No. S131798

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

On Petition for Review After a Denial of a Motion to Dismiss
by the Court of Appeal, First Appellate District, Division Four,
Case No. A106199

BRIEF OF *AMICI CURIAE* EXPRESS SCRIPTS INC., NATIONAL PRESCRIPTION ADMINISTRATORS INC., AETNA HEALTH OF CALIFORNIA INC., AND AETNA LIFE INSURANCE COMPANY IN SUPPORT OF DEFENDANT AND RESPONDENT MERVYN'S LLC

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UNFAIR COMPETITION CASE
(SEE BUS. & PROF. CODE § 17209; CAL. RULES OF COURT 15(c)(3), 44.5(c))

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 2, 2004, California voters, faced with a fiscal crisis and a hostile business climate fostered (at least in part) by "shakedown" lawsuits,[1] overwhelmingly approved Proposition 64 and repealed the statutory authority of private plaintiffs to prosecute actions seeking relief under the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq. (the "UCL")) unless the plaintiff "has suffered injury in fact and has lost money or property as a result of [the alleged] unfair competition." Under settled principles of California law as applied by this Court, Proposition 64 applies to all pending actions that were not reduced to final judgment by November 3, 2004.

Proposition 64 repealed a statutory anomaly that, contrary to common law principles of standing, allowed uninjured private plaintiffs in California to prosecute claims on behalf of the general public. In approving the initiative, the voters brought California in line with other states to require actual "injury in fact" and "lost money or property" for unfair competition law actions. That repeal of the formerly broad statutory standing provisions of the UCL *terminated* actions being prosecuted under the repealed statutory scheme, because of this Court's well settled rule that

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[1] (See generally *Graham v. DaimlerChrysler Corp.* (2005) 34 Cal.4th 553, 602-03 (dis. opn. of Chin, J.) [observing that in the current political climate, "Californians are increasingly concerned about extortionate lawsuits against businesses, large and small, and worried that the legal climate in California is so unfriendly to businesses that many are leaving the state and others are deterred from coming here in the first place"].)

an action wholly dependent on statute abates if the statute is repealed (in whole or in part) without a saving clause.

That is precisely the situation here: Proposition 64 repealed the formerly broad standing in the UCL to now require that any private plaintiff must have suffered an injury in fact and lost money or property as a result of the alleged unfair competition. Proposition 64 restricts the standing of private plaintiffs to "prosecute" and "pursue" UCL actions, not merely to "file" such actions. By its terms, the amended UCL therefore precludes uninjured private plaintiffs from continuing to prosecute or pursue representative UCL claims. Binding precedent from this Court requires that trial and intermediate appellate courts in California apply the law as it is, not as it was, even if this means the dismissal of pending actions that were permitted when filed. The California Legislature has codified this rule, warning litigants that they "act[] under any statute . . . in contemplation of this power of repeal."

Notwithstanding these settled legal principles, the Court of Appeal – in distinction to the overwhelming majority of trial and appellate courts that have addressed this issue[2] – refused to enforce this Court's well settled rule. Instead, it divined – and then attempted to resolve – an apparent "conflict in

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[2] The overwhelming majority of intermediate appellate courts that have addressed this issue have held that Proposition 64 applies to pending cases. For the Court's convenience, the Amici include an Appendix at the end of this Brief that catalogues all appellate decisions analyzing Proposition 64 as of today's filing. *Twenty* decisions that have addressed the issue have held that the initiative applies to pending cases (based on the analysis set forth in this Brief), while only *four* – including the decision under review here – reached the contrary conclusion.

canons of statutory interpretation," effectively annulled the well settled rule, and held that application of Proposition 64 to the instant case would be improperly "retroactive."

The Amici respectfully submit that the Court of Appeal's decision should be reversed. The law firm representing Amici Curiae Express Scripts, National Prescription Administrators, Aetna Health of California Inc., and Aetna Life Insurance Company (collectively, the "Amici") has litigated the issues presented by this appeal on nine separate occasions in the trial and intermediate appellate courts in California. Based on the analysis set forth in this Brief alone, the trial or appellate courts applied Proposition 64 to pending cases, including those in which the Amici were defendants, on all nine occasions. The Amici hereby support, and endorse, the arguments raised by Defendant/Respondent Mervyn's, as well as those raised by the California Chamber of Commerce (and other amici), but they also offer the additional arguments contained in this Brief that have not yet been presented to the Court.

This Court's well settled rule applies to terminate this action. This analysis is itself a sufficient basis for reversing the Court of Appeal's decision. A separate compelling basis for reversal, however, arises from a principled application of the "retroactivity" analysis urged, ironically, by Plaintiff/Appellant Californians for Disability Rights ("CDR"). This is because an immediate application of the initiative to this or any other pending case does not alter the legal consequences of past acts or impose new or different liabilities based on that conduct, and Proposition 64 effected only procedural (as opposed to substantive) changes to the UCL.

In sum, the Amici respectfully request that this Court apply its well settled rule that an action dependent upon a statute abate if the statute is

repealed (in whole or in part) during the pendency of the action, reverse the Court of Appeal, and direct the entry of judgment in favor of Mervyn's.

II.

INTERESTS OF *AMICI CURIAE*

Uninjured private plaintiffs have sued the Amici throughout California under the since repealed provisions of the UCL. The Amici have prevailed at the trial level in securing dismissals based on the analysis set forth in this Brief, and an appeal of one of those decisions has been stayed pending this Court's disposition of the instant appeal. If this Court were to affirm the Court of Appeal's decision in this case, the Amici may be forced to litigate the revived actions brought against them even though the plaintiffs in those cases did not suffer, and cannot allege that they have suffered, any injury in fact and lost money or property as a result of the alleged unfair competition.

Express Scripts, Inc., is a corporation headquartered in Missouri that contracts with employers that sponsor employee plans to facilitate the supply of prescription drugs to participants whose plans provide such benefits. National Prescription Administrators, Inc. ("NPA"), also provides these services, and it is headquartered in New Jersey. Aetna Health of California Inc., and Aetna Life Insurance Company (collectively, "Aetna"), as managed care companies, arrange for health care services for residents of California and other states throughout the country. As described in greater detail in the accompanying Application for Leave to File its Brief of Amicus Curiae, Express Scripts, NPA, and Aetna are currently involved in several lawsuits in California being prosecuted and pursued by uninjured private plaintiffs who allege that its business practices violate the UCL.

III.

ARGUMENT

Whatever analysis this Court applies, it all points to the same conclusion: Proposition 64 applies to terminate pending cases being prosecuted and pursued by uninjured private plaintiffs in which those litigants depended upon repealed portions of the UCL. The statutory language of the revised UCL supports immediate application to pending cases. This Court's well settled rule that the repeal of all or a portion of a statutory right or remedy terminates the pending action supports the same conclusion. The same is true of the "retroactivity" analysis applied by the Court of Appeal and CDR.

A. The Language of Proposition 64 Supports Immediate Application To Pending Cases.

Proposition 64 is a ballot initiative tellingly entitled "*Limits* on Private *Enforcement* of Unfair Business Competition Laws," and enacted pursuant to the voters' constitutional "power . . . to propose statutes . . . and to adopt or reject them." (Cal. Const., art. II, § 8(a).) "An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise." (*Id.*, art. II, § 10(a).) Proposition 64 does not contain a specific effective date (AB Appx. 1-6),[3] so the revised UCL took effect on November 3, 2004.

There are several components of Proposition 64 that are relevant to the full analysis this Court will undoubtedly undertake in deciding this case, including the Attorney General's "Official Title and Summary," the

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[3] "AB Appx." refers to the Proposition 64 ballot materials included in CDR's Answering Brief on the Merits.

"Analysis by the Legislative Analyst," the Ballot Arguments, and the "Text of Proposed Law" (including the voters' declarations and findings, the repealed provisions, and the new language of the UCL).

The Amici set forth all the relevant provisions together on the following pages for the Court's convenience. The cumulative impact of all of these provisions demonstrates a strong intent of California voters to affect pending actions filed before the election. In sum, Proposition 64 presented voters with: (1) a summary and analysis of the changes effected by the law that reflected that the initiative would apply to pending cases; (2) ballot arguments that specifically mentioned pending cases as a reason to support or oppose the initiative; (3) specific "findings" that expressed the specific intent to "*eliminate*" and limit the ability of certain private plaintiffs to "file and *prosecute*" UCL actions; and (4) a repeal of language from the statute that had authorized: (a) private actions on behalf of the "general public," (b) representative actions without compliance with procedural rules governing class suits, and (c) the prosecution of any UCL actions by private parties who had not suffered "injury in fact and lost money or property as a result of" the alleged unfair competition.

1. **"Official Title and Summary."** The very title of the initiative, "Limits on Private *Enforcement* of Unfair Business Competition Laws" (AB Appx. 3), suggests some intent to affect pending litigation. In the "Official Title and Summary of Proposition 64," the Attorney General observes, *inter alia*, that the initiative: (1) "Limits [an] individual's right to

sue[4] by allowing private ***enforcement*** of unfair business competition laws only if that individual was actually injured by, and suffered financial / property loss because of, an unfair business practice"; (2) "Requires private representative claims *to comply with procedural requirements* applicable to class action lawsuits"; (3) "Authorizes only the California Attorney General or local government prosecutors *to sue* on behalf of general public to enforce unfair business competition laws." (*Ibid.* (italics and bolded emphases added).) This summary, particularly the use of "sue," supports the conclusion that Proposition 64 applies to pending cases.

2. **"Analysis by the Legislative Analyst."** The official analysis contains the following statement suggesting immediate application of the initiative: "This measure requires that unfair competition lawsuits initiat***ed*** by any person, other than the Attorney General and local public prosecutors, on behalf of others, ***meet*** the additional requirements of class action lawsuits." (AB Appx. 4 (italics and bolded emphases added).) The use of the past tense of "initiate" and the present tense "meet" also suggests that Proposition 64 would apply to pending cases.

3. **"Ballot Arguments."** The arguments presented to the voters in favor of and against Proposition 64 both indicate (and the opponents expressly warn against) the anticipated impact on pending actions:

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[4] Merriam-Webster's Online Dictionary defines the verb "sue" as follows:

> **3 a :** to seek justice or right from (a person) by legal process; *specifically* : to bring an action against **b : *to proceed with and follow up (a legal action) to proper termination.***

(*Merriam-Webster Online Dictionary*, http://www.m-w.com (italics added).)

a. Proponents argued in favor of the initiative that "*No other state allows this.* It's time California voters **stopped** it"; "*Proposition 64 will **stop** thousands of frivolous shakedown lawsuits like these . . .*"; "*'YES' on Proposition 64 makes sense [because it] **Stops** these shakedown lawsuits*"; "'Proposition 64 **closes this loophole** and helps improve California's business climate and overall economic health'"; and "*Here's what 64 really does*: [¶] ***Stops** Abusive Shakedown Lawsuits* [¶] **Stops** fee-seeking trial lawyers from exploiting a loophole in California law . . . [¶] ***Stops** trial lawyers from pocketing FEE and SETTLEMENT MONEY that belongs to the public* [and] *Protects your right to file suit if you've been harmed.*" (AB Appx. 5-6 (bolded emphases added).)

b. In the arguments against the initiative, opponents offered five examples of pending lawsuits or judgments against donors to the campaign to pass Proposition 64, and they argued as follows: "Proposition 64 LIMITS THE RIGHTS OF CALIFORNIANS **TO ENFORCE** ENVIRONMENTAL, PUBLIC HEALTH, PRIVACY, AND CONSUMER PROTECTION LAWS" and "The Attorney General's Official Title for the Proposition 64 petition read[s] '**LIMITATIONS** on Enforcement of Unfair Business Competition Laws.'" (*Id.* at 5-6 (bolded emphases added).) Opponents also noted the following newspaper headlines: "*Measure would **limit** public interest suits*" and "*Consumer lawsuits targeted.*" (*Ibid.* (bolded emphases added).) They also argued that chemical, oil, tobacco, and credit card companies "want to stop . . . organizations **from enforcing**" or "**from suing**" them under various privacy and consumer protection laws. (*Ibid.* (bolded emphases added).) Finally, they urged voters to reject Proposition 64: "Don't let them **limit your right** to enforce the laws that protect us all." (*Ibid.* (bolded emphases added).)

CDR argues that the voters did not "intend" that Proposition 64 apply to pending cases. (AB at 20-25.) In other words, it contends that approval of an initiative entitled "*Limits* on Private Enforcement of Unfair Business Competition Laws," an express declaration of voter intent to "***eliminate*** frivolous unfair competition lawsuits" by uninjured private parties, and a repeal of the statutory authority of these plaintiffs to prosecute UCL actions is not sufficient evidence of voter intent.

Logically, this argument is flawed because it theorizes that voters, when deciding whether to approve Proposition 64, concerned themselves not with existing abuses of the UCL (many of which were well-publicized), but instead with curbing potential future abuses. In other words, CDR apparently postulates that the voters would have had no problem with the Trevor Law Group continuing to prosecute its infamous lawsuits if they were filed on November 1, 2004, but that the same voters intended that identical lawsuits filed *two days later* would be barred. The notion that voters considering the initiative intended to prohibit future, unknown abuses of the UCL – but not *existing* abuses that they could observe directly and read about in the ballot arguments – is entirely unreasonable.

4. **"Text of Proposed Law."** The text of Proposition 64 includes several "findings" by California voters. In the initiative, the voters "find and declare" that the UCL is "***being misused*** by some private attorneys" who had employed the UCL to:

> (1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.
>
> (2) File lawsuits where no client has been injured in fact.
>
> (3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(AB Appx. 1, Prop. 64, § 1(b) (italics and bolded emphasis added).)

In addition, California voters affirmed their intent: (1) "to ***eliminate*** frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to" the UCL; (2) "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"; (3) "that only the California Attorney General and local public officials be authorized to file and ***prosecute*** actions on behalf of the general public"; (4) to ensure that public prosecutors retain the authority and ability to enforce the UCL; and (5) that civil penalties recovered in UCL actions be used "to strengthen the enforcement of California's unfair competition and consumer protection laws." (AB Appx. 1, Prop. 64, § 1(d)-(h) (italics and bolded emphases added).)

CDR's argument that voters did not intend for Proposition 64 to apply to pending actions fails because it *ignores* key provisions of the initiative that expressly declare the voters' intent that the initiative applies to pending actions. CDR selectively recites the voters' intent to prohibit private plaintiffs from "filing" UCL actions if there has been no injury in fact. (AB at 24; AB Appx. 1, Prop. 64 § 1(e).) It conveniently disregards the fact that this statement is preceded by a paragraph that demonstrates express voter intent to eliminate *pending* cases in which there has been no actual injury: "It is the intent of California voters in enacting this act to ***eliminate*** frivolous unfair competition lawsuits." (AB Appx. 1, Prop. 64, § 1(d) (italics and bolded emphasis added).)

Surprisingly, CDR quotes the following provision as support for its position: "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and ***prosecute*** actions on behalf of the general public." (AB at 24; AB Appx. 1, Prop. 64, § 1(f) (italics and bolded emphasis added).) If the initiative did not apply to pending actions, there would be no need to use "prosecute" in addition to "file." To give meaning to both words, Proposition 64 must forbid any continued pursuit of UCL actions by "unaffected" private plaintiffs (such as CDR) purporting to represent the "general public."

The voters also indicated their intent to affect pending cases through their repeal of provisions of the UCL and the addition of new requirements, but CDR does not address the repealed language. Proposition 64 amended Sections 17203 and 17204 by removing the ability of any private person to prosecute an action on behalf of "itself, its members or the general public." It repealed the prior, more expansive standing requirements of the UCL to require that the private plaintiff suffer an actual "*injury in fact*" – in the form of "*lost money or property as a result of such unfair competition.*" (Bus. & Prof. Code, §§ 17203, 17204, as amended by Prop. 64, §§ 2, 3 [AB Appx. 1] (italics added).) The law now provides that "[a]ny person ***may pursue*** representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure" (Bus. & Prof. Code, § 17203, as amended by Prop. 64, § 2 [AB Appx. 1] (italics and bolded emphasis added)), and that "[a]ctions for any relief pursuant to this chapter shall be *prosecuted* exclusively . . . by [selected government officials] or any person who has suffered injury in fact and has lost money or property

as a result of such unfair competition." (*Id.*, § 17204, as amended by Prop. 64, § 3 [AB Appx. 1] (italics added).)[5]

B. <u>This Court's Well Settled Rule Regarding the Repeal of The Statutory Basis for an Action Requires Immediate Application of Proposition 64 To Pending Cases</u>.

Binding precedent of this Court requires the application of Proposition 64 to this action "because of *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 (hereafter *Younger*) (italics added); accord *Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 829-31 (hereafter *Mann*); *Southern Serv. Co. v. City of Los Angeles* (1940) 15 Cal.2d 1, 11-12 (hereafter *Southern Serv. Co.*).)

If the voters or the Legislature terminate the statutory basis upon which any purely statutory action depends, such an action "***stops where the repeal finds it***." (*People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67 (hereafter *Bank of San Luis Obispo*) (italics added); see also *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (hereafter *Callet*) ["[T]he rule is well settled that a cause of action or remedy dependent on a statute fails with a repeal of the statute . . . ."]; *Krause v. Rarity* (1930) 210 Cal. 644, 652-53 (hereafter *Krause*) [observing that it is "thoroughly established in the law of this state that when a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right unless the

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[5] Proposition 64 effected similar changes to the False Advertising Law. (See Bus. & Prof. Code, § 17535, as amended by Prop. 64, § 5 [AB Appx. 1-2].)

right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation."].)[6]

The California Legislature codified this "well settled" rule, confirming for litigants that they invoke a statute with full knowledge that the statutory basis for any purely *statutory* right of action or remedy may change or even disappear during the pendency of the litigation: "*Persons*

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[6] Numerous intermediate appellate decisions follow and apply this "well settled" rule. (See, e.g., *Physicians Comm. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125 ["The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered."]; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 ["Where a right or remedy did not exist at common law but is dependent on a statute, the repeal of the statute without a savings clause destroys such right unless it has been reduced to a final judgment."]; *Dep't of Soc. Welfare v. Wingo* (1946) 77 Cal.App.2d 316, 320 ["It is the general rule here that where a cause of action unknown at the common law has been created by statute and no vested or contractual rights have arisen under it[,] the repeal of the statute without a saving clause before a judgment becomes final destroys the right of action."]; *Lemon v. Los Angeles Terminal Ry. Co.* (1940) 38 Cal.App.2d 659, 670 ["the repeal of the statute before the securing of a final judgment extinguished the cause of action"]; *Pac. Gas Radiator Co. v. Superior Court* (1924) 70 Cal.App. 200, 203 ["[W]here jurisdiction depends upon a statute[,] suits brought during the existence of the statute fall at once upon its repeal."]; accord 7 Witkin, Summary of Cal. Law (9th ed. 1990) Constitutional Law, § 497, p. 690 ["An exception to the rule of prospective construction is recognized where a right of action is created by statute and the statute is repealed without a saving clause: The repeal will operate retroactively to terminate a pending action based on the statute."].)

*acting under **any** statute act in contemplation of this power of repeal.*" (Gov. Code, § 9606 (italics and bolded emphasis added).)

Indeed, absent a "savings" clause or other intent "to save this proceeding from the ordinary effect of repeal," an intervening repeal of the statutory authority for any purely statutory right of action or remedy *presumptively* applies *immediately* to all cases, even those commenced before its enactment. (See *Younger*, *supra*, 21 Cal.3d at p. 110; *Mann*, *supra*, 18 Cal.3d at p. 829; *Wolf v. Pac. Southwest Disc. Corp.* (1937) 10 Cal.2d 183, 184-85; *Callet*, *supra*, 210 Cal. at pp. 67-68.) This analysis therefore obviates an inquiry into whether the voters *intended* that the revised statute apply to pending cases (which provided the Court of Appeal's primary basis for escaping the "well settled" rule in this case). Courts look as far as a saving clause to determine voter or legislative intent that the new statute should *not* apply to pending cases. (See *Younger*, *supra*, 21 Cal.3d at p. 110.)[7]

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[7] Because they focused on the wrong analysis, both CDR and the Court of Appeal misapprehended the inquiry into voter intent. Pursuant to this Court's "well settled" rule, it is necessary only to look as far as a saving clause or other intent "to save this proceeding from the ordinary effect of repeal" to determine voter or legislative intent that the new statute should *not* apply to pending cases. (*Younger*, *supra*, 21 Cal.3d at p. 110.) CDR suggests that it would have been easy for the drafters to simply include an express retroactivity clause (AB at 1, 15-16), but it fails to recognize that such a clause would have been superfluous in this instance because the law amended (repealed) the former authority for CDR's purely statutory right of action or remedy, and therefore, it would take immediate effect anyway under this Court's "well settled" rule. (See, e.g., *Beckman v. Thompson*, *supra*, 4 Cal.App.4th at p. 489 ["[Plaintiff] overlooks that we deal here with a repeal, not a 'retroactive' application of a new statute."].)

[Footnote continued on next page]

The rule applies whether the "repeal" is contained in the same statutory provision (*Mann*, *supra*, 18 Cal.3d at p. 828; *Krause*, *supra*, 210 Cal. at pp. 651-52), whether it takes the form of an amendment (*Younger*, *supra*, 21 Cal.3d at p. 109; *Dep't of Social Welfare v. Wingo*, *supra*, 77 Cal.App.2d at p. 320), whether it impacts part of a statute or the entire code or section (*Younger*, *supra*, 21 Cal.3d at p. 109), and whether it explicitly refers to the old law or simply repeals it by implication. (*Mann*, *supra*, 18 Cal.3d at p. 828; see also Gov. Code, § 9605 [providing that when "a section or part of a statute is amended," "the omitted portions are to be considered as having been repealed at the time of the amendment."].)[8]

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

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[Footnote continued from previous page]

For the reasons explained in the other briefs, CDR's contention that the entire Business and Professions Code is immune from the Court's "well settled" rule is without merit. (See Mervyn's Reply Br. at pp. 9-12; Amicus Curiae Br. of Cal. Chamber of Commerce *et al.*, at pp. 27-34.)

[8] In fact, this is a much clearer case than *Mann*; Proposition 64 involves *the same code provisions*, while *Mann* involved two entirely separate codes (Health & Safety and Education Codes). (*Mann*, *supra*, 18 Cal.3d at pp. 826-27.)

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

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

(*Id.* at pp. 109-10 (bolded emphases added).)

Likewise, Proposition 64 rescinded the jurisdiction of California courts to consider the claims of uninjured private plaintiffs such as CDR. Under *Younger*, the fact that the initiative entrusted this authority in the Attorney General and local public prosecutors (AB Appx. 1, Prop. 64, §§ 1(f)-(g)) "is irrelevant" to the analysis. (*Younger*, *supra*, 21 Cal.3d at p. 110.) As for "intent," the Court explained that "the only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by" the "well settled" rule. (*Ibid.*) Like Proposition 64, however, the new law at issue in *Younger* did not contain a saving clause. (*Ibid.*) Therefore, the Court "conclude[d] . . . that respondent superior court *no longer has jurisdiction* to enforce its order for destruction of records pursuant to [the old law], and the order must therefore be vacated." (*Id.* at p. 111 (italics added).)

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

time the repeal became effective," it was compelled to reverse the trial court's order. (*Mann*, *supra*, 18 Cal.3d at pp. 830-31.) As the Court explained, "a long and unbroken line of California decisions establishes beyond question that the repeal of the district's statutory authority does affect the present action." (*Id.* at pp. 822-23.) The Court flatly rejected the school board's argument that the new legislation may not apply to the pending case because of the presumption that "statutory enactments are generally presumed to have prospective effect":

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

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

Again, the same "long well-established line" of authority "conclusively refutes" CDR's lead argument that there is a governing "presumption" against applying Proposition 64 to this action. (AB at 2-3, 12-20.) (See *Beckman v. Thompson*, *supra*, 4 Cal.App.4th at pp. 488-89 ["[Plaintiff] cites the general rule that statutes are presumed to operate prospectively in the absence of express legislative direction. *This principle is not applicable here.* . . . [Plaintiff] overlooks that we deal here with a repeal, not a 'retroactive' application of a new statute."] (italics added), citing *Callet*, *supra*, 210 Cal. at p. 67.)

In *Bank of San Luis Obispo*, the intervening statute served to remove the basis for the trial court's ruling, and the Court explained that "[i]n the

case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative." (159 Cal. at p. 79.) "When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right . . . ." (*Id.* at p. 67.) Likewise, in *Southern Serv. Co.*, the Supreme Court explained that "a repeal of such a statute without a saving clause will *terminate* all pending actions based thereon." (15 Cal.2d at p. 11-12 (italics added).) The Court has applied this "well settled" rule specifically to statutory unfair competition claims. (See *Int'l Ass'n of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 422 (hereafter *Landowitz*) ["Where a statutory remedy is repealed without a saving clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated."].)

In *Mann*, *Younger*, *Bank of San Luis Obispo*, *Southern Service Co.*, and *Landowitz*, the intervening change in the law removed the statutory basis for the plaintiffs to prosecute their actions. Application of settled precedents compelled an immediate application of the revised statutes at issue in those cases, which led to outright dismissals of the plaintiffs' claims, and the Court held that this was the only appropriate result. Similarly, the UCL involves a purely statutory cause of action. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-64 [noting that "[t]he common law tort of unfair competition . . . required a showing of competitive injury"].) Standing under the UCL, while previously very

broad, is now limited by Proposition 64. (See Bus. & Prof. Code, §§ 17203, 17204, as amended by Prop. 64, §§ 2, 3 [AB Appx. 1].)[9]

Proposition 64 does not contain a saving clause to permit application of the repealed provisions. (AB Appx. 1-2.) Accordingly, to resolve this appeal, this Court need only apply its "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final." (*Younger*, *supra*, 21 Cal.3d at p. 109.) And private plaintiffs such as CDR were on notice of the risks of relying on a statutory cause of action, because they "act[ed] . . . in contemplation of this power of repeal." (Gov. Code, § 9606.) In sum, settled precedent sufficiently and conclusively resolves the issue presented in this appeal.

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[9] CDR must satisfy standing at every stage of a suit, and it is his burden to "plead and prove facts showing standing." (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 590-91; *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560-61 [describing "the irreducible constitutional minimum of standing" under Article III]; see also *Waste Mgmt. of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232 ["Standing is a jurisdictional issue that may be raised at any time in the proceedings," not a technical requirement that need only exist at the initiation of an action]; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523 ["[The] [n]ewly enacted [statute] must be applied retroactively to this action. There is no vested right in existing remedies and rules of procedure and evidence. . . . The repeal of [the old statute that led the trial court to sustain a demurrer for lack of standing] and the enactment of [the new law conferring standing] are procedural only and operate retroactively. [Plaintiff's] standing to pursue the claim . . . is now governed by [the new law]."].)

C. The "Retroactivity" Analysis Urged By CDR Does Not Apply.

CDR argues, and the Court of Appeal held, that the amended UCL may not apply to this action because this would constitute an improper "retroactive" application of the law. (AB at 12-25; *CDR v. Mervyn's* (2005) 126 Cal.App.4th 386, 392-93 (hereafter *CDR*).) There are several fundamental reasons for reversing the Court of Appeal's determination that an application of Proposition 64 to pending cases would be "retroactive." As discussed in this section, this analysis does not even apply here; as discussed in the next section, this analysis does not alter the result.

1. The Court's Well Settled Rule Governs, and There Is No Conflict with the "Retroactivity" Analysis.

For the reasons discussed above, this Court's "well settled" rule applies to resolve the issue presented by this appeal. CDR simply invokes the wrong governing principle when it argues repeatedly that there is a "presumption" against immediate application of Proposition 64. (AB at 2-3, 12-20.) When another plaintiff argued that this Court should not apply the new legislation to this case because of the presumption that "statutory enactments are generally presumed to have prospective effect," the Court responded that "[a] long well-established line of California decisions *conclusively refutes plaintiff's contention*." (*Mann, supra*, 18 Cal.3d at p. 829; see also *Beckman v. Thompson, supra*, 4 Cal.App.4th at pp. 488-89 ["*This principle is not applicable here*. . . . [Plaintiff] overlooks that we deal here with a repeal, not a 'retroactive' application of a new statute."] (italics added), citing *Callet, supra*, 210 Cal. at p. 67; *Physicians Comm. for Responsible Medicine v. Tyson Foods, Inc., supra*, 119 Cal.App.4th at p. 125 ["The repeal of a statutory right or remedy . . . *presents entirely*

distinct issues from that of the prospective or retroactive application of a statute."] (italics added).)

In this case, the Court of Appeal divined "a seeming conflict in canons of statutory interpretation" in assessing the Court's "well settled" rule and the "retroactivity" analysis (*CDR*, *supra*, 126 Cal.App.4th at p. 395), but this Court previously acknowledged the distinctness of these doctrines:

> It is too well settled to require citation of authority, that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. *It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.*

(*Callet*, *supra*, 210 Cal. at p. 67 (italics added); accord *Mann*, *supra*, 18 Cal.3d at p. 829 ["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.'"].)

CDR's lawsuit was "dependent" on the since-repealed portion of the UCL that had permitted uninjured plaintiffs to prosecute private actions for the "general public." Accordingly, the Court's "well settled" rule, and not the retroactivity analysis, applies to resolve the issue presented in this appeal.

2. *There Was No Common Law Right to Prosecute Individual or Representative Actions Without Actual Injury.*

As a threshold matter, the "retroactivity" cases (such as *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (hereafter *Evangelatos*), and related authorities) involve common law – as opposed to statutory – causes of action as well as "the issue of retroactivity in relation to tort concepts." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7, fn. 4.)[10]

CDR contends that this case is exempt from the "well settled" rule because unfair competition claims existed under common law. (AB at 26, fn. 6.) The fact that "unfair competition" is not unknown to the common law is irrelevant to the analysis, however. The specific *statutory* right of action for *uninjured* private parties to prosecute unfair competition claims on behalf of the "general public" did not exist at common law. (See generally *Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 181, fn. 9; *Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1264 [statutory UCL claims "cannot be equated" with the common law tort of unfair competition], quoting *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 109; Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."].) As this Court explained, "when a right of

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[10] The Court in *Evangelatos* addressed the applicability of Proposition 51, which "modified the traditional, *common law* 'joint and several liability' doctrine" and effected radical changes to pending "*common law*" claims that "accrued prior to the effective date of the initiative measure." (*Evangelatos, supra*, 44 Cal.3d at pp. 1192-93, 1196, 1198-99, 1205; see also *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).)

action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right unless the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation." (*Krause*, *supra*, 210 Cal. at p. 652.) Moreover, as noted above, the Court has applied the "well settled" rule to claims brought under the unfair competition laws. (*Landowitz*, *supra*, 20 Cal.2d at p. 422.)

For the reasons discussed above, the Court should apply its "well settled" rule in evaluating whether to apply Proposition 64 to pending cases, because the UCL involves a purely *statutory* (as opposed to a common law) cause of action.

D. Application of the "Retroactivity" Analysis Does Not Alter The Result: Proposition 64 Applies To Pending Cases.

1. Application of Proposition 64 to Pending Actions Is Not "Retroactive."

Even under an application of traditional retroactivity analysis (and not this Court's "well settled" rule), the revised UCL immediately applies to these cases. As an initial matter, application of Proposition 64 to this case is "prospective" – not "retroactive." Simply labeling a law "retroactive," as the Court of Appeal did in its decision (*CDR*, *supra*, 126 Cal.App.4th at p. 392) and CDR continues to do in its Brief (AB at 5), only begs the central legal question of whether and when the law applies to a particular case. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 (hereafter *Tapia*); accord *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 270 (hereafter *Landgraf*) ["The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the

nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."].)

A law is "retrospective" or "retroactive," and may not be applied to pending actions, only if it "affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute" (*Aetna Cas. & Surety Co. v. Ind. Acc. Comm'n* (1947) 30 Cal.2d 388, 391), "when it substantially changes the legal consequences of past events" (*Western Sec. Bank v. Superior Court* (1997) 15 Cal.4th 232, 243), or if it "impos[es] new or different liabilities based upon such conduct." (*Tapia, supra*, 53 Cal.3d at pp. 290-91; compare *Landgraf, supra*, 511 U.S. at p. 273 ["When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."].)

That is not the case here. The UCL's new "injury in fact" requirement does not "attach[] new legal consequences" to completed acts. Instead, it specifies *who* may prosecute a UCL action, and it now excludes uninjured private parties.[11] Nor does the requirement that representative actions comply with the procedural requirements of Civil Procedure Code section 382. As such, it is inaccurate to label an application of Proposition 64 to this action, or any other pending action, as "retroactive."

Yet even if this Court were to conclude that immediate application of the new law would be "retroactive," this is " of course, just the beginning, rather than the conclusion, of [its] analysis." (*Evangelatos*,

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[11] While the wisdom of the initiative is not before this Court, it is worth observing that even if there has been no injury to *any* private plaintiff, a remedy remains: *the Attorney General may bring such an action.* (See Bus. & Prof. Code, §§ 17203, 17204, as amended by Prop. 64, §§ 2, 3 [AB Appx. 1].)

supra, 44 Cal.3d at p. 1206.) The next step is to determine whether voters intended to apply the new law to cases pending before the legislative change. (*Tapia*, *supra*, 53 Cal.3d at p. 287.) The Court of Appeal wrote that because Proposition 64 did not include an explicit "retroactivity" clause and was "wholly silent" on the matter, it could not apply the initiative to pending cases. (*CDR*, *supra*, 126 Cal.App.4th at p. 392.) CDR also attributes dispositive weight to the absence of such a clause. (AB at 1.) Again, this is not conclusive, because it was not independently sufficient in *Evangelatos* or other decisions.[12] Here, notwithstanding the absence of an express "retroactivity" clause, there is evidence of the voters' intent to immediately apply Proposition 64 to pending cases.

As recounted above in greater detail in Section III(A), the voters expressed their intentions in detail and unequivocally: "It is the intent of California voters in enacting this Act to *eliminate* frivolous unfair competition lawsuits" and that "only the California Attorney General and local public officials be authorized to file *and prosecute* actions on behalf of the general public." (AB Appx. 1, Prop. 64, § 1(d), (f) (italics added).) Again, the notion that voters considering the initiative intended to prohibit

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[12] (See, e.g., *Evangelatos*, *supra*, 44 Cal.3d at pp. 1209-10 ["[O]n a number of occasions in the past we have found that even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application."]; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 980-81 [finding the absence of an express "retroactivity" clause not to be dispositive because other portions of the initiative "support a clear finding of retroactive intent."].)

future, unknown abuses of the UCL – but not *existing* abuses that they could observe directly and read about in the ballot arguments – is entirely unreasonable.

Similarly, and more significantly, the amended language of the actual underlying statute (which took effect on November 3, 2004) now provides that "[a]ny person *may pursue* representative claims or relief on behalf of others *only if* the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure . . . ." (Bus. & Prof. Code, § 17203, as amended by Prop. 64, § 2 [AB Appx. 1] (italics added).) The Court of Appeal cited this new language, but ignored its impact. (*CDR*, *supra*, 126 Cal.App.4th at p. 392.) The new "standing requirements of Section 17204" mandate that UCL actions "shall be *prosecuted* exclusively . . . [by public prosecutors] or by any person . . . who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204, as amended by Prop. 64, § 3 [AB Appx. 1] (italics added).)

Finally, because UCL claims are equitable in nature, immediate application of Proposition 64 is not "retroactive": "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." (*Landgraf*, *supra*, 511 U.S. at p. 273, citing *American Steel Foundries v. Tri-City Central Trades Council* (1921) 257 U.S. 184, 201.) The Court of Appeal relies on a lengthy, eighteen-page excerpt from *Landgraf,* which it cites in support of the proposition that the "retroactivity" analysis trumps the "well settled" rule governing statutory repeals (*CDR*, *supra*, 126 Cal.App.4th at p. 395, citing *Landgraf*, *supra*, 511 U.S. at pp. 263-80), but it ignores this express acknowledgment that an application of new law is not "retroactive" if it

"authorizes or affects the propriety of prospective relief. . . ." (511 U.S. at p. 273.) Because UCL claims are equitable, there is no authority for the trial or appellate courts to grant relief to private plaintiffs who fail to "meet[] the standing requirements of Section 17204." (Bus. & Prof. Code, § 17203, as amended by Prop. 64, § 2 [AB Appx. 1].) Moreover, as the Supreme Court also observed in *Landgraf*, "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." (511 U.S. at p. 274.)

2. *Proposition 64's Changes to the UCL Affected Procedural, Not Substantive, Rights.*

In addition, although not independently dispositive of the analysis, past precedents of this Court also examine whether the underlying law is "substantive" or "procedural" to determine whether there would be a "retroactive" application. (See *Tapia, supra*, 53 Cal.3d at p. 288 ["[T]he effect of [procedural] statutes is actually prospective in nature since they relate to the procedure to be followed in the future," and "it is a misnomer to designate" these laws "as having retrospective effect."].) A statute is procedural if it "neither creates a new cause of action nor deprives defendant of any defense on the merits." (*Owens v. Superior Court* (1959) 52 Cal.2d 822, 833.) Statutes altering a rule of standing are "procedural" under this analysis (see, e.g., *Parsons v. Tickner, supra*, 31 Cal.App.4th at p. 1523),[13] so immediate application of Proposition 64 to this case would not implicate the retroactivity analysis.

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[13] (See also *J & K Painting Co. v. Bradshaw* (1996) 45 Cal.App.4th 1394, 1402, fn. 8 [whether plaintiff "lacked standing to proceed with the

[Footnote continued on next page]

IV.

CONCLUSION

What the California Legislature or voters give, they may take away. This simple, common-sense notion is a bedrock principle of California law. When CDR invoked the UCL and began to prosecute a claim against Mervyn's on behalf of the "general public," it "act[ed] in contemplation" of the voters' power to "repeal," or take away, the authority of uninjured private plaintiffs to prosecute such claims. On November 2, 2004, the people overwhelmingly approved Proposition 64 and made this possibility a reality for CDR and other private plaintiffs throughout the State. It may not like the consequences of that decision – elections frequently disappoint about half of all voters – but as one appellate court observed, it is not the Court's "'task in reviewing an initiative . . . to second-guess the electorate's decision that the benefits to the state outweigh hardships to individual plaintiffs adversely affected by the measure.'" (*Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 530-31, quoting *Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, 462.) Proposition 64 repealed the statutory authority CDR may have had to prosecute this action, and the

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[Footnote continued from previous page]
action" was a "purely procedural" question]; *Personnel Comm. v. Barstow Unified Sch. Dist.* (1996) 43 Cal.App.4th 871, 875 [deeming lack of standing a "procedural ground" for disposal of appeal]; *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 122 [describing the "*procedural* requirements of standing to sue"] (italics added); see generally *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 680 (dis. opn. of Haerle, J.) ["Section 17200 is the *substantive* provision and sections 17203 and 17204 the principal *procedural* ones"].)

initiative contains no saving clause to preserve its ability to rely upon a repealed statutory anomaly.

Accordingly, pursuant to the "well settled rule" and Supreme Court precedent, the Amici respectfully request that this Court apply the law as it exists *today*, reverse the Court of Appeal's decision, and direct the entry of judgment in favor of Defendant/Appellant Mervyn's.

DATED: September 22, 2005

Respectfully submitted,
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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rules 14(c)(1) and 29.1(c)(1))

I, Christopher Chorba, hereby certify that this Brief contains **8,398** words as counted by the word-processing program used to generate this Brief.

DATED: September 22, 2005

Christopher Chorba

Appendix of Appellate Court Decisions Adjudicating Proposition 64

The following table lists published and unpublished decisions of the Courts of Appeal that actually analyzed and adjudicated the issue of whether Proposition 64 applies to pending cases. The table reflects that ***20*** decisions have applied the initiative to pending cases, while ***four*** have not. (After accounting for duplicate opinions issued by the same District/Division, the total is ***seven*** Appellate Districts/Divisions in favor of immediate application of Proposition 64, and ***two*** against.)*

A. Decisions Applying Proposition 64 to Pending Cases	
Branick v. Downey Savings & Loan Ass'n (2005) 126 Cal.App.4th 828, rev. granted, 28 Cal.Rptr.3d 2	Second App. Dist./Div. 5
Benson v. Kwikset Corp., 126 Cal.App.4th 887, rev. granted, 28 Cal.Rptr.3d 2	Fourth App. Dist./Div. 3
Bivens v. Corel Corp. (2005) 126 Cal.App.4th 1392, rev. granted, 28 Cal.Rptr.3d 3	Fourth App. Dist./Div. 3
In re Vaccine Cases (Cal. Ct. App., May 31, 2005, No. B168163) 2005 Cal. App. Unpub. LEXIS 4766	Second App. Dist./Div. 3
Lytwyn v. Fry's Electronics, Inc. (2005) 126 Cal.App.4th 1455, rev. granted, 28 Cal.Rptr.3d 3	Fourth App. Dist./Div. 1

* The Amici recognize that unpublished decisions of the courts of appeal may not be cited or relied upon. (Cal. Rules of Court, rule 977.) The Amici offer these decisions not as binding precedent, but rather to provide the Court with a complete picture of the intermediate appellate court record on the legal issue presented here.

A. **Decisions Applying Proposition 64 to Pending Cases**	
Boling v. Santa Maria (Cal. Ct. App., Mar. 14, 2005, No. G033691) 2005 Cal. App. Unpub. LEXIS 2249, 2005 WL 591288	Fourth App. Dist./Div. 3
Frey v. Trans Union Corp. (2005) 127 Cal.App.4th 986, depublished, 2005 Cal. LEXIS 7966	Fourth App. Dist./Div. 3
Thornton v. Career Training Center, Inc. (2005) 128 Cal.App.4th 116, rev. granted, 31 Cal.Rptr.3d 457	Fourth App. Dist./Div. 1
Schulz v. Neovi Data Corp. (2005 Cal. App. Unpub. LEXIS 3264 (Cal. Ct. App., Apr. 11, 2005, No. G033879) 129 Cal.App.4th 1, rev. granted, 2005 Cal. LEXIS 8683 (Cal., Aug. 10, 2005, No. S134073)	Fourth App. Dist./Div. 3
Tucker v. AT&T Wireless Services, Inc. (Cal. Ct. App., Apr. 20, 2005, No. G034038) 2005 Cal. App. Unpub. LEXIS 3539	Fourth App. Dist./Div. 3
Cohen v. Health Net (Cal. Ct. App., Apr. 27, 2005, No. G033868) 2005 Cal. App. Unpub. LEXIS 3761	Fourth App. Dist./Div. 3
NEI Direct v. First USA Bank (Cal. Ct. App. Apr. 28, 2005, No. B159728) 2005 WL 978454, req. for publication denied	Second App. Dist./Div. 1
Boling v. Trendwest Resorts, Inc. (Cal. Ct. App. May 19, 2005, No. G034203) 2005 Cal. App. Unpub. LEXIS 4418	Fourth App. Dist./Div. 3
Nagle v. Sunshine Enters. (Cal. Ct. App. May 20, 2005, No. C046793) 2005 Cal. App. Unpub. LEXIS 4441	Third App. Dist.
Huntingdon Life Sciences, Inc., et al. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal.App.4th 1228	Fourth App. Dist./Div. 1

A. **Decisions Applying Proposition 64 to Pending Cases**	
Mabie v. Kaplan Higher Education Corp. (Cal. Ct. App. June 10, 2005, No. D043979) 2005 Cal. App. Unpub. LEXIS 5070, petn. for review pending, petn. filed July 20, 2005, time for grant or denial of review extended to Oct. 18, 2005	Fourth App. Dist./Div. 1
Zamora v. CFN Inv. Holdings (Cal. Ct. App. July 8, 2005, No. D045334) 2005 Cal. App. Unpub. LEXIS 5979	Fourth App. Dist./Div. 1
Cantor v. Nichols Inst. Diagnostics, Inc. (Cal. Ct. App. Aug. 24, 2005, No. D044386) 2005 Cal. App. Unpub. LEXIS 7657	Fourth App. Dist./Div. 1
Petrini Van & Storage v. Superior Court (Cal. Ct. App. Sept. 8, 2005, No. C049042) 2005 Cal. App. Unpub. LEXIS 8269	Third App. Dist.
Wise v. Pacific Gas & Elec. Co. (Cal. Ct. App. Sept. 12, 2005, No. A093538) 2005 WL 2194468	First App. Dist./Div. 5

B. **Decisions Refusing to Apply Proposition 64 to Pending Cases**	
Californians for Disability Rights v. Mervyn's, LLC (2005) 126 Cal.App.4th 386, rev. granted, 28 Cal.Rptr.3d 1	First App. Dist./Div. 4
Foundation Aiding the Elderly v. Superior Court (Cal. Ct. App. Apr. 1, 2005, No. A109442) 2005 Cal. App. Unpub. LEXIS 3038, rev. denied, 2005 Cal. LEXIS 6532	First App. Dist./Div. 4
Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2005) 129 Cal.App.4th 540, petn. for review pending, petn. filed July 15, 2005, time for grant or denial of review extended to Oct. 27, 2005	Second App. Dist./Div. 8
Turner v. Aon Risk Servs. (Cal. Ct. App. Sept. 6, 2005, No. B17411) 2005 Cal. App. Unpub. LEXIS 8052	Second App. Dist./Div. 8

CERTIFICATE OF SERVICE

Californians for Disability Rights v. Mervyn's LLC
Supreme Court of California Case No. S131798
First Appellate District, Division 4, Case No. A106199
Alameda County Superior Court, Case No. 2002051738

I, Lynette Hall, hereby certify as follows:

I am employed in the County of Los Angeles, State of California. I am 18 years of age or older and not a party to the within entitled cause, and my business address is 333 S. Grand Avenue, Los Angeles, California, 90071.

I am employed in the office of Christopher Chorba, a member of the bar of this Court, and at his direction, on September 22, 2005, I served the attached **APPLICATION OF EXPRESS SCRIPTS, NATIONAL PRESCRIPTION ADMINISTRATORS, AND AETNA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT MERVYN'S LLC** and **BRIEF OF *AMICI CURIAE* EXPRESS SCRIPTS, NATIONAL PRESCRIPTION ADMINISTRATORS, AND AETNA IN SUPPORT OF DEFENDANT AND RESPONDENT MERVYN'S LLC** on the interested parties in this action by OVERNIGHT COURIER SERVICE, placing a true copy thereof enclosed in a sealed envelope to the persons listed below on the attached **SERVICE LIST**.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 22, 2005, at Los Angeles, California.

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