Case No. S269212

In the Supreme Court of the State of California

CALIFORNIA MEDICAL ASSOCIATION,
PLAINTIFF AND APPELLANT,

V.

AETNA HEALTH OF CALIFORNIA, INC.,
DEFENDANT AND RESPONDENT.

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

BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

In 2004, voters amended California's Unfair Competition Law (UCL), Business & Professions Code § 17200 et seq., to address concerns that a small number of attorneys were misusing the UCL to bring lawsuits solely for personal gain, with no interest in remedying the alleged misconduct. The UCL now provides that any private plaintiff must meet a threshold requirement of having "suffered injury in fact and [ ] lost money or property as a result of the unfair competition." (Bus. & Prof. Code § 17204.) The Attorney General submits this brief as *amicus curiae* to support the position that a plaintiff organization may establish its standing under the UCL where it expends or diverts economic resources to address a defendant's alleged unfair business practice

As this Court held in *Amalgamated Transit*, the amended UCL rejects the federal doctrine of associational standing, under which an organization can establish standing in a representative capacity based on the injuries suffered by its members. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1004.) But the UCL does allow a membership or advocacy organization that has suffered its *own* injury to bring a UCL lawsuit if it meets the law's standing requirements. In particular, the organization must have expended or diverted economic resources, other than the costs of bringing the UCL suit, in response to actions by the defendant that frustrated its organizational mission or programs. As discussed below, allowing organizations that meet these criteria

to bring UCL suits is consistent with the language of the statute and the intent of Proposition 64, serves the UCL's purpose of protecting the public and businesses from unfair practices, and complements enforcement by the Attorney General and local prosecutors. The Court of Appeal's contrary reading is unsupported and should be rejected.

LEGAL BACKGROUND

A. Standing under the Unfair Competition Law

California's Unfair Competition Law, today codified at sections 17200 et seq. of the Business and Professions Code, was enacted in 1933 and aimed to protect not only individual consumers and businesses, but the public as a whole, from unfair and fraudulent business practices.[1] (Cf. *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698 [noting "the right of the public to protection from fraud and deceit"].) Initially and for most of its existence, the UCL provided for broad standing. Former Civil Code section 3369 authorized complaints "by any person acting for the interests of itself, its members or the general public," and gave courts authority to enjoin any defendant "performing or proposing to perform an act of unfair competition within this State." (Stats. 1933, ch. 953, § 1, p. 2482.) Thus, from 1933 until the law was amended in 2004, a UCL plaintiff "had standing to sue even without having personally

[1] Subsequent statutory references are to the Business and Professions Code unless otherwise stated.

suffered any injury." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 977.)

The UCL's broad grant of standing to members of the public—allowing suits by any person acting on behalf of the general public—contrasted with the general principle governing standing: that in order to seek a remedy from a court, a plaintiff must assert "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 599; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1249 [noting that Civil Code section 367 generally limits standing to the "real party in interest"].) That approach to standing did not, however, present any constitutional issue. California has no "case or controversy requirement" like Article III of the federal Constitution, which "impos[es] an independent jurisdictional limitation" for standing. The state Legislature may therefore opt "to create judicial access for parties that would not otherwise be eligible to seek relief" under the typical standing analysis. (*Weatherford*, *supra*, 2 Cal.5th at p. 1249.)

In 2004, voters amended the UCL through a ballot measure, Proposition 64, which aimed to prevent misuse of the UCL as further explained below. Proposition 64 narrowed UCL standing by making two key changes. First, it required private plaintiffs to have "*suffered injury in fact* and [ ] *lost money or property* as a result of [the] unfair competition" alleged. (Voter Info. Guide, Gen. Elec. (Nov. 2, 2004), text of Prop. 64, § 3, p. 109, italics

modified [amending § 17204].)[2] As this Court has observed, by using the specific phrase "injury in fact," the drafters of Proposition 64 "intended to incorporate [its] established federal meaning." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.) The "lost money or property" requirement added a further qualitative limitation, that the plaintiff "demonstrate some form of *economic* injury." (*Id.* at p. 323, italics added.)

Second, Proposition 64 added language expressly permitting private UCL plaintiffs to "pursue representative claims or relief on behalf of others," but making clear that such plaintiffs must meet the must meet the new standing requirements. (Voter Info. Guide, text of Prop. 64, § 2, p. 109 [amending § 17203].) In addition, Proposition 64 required representative plaintiffs to "compl[y] with Section 382 of the Code of Civil Procedure," generally understood as referencing class-action procedures. (*Ibid.*, see also *Arias*, *supra*, 46 Cal.4th at p. 978.) Only the Attorney General and other specified prosecutors retained authority to bring UCL claims on behalf of the general public. (See Voter Info. Guide, text of Prop. 64, § 2, p. 109; see also *id.*, § 1, subd. (f).)

Proposition 64 did not alter the definition of "persons" who have standing to sue under the UCL, which includes "corporations, firms, partnerships, [and] associations and other

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[2] Available at <https://vig.cdn.sos.ca.gov/2004/general/english.pdf> (as of June 14, 2022.) All subsequent references to the Voter Information Guide are to the guide for the November 2, 2004 general election.

organizations of persons."[3] (§ 17201.) It also did not limit the court's broad discretion to order injunctive relief. (See § 17203 ["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 . . . ."].)

B. Proposition 64's purpose

The 2004 amendments to the UCL had a specific purpose: to prevent abusive UCL lawsuits. The preamble for the ballot measure, titled "Findings and Declaration of Purpose," observed that although unfair competition laws were "intended to protect California businesses and consumers," they had been "misused by some private attorneys" to "[f]ile frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit." (Voter Info. Guide, text of Prop. 64, § 1, subd. (a) & (b)(1), p. 109.) Such instances included lawsuits in which "no client has been injured in fact" or in which the purported client "ha[s] not used the defendant's product or service, viewed the defendant's advertising, or had any business dealings with the defendant." (*Id.*, § 1, subd. (b)(2), (3).) The preamble further noted that UCL lawsuits had been filed "on behalf of the general public without any accountability to the public and without adequate court supervision." (*Id.*, § 1, subd. (b)(4).)

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[3] The Attorney General uses the term "organization" according to its common meaning: "an organized body of people with a particular purpose, as a business, government department, charity, etc." (Oxford English Dict. Online, available at <https://www.oed.com> [as of June 14, 2022]). The synonyms "organization" and "association" are used interchangeably.

The concerns raised in Proposition 64's ballot materials were not hypothetical. In the early 2000s, a handful of attorneys in southern California had seized upon the UCL's broad standing provision to "extort money from small businesses" via threatened "'shakedown' suits." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316.) These attorneys would scour public records to find businesses with minor regulatory violations, threaten to sue them under the UCL, and then pressure the businesses to settle for a few thousand dollars. (See, e.g., Decision and Order of Involuntary Inactive Enrollment, *In re Trevor, et al.* (Cal. State Bar Ct., May 21, 2003, No. 03-TE-00998-RAH), at pp. 4–5, 20–28, 69, 91 (Order, *In re Trevor*); *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316–17 (*Brar I*).) Typical targets included immigrant-owned businesses such as nail salons and auto repair shops, and other family operations that would likely find defending a lawsuit prohibitively expensive. (See Order, *In re Trevor*, *supra*, at pp. 20–21, 65; *Brar I*, *supra*, at p. 1317.)

The offending attorneys did not represent consumers who had purchased goods or services from the defendant companies, or who had otherwise been affected by their conduct; rather, in many cases, they created new organizational entities solely for UCL litigation purposes, which allowed the attorneys to keep the funds they had extracted through settlements. (See Order, *In re Trevor*, *supra*, at pp. 13–16, 118–119.) Moreover, the attorneys had no genuine interest in remedying unfair business practices. (See *id.* at p. 118.) Instead of using the UCL to stop or prevent deception and fraud, the attorneys inflicted "serious harm" on

legitimate businesses, the public, and the legal profession. (*Id*. at p. 120.)

Reports of attorney misconduct involving the UCL were widely circulated in the press and galvanized efforts to narrow the law.[4] Proponents of Proposition 64 encouraged voters to "close the shakedown loophole" while assuring voters that the initiative still "[p]rotects your right to file a lawsuit if you've been damaged." (Voter Info. Guide, argument in favor of Prop. 64, p. 40.) In more measured language, the preamble for Proposition 64 stated that, if adopted, the amendments would reflect "the intent of the California voters . . . 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." (Voter Info. Guide, text of Prop. 64, § 1, subd. (e), p. 109.) Under the UCL as amended by Proposition 64, only the Attorney General and specified prosecutors would be "authorized to file and prosecute actions on behalf of the general public." (*Id.*, § 1, subd. (f).) All other plaintiffs would have to show they had suffered a loss of money or property and injury in fact. (*Id.*, § 3.)

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[4] See, e.g., Morin, *3 Lawyers Deny Lawsuits Were Extortion Scam*, L.A. Times (Apr. 18, 2003), available at <https://www.latimes.com/archives/la-xpm-2003-apr-18-me-lawyers18-story.html> (as of June 14, 2022); Chorney, *State Bar Suspends Licenses of 17200 Trio¸* The Recorder (May 22, 2003) p. 5; Hardesty et al., *Watchdogs or Money Hounds? California Business Owners Say Attorneys Are Abusing Consumer Protection Laws*, Orange County Register (Jan. 10, 2003).

STATEMENT OF THE CASE

This appeal arises from an action filed by Appellant California Medical Association (CMA or Appellant), which describes itself as a "professional organization representing California physicians" whose mission includes "promot[ing] the science and art of medicine, protection of public health, [and] the betterment of the medical profession."[5] CMA brought an unfair competition lawsuit against medical insurer Aetna, alleging that Aetna had violated the UCL and other statutes by "implement[ing] a policy to restrict or eliminate patient referrals by its in-network physicians to out of-network physicians," Opinion 2, even though patients with certain of Aetna's insurance plans were entitled to receive out-of-network referrals that their in-network physicians deemed "medically appropriate," OMB 41. CMA brought suit on its own behalf, alleging that it had suffered its own injury by expending over 200 hours of staff time to counter Aetna's out-of-network policy. (Opn. 3–6.) Among other things, CMA spent time developing public educational materials about Aetna's policy, advising its member physicians of their options for responding to the policy, and advocating on behalf of member physicians who had been terminated from Aetna's network or otherwise affected by the policy. (OBM 31.)

The Court of Appeal held that CMA lacked standing to bring a UCL action. First, relying on *Amalgamated Transit* and other cases, it held that CMA could not "bring a nonclass

[5] CMA, *Our Story* <https://www.cmadocs.org/about> (as of June 14, 2022).

representative action" against Aetna, Opn. 3, and, to establish standing, must "produce evidence that CMA itself, and not just its members, lost money or property," Opn. 9. Second, the court reasoned that because CMA had diverted or expended resources in the course of "advocating on behalf of" its members or "help[ing] its members deal with their loss of money or property," its suit was necessarily representational in nature, intended "to rectify injury to its aggrieved physician members," and thus barred by *Amalgamated Transit*'s rule. (Opn. 11–12.)

CMA sought and this Court granted review. Among the issues presented is whether an organization can establish standing under the UCL notwithstanding the Court's decision in *Amalgamated Transit* that associational (*i.e.,* representative) standing is barred by Proposition 64. (PR 1; OBM 8.) Also at issue is whether an organization can meet Proposition 64's standing requirements by showing that it has expended or diverted resources to address an unfair business practice, and whether the nature of the injunctive relief an organization seeks—namely, whether it would benefit the organization itself, as opposed to its members or the public—determines its standing under the UCL. (PR 1; OBM 8.)

ARGUMENT

I. A PLAINTIFF ORGANIZATION MAY HAVE UCL STANDING IF IT EXPENDS OR DIVERTS ECONOMIC RESOURCES TO ADDRESS AN UNFAIR BUSINESS PRACTICE

Proposition 64's amendments to UCL standing apply to all potential plaintiffs, defined by the statute as including "natural persons" as well as "corporations, firms, partnerships . . .

associations and other organizations of persons." (§ 17201.) As applied to organizations specifically, Proposition 64 precludes *associational* standing—a type of representative standing asserted when a "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.) But Proposition 64 did not remove "organizations" from Section 17201's definition of "persons" entitled to bring a UCL case, and thus an organization can establish standing by showing it has suffered injury in fact and a loss of money or property due to the defendant's conduct, just as a natural-person plaintiff may do. While the injury in fact requirement expressly *supports* standing for organizations, it also prescribes certain criteria that such plaintiffs must meet, which function to prevent organizations from manufacturing an injury for standing purposes.

A. Proposition 64 requires private UCL plaintiffs to show a loss of money or property—an economic injury—resulting from the unfair business practice

Proposition 64's first requirement for standing—that the plaintiff must have lost money or property—can be met when an organization diverts or expends economic resources. As this Court has recognized, "[n]either the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of "lost money or property." (*Kwikset*, *supra*, 51 Cal.4th at p. 323.) The "plain import" of this requirement is only that the plaintiff "must now demonstrate *some form* of economic injury." (*Ibid.*, italics added.) This showing can be made in "innumerable

ways" and need not result in a calculable, out-of-pocket loss of cash. (*Ibid.*)

Kwikset provides the following examples of economic injury: a plaintiff has standing if it "ha[s] a present or future property interest diminished," if it is "deprived of money or property to which [it] has a cognizable claim," or if it is "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Kwikset*, *supra*, 51 Cal.4th at p. 323.) Thus, if a manufacturer's alleged price-fixing conduct causes a retailer to pay more for the goods it sells, the retailer has standing to challenge the price fixing, even if it has "pass[ed] on the overcharges" to consumers. (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 789.) Similarly, a plaintiff business has standing if it has lost customers, charged less for its services, or expended additional funds on advertising due to the defendant business's unlawful practices, even though it had no direct economic interactions with defendant. (See *Law Offs. of Mathew Higbee v. Expungement Asst. Servs.* (2013) 214 Cal.App.4th 544, 547–548 (*Higbee*). Given the absence of language in Proposition 64 limiting how loss of money or property may be shown, and this Court's acknowledgement that a wide range of economic injuries can support UCL standing, both the statute and precedent favor recognizing that an organization may suffer the requisite injury when it diverts or expends economic resources.

Proposition 64 further requires that the loss of money or property occurred "as a result of [the] unfair competition" alleged. (Voter Info. Guide, text of Prop. 64, § 3, p. 109 [amending

§ 17204].) Again, this requirement can be met by an organization that has diverted or expended resources in response to a defendant's alleged unfair business practices. Neither the text of Proposition 64, nor the ballot materials, point to a particular standard of causation. (See *Tobacco II Cases*, *supra*, 46 Cal.4th at pp. 325–326.) "In its plain and ordinary sense," the phrase *as a result of* "means 'caused by'" and requires a "causal connection" between the defendant's conduct and the plaintiff's injury. (*Kwikset*, *supra*, 51 Cal.4th at p. 326, internal quotation marks omitted.)

This Court has assessed the UCL's causation requirement mainly in the context of cases involving deceptive statements or advertising, *i.e.,* cases alleging a fraudulent business practice. (See *Tobacco II Cases*, *supra*, 46 Cal.4th at pp. 325–326; *Kwikset*, *supra*, 51 Cal.4th at pp. 326–327.) In that context, the "causal mechanism" is reliance, *Tobacco II Cases* at p. 326, and causation is established if the plaintiff relied on the defendant's statements, for example, to make a purchase.[6]

In this case, by contrast, CMA alleges Aetna has engaged in unlawful or unfair, rather than deceptive, business practices. (See OBM 14.) But the deception cases are still instructive insofar as they require the defendant's conduct to be an

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[6] Because CMA does not allege a fraudulent business practice, this case does not address how an organization may show reliance or causation in that context. Causation or reliance is not required in actions brought by the Attorney General and other prosecutors, as Proposition 64's standing provisions do not apply. (See, e.g., *Tobacco II Cases*, *supra*, 46 Cal.4th at p. 326.)

"immediate cause" of the plaintiff's injury, but not "the only cause." (*Tobacco II Cases*, *supra*, 46 Cal.4th at p. 326; see also *Kwikset*, *supra*, 51 Cal.4th at p. 330 [allegation that plaintiff "would not have bought the product but for the misrepresentation . . . is sufficient to allege causation"].) A cause is "immediate" if "in its absence the plaintiff in all reasonable probability would not have engaged in the injury-producing conduct." (*Tobacco II Cases*, *supra*, 46 Cal.4th at p. 326, internal citations omitted.) Thus, in *Tobacco II Cases*, a decision involving deceptive advertising, this Court held that the causal requirement was met where "plaintiffs testified that their decision to begin smoking was influenced and reinforced by [defendant's] cigarette advertising," *id.* at p. 327—even if plaintiffs were swayed by other factors too, and ultimately exercised their own volition in choosing to smoke, *see id.* at p. 326.

Neither the lost money or property requirement, nor the causation requirement, prohibits organizations from suing under the UCL. Although organizations may expend economic resources in a manner different from consumers or businesses—often by diverting resources to address the defendant's conduct rather by than spending money out-of-pocket—this is not a reason to deny them standing via a categorical rule, given the wide range of ways economic injury may be shown. (See *(Kwikset*, *supra*, 51 Cal.4th at p. 323 [listing potential forms of economic injury].) Moreover, although organizations exercise discretion over their use of resources, this fact alone does not sever a causal link between the defendant's conduct and the

plaintiff's injury. (Cf. *Tobacco II Cases*, *supra*, 46 Cal.4th at p. 327; *Higbee*, *supra*, 214 Cal.App.4th at p. 564 [causation requirement met at demurrer phase where plaintiff business alleged loss of revenue and increased advertising costs due to defendant's unfair competition].)

Case law addressing UCL standing already acknowledges that different categories of UCL plaintiffs—i.e., business-entity plaintiffs, as opposed to consumer plaintiffs—suffer different types of economic injuries, in different ways. For example, a plaintiff business may sue a competitor or supplier for losses resulting from the defendant's unfair business practices even if the two businesses have no had direct dealings. (See *Clayworth, supra,* 49 Cal.4th at p. 788 [no direct dealings between pharmacies and drug manufacturers]; *Higbee*, *supra*, 214 Cal.App.4th at pp. 562, 564 [no dealings, direct or indirect, between plaintiff and defendant businesses]; see also *Allergan, Inc. v. Athena Cosmetics, Inc.* (Fed. Cir. 2011) 640 F.3d 1377, 1383 [similar to *Higbee*].) In contrast, it is difficult, though perhaps not impossible, for consumer plaintiffs to meet the lost money or property and causation requirements where they have not had direct dealings with a defendant or its agents, usually by purchasing a good or service.

Nothing in Proposition 64 requires that only injuries directly resulting from the purchase of goods or services, or from the direct interaction between the defendant and plaintiff, can serve as the basis for standing. An organization can be injured by an unfair practice if the organization expends resources to take

action to address that practice consistent with its mission. As an example, a membership organization might expend resources to limit the scope or impact of a problem in the marketplace—such as rising and allegedly collusive healthcare costs—before the financial toll is felt among its members individually. (See SEIU et al. Ltr. ISO PR at p. 11 [describing UCL cases brought by labor unions and other membership organizations].) As relevant here, where an organization has a mission to promote the values of a profession or to educate the public, as CMA does, and devotes economic resources to counteract business practices that allegedly interfere with professional prerogatives or that misinform the public, the organization has suffered an economic injury that results from that practice for purposes of UCL standing.

B. Proposition 64 incorporates the federal injury-in-fact requirement, which recognizes that organizations can suffer their own injuries

In addition to requiring a plaintiff to show that it lost money or property as a result of the defendant's misconduct, Proposition 64 requires UCL plaintiffs to show an "injury in fact." (Voter Info. Guide, text of Prop. 64, § 3, p. 109 [amending § 17204].) As this Court noted in *Kwikset*, *supra*, 51 Cal.4th at p. 322, Proposition 64 expressly borrowed this concept from federal law, stating as among its goals "to prohibit private attorneys from filing lawsuits . . . where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (*Ibid.*, quoting Prop. 64, § 1, subd. (e).) Proposition 64 makes no reference to redressability or

causation—the other two pillars of Article III standing—so they have no bearing on the UCL. (See *Kwikset*, *supra*, 51 Cal.4th at p. 322 fn. 5 [noting that courts should be "cautious in borrowing federal standing concepts" except where, as here "the electorate has expressly directed" them to do so].)

The lost money or property required by Proposition 64 "is itself a classic form of injury in fact." (*Kwikset*, *supra*, 51 Cal.4th at p. 323.) As a result, in many UCL cases, especially those brought by a plaintiff who has purchased goods or services from a defendant, it is unnecessary to assess injury in fact as an independent criterion. (*Id.* at p. 325.) But federal cases addressing injury in fact are still instructive for determining whether a diversion or expenditure of organizational resources can support UCL standing. Because organizations often bring cases in federal court to challenge governmental actions that frustrate their missions—*i.e.*, cases alleging harm to the organization itself, not to its members under an associational theory of standing—the federal judiciary has a well-developed corpus of decisions about the standing of organizations. In particular, those federal cases decided before November 2004, the time of Proposition 64's passage, are key to understanding what the initiative's drafters intended by referring expressly to the federal injury-in-fact requirement.

Under federal case law, an organization may meet the injury-in-fact requirement when it diverts resources to counteract a defendant's unlawful acts. The touchstone case addressing standing for organizations, *Havens Realty Corporation v.*

Coleman (1982) 455 U.S. 363, predates Proposition 64 by two decades and would have been known to the initiative's drafters as a primary federal precedent defining injury in fact. Under *Havens*, an organization suing and alleging harm to itself has standing if it alleges not merely "a setback to [its] abstract social interests" but "a concrete and demonstrable injury to [its] activities" accompanied by a "consequent drain on the organization's resources." (*Id.* at p. 379.)

In *Havens*, the plaintiff, a non-profit advocating for equal opportunity in housing, was held to have "standing in its own right" against a property-management company because its mission had been "frustrated by defendants' racial steering practices" and because the organization "had to devote significant resources to identify and counteract" those practices. (455 U.S. at p. 379). As a result, the plaintiff's core activities—"provid[ing] counseling and referral services for low-and moderate-income homeseekers"—were "perceptibly impaired." (*Ibid.*)

Later pre-Proposition 64 decisions continued to apply *Havens*, making clear that under the injury-in-fact requirement, an organization can suffer an injury to itself, even if it is a membership organization or was formed to represent or advance the interests of a group of individuals. A 2004 decision by the Ninth Circuit, for example, applied *Havens* to hold that an organization meets the injury-in-fact requirement if it can show "frustration of its organizational mission" and "diversion of its resources to combat the particular [unlawful conduct] in question." (*Smith v. Pacific Properties and Dev. Corp.* (9th Cir.

2004) 358 F.3d 1097, 1105 (*Pacific Properties*), citing *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 905.) In decisions applying *Havens*, federal courts across the country have held that organizations meet the injury-in-fact requirement across a variety of factual contexts, including the following:

- A group advocating for day laborers had standing to challenge a local anti-solicitation ordinance where it alleged that it was forced to devote resources to assist laborers arrested under or targeted by the ordinance, rather than expend them on "core organizing activities," *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (9th Cir. 2011) 657 F.3d 936, 943–944;

- An organization that advocates for terminally ill patients had standing to challenge new FDA requirements that "frustrated [its] efforts to assist its members and the public in accessing potentially life-saving drugs" and required it to "divert significant time and resources" from its usual activities, *Abigail Alliance for Better Access to Dev. Drugs v. Eschenbach* (D.C. Cir. 2006) 469 F.3d 129, 132–133; and

- A legal advocacy organization had standing to challenge a law barring undocumented students from public universities because passage of the law had caused it to field inquiries from immigrant families, host informational sessions about the law's impact, and otherwise "divert resources from other immigration policy work," *Hispanic Interest Coalition of Alabama v. Governor of Alabama* (11th Cir. 2012) 691 F.3d 1236, 1243–1244.

Although Respondent insists that recognizing standing based on an organization's diversion of resources will invite plaintiffs to "manufacture standing," ABM 21, both federal and state courts have developed criteria to avoid this result. These criteria, derived from injury-in-fact analyses, advance Proposition 64's goal of preventing frivolous lawsuits.

First, a plaintiff organization will not have standing if the defendant's unfair business practices do not actually frustrate the organization's ability to carry out its mission. (See, e.g., *Nat. Treasury Employees Union v. U.S.* (D.C. Cir. 1996) 101 F.3d 1423, 1430 [no injury in fact where union's mission did not conflict with legislation at issue]; *Heap v. Carter* (E.D. Va. 2015) 112 F.Supp.3d 402, 417 [no injury in fact where member of plaintiff organization was denied application to become Navy chaplain].) *Second*, standing will be denied if the plaintiff organization has not expended or diverted resources specifically to counteract the defendant's conduct, and that counteraction cannot consist solely of funds spent on the litigation at issue. (See *Animal Legal Defense Fund v. LT Napa Partners LLC*, (2015) 234 Cal.App.4th 1270, 1282 [in UCL case, injury-in-fact requirement met where organization's expenditures "had a purpose independent of the current litigation and might have rendered such litigation unnecessary"]; *Spann v. Colonial Village, Inc.* (D.C. Cir. 1990) 899 F.2d 24, 27 [observing that a plaintiff "cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit"]; cf. *Fair Housing of Marin*, 285 F.3d at p. 905 [disregarding litigation expenses for injury-in-fact assessment].) *Third*, and relatedly, standing will also be denied if the plaintiff organization does not engage in meaningful activities apart from simply litigating against the defendant's business practices. (See, e.g., *Animal Lovers Volunteer Assn. Inc., v. Weinberger* (9th Cir. 1985) 765 F.2d 937, 939 [injury-in-fact analysis; finding it "highly relevant" to

standing that plaintiff organization "has no history which antedates the legal action it seeks to bring"]; *Project Sentinel v. Evergreen Ridge Aparts.* (N.D. Cal. 1999) 40 F.Supp.2d 1136, 1139 [same; no standing where plaintiff "does not allege that it provides any service or is engaged in any other enterprise independent of this action"].)

By using these factors to guard against manufactured standing, courts can respect the letter and purpose of Proposition 64 without drawing a bright-line rule that categorically bars organizations from seeking relief under the UCL.

II. A UCL PLAINTIFF'S STANDING DOES NOT DEPEND ON THE SCOPE OF INJUNCTIVE RELIEF THE PLAINTIFF SEEKS

Another issue presented by this case is whether a plaintiff organization's standing is affected by the nature or scope of the injunctive relief it requests under the UCL. (PR 1; OBM 8.) Respondent argues that whenever a plaintiff organization seeks injunctive relief "for the benefit of others that are not before the court," under Proposition 64, the plaintiff must bring the case as a class action representing its members, and cannot establish standing on any other basis. (ABM 37.) That is incorrect. A UCL plaintiff may request, and the court may order, injunctive relief that would benefit non-parties; doing so does not make the UCL claim representative in nature. As this Court held in *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 959–960, a request for broad injunctive relief "does not constitute the 'pursu[it]' of 'representative claims or relief on behalf of others'" under Section 17203. Thus, while the parties discuss at length the nature of the injunctive relief Appellant seeks—*i.e.,* whether it would

benefit the organization itself, physicians, or the public—the scope of any injunction that the court may eventually issue is not relevant to determining Appellant's standing to sue, and does not require Appellant to bring its case as a class action.[7]

The UCL favors injunctive relief. While, for most causes of action, an injunction is considered an "extraordinary remedy," see, e.g., *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352, it is "the primary form of relief available under the UCL," *Clayworth*, *supra*, 49 Cal.4th at p. 790, citations omitted. Injunctive relief is key to serving the UCL's purpose, because the statute's "primary objective . . . is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising." (*Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) 9 Cal.5th 279, 326.) Both before and after Proposition 64, the UCL has permitted courts to "make such orders or judgments . . . *as may be necessary to*

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[7] Although this Court has distinguished between "public" and "private" injunctive relief under the UCL, it has done so not in cases involving UCL standing, but in the specific context of determining whether claims for public injunctive relief under the UCL and other unfair-competition statues are arbitrable or waivable, holding that they are neither. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1081–1082 (*Broughton*) [holding that claims for injunctive relief under CRLA are not arbitrable; institutional and procedural limitations of arbitration forum make it an "inadequate substitute" for judicial relief]; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315–316 [applying *Broughton* to hold claim for injunctive relief under UCL not arbitrable]; *McGill*, *supra*, 2 Cal.5th at p. 961 [holding that agreement to waive pursuit of public injunctive relief in any forum is unenforceable].)

prevent the use or employment by any person of any practice which constitutes unfair competition," including enjoining "[a]ny person who engages, *has engaged, or proposes to engage* in unfair competition." (§ 17203, italics added.)

Respondent's interpretation of Section 17203—as requiring an organization's UCL case to be brought as a class action whenever the injunctive relief sought would benefit its members—should be rejected. In recent cases, this Court has avoided interpreting Proposition 64 in a manner that would impose restraints on the UCL beyond those clearly spelled out in the initiative's text. For example, in *Kwikset*, *supra*, 51 Cal.4th at pp. 336–337, this Court rejected the argument that a plaintiff lacks UCL standing if it is unable to obtain restitution, noting that such an interpretation "would narrow [standing under] section 17204 in a way unsupported by its text." Similarly, in *Tobacco II Cases*, *supra*, 46 Cal.4th at p. 321, this Court rejected the argument that Proposition 64 requires absent class members to meet the new standing criteria for several reasons applicable here. First, the "express language" of Proposition 64 did not contain the limitation defendant proposed. (*Ibid.*) Second, defendant's position was not reflected in the ballot materials, and instead conflicted with assurances made by Proposition 64's proponents "that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair businesses practices." (*Id.* at pp. 321, 324.) Third, defendant's interpretation would "alter accepted principles of class action procedure" in a manner "not necessary to remedy the specific

abuse of the UCL at which Proposition 64 was directed." (*Id.* at p. 321.). Finally, defendant's interpretation would "undermine the efficacy of the UCL as a means of protecting consumer rights." (*Ibid.*; *see also id.* at p. 324 [observing that "[t]he substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct, and the focus of the statute is on the defendant's conduct," internal citation and quotation marks omitted].)

The Court's reasoning applies with equal force here. Respondent's interpretation of Section 17203 is not found in the text of the UCL as amended, nor is it reflected in the ballot materials. Notably, Proposition 64 did not diminish a court's authority to issue injunctive relief "as may be necessary to prevent" unfair competition. (Voter Info. Guide, text of Prop. 64, § 2, p. 109 [amending § 17203].) But Respondent's position would have exactly that effect by curtailing the scope of injunctive relief that the court could enter—potentially in all UCL cases, not just those brought by organizations. Proposition 64 also did not alter the definition of "persons" entitled to bring a UCL action to remove organizations, as noted above. (§ 17201.) But requiring organizations to bring all UCL cases as class actions would effectively write organizations out of the statue by permitting them to litigate UCL claims *only* in the capacity of a representative of their individual members. Such a rule overlooks the fact that organizations may suffer harms different in type and degree from those of their members or the constituents they serve—and the fact that some advocacy groups

have no clearly defined "members" at all. None of these outcomes is necessary to carry out Proposition 64's intended reforms.

As this Court has already concluded, Proposition 64's limitations on representative actions are best understood not as limiting the scope of injunctive relief available, but as prohibiting a private non-class plaintiff from "'seek[ing] disgorgement and/or restitution on behalf of [other] persons.'" (*McGill*, *supra*, 2 Cal.5th at p. 961, quoting *Kraus v. Trinity Management Servs., Inc.* (2000) 23 Cal.4th 116, 126 fn.10.) With regard to representative actions, the ballot materials for Proposition 64 explain that the UCL had been "misused" to "file lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Voter Info. Guide, text of Prop. 64, § 1, subd. (b)(4), p. 109.) Proposition 64 addressed that concern by mandating that private representative plaintiffs follow class action procedures—such as giving notice to potential class members, Cal. Rules of Court, rule 3.766, and obtaining judicial approval of settlements, *id.*, rule 3.769—and thereby ensuring that secret, out-of-court settlements would not determine the rights of affected but absent third parties. (Cf. *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 266–267, 273 [discussing the features of class actions that protect unnamed class members].) The due-process concerns addressed by Proposition 64 are not at issue when "persons"—whether they be organizations or individuals—seek injunctive relief to redress their *own* harms, even if the relief they seek would benefit non-parties.

After Proposition 64, courts may continue to enter injunctions in UCL cases, including cases not brought as class actions, that benefit non-party consumers or competitors. Consistent with the UCL's preventive goals, such beneficiaries include consumers who have not transacted or competed with the defendant, but who may do so in the future. (See, e.g., *Robinson v. U-Haul Co. of Cal.* (2016) 4 Cal.App.5th 304, 314–317 [upholding injunction barring enforcement of covenant-not-to-compete clause, even though defendant had "carved out an exception" for plaintiff].) The Court should reject the argument that an organization must bring a class action if it seeks an injunction that, if granted, would benefit its members or the public.

CONCLUSION

The Court should reverse the Court of Appeal's judgment.

Respectfully submitted,

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June 15, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF APPELLANT uses a 13-point Century Schoolbook font and contains 6,314 words.

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June 15, 2022

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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No.: S269212, 2DCA No. B304217, LASC No. BC487412

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Declarant	Signature

SERVICE LIST

Case Name: California Medical Association v. Aetna Healthcare of California, et al.
No.: S269212, 2DCA No. B304217, LASC No. BC487412

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STATE OF CALIFORNIA
Supreme Court of California

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