacy against the practice to be challenged." (Resp. Br. 23.) But whether that stratagem would succeed is highly debatable.

First, if the organization were established for the sole purpose of bringing UCL cases, any "brief stint of advocacy" would likely be deemed "pre-litigation" and thereby insufficient to establish standing. In *Buckland*, for example, the court rejected plaintiff's asserted standing "[b]ecause the costs were incurred solely to facilitate her litigation ... [and] to hold otherwise would gut the injury in fact requirement." (*Buckland*, 155 Cal.App.4th at 816.)

Second, it is far from clear that an organization with such an expansive statement of purpose could satisfy the actual-interference-with-stated-mission safeguard. Aetna's hypothetical organization would have difficulty establishing that it actually diverted resources from existing projects to respond to any particular defendant's conduct, separate and apart from its existing advocacy. (See, e.g., *Sanderson*, 992 F.3d at 943 [distinguishing between "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 [the defendant's] representations."].)

Aetna further argues that organizational standing based on reallocation of institutional resources is inconsistent with Proposition 64 because it would provide an "exception" for organizational standing that is not available to individual plaintiffs. (Resp. Br. 15–16.) But economic injury caused by resource reallocation is not necessarily limited to organizations (although the safeguard requirement of a pre-existing, stated mission would presumably not apply to individual plaintiffs). If an individual's spending decisions reflect a non-litigation response to conduct that arguably violated the UCL and personally affected them, they would have standing to pursue that claim. As long as an individual plaintiff expends funds "as a result of" conduct that she would not otherwise have expended, or devotes funds she would otherwise have spent elsewhere because

of the need to remedy such conduct, she should be entitled to pursue a UCL claim.[3]

D. Aetna's challenges to the sufficiency of CMA's summary judgment evidence are unavailing

Aetna urges the Court to disregard CMA Vice-President Silva's declaration below on the ground that a party cannot "defeat summary judgment by means of declarations or affidavits which contradict that party's deposition testimony or sworn discovery responses." (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459–60). That principle has no application here, as it applies "*only* where [the party's declaration and its] deposition testimony or discovery responses are 'contradictory

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[3] For example, an individual plaintiff who purchased credit monitoring services because the defendant unlawfully disclosed her personal information to third parties would be in a similar position as an organization asserting diversion of resources in response to unlawful conduct. In *Witriol v. LexisNexis Grp.* (N.D.Cal., Feb. 10, 2006, No. C05-02392 MJJ) 2006 WL 4725713, for example, the court held that "costs associated with monitoring and repairing credit" were sufficient for UCL standing. (*Id.* at *6; cf. *Ruiz,* 2009 WL 250481, at *1, 4 [finding no standing where the defendant company offered to provide credit monitoring without charge].) Although *Witriol* is unpublished, it was included in *Hall*'s list of examples of cases finding injury in fact under the UCL.

Under Aetna's logic, the *Witriol* plaintiff would lack standing because he chose to purchase credit monitoring in response to a violation that did not itself cause economic harm. *Kwikset* explained, however, that a plaintiff suffers economic injury whenever "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Kwikset*, 51 Cal.4th at 323.) That language, like *Hall's* citation to *Witriol*, fully supports CMA's position here.

and mutually exclusive' [citation] or where the declaration contradicts 'unequivocal admissions' in discovery. [Citation.]" (*Id.* at 460, emphasis added.)

None of the purported "admissions" Aetna identifies contradict Silva's declaration. Although Aetna asserts that CMA "admitted below that it had *no information* to quantify the amount of time spent by staff members or its value" (Resp. Br. 33), the cited statements show only that CMA had not estimated the actual *monetary value* of its expended resources. (See RA 466–467, 477–479.) At no point did Silva or CMA state that they would be unable to estimate the staff time diverted to address Aetna's policy. In fact, CMA's PMQ witness listed the projects CMA undertook in response to Aetna's policy—the same projects described in Silva's declaration—and explained that CMA was working to identify all the staff who devoted time to those projects. (JA 1149–1154.)

Nor is Aetna's requested quantification of the total value of CMA's expended resources legally required. 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*, 51 Cal.4th at 324.) CMA's evidence of its diversion of staff time for specific, identifiable projects is thus sufficient to support its standing.[4]

[4] If the Court were to determine that organizational plaintiffs must show something beyond what is required under *Southern California Housing* and *ALDF*, it should direct the trial

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

Based on a passing reference in *Kwikset*, Aetna argues that CMA also lacks standing because the UCL requires direct "business dealing[s]" between the plaintiff and defendant. (Resp. Br. 30, quoting *Kwikset*, 51 Cal.4th at 317; see also *id.* at 12.) This argument finds no support in the text or purpose of Proposition 64 (and in any event, the record demonstrates that CMA *did* have direct business dealings with Aetna).

The text of an initiative is "the first and best indicator of intent." (*People v. Mentch* (2008) 45 Cal.4th 274, 282, as modified (Dec. 17, 2008)). While Proposition 64 sought to "confine standing to those *actually injured* by a defendant's business practices" (*Clayworth,* 49 Cal.4th at 788), it did so by limiting standing to a plaintiff "who has suffered injury in fact and has lost money or property as a result of the unfair competition," not by requiring a contractual relationship or direct business dealings for all UCL claims. (Bus. & Prof. Code, § 17204.) "The language is clear on its face and contains no requirement that the plaintiff must have engaged in business dealings with the defendant." (*Law Offs. of Mathew Higbee v. Expungement Assistance Servs.* (2013) 214 Cal.App.4th 544, 563.)

Restricting standing to plaintiffs who had some sort of business dealing with defendants was just one of the examples provided in the Proposition 64 ballot materials to describe the

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court on remand to allow CMA to supplement the record to provide any such evidence.

new standing requirements. (*Kwikset*, 51 Cal.4th at 317.) Those materials referred to "business dealings" in the broadest possible sense, expressing concern about lawsuits brought for "clients who [had] not used the defendant's product or service, viewed the defendant's advertising, or had *any other business dealing* with the defendant." (Prop. 64, § 1, subd. (b)(3), emphasis added.) If a person who views a defendant's misleading advertising can be said to have had a "business dealing" with that defendant, surely an organization whose central mission is adversely affected by that defendant's wrongful conduct has such "dealing" as well.

This Court held in *Clayworth* that even "indirect business dealings" are sufficient for UCL standing. (49 Cal.4th at 788.) Here, CMA had extensive connections to Aetna and its challenged policy. Although CMA as an organization was not subject to the policy, CMA engaged in "dialogue with Aetna" (JA 1155) "in an effort to get Aetna not to proceed with its threats to terminate and/or to rescind its terminations" of certain physician members (JA 959; see also Pet. Br. 31.) Nothing in Proposition 64's language or purposes so narrowed business dealings as to exclude as a basis for UCL standing CMA's diversion of resources to directly negotiate with Aetna.

F. Organizations that establish a diversion of resources "as a result of" a defendant's challenged practice satisfy the UCL's direct causation requirement

To support its argument that Proposition 64 precludes organizational standing based on reallocation of institutional resources, Aetna also contends that Proposition 64 impliedly imported a proximate-cause requirement from negligence law

into the UCL, even though Proposition 64's text only refers to cause in fact ("as a result of"). Aetna's argument relies entirely on dicta in a single footnote in the Court of Appeal decision in *Hall*, which cannot support the weight Aetna asks it to bear. (Resp. Br. 16–17.)

In the cited footnote, *Hall* merely stated that the word "causation" refers "both to the causation element of a negligence cause of action [citation] and to the justifiable reliance element of a fraud cause of action [citation]." (*Hall*, 158 Cal.App.4th at 855 fn. 2.) To construe *Hall*, which never mentions proximate cause (and did not undertake a negligence analysis), as "import[ing] a 'proximate cause' requirement" from negligence case law into Proposition 64 (Resp. Br. 17) would not only be contrary to Proposition 64's text (and misread the *Hall* opinion), but would contradict *this* Court's conclusion in *Kwikset* that a "but for" relationship between a misrepresentation and purchase is "sufficient to allege causation" under the UCL. (*Kwikset*, 51 Cal.4th at 330.)

Both *Hall* and *Kwikset* concluded that the "phrase 'as a result of' [in Proposition 64, construed] in its *plain and ordinary sense* means 'caused by' and requires a showing of a causal connection *or* reliance on the alleged misrepresentation." (*Kwikset*, 51 Cal.4th at 326, quoting *Hall*, 158 Cal.App.4th at 855, emphasis added.) This Court's "commonsense reading of the language" (*ibid.*) precludes Aetna's attempt to add an irrelevant negligence-law principle to Proposition 64 standing analysis. Aetna's citations to negligence cases cannot transform the "plain

and ordinary" meaning of causation required by Proposition 64. (See Resp. Br. 17, citing 4 Witkin, Cal. Proc. 6th Pleading, § 581 (2021).)[5]

K*wikset* also involved a misrepresentation claim, which requires a showing of reliance. Even in those circumstances, this Court has not required a showing as stringent as Aetna urges. Reliance requires that "a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct," but "the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328.) This Court, in *In re Tobacco II Cases* and later *Kwikset*, "express[ed] no views concerning the proper construction of the cause requirement in other types of cases." (*Kwikset*, 51 Cal.4th at 326 fn. 9.) Notably, neither case suggested or discussed application of a proximate cause standard.

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[5] Aetna's reference to federal RICO cases is similarly inapposite. The Supreme Court has expressly held that the RICO statute, 18 U.S.C. § 1961 et seq., requires both a showing of proximate cause and "some *direct* relation between the injury asserted and the injurious conduct alleged. [Citation.]" (*Hemi Grp., LLC v. City of New York* (2010) 559 U.S. 1, 9, emphasis added.) As discussed, *supra* at 31, the UCL does not have the same requirements, but allows standing for those who can show "but for" causation and "indirect business dealings" with defendants. (*Clayworth*, 49 Cal.4th at 788).

Moreover, the Supreme Court's RICO case law provides an example of the clear analysis courts typically engage in to apply a proximate-cause requirement to a statute, in contrast to *Hall*'s single vague footnote. (Compare *Holmes v. Sec. Inv. Prot. Corp.* (1992) 503 U.S. 258, 268 ["Proximate cause is thus required."] with *Hall*, 158 Cal.App.4th at 855 fn. 2.)

An organization that establishes standing based on the diversion or expenditure of paid staff time and institutional resources satisfies *Kwikset*'s required "showing of a causal connection" and "but for" causation. That is why federal courts have consistently determined that diversion of organizational resources under these circumstances satisfies Article III's injury-in-fact causation requirement. (See *Comite de Jornaleros,* 657 F.3d at 943.) Under Article III, "the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' [citation]." (*Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, 560, alterations in original.)

Aetna tries to separate the harm to the organization's mission from the resulting diversion of resources, arguing that, under a proximate-cause analysis, the organization's decision to respond to that harm by reallocating resources constitutes an independent intervening cause that breaks the chain of causation. (Resp. Br. 17.) Even if this Court were to accept Aetna's invitation to add a proximate-cause requirement to the UCL, this case would satisfy that standard. The chain of causation is broken for purposes of proximate-cause analysis "where the injury was brought about by a later cause of independent origin." (*Akins,* 67 Cal.2d at 199.) CMA's dedication of resources to respond to actions that frustrate its mission is not "of independent origin"—the origin of the diversion *is* the allegedly unlawful conduct.

Even when an injury is caused by an independent third party, proximate cause is satisfied if the injury or the intervening cause was "foreseeable." (*Ibid.*) Here, it was foreseeable that Aetna's Non-Par Intervention policy would frustrate the mission of CMA and any other organization whose mission is to advocate for physicians and patients and to protect the public health of California residents. Indeed, as noted above the record shows that CMA advocated directly with Aetna, and there is no indication in the record that Aetna was surprised by CMA's involvement. CMA's expenditure of organizational resources in response to Aetna's policy was also foreseeable, as organizations generally act through their staff, have limited budgets, and must plan projects and expenditures in the manner that best furthers their institutional missions. Thus, even if Proposition 64 required a showing of proximate cause, that would pose no impediment to concluding that CMA has standing.

II. CMA Is Not Required to Satisfy Code of Civil Procedure Section 382 as a Condition of Pursuing Public or Private Injunctive Relief

Aetna contends that CMA did not petition for review on any question regarding the scope of relief so "is now precluded from seeking review on this issue." (Resp. Br. 36.) But one of the issues presented by CMA was whether "an action seeking solely 'public injunctive relief' [is] a 'representative action' under [the UCL]." (Pet. for Rev. 1.) CMA's petition argued that the Court of Appeal erred in concluding that "[a] person who seeks 'public injunctive relief' as a substantive statutory remedy" is bringing "a 'representative action' under the UCL" (*id.* at 29), and in

suggesting that "the form of injunctive relief sought by CMA that the trial court could order was not necessarily 'public'" (*id.* at 30). The issue of how to characterize the injunctive relief sought by CMA was thus "raised or fairly included in the petition." (Cal. R. Ct. 8.516(b)(1).)

The Ninth Circuit's decision in *Hodges v. Comcast Cable Commc'ns, LLC* (9th Cir. 2021) 21 F.4th 535, published after this Court granted review, did not change the issues on which CMA sought review. Instead, the Ninth Circuit's rejection of two California Court of Appeal decisions as wrongly decided (*Mejia v. DACM Inc*. (2020) 54 Cal.App.5th 691, review denied (Dec. 23, 2020) and *Maldonado v. Fast Auto Loans, Inc.* (2021) 60 Cal.App.5th 710, review denied (Apr. 28, 2021)), and its announcement of a new rule narrowly defining "'public' injunctive relief," support CMA's request that this Court "clarify what it means to seek 'public' injunctive relief." (Pet. for Rev. 32.)

Aetna's substantive arguments further highlight the need for this Court's guidance. Aetna asserts that any injunction CMA could seek in this case would not be public, because it would only "implicate[] an exclusively private dispute." (Resp. Br. 37, citing *Hodges*, 21 F.4th at 542.) But that characterization ignores the broad public benefits of CMA's requested relief. (See Pet. Br. 40–42.) Aetna quotes *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303, 315 for the proposition that injunctive relief that "'incidentally' benefit[s] 'the public'" while primarily redressing individual injury is not public injunctive relief. But *Cruz* was contrasting an injunction on deceptive advertising that would

benefit "health care consumers and the general public" with claims brought "primarily to redress injuries to competing businesses" with only incidental public benefits. (*Ibid.*)

As in *Cruz*, the injunction CMA seeks would broadly benefit health care providers and consumers. Aetna's implementation of its Non-Par Intervention policy prevented physicians from making out-of-network referrals based on their medical judgment. Aetna thereby prevented health care patients throughout California from obtaining the medically appropriate out-of-network referrals they or their employers paid for when selecting a PPO/POS plan over an HMO. CMA's requested injunctive relief would benefit physicians (CMA members and non-members alike), patients, health care plans that paid for benefits Aetna refused to provide, and anyone who might become an Aetna policyholder in the future (either because they choose Aetna or because of their employer's decision to contract with Aetna or their own change in job). Although an injunction would also benefit CMA (by allowing it to focus on its organizational mission without having to respond further to Aetna's unlawful conduct), the injunction's "primary purpose and effect" would be to "prohibit[] unlawful acts that threaten future injury to the general public." (*McGill*, 2 Cal.5th at 955.)

The Court should also clarify that CMA has standing to pursue private injunctive relief without having to satisfy the requirements of section 382. Aetna argues that if CMA cannot pursue an injunction because that would be a representative action "for the benefit of others" that requires compliance with

section 382. (Resp. Br. 37–38.) But Aetna again misconstrues CMA's claim as a "representative action," rather than an action on its own behalf. (*Ibid.*) CMA's UCL claim is predicated on *its own injuries* (see *supra* at 15–16) and relief tailored to CMA's injury is not relief sought on behalf of others.

Aetna dismisses as irrelevant the cases CMA cites for the proposition that plaintiffs can seek injunctive relief on an individual basis even if that relief incidentally benefits others. (See *E. Bay Sanctuary Covenant*, 994 F.3d 962; *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir. 1996) 92 F.3d 1486; *Bresgal v. Brock* (9th Cir. 1987) 843 F.2d 1163.) While Aetna is correct that the cited cases "say nothing about the specific remedial statute at issue here" (Resp. Br. 38), they support CMA's point that relief for an individual plaintiff may benefit non-parties without making the action a class or representative claim.

Aetna's only support for its contrary contention, an unpublished federal district court decision affirmed in an unpublished disposition, simply states that "the Court cannot issue injunctive relief *on behalf of others* as a matter of state law under the UCL without class certification." (*Circle Click Media LLC v. Regus Mgmt. Grp. LLC* (N.D.Cal., July 18, 2016, No. 12-CV-04000-EMC) 2016 WL 3879028, at *5, emphasis added, affd. (9th Cir. 2018) 743 F.App'x 883.) Here, an injunction that remedied CMA's organizational injury by requiring Aetna to stop

implementing its challenged policy would not be representative in nature, even if it also benefitted others in addition to CMA.[6]

CONCLUSION

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

Dated: April 15, 2022

Respectfully submitted,

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[6] Contrary to Aetna's position, there is no need for this Court to explore the precise scope of such an injunction at this stage of the litigation.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 8,394 words, as counted by Microsoft Word, which is within the 8,400 words permitted.

By: */s/ Michael Rubin*
Michael Rubin

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I, Janelle Ibañez declare: I am a citizen of the United States and employed in San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 15, 2022, I served a copy of the Petitioner's Reply 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 April 15, 2022 at San Francisco, California.

/s/ Janelle Ibañez

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S269212**
Lower Court Case Number: **B304217**

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