No. S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLARD BROWN, et al.,

Plaintiffs and Appellants,

v.

PHILIP MORRIS USA, INC., et al.,

Defendants and Respondents.

On Review of the Decision of the Court of Appeal, Division One
Affirming an Order Decertifying a Class Action,
San Diego Superior Court, Case No. 711400,
Judicial Council Coordination Proceeding 4042
Hon. Ronald Praeger, Judge

APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS; PROPOSED BRIEF IN SUPPORT THEREOF

UNFAIR COMPETITION CASE
(See Bus. & Prof. § 17209; Cal. R. Ct. 8.29)

Jeffrey L. Fazio (SBN 146043)
Dina E. Micheletti (SBN 184141)
FAZIO | MICHELETTI LLP
2410 Camino Ramon, Suite 315
San Ramon, California 94583-4328
Telephone: (925) 543-2555
Facsimile: (925) 369-0344

Attorneys for Amici Curiae
Public Citizen, Inc., and The Center for Auto Safety

TABLE OF CONTENTS

PAGE NO.

I. INTEREST OF AMICI CURIAE 1

II. INTRODUCTION 2

III. ARGUMENT 8

A. What Voters Were Told — and Not Told — About Proposition 64 8

B. Proposition 64: Before and After the November 2004 Election 12

C. The Court of Appeal's Reasoning Does Not Comport with the Text of Proposition 64's Amendments, With This Court's Recent Rulings, or With Decades of UCL Jurisprudence 15

1. Proposition 64 Did Not Amend the UCL to Include a Reliance Requirement 20

2. Neither the UCL's Standing Provisions Nor Class-Certification Criteria Require a Showing That Each Class Member Suffered a Loss of Money or Property for the Case to Be Certified to Proceed as a Class Action 23

IV. CONCLUSION 31

WORD-COUNT CERTIFICATION 34

DECLARATION OF SERVICE 35

TABLE OF AUTHORITIES

PAGE NO.

CASES

American Philatelic So. v. Claibourne,
3 Cal.2d 689 (1935) 18

Anunziato v. eMachines, Inc.,
402 F. Supp. 2d 1133 (N.D. Cal. 2005) 22

Bank of the West v. Superior Court,
2 Cal. 4th 1254 (1992) 16

Barquis v. Merchants Collection Ass'n,
7 Cal. 3d 94 (1972) 16, 18

Blackie v. Barrack,
524 F.2d 891 (9th Cir. 1975) 17

Branick v. Downey Sav. & Loan Ass'n,
39 Cal. 4th 235 (2006) 30

Bzdawka v. Milwaukee County,
238 F.R.D. 469 (E.D. Wis. 2006) 25, 27, 31

Californians for Disability Rights v. Mervyn's LLC,
39 Cal. 4th 223 (2006) ..... passim

Casey v. Lewis,
4 F.3d 1516 (9th Cir. 1993) 26

Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.,
20 Cal. 4th 163 (1999) 16, 21

Chern v. Bank of Am.,
15 Cal. 3d 866 (1976) 16

City of San Jose v. Superior Court,
12 Cal. 3d 447 (1974) 24, 30

Collins v. Safeway Stores, Inc.,
187 Cal. App. 3d 62 (1986) 25

Committee on Children's Television v. General Foods Corp.,
35 Cal. 3d 197 (1983) 23

TABLE OF AUTHORITIES

PAGE NO.

Consumers Union of the United States, Inc. v. Fisher Dev., Inc.,
208 Cal. App. 3d 1433 (1989) 9

F.T.C. v. Figgie Int'l, Inc.,
994 F.2d 595 (9th Cir. 1993) 16

Fallick v. Nationwide Mut. Ins. Co.,
162 F.3d 410 (6th Cir. 1998) 28

Hernandez v. Atlantic Finance Co,
105 Cal. App. 3d 65 (1980) 9

In re Firearm Cases,
126 Cal. App. 4th 959 (2005) 21

In re Leapfrog Enterprises, Inc. Securities Litig.,
2005 WL 3801587 (N.D. Cal. 2005) 27

In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions,
148 F.3d 283 (3d Cir. 1998) 26

In re Tobacco Cases II,
142 Cal. App. 4th 891 (2006) ..... passim

Klein v. Earth Elements, Inc.,
59 Cal. App. 4th 965 (1997) 21

Korea Supply Co. v. Lockheed Martin Corp.,
29 Cal. 4th 1134 (2003) 21

Kraus v. Trinity Mgmt.
23 Cal. 4th 116 (2000) 20

Laufer v. United States Life Ins. Co. in the City of New York,
896 A.2d 1101 (N.J. App. 2006) ..... passim

Lewis v. Casey,
518 U.S. 343 (1996) 28

Madrid v. Perot Systems Corp.,
130 Cal. App. 4th 440 (2005) 21

People ex rel. Mosk v. Nat'l Research Co. of Cal.,
201 Cal. App. 2d 765 (1962) 16

TABLE OF AUTHORITIES

PAGE NO.

Pines v. Tomson,
160 Cal. App. 3d 370 (1984) 9

Robert L v. Superior Court,
30 Cal. 4th 894 (2003) 14

Simpson v. Fireman's Fund Ins. Co.,
231 F.R.D. 391 (N.D. Cal. 2005) 25

Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,
17 Cal. 4th 553 (1998) 9

Weinberg v. Sprint Corp.,
801 A. 2d 281 (N.J. 2002) 27

STATUTES

Bus. & Prof. Code § 17200 ..... passim

Bus. & Prof. Code § 17204 ..... 9, 11, 29

Bus. & Prof. Code § 17500 2

Civil Code § 3369 18

N.J.S.A. 56:8-19 27

OTHER AUTHORITIES

Dawn House, *Tort Reform — What About the Little Guy?*,
39 LOYOLA L. REV. 819 (2006) 6

Geoof Boehm, *Debunking Medial Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"*
5 YALE J. HEALTH POLICY L. & ETHICS 357 (2005) 6

Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*,
31 U. Dayton L. Rev. 243 (2005) 6

Official Voter Information Guide: California General Election November 2004 (2004) 8, 9, 10, 24

TABLE OF AUTHORITIES

PAGE NO.

Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice,*
51 N.Y.L. SCH. L. REV. 323 (2006) 6

TREATISES

Alba Conte & Herbert Newberg,
NEWBERG ON CLASS ACTIONS (4th ed. 2002) 25

Charles Alan Wright & Arthur R. Miller,
FEDERAL PRACTICE & PROCEDURE, *Prerequisites to Bringing a Class Action* (3d ed. 2005) 26

Daniel R. Coquillette, Gregory P. Joseph, Esq., Sol Schreiber, Esq., Jerold Solovy, Esq., and Professor Georgene M. Vairo,
MOORE'S FEDERAL PRACTICE (3d ed. 1997) 29, 30

William L. Stern,
BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE (2006 ed.) 13

I. INTEREST OF AMICUS CURIAE

Public Citizen is a national, nonprofit consumer advocacy organization that was founded in 1971 to represent the interests of consumers in Congress, the executive branch, and the courts. For over 30 years, Public Citizen has fought for the right of consumers to seek redress in the courts; for safe, effective, and affordable prescription drugs and health care; and for strong health, safety and environmental protections. Public Citizen has more than 16,000 members in California alone.

The Center for Auto Safety ("CAS") is also a national, nonprofit consumer advocacy organization, which consumer advocate Ralph Nader and the Consumers Union founded in 1970. It is a member of the Consumer Federation of America, and is dedicated to, *inter alia,* promoting motor vehicle safety, ensuring that defective and unsafe vehicles and automotive equipment are removed from the road, and to improving the quality and reducing the cost of automotive repairs. CAS's members reside in California and throughout the United States.

The decision by the court below raises grave concerns for Public Citizen and CAS, and their members in California. They are familiar with the issues raised in the present case, and the arguments that have been made by the parties and other *amici curiae*. Public Citizen and CAS believe that their perspective about those issues can be of valuable assistance to the Court, and they respectfully request permission to file this brief in support of Plaintiffs and Appellants.

II. INTRODUCTION

In this case, the defendants, several tobacco companies and their "research" arms (collectively, the "Tobacco Companies"), persuaded the Court of Appeal that Proposition 64 drastically altered the Unfair Competition Law, Bus. & Prof. Code §§ 17200-17209, and the False Advertising Law, Bus. & Prof. Code §§ 17500-17536 (collectively, the "UCL"). According to the Tobacco Companies, Proposition 64 — which was presented to the electorate as a means of preventing frivolous UCL cases from being prosecuted while preserving the right to prosecute legitimate UCL claims — effectively forecloses the possibility of prosecuting some of the most serious, large-scale UCL violations in a private civil action.

This was not what voters were told before the November 2004 election. Voter materials reveal that the electorate was told that Proposition 64 would preserve their right to pursue legitimate UCL claims while weeding out frivolous lawsuits that unscrupulous lawyers were using to "shake down" small businesses. According to its proponents, Proposition 64 would achieve that objective by requiring the person who brought the claim to demonstrate that they personally suffered an injury. And this, voters were told, would be accomplished by compelling the claimant to show that he or she lost money or property as a result of the defendant's UCL violation.

But the Tobacco Companies contend that Proposition 64 does not merely serve a gate-keeping function, screening out frivolous lawsuits by conditioning standing on a showing that the claimant lost money or property as a result of the UCL violation. According to the Tobacco

Companies, Proposition 64 requires the named plaintiff in a class action to establish that each and every class member also suffered a loss of money or property, and that the defendant's UCL violation was the ***but-for*** cause of their loss.

To reach this conclusion, the Tobacco Companies navigated nimbly around the statements Proposition 64 proponents' made about the ballot initiative before the November 2004 election, and around this Court's holding that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct." *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 232 (2006).

Stripped of obfuscatory rhetoric, the Tobacco Companies are actually arguing that Proposition 64 was intended to create immunity from prosecution for violating the UCL by engaging in widespread fraud. Rather than focusing on whether the defendant's conduct was likely to deceive reasonable consumers, the Tobacco Companies' approach would require the courts to focus on whether each individual class member actually relied on each deceptive act or false statement, and on whether each class member's reliance on the defendant's deceptive conduct caused each of them to lose money or property. Such an approach would, of course, preclude any possibility of prosecuting the case as a class action, leaving consumers to fend for themselves in their own individual actions, in which the cost of undertaking discovery alone would almost always make that impossible.

But clever argument is no match for common sense. No matter how the Tobacco Companies attempt to spin it, their construction of Proposition 64 simply does not comport with this Court's observation that "[n]othing a

business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." *Californians for Disability Rights*, 39 Cal. App. 4th at 232.

Nor does it comport with applicable law. The Tobacco Companies convinced the courts below that Proposition 64's new standing requirements meant that the named plaintiff must establish the standing of each unnamed class member. But that is not the law, and it never has been. The Tobacco Companies also argued that Proposition 64's adoption of class-certification requirements for all private representative UCL actions meant that the named plaintiff's claims must be identical to those of the unnamed class members.

But that's not true, either. Recently, a New Jersey appellate court addressed the same argument in connection with that State's consumer-protection statute, which also conditions standing on the plaintiff demonstrating that he or she suffered damage "as a result of" a violation of the statute. The plaintiff alleged that he had suffered ascertainable damage as a result of the defendant's violation, but did not allege any of the unnamed class members had suffered any harm; indeed, he sought only injunctive relief on behalf of the class, even though the statute does not permit private plaintiffs to seek injunctive relief unless they first plead and prove the existence of ascertainable damage resulting from a violation of the statute.

Like the Tobacco Companies, the defendants argued that standing had to be established for each unnamed class member, and that the class could not be certified because the plaintiff's claims were not typical of

those the rest of the class pursued. The court disagreed. *See, e.g.*, *Laufer v. United States Life Ins. Co. in the City of New York,* 896 A.2d 1101 (N.J. App. 2006) (affirming class-certification order after explaining that standing and typicality are two separate and distinct analyses; that once plaintiff established standing for his individual claims, only remaining question was whether class-certification criteria could be met; and that because claims arose from same events, practice, or conduct, and were based on same legal theory as those of other class members, plaintiff's claims were typical of class members' claims, despite absence of allegation that unnamed class members had suffered any damage).

Proposition 64 put an end to private-attorney-general standing by requiring that the plaintiff establish a loss of money or property "as a result of" the UCL violation, and by requiring representative actions to satisfy class-certification criteria. Without question, those changes were made to ensure that only those who are directly affected by the defendant's unlawful, unfair, or fraudulent conduct may bring suit under the UCL.

But that is a far cry from saying that Proposition 64's "as a result of" language changed the UCL substantively. The UCL has ***always*** required plaintiffs to demonstrate a causal relationship between the conduct that violated the UCL and the remedy they seek; Proposition 64 did not change that. Nor did it change the fact that representative UCL claims could be pursued in a class action. Rather, Proposition 64 eliminated ***private-attorney-general standing*** — which permitted any citizen to pursue representative UCL claims on behalf of the general public, regardless of whether they were personally involved in the challenged transaction or was personally aggrieved in any way — and conditioned standing to sue in a

private civil action on the claimant suffering a tangible loss as a result of the UCL violation.

And although the Tobacco Companies and their supporters urge the Court to find, as a matter of "policy," that strict limits must be imposed on the ability to prosecute UCL claims because "frivolous" lawsuits will continue to be filed without them, the examples they provide are cases filed by a rogue group of lawyers who attempted to use the UCL to extort "settlements" and were forced to give up their licenses to practice law because they had done so.[1]

[1] For that reason, we have elected not to address the so-called "policy" arguments offered by some of the Tobacco Companies' *amici*. It suffices to say that, to the extent such contentions have superficial appeal, they lose that appeal when the other side of the story is told. *See, e.g.,* Dawn House, *Tort Reform — What About the Little Guy?*, 39 LOYOLA L. REV. 819 (2006) (discussing failure of FDA to protect consumers in context of orchestrated efforts to block access to courts); Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 327 (2006) ("for all its sound and fury about trial lawyers, the campaign is really one against the nature of our civil justice system, where corporate bosses must stand on an equal footing with the 'unwashed masses' and suffer the ignominy that comes from being held accountable by those who lack their education, wealth, political clout, or status in the community"); Geoof Boehm, *Debunking Medial Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POLICY L. & ETHICS 357, 363 (2005) ("The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing") (footnotes omitted); Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. Dayton L. Rev. 243 (2005) (discussing the interrelationships of various tort "reform" efforts, the distortion of facts used to support it, and the deficiencies of the arguments in favor of "reform").

But even if empirical evidence did support their claim that the UCL will permit frivolous lawsuits without limits of the sort the Court of Appeal imposed below (and it does not), the Court need not resort to "policy" to answer the questions now before it: whether Proposition 64 requires each class member to have suffered "injury in fact," and whether each class member must have actually relied on a defendant's representations before a class action may be pursued under the UCL. The answer to those questions is "No," which is readily apparent from the text of Proposition 64, the voter materials that pertain to that ballot measure, and applicable law.

At bottom, the Tobacco Companies are attempting to convert Proposition 64 into a Trojan Horse — which rolled into the State with an election campaign that characterized it as a narrow measure to protect small businesses from frivolous lawsuits filed by unscrupulous lawyers. But once enacted by the voters, large corporate interests unleashed a series of previously unheard arguments designed to transform one of the nation's most powerful consumer-protection statutes into a toothless version of common-law fraud.

That is, in addition to requiring a plaintiff to plead and prove damages that cannot be recovered as a UCL remedy, these advocates argued that Proposition 64 includes the very attributes — particularly the need to show reliance — that gave rise to the enactment of consumer-protection statutes around the country. The UCL was one of those statutes, which traded the elements of tort law for the ability to prosecute widespread fraudulent schemes that were likely to deceive the public, and it remained one of those statutes after Proposition 64 became law. Now, however, the Tobacco Companies and other large corporations have sought to turn back the clock by claiming that the ballot initiative imported the

elements of tort law into the UCL, thereby rendering it all but useless as a means of putting a stop to and remedying false advertising, large-scale deception, and other wrongful conduct.

Voters never intended that to happen, because they were never told that voting for Proposition 64 would destroy their ability to prosecute large-scale UCL violations by well-funded multinational corporate defendants, such as the Tobacco Companies. To the contrary, the electorate was told unequivocally that Proposition 64 would ***preserve*** the right to pursue meritorious UCL claims. Fortunately, however, if what Proposition 64's proponents told voters was not true, they cannot benefit from that deceptive conduct now; the ballot measure that became law in November 2004 must be read to be precisely what its proponents said it was — even if its proponents really didn't mean what they said about it in the run-up to the election. Accordingly, we respectfully request that the Court reverse the Court of Appeal's decision.

III. ARGUMENT

A. WHAT VOTERS WERE TOLD — AND NOT TOLD — ABOUT PROPOSITION 64

In the ads and voter materials presented to voters in advance of the November 2004 election, Proposition 64 proponents told the electorate that they sought to close "a LOOPHOLE IN CALIFORNIA LAW that allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled." Official Voter Information Guide: California General Election November 2004 at 40 (2004) (hereinafter, "*Voter Guide*") (emphasis in original).

The "loophole" to which proponents referred was the private-attorney-general standing of former Business & Professions Code section 17204, which enabled any California citizen to prosecute UCL violations, without the need to certify the case a class action and without regard to whether the plaintiff was personally involved in the challenged transaction or had personally suffered any harm as a result of the UCL violation. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998) ("pursuant to § 17200 as construed by this court and the Courts of Appeal, a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others") (citations and internal quotation marks omitted); *Consumers Union of the United States, Inc. v. Fisher Dev., Inc.*, 208 Cal. App. 3d 1433 (1989) (plaintiff public interest group had standing to sue for UCL violations on behalf of general public, regardless of whether group or its members were directly affected by defendant's unlawful conduct); *Pines v. Tomson*, 160 Cal. App. 3d 370, 381 (1984) (same); *Hernandez v. Atlantic Finance Co*, 105 Cal. App. 3d 65, 70-73 (1980) (same).

Proponents went on to explain that "*Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits[,]*" *Voter Guide* at 40 (emphasis in original), and "*[p]rotects your right to file a lawsuit if you've been damaged," id.* (emphasis in original). They also responded to opponents of the initiative, who contended that Proposition 64 might undermine the ability to prosecute certain kinds of UCL violations, such as those based on environmental, public health, and privacy laws, by characterizing these arguments as a "trial lawyer smokescreen." *Id.* at 41. Proponents urged voters to

> *Read the official title and the law yourself.* [¶] *Nowhere is Environment, Public Health, or Privacy mentioned! . . .* [¶]

> *Proposition 64 would permit ALL the suits cited by its opponents. . . .*
>
> *Here's what 64 really does:*
>
> - *Stops Abusive Shakedown Lawsuits.*
> - Stops fee seeking trial lawyers from exploiting a loophole in California law—a *LOOPHOLE NO OTHER STATE HAS*—that lets them 'appoint' themselves Attorney General and file lawsuits on behalf of the People of the State of California.
> - *Stops trial lawyers from pocketing FEE AND SETTLEMENT MONEY that belongs to the public.*
> - *Protects your right to file suit if you've been harmed.*
> - *Permits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California.*

Id. (emphasis in original).

The clear message proponents sent to voters was that Proposition 64 would eliminate frivolous "shakedown" lawsuits against small businesses by doing away with private-attorney-general standing that a few unscrupulous lawyers were abusing. That message was repeated in the initiative's Findings and Declaration of Purpose, where voters were advised that the UCL was being misused by private lawyers who "[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." *Voter Guide* at 109. *See also id.* ("It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution").

But another message in the Findings and Declaration of Purpose was just as loud and just as clear: That Proposition 64 would preserve the right to prosecute legitimate UCL claims:

> It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits ***while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code***.

Id. (emphasis added).

The proponents' message worked: Business & Professions Code section 17203 now states, in relevant part, 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 . . ."; Section 17204 now states that standing to pursue a UCL claim is limited to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition"; and Section 17535 now incorporates the same standing provisions that sections 17203 and 17204 contain.

B. PROPOSITION 64: BEFORE AND AFTER THE NOVEMBER 2004 ELECTION

Soon after Proposition 64 became law, its proponents began unpacking arguments that were never heard before the November 2004 election. They began to assert that the initiative went far beyond more stringent standing requirements and claimed — for the first time ever — that Proposition 64 was actually a radical revision of the UCL, which fundamentally changed the way the statute could be applied.[2]

According to these proponents, plaintiffs who sue for violations of the UCL's fraud prong must plead and prove reliance to prevail on that claim, because the UCL now provides that plaintiffs must show they "lost money or property *as a result of* . . . unfair competition." Andrew B. Serwin and Russell L. Carlberg, *Is UCL Fraud Now Akin to Common Law Fraud? Reliance, Materiality and Causation After Proposition 64*, 14 Competition 45, 47 (2005) (hereinafter, "*UCL Fraud*") (quoting Bus. & Prof. Code § 17203 West Supp. 2005) (emphasis added).

In other words, the proponents of this approach contended that stating a claim under the fraud prong of the UCL not only requires the plaintiff to show a relationship between the fraudulent transaction and the remedy the plaintiff seeks, it requires the plaintiff to prove that the but-for

[2] Proposition 64's proponents were not and are not the small businesses who were portrayed as the victims of corrupt trial lawyers in the pro-Proposition 64 voter materials and advertising in the run-up to the November 2004 election. Rather, these proponents include some of the largest and powerful corporations in the world. *See Voter Guide* at 40.

cause of each and every individual class member's loss was that they actually relied on the defendant's fraudulent conduct. *Id.* at 45-47. [3]

Under this view of the law, pursuing a claim under the fraud prong of the UCL would be virtually identical to pursuing a claim for common-law fraud — one of the most difficult claims to plead and prove — but without the ability to recover the damages that the common law provides. *See UCL Fraud* at 45-47. Put differently, from this perspective, the UCL is no longer capable of providing a collective remedy for fraud that is perpetrated on a large scale.

The most basic problem with the argument is that none of this was ever mentioned to the electorate, hence it does not and cannot comport with

---

[3] The less-than-straightforward nature of the argument (hence the allusion to a "Trojan Horse") is illustrated by a passage from a practice guide that was written by one of Proposition 64's principal authors, William L. Stern. There, Mr. Stern writes that

> Proposition 64 ***may*** have overruled the former 'no-reliance' rule of the UCL. After Proposition 64, the plaintiff must be someone who has 'suffered injury in fact *and* has lost money or property as a result of such unfair competition.' [Prop. 64, § 3 (italics added); *see* ¶ *2:47.1 ff.*] ***Arguably***, the 'and' in that sentence means that someone who did not rely on the false statement did not lose 'money or property *as a result of*' the UCL violation and, hence, may not have standing to sue for 'fraudulent' business practices."

William L. Stern, BUSINESS & PROFESSIONS CODE SECTION 17200 PRACTICE § 3:167.1 (2006 ed.) (bold italics added; plain italics in original). Put bluntly, one would think that if such a drastic revision was intended by Proposition 64, the principal author of the initiative would be able to discuss it in terms more definite and more forceful than an observation that the language "may" have overruled seven decades of jurisprudence, "arguably" due to the placement of an "and" in a sentence.

voter intent. As this Court has explained, discerning voter intent in the context of a ballot initiative is no different than construing and applying a statute:

> In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction. Thus, [1] we turn first to the language of the statute, giving the words their ordinary meaning. [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent. [3] When the language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.

Robert L v. Superior Court, 30 Cal. 4th 894, 900-01 (2003) (citations, quotation marks, and brackets omitted).

Employing this methodology in *Californians for Disability Rights*, this Court confirmed what the electorate was told when it summed up what Proposition 64 was supposed to accomplish:

> In Proposition 64, as stated in the measure's preamble, the voters found and declared that the UCL's broad grant of standing had encouraged "[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers" and "threaten[ ] the survival of small businesses...." (Prop. 64, § 1, subd. (c) ["Findings and Declarations of Purpose"].) The former law, the voters determined, had been "misused by some private attorneys who" "[f]ile frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit," "[f]ile lawsuits where no client has been injured in fact," "[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant," and "[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, § 1, subd. (b)(1)-(4).) "[T]he intent of California voters in enacting"

> Proposition 64 was to limit such abuses by "prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact" (*id.*, § 1, subd. (e)) and by providing "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public" (*id.*, § 1, subd. (f)).

39 Cal. 4th at 228.

Plainly, the concept that was articulated to voters was the need to curb ***frivolous "shakedown" lawsuits*** that a small group of unethical lawyers had filed by taking advantage of the UCL's private-attorney-general standing provisions. *See id.* Equally plain was that Proposition 64 proposed to solve that problem by closing that "loophole" through the elimination of private-attorney-general standing (which had been available as an alternative to proceeding with the case as a class action) and ensuring that those who prosecuted UCL claims had a stake in the action by requiring them to demonstrate a loss of money or property resulting from a UCL violation. *See id.*

C. THE COURT OF APPEAL'S REASONING DOES NOT COMPORT WITH THE TEXT OF PROPOSITION 64'S AMENDMENTS, WITH THIS COURT'S RECENT RULINGS, OR WITH DECADES OF UCL JURISPRUDENCE

Nowhere in any of the voter materials or the text of Proposition 64 itself was there any mention of reliance, much less that the initiative would make it impossible to prosecute widespread UCL violations. Indeed, like most other consumer-protection statutes that were enacted by other States during the same period, the UCL was designed to eliminate the need to plead and prove reliance and other elements of tort law, precisely because

those elements would make it impossible to prosecute unfair and deceptive business practices that were perpetrated on large numbers of victims. "As a result, to state a claim under the [UCL] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992) (quoting *Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (1976)).

Moreover, as this Court has explained on many occasions, the UCL and the Federal Trade Commission Act are quite similar in terms of their language and statutory purpose, which is the reason "'decisions of the federal court on the subject are more than ordinarily persuasive.'" *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999) (quoting *People ex rel. Mosk v. Nat'l Research Co. of Cal.,* 201 Cal. App. 2d 765, 773 (1962)); *see also Barquis v. Merchants Collection Ass'n,* 7 Cal. 3d 94, 109-110 (1972) (discussing same).

And as the federal courts have explained, imposing an actual-reliance requirement in actions involving widespread fraud would all but nullify the effectiveness of these statutes. *See, e.g., F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) ("Requiring proof of subjective reliance by each individual consumer ***would thwart effective prosecutions of large consumer redress actions*** and frustrate the statutory goals of the [FTC Act]. A presumption of actual reliance arises once the Commission has proved that the defendant has made material misrepresentations, that

they were widely disseminated and that consumers purchased the defendant's product") (emphasis added).[4]

In light of the way Proposition 64 was pitched to voters, it is neither reasonable nor logical to conclude that the initiative was intended to make drastic changes that prevent the prosecution of widespread violations of the UCL. And to the extent that there were any doubts about the effect of Proposition 64, this Court eliminated them when it ruled that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." *Californians for Disability Rights*, 39 Cal. 4th at 232.

Under the circumstances, it is simply not possible to reconcile the Tobacco Companies arguments with what the electorate was told they were voting for when Proposition 64 was on the ballot. It is even more difficult

---

[4] The same approach is commonly used in private securities-fraud class actions:

> Proof of reliance is adduced to demonstrate the causal connection between the defendant's wrongdoing and the plaintiff's loss. ***We think causation is adequately established in the impersonal stock exchange context by proof of purchase and of the materiality of misrepresentations, without direct proof of reliance***. Materiality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price when the purchase is made the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case.

Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975) (emphasis added).

to reconcile those arguments — which amount to nothing more than a series of inferences, strung together with finely spun theories drawn from tort-reform repositories — with this Court's description of the legislative purpose that has informed the UCL since it was codified at California Civil Code section 3369 over seven decades ago:

> The language of section 3369 . . . explicitly extends to any "unlawful, unfair *or* deceptive business practice"; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, although ***most precedents under section 3369 have arisen in a "deceptive" practice framework***, even these decisions have frequently noted that ***the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innum1erable "'new schemes which the fertility of man's invention would contrive***.'" (*American Philatelic So. v. Claibourne* (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) As the *Claibourne* court observed: "When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. ***There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem***."

Barquis, 7 Cal. 3d at 111-12 (footnote omitted; initial emphasis in original, latter emphasis added).

Given this Court's clear statements about the nature and purpose of the UCL, the nature and purpose of Proposition 64's amendments, and the fact that those amendments did not have ***any*** impact on the rights or duties that preexisted the ballot initiative, it is simply not possible to argue credibly that Proposition 64 makes it nearly impossible to prosecute false

advertising and widespread unlawful, unfair, and fraudulent conduct as a UCL violation. Nonetheless, this is the same argument that the Tobacco Companies used to persuade the trial court to decertify a class that had been certified under the UCL before the enactment of Proposition 64. *In re Tobacco Cases II*, 142 Cal. App. 4th 891, 919-20 (2006).

The Tobacco Companies contended that the UCL's new standing provisions made it impossible for the plaintiffs to prosecute claims that the Tobacco Companies made false and misleading statements by denying or disputing the health hazards and addictiveness of cigarette smoking, and that they targeted minors to induce them into becoming new customers. *Id.* at 920. The trial court agreed, finding that the UCL had changed since it certified the class, and that "the requirement of individual reliance meant the individual issues predominate over the common issues thus making the case unsuitable for a class action." *Id.* at 921.

Most would find it difficult to argue that, by decertifying a UCL class on these grounds after Proposition 64 became law, the trial court and the Court of Appeal believed that Proposition 64 actually had substantively changed the way the UCL governs business and competitive conduct. Not the Tobacco Companies. They contend that "[a]pplication of Proposition 64's standing requirements to all class members is fully consistent with [this Court's] observation" that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct." Respondents' Answer Brief on the Merits ("Answer") at 16 (quoting *Californians for Disability Rights*, 39 Cal. 4th at 232). They are mistaken.

1. *Proposition 64 Did Not Amend the UCL to Include a Reliance Requirement*

The Court of Appeal's importation of a reliance requirement — which was at the heart of its ruling that a class that had been certified under the UCL before the passage of Proposition 64 was properly decertified afterwards — simply cannot be reconciled with this Court's observation that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." *Californians for Disability Rights*, 39 Cal. 4th at 232. Implicit in the Court of Appeal's ruling is a finding that Proposition 64 was not merely a procedural check on frivolous UCL actions, but was a fundamental, substantive revision of the UCL that would do away with decades of UCL jurisprudence.

This is not a difficult issue. Although Proposition 64 now conditions standing on a loss of money or property, the "as a result of" language did not add anything new to the UCL. That is, if the ballot measure did not alter "the substantive rules governing business and competitive conduct," then the "as a result of" language simply means what it says: That plaintiffs must demonstrate that the remedy they seek is traceable to the defendant's UCL violation — just as UCL cases have always required. *E.g.*, *Kraus v. Trinity Mgmt.* 23 Cal. 4th 116, 126-27 (2000) ("when we refer to orders for restitution, we mean orders compelling a UCL defendant to return money ***obtained through an unfair business practice*** to those persons in interest from whom the property was taken, that is, to persons

who had an ownership interest in the property or those claiming through that person") (emphasis added).

The same is true of the UCL's non-monetary remedies, just as it was well before Proposition 64 eliminated private-attorney-general standing. *E.g.*, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003) ("the breadth standing under this act allows any consumer ***to combat unfair competition*** by seeking an injunction ***against unfair business practices***") (emphasis added).

Conversely, the UCL provides no remedy at all unless the UCL has been violated. *E.g.*, *In re Firearm Cases*, 126 Cal. App. 4th 959, 981 (2005) ("In light of the Supreme Court's caution that businesses must be able to 'know, to a reasonable certainty, what conduct California law prohibits and what it permits,' we do not believe a UCL violation may be established without a link between a defendant's business practice and the alleged harm") (quoting *Cel-Tech*, 20 Cal. 4th at 185); *Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965 (1997) (finding that manufacturer was not liable under UCL for distributing contaminated pet food, where evidence showed that distribution was inadvertent and manufacturer acted promptly to recall product). Similarly, restitution is not available unless the funds in question can be traced to the victims of the UCL violation. *E.g.*, *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 455 (2005) ("plaintiff's assertion that defendants received ill-gotten gain does not make a viable UCL claim unless the gain was money in which plaintiff had a vested interest").

Under this approach, there would be no difficulty with proceeding as a class action in the vast majority of UCL cases, without doing violence to the substantive provisions of the UCL itself or decades of jurisprudence construing and applying it. Indeed, as one court recently explained, requiring a showing of actual reliance would not only subvert the basic objectives of the UCL, it would have the effect of immunizing wrongdoers, even in the clearest cases of fraudulent conduct:

> One common form of UCL or FAL claim is a "short weight" or "short count" claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation.

Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1135 (N.D. Cal. 2005).

The Court of Appeal brushed aside the *Anunziato* court's reasoning as distinguishable on the ground that it "did not address a situation where the complaint alleged numerous misrepresentations occurring over a lengthy period and where not all of the misrepresentations were made to all class members." *Tobacco II*, 142 Cal. App. 4th at 925. The Court of Appeal's rationale makes sense if liability under the UCL depends on consumers actually seeing and relying on each allegedly false advertisement. Its rationale falls apart, however, if "it is necessary only to show that 'members of the public are likely to be deceived'" and

[a]llegations of actual deception [and] reasonable reliance . . . are unnecessary." *Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983). In other words, the Court of Appeal's rejection of *Anunziato* is entirely circular; that is, it becomes defensible only ***after*** it has adopted an actual-reliance standard.

2. *Neither the UCL's Standing Provisions Nor Class-Certification Criteria Require a Showing That Each Class Member Suffered a Loss of Money or Property for the Case to Be Certified to Proceed as a Class Action*

Although the Court of Appeal acknowledged this Court's ruling in *Californians for Disability Rights*, it focused exclusively on the aspect of the ruling in which "the court held Proposition 64's new standing requirements apply to pending cases. We are bound by this decision." *Tobacco II*, 142 Cal. App. 4th at 920. The Court of Appeal said nothing, however, about the rationale that informed the Court's retroactivity ruling. Instead, the court moved on to find that Proposition 64 "significantly restricts the standing of private citizens to bring UCL lawsuits. After Proposition 64, a private citizen has standing to bring a UCL lawsuit only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" *Id.* Accordingly, the court ruled that because the named plaintiffs as well as each class member would have to show that they had standing under the UCL, it would be impossible to try the case on a classwide basis. *Id.*

The Court of Appeal reached the wrong conclusion because it began from the wrong premise. As support for its conclusion that the trial court acted properly when it decertified the UCL class in this case, it stated that

"Proposition 64 forecloses relief to a private plaintiff who has not suffered an injury in fact and lost money or property as a result of an unfair business practice. (§ 17203.) Thus, the named plaintiff as well as class members must have suffered an injury in fact and lost money or property." *Tobacco II*, 142 Cal. App. 4th at 921.

Taking this a step further, the Tobacco Companies argue that applying the UCL's new standing criteria only to the person who files the action, as the voter materials and the Findings and Declaration of Purpose plainly state, *see, e.g., Voter Guide* at 109 (referring to the "claimant" and the "client" of the attorney who files the action), would "contravene[] fundamental due process principals and distort[] the purpose of the class action device." Answer at 46 (citing *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 462 (1974) ("Altering the substantive law to accommodate procedure would be to confuse the means with the ends — to sacrifice the goal for the going")).

In the present case, however, this oft-quoted passage from *City of San Jose* could not be more inapt. Normally, the passage is used in cases where the plaintiff seeks to overlook the substantive provisions of the law in question so that the claims will satisfy class-action requirements. Here, however, the argument has been turned on its head: The Tobacco Companies persuaded the courts below that class-action requirements should govern the way they construed the UCL's substantive provisions.

In other words, the new standing provisions could be viewed two ways in the context of a class action: **(1)** as serving a gate-keeping function that screens frivolous claims by focusing on whether the "claimant" or the "client" (which are the terms used in Proposition 64's Findings and

Declaration of Purpose) has demonstrated a loss of money or property as a result of the UCL violation as a means of eliminating private-attorney-general standing; or **(2)** through the prism of class-action criteria, which (ostensibly) require that the named plaintiff demonstrate not only that he or she has suffered a loss of money or property as a result of the UCL violation, but that each of the unnamed class members have also suffered such a loss.

Here, the Court of Appeal chose the latter view, based on its observation that "'[t]he definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his [or her] own right.'" *Tobacco II*, 142 Cal. App. 4th at 921 (quoting *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73 (1986)). This, however, was the fatal flaw in the court's analysis.

As other courts have done in this area of the law, *Collins* "***confuse[d] the concepts of standing and typicality. In a class action, the question of whether the plaintiff may be allowed to present claims on behalf of others does not depend on the standing of the absent class members***, but on the assessment of the typicality and adequacy of representation of the named plaintiff." *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) (emphasis added). *See also Bzdawka v. Milwaukee County*, 238 F.R.D. 469, 472 (E.D. Wis. 2006) (these decisions "appear to be examples of courts' 'uncritical reliance . . . on standing-related concepts in attempts to articulate the limits of the Rule 23 qualifications'") (quoting Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 2.7 (4th ed. 2002)); 7A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE, *Prerequisites to*

Bringing a Class Action § 1764 (3d ed. 2005) ("A few courts have held that the representatives' claims are typical when they are co-extensive with those of the other class members, but this test has not been generally adopted. To the extent that 'co-extensive' suggests that the representatives' claims must be substantially identical to the absent class members, it is too demanding a standard").

This, in turn, is the product of a basic misunderstanding of the function a typicality analysis serves in the context of class certification. As the Third Circuit has explained,

> [t]he typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals. . . . In this respect the commonality and typicality requirements both seek to ensure that the interests of the absentees will be adequately represented. However, neither of these requirements mandates that all putative class members share identical claims.

In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 311 (3d Cir. 1998). *See also Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) ("At least one *named* plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf of himself or the class") (emphasis in original).

Stated differently, the typicality requirement is not an arbitrary test that requires a court to deny certification simply because class members' claims may differ from those of the named plaintiff. Rather, the typicality analysis is a means of determining whether the named plaintiff's pursuit of his own interests is consistent with — and not antagonistic to — the pursuit of the unnamed class members' interests.

Therefore, "[i]n a class action, ***the appropriate question with respect to unnamed class members is not whether they have standing to sue but whether the named plaintiff may assert their rights***." *Bzdawka*, 238 F.R.D. at 472 (emphasis added). *See also In re Leapfrog Enterprises, Inc. Securities Litig.*, 2005 WL 3801587, *3 (N.D. Cal. 2005) ("Once the class representatives individually satisfy standing, that's it: standing exists. The presence of individual standing is sufficient to confer the right to assert issues that are common to the class, speaking from the perspective of any standing requirements") (citation and quotation marks omitted).

It was for these reasons that a New Jersey appellate court recently reached precisely the opposite conclusion that the Court of Appeal reached here on precisely the same issues. In *Laufer v. United States Life Ins. Co. in the City of New York*, 896 A.2d 1101 (N.J. App. 2006), the court upheld a trial court's order certifying a class in a case in which the named plaintiff alleged that he, but not the unnamed class members, had suffered damage "as a result of" the defendant's violation of New Jersey's Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-19, by falsely stating that the payment of additional premiums would provide them with nursing-home coverage. *Id.* at 176-77.

Like the UCL, the CFA confers standing to sue in a private civil action if the plaintiff suffers an ascertainable loss "as a result of" the defendant's violation of the CFA. *Id.* at 179. The CFA is even more stringent than the UCL, however, in that the CFA permits a plaintiff to obtain declaratory and other equitable relief only if he or she first establishes an entitlement to damages. *See id.* at 180; *Weinberg v. Sprint Corp.*, 801 A. 2d 281, 291 (N.J. 2002).

Thus, because the complaint in *Laufer* did not include allegations "that other members of the class suffered any 'ascertainable loss,' and it [sought] only declaratory and injunctive relief on their behalf[,]" the defendant contended that class members lacked standing and that the class could not be certified because the plaintiff's claims were not typical of the class members' claims. *Laufer*, 896 A.2d at 179, 184-85. The court explained why the contention was misguided:

> In a class action, only the putative class representative is required to satisfy any applicable standing requirement. "Unnamed plaintiffs need not make any individual showing of standing in order to obtain relief, because the standing issue focuses on whether the plaintiff is properly before the court, not whether . . . absent class members are properly before the court." "Once the named plaintiff's standing has been established, whether he will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed by the rules governing class actions."

Id. at 1110 (quoting *Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring in part, dissenting in part), and *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998)) (citations, brackets and inner quotation marks omitted).

The *Laufer* court also explained why the proposed class satisfied the typicality criterion, even though the named plaintiff had established that he had suffered an ascertainable loss as a result of the defendant's CFA violations, but had not established that the unnamed class members had suffered such a loss.

The court explained that the typicality requirement is not a particularly demanding one: "'If the class representative's claims arise

from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members, the typicality requirement is satisfied.'" *Laufer*, 896 A.2d at 1107 (quoting 3B Daniel R. Coquillette, Gregory P. Joseph, Esq., Sol Schreiber, Esq., Jerold Solovy, Esq., and Professor Georgene M. Vairo, MOORE'S FEDERAL PRACTICE § 23.24[4] (3d ed. 1997) (hereinafter "*Moore's*")). The court then explained why the plaintiff's claims satisfied that criterion in the case before it:

> Although Laufer's complaint seeks declaratory and injunctive relief on behalf of the other members of the class and ancillary monetary relief for herself only, Laufer's claims on behalf of the class and herself are all based on the same alleged unlawful conduct — Wohlers' mailing of notices to U.S. Life policyholders containing alleged deceptive statements that their coverage included nursing home benefits — and they rely upon the same legal theory — that those statements violated the Consumer Fraud Act. Therefore, Laufer's claims "have the essential characteristics common to the claims of the class, and thus satisfy the typicality requirement of *Rule* 4:32-1(a)(3).

Laufer, 896 A.2d at 1107 (citation, quotation marks, and brackets omitted).

The same is true of a UCL claim. Again, as this Court found in *Californians for Disability Rights*, the stated purpose and intent of Proposition 64 was to prevent unscrupulous lawyers from filing frivolous lawsuits while preserving the right to pursue meritorious claims. 39 Cal. 4th at 228. The ballot initiative achieved the first objective by revising the UCL's standing provisions to require that the plaintiff demonstrate a loss of money or property as a result of the UCL violation. *See* Bus. & Prof. Code §§ 17203, 17204. The second objective can only be achieved by focusing on whether the named plaintiff has standing to sue, and conducting the typicality analysis the way the courts have done in *Laufer* and myriad other

cases — by focusing on whether the named plaintiff's "claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members. . . ." *Moore's* § 23.24[4].

Indeed, preserving the right to prosecute meritorious UCL actions is important not only because voters were assured it would be; it is important because the UCL's very purpose would be jeopardized by blindly adhering to erroneous class-certification criteria. As this Court has explained, "to bar a meritorious action prosecuted by a substituted plaintiff 'who *has* suffered injury in fact and *has* lost money or property as a result of' unfair competition or false advertising ***serves none of the voters' articulated objectives***." *Branick v. Downey Sav. & Loan Ass'n,* 39 Cal. 4th 235, 241-42 (2006) (bold italics added; plain italics in original). And as the *Laufer* court explained, construing a remedial statute in a cramped, restrictive fashion would undermine the very purpose of the statute:

> [T]his would create a significant obstacle to the maintenance of class actions under the Act. However, as previously noted, our courts have consistently indicated that class actions for the vindication of rights protected by the Consumer Fraud Act should be encouraged. Therefore, we decline to construe the "ascertainable loss" prerequisite for maintenance of a private action in a manner that would significantly undermine the availability of class actions to remedy violations of the Consumer Fraud Act.

Id. at 1110.

This is not "confusing the goal for the going," as that term is used in *City of San Jose*; it is refusing to construe the UCL's new standing provisions by confusing standing with typicality, and by confusing typicality with the need for a named plaintiff to have claims that are

identical to unnamed class members. *See Bzdawka*, 238 F.R.D. at 473 ("to require a plaintiff to show that every class member's claim presents an actual controversy would place a formidable, if not insurmountable, threshold burden on the parties and the court. Since by definition the joinder of class members is impracticable, to require proof of the existence of individualized cases would in essence be treating the class members as parties").

Indeed, as the Tobacco Companies have put it, "the class action device is ultimately not the *source* of any new standing requirement; on the contrary, that purely procedural device neutrally carries forward any requirements that happen to apply to the underlying *individual* causes of action." Answer at 15 (emphasis in original). In the case of the UCL's standing provisions, applying them to the named plaintiff — and not to unnamed class members — is wholly consistent with Proposition 64 as well as the UCL's text and its 75-year history.

V. CONCLUSION

The voter materials and the advertisements that were run by supporters of Proposition 64 featured small business people as victims of corrupt trial lawyers, who exploited the UCL's private-attorney-general standing provisions as a "loophole" that enabled them to extort money with patently frivolous claims. Voters were told that Proposition 64 would close that "loophole," put a stop to such frivolous lawsuits, and protect citizens' right to pursue meritorious claims.

The defendant in this case is not a defenseless small business that has become the victim of a frivolous lawsuit. It is a large transnational corporation that has a long history of engaging in insidious, corrupt, and fraudulent business practices for one reason: To make billions of dollars by selling a product that it knows will kill people, by lulling them into a sense of security with "light" cigarettes that are no less deadly than regular cigarettes, and by targeting children to draw them in as their next group of customers.

This is not the kind of case that Proposition 64 was intended to prevent. Nothing in the voter information materials even hinted that the amendments would make it more difficult to prosecute UCL claims as a matter of substantive law, nor did it even intimate that the ordinary class action rules would be stood on their head. To the contrary, the importance of the UCL as a weapon against unlawful, unfair, and fraudulent business practices was expressly reaffirmed, and voters were told that Proposition 64 would ***preserve*** the ability to prosecute legitimate claims, and that the purpose of the amendments was simply to weed out the frivolous and abusive lawsuits that should never have been filed in the first place.

Although the same proponents suddenly decided that Proposition 64 had swept aside decades of jurisprudence after the ballot initiative became law, this Court has already ruled that "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." *Californians for Disability Rights,* 39 Cal. App. 4th at 232. Indeed, the notion that a ballot measure created an enormous shift in the way this State has protected consumers for nearly 75 years by using obscure language

whose purportedly specialized meaning was never discussed (much less explained) in voter materials is, frankly, absurd.

Faced with similar arguments, the United States Supreme Court put it this way: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes" *Gonzales v. Oregon*, 546 U.S. 243, ___, 126 S. Ct.904, 921 (2006).

Neither do the authors of ballot measures. But even if they did, they do not get rewarded by effectively nullifying one of the most important consumer-protection statutes in the nation by silently overturning decades of legal precedent, regardless of whether they hide their true intent in a mousehole or a Trojan Horse. For those reasons, we respectfully submit that this Court should reverse the Court of Appeal's decision.

Dated: April 20, 2007 FAZIO | MICHELETTI LLP

by_____
Jeffrey L. Fazio

Attorneys for Proposed Amici Curiae
Public Citizen, Inc., and
The Center for Auto Safety

CERTIFICATE OF WORD COUNT

I, Jeffrey L. Fazio, hereby certify that there are 8,850 words in the foregoing brief, exclusive of the tables of contents and authorities, declaration of service, and this certificate. I determined the number of words using the Word Count tool in Microsoft Word, the word processing software that was used to prepare this brief.

Dated: April 23, 2007

Jeffrey L. Fazio

DECLARATION OF SERVICE

I, the undersigned, am a citizen of the United States, over the age of 18 years, working in the City of San Ramon, County of Contra Costa, and not a party to this action. My business address is 2410 Camino Ramon, Suite 315, San Ramon, California, 94583.

On the date appearing below, I served the items identified below, to the persons identified below, by placing a true and correct copy thereof in the U.S. Mail, addressed as set forth below. I placed the envelope or package for collection and delivery at the postal drop box outside my office.

ITEMS SERVED

- **APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS AND APPELLANTS**

PERSONS SERVED

See attached service list.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration of service was executed on April 22, 2007, at San Ramon, California.

_____

Alissa N. Micheletti

SERVICE LIST

Office of the Clerk
California Court of Appeal
Fourth Appellate District
750 B Street, Suite 2300
San Diego, CA 92101-8196

Administrative Office of the Courts
Attn: Carlotta Tillman
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102-3688

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Bonnie Dumanis, D.A.
Office of the District Attorney
Hall of Justice
330 West Broadway, Room 1300
San Diego, CA 92101

Thomas D. Haklar
Dougherty & Hildre
2550 Fifth Avenue, Suite 600
San Diego, CA 92103

Mark P. Robinson, Jr.
Robinson, Calcagnie & Robinson
620 Newport Center Drive, Suite 700
Newport Beach, CA 92660-7147

William T. Plesec
Jones Day
North Point, 901 Lakeside Avenue
Cleveland, OH 44114-1190

William S. Boggs
DLA Piper US LLP
401 "B" Street, Suite 2000
San Diego, CA 92101

Gerald L. McMahon
Daniel Eaton
Seltzer, Caplan, McMahon & Vitek
Symphony Towers
750 B St., Suite 2100
San Diego, CA 92101-8177

H. Joseph Escher III
Dechert LLP
One Market Street
Steuart Tower, Suite 2500
San Francisco, CA 94105

Robert C. Wright
Wright & L'Estrange
701 B Street, Suite 1550
Imperial Bank Building
San Diego, CA 92101

Sharon S. Mequet
Loeb & Loeb
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067

Jeffrey P. Lendrum
The Lendrum Law Firm
4275 Executive Square, Suite 910
La Jolla, Ca 92037

Mary C. Oppedahl
Reed Smith LLP
1999 Harrison Street, Suite 2400
Oakland, CA 94612-3583

San Diego County District Attorney
Consumer Fraud Division
Hall of Justice
330 W. Broadway
San Diego, CA 92101

Gregory P. Stone
Munger Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Martin D. Bern
Patrick J. Cafferty, Jr.
Munger Tolles & Olson LLP
560 Mission Street
San Francisco, CA 94105

Court of Appeal
of the State of California
Fourth Appellate District
Division One
750 B Street, Suite 300
San Diego, CA 92101-8196