# IN THE SUPREME COURT
# OF THE STATE OF CALIFORNIA

WEBSTER BIVENS,
Plaintiff and Appellant,

vs.

GALLERY CORPORATION,
Defendant and Respondent

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After A Decision By The Court of Appeal
Fourth Appellate District, Division One
Case No. D045557

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## APPELLANT'S PETITION FOR REVIEW

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Unfair Competition Case
(Bus. & Prof. Code §§ 17200, 17500, 17504)

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WEBSTER BIVENS,

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Fourth District Court of Appeal, Division One
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Appeal from the Superior Court of the State of California,
County of San Diego
Hon. Charles R. Hayes, Judge (Case No. GIC 832910)

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# APPELLANT'S PETITION FOR REVIEW

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## I. ISSUES PRESENTED

1. Do the amendments to Business and Professions Code sections 17203, 17204, and 17535 enacted through Proposition 64, which changed the criteria for standing and for representative actions, apply to previously-filed cases?

2. Can Business and Professions Code section 17504, which prohibits a merchant from advertising a good or service at a single unit price when only multiple units are available for sale, be avoided merely by making the multiple units heterogeneous?

## II. WHY REVIEW SHOULD BE GRANTED

This case presents issues of law that will affect the rights of thousands of litigants and millions of consumers across the State of California. This Court should grant review of this petition to secure uniformity of the decisions among the various Courts of Appeal and trial courts in the state of California on the issue of whether Proposition 64 applies retroactively. Further, this Court should grant review to settle an important question of law regarding the disclosure requirements for the advertising of the price of products that cannot be purchased as single units.

### A. Retroactivity of Proposition 64

Proposition 64 amends the standing requirements under the Business and Professions Code sections 17203, 17204 and 17535. The amended Business and Professions Code now requires a plaintiff to have suffered injury in fact or to have lost money or property as a result of the unfair competition. The amendments also bar representative claims by a plaintiff on behalf of the general public unless that plaintiff not only meets the section's standing requirements but also complies with the provisions of Code of Civil Procedure § 382, the class action statute. If Proposition 64 applies retroactively, over 1,500 plaintiffs who have filed their complaints on behalf of the general public

will lose their rights to maintain their legitimate claims under the Business and Professions Code.

The Courts of Appeal are in conflict regarding the retroactivity of Proposition 64's amendments to the Business and Professions Code. The Courts of Appeal for the First Appellate District, Division 4, in *Californians for Disability Rights v. Mervyns, LLC* (2005) 126 Cal.App.4th 386 (review granted), and for the Second Appellate District, Division 8, in *Consumer Advocates Group, Inc. v. Kintetsu Enterprises* (2005) 129 Cal.App.4th 540 (review granted), held that Proposition 64 *does not* apply retroactively. However, the Courts of Appeal for the First Appellate District, Division 2, in *Schwartz v. Visa Int'l Service Assn.* (2005) 132 Cal.App.4th 1452 (review granted); for the Court of Appeal for the Second Appellate District, Division 5 in *Branick v. Downey Savings and Loan Association* (2005) 126 Cal.App.4th 828 (review granted); and for the Fourth Appellate District, Division 1, in *Lytwyn v. Fry's Electronics, Inc*. (2005) 126 Cal.App.4th 1455 (review granted), *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392 (review granted) and *Thornton v. Career Training Center, Inc.*, 128 Cal.App.4th 116 (2005) (review granted); and Division 3, in *Frey v. Trans Union Corp.* (2005) 127 Cal.App.4th 986 (depublished), and *Benson v. Kwikset Corporation* (2005) 126 Cal.App.4th 887 (review granted) have held that Proposition 64 *does*

apply retroactively. In addition to the cases pending in the Courts of Appeal, many Superior Courts across the State of California have split on the issue of whether Proposition 64 applies retroactively.

This Court has granted review on this issue in the *Mervyns* case and on a related issue (assuming retroactivity, can the problem be cured by amendment?) in the *Branick* case.

Ths Court has issued grant and hold orders on this issue in the *Consumer Advocates Group*, *Schwartz*, *Lytwyn, Bivens v. Corel Corp.*, and *Thornton* cases.

Accordingly, review by this Court is necessary to clear up the conflicting opinions among the California courts on the issue of whether the amendments by Proposition 64 should be applied retroactively.

### B. Extent of Consumer Protection under Business and Professions Code Section 17504 for Advertisements of Products Sold in Multiple Units

Business and Profession Code section 17504(a) requires any retail seller who sells consumer goods or services only in multiple units and who advertises by price, to advertise at the price of "the minimum multiple unit in which they are offered." In interpreting the language of this statute, the Court of Appeal held, in a published decision, that the Legislature unambiguously wrote the statute in a way that totally defeats its purpose. Specifically, the

Court of Appeal held that an advertiser need not advertise a good or service at the minimum multiple unit at which it is offered, so long as the multiple units are heterogeneous and not homogeneous. Thus, under the Court of Appeal's strained interpretation, evasion of the statute is simple.

The Legislature could not have intended for this statute to be so easily avoided, and nothing in the language or the history of the statute indicates that it so intended. However, unless and until this Court addresses this question, this important consumer protection will have been written off the books.

## III. BACKGROUND

On or about December 7, 2003, Gallery Corp. published an advertisement in the supplement to the Los Angeles Times depicting an image of a woman lying on a mattress, with an advertised cost to the right of the image. (Complaint, Exhibit A, AA Tab 1, pg 8.) The advertisement provided in large type: "PRICING STARTING AS LOW AS . . . $48.00," in smaller print, the advertisement provided "TWIN EA. PC." and in even smaller type the advertisement provided "SOLD IN SETS ONLY." (Complaint, Exhibit A, AA Tab 1, pg 8.) At no point does the advertisement explain what a "set" is.


Over the next few months, Gallery Corp. published similar advertisements in the Los Angeles Times. (Complaint, Exhibit A-D, AA Tab 1, pgs. 8-14.) These advertisements enticed consumers to shop at Gallery Corp.'s retail outlet, ultimately to discover that the advertised savings were not available. Specifically, Gallery would not sell the customer a single mattress or box spring for the advertised price. (Complaint ¶16, AA Tab 1, pg. 4.)

Bivens brought his claims on behalf of the general public, as he was permitted to do under the then-existing standing requirements of the Business and Professions Code. (Complaint, ¶¶ 1, AA Tab 1, pg 1.) By and through his Complaint for declaratory and equitable relief, Bivens sought to protect the general public from Gallery Corp.'s unfair and misleading advertising techniques.

On demurrer, the Superior Court dismissed Bivens's claim without leave to amend, and the Court of Appeal affirmed, in a decision reported at 134 Cal.App.4th 847 (2005).[1] The Court of Appeal held that Proposition 64 was applied to cases on file at the time of its filing, so that Bivens lacked standing and could not maintain a representative action. (134 Cal.App.4th at 856-57.) The Court of Appeal also held that Business and Professions Code 17504 did not apply to multiple unit sales in which the multiple units consisted of more than one type of good or service. (134 Cal.App.4th at 860.)

## IV. LEGAL DISCUSSION

### A. Proposition 64 Should Not Be Applied to Pending Cases

Under well established California law, Proposition 64 does not apply to cases filed before its passage. There is a strong presumption against legislative retroactivity. Generally, a statute will only apply prospectively. (*Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) A statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. (*McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475; *Evangelatos v. Superior*

[1] A copy of the appellate court decision. is attached, per California Rule of Court 28.1(b)(4).

*Court* (1988) 44 Cal.3d 1188, 1193-94; *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4th 367, 378; *Plotkin v. Sajahtera* (2003) 106 Cal.App.4th 953, 960.) There is no indication that the voters in enacting Proposition 64 intended to make the legislation retroactive, and therefore there is no basis from departing from the usual presumption. The failure to include an express provision of retroactivity is, in and of itself, highly persuasive of a lack of intent to apply a newly enacted legislation retroactively. (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 818.)

The language of Proposition 64 says nothing to indicate that the normal presumption of non-retroactivity should be discarded. Nor do its findings and declarations. The findings and declarations provide that the "unfair competition lawsuits are being misused," that "frivolous unfair competition lawsuits clog our courts and cost taxpayers," and "cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices" (Proposition 64 section 1(c).) None of these passages even suggests retroactivity.

Section 1(e) provides that it is the "intent of the voters. . . to prohibit private attorneys from *filing* lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Proposition 64 section 1(e) (emphasis added).)

Section 1(f) provides that "it is the intent of the California voters . . . that only the California Attorney General, district attorneys, county counsels and city attorneys be authorized to *file* and prosecute actions on behalf of the general public." (Proposition 64 section 1(f) (emphasis added).)

Thus, the only indication of the intent behind Proposition 64 is to prevent the *filing* of certain types lawsuits – a future act – and not to undermine previously filed lawsuits. As this Court noted with respect to ballot measures, "voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

At the very least, the retroactivity of Proposition 64 is an important unsettled legal question that can only be resolved by this Court.

### B. Business and Professions Code 17504 Must Be Construed to Bar the Type of Deceptive Advertising at Issue Here

The Legislature in enacting Business and Professions Code section 17504 was quite clear: merchants were not to be allowed to lure customers with promises of pricing for individual units that they could not buy as individual units. Obviously, under the statute, a merchant cannot lure a customer into its store by advertising a mattress for $48, and then refuse to sell that customer anything but two mattresses for $96. The Court of Appeal, however, found the statute powerless to stop the equivalent scam of luring a

customer into a store by advertising a mattress for $48, and then refusing to sell that customer anything but a mattress and box spring for $96.

The Court of Appeal reached this absurd result through semantic reasoning that cannot withstand scrutiny. Even though a single mattress is obviously a "single unit," and in this case Gallery Corp. was advertising a single mattress for a single unit price that it would not honor when the customer came through the door, the Court of Appeal found no statutory violation because it did not consider a mattress and a box spring to be "multiple units."

The sole basis for the Court of Appeal's conclusion was that one dictionary definition of unit is the following: "4. *Measurement.* A precisely specified quantity in terms of which the magnitudes of other quantities of the same kind can be stated." (Slip Opinion at 15, quoting American Heritage Dict. (New College ed. 1981) p. 1400, col. 2.) For reasons that it did not make clear, the Court of Appeal decided that this meant that "multiple units" necessarily had to be homogeneous: "'multiple units' necessarily refers to more than one 'good' or 'service' of the same kind." (Slip Opinion at 15.)

However, "a dictionary definition, though always a good starting point, does not necessarily settle how the Legislature meant a term to be understood within a statutory scheme." *Handyman Connection of Sacramento, Inc. v.*

*Sands* (2004) 123 Cal.App.4th 867, 895.) In this case, the Court's choice of a dictionary definition made no sense at all because the problem is not one of "measurement," which is all that the definition pertains to. The statute, like this case, is not concerned with a unit of measurement such as a quart or an inch; it is concerned with mattresses. Much closer to the mark would be the same dictionary's first and preferred definition for the word "unit": "1. An individual, group, structure, or other entity regarded as an elementary structural or functional constituent of a whole." (American Heritage Dictionary of the English Language online edition at http://education.yahoo.com/reference/dictionary/entry/unit;_ylt=ArHffeAHpEKcu.0A8EGAmjusgMMF.) Nothing in this definition suggests that the elementary constituents of the whole – the "units" – must all be the same. In this case, both the mattress and the box spring were individual items that could only be regarded as elementary functional constituents of the "sets" that Gallery Corp. was selling. In selling only sets at the advertised price, and not selling the constituents for which it was advertising a price, Gallery Corp. was advertising single units at a price available only upon the purchase of multiple units. Hence it violated Business and Professions Code section 17504.

For the present, though, the question is not whether the Court of Appeal erred but whether the issue merits Supreme Court review. There are no other appellate decisions interpreting section 17504, probably because until the Court of Appeal issued its ruling, the statute was taken to mean what it says. Now, however, merchants have been freed to advertise prices they do not offer to the customer, so long as the advertised product or service is combined into a heterogeneous bundle. Under the Court of Appeal's decision, a merchant can advertise a pencil for 5¢, inducing the customer has traveled across town to make the purchase, and then refuse to sell the pencil except as part of a $100 pen and pencil set. This is precisely the sort of behavior that the Legislature sought to prevent with section 17504. Unless and until this Court steps in, it will be common practice in California.

## V. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant this petition for review to determine whether Proposition 64 should be applied retroactively to affect existing causes of action and whether Business and Profession Code section 17504 bars the advertisement of single

unit prices that are not actually available for sale only if the multiple units that are available for sale are completely homogeneous.

DATED: January 13, 2006

Respectfully Submitted,

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**CERTIFICATE OF WORD COUNT**
**(California Rules of Court, rule 14(c)(1))**

The text of this petition consists of 2419 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the petition.

DATE: January 13, 2006

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