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Case No. S117156

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIDS AGAINST POLLUTION, et al.,

Plaintiffs and Respondents,

vs.

CALIFORNIA DENTAL ASSOCIATION,

Defendant and Appellant.

On Petition for Review After a Decision of the Court of Appeal
First Appellate District, Division Three, No. A098396.
On Appeal from the Superior Court of San Francisco County,
Hon. A. James Robertson II, Judge Presiding (Nos. 322109 & 322110)

AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CALIFORNIA BANKERS ASSOCIATION ON PROPOSITION 64's APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND APPELLANT CALIFORNIA DENTAL ASSOCIATION

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Alleged Unfair Competition (Bus. & Prof. Code § 17200 et seq.)
Service on Attorney General and District Attorney, as required by Bus. & Prof. Code § 17209, Cal. Rules of Court 15(c)(3) and 44.5(c)

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Cases

State Statutes and Constitution

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Statutes

Federal Regulations

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Chamber of Commerce and the California Bankers Association respectfully submit this amicus curiae brief in support of the position of defendant and respondent, the California Dental Association, that Proposition 64 applies to cases pending before the initiative was enacted on November 2, 2004 and took effect the next day. There are two distinct reasons the Court should reach this conclusion.

First, Proposition 64 applies to pending cases under the common law's Repeal Rule – i.e., the "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final."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 v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*); see also *Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 828-831 (*Mann*); Gov. Code, § 9606.) The appellate courts have overwhelmingly and correctly held that Proposition 64 applies to pending cases under the Repeal Rule. (See *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828 (*Branick*); *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887 (*Benson*); *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392 (*Bivens*); *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455 (*Lytwyn*); *Frey v. Trans Union Corp.*, 2005 Cal.App.LEXIS 401 (March 24, 2005) (*Frey*); *Thornton v. Career Training Center, Inc.*, 2005 Cal.App.LEXIS 527 (April 4, 2005) (*Thornton*); but see *Californians For Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386 (*Mervyn's*.)

Second, Proposition 64 alternatively applies immediately because its amendments to California's Unfair Competition Law, Business and Professions Code sections 17200 et seq. ("UCL"), are procedural and do not change the legal consequences of past conduct; indeed, application of Proposition 64 to prohibit uninjured private parties from continuing to prosecute and pursue UCL claims after the initiative's effective date is a

prospective application to future proceedings. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-291 (*Tapia*); *Aetna Cas. & Surety Co. v. I.A.C.* (1947) 30 Cal. 2d 388, 395 (*Aetna*).)

BACKGROUND

A. Procedural Background

Plaintiffs Kids Against Pollution et al. ("Plaintiffs") assert four UCL claims for the general public against defendant California Dental Association ("CDA") arising from allegedly misleading activities regarding the health risks associated with mercury amalgam filings. Plaintiffs do not allege they have suffered injury in fact and lost money or property as a result of any UCL violations.

CDA filed a special motion to strike under the SLAPP statute, which was denied. The appellate court reversed with directions to dismiss the action. Review was granted September 17, 2003, and the parties (and numerous amici) filed briefs on the merits of the SLAPP motion.

While the appeal remained pending, the voters enacted Proposition 64. CDA then filed a 6-page brief asserting that Proposition 64 provides an independent basis for affirmance, and Plaintiffs thereafter filed a 13-page response. On March 9, 2005, the Court granted the application of the Consumer Attorneys of California ("CAOC") and the California Rural Legal Assistance, Inc. ("CRLA") [collectively "Plaintiffs' amici"] for leave to file a 53-page amicus brief, affording CDA until April 18, 2005 to respond.[1]

[1] Plaintiffs' brief is cited herein as "Pltfs' Br."; and CAOC and CRLA's amicus brief is cited as "CAOC-CRLA Br."

B. Proposition 64

On November 2, 2004, the voters enacted Proposition 64, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)

The enactment was based on the finding that California's Unfair Competition Law, Business and Professions Code sections 17200 et seq. ("UCL") and False Advertising Law, Business and Professions Code sections 17500 et seq. ("FAL") "are being misused" in private litigation. (Request for Judicial Notice, Exh. A, Prop. 64, § 1(b).) The root cause of the perceived litigation abuse was the statutes' formerly broad standing provisions.

The voters in Proposition 64 identified cases in which lawyers had employed the UCL and FAL "to file" what the voters deemed "frivolous lawsuits" motivated by "attorneys' fees" for "clients" who were not "injured in fact" and had not even "used the defendant's product or service," "viewed the defendant's advertising," "or had any other business dealing with the defendant." (Prop. 64, §§ 1(b)(1), 1(b)(2), 1(b)(3).) The voters voiced their intent "to eliminate" such suits, and to mandate that "only" state and local prosecutors shall be "be authorized to file and prosecute actions on behalf of the general public." (*Id.*, §§ 1(d), 1(f).) To *stop* such litigation abuse (*id.*, § 1(d)),[2] the voters altered the UCL and FAL's procedural provisions in sections 17203, 17204, and 17535, but left the substantive proscriptions of sections 17200 and 17500 intact.[3]

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[2] The pro-Proposition 64 ballot arguments stated that it "***will stop*** thousands" of lawsuits by closing a "LOOPHOLE IN CALIFORNIA LAW," and concluded that voters should "Vote Yes" to "Close the frivolous shakedown lawsuit loophole." (Request for Judicial Notice, Exh. B, at pp. 1-3, bold italics added).

[3] Statutory references are to the Business and Professions Code unless otherwise noted.

Proposition 64 explicitly strikes, and thus repeals, the language in sections 17204 and 17535 that allowed UCL and FAL claims to be prosecuted by any person "acting for the interests of itself, its members or the general public." (*Id.*, §§ 3, 5.)

Proposition 64 provides that UCL and FAL actions "shall be prosecuted exclusively" by (1) public officials, or (2) persons who suffered "injury in fact" and "lost money or property as a result of" alleged UCL and FAL violations. (*Id.*, §§ 3, 5.)

Proposition 64 also amends sections 17203 and 17535 to provide that private parties may "pursue" UCL and FAL claims in any representative capacity "only" if they both satisfy the law's "standing" provisions and also comply with the class-action procedures of Code of Civil Procedure section 382. (*Id.*, §§ 2, 5.)

Proposition 64 does not affect the authority of public officials to prosecute UCL and FAL claims for general public. (*Id.*, §§ 1(f), 1(g), 2, 3, 5.)

ARGUMENT

I. Proposition 64 Applies To Pending Cases Under The Common Law's Repeal Rule And Its Abatement Principles

Plaintiffs and their amici argue that Proposition 64 does not apply to pending cases, relying on the principle that new enactments are generally presumed to apply prospectively and not "retroactively" without clear retroactive legislative intent. (Pltfs' Br., at pp. 3-7; CACO-CRLA Br., at pp. 6, 9-11.) Their arguments are fundamentally flawed because they are based upon the wrong legal rule.

"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.'" (*Mann, supra*, 18 Cal.3d at p. 829, citation omitted; accord, *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (*Callet*).) *Mann* confirms that arguments based on the "traditional rule that statutory enactments are generally presumed to have prospective effect" are inapposite in cases governed by the Repeal Rule, i.e., the "general common law rule" of repeal and abatement. (*Mann, supra*, 18 Cal.3d at p. 829; accord, *Callet, supra*, 210 Cal. at 67-68; see also 7 Witkin, Summary of California Law (9th ed. 1990) Constitutional Law, § 497, pp. 690-691 [Repeal Rule is a "recognized exception to the rule of prospective construction"].)

Proposition 64 applies to this pending case under the common law's Repeal Rule because it effectively repeals Plaintiffs' authority to prosecute their UCL claims for the "general public." (Prop. 64, § 3.)

A. Under The Repeal Rule, Enactments That Withdraw The Authority For Purely Statutory Claims Or Remedies Without A Saving Clause Apply To Pending Cases

Any "'cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.'" (*Mann, supra*, 18 Cal.3d at p. 829, citation omitted.) As *Mann* explains, the Court has long applied this "general common law rule" in "a multitude of contexts" – whether they be criminal, quasi-criminal, or civil. (*Id.* at pp. 830-831 & fn. 8.)

For over a century, the Court has held under the Repeal Rule that intervening enactments withdrawing the authorization for purely statutory rights of action or remedies without a saving clause apply immediately to

pending cases. (*Younger*, *supra*, 21 Cal.3d at pp. 109-110; *Mann*, *supra*, 18 Cal.3d at pp. 823, 839-831; *People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 365 (*One 1953 Buick 2-Door*); *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 423 (*Landowitz*); *Southern Service Co. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12 (*Southern Service*); *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184-185 (*Wolf*); *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67, 78-79 (*Bank of San Luis Obispo*); *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317-318 (*Napa State Hospital*).) The Repeal Rules applies to any "amendment" or "repeal" that eliminates the "statutory authority" for statutory rights of action or remedies without a saving clause while the case is pending – even if the enactment does not repeal the entire statutory scheme. (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at p. 822-823, 828-831.) "A repeal of the statute, or an amendment thereof, resulting in a repeal of the statutory provision upon which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment." (*Wolf*, *supra*, 10 Cal.2d at pp. 184-185.)

The Repeal Rule's "justification" is that purely statutory claims and remedies "are pursued with full realization that the legislature may abolish the right to recover at any time.'" (*Mann*, *supra*, 18 Cal.3d at p. 829, quoting *Callet*, *supra*, 210 Cal. at 67-68.) The same rule and reason is codified in Government Code section 9606: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."

The Repeal Rule applies only to rights of action and remedies that are "statutory" in nature. (*Mann*, *supra*, 18 Cal.3d at pp. 829-830.) It "does not apply" to a "right of action which has accrued to a person under

the rules of the *common law*," or to claims under statutes merely "codifying the *common law*." (*Callet, supra*, 210 Cal. at pp. 67-68, italics added.)

The basis for this distinction is that – unlike statutory claims – a common law claim may constitute a "vested property right" at the time it accrues. (*Ibid.*) Rights to statutory claims or remedies are *not* "vested" until "final judgment," including exhaustion of appeals. (*Bank of San Louis Obispo, supra*, 159 Cal. at pp. 67, 78-79; *Callet, supra*, 210 Cal. at 67-68; see also *Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1025 (*Chapman*); *South Coast Reg. Com. v. Gordon* (1978) 84 Cal.App.3d 612, 616, 618-19 (*Gordon*).)

Hence, no parties may justifiably rely on purely statutory rights of action or remedies until they acquire *vested* rights by perfecting them in a non-appealable final judgment. (*Bank of San Louis Obispo, supra*, 159 Cal. at pp. 70-71, 79-80.) Until then, any statutory right of action or remedy "can be abolished or modified by statute at the will of the Legislature that created [them]" (*One 1953 Buick 2-Door, supra*, 57 Cal.2d at p. 365), or by the voters through either the initiative or referendum process (see, e.g., *Wolf, supra*, 10 Cal.2d at pp. 184-185; *Chapman, supra*, 132 Cal.App.3d at pp. 1023-1025). "In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected" (*Bank of San Luis Obispo, supra*, 159 Cal. at pp. 67, 78-79; accord, *One 1953 Buick 2-Door, supra*, 57 Cal.2d at p. 365), and, thus, "a repeal of the statute conferring the right, prior to final judgment, would abolish the right and place the parties in the same position as if the right never existed." (*Krause v. Rarity* (1930) 210 Cal. 644, 653.)

This Court has consistently applied the Repeal Rule even where it deprived a plaintiff of a statutory claim that was viable – even meritorious – under the statutory regime in place when the case was filed.

In *Younger*, the plaintiff asserted a statutory claim to expunge his criminal records under a then-existing statutory right of action. (21 Cal.3d at pp. 107-108.) While the action was pending, "the Legislature changed the law" by way of an "amendment" that superseded the claim's statutory authorization. (*Id.* at pp. 108-109.) Although the claim was valid under the former regime, the statute enacted while the case was pending "effectively repealed [its] statutory authority." (*Id.* at p. 109.) Thus, the claim failed under "the 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." (*Ibid.*) As *Younger* holds, the "*only legislative intent relevant* in such circumstances would be a determination to *save* this proceeding from the ordinary effect of repeal." (*Id.* at p. 110, italics added.) But "no such intent" appeared, because the amendment had "no express saving clause" and no intent "to save" pending cases could be ascertained from contemporaneous legislation. (*Ibid.*)

In *Mann*, the plaintiff school district obtained a ruling that a teacher's marijuana conviction provided grounds for dismissal under the Education Code. (18 Cal.3d at pp. 821-823, 828-829.) While the case remained pending, the Legislature enacted a Health and Safety Code provision that partially repealed the Education Code provision and eliminated the statutory basis on which plaintiff prevailed. (*Ibid.*) Because plaintiff's right of action "rest[ed] solely on statutory grounds," this Court held that the "repeal" of its "statutory authority" without a saving clause "necessarily defeat[ed]" the action "at the time the repeal became effective." (*Id.* at 830-831.) This result was based on the "long and

unbroken line of California decisions" that "establishe[d] beyond question that the repeal of [plaintiff's] statutory authority" for its right of action "does affect the present action," which remained pending when the repeal went into effect. (*Id.* at p. 822.)

In *Wolf*, the Court applied an amendment to California's usury law to a pending case under the Repeal Rule. (10 Cal.2d at pp. 183-185.) Plaintiff sought treble damages under the 1918 statutory usury laws in effect on the dates of plaintiff's loan transactions with defendant. (*Id.* at p. 184.) In 1934, the usury statutes were modified by a voter-enacted amendment without a saving clause. (*Id.* at pp. 184-185.) Although the amendment "did not repeal the usury law of the state," it caused "some radical changes to be made" in the usury laws in a way that eliminated the authority for plaintiff's claim against the defendant. (*Id.* at p. 184.) The Court held that the amendment applied immediately under the Repeal Rule, and wiped out plaintiff's claim because it had not "been merged into a final judgment." (*Id.* at pp. 184-185.)

The result in these cases is based on the "ordinary effect of repeal" under the common law's Repeal Rule. (*Younger*, *supra*, 21 Cal.3d at p. 110.) The ordinary "effect" of repeal is "to obliterate" the former statutory provision as if it "never existed, except [for those actions] ... concluded whilst it was an existing law." (*Napa State Hospital*, *supra*, 134 Cal. at pp. 317-318, citation and internal quotations omitted; *People v. Rossi* (1976) 18 Cal.3d 295, 301 (*Rossi*).)

B. Proposition 64 Applies To This Pending Case Because All The Elements Of The Repeal Rule Are Satisfied Here

As in *Younger* and the Court's other Repeal Rule cases, "each element of the rule" is met here. (21 Cal.3d at pp. 109-110.)

First, any right Plaintiffs have to prosecute UCL claims for the general public depends entirely on a statutory basis under section 17204. The right of private plaintiffs – including uninjured persons – to prosecute statutory unfair competition claims for the "general public" was first added by the Legislature in 1933 to the UCL's predecessor, Civil Code section 3369, and then carried over into the UCL. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129-30 (*Kraus*), citing Stats. 1933, ch. 953, § 1, p. 2482; see also *Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561-562 (*Stop Youth Addiction*); *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-110 (*Barquis*).) No standing for *uninjured* persons to prosecute unfair competition claims for the general public, or at all, existed at common law. (*Benson*, *supra*, 126 Cal.App.4th at p. 905; *Branick supra*, 126 Cal.App.4th at pp. 843-844; *Lytwyn*, *supra*, 126 Cal.App.4th at pp. 1479-1480; *Benson*, *supra*, 126 Cal.App.4th at p. 905.)

Second, the authority for Plaintiffs to prosecute UCL claims for the "general public" has been repealed: Proposition 64 strikes from section 17204 the authority for any private person to prosecute UCL claims "acting for the interests of itself, its members or the general public." (Prop. 64, § 3.) That is the language this Court interpreted as authorizing *uninjured* persons or groups to prosecute UCL claims. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at pp. 560-561.)

Third, this action was *pending* when Proposition 64 took effect. Hence, no rights under the UCL had been "vested" in Plaintiffs at that time. (*Mann*, *supra*, 18 Cal.3d at p. 829; *Callet*, *supra*, 210 Cal. at 67-68; *Chapman*, *supra*, 132 Cal.App.3d at p. 1025; *Gordon*, *supra*, 84 Cal.App.3d at pp. 616, 618-619.) Any such "rights" were "inchoate,

incomplete, and unperfected." (*One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at p. 365.)

Fourth, there is no saving clause in Proposition 64. Nor is there any other evidence that the voters intended to save pending cases from the ordinary effect of Proposition 64's repeal of the authority for private parties, including the uninjured, to prosecute UCL claims for the general public. (See also *Rossi*, *supra*, 18 Cal.3d at pp. 299-300, 303-304 [Repeal Rule governs "in the absence of clear legislative intent to the contrary" through a provision unambiguously "demonstrat[ing] a legislative intent to alter the established common law rule relating to abatement"].)[4] Because "Proposition 64 does not contain a saving clause indicating an electorate intent to save pre-Proposition 64 UCL actions from the ordinary effect of repeal" (*Frey*, *supra*, 2005 Cal.App.LEXIS 401, at *19), it applies to pending cases under the common law's Repeal Rule.

C. None Of The Arguments Advanced In An Effort To Evade Application Of Proposition 64 To Pending Cases Under The Repeal Rule Has Merit

1. For The Repeal Rule To Apply, The Entire Statutory "Cause Of Action" Does Not Need To Be Repealed In All Circumstances

Plaintiffs and their amici argue that the Repeal Rule does not apply because Proposition 64 does not *entirely* repeal "the UCL cause of action." (CAOC-CRLA Br., at p. 13; Pltfs' Br., at pp. 7-8). The argument fails.

Under the Repeal Rule, it is not required that the new enactment repeal the statutory cause of action in all circumstances. The distinctive feature triggering the rule is the withdrawal of the "statutory authority" for

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[4] The erroneous nature of the argument that Business and Professions Code section 4 is a "general saving clause" is discussed *Post*, at pp. 21-32.

plaintiff's purely statutory claim or remedy without a saving clause while the case remains pending. (*Younger*, *supra*, 21 Cal.3d at pp. 109-110; *Mann*, *supra*, 18 Cal.3d at pp. 828-831.) That is precisely what Proposition 64 does. The argument that the Repeal Rule applies only where a statutory cause of action is entirely repealed is contrary to this Court's cases. (See, e.g., *Wolf*, *supra*, 10 Cal. 2d at pp. 184-85 [applying Repeal Rule even though voters' amendment did not "repeal" the "usury law of the state" or repeal statutory usury claims in all circumstances]; *One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at p. 360-366 [applying Repeal Rule to statutory vehicle forfeiture proceedings even though new amendment did not abolish forfeiture claims but permitted them only if specified "conditions" met].)

Plaintiffs and their amici cite only *Krause v. Rarity* (1930) 210 Cal. 644 (*Krause*), and *In re Whiting* (1930) 110 Cal.App. 399 (*Whiting*) (Pltfs' Br., at p. 8), but neither supports their argument. *Krause* involved a statutory claim under Code of Civil Procedure section 377 asserted by heirs of a decedent killed while riding in a car driven by defendant that was struck by a locomotive. (210 Cal. at pp. 647-650.) When the accident occurred, the heirs had a claim under section 377 against the defendant if they proved defendant's lack of "ordinary care" caused the death. (*Id.* at p. 654.) During the case's pendency, the Legislature enacted California Vehicle Act section 141¾, which precluded the heirs' right of recovery unless the death was caused by defendant's gross negligence, wilful misconduct, or intoxication. (*Id.* at pp. 651-652.) *Krause* does not hold that the Repeal Rule applies only where a statutory cause of action is entirely repealed. Rather, the Repeal Rule was inapplicable in *Krause* because the amendment did *not* "repeal" the heirs' authority "to maintain" their claim against the defendant; it caused a "change in the proof required, not to maintain the action, but to permit a recovery." (*Id.* at p. 654.) The

amendment "simply changed the degree of negligence required to permit a recovery" and did not "repeal" the statutory authority for plaintiffs' right of action "in whole or in part." (*Id.* at p. 655.) Despite the amendment, "there has not been a moment in time since the enactment of section 337 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest." (*Id.* at p. 654) Proposition 64 does what the amendment in *Krause* did not: It repeals Plaintiffs' right "to maintain" their claims. (*Id.*)

Nor does *Whiting* hold that the Repeal Rule applies only where a statutory claim is repealed in all circumstances. *Whiting* held that the Repeal Rule did not govern because plaintiff's statutory "right" to contest a will after probate had *not* been "taken away" by the amendment enacted while his case was pending. (110 Cal.App. at p. 405.) Only "the time within which the contest must be filed ha[d] been shortened from one year to six months" by the intervening enactment; plaintiff's "right to contest under the new statute is the same as under the old." (*Id.*) Because plaintiff's authorization for his statutory claim had not been withdrawn by amendment or repeal, the Repeal Rule did not apply. Here, however, Proposition 64 repeals the statutory authorization for Plaintiffs, and other uninjured private parties, to prosecute UCL claims for the general public.

Moreover, the appellate courts have uniformly rejected the very argument advanced by Plaintiffs and their amici (see *Bivens*, *supra*, 126 Cal.App.4th pp. 1403-1404; *Branick*, *supra*, 126 Cal.App.4th at p. 844; *Benson*, *supra*, 126 Cal.App.4th at pp. 902-905; *Lytwyn*, *supra*, 126 Cal.App.4th at pp. 1478, 1480; *Frey*, *supra*, 2005 Cal.App.LEXIS 401, at *16-*17), and for good reason. What matters under the Repeal Rule is that an intervening enactment repeals the authority for a purely statutory right of action. (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at pp.

828-831; *Wolf, supra*, 10 Cal.2d at pp. 184-185.) That is what Proposition 64 does to Plaintiffs' authority to prosecute their statutory UCL claims here.

2. The Former Authorization For Uninjured Persons To Prosecute UCL Claims Did Not Codify Pre-Existing Common Law Rights

Plaintiffs' amici next try to invoke the Court's instruction in *Callet, supra*, 210 Cal. at pp. 67-68, that the Repeal Rule "only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law." (See CAOC-CRLA Br., at pp. 13-14.) They claim the UCL's predecessor statute "codified" the common law tort of unfair competition between business competitors, and the "courts" then extended to consumers and the general public the protections once afforded only to business competitors under the common law. (*Id.* at p. 14.) Plaintiffs' amici conclude that, because *Callet* excludes claims under "a statute codifying common law" from the Repeal Rule, and because Plaintiffs' UCL claims are supposedly "grounded" in or "derived" in part from the common law, the Repeal Rule "has no application here." (*Ibid.*) Their confused argument fails for several clear reasons.

The suggestion that statutory unfair competition claims under the UCL or its predecessor are merely *codifications* of the common law tort of unfair competition (*id.*, at p. 13) is clearly incorrect. This Court has not only instructed repeatedly that statutory unfair competition claims "cannot be equated" with the common law tort of unfair competition (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-1264 (*Bank of the West*); *Barquis, supra*, 7 Cal.3d at p. 109; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181 fn. 9

(*Cel-Tech*)), but it has also rejected the contention that California's statutory unfair competition law "did nothing more than codify the common law." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 181 fn. 9).[5] Contrary to the argument of Plaintiffs' amici, this Court in *Barquis* did not state either that the UCL's predecessor statute "codified the common law," or that it was the "courts" that "extended the common law 'protection once afforded only to business competitors' to the entire consuming public." (CAOC-CRLA Br., at p. 14, quoting *Barquis*, *supra*, 7 Cal.3d at p. 109.) Rather, *Barquis* provides that statutory unfair competition claims are broader than, and "cannot be equated with," common law unfair competition; and confirms that it was "the Legislature" in enacting the UCL's predecessor that "extended to the entire consuming public the protection once afforded only to business competitors" under the "common law." (7 Cal.3d at p. 109; see also *Bank of the West*, *supra*, 2 Cal.4th at pp. 1263-1264 [through the "enactment of statutes" the protections once afforded only business competitors under common law unfair competition were "'extended to the entire consuming public,'" quoting *Barquis*, *supra*, 7 Cal.3d at p. 109].)

Moreover, Plaintiffs' amici disregard the aspect of the UCL repealed by Proposition 64: section 17204's standing language that had permitted *uninjured* private parties to prosecute UCL claims for the general public. This is fatal to their argument, because the Repeal Rule's exception from

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[5] The authorities Plaintiffs' amici cite nowhere state that the UCL or its predecessor "codified the common law tort of unfair business competition." (CAOC-CRLA Br., at p. 13). Rather, the cited practice guide provides that the "sweeping" language in the UCL's predecessor was "a major departure" from the "common law rules of unfair competition." (Stern, Cal. Prac. Guide: Bus. & Prof. Code Section 17200 Practice, ¶¶ 2:3, 2:11 (The Rutter Group 2004).) *People ex rel. Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765, notes both the narrow scope of common law unfair competition claims and that the Legislature's enactment of the Civil Code section 3369 *expanded* the law. (*Id.* at pp. 770-771.)

Callet applies only to the repeal of statutes "codifying" a pre-existing "right" that existed in the same form at "common law." (210 Cal. at pp. 67-68.) The exception's test focuses on whether the "right" repealed while the case was pending "is a right recognized at common law" or "a right based entirely on statute." (*Id.* at p. 68; see also *id.* at 67-70 [holding that repeal of statutory "right" for vehicle guests to sue negligent drivers did not require dismissal of pending claim where same "right" existed under common law].) The now-repealed standing "right" of *uninjured* persons to prosecute statutory UCL claims was dependent upon section 17204, and thus was "based entirely on statute." (*Ibid.*) No such "right" for *uninjured* persons to prosecute unfair competition claims was "recognized at common law." (*Id.* at pp. 67-68).[6] It is for precisely this reason that the appellate courts have uniformly rejected the very argument Plaintiffs' amici advance here. (See *Lytwyn*, *supra*, 126 Cal.App.4th at pp. 1479-1480 [holding that the "right" of uninjured plaintiffs to prosecute UCL claims for the general public that Proposition 64 effectively repealed "was not a codification of prior common law rights"]; accord, *Branick*, *supra*, 126 Cal.App.4th at pp. 843-844; *Benson*, *supra*, 126 Cal.App.4th at pp. 904-905; *Bivens*, *supra*, 126 Cal.App.4th at p. 1403; *Frey*, *supra*, 2005 Cal.App.LEXIS 401, at *17-*18; *Thornton*, *supra*, 2005 Cal.App.LEXIS 527, at *12-*13.)

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[6] Because the exception's test focuses on whether the repealed "right" was "recognized at common law" or "based entirely on statute" (210 Cal. at p. 68), Plaintiffs' amici are wrong to claim it applies if UCL claims are distantly "grounded" in or "derived" in irrelevant part from the *different* common law tort of unfair competition. (CAOC-CRLA Br., at pp. 13-14.)

3. Plaintiffs' Amici Are Wrong To Suggest That, Under The Repeal Rule, New Enactments Do Not Apply To Pending Cases Without Clear Retroactive Legislative Intent

Plaintiffs' amici then suggest that, even under the Repeal Rule, no new enactment applies to pending cases without clear retroactive legislative intent. (CAOC-CRLA Br., at pp. 14-20.) That is wrong.

First, their argument is based on an incorrect reading of *Mann* and *Younger*. They posit that the holdings in both cases were predicated on the conclusion that the new "statutes" had expressed "a clear legislative intent that [they] applied retroactively to pending cases." (*Id.*, at pp. 17-18.) But the Court in neither case suggested that its Repeal Rule analysis was in any way based on any supposed clear expression of retroactive intent.[7] In fact, *Mann* specifically rejects the plaintiff's argument that its case should be governed by the "traditional rule" that statutes are "generally presumed to apply prospectively" and not to apply to pending cases without a clear expression retroactive intent – because "[a] long well-established line of California decisions" applying the Repeal Rule "conclusively refutes plaintiff's contention." (18 Cal.3d at pp. 828-829.) And *Younger* explicitly holds that "the *only* legislative intent relevant" in cases governed by the Repeal Rule would be an intention "to save" pending cases "from the ordinary effect of repeal." (21 Cal.3d at pp. 109-110, italics added.)

Second, Plaintiffs' amici erroneously rely on several cases in which the Repeal Rule was not even implicated. They cite *Myers v. Philip Morris Inc.* (2002) 28 Cal.4th 828 (*Myers*), arguing that the Court did not apply the Repeal Rule in that case and, instead, held that the new "repeal" at issue

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[7] Plaintiffs' amici ignore the Court's Repeal-Rule analysis in *Younger* and *Mann* and base their argument on parts of the decisions that had *no bearing* on that analysis.

could not be applied retroactively in the absence of clear retroactive legislative intent. (CAOC-CRLA Br., at pp. 18-20; see also *id.* at pp. 6-7, 8, 9, 16.) But the reason the Court in *Myers* did not apply the Repeal Rule is that the case did not involve a statute that repealed the authority for any purely statutory claim or remedy. *Myers* involved the 1998 repeal of a statutory "immunity" defense: the former immunity afforded cigarette companies under Civil Code section 1714.45. (CAOC-CRLA Br., at p. 18.) That feature brought the 1998 repeal statute within the distinct rule – not applicable here – that, absent clear legislative intent, a statute may not be applied so as to change the legal effects of past conduct by making "tortious" conduct that was "lawful" at the time it occurred. (28 Cal.4th at pp. 839-840.) Thus, *Myers* did not even implicate "well settled rule" that any "*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, italics added; accord, *Mann*, *supra*, 18 Cal.3d at p. 829.) The plaintiff asserted only *common law claims* for "'strict liability, negligence, breach of implied warranties, fraud, and negligent misrepresentation.'" (*Myers*, *supra*, 28 Cal.4th at p. 832, citation omitted.) Thus, *Myers* is simply inapposite here.[8]

The reliance of Plaintiffs' amici on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*), is misplaced for the same reason. Indeed, the appellate courts have overwhelmingly recognized that

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[8] The Repeal Rule also was not implicated in *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469-70, 476-77 (*McClung*), or *Elsner v. Uveges* (2004) 34 Cal.4th 915, 923-924, 936-939 (*Elsner*), cited by Plaintiffs' amici. Neither involved a new statute withdrawing the authorization for any purely statutory claim or remedy, which would have triggered the Repeal Rule. Both involved the different context in which new statutes would *impose new and additional liabilities* on *defendants* based on their *underlying past conduct*. (*Ibid.*)

Evangelatos has no bearing on Proposition 64's application to pending cases under the Repeal Rule, and uniformly denounced the one outlier decision (*Mervyn's*, *supra*, 126 Cal.App.4th at p. 365) that erroneously predicated its analysis on *Evangelatos*. (*Benson*, *supra*, 126 Cal.App.4th at pp. 905-907; *Branick*, *supra*, 126 Cal.App.4th at p. 842; *Bivens*, *supra*, 126 Cal.App.4th at pp. 1404; *Lytwyn*, *supra*, 126 Cal.App.4th at p. 1480 fn. 13; *Frey*, *supra*, 2005 Cal.App.LEXIS 401, at *20; *Thornton*, *supra*, 2005 Cal.App.LEXIS 527, at *15.)

In contrast to Proposition 64's application to statutory UCL claims, *Evangelatos* addressed the applicability of Proposition 51 – an initiative that "modified the traditional, *common law* 'joint and several liability' doctrine" and effected radical changes to pending "*common law*" claims "which accrued prior to the effective date of the initiative measure." (*Id.* at pp. 1192-1193, 1196, 1198-1199, 1205, italics added; *id.* at p. 1225 [emphasizing the "substantial and significant change" Proposition 51 made to "long-standing *common law* doctrine applicable to all negligence actions," italics added].) The defendant in *Evangelatos* sought to apply Proposition 51's changes to the plaintiff's accrued common-law claims; such application, however, would have interfered with the plaintiff's "vested property right" in his "accrued" claims "under the common law." (*Callet*, *supra*, 210 Cal. at pp. 67-68.) Because the Repeal Rule was not implicated, *Evangelatos* does not support any contention that Proposition 64 cannot be applied to pending cases without clear retroactive intent.

Finally, Plaintiffs' amici wrongly contend that *Landgraf v. USI Film Products* (1994) 511 U.S. 244 (*Landgraf*), compels the conclusion that Proposition 64 cannot apply to pending cases under the Repeal Rule in the absence of clear retroactive intent. (CAOC-CRLA Br., at pp. 14-16.) *Landgraf* simply articulates the analysis that applies "[w]hen a case

implicates a *federal statute* enacted after the events in suit" (511 U.S. at p. 280, italics added), and does not pronounce mandatory principles of statutory construction state courts must follow in all circumstances under their respective state laws. (*Thornton, supra*, 2005 Cal.App.LEXIS 527, at *13-*14 & fn. 3.)

The suggestion that *Landgraf* requires this Court to modify its analysis embodied in cases such as *Mann* and *Younger* is further undermined by the fact that the Repeal Rule does not apply to federal statutes such as those at issue in *Landgraf*. (*Ibid.*) Unlike California law, the general provisions of the U.S. Code have, for over 130 years, contained a *federal general saving clause* – which provides that a "repeal of any statute shall not have the effect to release or extinguish any ... liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such ... liability." (1 U.S.C. § 109; see also *Korshin v. Commissioner* (4th Cir. 1996) 91 F.3d 670, 673.)[9] Thus, it is not surprising that *Landgraf* alludes briefly to the Repeal Rule only in passing, followed by the citation: "But see 1 U.S.C. §109 (repealing common-law rule)." (511 U.S. at pp. 270-271.) Given *Landgraf*'s recognition that Congress had abrogated the Repeal Rule with respect to federal statutes, it is implausible to read that decision as resolving any claimed tension or conflict under state law with respect to the proper application of the Repeal Rule in those states (such as California) that adhere to the "general common law rule." (*Mann, supra*, 18 Cal.3d at pp. 829-830.)

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[9] In contrast to Congress' abolition of the common law's Repeal Rule, the California Legislature codified it. (Gov. Code, § 9606; see also *Bank of San Louis Obispo, supra*, 159 Cal. at p. 75 [section 9606's predecessor "cod[ified]" the common law's Repeal Rule].)

Moreover, even *Landgraf* recognizes in the federal context that, despite the presumption of prospectivity, "application of new statutes passed after the events in suit is unquestionably proper in many situations" – including where an intervening statute "affects the propriety of prospective relief" such as "injunctive relief." (511 U.S. at pp. 273-274.) Hence, while inapposite, *Landgraf* is actually consistent with the application of Proposition 64 here to prevent Plaintiffs from continuing to prosecute their UCL claims for injunctive and equitable relief.

4. There Is No "Saving Clause" In Proposition 64 Or The Business And Professions Code That Abrogates The Common Law's Repeal Rule Here

Plaintiffs and their amici concede that Proposition 64 contains no express saving clause. They argue, however, that this Court should imply a saving clause into Proposition 64 based on an entirely incorrect construction of Business and Professions Code section 4. Section 4 is *not* – as Plaintiffs and their amici contend – a *general* "saving clause" that abrogates the common law's Repeal Rule as applied to any subsequent repeal or amendment to any portion of the Business and Professions Code. Rather, section 4 is a *limited* saving clause that saved *only* those pending cases or subsisting rights at the time the Business and Professions Code originally went into effect in 1937.

Section 4 provides: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." (Bus. & Prof. Code, § 4.) By its terms, this provision saved only those subsisting "rights accrued" and cases "commenced" at a particular time – i.e., "before this code takes effect," which was on August 27, 1937. (See Stats. 1937, ch. 399, at p. 1230; *Sobey v. Maloney* (1940) 40 Cal.App.2d 381, 388-390 (*Sobey*) [Bus. & Prof. Code

§ 4 "saves prosecutions for offenses committed prior to August, 1937, although complaints were not filed until after that date"].)[10] Thus, section 4 is a *limited*, not a general, saving clause.

Similar language has been included over the years in numerous enactments, and the courts – including this Court – have consistently construed such provisions to operate as limited saving clauses applicable to cases commenced or rights accrued before the effective date of the original enactments. For example, in *In re Dapper* (1969) 71 Cal.2d 184 (*Dapper*), the Court construed as a limited saving clause a provision included in the initial codification of the San Diego Municipal Code, which saved prosecutions for violations "'committed prior to the effective date'" of the Code. (*Id.* at p. 188, italics omitted). The Court rejected the argument – similar to Plaintiffs' here – that the provision operated as a general saving clause to preserve cases involving violations of "ordinances comprising the code which are subsequently repealed." (*Ibid.*) The Court found it "patently clear" that the provision saved *only* those actions involving violations "occurring before the adoption of the code" and when the code originally took "effect[]." (*Id.* at pp. 188-189.) Likewise, in *Pohle v. Christian* (1942) 21 Cal.2d 83, the Court interpreted section 231 of the

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[10] The correctness of this interpretation of section 4 is confirmed by review of its surrounding provisions. Section 4 is one of the several preliminary provisions at the beginning of the Business and Professions Code that established *transitional rules* to ensure that the original 1937 codification of the Code, and its related repeals, did not alter *then-existing* rights in August 1937. (See, e.g., Bus. & Prof. Code, § 3 ["All persons who, *at the time this code goes into effect,* hold office under any of the acts repealed by this code, which offices are continued by this code, shall continue to hold the same...," italics added]; Bus. & Prof. Code, § 6 ["All persons, who, *at the time this code goes into effect*, are entitled to a certificate under any act repealed by this code, are thereby entitled to a certificate under the provisions of this code so far as the provisions of this code are applicable," italics added].)

Civil Service Act of 1937 as a limited saving clause. That provision was enacted the same year as Business and Professions Code section 4, and contained virtually identical language: "No action or proceeding commenced before this act takes effect and no right accrued, is affected by the provisions of this act, but all procedure thereafter taken therein shall confirm to the provisions of this act so far as possible." (21 Cal.2d at pp. 88-89.) As the Court recognized, such statutory language operated to save and exempt from the new enactment those subsisting rights and cases commenced *before* the enactment's "effective date" in 1937. (*Id.*, at p. 88.) Other courts have long construed provisions in other codes worded similarly to section 4 as operating to save those "proceedings pending at the time of the adoption of the code" (*Sacramento Terminal Co. v. McDougall* (1912) 19 Cal.App. 562, 565-566), and those rights subsisting "prior to and at the time of the adoption of the codes." (*James v. Oakland Traction Co.* (1909) 10 Cal.App. 785, 797.)

Contrary to the argument of Plaintiffs and their amici, section 4 cannot qualify as a "general saving clause" under this Court's governing authorities of *People v. McNulty* (1892) 93 Cal. 427 (*McNulty*), and *Peterson v. Ball* (1931) 211 Cal. 461 (*Peterson*). *McNulty* instructs that a provision can qualify as a general saving clause – and thereby abrogate the common law's Repeal Rule on a going-forward basis – *only* if "it be clothed in apt language to express [such a] purpose." (93 Cal. at p. 437.) *Peterson* likewise confirms that it must be "plain from the language" of the provision "that it is intended to apply to the *amendment or repeal of any part*" of the statute or code at issue, and *not* just the original enactment itself. (211 Cal. at p. 475, italics added.) That is, of course, precisely what the text of section 4 does *not* do. Section 4 refers only to those subsisting rights or cases pending on the date "this code takes effect" in August 1937,

and contains no "apt language" (*McNulty, supra*, 93 Cal. at p. 437) demonstrating any intent to save *future* suits that might be pending on the effective date of some *subsequent* repeal of some portion of the code. Because section 4 was enacted six years after this Court's decision in *Peterson*, the absence of the requisite additional language making "plain" that section 4 was "intended to apply to the amendment or repeal of any part" of the Business and Professions Code (211 Cal. at p. 475) confirms that the Legislature did *not* intend section 4 to constitute a general saving clause.[11]

Undaunted, Plaintiffs and their amici assert that section 4's language is "unambiguous" in their favor, but that is obviously wrong. There is no escaping the fact that their argument effectively rewrites section 4 as if it referred not just to those subsisting rights and cases commenced "before this code takes effect" in August 1937 (Bus. & Prof. Code, § 4), but also to any post-1937 actions that might be commenced "before any repeal or amendment to any part of this code takes effect." Their argument must be rejected, for it violates the settled principles of construction that "[w]ords may not be inserted in a statutory provision under the guise of interpretation" (*Kirkwood v. Bank of America Nat. Trust and Savings Assn.* (1954) 43 Cal.2d 333, 341), and courts "may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002.)

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[11] Moreover, section 4's text is entirely unlike the language in those provisions this Court has held to qualify as "general" saving clauses – such as the federal general saving clause, California's criminal general saving clause (Gov. Code, § 9608, formerly Pol. Code, § 327), and former Civ. Code, § 404 (now Corp. Code § 102). (*McNulty, supra*, 93 Cal. at pp. 437-438; *Peterson, supra*, 211 Cal. at p. 464; see also *Dapper, supra*, 71 Cal.2d at p. 189, fn. 2 [contrasting Gov. Code, § 9608, with narrower language in San Diego Municipal Code's limited saving clause].)

The effort of Plaintiffs and their amici to have this Court *expansively* construe section 4 is further undermined by the "well settled" canon that statutes "in derogation" of "common law" principles "must be construed strictly." (*Prager v. Isreal* (1940) 15 Cal.2d 89, 93; accord, *McCann v. Hoffman* (1937) 9 Cal.2d 279, 282; *Kramer v. San Francisco Market Street Railroad Co.* (1864) 25 Cal. 434, 436; see also *United States v. Texas* (1993) 507 U.S. 529, 534 ["to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law"].) Because a saving clause is a statute in derogation of the "general common law rule" of repeal and abatement (*Mann, supra,* 18 Cal.3d at pp. 829-831), any such provision is strictly construed and limited. (See, e.g., *Bell v. Maryland* (1964) 378 U.S. 226, 233-234; *Rodgers v. United States* (6th Cir. 1947) 158 F.2d 835, 836-837.)[12] Under this applicable canon of construction, the Court cannot entertain the invitation of Plaintiffs and their amici broadly to construe section 4. "Where there is any doubt about their meaning and intent," statutes in derogation of the common law "are given the effect which makes the least rather than the most change in the common law." (3 N.J. Singer, Statutes & Statutory Construction (6th ed. 2002) § 61:1, at p. 217.)

Moreover, the Legislature knows how to write a general saving clause that applies to future repeals or amendments to any part of a code or statute when that is its genuine intent. Unlike section 4 here, the California Codes contain several provisions employing the sort of broadly worded language that – under *McNulty* and *Peterson* – is necessary to qualify them as such a genuine "general" saving clause. For example, the saving clause

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[12] While several California Codes have provisions abrogating this canon of construction as applied to those specific codes (see, e.g., Civ. Code, § 4; Penal Code, § 4; Code Civ. Proc., § 4), the Business and Professions Code contains no such provision.

in Financial Code section 117 contains language that explicitly goes beyond the initial enactment of the code to include subsequent amendments and repeals: "[n]either the enactment of this code *nor the amendment or repeal thereof nor the repeal of any statute affected thereby* shall take away or impair any liability or cause of action existing or incurred against any bank or trust company or the shareholders, directors, or officers thereof." (Fin. Code, § 117, italics added.) Likewise, Corporations Code section 102, subdivision (c), explicitly states that "[n]either ... the enactment of this title, *nor the amendment thereof* shall impair or take away any existing liability or cause of action against any corporation, its shareholders, directors, or officers incurred *prior to the time of the enactment, reenactment, or amendment.*" (Corp. Code, § 102, subd. (c), italics added.) The *limited* saving clause of section 4 here is materially different from these aptly worded *general* saving statutes.

In fact, both the Financial and Corporations Codes contain limited saving clauses indistinguishable from Business and Professions Code section 4, which similarly operated to save those subsisting rights and cases commenced before those Codes originally took effect. (See Fin. Code, § 3; Corp. Code, § 4.) If Plaintiffs and their amici were correct that the language of section 4 qualifies it as a general saving clause, then the same would be true of its counterparts in the Financial and Corporations Codes. That, however, would render the additional and apt saving clauses in Financial Code section 117 and Corporations Code section 102 superfluous, unnecessary, and mere surplusage. Because the Court "avoid[s] statutory constructions that render particular provisions superfluous or unnecessary" (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459), or mere "surplusage" (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045), it should reject the claim that section 4 is a general saving clause.

While Plaintiffs and their amici contend that section 4 can be transformed into a general saving clause based on Business and Professions Code section 12, their argument is frivolous. Section 12 provides that "[w]henever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made." (Bus. & Prof. Code, § 12.) Section 12 ensures that *cross-references* within the Business and Professions Code to "any portion of this code" or to "any other law of this State" will always be understood to refer to the *then-current* version of the section being cross-referenced. (*Ibid.*) Section 12 has no application here, because section 4 does *not* adopt or incorporate by "reference" a "portion of this code" or "any other law." (*Ibid.*)[13] Rather, the word "code" appears in the *specific context* of section 4's phrase "before this code takes effect" – which the Legislature employed to identify what subsisting cases and rights were unaffected by the original adoption of the Business and Professions Code and its related repeals in August 1937.[14] Section 4's phrase "before

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[13] Section 12 is one of California's "reference statute construction laws" applicable to statutes "commonly called 'reference statutes," which involve a "statute that cross-references another law" and "adopts within itself the provisions of the cross-referenced law." (S.A. Baxter, Reference Statutes: Traps for the Unwary, 30 McGeorge L. Rev. 562, 563-564, 568-560 (1999.) Like comparable provisions, section 12 was designed to abrogate not the common law's Repeal Rule, but rather the common law's strict rules about "reference statutes." (*Ibid.*; compare *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 [under common law, where "a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified"].)

[14] Plainly, the word "code" in section 4 cannot be interpreted out of the phrase and specific context in which it actually appears, as Plaintiffs and their amici effectively seek. (See, e.g., *State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) Cal.4th 1029, 1043 ["'statutory language'" must be

this code takes effect" thus references a *particular point in time*: the fixed date on which the code took effect in August 1937. Nothing in section 12 or its history suggests that section 4's use of the word "code" in the phrase "before this code takes effect" can be transmogrified into an open-ended reference to all future dates in which any repeal or amendment to any part of the Business and Professions Code might take effect.[15]

Finally, *none* of the authorities cited by Plaintiffs and their amici holds – or even suggests – that section 4 qualifies as a general saving clause sufficient to abrogate the Repeal Rule here. The only cited case that involved repeals at all is *Sobey v. Maloney*, but Plaintiffs and their amici misinterpret the case. *Sobey* is 1940 appellate decision arising from a prosecution of a defendant doctor for performing criminal abortions between July 1934 and March 1937, before the August 1937 codification of the Business and Professions Code. (40 Cal.App.2d at p. 383.) The Court of Appeal in dicta reasoned that section 4 operated as a limited saving clause applicable *only* to those pending cases or rights accrued *prior to August 1937* when the code took effect – including the right to prosecute defendant Sobey for his pre-August 1937 criminal abortions – if the Legislature in 1937 or subsequent sessions amended the law in a substantial

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construed "'in context'" and not "'in isolation,'" citation omitted]; *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1055 ["words of [a] statute must be construed in context," giving meaning "to every word" and "phrase" employed].)

[15] The only "authority" Plaintiffs or their amici cite for their position is a passing snippet of inapposite dicta in *Koster v. Warren* (9th Cir. 1961) 297 F.2d 418, 419-420 – a case not even implicating the Repeal Rule – suggesting that Corporations Code sections 4 and 9 "cast doubt" on whether Corporations Code section 834's liberalization of a plaintiff's ability to sue without posting a bond could be applied retroactively to a defendant's detriment. That passing dicta is plainly insufficient to transform section 4 into a *general saving clause* that could preclude application of Proposition 64 to this pending case under the Repeal Rule.

manner that might otherwise affect *those 1937-subsisting rights and cases.* (40 Cal.App.2d at pp. 388-389; *id.* at p. 388 [agreeing that section 4 "saves prosecutions for offenses committed prior to August, 1937, although complaints were not filed until after that date"].)[16] The *Sobey* court did not decide – nor did it have any occasion to decide – whether section 4 operated as a general saving clause under *McNulty* and *Peterson* (neither of which *Sobey* even cites) regarding what effect *subsequent repeals* of *any part* of the Business and Professions Code would have on those rights accrued in cases commenced *long after* the Code originally took effect.

Nor do *Hogan v. Ingold* (1952) 38 Cal.2d 802 (*Hogan*), or *Evangelatos*, *supra*, 44 Cal.3d 1188, lend credence to the claim of Plaintiffs and their amici that section 4 is a "general saving clause" sufficient to abrogate the Repeal Rule as applied to Proposition 64. *Hogan* held that a particular amendment to Corporations Code section 834 imposing restrictions on the maintenance of shareholder derivative suits was "procedural" and properly applied to plaintiff's post-amendment suit. (38 Cal.2d at 805.) While Plaintiffs fasten on one paragraph at the end of the decision involving Corporations Code section 4, the Court in that passage simply rejected the argument that the provision could possibly assist the plaintiffs there, because "there is nothing in the quoted language [of section 4] which implies that section 834 shall not be applied to actions *commenced after* its effective date." (*Id.* at 816, italics added.) The Court had no occasion to address whether section 834 would also apply to suits *before* the effective date of the new amendment. In any event, nothing in *Hogan*

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[16] In fact, *Sobey* holds that the case was governed by section 2 (not section 4), because section 2 operates "as a saving clause where no substantial change was made in the law" and the provision pertinent to Sobey's case had not been changed by enactment of the Code. (40 Cal.App.2d at pp. 384-391.)

remotely compels the conclusion that the language of Business and Professions Code section 4 qualifies it as a *general saving clause* sufficient to abrogate the common law's Repeal Rule here. Indeed, *Hogan* did not even implicate the Repeal Rule.

The suggestion of Plaintiffs and their amici that *Evangelatos* supports their general-saving-clause argument is similarly unavailing. They imply that *Evangelatos* instructs that provisions like Business and Professions Code section 4 apply to subsequent repeals or amendments to any part of the Codes at issue, but that is not correct. *Evangelatos* holds that Civil Code section 3 – which provides "[n]o part of it [i.e., the Civil Code] is retroactive, unless expressly so declared" – applies to any subsequent amendment to parts of the Civil Code. (44 Cal.3d at p. 1207 & n.11).[17] Unlike section 4 here, Civil Code section 3 does not limit its application to only those rights accrued and cases commenced "before" the fixed date on which "this code takes effect" (Bus. & Prof. Code § 4), but rather broadly declares that the non-retroactivity principle applies to the Civil Code and any "part of it." (Civ. Code, § 3.)

While Plaintiffs note that *Evangelatos* included Labor Code section 4 among a list of provisions that are "similar" or "comparable" to Civil Code section 3 (44 Cal.3d at pp. 1207-08 & fn. 11), they disregard the respect in which *Evangelatos* says that the provisions are comparable: "'[S]ection 3 of the Civil Code embodies the common law presumption

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[17] Plaintiffs and their amici disregard that the Civil Code's counterpart to Business and Professions Code section 4 is *Civil Code section 6*, not section 3. (Civ. Code, § 6 ["No action or proceeding commenced before this code takes effect and no right accrued, is affected by its provisions."].) A statement that Civil Code section 3 applies to amendments therefore says nothing about whether Civil Code section 6 (and Business and Professions Code section 4) applies to future repeals or amendments to any part of the Codes – much less whether such provisions constitute general saving clauses under *Peterson* and *McNulty*.

against retroactivity,' and numerous decisions of this court have recognized that comparable provisions in other codes represent legislative embodiments of this general legal principle." (*Id.* at p. 1207, fn. 11; *id.* at pp. 1207-1208 ["Like similar provisions found in many other codes (see, e.g., Code Civ. Proc., § 3; Lab. Code, § 4), section 3 reflects the common understanding that legislative provisions are presumed to operate prospectively...."].)

The statement that Labor Code section 4 at some level "reflects" or "embod[ies]" the general principle of non-retroactivity says absolutely nothing about the entirely *different* question of whether the text of Labor Code section 4 (or, here, Business and Professions Code section 4) qualifies as a *general saving clause* sufficient to abrogate the Repeal Rule with respect to subsequent repeals or amendments to any part of the Codes. At most, *Evangelatos*' reference to Labor Code section 4 as "reflecting" general anti-retroactivity principles merely underscored the uncontroversial fact that such general principles remain applicable to the Labor Code – regardless of whether that Code contains any provision analogous to Civil Code section 3.

But even assuming *arguendo* that Business and Professions Code section 4 "embodies the common law presumption against retroactivity" (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207, fn. 11), that would *not* assist Plaintiffs or their amici in trying to evade application of Proposition 64 to this pending case under the Repeal Rule. As this Court has repeatedly made clear, arguments based on any general anti-retroactivity principles are *insufficient* to preclude application of a repeal to pending cases under the common law's Repeal Rule. (*Mann*, *supra*, 18 Cal.3d at p. 829; *Callet*, *supra*, 210 Cal. at pp. 67-68; *Tapia*, *supra*, 53 Cal.3d at p. 301 n.18 [confirming that statutes embodying the general common law presumption against retroactivity are insufficient to displace the common law's Repeal

Rule].) What Plaintiffs and their amici would need to establish – and what they cannot – is that section 4 is a genuine "general saving clause" that, under *Peterson* and *McNulty*, is sufficient to abrogate the Repeal Rule.

Accordingly, the Court should reject the legally defective effort of Plaintiffs and their amici to portray section 4 as if it were a genuine "general saving clause" that could nullify the otherwise controlling effect of the Repeal Rule here with respect to Proposition 64.

II. Proposition 64 Alternatively Applies To Pending Cases Because Its Provisions Are Procedural And Do Not Change The Legal Consequences Of Past Conduct, And Because Such Application Is Prospective

The foregoing is dispositive: Proposition 64 applies to pending cases under this Court's Repeal Rule jurisprudence. As an entirely alternative ground, Proposition 64 also applies here under the Court's distinct jurisprudence regarding the "prospective" and "retrospective" (or retroactive) application of new statutory enactments.

Despite the general presumption in favor of "prospectivity" and against "retrospective" application of new enactments without clear retroactive legislative intent, "[t]here remains the question of what the terms 'prospective' and 'retrospective' mean." (*Tapia, supra*, 53 Cal.3d at pp. 287-288.) A new enactment has a "retrospective effect" only "when it substantially changes the legal consequences of past events." (*Western Security Bank v. Superior Court* (*Vista Place Assocs.*) (1997) 15 Cal.4th 232, 243; accord, *McClung, supra*, 34 Cal.4th at p. 471; *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 (*Kizer*); *Tapia, supra*, 53 Cal.3d at pp. 289-291 [new enactment is not retrospective unless it actually "change[s] the legal consequences of the parties' past conduct," typically "by imposing new or different liabilities based upon such conduct"].)

Application of new *procedural* enactments to future proceedings in pending cases is generally deemed "prospective," and "'is not made retroactive merely because it draws upon facts existing prior to its enactment.'" (*Tapia, supra*, 53 Cal.3d at p. 288-290, quoting *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49 (*Strauch*).) The "effect" is "prospective in nature" because such enactments typically "'relate to the procedure to be followed in the future.'" (*Id.* at p. 288, citation omitted.) It is a "'misnomer" to designate such procedural enactments "'as having retrospective effect.'" (*Ibid.*; *Elsner, supra*, 34 Cal.4th at p. 936.) Thus, a "statute is applied retroactively only if it changes the legal consequences of an act completed before the effective date of the statute," while a statute "addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date of the statute." (*Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 503 (*Bonta*).)

Because there is "no clear cut distinction between purely 'procedural' and purely 'substantive' legislation," the Court ultimately focuses on the "effects" of applying the new enactment. (*Aetna, supra*, 30 Cal.2d at pp. 394-395; accord, *Elsner, supra*, 34 Cal.4th at p. 937.) But application of a new "procedural" enactment is deemed "retroactive" *only* where is it shown to be "substantive in its effect" by actually "chang[ing]" the "legal effects of past events" – such as by "impos[ing] a new or additional liability" on a party based on its pre-enactment conduct, thereby "substantially affect[ing] existing rights and obligations." (*Aetna, supra*, 30 Cal.2d at pp. 394-395; see also *Tapia, supra*, 53 Cal.3d at pp. 290-291.)

Here, there are two reasons why Proposition 64 applies to pending cases under this Court's authorities governing the prospective or retrospective application of new enactments.

A. Applying Proposition 64's Procedural Standing And Class-Action Provisions Has No "Retroactive" Effect Because It Does Not Change The Legal Effects Of Past Conduct

This case implicates Proposition 64's standing amendment to section 17204 (Prop. 64, § 3), and its class-action amendment to section 17203 (Prop. 64, § 2). Both provisions are procedural in nature: This Court and the Courts of Appeal have repeatedly acknowledged the "procedural" nature of both standing requirements[18] and class-action requirements.[19]

While not necessarily dispositive in itself, the fact that Proposition 64's provisions at issue here are procedural in nature informs the Court's analysis of whether applying them here raises retroactivity concerns.[20]

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[18] (See, e.g., *Casa Herrera, Inc. v. Beyduon* (2004) 32 Cal.4th 336, 348 ["lack of standing" is "procedural"]; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447 [plaintiff's "standing to sue" involves "procedural questions"]; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523 (*Parsons*) [amended "standing" rules governed pending case as "procedural only"]; see also *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1164 fn. 2; *Residents of Beverly Glen, Inc. v. Los Angeles* (1973) 34 Cal.App.3d 117, 122.)

[19] (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440 ["the propriety" of representative "class action" litigation involves "'a procedural question,'" citation omitted]; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 ["class action mechanism" is a "procedural device"]; see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Green v. Obledo* (1981) 29 Cal.3d 126, 146; *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849; *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716.) Requirements governing the propriety of any form of representative action have been described as "procedural" in nature. (*Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864; *Weaver v. Pasadena Tournament of Roses Ass'n* (1948) 32 Cal.2d 833, 841; cf., *Hogan*, *supra*, 38 Cal.2d at pp. 812-813, 816.)

[20] If, however, the Court were to accept Plaintiffs' erroneous arguments regarding Business and Professions Code section 4 and thus find that provision implicated here, then the *procedural* nature of Proposition 64's standing and class-action provisions would fully support their application to this case – given that the last clause of section 4 provides "but *all*

Indeed, application of Proposition 64's procedural changes to govern future proceedings here could raise retroactivity concerns only if it "changed the legal consequences of past conduct." (*Tapia*, *supra*, 53 Cal.3d at pp. 288-291; *Aetna*, *supra*, 30 Cal.2d at pp. 394-395.)

Plaintiffs and their amici have made no such showing, nor could they. Proposition 64 does not alter the UCL's *substantive* proscriptions under section 17200. Any conduct that violated the UCL before violates the UCL after Proposition 64. So under Proposition 64, any defendant that violated the UCL's substantive proscriptions in section 17200 *remains subject to suit* by state and local authorities, as well as by persons who were genuinely injured by such violations. Proposition 64 merely operates after its November 3, 2004 effective date to prevent *un*-injured and *non*-aggrieved persons or groups from prosecuting and pursuing UCL claims – including the procedural ability to litigate such statutory equitable claims on behalf of others. Thus, Proposition 64 does *not* "exonerate" defendants who have violated the UCL's substantive provisions (Pltfs' Br., at p. 5), but rather simply alters *who* may prosecute UCL claims for the general public and *how* such claims may be pursued after November 3, 2004.[21] Given that Proposition 64 does not alter the substantive legal effects of any past conduct, its application here raises no retroactivity concerns.

Unlike here, cases in which new enactments have been held to have a "retroactive" or "retrospective" effect involved circumstances in which

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procedure thereafter taken therein *shall* conform to the provisions of this code *so far as possible*." (Bus. & Prof. Code, § 4, italics added.)

[21] Plaintiffs are wrong to say that applying Proposition 64 to "terminate" this case for lack of standing would "exonerate the defendant" from UCL liability "unless injury in fact is shown" (Pltfs' Br., at p. 5), because state and local prosecutors are not encumbered by any "injury in fact" requirement. (Prop. 64, § 3; see also *id.*, §§ 1(f), 1(g).)

the enactment would: make "tortious" conduct that was "lawful" at the time it occurred (*Myers*, *supra*, 28 Cal.4th at pp. 839-840); increase the monetary exposure for a party's past conduct greater than that in effect when the conduct occurred, thereby imposing a "new or additional liability" on past conduct (*Aetna*, *supra*, 30 Cal.2d at pp. 394-395); "impose personal liability on persons" for "actions not subject to liability when performed" (*McClung*, *supra*, 34 Cal.4th at pp. 489-470, 476-477; alter the "standard of care" applicable to conduct of a party that may have met the applicable standard of care when that party acted (*Elsner*, *supra*, 34 Cal.4th at p. 938); or subject a party's pre-enactment conduct to laws from which that conduct was previously exempt (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950, 953).[22]

Application of Proposition 64 to this pending case would *not* have any such retroactive effects. Proposition 64 does not render tortious or actionable any past conduct. It does it impose any new, different or additional liabilities. Nor does it otherwise impair any "'vested rights'" Plaintiffs possess under California law. (*Myers*, *supra*, 28 Cal.4th at p. 839, quoting *Landgraf*, *supra*, 511 U.S. at p. 269.) Tellingly, neither Plaintiffs or their amici cite any case holding (or even suggesting) that application of a new enactment to deprive an *uninjured* party of *representative* standing to prosecute statutory and entirely *equitable* claims for the general public would even raise – much less violate – any retroactivity principles.

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[22] While *Evangelatos* held Proposition 51's changes to the common law's joint-and-several liability doctrine did not apply to pre-enactment cases given the absence of express retroactive intent, such application would have interfered with vested rights in accrued common law claims where the parties had justifiably relied on the then-existing state of the common law and took irreversible actions based thereon. (44 Cal.3d at pp. 1192-1193, 1196-1199, 1205, 1225 & fn. 26.) This case involves purely statutory UCL claims, and no party can justifiably rely on the immutable nature of such claims. (See Gov. Code, § 9606.)

Instead, Plaintiffs simply assert that applying Proposition 64 to "terminate" their case for lack of standing would deprive them of "substantive" "rights" they supposedly had under the pre-Proposition 64 UCL regime. (Pltfs' Br., at p. 5.) The assertion is not only unsupported, but it is contrary to a century of this Court's jurisprudence: Parties in California have *no* legally protected "rights" in any purely statutory claims that are not at risk of being withdrawn or impaired by an intervening enactment at any time until such rights have been perfected and vested in a non-appealable final judgment. (*Ante*, at pp. 5-11; Gov. Code, § 9606.)[23] Moreover, because Plaintiffs were admittedly *not injured* by CDA's alleged UCL violations, it is inconceivable to posit that they have any "substantive rights" at all – particularly where the claimed "right" at issue is the *procedural* ability of *uninjured* parties to prosecute statutory equitable claims in a *representative* capacity for others. (*Hogan*, *supra*, 38 Cal.2d at pp. 812-813 [authority to "maintain a suit in equity 'in the right' of another is a matter manifestly appropriate for state legislation" over which the state has "plenary" authority, and involves "no vested right"]; *Parsons*, *supra*, 31 Cal.App.4th at p. 1523 [parties have no "vested" rights in any "rules of

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[23] Plaintiffs' "rights" argument is based on an incorrect reading of one formulation of the retroactivity test in *Myers*: whether the new enactment "'affects rights, obligations, acts, transactions and conditions which [we]re performed or exist[ed] prior to the adoption of the statute.'" (Pltfs' Br., at p. 4, citation omitted.) In *Tapia*, the Court explained that it has never employed that formulation to prevent application of new procedural enactments in the conduct of future trials and proceedings. (53 Cal.3d at pp. 291-292.) The same the formulation appears in *Aetna* and *Evangelatos*, but the holdings in both cases were based on the critical conclusion that the new statutes "changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Id.*, at pp. 290-291.) *Myers* itself equates the formulation on which Plaintiffs rely with this standard: "Phrased another way, a statute that operates to 'increase a party's liability for past conduct' is retroactive." (28 Cal.4th at p. 839, citation omitted.)

procedure"; statutory standing changes are "procedural only"].) Plaintiffs also forget that their UCL claims are asserted for the general public. Yet it is the general public – the voters – that enacted Proposition 64 to deprive uninjured persons of the authority to prosecute UCL claims for the general public, and to authorize only designated state and local prosecutors to do so. (Prop. 64, § 3; *id.*, §§ 1(f), 1(g).)

The argument that Proposition 64 deprives Plaintiffs of some absolute "right to pursue a UCL action" they supposedly had before Proposition 64 (CAOC-CRLA Br., at p. 5) also disregards this Court's instruction in *Kraus* that, "because a UCL action is one in equity," courts always could "decline to entertain the action as a representative suit" if the "action is not one brought by a competent plaintiff for the benefit of injured parties." (23 Cal.4th at p. 138.) It also ignores that the trial courts have always had the broad "equitable" discretion to deny any relief in UCL actions, given that the UCL does "not mandate restitutionary or injunctive relief" even where "an unfair business practice has been shown." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179 (*Cortez*).) So even under the pre-Proposition 64 regime, Plaintiffs had no absolute "right to pursue" representative UCL claims for the general public (Pltfs' Br., at p. 5) – much less any "right" to proceed to trial and to obtain any of the UCL's equitable remedies. Rather, the trial court had broad discretion to decline to entertain the suit (*Kraus*, *supra*, 23 Cal.4th at p. 138); to deny recovery (*Cortez*, *supra*, 23 Cal.4th at p. 179); or to abstain where appropriate (see, e.g., *Desert Healthcare Dist. v. Pacificare, FHP, Inc.* (2001) 94 Cal.App.4th 781,794-795). Depriving an uninjured party of a ticket to a court of equity does not raise retroactivity concerns because it does not change the legal consequences of past conduct in any legally cognizable way. Indeed, because Proposition 64 *preserves* the ability of

public prosecutors and injured persons to prosecute violators of the UCL, the initiative does not change the legal consequences of past conduct at all.

Plaintiffs' claim that there is "no principled" way to distinguish *Beeman v. Burling* (1990) 216 Cal.App.3d 1586 (*Beeman*) is incorrect. (Pltfs' Br., at pp. 5-6.) *Beeman* involved an injured plaintiff who was found to have obtained personal "substantive rights" by virtue of a "default judgment" that he rightly secured under the law in effect when the default-judgment procedure was invoked. (216 Cal.App.3d at 1607.) This case, by contrast, involves *uninjured* plaintiffs with no personal substantive rights; the sole issue is the *procedural* standing of uninjured parties to prosecute representative claims for others in the hopes of someday obtaining a judgment. The procedural determination to which the new rules in *Beeman* related (motion to set aside a default judgment) had already occurred and, as *Beeman* holds, was correctly made in accordance with the law at the time the procedure was invoked. (*Ibid.*)[24] The procedural determination here is not comparable; standing must exist at *all* stages of a case. (See, e.g., *Bivens*, *supra*, 126 Cal.App.4th at p. 1404-1405.) Thus, unlike *Beeman*, this case involves the "prospective" application of Proposition 64's procedural standing rules to the *continued* efforts of Plaintiffs to prosecute UCL claims for the general public. Proposition 64 governs all "procedure to be followed in the future" (*Tapia*, 53 Cal.3d at p. 288), for all "acts to be

[24] It was for this reason the *Beeman* court believed that assessing the trial-court's ruling under the new default-judgment rules would involve a "retroactive" application, for that would grant the defendant a "right" it already "lost" under "the law existing at the time of the default judgment." (216 Cal.App.3d at 1607.)

performed after" Proposition 64's "effective date" (*Bonta, supra*, 77 Cal.App.4th at p. 503).[25]

Finally, Plaintiffs' amici also fail to demonstrate that applying Proposition 64 to pending cases will have a "retroactive" effect by substantially changing the legal effects of past events. Their argument focuses on the claimed "effect" that application of Proposition 64 might have on pending UCL representative cases in which amici CRLA is counsel of record. (CAOC-CRLA Br., at pp. 23-51.) CRLA's clients are identified as poor farm workers, low-wage workers, and low-income tenants. (*Id.*, at p. 27.) CRLA states that its clients *have* suffered "injuries in fact" and "monetary injuries" as a result of the challenged practices in those cases, and also says that such cases could properly proceed as class actions. (*Id.* at pp. 30-31.) Thus, Proposition 64's standing provision would not deprive CRLA's clients of UCL claims; nor would its class-action requirement preclude litigation of CRLA's cases as class actions.

In fact, CRLA does not even claim that Proposition 64 itself would operate to change the legal consequences of any past acts. Their argument is based on the fact that Congress enacted a federal law precluding CRLA from acting as counsel for injured clients in class actions. (*Id.* at p. 31; 45 C.F.R 1617.1-1617.4.) Due to this federal law, CRLA asserts that applying Proposition 64 to pending cases means that its injured clients would have to either (i) "substitute new counsel" in place of CRLA, or (ii) "abandon their

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[25] Plaintiffs' claim that *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, supports their retroactivity arguments is equally baseless. *Brenton* rejected the contention that applying the new SLAPP amendment "would change the legal consequences of past conduct" merely because it would make "unauthorized" litigation activities that might previously have been authorized. (116 Cal.App.4th at pp. 690-691.) Likewise, the mere fact that Plaintiffs were formerly authorized to file and litigate their UCL claims "is no impediment" to applying Proposition 64 here. (*Ibid.*)

claims." (*Id.*) CRLA speculates that substituting counsel is "impractical" and predicts its clients will abandon their claims; hence, CRLA says, the legal consequences of defendants' past conduct "will" be changed. (*Id.* at 31, 42-43.) While the conjectural assumptions underlying CRLA's predictions are dubious, it is the entirely *speculative* nature of their argument that is dispositive: This Court has long rejected retroactivity arguments rooted in "speculation." (*Tapia, supra*, 53 Cal.3d at p. 300; *County of Los Angeles v. Superior Court* (1965) 62 Cal.2d 839, 845.)

Moreover, the claimed effect about which CRLA complains is not caused by Proposition 64, but rather by *Congress* and the *federal law* that prohibits *CRLA* from participating in class-action litigation. Without that federal law, even CRLA admits that Proposition 64 would not impede CRLA or its clients from proceeding with pending claims individually or on a class-wide basis.[26] Thus, it is not any "retroactive" application of *Proposition 64* to pending cases that causes the hardships about which Plaintiffs' amici complain. Indeed, all of the problems they identify arise from an indisputably prospective application of Proposition 64 to cases filed after its effective date. That CRLA's clients might need to obtain new counsel to proceed on the class-action (or individual) claims that Proposition 64 *preserves* for them is plainly insufficient to preclude its application to pending cases.

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[26] Although federal law prohibits CRLA from "initiating or participating" in a class action, it does *not* prohibit CRLA from assisting injured clients in other ways – such as identifying victims; notifying them of their rights (in languages they understand); helping them secure other counsel; and representing them in prosecuting their *individual* UCL claims after Proposition 64, even on a coordinated *non*-class-action basis. (See 61 Fed.Reg. 63754, 63755 (Dec. 2, 1996).)

B. Proposition 64 Applies Here On A Prospective Basis In Accordance With The Plain Meaning Of The UCL's Statutory Text, As Amended By The California Voters

Any analysis of the proper application of a new statutory provision "must begin" with the "plain language of the statute." (*Kizer*, *supra*, 48 Cal.3d at p. 8 ["If a statute's language is clear," then the language's "plain meaning" governs].) This rule applies "equally in construing statutes enacted through the initiative process." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Thus, the Court begins its analysis by examining the language of the UCL's amended statutory text, "giving the words their usual and ordinary meaning." (*Ibid.*) Further, the Court analyzes the "date of the conduct regulated" (*Tapia*, *supra*, 53 Cal.3d at p. 291) by the "language of the statute" (*Kizer*, *supra*, 48 Cal.3d at pp. 7-8) in determining whether the enactment's application is prospective or retrospective. (*Bonta*, *supra*, 77 Cal.App.4th at p. 503 [analyzing statutory text to interpret "time" of conduct governed by new enactment in assessing whether application was prospective or retrospective].)

The plain language of the UCL's amended statutory text confirms that applying the initiative to prevent Plaintiffs from *continuing* to prosecute and pursue UCL claims *after* Proposition 64's effective date is *prospective*.

As amended, section 17204 restricts the standing of private plaintiffs by mandating that UCL claims "shall be *prosecuted* exclusively" by persons who "suffered injury in fact" and "lost money or property as a result of" the alleged UCL violations. (Prop. 64, § 3, italics added.) Thus,

the UCL's amended standing provision does not govern only who may file or bring UCL claims, but who may *prosecute* UCL claims. (*Ibid.*)[27]

The plain meaning of the word "prosecute" includes not only the filing of an action, but its litigation to completion: "To 'prosecute' an action is not merely to commence it, but includes following it to its ultimate conclusion." (Black's Law Dict. (6th ed. 1990) p. 1221; Webster's 3d New Internat. Dict. Unabridged (2002) p. 1820 [defining "prosecute" as: "to follow to the end," "press to execution or completion," "pursue until finished," and "to institute and carry on a legal suit"].) This meaning has long been applied to the word "prosecution": "'The term "prosecution" is sufficiently comprehensive so as to include every step in an action from its commencement to its final determination.'" (*Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708, quoting *Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18; *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 36.)

Further, Proposition 64 amends section 17203 to provide that private parties may "pursue" UCL actions in any representative capacity only if they both satisfy the UCL's standing requirements and comply with the class-action requirements of Code of Civil Procedure section 382. (Prop. 64, § 2.) Like the UCL's statutory term prosecute, the plain meaning of the term "pursue" encompasses not simply the initiation of an action, but its full litigation and prosecution. (Black's Law Dict., at p. 1237 [defining "pursue" as "[t]o follow, prosecute, or enforce a matter judicially, as a complaining party"].)

Thus, the plain meaning of the UCL's amended statutory text provides yet another reason Proposition 64 applies to cases such as this one

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[27] The words "file" and "bring" (or any derivations thereof) *do not appear* anywhere in the text of the UCL's statutory provisions revised by Proposition 64.

in which parties seek to *continue* to prosecute and pursue UCL claims in the courts after the enactment's November 3, 2004 effective date. Indeed, that plain meaning confirms that the effect of Proposition 64's application to pending cases such as this one is *prospective*. (*Bonta*, *supra*, 77 Cal.App.4th at p. 503 ["A statute addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date of the statute."]; accord, *Tapia*, *supra*, 53 Cal.3d at p. 289.) The prospective nature of such application stems from the settled rule that the "requirement of standing must be satisfied throughout the entire action, not just upon the filing of an action." (*Bivens*, *supra*, 126 Cal.App.4th at pp. 1404-1405.)

Proposition 64 changes the *procedural* showing that private plaintiffs must make to continue to pursue or prosecute UCL actions after November 3, 2004. That determination in no way turns on whether an uninjured party was authorized to file or maintain its UCL claims for the general public *in the past*, but rather pertains solely to whether that party has the authority to continue to prosecute and pursue its UCL claims *in future proceedings* after Proposition 64's effective date. Applying Proposition 64 to make that determination is a prospective, not retroactive, application of law. (*Tapia*, *supra*, 53 Cal.3d at p. 289; *Elsner*, *supra*, 34 Cal.4th at p. 936.)

But even if such application were considered "retroactive," the plain language of the UCL's statutory text as amended by the voters in Proposition 64 provides a "clear indication that the electorate" intended it to apply to pending cases. (*Tapia*, *supra*, 53 Cal.3d at p. 287.) This is consistent with the voters' expressed "intent" to authorize "*only* the California Attorney General and local public officials to file and *prosecute* actions on behalf of the general public." (Prop. 64, § 1(f), italics added).

Further, given the ballot arguments that Proposition 64 was designed to "close the loophole" in the UCL's standing provision that allowed the uninjured to prosecute UCL claims in order "to stop" such suits (*Ante*, at p. 3, fn. 2), it would be "'absurd' to 'subscribe to the notion that the [voters] desired to postpone the demise of a procedural loophole.'" (*Tapia, supra*, 53 Cal.3d at p. 289, quoting *Andrus v. Superior Court* (1983) 143 Cal.App.3d 1041, 1047.)

Accordingly, the Court should give immediate effect to the voters' expressed intent and the plain meaning of the UCL's provisions, as amended by Proposition 64, and hold that these uninjured Plaintiffs may no longer continue to prosecute and pursue their UCL claims for the general public after the initiative's November 3, 2004 effective date.

CONCLUSION

For the foregoing reasons, the Court should hold that Proposition 64 applies to cases pending before it was enacted and went into effect.

DATED: April 18, 2005

Respectfully submitted,

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RULE 14(C)(1) CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies, pursuant to Rule 14(c)(1) of the California Rules of Court, that the AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CALIFORNIA BANKERS ASSOCIATION ON PROPOSITION 64'S APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND APPELLANT CALIFORNIA DENTAL ASSOCIATION is produced using proportionately-spaced Times New Roman 13-point typeface and that the text of this brief (including footnotes) contains 13,982 words according to the word count provided by the computer program used to prepare this brief.

Dated: April 18, 2005

By: Steven Weisburd /mds
Steven B. Weisburd

Attorneys for Amici Curiae the California Chamber of Commerce and the California Bankers Association

PROOF OF SERVICE VIA U.S. MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 27th Floor, San Francisco, California 94105.

On April 18, 2005, I served the foregoing document described as follows: **AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CALIFORNIA BANKERS ASSOCIATION ON PROPOSITION 64's APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND APPELLANT CALIFORNIA DENTAL ASSOCIATION**
on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on April 18, 2005, at San Francisco, California.

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Julie W. Lunsford

KIDS AGAINST POLLUTION v.
CALIFORNIA DENTAL ASSOCIATION
In the Supreme Court of the State of California
Case Number S117156
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Party	Attorney
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KIDS AGAINST POLLUTION v.
CALIFORNIA DENTAL ASSOCIATION
In the Supreme Court of the State of California
Case Number S117156
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KIDS AGAINST POLLUTION v.
CALIFORNIA DENTAL ASSOCIATION
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KIDS AGAINST POLLUTION v.
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