No. S147345

IN THE SUPREME COURT OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.,

Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA, INC., ET AL.,

Defendants and Respondents.

After A Decision By The Court Of Appeal Of The State of California, Fourth Appellate District, Division One, Case No. D046435

[Service on the Attorney General and the District Attorney required by Bus. & Prof. Code § 17209]

BRIEF OF *AMICI CURIAE* FARMERS INSURANCE EXCHANGE AND GRANITE STATE INSURANCE COMPANY IN SUPPORT OF DEFENDANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities
(Continued)

Page(s)

Statutes

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposition 64 amended the standing requirements of the Unfair Competition Law ("UCL") and False Advertising Act ("FAA") to require that a private plaintiff bringing a UCL claim must have "suffered injury in fact and . . . lost money or property as a result of such unfair competition." Applying Proposition 64, the Court of Appeal in this case determined that, in a claim brought under the UCL, both putative class representatives and absent members of a purported class must satisfy the standing requirements of "injury in fact," loss of money or property, and proximate causation. (*In re Tobacco II Cases* (2006) 142 Cal. App. 4th 891, 897-898, 904.) The Court of Appeal also determined that plaintiffs in this case could not maintain a class action on behalf of millions of California smokers premised on allegedly deceptive statements made by a group of different companies over more than five decades. (*Id.* at pp. 898-904.)

This amicus brief addresses a narrow but crucial question: Does the Court of Appeal's holding in this case conflict with this Court's unanimous ruling last year in *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223? Plaintiffs argue that the decisions are in conflict. (See Petitioners' Br. on the Merits ("P.O.B.") at pp. 26-30.)

Amici respectfully submit that the Court of Appeal's decision is entirely consistent with *Mervyn's*. The underlying premise of Plaintiffs' argument that the Court of Appeal's decision here somehow conflicts with *Mervyn's* is that a requirement that proposed class members satisfy Proposition 64's standing requirements is a "substantive" change that cannot be applied "retroactively" to pending cases, and, according to plaintiffs, the decision in *Mervyn's* is predicated on Proposition 64 making

"procedural" amendments, while leaving substantive rules governing business and competitive conduct unchanged. (See P.O.B. at p. 27.)

As the Court in *Mervyn's* recognized, however, Proposition 64's amendments to the previously broad standing provisions of the UCL and FAA caused prospective changes because they did not create a new cause of action, deprive a defendant of a defense on the merits, or otherwise change the substantive legal rules governing the conduct of an individual who directly and reasonably relied on the previously existing state of law. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232-233.) At issue in this case are the amendments in Proposition 64 that require proposed class members to satisfy requirements for private party standing – causation, injury-in-fact, and actual loss. These amendments also are prospective changes because they do not affect an "existing right" of an uninjured plaintiff. A private plaintiff does not have an existing right in a defendant's liability for representations that the private plaintiff neither relied upon nor caused him any injury or lost money or property.

Moreover, even if this Court were to conclude that Proposition 64 did add new, "substantive" requirements to private UCL claims, such a conclusion need not undermine the rationale for this Court's decision in *Mervyn's* applying Proposition 64 to cases already pending on the date of its enactment. There is an independent basis for this Court's unanimous decision in *Mervyn's*. This Court resolved the question at issue in *Mervyn's* by holding that an application of Proposition 64 was not retroactive, so it did not need to "reach Mervyn's additional argument that Proposition 64 applies to pending cases under the statutory repeal rule, i.e., the rule 'that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final.'" (*Mervyn's*,

supra, 39 Cal.4th at p. 232, fn. 3, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.) Likewise, Proposition 64 rescinded the statutory basis for California courts to consider the claims of uninjured private plaintiffs. Accordingly, even if this Court were to conclude that Proposition 64 made "substantive" statutory amendments, those amendments would nonetheless apply to pending cases.

Plaintiffs' argument that the decision by the Court of Appeal is in conflict with *Mervyn's* is a red herring. *Amici* respectfully submit that the Court of Appeal's decision is entirely consistent with *Mervyn's*.

II.

INTERESTS OF *AMICI CURIAE*

The *Amici* are among the many defendants facing lawsuits or potential future lawsuits by plaintiffs alleging violations of the UCL. If this Court were to reverse the Court of Appeal's decision in this case, the *Amici* may be forced to litigate actions brought against them even though the plaintiffs in those cases did not suffer, and cannot allege that they have suffered, any injury in fact and lost money or property "as a result of" the alleged unfair competition.

Farmers Insurance Exchange ("FIE") is a reciprocal or interinsurance exchange headquartered in California. Interinsurance exchanges are unincorporated business organizations composed of subscribers, managed by an attorney-in-fact, and governed by Insurance Code section 1280 *et seq*. (See generally *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 702-703.) As described in greater detail in the accompanying Application for Leave, FIE is currently involved in lawsuits in California being prosecuted and pursued by uninjured private plaintiffs who allege that its business practices violate the UCL.

Granite State Insurance Company ("Granite State") is a member company of American International Group, Inc. ("AIG"), and it transacts business in California. Like FIE, Granite State and other member companies of AIG may face litigation in California brought by uninjured private plaintiffs who allege that their business practices violate the UCL.

III.

ARGUMENT

Amici respectfully submit that the Court of Appeal correctly determined that the plain language of the newly amended standing requirements of the Unfair Competition Law (specifically, Sections 17203 and 17204 of the Business and Professions Code) and binding precedent require class representatives *and* absent members of the purported classes to have standing – *i.e.*, that they suffered "injury in fact and . . . lost money or property as a result of" the defendant's challenged business acts or practices. (*In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, 897-898, 904; Respondents' Br. on the Merits ("R.B.") at pp. 23-31.) In addition, for the reasons set forth by the Respondents, the Court of Appeal correctly determined that as applied to the facts of this case, plaintiffs cannot maintain a class action on behalf of millions of California smokers premised on allegedly deceptive statements made by a group of different companies over more than five decades. (*In re Tobacco II Cases*, *supra*, 142 Cal.App.4th at pp. 898-904; R.B. at pp. 32-46.)

The following analysis specifically addresses Plaintiffs' argument that this reasoned decision somehow conflicts with this Court's unanimous ruling last year in *Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223. (See P.O.B. at pp. 26-30.) *Amici* respectfully submit that the Court of Appeal's decision is entirely consistent with *Mervyn's*, and that

binding precedent from this Court provides an alternate ground for this conclusion.

A. Application Of Proposition 64's Standing Requirement To Uninjured Plaintiffs Is Consistent With This Court's Decision In *Mervyn's*.

Plaintiffs maintain that "[i]mposing new substantive requirements for bringing a UCL class action would conflict with this Court's decision in *Mervyn's*." (P.O.B. at p. 26.) The underlying premise of this argument is that a requirement that representative plaintiffs and proposed class members share standing – *i.e.*, that they all satisfy the measure's reliance, causation, and actual loss requirements – is a "substantive" change that cannot be applied "retroactively" to pending cases, and therefore such a requirement would call the *Mervyn's* holding into question. This is a false choice.

Proposition 64's amendments to the previously broad standing provisions of the UCL and FAA caused prospective changes because they do not create a new cause of action, deprive a defendant of a defense on the merits, or otherwise change the substantive legal rules governing the conduct of an individual who directly and reasonably relied on the previously existing state of the law. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232-233; see also R.B. at 15-17; *Owens v. Superior Court* (1959) 52 Cal.2d 822, 833 [finding that a statue is "procedural" if it "neither creates a new cause of action nor deprives defendant of any defense on the merits"]; *Rosasco v. Comm'n on Judicial Performance* (2000) 82 Cal.App.4th 315, 322, 325 ["The critical question is whether a change in the law can be applied retrospectively to create a substantive change in the *legal circumstances* in which an individual has already placed himself in direct and reasonable *reliance* on the previously existing state of the law."].)

At issue here are the amendments in Proposition 64 that require both representative plaintiffs and proposed class members to satisfy the measure's causation, injury-in-fact, and actual loss requirements. These amendments are "prospective" changes because they do not affect an "existing right" of an uninjured plaintiff. A private plaintiff does not have an existing right in a defendant's liability for representations that the private plaintiff did not rely upon and that did not cause him any injury or lost money or property. In this sense, the issues presented to this Court for decision in this case are two sides of the same coin – a putative private plaintiff (whether individual, class representative, or class member) must have relied on the representations at issue to meet the requirement that he suffered "injury in fact" and he could not have suffered such injury absent such reliance.

Moreover, the use of a label such as "procedural" or "substantive" would not be dispositive in any event. This Court's analysis in *Mervyn's* makes clear that the appropriate consideration in determining the application of Proposition 64 is not whether a "procedural or substantive label best applies," but rather "the effect of a law on a party's rights and liabilities." (*Mervyn's*, 39 Cal.4th at p. 231; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 ["In determining whether such statutes changed 'the legal effects of past events' . . . we sometimes used the terms 'substantive' and 'procedural.' . . . . However, we also made it clear that it is the law's effect, not its form or label, which is important," quoting *Aetna Cas. & Sur. Co. v. Indust. Accident Comm'n* (1947) 30 Cal.2d 388, 394 and citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1225-1226 & fn. 26].)

In determining whether the application of the statute to pending cases was "impermissibly retroactive" in *Mervyn's*, this Court analyzed the "function, not form" of the standing requirement imposed by Proposition 64. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 230-231.) In so doing, the Court asked two questions to determine whether applying the change in the law to a pending case is a "retroactive" application: (1) "Does the law change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct?" and (2) "Does it substantially affect existing rights and obligations?" (*Id.* at p. 231, internal quotations omitted.) This analysis emphasizes and renders determinative the *effect* of the law, not whether a change is labeled as "substantive" or "procedural."

To illustrate this point, the Court contrasted examples of "retroactive" and "prospective" application in *Mervyn's*, explaining that the Court has found to be "*retroactive* and thus impermissible":

> [T]he application of new statutes to pending cases in ways that would have: (a) expanded contractors' tort liability for past conduct by imposing broader duties than existed under the common law (*Elsner* [*v. Uveges* (2004)] 34 Cal.4th 915, 937-938); (b) subjected tobacco sellers to tort liability for acts performed at a time when they enjoyed the protection of an immunity statute (*Myers* [*v. Philip Morris Cos., Inc.* (2002)] 28 Cal.4th 828, 840); and (c) subjected persons to increased punishment for past criminal conduct, or to punishment for past conduct not formerly defined as criminal (*Tapia*, *supra*, 53 Cal.3d 282, 297-299). In each of these cases, application of the new law to pending cases would improperly have changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. (See *Elsner*, at p. 937.)

(*Mervyn's*, *supra*, 39 Cal.4th at p. 231.)

In contrast, the following changes were "*prospective*, and thus permissible":

> [T]he application to pending cases of new statutes: (a) requiring plaintiffs suing under an environmental law to provide a certificate of merit (*In re Vaccine Cases* (2005) 134 Cal.App.4th 438, 454-456 [36 Cal. Rptr. 3d 80]); (b) eliminating the right under the anti-SLAPP law (Code Civ. Proc., §§ 425.16, 425.17) to dismiss certain public-interest lawsuits (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 688-691 [10 Cal. Rptr. 3d 702]); and (c) eliminating the right to appeal (as distinguished from the right to file a petition for writ of mandate) from a superior court's decision upholding the Medical Board of California's decision to revoke a physician's license (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 213-216 [97 Cal. Rptr. 2d 657]).

(*Mervyn's*, *supra*, 39 Cal.4th at pp. 231-232.)

Here, a requirement that proposed class members have standing – *i.e.*, that they satisfy the requirements of reliance, legal causation, and actual loss – does not impose *any* "new or different liabilities based upon [past] conduct" or "substantially affect existing rights and obligations" of any party. (*Id.* at p. 231.) As to the first part, Proposition 64 does not expand liabilities at all. As this Court explained in *Mervyn's*, "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Id.* at p. 232; see also R.B. at pp. 15-16.) Proposition 64 does not alter the scope of the conduct that satisfies the "unlawful," "fraudulent," or "unfair" prongs of the UCL, or the "untrue and misleading advertising" element of the FAA. (See also *Mervyn's*, *supra*, 39 Cal.4th at p. 232 ["The measure left entirely unchanged the substantive rules governing business and competitive

conduct."].) Instead, it imposes limitations on *who* may bring such a claim.[1] And under California law, "[f]or a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Id.* at pp. 232-233.)

Nor do the amendments "substantially affect existing rights and obligations" of private parties who cannot establish reliance, legal causation, and a loss of money or property; indeed, such a conclusion would be absurd. While Plaintiffs contend that these requirements would substantially affect the existing rights and obligations of proposed class members because they would eliminate a cause of action such class members possessed prior to the enactment of Proposition 64 (P.O.B. at pp. 27-28), another private plaintiff advanced this argument in *Mervyn's*, contending that application of the initiative to pending cases "would significantly impair the settled rights and expectations of the parties to continue prosecution of their actions." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.) This Court unanimously rejected this argument then, and it should

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[1] In this regard, Plaintiffs (and the *amici* supporting Plaintiffs' position) ignore that the initiative does not presage a "doomsday" for consumer protection. (See, e.g., P.O.B. at p. 43 ["it would wholly undermine the protective goals and public policies underlying the UCL to impose any reliance requirements at all"]; Brief of Amicus Curiae Consumer Attorneys of California at p. 10 ["If such a showing [that a class member prove actual deception, reliance, and lost money or property] is now required, . . . it is highly unlikely that a class action could ever be brought under the statute."].) Specifically, they ignore a key observation of the Court of Appeal – even if there has been no injury to any private plaintiff, a remedy remains – the Attorney General may bring such an action (*In re Tobacco II Cases*, *supra*, 142 Cal.App.4th at p. 898; Bus. & Prof. Code, §§ 17203, 17204) – and thus there is no change to the substantive law at all.

do so now as well, because "the only rights and expectations Proposition 64 impairs hardly bear comparison with the important right the presumption of prospective operation is classically intended to protect, namely, the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." (*Ibid.*, citing *Elsner*, *supra*, 34 Cal.4th at pp. 936-937; *Myers*, *supra*, 28 Cal.4th at p. 839; *Aetna Cas. & Sur. Co.*, *supra*, 30 Cal.2d at pp. 393-395.)[2]

The Court also rejected the notion that a loss of "private attorney general" attorneys' fees under Civil Code section 1021.5 or "the civic or philosophical interest in enforcing the UCL as an uninjured, volunteer plaintiff" would change the result, in part because they are not "property right[s] beyond statutory control," and "to deny full effect to an initiative measure in which the voters have chosen their own legal representatives for cases brought ostensibly on their behalf cannot be defended as a plausible interpretation of the measure." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233, citing *Hogan v. Ingold* (1952) 38 Cal.2d 802, 809.)

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[2] Plaintiffs' argument focuses on a defendant's liability and not on any of their own "vested" rights. They essentially contend that because defendants may have been liable in some sense under prior law to uninjured plaintiffs who could not establish legal causation or reliance, it is an impermissible "substantive" change if plaintiffs cannot satisfy the requirements of the revised provisions of the UCL and FAA and the defendant is not liable to them as a result. But to the extent that Proposition 64 eliminates the ability of an uninjured private party (*i.e.*, one who cannot satisfy the initiative's standing requirements) to invoke the UCL, this is not the sort of "right the presumption of prospective operation is classically intended to protect." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.)

In sum, the changes effected by Proposition 64 relate solely to *who* may invoke the UCL. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 232-233.) After Proposition 64, a private person has standing to sue only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition." (*Id.* at p. 227, quoting § 17204, as amended by Prop. 64, § 3.) These changes do not "change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct" or "substantially affect existing rights and obligations." (*Id.* at p. 231.)

The Court of Appeal specifically acknowledged and considered itself "bound by" this Court's decision in *Mervyn's* (*In re Tobacco II Cases*, *supra*, 142 Cal.App.4th at pp. 896-897), and the decisions are not inconsistent.

B. This Court's Well Settled Rule Regarding The Repeal Of The Statutory Basis For An Action Also Requires Immediate Application Of Proposition 64 To Pending Cases.

For the foregoing reasons, *Amici* respectfully submit that the Court's decision in *Mervyn's* is fully reconcilable with a holding that Proposition 64 requires proof of reliance and causation. As a practical matter, however, even a contrary conclusion that Proposition 64 did engraft new, "substantive" requirements to private UCL claims does not mean that those amendments cannot apply to pending cases. That is because there is an independently sufficient basis for the decision in *Mervyn's*. This Court resolved the question at issue in *Mervyn's* by holding that an application of Proposition 64 was not retroactive, so it did not need to "reach Mervyn's additional argument that Proposition 64 applies to pending cases under the statutory repeal rule, i.e., the rule 'that an action wholly dependent on

statute abates if the statute is repealed without a saving clause before the judgment is final.'" (*Mervyn's, supra*, 39 Cal.4th at p. 232, fn. 3, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.)

This rule is simple and straightforward: If the voters or the Legislature terminate the statutory basis upon which any purely statutory action depends, such an action "*stops where the repeal finds it.*" (*People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67, italics added; see also *Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 829-831; *Southern Serv. Co. v. City of Los Angeles* (1940) 15 Cal.2d 1, 11-12; *Callet v. Alioto* (1930) 210 Cal. 65, 67 ["[T]he rule is well settled that a cause of action or remedy dependent on a statute fails with a repeal of the statute . . . ."]; *Krause v. Rarity* (1930) 210 Cal. 644, 652.)[3]

The California Legislature codified this "well settled" rule, confirming for litigants that they invoke a statute with full knowledge that the statutory basis for any purely *statutory* right of action or remedy may change or even disappear during the pendency of the litigation: "*Persons acting under any statute act in contemplation of this power of repeal.*" (Gov. Code, § 9606, italics added.)

Indeed, absent a "savings" clause or other intent "to save this proceeding from the ordinary effect of repeal," an intervening repeal of the statutory authority for any purely statutory right of action or remedy *presumptively* applies *immediately* to all cases, even those commenced

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[3] Numerous intermediate appellate decisions follow and apply this "well settled" rule. (See, e.g., *Physicians Comm. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489.)

before its enactment. (See *Younger*, *supra*, 21 Cal.3d at p. 110; *Mann*, *supra*, 18 Cal.3d at p. 829; *Callet*, *supra*, 210 Cal. at pp. 67-68.) This analysis therefore obviates an inquiry into whether the voters *intended* that the revised statute apply to pending cases; courts need only look for a saving clause to determine voter or legislative intent that the new statute should *not* apply to pending cases. (See *Younger*, *supra*, 21 Cal.3d at p. 110.)

The rule applies whether the "repeal" is contained in the same statutory provision (*Mann*, *supra*, 18 Cal.3d at p. 828; *Krause*, *supra*, 210 Cal. at pp. 651-652), whether it takes the form of an amendment (e.g., *Younger*, *supra*, 21 Cal.3d at p. 109), whether it impacts part of a statute or the entire code or section (*Younger*, *supra*, 21 Cal.3d at p. 109), and whether it explicitly refers to the old law or simply repeals it by implication. (*Mann*, *supra*, 18 Cal.3d at p. 828; see also Gov. Code, § 9605 [providing that when "a section or part of a statute is amended," "the omitted portions are to be considered as having been repealed at the time of the amendment."].)

As this Court explained in *Younger* with regard to the trial court's record destruction order, "the Legislature effectively repealed the statutory authority for the order here challenged when it enacted" the new law. (21 Cal.3d at p. 109.) "Although cast in terms of an 'amendment' to [the prior law], the new legislation completely eliminate[d]" the basis for the trial court's jurisdiction. (*Ibid.*) In response to the petitioner's arguments "that the repeal was a matter of form rather than substance[,]" that the intent of both statutes is the same, and that the new law "merely substitutes . . . the 'instrumentality' by which such destruction is to be ordered[,]" the Court

explained that the law was more than a formal change and in fact directly affected the trial court's jurisdiction to hear the case:

> The argument misses the mark. **We deal here with a question of jurisdiction**: [the old law] vested respondent superior court with jurisdiction . . . where none existed before; [petitioner] invoked such jurisdiction by his petition for a destruction order; and [the new law] now removes that jurisdiction from respondent court. For present purposes it is irrelevant that [the new law] also grants similar powers to an agency of the executive branch; the fact remains that **the Legislature has revoked the statutory grant of jurisdiction for *this* proceeding, and has vested it in no other court.**

(*Id.* at pp. 109-110, bolded emphases added.)

Likewise, Proposition 64 rescinded the jurisdiction of California courts to consider the claims of uninjured private plaintiffs. Under *Younger*, the fact that the initiative entrusted this authority to the Attorney General and local public prosecutors (Bus. & Prof. Code, §§ 17203, 17204) "is irrelevant" to the analysis. (*Younger*, *supra*, 21 Cal.3d at p. 110.) As for "intent," the Court explained that "the only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by" the "well settled" repeal rule. (*Ibid.*) Like Proposition 64, however, the new law at issue in *Younger* did not contain a saving clause. (*Ibid.*) Therefore, the Court "conclude[d] . . . that respondent superior court no longer has jurisdiction to enforce its order for destruction of records pursuant to [the old law], and the order must therefore be vacated." (*Id.* at p. 111.)

Similarly, in *Mann*, the Court held that because the school district's authority to dismiss the teacher rested completely on statute, and because of "the settled common law rule [that] the repeal of the district's statutory authority necessarily defeats this action which was pending on appeal at the

time the repeal became effective," it was compelled to reverse the trial court's order. (*Mann*, *supra*, 18 Cal.3d at pp. 830-831.) As the Court explained, "a long and unbroken line of California decisions establishes beyond question that the repeal of the district's statutory authority does affect the present action." (*Id.* at p. 822.) The Court flatly rejected the school board's argument that the new legislation may not apply to the pending case because of the presumption that "statutory enactments are generally presumed to have prospective effect":

> A long well-established line of California decisions *conclusively refutes plaintiff's contention.* Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, "a repeal of such a statute without a saving clause will terminate all pending actions based thereon."

(*Id.* at p. 829, italics added, quoting *Southern Serv. Co.*, *supra*, 15 Cal.2d at pp. 11-12.)

In *Bank of San Luis Obispo*, the intervening statute served to remove the basis for the trial court's ruling, and the Court explained that "the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative." (159 Cal. at p. 79.) "When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right . . . ." (*Id.* at p. 67.) Likewise, in *Southern Serv. Co.*, the Supreme Court explained that "[t]he Legislature may withdraw . . . a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon." (15 Cal.2d at pp. 11-12.) Finally, the Court has applied this "well settled" repeal rule specifically to statutory unfair

competition claims. (See *Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 423 ["Where a statutory remedy is repealed without a saving clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated."].)[4]

In all of these cases, the intervening change in the law removed the statutory basis for the plaintiffs to prosecute their actions. Application of settled precedents compelled an immediate application of the revised statutes at issue in those cases, which led to outright dismissals of the plaintiffs' claims, and the Court held that this was the only appropriate result. Similarly, the UCL involves a purely statutory cause of action. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264 [noting that "[t]he common law tort of unfair competition . . . required a showing of competitive injury"].) Standing under the UCL, while previously very broad, is now limited by Proposition 64. (See Bus. & Prof. Code, §§ 17203, 17204, as amended by Prop. 64, §§ 2, 3.)

Proposition 64 does not contain a saving clause to permit application of the repealed provisions. Accordingly, to resolve any perceived

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[4] In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1261-1262, the Court of Appeal applied this analysis to Proposition 64, citing and relying upon *Callet, supra*, 210 Cal. 65. (See also *Chamberlan v. Ford Motor Co.* (N.D. Cal. 2005) 369 F.Supp.2d 1138, 1150-1151 [relying in part on repeal rule and Gov. Code, § 9606 in dismissing action based on Proposition 64]; *Envtl. Prot. Info. Ctr. v. United States Fish & Wildlife Serv.* (N.D.Cal., Apr. 22, 2005, No. 04-4647) 2005 U.S. Dist. LEXIS 7200, at *13-14 ["[T]he *Mann* repeal rule applies to Proposition 64: actions under section 17200 rest solely on a statute and there is no saving clause"].)

inconsistency with *Mervyn's* (which does not exist in any event for the reasons discussed above), this Court need only apply its "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final." (*Younger*, *supra*, 21 Cal.3d at p. 109.) And private plaintiffs were on notice of the risks of relying on a statutory cause of action, because they "act[ed] . . . in contemplation of this power of repeal." (Gov. Code, § 9606.)

IV.

CONCLUSION

Amici respectfully request that the Court affirm the reasoned judgment of the Court of Appeal.

DATED: April 23, 2007

Respectfully submitted,
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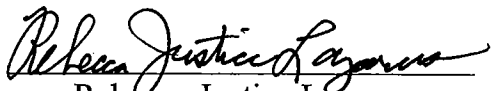
CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rules 8.204(c)(1) and 8.520(c)(1))

I, Rebecca Justice Lazarus, hereby certify that this Brief contains 4,837 words as counted by the word-processing program used to generate this Brief.

DATED: April 23, 2007



Rebecca Justice Lazarus

CERTIFICATE OF SERVICE

In re Tobacco II Cases
Supreme Court of California Case No. S147345
Fourth Appellate District, Division 1, Case No. D046435

I, Robin McBain, hereby certify as follows:

I am employed in the County of San Francisco, State of California. I am 18 years of age or older and not a party to the within entitled cause, and my business address is 1 Montgomery Street, Suite 3100, San Francisco, California 94104, telephone (415) 393-8200, fax (415) 986-5309.

I am employed in the office of Rebecca Justice Lazarus, a member of the bar of this Court, and at her direction, on April 23, 2007, I served the attached **BRIEF OF *AMICI CURIAE* FARMERS INSURANCE EXCHANGE AND GRANITE STATE INSURANCE COMPANY IN SUPPORT OF DEFENDANTS** on the interested parties in this action by U.S. MAIL, placing a true copy thereof enclosed in a sealed envelope to the persons listed below on the attached **SERVICE LIST**.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 23, 2007, at San Francisco, California.

Robin McBain

SERVICE LIST

Service on the Courts Below

Clerk of the Court San Diego Superior Court Central Civil West Courthouse 330 W. Broadway San Diego, CA 92101	1 Copy
Clerk of the Court California Court of Appeal Fourth Appellate District, Div. 1 Symphony Towers 750 B St., Ste. 300 San Diego, CA 92101	1 Copy

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Gregory P. Stone Daniel P. Collins Munger Tolles & Olson 355 S. Grand Ave., 35th Floor Los Angeles, CA 90071 Telephone: (213) 683-9100	*Defendant & Respondent* Philip Morris USA, Inc. 1 Copy