Case No. **S117156**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. **S117156**

KIDS AGAINST POLLUTION, et. al.,

Petitioners and Respondents,

vs.

CALIFORNIA DENTAL ASSOCIATION,

Defendant and Appellant.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, NO. A098396. ON APPEAL FROM THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, HON. A. JAMES ROBERTSON II, JUDGE PRESIDING (NOS. 322109 & 322110).

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA ON APPLICABILITY OF PROPOSITION 64 TO THIS CASE AND IN SUPPORT OF DEFENDANT AND APPELLANT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

The Civil Justice Association of California (CJAC or amicus)[1] reads the Court's order that "any party" may file "an answer" to the *amici curiae* brief of the Consumer Attorneys of California (CAC) and California Rural Legal Assistance (CRLA), inclusively.[2] While not a "party" in the narrow sense of being either a named plaintiff or defendant, we are, as *amicus curiae*, a participant or litigant herein. As an official ballot sponsor of Proposition 64 and frequent contributor to cases concerning the Unfair Competition Law ("UCL")[3] – the legal linch-pin

[1] CJAC filed an amicus curiae brief herein that addresses the constitutional issue of "associational expression" and how that underlies and informs the Court's responsibility to harmonize the UCL and anti-SLAPP statutes. We did not address whether legislative changes made to either statute before the conclusion of this litigation apply immediately to effect that conclusion. With the passage of Proposition 64 and its repeal of the UCL's broad standing requirement, that issue is now of paramount importance.

[2] Court Order filed March 9, 2005.

[3] See, e.g., *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939; *Kraus v.* (continued...)

for prosecution of this suit – we also have ideas and authority we believe will help the Court decide the most recent issue this case presents: Does repeal of the UCL's broad standing and representative action provisions by the passage of Proposition 64, require dismissal?

CJAC believes that Proposition 64 applies to this case and requires its dismissal because the plaintiff now lacks "standing" to prosecute it. Indeed, this case affords the Court an excellent opportunity to resolve this threshold issue of obvious importance by clarifying the conflicting authority of intermediate appellate courts that have addressed it.[4] While several Proposition 64 cases are "percolating" up the judicial ladder seeking this Court's review and clarification, this one presents the legal issue cleanly, without the clutter of factual disputes. It is, therefore, an excellent vehicle to bring about the earliest resolution to this important and unsettled issue.

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[3](...continued)
Trinity Management Services, Inc. (2000) 23 Cal.4th 116; and *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163.

[4] *Compare, e.g.*, *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455; *Bivens v.Corel Corp.* (2005) 126 Cal.App.4th1392; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887; and *Branick v. Downey Savings & Loan Assoc.* (2005) 126 Cal.App.4th 828 (all holding that Proposition 64 applies immediately to all pending cases) *with Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386 (only appellate opinion holding that Proposition 64 does not apply to pending cases filed before its enactment). Amici CAC and CRLA characterize these opinions as "four different panels . . . issu[ing] five conflicting decisions, all certified for publication." (CAC & CRLA Amici Brief on Proposition 64, p. 1.) This was before *Frey v. Trans Union Corp.* (March 24, 2005) 2005 Cal.App. Lexis 401 held that Proposition 64 applies to all pending cases, which now makes the count 5 opinions to 1 in favor of immediate application.

SUMMARY OF ARGUMENT

The changes made to the UCL by passage of Proposition 64 effectively repeal that law's formerly broad standing and representative action provisions. Now a plaintiff must demonstrate "actual injury" and, if the plaintiff seeks to represent the general public, satisfy the requirements for a class action.

Proposition 64 applies to this and all pending cases because it is a *repeal* of remedies based wholly on statute, *not* the common law; and contains no savings clause. Proposition 64 also applies to this and all cases pending at the time it became law because the changes it made to the UCL are procedural, not substantive.

When Proposition 64 is applied here to the attempted hi-jacking by one organization of another one with different views about the safety of dental amalgam, the case must be dismissed. Petitioner has suffered no actual injury and seeks relief on behalf of the general public absent class certification. These legal lacunae conflict with Proposition 64 and are fatal to petitioner's cause.

ARGUMENT

I. PROPOSITION 64 APPLIES TO THIS AND ALL PENDING CASES.

A. The Primary Purposes of Proposition 64 are to Require that (1) Plaintiffs Who Bring Suit Have Suffered "Actual Injury" and (2) Private Representative Actions on Behalf of the General Public Comply with Class Action Procedural Requirements.

Proposition 64 took effect the day *after* voters approved it, or November 3, 2004.[5] Its purposes are, *inter alia*, to (1) "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;" and (2) ensure "that *only* the California Attorney General and local public officials be authorized to file and *prosecute* actions on behalf of the general public."[6]

Proposition 64 seeks to accomplish these purposes in three ways. First, it repeals a portion of former UCL section 17204, which permitted "any person acting for the interests of itself, its members or the general public" to bring suit. In striking this quoted language and substituting in its place language specifying that "any person" now bringing suit must have "suffered injury in fact and . . . lost money or property as a result," Proposition 64 furthered the goal of putting some teeth into the "standing requirement" for UCL prosecutions.

Second, Proposition 64 repealed the portion of the injunctive remedy

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[5] "An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. . .." (Cal. Const., art. II, § 10(a).)

[6] Proposition 64, "Findings and Declarations of Purpose," § 1, subd. (e) & (f) (emphasis added). Courts rhythmically look to an initiative statute's "Findings and Declaration of Purpose" in ascertaining the aim of the measure "because it bears directly on the issue of legislative intent . . .." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 274.)

provision of the UCL that permitted "any person acting for interests of itself, its members or the general public" to obtain an injunction, and substituted in its place the requirement that a person who suffered "injury in fact" may "pursue representative claims or relief on behalf of others *only* if the claimant meets the [newly enacted] standing requirement . . . and complies with Section 382 of the Code of Civil Procedure,"[7] the state's statutory class action authorization. These changes accomplish the measure's second purpose of ensuring that only public prosecutors can "file and prosecute actions on behalf of the general public" when there has been no demonstrated injury-in-fact to the plaintiff.

Third, both of these objectives are reiterated and linked through the use of the conjunctive term "and" in newly amended section 17203, which states that "[a]ny person may pursue representative claims or relief on behalf of others *only if* the claimant meets the standing requirements of Section 17204 *and* complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General or [public prosecutors]."[8]

As a recent law review article stated about the changes to UCL litigation wrought by Proposition 64:[9]

> The measure greatly restricts who can bring an unfair competition

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[7] B & P C. § 17535.

[8] Emphasis added.

[9] Mathieu Blackston, *California's Unfair Competition Law – Making Sure the Avenger Is Not Guilty of the Greater Crime* (2004) 41 *SAN DIEGO L. REV*. 1833, 1856, citing to and quoting from *Richmond v. Dart Industries, Inc.* (1981) 29 Cal. 3d 462, 470.

> claim and in essence eliminates all private attorney general actions. By importing the elements of class certification into UCL claims, the proposition resolves the due process and lack of finality concerns that had besieged section 17200 actions. As with class certification requirements, imposing a harm requirement on private UCL actions also limits standing. Individuals no longer have standing to seek judicial relief under the UCL by simply crying foul. Rather, they must be harmed themselves and "establish the existence of an ascertainable class and a well-defined community of interest among the class members."

B. The Plain Language of Proposition 64 Makes Clear that it is Intended to Apply to Pending Cases.

The aforementioned purposes of Proposition 64 are inextricably tied to the issue of its effect on pending cases. That is because in construing a statute's scope and application, "courts first determine the . . . intent and *purpose* for the enactment." (*People v. Tindall* (2000) 24 Cal.4th 767, 772.) Toward this end, courts look to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. (*Ibid.*) If there is no ambiguity in the statutory language, its plain meaning controls; the judiciary presumes the Legislature – or in this case the People acting to represent themselves through the initiative process – meant what it (they) said. (*Ibid.*) However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including, again, "the *purpose* of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing [it]." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973,

977.) In short, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[10]

The purposes of Proposition 64 are, according to its plain language, to restrict not only who may *file*[11] claims under the UCL, but who may "prosecute"[12] such claims and who may "pursue"[13] relief as a "representative" of some group. Prosecution and pursuit of claims necessarily comes *before*, or are prerequisites to, their final determination. So Proposition 64 applies, by its plain language, to "pending" cases that are being "prosecuted" and "pursued" as well as cases "filed" but not finally determined. Proposition 64 applies, in other words, to this as yet unresolved case.

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[10] Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VANNED. L. REV*. 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* § 48A:08, p. 639 (2000 ed.).

[11] Prop. 64, §§ 1, subd. (b)(1) - (4) refer to a variety of legal, social and economic ills occasioned by "filings" under the UCL, especially when they are "a means of generating attorney's fees without creating a corresponding benefit," and undertaken "where no client has been injured in fact" or has "used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." The result of these lawsuits is to "clog our courts and cost taxpayers, . . . California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees . . .."

[12] Prop. 64 refers in several sections, both new and old, to the "prosecut[ion]" of actions under the UCL. (*Id.* at § 1, subd. (f), § 5 (§ 17535 of the UCL).)

[13] Prop. 64 states that any private party seeking to represent others "may *pursue* [such claims] only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . .," the statutory authorization for class actions. Identical language also appears in § 5 (B & P C § 17535).

II. PROPOSITION 64 APPLIES TO PENDING CASES BECAUSE IT REPEALS THE FORMER UCL PROVISIONS PERMITTING PRIVATE PERSONS WHO HAVE NOT SUFFERED ANY INJURY TO OBTAIN RELIEF FOR THE GENERAL PUBLIC.

Governing Board of Rialto Unified School District v. Mann (1977)[14] 18 Cal.3d 819, 829 states the controlling principle:

> [A] cause of action or remedy dependent on a statute falls with a repeal of the statute, *even after the action thereon is pending*, in the absence of a saving clause in the repealing statute. The justification for this rule is that the Legislature may abolish the right to recover at any time.[15]

This rule, known as the "repeal doctrine," admits two exceptions: (1) when the right or remedy repealed is based, not on statute, but the common law; and (2) when a "savings clause" is enacted accompanying the repeal. Neither exception applies to Proposition 64.

Before Proposition 64's passage, the UCL contained a phantom "standing" requirement that permitted "any person" to sue on behalf of the general public for injunctive relief regardless of whether he suffered injury from the complained of practice. This was a unique statutorily created cause of action, one that by the capacious terms of the offenses it substantively proscribes – *i.e.*, conduct that is "unlawful, unfair or fraudulent" – invited abuse. According to Proposition 64, that abuse includes the "filing," "prosecution" and "pursuit" of cases "where no client has been injured in fact," including "lawsuits on behalf of the general public

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[14] Hereinafter referred to as "*Mann*."

[15] Emphasis added. *Accord*: *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (The rule is "well settled that an action wholly dependent on statute abates if the statute is repealed . . .").

without any accountability to the public and without adequate court supervision."[16]

These rights and remedies under the UCL were unique creatures of statute; they cannot be traced to any antecedent common law right to be free from unfair competition. As the Court stated in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264:

> The common law tort of unfair competition is generally thought to be synonymous with the act of "passing off" one's goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. [Citation.] [¶] In contrast, *statutory* "unfair competition" extends to all unfair and deceptive business practices. For this reason, the statutory definition of "unfair competition" "cannot be equated with the common law definition." (Italics added.)

The old regime version of the UCL was, then, in the words of the *Mann* opinion, solely "a cause of action or remedy dependent on a statute." (*Mann*, *supra*, 18 Cal.3d at 829.) Repeal of the former standing and representative action standards in the UCL – whether a *partial* or *total* repeal of the UCL or characterized as an "amendment" – has the same legal effect. "A repeal of the statute, or an amendment thereof, resulting in a repeal of the statutory provision

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[16] Until Proposition 64 put a stop to these abusive practices, "plaintiffs could [1] file representative actions against an extraordinary number of defendants without having to worry about a reciprocal defendant class because the UCL contains no notice requirement. . .; [2] file a case on behalf of the general public solely to pile on an additional sanction against a defendant who is in the midst of complying with a regulatory process; . . . [and 3] 'tack on' section 17200 claims in an effort to broaden a plaintiff's scope of discovery and increase settlement leverage." Blackston, *supra*, 41 *SAN DIEGO L. REV.* at 1849-1851.

under which the cause of action arose, wipes out the cause of action unless the same has been merged into a final judgment." (*Wolf v. Pacific Southwest etc. Corp.* (1937) 10 Cal.2d 183, 185.) Standing to sue, of course, goes to the very existence of a cause of action. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) Absent the standing required under the amended versions of sections 17204 and 17535, plaintiff has no cause of action under either the unlawful competition law or the false advertising law.

Nor is there any "savings clause" in Proposition 64. A savings clause is a "restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, etc., from the annihilation which would result from an unrestricted repeal." (*BLACK'S LAW DICTIONARY* 1343 (6th ed. 1990).) A general savings clause contained in the statute before the repealing measure is enacted will not, contrary to the contention by amici CAC and CRLA, suffice to save that which is repealed. If it is to have effect, the "savings clause" must be enacted during the *same session* as the repealing measure to show the legislative intent to save pending actions from the repeal. (*County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 203 ("[I]ntent to [apply savings clause effect] [must] appear by legislative provision *at the session of the Legislature effecting the repeal of the statute* from which the rights are to be saved."); emphasis added.) As the Court made clear when applying the "repeal doctrine" to give immediate effect to a legislative "amendment" that changed an earlier statutory procedure for records destruction, the "amendment" "contain[ed] no express saving clause, and none [wa]s implied by *contemporaneous* legislation." (*Younger v. Superior Court*, *supra*, 21 Cal.3d at 109 -110; emphasis added.) No savings clause, specific or general, was enacted by the Legislature or

the People during the time Proposition 64 was passed. So repeal of the UCL's non-standing provision, and repeal of its broad conferral upon private parties (who have themselves suffered no injury) to pursue representative actions on behalf of the general public, immediately ends all pending UCL causes of action that do not comport with Proposition 64's new requirements. That includes this case.

The facts animating the opinion in *Mann* are instructive on these points. A tenured teacher pled guilty in 1971 to possession of marijuana arising out of his consumption of a small quantity of that substance in his private residence. The school district then sought a judicial determination that the teacher's marijuana conviction constituted grounds for dismissal under the Education Code, which provided that conviction of a felony or any crime involving moral turpitude constituted cause for dismissal. The trial court agreed and entered a judgment declaring that the school district had the right to dismiss the teacher from his tenured position. During the pendency of defendant's appeal, the Legislature passed an entirely new statute that prohibited any public entity, including a school district, from revoking any right of an individual on the basis of a pre-1976 possession of marijuana conviction so long as two years have elapsed from the date of conviction.

When the case reached this Court, it applied the new statute allowing the teacher to continue his employment. The School District argued, as petitioner and its *amici* argue about Proposition 64, that even if the new legislation repealed the former remedy, the repeal should not affect a case that "was pending on appeal

at the time the repealing legislation became effective."[17] This argument was soundly repudiated by a unanimous Court for reasons that ring true today for Proposition 64:

> The school district's authority to dismiss defendant rests solely on statutory grounds, and thus under the settled common law rule the repeal of the district's statutory authority necessarily defeats this action which was pending on appeal at the time the repeal became effective. As this court noted in *Southern Service Co, Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 12: "If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case *under the law in force when its decision is rendered*."

Amici CAC and CRLA rely on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 in arguing that Proposition 64 does not apply to lawsuits filed before its enactment because the measure does not show an unmistakable intent that it apply. Their reliance on *Evangelatos* is shared by the appellate opinion in *Mervyn's*; but it is misplaced because *Evangelatos* involved the repeal of a common law right, not a statutory right. CJAC knows this because we, as a sponsor of the initiative measure at issue in *Evangelatos* (Proposition 51, which modified the common law rule of joint and several liability to allow for several liability based on proportionate fault for noneconomic damages), were unsuccessful in persuading the Court to apply it all pending cases. Neither amici nor *Evangelatos*, however,

[17] *Mann*, *supra*, 18 Cal.3d at 829.

discuss the repeal doctrine or cite or analyze either *Mann*, *supra*, 18 Cal.3d 819 or *Younger*, *supra*, 21 Cal.3d 102. Therein lies the rub.

As with the *Mann* opinion, the "law in force" that now governs pending UCL cases is Proposition 64, which mandates dismissal of UCL cases that conflict with its provisions. "If a case is appealed, and, pending the appeal, the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered."[18] This is neither a new nor radical notion. A unanimous opinion by Chief Justice John Marshall underscored early in our nation's jurisprudence that repeal of a statute requires the court to apply the changed law to pending cases, not the repealed law that was in effect when the case arose. In *United States v. Schooner Peggy* (1801) 1 Cranch 103 the owners of a ship that had been seized and condemned by a lower court filed an appeal from the condemnation. During appeal, the United States entered into a treaty with France, in which both nations agreed to restore all property that had not been definitively condemned. The captors of the seized ship argued that the ruling of the court below was a definitive condemnation, which the Court could only reverse if the judgment of condemnation was erroneous when delivered; but if it was not, then it could not be disturbed because it was based on valid law at the time. Chief Justice Marshall rejected this contention, stating:

> It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not, but, if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule

[18] *First Nat'l. Bank of San Luis Obispo v. Henderson* (1894) 101 Cal. 307, 309-310.

> which governs, the law must be obeyed or its obligation denied. In such a case the court must decide according to existing laws, and, if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[19]

California follows Chief Justice Marshall's eminently sensible path to the same conclusion. "If final relief has not been granted before the repeal goes into effect, it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered." (*Southern Service Co., Ltd. v. Los Angeles County*, *supra*, 15 Cal.2d at 11-12.)

III. PROPOSITION 64 IS A PROCEDURAL AND REMEDIAL MEASURE THAT SHOULD BE APPLIED TO PENDING UCL CASES.

There is a second, independent ground upon which to apply Proposition 64 to all pending cases: while changes in *substantive* legal rights normally operate only prospectively, changes made in *procedural or remedial* laws apply immediately to cases that have not been finally determined. Applying changed procedural statutes to existing litigation, even though the litigation involves an underlying dispute that arose from conduct occurring before the effective date of the new statute, involves no improper retrospective application because the statute addresses *conduct in the future*, not the past.

> Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . .. [Instead,] [t]he effect of such

[19] *Schooner Peggy*, *supra*, 1 Cranch. at 110.

> statutes is actually prospective in nature since they relate to the *procedure to be followed in the future*." [Citation.] For this reason, we have said that "it is a misnomer to designate [such statutes] as having retrospective effect. [Citation.]"[20]

As *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395 explained:

> [P]rocedural changes "operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." [Citations.] In other words, procedural statutes may become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. [Citation.] In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively.

It is, then, the effect of the law, not its form or label, that is important for purposes of analysis as to what cases it affects.[21] If a statutory change is *substantive* because it imposes new, additional or different *liabilities* based on past conduct, courts are loath to interpret it as having retrospective application.[22] "[W]hat is

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[20] *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.

[21] *Tapia*, *supra*, 53 Cal.3d at 289.

[22] *Id.* at pp. 290-291; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, (continued...)

determinative is the effect that application of the statute would have on substantive rights and liabilities."[23]

Petitioners understand this principle well for they assert it in their briefs. They contend that the amendment limiting application of the anti-SLAPP statute, which took legal effect during the pendency of this case may – because it is a "procedural statute" – "be applied to petitioners' existing causes of action." (See Petitioners' Opening Brief, p. 20; and Petitioners' Reply Brief, p. 4.) Several appellate courts have recognized this distinction to give immediate effect to newly restrictive amendments on use of the anti-SLAPP motion. (See, e.g., *Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs.* (2004) 124 Cal.App.4th 296, 301-302; *Physicians Com. For Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120, 125-126; and *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 690.)

It is well-settled that issues of *standing* – i.e., who may bring suit to enforce a substantive right – are *procedural* in nature. "In recent years there has been a marked accommodation of formerly strict *procedural requirements of standing to sue* [citation] and even of capacity to sue [citation] where matters relating to the 'social and economic realities of the present-day organization of society' [citation] are

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[22](...continued)
269[" 'every [statute that] takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective' "]. If a newly enacted statute merely changes the procedures to be used in the conduct of existing litigation, however, its application is not considered retrospective.

[23] *Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 378.

concerned."[24] So are the statutory authorization and requirements for class actions, which is undoubtedly why they are found in section 382 of the Code of Civil Procedure and have been judicially recognized as "essentially . . . procedural . . .."[25]

These two reform provisions of Proposition 64 are tied-together in sections 2 and 5, where the measure specifies that a private plaintiff may bring a representative action on behalf of others "only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . .." The standing requirements of Section 17204 are, of course, the Proposition 64 language requiring a private plaintiff to have "suffered injury in fact and . . . lost money or property" as a condition of suing under the UCL.

Admittedly, the "substance" versus "procedure" dichotomy is not always clear-cut. As the Court recognized in *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 865:

> "Substance" and "procedure" . . . are not legal concepts of invariable content . . . and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for

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[24] See also *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1164 n.2 (explaining that a creditor's claim was disallowed in another case "for the purely *procedural* reason of lack of standing") (emphasis in original); *Personnel Comm. of the Barstow Unified Sch. Dist. v. Barstow Unified Sch. Dist.* (1996) 43 Cal.App.4th 871, 875 ("[W]e dispose of the matter on *procedural* grounds. Specifically, we conclude . . . the Commission lacked *standing to sue* . . .") (emphasis added); *J & K Painting Co., Inc. v. Bradshaw* (1996) 45 Cal.App.4th 1394, 1402 n.8 (question of whether "plaintiff lacked standing to proceed with the action" was "purely procedural"); *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117; emphasis added; and *Saks v. Damon Raike and Co.* (1992) 7 Cal.App.4th 419, 430. ("Because of the nature of their claim and the particular jurisdictional and *procedural* requirements of the law pertaining thereto, [plaintiffs] lack *standing* to bring their claims in the trial court below"; emphasis added.)

[25] *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439; *Global Minerals and Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849.

which a characterization must be made.

The "nature of the problem for which a characterization must be made" turns, courts tell us, on whether the newly enacted statute changes "the legal consequences of past conduct by imposing new or different liabilities based upon such conduct."[26] Proposition 64 does *not* change the legal consequences of past conduct by imposing new or additional liability; it simply governs who may prosecute UCL actions *after* its enactment. ("Actions for any relief pursuant to this chapter shall be *prosecuted* exclusively" by the various governmental actors as well as private parties who suffered injury in fact and lost money or property as a result of unfair competition.) Application of Proposition 64 does not, in other words, affect whether plaintiffs had standing to maintain this action in the past, but bars them from continuing to maintain actions in the future due to their lack of standing. This is, of course, consistent with the venerable rule that an absence of standing "may be raised at any time in the proceeding,"[27] including after a change of law on what is required for standing. With respect to defendants, if their alleged conduct violated the UCL, they could still be held liable for this conduct through lawsuits brought by the California Attorney General, local public officials, or private plaintiffs who can demonstrate "injury in fact" under Proposition 64. The legal consequences of any conduct that purportedly violated the UCL are, therefore, unchanged by Proposition 64.

Finally, public policy favors immediate application of Proposition 64 to

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[26] *Tapia v. Superior Court*, *supra*, 53 Cal.3d at 290-291.

[27] See *McKinny v. Board of Trustees* (1982) 31 Cal. 3d 79, 90 ("[L]ack of standing . . . may be raised at any time in the proceeding").

pending cases because that is the surest and swiftest way to stop phantom plaintiffs (i.e., ones who have not suffered any injury) – acting as self-appointed "representatives" of the *general public* – from prosecuting UCL claims that clog our courts, cost taxpayers and dampen our economy. There is simply no offsetting public benefit in allowing pending UCL cases to go forward if they do not conform to Proposition 64. An unharmed private plaintiff purporting to the represent the general public cannot continue to, as the Proposition states, "pursue" or "prosecute" these UCL claims without satisfying the new standing and class certification requirements.

The standing and class action requirements for private representative actions added to the UCL by Proposition 64 are *procedural*, not substantive. Accordingly, they may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect.[28]

[28] *Tapia v. Superior Court*, *supra*, 53 Cal.3d at 288; *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1211, fn. 20.

CONCLUSION

Proposition 64 changes the standing requirements for private parties to prosecute UCL actions and to require that when a private party seeks to prosecute a representative UCL action it comply with the procedural dictates for class actions. These changes *repeal* key elements of existing statutes and are *procedural* in nature. Thus they apply immediately upon taking effect to all pending cases.

For these reasons, amicus urges the Court to apply Proposition 64 to this case and dismiss it because petitioner does not satisfy current legal requirements for prosecution of a UCL case.

Dated: March 29, 2005

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CERTIFICATE OF WORD COUNT

The text of the foregoing amicus curiae brief consists of approximately 5700 words as counted by the Corel WordPerfect 12 word processing program used to generate this brief.

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