Case No.: _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANICE DURAN, an individual, and JULIA RAMOS, an individual, for themselves and as putative class representatives

Petitioners,

vs.

SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent.

THE MAY DEPARTMENT STORES COMPANY
[erroneously sued as ROBINSONS-MAY, INC.]

Real Party in Interest,

FROM AN ORDER DENYING A WRIT PETITION,
COURT OF APPEAL, FOURTH APPELLATE DISTRICT, CASE NO. E037693

WRIT PETITION FROM AN ORDER OF THE SAN BERNARDINO SUPERIOR COURT,
THE HONORABLE MARTIN HILDRETH, CASE NO. RCV 42727

PETITION FOR REVIEW; IMMEDIATE STAY REQUESTED

Service on Attorney General and District Attorney of San Bernardino County required by BUS. & PROF. CODE § 17209 and CAL. RULES OF COURT, RULE 15(c)(3)

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PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

This Petition addresses whether Proposition 64, passed by California voters on November 2, 2004, applies retroactively to pending actions and the consequences of retroactive application if it does.

Plaintiffs and Petitioners JANICE DURAN and JULIA RAMOS ("Petitioners") respectfully petition for review of the March 23, 2005 Order of the Court of Appeal, Fourth Appellate District, summarily denying their Petition for a Peremptory or Alternative Writ of Mandate or Other Extraordinary Relief and Request For Immediate Stay. The issues presented by way of this Petition are virtually identical to those same issues raised in the Petitions entitled *Californians for Disability Rights v. Mervyn's, LLC*, Cal. Supreme Court case no. S131798, and *Mastercard Int'l, Inc. v. Superior Court*, Cal. Supreme Court case no. S131416. However, this Petition presents these issues from the contrary viewpoint.

Petitioners' Petition to the Court of Appeal Sought:

1. an Alternative Writ requiring the Superior Court to withdraw the Order striking Petitioners' representative allegations and apply the Unfair Competition Law (BUS. & PROF. CODE § 17200, *et seq.*, or "UCL") as it existed prior to the passage of Proposition

64, or show cause why such withdrawal should not take place;

2. an Alternative Writ requiring the Superior Court to permit Petitioners to amend their Second Amended Complaint to state class allegations related to their UCL Cause of Action, or show cause why such amendment should not be permitted; or,

3. the issuance of a Peremptory Writ of Mandate directing the Superior Court to either withdraw the Order striking Petitioners' representative allegations and apply the UCL as it existed prior to the passage of Proposition 64, or permit Petitioners to amend their Second Amended Complaint to state class allegations related to their UCL Cause of Action.

A copy of the order of the Court of Appeal is attached hereto as Exhibit "1."

I.

ISSUES AND QUESTIONS PRESENTED FOR REVIEW

1. GOVT. CODE § 9605 states that a when "a section or part of a statute is amended, it is not to be considered as having been repealed." The parallel common law rule, reflected by this Court's decision in *Krause v. Rarity*, 210 Cal. 644, 653-54 (1930) and others, holds that amendments to statutes do not operate as repeals. This Court's decisions in *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207-08

(1988), *McClung v. Employment Development Dept*., 34 Cal. 4th 467, 475 (Nov. 4, 2004), and others, hold that, absent an express declaration that the Legislature intended retroactivity, a new statute is *presumed* to operate prospectively. In light of this authority, do the provisions of Proposition 64, passed by California voters on November 2, 2004, apply retroactively to civil cases – such as the instant matter – that were pending when Proposition 64 became effective?

2. If Proposition 64 applies retroactively to cases pending at the time of its passage, should affected plaintiffs such as Petitioners be granted leave to amend their complaint to comply with the newly enacted provisions of Proposition 64, including the class action requirements for a representative action?

3. Whether this matter should be granted review and consolidated with any of the similar Petitions raising questions about the retroactive application of Proposition 64.

4. Whether this matter should be granted review and deferred until resolution of any Petition addressing the questions surrounding the retroactive application of Proposition 64. CAL. RULES OF COURT, RULE 28.2(d).

II.

WHY REVIEW SHOULD BE GRANTED

The issues presented herein are of widespread importance, concern and interest to Californians. Proposition 64 affects a substantial number of BUS. & PROF. CODE § 17200, *et seq*. cases currently pending throughout the state.[1] Historically, this Court has been called upon to resolve the proper application of new laws. *See, e.g., Evangelatos, supra,* 44 Cal. 3d at 1196-1200 (examining Proposition 51). This Court's experienced guidance is sorely needed with respect to Proposition 64.

The Courts of Appeal, addressing the retroactivity issue that has shadowed Proposition 64 from enactment, have reached conflicting conclusions. *Compare*: *Californians for Disability Rights v. Mervyn's, LLC*, 126 Cal. App. 4th 386 (1st Dist., 2005) (*C.D.R.*) (Proposition 64 does not apply to pending actions), with *Benson v. Kwikset Corp*., 126 Cal. App. 4th 887, 24 Cal. Rptr. 3d 683 (4th Dist., 2005) and *Branick v. Downey Sav. and Loan Ass'n*, 126 Cal. App. 4th 828, 24 Cal. Rptr. 3d 406 (2nd Dist., 2005) (Proposition 64 applies to pending actions). Even those decisions finding that Proposition 64 applies retroactively to pending actions disagree as to the consequences, with *Branick* holding that a plaintiff can amend to

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[1] Hereinafter referred to as "Unfair Competition Law," or "UCL".

add a new plaintiff, and *Benson* holding that no curative amendment is possible.

The split among the state's trial and appellate courts is without justification. Many of the courts applying Proposition 64 retroactively have done so in direct violation of an unequivocal legislative mandate (GOVT. CODE § 9605) that precludes operation of the "statutory repeal" doctrine to resolve the retroactivity of Proposition 64. Guidance from this Court is required to direct adherence to a clear legislative directive.

Without this Court's immediate intervention, the risk of further confusion is imminent, as there are 12 or more pending appeals raising the Proposition 64 retroactivity issue. In addition, scores of trial courts around the state – including different complex matter departments and, in some cases, different departments within the same county – have reached diametrically opposed conclusions regarding the applicability of Proposition 64 to pending cases. Given this split between the Courts of Appeal, tremendous resources will be expended on writs and appeals from the growing list of trial court decisions on this issue.

It is inevitable that this Court will ultimately be required to resolve this issue. CAL. RULES OF COURT, RULE 28(b)(1) (review is proper "when necessary to secure uniformity of decision or settle an important question of law"). Because of the importance of these issues, and the large number of pending cases potentially affected, early guidance from this Court would

assist litigants and the lower courts alike, and would prevent needless litigation costs. This case presents the Proposition 64 issue in a direct manner, on undisputed facts. Competent counsel on both sides will assure full briefing of the important issues presented herein.

This case presents the contrary view to that supplied by the Petitions for review filed in *C.D.R.*, Cal. Supreme Court case no. S131798 and *Mastercard Int'l, Inc. v. Superior Court*, Cal. Supreme Court case no. S131416. As such, this Court would benefit from the presentation of every legitimate argument, from opposing viewpoints, as to whether Proposition 64 applies retroactively to cases already pending when it was enacted.

In the absence of immediate review by this Court, Petitioners have no other plain, speedy or adequate remedy at law. CODE CIV. PROC. § 1086; *Babb v. Superior Court*, 3 Cal. 3d 841, 850-851 (1971). Petitioners have no current right to appeal from the Trial Court's Order because it is not a final judgment. The Trial Court's Orders granting a Motion to Strike and denying Leave to Amend are not appealable. CODE CIV. PROC. § 904.1.

III.

STATEMENT OF THE CASE

In this action, seeking overtime pay for roughly 2,000 Area Sales Managers of Defendant Robinsons-May, Inc. ("Robinsons-May"),

Robinsons-May argued to the Trial Court that the November 2004 passage of state ballot Proposition 64 operates in this lawsuit to bar Petitioners' representative claim filed pursuant to the UCL.[2] In response, the Trial Court struck Petitioners' representative allegations.

A. History Of The Action

Petitioners are the Plaintiffs in an action entitled *Duran, et al. v. Robinsons-May, Inc.*, case number RCV 42727, now pending before the Hon. Judge Martin Hildreth in Division R-11 of the Ranch Cucamonga Branch of the San Bernardino Superior Court. Robinsons-May is named as the Real Party In Interest.[3]

This action was filed on September 9, 1999. The Petitioners worked for Robinsons-May as Area Sales Managers ("ASMs"). The operative Second Amended Complaint ("SAC") alleges violation of the overtime statutes, LAB. CODE § 1194, *et seq*., conversion, and violation of the UCL,

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[2] This Court, in *Kraus v. Trinity Management Services, Inc*., 23 Cal. 4th 116 (2000), used the term "representative action" to refer to a UCL action, not certified as a class, in which a plaintiff seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff. *Kraus,* at 126, n. 10. Petitioners adopt that Court's terminology, referring to a non-certified UCL claim as a "representative action."

[3] Petitioners are informed that Defendant's correct legal name is THE MAY DEPARTMENT STORES COMPANY dba ROBINSONS-MAY. Defendant was originally sued as ROBINSONS-MAY, INC.

for which Petitioners seek, amongst other relief, restitution and injunctive and declaratory relief. Underlying these causes of action are factual allegations that Robinsons-May misclassified as exempt from the overtime laws, and failed to pay overtime compensation owed to, Petitioners and some 2,000 or more current or former ASMs who worked during the relevant period at Defendant's retail department stores.

On or about June 29, 2001, Petitioners filed a Motion for Class Certification. Petitioners' Motion sought certification of their Labor Code and Conversion Causes of Action, but not their UCL claim, which included allegations that Petitioners were proceeding as private attorneys-general on behalf of all current and former ASMs owed overtime pay by Robinsons-May.

The Trial Court denied Petitioners' Motion for Class Certification. Petitioners appealed. The Court of Appeal affirmed the order denying certification, and a remittitur issued on August 5, 2003. Petitioners proceeded with their representative UCL claim.

B. November 2, 2004 Passage Of Proposition 64

On November 2, 2004, California voters passed Proposition 64. Proposition 64 amends BUS. & PROF. CODE §§ 17203, 17204, 17205, 17535 and 17536. With respect to this action, the changes at issue relate to sections 17203 and 17204.

Prior to the passage of Proposition 64, any plaintiff "acting for the interests of itself, its members or the general public" could bring a UCL claim. However, section 17204 was amended to limit standing to bring UCL claims. Under the revised section, a person may only pursue an action for relief under the UCL if he or she has "suffered injury in fact and has lost money or property as a result of such unfair competition."

Section 17203 was amended to append new requirements for private representative actions. In actions filed after the passage of Proposition 64, a plaintiff bringing a representative claim must meet the standing requirement of revised section 17204 and comply with CODE CIV. PROC. § 382 (governing class actions).

C. Defendant's Motion To Strike And Petitioners' Motion For Leave To Amend

After the passage of Proposition 64, Robinsons-May, like many defendants across the state, filed a Motion to Strike the representative allegations from Petitioners' UCL cause of action, arguing that Proposition 64 applied retroactively to pending cases. The Trial Court agreed, and in an Order entered January 21, 2005, the Court struck Petitioners' representative allegations. EXH. "2." The Court acknowledged, however, the uncertainty surrounding the retroactivity of Proposition 64 and provided a Certification to that effect in its Order:

> Notwithstanding the instant ruling, this Court believes that the question presented herein — *i.e.*, the applicability to this litigation of certain statutory provisions, as amended by Proposition 64 — is a controlling question of law in this and other cases pending throughout California as to which there are substantial grounds for difference of opinion. ***The appellate resolution of this controlling question of law may materially advance the conclusion of this and other litigation***. Hence, pursuant to Code of Civil Procedure section 166.1, ***this Court invites appellate review of the instant order. Likewise, this Court invites such review to take place as soon as practicable***.

EXH. "2," emphasis added.

In response to the Trial Court's ruling on the retroactivity of Proposition 64, Petitioners moved for leave to file a Third Amended Complaint that alleged the UCL claim in accordance with the changes imposed by Proposition 64. The Trial Court denied Petitioners' Motion for Leave to File Third Amended Complaint; that Order was filed on February 7, 2005. EXH. "3."

The 5-year deadline for bringing the action to trial (as extended by agreement) is rapidly approaching. On January 25, 2005, the Trial Court stayed the action for 60 days. On March 24, 2005, the Trial Court stayed the action until May 26, 2005. When that stay expires, and if this Court grants this Petition for Review, Petitioners will not be protected unless this Court issues a stay while the retroactivity and amendment issues are resolved in this Court.

DISCUSSION

IV.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL THAT IS OF URGENT STATEWIDE IMPORTANCE AND DECIDE WHETHER PROPOSITION 64 APPLIES RETROACTIVELY TO PENDING CASES, DESTROYING THE CLAIMS OF THIRD PARTIES THAT WERE PREVIOUSLY PROTECTED BY REPRESENTATIVE UCL CLAIMS

The question of whether a statute applies retroactively has not, over the years, been answered with a simple and consistent response. Instead, courts have looked to numerous factors when asked to determine whether a statute applies retroactively.[4]

The simple case, in which a statute contains an express declaration of retroactivity, requires little discussion. The singular contribution of such cases is the identification of the limiting factor governing retroactivity analysis: a statute cannot be applied retroactively when doing so would violate constitutional rights. *Myers v. Philip Morris Companies, Inc*., 28

[4] Initiative measures are subject to the ordinary rules and canons of statutory construction. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1212 (1988).

Cal. 4th 828, 846 (2002) ("An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].'").

With that simple scenario discarded, what remains is the hodgepodge of decisions addressing the retroactivity of statutes where an express statement of retroactivity is absent. From this muddled body of law, however, percolate clear and guiding principles identifying when the retroactive application of a statute is impermissible.

The overriding principle, articulated in virtually every case to address the issue, is the presumption that statutes apply prospectively:

> It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.

Tapia v. Superior Court, 53 Cal. 3d 282, 287 (1991).[5] This presumption provides the first rule of statutory interpretation, when an express declaration of retrospectivity is absent, and this presumption leads to the conclusion that Proposition 64 does not apply retroactively.

In the absence of an *express* declaration of retrospectivity, courts have turned to the *intent* of the legislature (or electorate):

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[5] Countless decisions echo this fundamental principle. *See, e.g., Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 840-841 (2002); *People v. Hayes*, 49 Cal. 3d 1260, 1274 (1989); *Evangelatos, supra*, 44 Cal. 3d at 1206-1209; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388, 393 (1947) (*Aetna*); *Jones v. Union Oil Co.*, 218 Cal. 775, 777 (1933); *In re Estrada*, 63 Cal. 2d 740, 746 (1965).

> As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, supra, 30 Cal.2d 388, 182 P.2d 159—the seminal retroactivity decision noted above—"[i]t is an established ***canon of interpretation*** that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."

Evangelatos, *supra*, 44 Cal. 3d at 1207. *Evangelatos* provided an exhaustive analysis of the intent of the electorate before ultimately concluding that Proposition 51, which abolished joint and several tort liability for non-economic damages, did not apply retroactively. *Id*., at 1209-1221. As *Evangelatos* reaffirmed, the emphasis on *intent* is simply the proper application of the canons of statutory interpretation in instances where silence as to retroactivity creates a lingering ambiguity.

Evangelatos also gave weight to the factor of "detrimental reliance" when considering whether an initiative applied retroactively:

> Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law.

Id., at 1215; *see also*, 1215-1218. *Evangelatos* held that it would violate principles of statutory construction to presume that the electorate intended unanticipated consequences:

> As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the

> kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears.

Id., at 1218. Unlike *Californians for Disability Rights v. Mervyn's, LLC*, (*C.D.R.*), the recent Proposition 64 decisions of *Benson* and *Branick* failed to consider or apply the "detrimental reliance" factor analyzed and applied by *Evangelatos*.

A number of cases imply a distinction between "procedural" and "substantive" laws, suggesting that "purely procedural" statutes always apply retroactively to pending actions. *See, e.g., Brenton v. Metabolife Intern. Inc*., 116 Cal. App. 4th 679, 688-689 (2004). While this distinction is frequently mentioned, it has effectively been discredited. *Russell v. Superior Court*, 185 Cal. App. 3d 810, 816 (1986).

Finally, a number of cases, including the just-issued *Benson* and *Branick* decisions, assert a bright-line rule for resolving the retroactivity question in cases where statutes are repealed. Sometimes called the "statutory repeal" doctrine, this rule purports to authorize retroactive application of certain new laws, if they affect a statutory remedy not otherwise recognized under the common law. However, *Benson, Branick* and other courts have improperly applied this rule to a ballot proposition that merely *changes*, rather than repeals, existing law. GOVT. CODE § 9605.

Moreover, these "statutory repeal" cases, as applied here, are in

conflict with a line of decisions addressing the propriety of retroactive *changes* to a statute. *See, e.g., Santangelo v. Allstate Ins. Co.*, 65 Cal. App. 4th 804, 815 (1998); *Aronson v. Superior Court*, 191 Cal. App. 3d 294, 297 (1987). Applying the "statutory repeal" rule to Proposition 64 oversteps the constitutional limitations on retroactive legislation.

In this matter, after the Trial Court struck Petitioners' representative allegations in their UCL claim, the Trial Court then denied Petitioners' motion to amend their complaint to state class allegations for their UCL claim. Thus, this ruling raises a question of first impression: If Proposition 64 applies retroactively to pending cases, eliminating representative UCL claims in the process, should Petitioners be permitted to allege class allegations for their UCL Cause of Action, despite having sought class certification of other causes of action previously in the case?[6] Setting aside the due process concern, fundamental fairness requires that, if a plaintiff must operate under the new burdens of the revised UCL, he or she must be entitled, through amendment, to exercise *all* of its new provisions as well.

This Court must grant review to answer pivotal questions of

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[6] This question of first impression is only relevant if Proposition 64 applies retroactively to cases pending prior to the passage of Proposition 64. Petitioners assert that retroactive application is improper. However, if this Court finds otherwise, then Petitioners request that this Court address the subsequent issue of the right to amend, an issue affecting numerous cases throughout the state and one over which the Courts of Appeal are also divided.

statewide concern in order to prevent, conservatively, dozens of appeals that will follow in the wake of the split among the Courts of Appeal.

A. Proposition 64 Does Not And Should Not Apply To Pending Cases

1. California Follows The Time-Honored Principal That Statutes Are Presumed To Operate Prospectively

> In the recent decision of *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80, 103 S.Ct. 407, 412-413, 74 L.Ed.2d 235 Justice (now Chief Justice) Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining: "*The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.] This court has often pointed out: '[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past*.... The rule has been expressed in varying degrees of strength but always of one import, that *a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.*" ' [Citation.]"

Evangelatos, supra, 44 Cal. 3d at 1207.

A statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer. *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 244 (1997). Unless there is an "express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application." *Myers, supra*, 28 Cal. 4th at 841. "[T]his rule is particularly applicable to a statute which

diminishes or extinguishes an existing cause of action." *Evangelatos, supra*, 44 Cal. 3d at 1223.

This Court recently described the strength of the presumption that new legislation should not apply retroactively:

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' "

McClung v. Employment Development Dept., 34 Cal. 4th 467, 475 (Nov. 4, 2004).[7] Because there is no express statement of retroactivity, Proposition 64 must be presumed to operate *prospectively*. This Court's role of institutional oversight is needed to unify courts that have incorrectly applied the rules of statutory construction related to retroactivity analysis.

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[7] This recent decision reaffirmed the vitality of this long-standing rule. *See, e.g., Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388 (1947); *Interinsurance Exchange of Auto. Club of So. Calif. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 149 (1962); *Marriage of Bouquet*, 16 Cal. 3d 583, 587 (1976); *Evangelatos, supra*, 44 Cal. 3d at 1208-1209 (1988).

2. The *Evangelatos* Standard: Because Proposition 64 Lacks An Express Declaration Of Intended Retroactivity, And Because Extrinsic Sources Do Not Provide "Clear And Unavoidable" Evidence Of Such Intent, The Presumption Of Prospective Application Applies

Absent an express declaration that the Legislature intended retroactivity, a new statute is *presumed* to operate prospectively. *See*, *Evangelatos*, *supra*, 44 Cal. 3d at 1207-1208; *see also, Tapia, supra,* 53 Cal. 3d at 287. Drafters of new legislation are familiar with this rule, and when they intend a statute to operate retroactively they use clear language to accomplish that purpose. *See, e.g., DiGenova v. State Board of Education*, 57 Cal. 2d 167, 176 (1962).

Even a *strong suspicion* of retroactive intent is insufficient to overcome the presumption against the retroactive application of a new law:

> We strongly suspect that, if asked a question about retroactive application, the Legislature would have said the change should apply to past abuse. However, we also suspect the Legislature never considered whether to make the amendment retroactive. We find no clear indication of retroactive intent.

ARA Living Centers - Pacific, Inc. v. Superior Court, 18 Cal. App. 4th 1556, 1561 (1993) (change in elder abuse law held *prospective* only, despite court's suspicion of retroactive intent).

The litigation that followed MICRA tort reform legislation provides

an example of how the "intent" element has been applied by courts. Two separate panels of the Court of Appeal addressed whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but which was tried after it went into effect. *Bolen v. Woo*, 96 Cal. App. 3d 944 (1979); *Robinson v. Pediatric Affiliates Medical Group, Inc.*, 98 Cal. App. 3d 907 (1979). Both Courts of Appeal concluded that, in the absence of a specific provision calling for such retroactive application, the general presumption of prospective application applied.

Here, Proposition 64 is silent as to its retroactivity. Its findings suggest that the measure is only intended to prevent future actions from being filed, not to terminate pending cases. Section 1(e) of the measure provides: "It is 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." EXH. "4," emphasis added.

The absence of retroactivity language in Proposition 64 contrasts sharply with an earlier tort reform initiative that appeared on the November 5, 1996 ballot. Proposition 213 enacted CIV. CODE § 3333.4, which bars uninsured motorists from recovering non-economic damages if they are injured by another driver. Unlike Proposition 64, Proposition 213 specifically provided that "[i]ts provisions shall apply to all actions in

which the initial trial has not commenced prior to January 1, 1997." *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 979 (1997) (Proposition 213 applied to cases that had not been tried as of the date of its enactment).

This Court has regularly reaffirmed the strong presumption against retroactive application of statutory amendments. *Myers v. Philip Morris Companies*, *supra*, 28 Cal. 4th at 840-845. In *Myers*, this Court held that the abolition of tobacco companies' immunity from suit was not retroactive because there was "no express language of retroactivity" or sources "providing a clear and unavoidable implication that the Legislature intended retroactive application." *Id*., at 884.

Immediately following the 2004 election, this Court again articulated and applied the *Evangelatos* test in *McClung*. There, it was held that an amendment of the Fair Employment and Housing Act extending liability for harassment of non-supervisory coworkers was not retroactive, finding "nothing to overcome the strong presumption against retroactivity." *McClung*, *supra*, at 475-476.

Had Proposition 64's drafters wished to make their measure retroactive, they would have inserted similar language into their measure. The fact that they did not means that the measure lacks the "clear legislative intent" required to make it apply retroactively.

Courts may also resort to legislative history, such as the ballot pamphlet, where there is no express provision of retroactive application.

Evangelatos, *supra*, 44 Cal. 3d at 1210-1211. But neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis advised voters that the measure would apply to pending cases. In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (Emphasis added.) The proponents' ballot arguments also emphasized that Proposition 64 would allow "only the Attorney General, district attorneys, and other public officials ***to file*** lawsuits on behalf of the People of the State of California . . ." (Emphasis added.) Proposition 64 did not put the voters on notice that its provisions were retroactive.

In this matter, neither the text of Proposition 64, nor its legislative analysis, contains an express provision that Proposition 64 was intended to have retrospective application. As such, there is no basis to depart from the ordinary rule of construction that Proposition 64 must operate prospectively. *See*, *Tapia*, *supra*, at 287. The courts "may not properly interpret the ballot measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999) (interpreting Proposition 213).

As in *Evangelatos*, a voter would not necessarily have supported Proposition 64, knowing it would apply to cases, such as this one, in which

litigants have invested years, tremendous energy and substantial resources, all in reliance on a 71-year old statute arising from common law principles. The focus of Proposition 64 was to stop "shakedown" lawsuits, not prevent workers from obtaining overtime pay. The mechanical application of cases such as *Governing Board of Rialto Unified School District v. Mann*, 18 Cal. 3d 819 (1977) (*Mann*) is inconsistent with that approach. Substance, not form, is controlling. "Statutory repeal," one of many canons of interpretation, cannot supplant voter intent.

B. The "Statutory Repeal" Rule Does Not Apply Here Because Proposition 64 Served To Amend, Not Repeal, Parts Of The UCL

The "statutory repeal" doctrine stems from an old line of cases holding, generally, that the repeal of a statute, without a savings clause, before a judgment becomes final, destroys the right of action. *Benson*, *Branick* and the Trial Court have improperly relied upon this narrow collection of cases, in direct violation of GOVT. CODE § 9605, which precludes application of the "statutory repeal" rule to determine the retroactivity of Proposition 64. Moreover, the application of this rule disregards the clear instructions of this Court, which has held that the intention of voters is "paramount" when interpreting a ballot initiative. *In re Lance W.*, 34 Cal. 3d 863, 889 (1985).

Because the Courts of Appeal have divided over the application of the "statutory repeal" rule, guidance from this Court is essential to prevent the scores of appeals that will follow as a result of this split.

1. GOVT. CODE § 9605 Explicitly Bars Application Of The "Statutory Repeal" Doctrine

Decided after the Trial Court's ruling, *Branick* and *Benson* both identified GOVT. CODE § 9606 as supporting their decision to retroactively apply Proposition 64 to pending cases.[8] *Branick, supra*, 24 Cal. Rptr. 3d at 414-15; *Benson, supra*, 24 Cal. Rptr. 3d at 697. *Branick* and *Benson* both criticized *C.D.R.* for not considering GOVT. CODE § 9606. *Ibid*.

However, it is *Branick* and *Benson* that should be criticized for failing to address GOVT. CODE § 9605, which provides that an amendment to part of a statute does *not* act as a repeal of the statute:

> "Where ***a section or part of a statute is amended, it is not to be considered as having been repealed*** and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment."

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[8] GOVT. CODE § 9606 provides: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."

GOVT. CODE § 9605, emphasis added. This statutory mandate for the construction of amended statutes applies here. Proposition 64 changed portions of BUS. & PROF. CODE §§ 17203, 17204, 17205, 17535 and 17536. By operation of law (GOVT. CODE § 9605), those changed sections are *not* to be considered as having been repealed.

This principle has been recognized in California for as long as the UCL has existed in any of its statutory forms:

> Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the reenactment takes effect at the same time.

Perkins Mfg. Co. v. Clinton Const. Co. of Cal., 211 Cal. 228, 238 (1931); *see also, In re Dapper*, 71 Cal. 2d 184, 189 (1969) and *In re Naegely's Estate*, 31 Cal. App. 2d 470, 474 (1939).

This Court must correct the *Benson* and *Branick* line of cases that improperly apply the "statutory repeal" doctrine to Proposition 64, where GOVT. CODE § 9605 expressly prohibits that application.

2. Decisional Law Confirms That The "Statutory Repeal" Doctrine Does Not Apply To Proposition 64

Krause v. Rarity, 210 Cal. 644 (1930), represents the common law precursor to GOVT. CODE § 9605. In *Krause v. Rarity*, Rarity, a passenger

in a car, was killed when the car was struck by a train, and his heirs filed suit. On appeal, this Court addressed whether the California Vehicle Act *repealed* CODE CIV. PROC. § 377, thereby extinguishing the wrongful death claim asserted by the heirs. After a detailed analysis of the enactment and operation of the new law, this Court said:

> [T]he Legislature did not stop with the enactment of the portions of the statute which would have worked a repeal irrevocably, but added the provision which in effect continued the right of action on account of the death of the guest. In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. ***The only change brought about by the new law was in the nature and character of the proof required in each case.*** There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery.

Id., at 654, emphasis added.[9]

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[9] The Court then applied the very same rule of construction articulated by *Evangelatos*:

> The case, then, falls within the operation of the rule contended for by the plaintiff, namely, that, although the Legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute.

Id., at 655.

As was the case in *Krause v. Rarity*, Proposition 64 did not operate to repeal any portion of the UCL. Instead, Proposition 64 changed "the nature and character of the proof required" in a UCL action.

In sum, the common law and GOVT. CODE § 9605 both confirm that Proposition 64 cannot be said to have "repealed" any portion of the UCL. Instead, Proposition 64 "amended" portions of the UCL, and all claims that accrued prior to the amendment continued in full force and effect thereafter. Thus, under both *Krause v. Rarity* and GOVT. CODE § 9605, the "statutory repeal" rule does not support the retroactive application of Proposition 64 to matters pending prior to its enactment.

3. The "Statutory Repeal" Decisions Relied Upon By *Benson, Branick* And Other Courts Are Misapplied

Many of the so-called "statutory repeal" decisions are not actually decided on that basis. For example, *Penziner v. West American Finance Co.*, 10 Cal. 2d 160 (1937), articulated the "statutory repeal" rule, but *Penzinger* ultimately held, on facts analogous to this matter, that an amendment to the Usury Law did not operate to repeal it.[10]

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[10] As with *Krause v. Rarity* and GOVT. CODE § 9605, *Penziner's* analysis indicates that the "statutory repeal" rule does not apply where, as here, a statute is *changed* or *amended*, rather than repealed.

And while *Southern Service Co. v. Los Angeles County*, 15 Cal. 2d 1 (1940) is also relied upon by *Benson* and *Branick* as a validation of the "statutory repeal" doctrine, it, too, was decided upon another ground: express legislative intent. *Southern Service*, concerning the repeal of a statute allowing the recovery of certain tax overpayments, ultimately held that the legislature's clearly *expressed* intent was controlling:

> The legislature, no doubt having in mind the holding of this court in Krause v. Rarity, 210 Cal. 644, 654, 655, 293 P. 62, 77 A.L.R. 1327, expressly provided that the withdrawal of the right to refund in the particular class of illegal taxes specified should terminate all pending actions. Its expression in this respect is sufficient to accomplish the declared intent and purpose.

Id., at 13.[11] *Southern Service* foreshadows the *Evangelatos* holding that intent *must* be considered as one canon of statutory interpretation.

More broadly speaking, *Southern Service* underscores the idea, discussed elsewhere herein, that all of the "rules" utilized to determine whether a statute operates prospectively or retrospectively are merely rules of construction. *See, e.g., Callet v. Alioto*, 210 Cal. 65, 67 (1930). *Southern Service* utilized an express statement of intent by the Legislature to reach its ultimate decision. Here, reliance upon such "rules of construction" is unnecessary, given that Proposition 64 is (1) silent about

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[11] *Southern Service* and *Krause v. Rarity* demonstrate the differing results when retroactive application is expressly declared.

retroactive operation, and (2) contains language indicating that only prospective application was intended.

Like *Southern Service*, other cases have been incorrectly identified as "statutory repeal" decisions. For example, a collection of recent cases held that changes in the anti-SLAPP suit law (CODE CIV. PROC. §§ 425.16 and 425.17) applied to pending cases. *See, e.g., Physicians Committee For Responsible Medicine v. Tyson Foods, Inc*., 119 Cal. App. 4th 120 (2004); *Brenton v. Metabolife Intern. Inc*., 116 Cal. App. 4th 679 (2004). These decisions turn not on the "statutory repeal" doctrine, but on *Aetna's* distinction between legislative changes affecting past transactions and those impacting only on future events.[12] On this point, *Brenton* said, "The issue is whether applying section 425.17 would impose new, additional or different liabilities on MII [defendant] based on MII's past conduct, or whether it merely regulates the conduct of ongoing litigation." *Brenton, supra*, 116 Cal. App. 4th at 689. The *Brenton* Court then concluded that the SLAPP device was merely one of several procedural screening devices, and that a limitation on the use of that device did not impact on the

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[12] Examples of this latter class of statutes include those involving rules of evidence in future trials, *Morris v. Pacific Electric Ry. Co.*, 2 Cal. 2d 764, 768 (1935), trial procedure, *Estate of Patterson*, 155 Cal. 626, 638 (1909), rules of service of process, *Abrams v. Stone*, 154 Cal. App. 2d 33, 40 (1957), or the awards of costs or attorney fees upon entry of judgment, *Bank of Idaho v. Pine Avenue Associates*, 137 Cal. App. 3d 5, 12-13 (1982).

substance of the claims and defenses in a lawsuit. *Physicians* concurs:

> [T]he fact that the anti-SLAPP statute shields litigants from trial of meritless claims arising from the exercise of first amendment freedoms does not alter the fact that it serves as a mechanism for early adjudication of such claims, in other words, as a statutory remedy.

Physicians, supra, at 130. The "remedy" to which these SLAPP decisions refer is a motion to strike, not a cause of action existing by statute for most of a century and as part of the common law prior.

It has been established that "the Legislature cannot, by a purported change in procedure, cut off all remedy." 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 493 (9th ed. 1988). In that regard, the *Brenton* Court observed that "applying section 425.17 here does not eliminate that purported *right,* but only removes one procedural mechanism for enforcing that right and requires MII to enforce the right to be free of meritless lawsuits by other procedures or remedies." *Brenton, supra*, at 691. In stark contrast, retroactive application of Proposition 64 *destroys*, mid-stream, the right of plaintiffs, including Petitioners, to represent others under the UCL as private attorneys general.

Proposition 64 was not enacted to protect defendants against meritorious and significant cases. A strong presumption exists against interpreting the measure to achieve this "absurd consequence." It is not only contrary to the solitary focus on "shakedown" lawsuits, but it is contrary to the interests of the voters themselves.

C. Irrespective of Whether Proposition 64's Changes to the UCL are Labeled "Substantive" or "Procedural," the Changes are Substantial and Preclude Retrospective Application

The substantive-procedural distinction does not prevail in California because both "procedural" and "substantive" statutes are subject to the presumption against retroactive effect. *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal. 2d at 394-395; *Perry v. Heavenly Valley*, 163 Cal. App. 3d 495, 503 (1985); see *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 173 (1962) (rule against retroactivity "is the same with respect to all statutes, and none of them is retroactive unless the Legislature has expressly so declared."). And, in any event, "the distinction between 'substantive' and 'procedural' is a misdirection." *Russell v. Superior Court*, 185 Cal. App. 3d 810, 816 (1986). Instead, "the true distinction is not between 'substantive' or 'procedural' statutes, but between those affecting past transactions and those impacting only on future events." *Ibid.*

C.D.R. confirmed that the "procedural" versus "substantive" distinction is misplaced when deciding whether a law applies retroactively:

> "In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [Citations.] We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (*Elsner v. Uveges, supra*, 34 Cal.4th at pp. 936-937.) The

> relevant question is whether the law substantially affects existing rights and obligations. (*Id.* at p. 937.)

C.D.R., supra, 126 Cal. App. 4th at 396.

Here, the changes imposed by Proposition 64 are profound:

> The disruption that would result from application of Proposition 64 to preexisting lawsuits should not be minimized. Plaintiffs who filed and prosecuted cases for years, like CDR, could suffer dismissal of their lawsuit at all stages of litigation.

C.D.R., supra, at 397. The "effect" that retroactive application of Proposition 64 would have on substantive rights and liabilities compels the construction that retroactive application is improper.

D. Denying Petitioners Leave To Amend Was An Unconstitutional Denial Of Their Due Process Rights

If Proposition 64 applies retroactively to pending cases, due process and fundamental fairness require that affected litigants be afforded an opportunity to plead allegations establishing compliance with the newly enacted provision of Proposition 64.

1. Due Process Requires That Petitioners Be Allowed To Satisfy The New Class Requirements For A UCL Action

A retrospective law is invalid if it conflicts with certain constitutional protections: (1) if it is an *ex post facto law*; (2) if it impairs

the obligation of a contract; or, (3) if it, as here, deprives a person of a vested right or *substantially impairs* a right, thereby denying *due process.* *Roberts v. Wehmeyer*, 191 Cal. 601, 612 (1923); 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 486 (9th ed. 1988).

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive *any person* of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees. Art. I, §§ 7, 15; *People v. Ramirez*, 25 Cal. 3d 260, 265 (1979); *San Jose Police Officers Assn. v. San Jose*, 199 Cal. App. 3d 1471, 1478 (1988) [applying *Ramirez* analysis].

Both procedural and substantive due process rights are affected by the retroactive application of Proposition 64. A legislative change cannot, by a purported change in procedure, cut off all remedy. 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 493 (9th ed. 1988). Unless a statutory amendment leaves a reasonably efficient remedy in place to enforce the right, the right itself is affected, and the statute will be held invalid as an impairment of a *substantive* right.

For example, when a *change* in statute is made retroactive, and cuts off an existing remedy without leaving time to exercise the remedy, the retroactive application of that remedy is unconstitutional as to that party:

> "[W]here the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to

> avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party. [Citation.]" (*Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123, 47 P.2d 716 [application of statutory amendment concerning dismissal for delay in prosecution to pending case was permissible where plaintiff had almost a year after amendment went into effect to bring case to trial].)

Santangelo v. Allstate Ins. Co., 65 Cal. App. 4th 804, 815 (1998). When due process rights are at issue, a Court has no discretion when considering whether reasonable alternative remedies exist; rather, it is a question of law. *Aronson v. Superior Court*, 191 Cal. App. 3d 294, 297-298 (1987).

Where Trial Courts have granted motions for judgment on the pleadings or struck representative remedies under the UCL, these Orders have impaired the substantive due process rights of plaintiffs, including Petitioners. If leave to amend to conform to the revised UCL is also denied, that denial violates procedural due process rights.

2. Before Proposition 64, Plaintiffs Were Not Obligated To Certify UCL Claims

Prior to the amendments instituted by Proposition 64, representative actions under the UCL and class actions were viewed as separate and distinct methods of mass representation. *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 453-454 (1979). In particular, there was no

obligation upon a plaintiff to seek certification of a UCL claim. In fact, as acknowledged by *Fletcher*, the representative UCL claim was still viewed as an *individual* action. The power of restitution, being a power of equity, was available in any UCL case; a Court could fashion those orders necessary to compel disgorgement of what constituted ill-gotten gains from a defendant to the *individual* plaintiff and/or third-parties.

Stephen v. Enterprise Rent-A-Car, 235 Cal. App. 3d 806 (1991) does not support a refusal to permit Petitioners to amend their SAC. In *Stephen*, the plaintiff moved for class certification and was denied. Plaintiff did not appeal, and the decision became final. Six months later, plaintiff sought to *renew* the motion for class certification, based upon new facts (or theories predicated upon existing facts), but the plaintiff failed to timely move for reconsideration, under CODE CIV. PROC. § 1008. *Id.*, at 816-819. *Stephen*, then, stands for the principle that a slothful plaintiff cannot wait for the evidence to come to him.

Here, Petitioners have been nothing but diligent in all aspects of this litigation. Now they merely request that, if Proposition 64 applies to pending actions, they, along with other affected plaintiffs, be granted the opportunity to allege and prove the class action elements required for a representational form of action. "The refusal to certify a class on other claims is not dispositive on whether the UCL claim should be certified, because the UCL claim is materially different from the other causes of

action. Relief under the UCL is available without individualized proof of deception, reliance, and injury." *Corbett v. Superior Court*, 101 Cal. App. 4th 649, 672 (2002).

If Proposition 64 imposes new requirements upon pending actions, parties thereto should have the opportunity to meet those new requirements.

V.

CONCLUSION

Cases pending throughout the state were thrown into disarray with the passage of Proposition 64. Trial courts split on the issue of whether the newly enacted provisions of Proposition 64 applied to pending litigation. Appellate decisions, including *Californians for Disability Rights v. Mervyn's, LLC*, 126 Cal. App. 4th 386 (1st Dist., 2005), *Benson v. Kwikset Corp*., 126 Cal. App. 4th 887, 24 Cal.Rptr.3d 683 (4th Dist., 2005) and *Branick v. Downey Sav. and Loan Ass'n*, 126 Cal. App. 4th 828, 24 Cal. Rptr. 3d 406 (2nd Dist., 2005) merely reinforced and elevated that dispute.

GOVT. CODE § 9605 and numerous decisions of this Court, including *Evangelatos*, should have been sufficient to advise the trial courts that the presumption of prospectivity applies to Proposition 64, given the absence of an express declaration of retroactive intent.

Without guidance from this Court, litigants will remain at the uncertain mercy of divided trial and appellate courts for years to come.

Scores of cases will be delayed for years, as litigants test the split amongst the Courts of Appeal. Review by this Court is urgently needed.

The similarities between this matter and the other Proposition 64 Petitions are evident. If this Court intends to provide guidance to the Courts below with respect to whether Proposition 64 applies retroactively to cases pending at the time of its enactment, review should be granted, and this case should be consolidated with those other matters for which review is granted. In that way, all viewpoints will be stridently supported by parties with direct interests in the outcome. In the alternative, if this Court has already elected to grant review of any particular Proposition 64 Petition, review should be granted here, and this matter should be held, until the opinion in one of those other matters is rendered. *See*, CAL. RULES OF COURT, RULE 28.2(d).

While this Court considers this Petition, Petitioners request that this Court immediately stay the action in the Trial Court to prevent undue prejudice to Petitioners that would result otherwise.

Dated: March 31, 2005.

Respectfully submitted,

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CERTIFICATION

Line Spacing: Respondents' Brief was double spaced, except for indented quotations and footnotes, which were all single spaced.

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Dated: March 31, 2005.

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