IN THE SUPREME COURT

Californians For Disability Rights, Appellant, vs. Mervyn's LLC, Respondent,	Supreme Court No. S131798 Court of Appeal No. A106199 Alameda County Superior Court Trial Court No. 2002-051738 Trial Judge: Needham, Jr., J.

APPLICATION TO FILE BRIEF AMICI CURIAE AND

BRIEF AMICI CURIAE

OF AMICI CURIAE CENTER FOR BIOLOGICAL DIVERSITY, INC., ENVIRONMENTAL PROTECTION INFORMATION CENTER, AND ELECTRONIC FRONTIER FOUNDATION

IN SUPPORT OF APPELLANT CENTER FOR DISABILITY RIGHTS;

SUGGESTION FOR EXPEDITED CONSIDERATION

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Service on Attorney General and District Attorney Required By Bus. & Prof. Code § 17209

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APPLICATION FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Amici curiae Center for Biological Diversity, Inc., Environmental Protection Information Center, and Electronic Frontier Foundation respectfully request permission to file the accompanying brief amici curiae in support of appellant Californians for Disability Rights. The brief will assist the Court by presenting additional authorities and arguments explaining why Proposition 64 is not retroactive that have not been fully addressed in the submissions of the parties, and explaining why the associational standing of organizations like amici to represent their injured members survives Proposition 64.

The Center for Biological Diversity, Inc. ("CBD") is one of the leading wildlife conservation organizations in California and the United States. Through public education, science, and participation in administrative proceedings and litigation, CBD seeks to preserve, protect, and restore biodiversity, native species, ecosystems, and public lands and public trust resources.

CBD is a nonprofit public benefit corporation with over 14,000 members. Over 4,400 of CBD's members reside in California. CBD has offices in San Francisco, San Diego, and Joshua Tree, California, as well as at other locations.

CBD has a direct and immediate interest in this Court's resolution of the question of Proposition 64's application to actions pending at the time of its enactment, and for that reason respectfully requests leave to file this brief. Before the enactment of Proposition 64, CBD filed a lawsuit in

Alameda County Superior Court (*Center for Biological Diversity v. FPL Group*, No. RG04-183113) under the unfair competition law, Business and Professions Code section 17200 (the "UCL"), on behalf of itself, its members, and the general public against defendants who operate thousands of wind turbine electricity generators at Altamont Pass in eastern Alameda and Contra Costa Counties. These obsolete, first-generation wind turbines each year illegally kill 1000 or more eagles, hawks, falcons, and owls in violation of numerous state and federal wildlife protection laws. Over the past 25 years, the Altamont Pass wind power industry has illegally slaughtered 17,000 to 26,000 eagles, hawks, falcons, and owls, and tens of thousands of other protected birds; a vast destruction of the public trust wildlife resources of California.

After the enactment of Proposition 64, the defendants demurred to CBD's complaint on the ground that Proposition 64 was retroactive and barred CBD's claims on behalf of the general public. The trial court held that Proposition 64 was retroactive and dismissed CBD's UCL claims on behalf of the general public. This Court's resolution of the question of Proposition 64's retroactivity will have a direct and immediate bearing on CBD's lawsuit and the propriety of the trial court's dismissal of CBD's claims on behalf of the general public.

Environmental Protection Information Center ("EPIC") is a nonprofit California corporation dedicated to the preservation, protection, and restoration of forests, biodiversity, native species, watersheds, and ecosystems in Northern California. EPIC has over 1,000 members throughout California and maintains offices in Garberville, California. EPIC's members use lands and waters throughout California, including lands and waters that contain threatened and endangered species and

habitat. EPIC pursues its goals through public education, advocacy, and litigation on behalf of its members.

EPIC has a direct and immediate interest in this Court's resolution of the question of Proposition 64's retroactivity. EPIC is plaintiff in a lawsuit challenging logging in sensitive watersheds in Northern California that is harming fish and wildlife, including endangered species, that is currently pending in the United States District Court for the Northern District of California (*Environmental Protection Information Center v. United States Fish & Wildlife Service*, No. C 04-4647 CRB). This lawsuit was filed before Proposition 64 and included a UCL claim; after Proposition 64, the defendants moved to dismiss the UCL claim on the ground that Proposition 64 was retroactive and barred the claim. The District Court held that Proposition 64 was retroactive and granted the motion to dismiss the UCL claim. This Court's resolution of the question of Proposition 64's retroactivity will determine the propriety of the District Court's dismissal of EPIC's UCL claim.

Electronic Frontier Foundation ("EFF") is a membership-supported, nonprofit public interest organization based in San Francisco dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents the interests of Internet users in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF works to protect fundamental rights and liberties from curtailment by new technologies; to educate the general public, policymakers, and the press about civil liberties issues related to technology; and to act as a defender of those rights and liberties in advocacy before legislative bodies and in litigation. EFF both initiates and defends court cases to protect the rights of its members and others. EFF

publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

Although EFF does not have any currently pending litigation affected by the question of Proposition 64's retroactivity, it agrees with the analysis presented on all points and is especially concerned that the Court reaffirm the associational standing of organizations like EFF to raise UCL claims on behalf of their affected members.

INTRODUCTION

Under this Court's well-settled precedents, Proposition 64 does not apply retroactively to cases pending at the time of its enactment. This Court has repeatedly held that new statutes are presumed to operate prospectively only. *See, e.g., Elsner v. Uveges*, 34 Cal.4th 915, 936 (2004). This presumption is overcome, and a statute is retroactive, only if the enacting body unequivocally and inescapably expresses in one of two ways its intent that the statute be retroactive: 1) by including an express retroactivity provision in the statute itself; or 2) by making a "*very clear*" statement of retroactive intent in the statute's legislative history. *Myers v. Philip Morris Cos., Inc.*, 28 Cal.4th 828, 841 (2002) (emphasis original).

Here, there is no express retroactivity provision in the text of Proposition 64. Nor in the legislative history of Proposition 64 is there any "*very clear*" statement that the electorate intended for it to be retroactive. Accordingly, Proposition 64 does not apply retroactively to cases pending at the time of its enactment.

Neither of the two narrow exceptions to the rule against retroactivity on which Mervyn's relies are applicable to Proposition 64. The first is the exception of *In re Estrada*, 63 Cal.2d 740, 744-45 (1965), for statutes that abolish or lessen the liability or duty of the defendant and makes the defendant's conduct to that extent no longer wrongful. The *Estrada* exception does not apply because nothing in Proposition 64 alters or diminishes a defendant's liability for acts of unfair competition in violation of the Unfair Competition Law ("UCL"), Business and Professions Code section 17200. Proposition 64 has not altered the contours of any defendant's liability under section 17200, much less abolished liability entirely for any defendant, as Mervyn's concedes. *See* Mervyn's Opening Brief at 32-33. Section 17200 continues to forbid exactly the same

wrongful conduct as it did before Proposition 64's enactment, and that wrongful conduct is subject to exactly the same remedies as it was before Proposition 64's enactment. Proposition 64 has changed only who may act as plaintiff to enforce that liability and those remedies against a defendant.

Because Proposition 64 *did*, however, change the rights of plaintiffs to bring UCL actions, the second rule against retroactivity exception on which Mervyn's relies—the exception for procedural statutes—also does not apply. The procedural statute exception is limited to statutes that merely alter the procedures for resolving a cause of action while leaving both the plaintiff's rights and the defendant's liabilities intact. Proposition 64 has abolished the right of persons not personally injured to bring UCL actions on behalf of the general public. Extinguishing the right to bring an action that a person previously possessed is a change that " 'substantially affect[s] existing rights and obligations' " and thus is an impermissible retroactive effect. *Elsner*, 34 Cal.4th at 936-937.

Finally, the Court should note in its resolution of this case that even after Proposition 64, organizations such as Californians for Disability Rights, CBD, EPIC, and EFF continue to have associational standing to represent those of their members who have suffered injury from a defendant's conduct in violation of the UCL. California has long recognized associational standing, by which an organization has standing to represent the interests of its injured members. *Associated Builders & Contractors v. San Francisco Airports Comm'n*, 21 Cal.4th 352, 361 (1999). As amended by Proposition 64, Business and Professions Code section 17203 provides in part: "Any 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 Code of Civil Procedure Section 382 . . . ." Section 382 of the Code of Civil Procedure in turn

authorizes associational standing (*see Weaver v. Pasadena Tournament of Roses Assoc.*, 32 Cal.2d 833, 836-837 (1948)); thus associational standing under the UCL survives the enactment of Proposition 64.

ARGUMENT

I. Proposition 64 Is Not Retroactive

A. A New Statute Applies Only Prospectively Unless It Clearly, Unambiguously, And Inescapably Manifests The Enacting Body's Retroactive Intent

It has long been settled by this Court that statutory changes apply only prospectively, absent a clearly expressed intent by the enacting body that the new statute shall apply retroactively. " '[It] is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.' This rule has been repeated and followed in innumerable decisions." *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988) (citation omitted).

Twice in the same day last December, this Court reiterated this rule yet again: In *City of Long Beach v. Dept. of Ind. Relations*, 34 Cal.4th 942, 953 (2004), the Court stated that it is "the well-established rule that legislation is deemed to operate prospectively only, unless a clear contrary intent appears." In *Elsner v. Uveges*, 34 Cal.4th 915, 936 (2004), the Court stated: "New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise."

The rule against retroactivity is of ancient lineage, and is the same rule that is applied by the United States Supreme Court: " '[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.' " *McClung v. Employment Dev. Dept.*, 34 Cal.4th 467, 475 (2004). "California courts apply the same 'general prospectivity principle' as the United States Supreme Court." *Myers v. Philip Morris Cos., Inc.*, 28 Cal.4th 828, 841 (2002).

Under this unusually firm rule of statutory construction, a statute is retroactive only if the enacting body intends that it be retroactive *and* expresses that intent either in an express retroactivity provision in the statute itself or in an equally clear, unambiguous, and inescapable statement of retroactive intent in the statute's legislative history: "California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " *Myers*, 28 Cal.4th at 841 (emphasis original), 844 ("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" (emphasis original)); *accord*, *Tapia v. Superior Court*, 53 Cal.3d 282, 287 (1991) ("It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.").

Thus, for a statute to apply retroactively, the enacting body must make an "unequivocal and inflexible statement of retroactivity," *Myers*, 28 Cal.4th at 843, either in the statute itself or in its legislative history. Any lesser expression of retroactive intent is insufficient to make the statute retroactive: " '[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " *Myers*, 28 Cal.4th at 841; *see also ibid.* ("retroactive effect [is] adequately authorized by a statute only when statutory language [is] so clear that it could sustain only one interpretation" (internal quotation marks omitted)). "[T]he time-honored presumption against retroactive application of a statute … would be meaningless if . . . vague phrases . . . were considered sufficient to satisfy the test of a clear manifestation, or an unequivocal and inflexible

assertion of … retroactivity." *Myers*, 28 Cal.4th at 843 (internal quotation marks, citations, and brackets omitted).

The United States Supreme Court has described the manifestation of legislative intent that is necessary to overcome the rule against retroactivity in equally forceful terms: "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied." *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908).

Nor is there any merit to the view sometimes advanced that the rule against retroactivity applies only to statutes modifying common law causes of action. This Court has consistently applied the rule against retroactivity to statutes modifying statutory causes of action and statutory rights. In *City of Long Beach v. Dept. of Ind. Relations*, 34 Cal.4th at 953, for example, this Court applied the rule against retroactivity to a statutory cause of action and held that a new statute modifying the statutory duty of contractors to pay "prevailing wages" on public works projects was not retroactive because there was no legislative expression of retroactive intent. *See also McClung*, 34 Cal.4th at 475-76 (new statute modifying the scope of statutory liability under the Fair Employment and Housing Act not retroactive because no legislative expression of retroactive intent); *Aetna Casualty & Surety Co. v. Ind. Accident Comm'n*, 30 Cal.2d 388, 393-95

(1947) (new statute modifying the statutory workers' compensation scheme not retroactive because no legislative expression of retroactive intent).

B. Proposition 64 May Only Be Applied Prospectively Because It Does Not Clearly, Unambiguously, And Inescapably Manifest Any Retroactive Intent

Proposition 64 may only be applied prospectively because it lacks any manifestation of retroactive intent. Proposition 64 neither contains an express retroactivity provision nor is there any clear and unavoidable expression of retroactive intent in its legislative history.

In *Evangelatos*, this Court addressed the question of retroactive intent in the context of a tort reform initiative, Proposition 51. The Court confirmed that, as with legislative statutes, initiative measures are not retroactive unless the measure or its legislative history contains a clear and inescapable expression of retroactive intent: "The drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued and there is nothing to suggest that the electorate considered the issue of retroactivity at all." *Evangelatos*, 44 Cal.3d at 1194; *see also id.* at 1211 ("the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively"), 1212-13 ("[T]here is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all. Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction, informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure—like other statutes—would be applied prospectively because no

express provision for retroactive application was included in the proposition." (Emphasis added; citations omitted)).

What was true of Proposition 51, the tort reform initiative at issue in *Evangelatos*, is equally true of Proposition 64. Nothing in the language of Proposition 64 itself clearly, unambiguously, and inescapably mandates the conclusion that it must be applied retroactively. To the contrary, in its declarations of purpose the statute states that "It is the intent of the California voters in enacting this Act to prohibit private attorneys from *filing* lawsuits for unfair competition where they have no client who has been injured in fact . . . ." (emphasis added). Proposition 64, Findings and Declarations of Purpose, § 1, subd. (e). This is a statement of intent that Proposition 64 be prospective only, prohibiting the filing of future actions, but not retroactively barring already-filed lawsuits.

Nor does anything in the Attorney General's summary or the Legislative Analyst's analysis—the legislative history of Proposition 64—even hint that the electorate intended the measure to be retroactive. In particular, there is no evidence that the electorate intended the dismissal of the many meritorious actions pending at the time of Proposition 64's enactment. Dismissal of these actions by retroactive application of Proposition 64 would cause many injured nonparties to lose forever any remedy, whether by operation of the statute of limitations or because individual actions are economically infeasible. *See Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 (2000). It is far more probable that the electorate would have intended an orderly transition by establishing Proposition 64 as the structure for the future, but allowing cases filed before the election to proceed as they otherwise would have.

Because there is no evidence, much less "*very clear*" evidence (*Myers*, 28 Cal.4th at 841 (emphasis original)), that the electorate intended

Proposition 64 to apply retroactively to actions filed before the election, there is no basis on which to hold that Proposition 64 is retroactive. Instead, "reflecting the common-sense notion that it may be unfair to change 'the rules of the game' in the middle of a contest, . . . the general legal presumption of prospectivity applies with full force to a measure, like the initiative at issue here, which substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment." *Evangelatos*, 44 Cal.3d at 1194.

C. Proposition 64 Does Not Fall Within The Exception To The Rule Against Retroactivity For Statutes That Abolish Or Lessen The Defendant's Liability

Proposition 64 also does not fall within the following narrow exception to the rule against retroactivity: Where a statute abolishes or lessens the liability or duty of the defendant and makes the defendant's conduct to that extent no longer wrongful, it is presumed that the enacting body intended the statute to apply to pending actions, absent any evidence of a contrary legislative intent. As this Court said in the leading case of *In re Estrada*: "The problem, of course, is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply? . . . [¶] . . . When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." *In re Estrada*, 63 Cal.2d 740, 744-45 (1965); *accord, Governing Board v. Mann*, 18 Cal.3d 819, 829 (1977). Like the rule against retroactivity itself, the *Estrada* exception is a quest for

legislative intent. *In re Pedro T.*, 8 Cal.4th 1041, 1045 (1994) ("The basis of our decision in *Estrada* was our quest for legislative intent.").

Thus, "absent a saving clause, a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense or decriminalizes the conduct altogether." *People v. Babylon*, 39 Cal.3d 719, 725 & n.10 (1985) (citing *In re Estrada* and *Governing Board v. Mann*).

Whether the *Estrada* exception to the rule against retroactivity applies is judged by examining whether the duties, liabilities, and obligations to which the *defendant* is subject have been lessened or extinguished by the new statute. *Governing Board v. Mann* is illustrative. In *Governing Board v. Mann*, the plaintiff school district sued to discharge the defendant teacher who had been convicted of a marijuana offense more than two years earlier. At the time the school district filed its suit, conviction of a marijuana offense was a ground for discharging a teacher. While the school district's lawsuit was pending, the Legislature enacted a statute forbidding the discharge, "on or after" the date two years after the date of conviction, of teachers convicted of marijuana offenses. The Court held that because the Legislature had abolished the previously-existing ground on which the defendant teacher could have been discharged, making his conduct no longer wrongful, his liability for discharge was extinguished retroactively. 18 Cal.3d at 829-30.

The *Estrada* exception originated in the field of criminal law, in cases in which the law under which a defendant was being prosecuted was entirely repealed, making the previously proscribed conduct lawful. *Governing Board v. Mann*, 18 Cal.3d at 829 ("Perhaps the rule's most familiar application is in the criminal realm . . ."); *People v. Babylon*, 39 Cal.3d at 725 & n.10. The decisions in *Governing Board v. Mann*, 18 Cal.3d at 829, and *In re Estrada*, 63 Cal.2d at 746-47, each trace the

exception back to *Spears v. County of Modoc*, 101 Cal. 303 (1894) , a criminal case, and earlier.

The *Estrada* exception to the rule against retroactivity remains the same in both civil and criminal cases, as *Governing Board v. Mann* notes. 18 Cal.3d at 829-30. The decision in the civil case of *Governing Board v. Mann*, 18 Cal.3d at 829, cites the criminal cases of *In re Estrada* and *People v. Rossi*, 18 Cal.3d 295, 298-302 (1976); *Governing Board v. Mann* in turn is cited by *People v. Babylon*, 39 Cal.3d at 725. And this Court has characterized its holding in *Governing Board v. Mann* as a reaffirmation of its similar holding in *People v. Rossi*. "*Rossi* represents a logical extension of the principles developed in the line of cases dealing with the common law rule, as we recognized in reaffirming its holding in *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829." *People v. Collins*, 21 Cal.3d 208, 213 (1978).

This Court has never applied the *Estrada* exception except in the case of statutes that have abolished or lessened the duty or liability to which the *defendant* was previously subject. The rationale for the exception, which is based on legislative intent, extends no further, as this Court explained in *Sekt v. Justice's Court of San Rafael Township*: "[The exception] is based on presumed legislative intent, it being presumed that the repeal was intended as an implied legislative pardon for past acts. This rule results, of course, in permitting a person who has admittedly committed a crime to go free, it being assumed that the Legislature, by repealing the law making the act a crime, did not desire anyone in the future whose conviction had not been reduced to final judgment to be punished under it. But this rule only applies in its full force where there is an outright repeal, and where there is no other new or old law under which the

offender may be punished." *Sekt v. Justice's Court of San Rafael Township*, 26 Cal.2d 297, 304-305 (1945) (citation omitted).

This Court's jurisprudence since *Sekt* has consistently continued to limit the *Estrada* exception to the rule against retroactivity to only cases abolishing or lessening the defendant's liability, because it is only in those cases that the enacting body's intent to apply the statute retroactively can be reasonably inferred. *People v. Dennis*, 17 Cal.4th 468, 504 (1998) ("The fundamental function of the *Estrada* rule is to further a legitimate legislative intent that is manifested by a change in the punishment prescribed for an offense. When an amendment moderates the punishment for an offense, the ordinary and reasonable inference is that the Legislature determined imposition of the lesser penalty on offenders from then on will sufficiently serve the public interest."); *People v. Nasalga*, 12 Cal.4th 784, 792 (1996) ("To ascertain whether a statute should be applied retroactively, legislative intent is the 'paramount' consideration: 'Ordinarily, when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest.' "); *In re Pedro T.*, 8 Cal.4th at 1045 ("The basis of our decision in *Estrada* was our quest for legislative intent. Ordinarily when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest."); *People v. Collins*, 21 Cal.3d at 212 ("In *Sekt v. Justice's Court* . . . we discussed the rule's theoretical basis: it presumes the Legislature, by removing the proscription from specified conduct, intended to condone past acts."), 213 ("an amendment eliminating criminal sanctions is a sufficient declaration of the Legislature's intent to bar all punishment for the conduct so decriminalized").

In describing the *Estrada* exception, one court has further noted that, "because the rule is based on a presumed legislative intent, it does not apply automatically upon the repeal of a statute. . . . That is, where the circumstances of the repeal do not reasonably give rise to the presumption of a legislative pardon and remission of crimes not reduced to final judgment, the rule is inapplicable and a prosecution may be maintained even in the absence of a savings clause." *People v. Alexander*, 178 Cal.App.3d 1250, 1261 (1986).

As this Court explained in *Evangelatos*, the *Estrada* exception has little application outside of criminal law: "In *In re Estrada*, . . . the court also held that a statutory enactment should be applied retroactively despite the absence of an express retroactivity clause, but that case involved considerations quite distinct from the ordinary statutory retroactivity question. In *Estrada*, the Legislature had amended a criminal statute to reduce the punishment to be imposed on violators; the amendment mitigating punishment was enacted after the defendant in *Estrada* had committed the prohibited act but before his conviction was final. . . . . [¶] . . . [T]he rationale for the *Estrada* ruling bears little relationship to the determination of the retroactivity of most nonpenal statutes, and, as noted below, other jurisdictions have not applied the special rule applicable to ameliorative penal provisions in determining the retroactivity of a general tort reform measure like Proposition 51. We similarly conclude that the *Estrada* decision provides no guidance for the resolution of this case." *Evangelatos*, 44 Cal.3d at 1210 n.15.

The narrow *Estrada* exception has no application here, either. Proposition 64 has not altered the contours of any defendant's liability under section 17200, much less abolished liability entirely for any defendant, as Mervyn's concedes. *See* Mervyn's Opening Brief at 32-33.

Section 17200 continues to forbid exactly the same wrongful conduct as it did before Proposition 64's enactment. That wrongful conduct is subject to exactly the same remedies as it was before Proposition 64's enactment. Proposition 64 has changed only who may act as plaintiff to enforce that liability and those remedies against a defendant. It has changed nothing on the defendant's side of the equation, but has acted only on the plaintiff's side.

Moreover, nothing in Proposition 64 suggests that the voters intended to release past violators of section 17200 from liability and let them off scot-free. To the contrary, the findings and declarations of purpose emphasize that the liability of defendants will continue unchanged because prosecutors will continue to "be authorized to file and prosecute actions on behalf of the general public." Proposition 64, Findings and Declarations of Purpose, § 1, subd. (f). Thus, because Proposition 64 has not lessened or abolished any defendant's liability under section 17200, the *Estrada* exception for statutes abolishing or lessening the defendant's liability has no application here.

D. Government Code Section 9606 Is Not A Rule Of Statutory Construction

Those lower court decisions that have held that Proposition 64 is retroactive have typically relied on Government Code section 9606, which provides: "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." Government Code section 9606, however, by its very terms speaks only to legislative "*power*" to repeal, and not to legislative *intent* regarding the retroactivity of a repeal.

Section 9606 is a statement of the legislative power to repeal a statute and to make that repeal retroactive. It is not a rule of statutory

construction, and offers no guidance in determining whether, when the Legislature has repealed a statute, the Legislature has chosen to exercise its further power to make a repeal retroactive. That task is left to the rules of statutory construction outlined above, which require a clear, unequivocal, and inflexible statement of retroactivity. *Myers*, 28 Cal.4th at 841, 843. Because there is no manifestation of retroactive intent in Proposition 64 or its legislative history, and because Proposition 64 does not abolish or lessen a defendant's liability under the UCL, it does not apply retroactively to UCL actions filed before its enactment.

Nor does *Callet v. Alioto*, 210 Cal. 65 (1930), a repeal case on which Mervyn's relies, support its argument that Proposition 64 is retroactive. *Callet* is consistent with the *Estrada* exception and agrees that the question is fundamentally one of legislative intent. At issue in *Callet* was a statute that abolished a driver's negligence liability to a guest in a vehicle. "By section 141 3/4 of the California Vehicle Act the right of action of a guest in a vehicle to recover for personal injuries based upon ordinary negligence of the driver is taken away." *Id.* at 66. *Callet* began its analysis by reiterating the general rule that statutes are not retroactive: "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." *Id.* at 67.

Callet then set forth the *Estrada* exception to the general rule against retroactivity, stating 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*

v. Alioto, 210 Cal. at 67. *Callet* noted an additional limitation on the *Estrada* exception: it applies only where the defendant's liability that is being abolished is a liability created by statute rather than by common law. *Id*. at 68. Because the negligence liability that the Vehicle Act section abolished was a creation of common law, and not a liability created by statute, the Court therefore held that the *Estrada* exception did not apply. Instead, the general rule against retroactivity controlled, the statute was not retroactive, and the plaintiff's lawsuit was not affected by the new statute.

This holding has no direct application here, for, as Mervyn's concedes, Proposition 64 has not abolished *any* preexisting liability, either statutory or common-law, unlike the statute at issue in *Callet*. Mervyn's Opening Brief at 32-33. Thus, the question at issue in *Callet*—whether a particular liability that has been abolished is statutory or common-law—is never reached here because Proposition 64 abolishes no liability.

Moreover, *Callet* cannot be read in isolation as Mervyn's does but must be read in the context of all of this Court's post-*Callet* repeal cases, including *Estrada* and its progeny. Once those post-*Callet* cases are taken into account, it becomes clear as shown above that the *Estrada* exception applies only in the case of statutes that have abolished or lessened the statutory duty or liability to which the defendant was previously subject.

E. Proposition 64 Is Not A Procedural Statute

Proposition 64 is not a procedural statute for purposes of retroactivity analysis. This Court recently explained how retroactivity principles apply in the case of statutes that alter the procedure by which a cause of action is tried without altering *either* the rights of the plaintiff *or* the liabilities of the defendant under that cause of action: "However, th[e] rule [against retroactivity] does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even

though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. This is so because these uses typically affect only future conduct—the future conduct of the trial. Such a statute is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. For this reason, we have said that it is a misnomer to designate [such statutes] as having retrospective effect. [¶] In deciding whether the application of a law is prospective or retroactive, we look to function, not form. We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies. Does the law change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?] Does it substantially affect[] existing rights and obligations[?] If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective." *Elsner*, 34 Cal.4th at 936-937 (citations and internal quotation marks omitted); *accord*, *Myers*, 28 Cal.4th at 839 ("a retroactive or retrospective law ' "is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute" ' ").

Thus, the question is whether the statute acts retrospectively by altering preexisting rights or obligations or instead merely alters the procedure for resolving a cause of action while leaving both the plaintiff's rights and the defendant's liabilities untouched. Function, not form, controls.

Here, there is no doubt that Proposition 64 is not a statute that merely changes the pretrial and trial procedures to be used to resolve the litigation. Rather, it abolishes the right of certain persons and organizations to bring a UCL action against the defendant for the defendant's wrongful conduct on behalf of the "general public." Bus. & Prof. Code former § 17203.

Before Proposition 64's enactment, every person possessed the right under former section 17204 to bring a "general public" UCL action not only to vindicate the interests of those who had been specially harmed by the defendant's conduct but also to vindicate the interests of the public at large in remedying the defendant's unlawful conduct. Thus, as this Court recently discussed, two categories of relief existed in "general public" actions under the UCL—specific relief for persons specially injured by the defendant's acts of unfair competition and relief on behalf of the public at large: "As we have recognized, injunctive relief may fall into two categories: injunctions intended 'to remedy a public wrong' and injunctions primarily intended to resolve 'a conflict between the parties and rectify[] individual wrongs.' Injunctions sought under the UCL may fall into either category." *State of California v. Altus Finance*, 36 Cal.4th 1284, 1308 (2005) (citations omitted, brackets original).

Accordingly, before Proposition 64's enactment, any person, whether or not personally harmed, could bring a "general public" UCL action for restitution and injunctive relief on behalf of all persons injured by the defendant's conduct, or could bring a "general public" action on behalf of the public at large. In addition, organizations like Californians for Disability Rights, CBD, EPIC, and EFF also had the right under former section 17204 to bring a UCL action "acting for the interests of . . . [their] members," whether or not their members had suffered any harm.

"General public" representative actions on behalf of injured nonparties played a crucial and unique role in UCL enforcement and were not just public prosecutor UCL actions by another name.[1]

"[R]epresentative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. . . .

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[1] This Court has recognized that "general public" representative UCL actions for restitution are brought for the benefit of specially injured persons, both parties and nonparties. "We use the term 'representative action' to refer to a UCL action that is not certified as a class action in which a private person is the plaintiff and seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff." *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 n.10 (2000); *see also id.* at 138 n.18 ("the absent persons *on whose behalf* the action is prosecuted"), 121 ("an action that is not certified as a class action, but is brought *on behalf of* absent persons by a private party under the unfair competition law") (emphasis added).

"General public" actions seeking relief on behalf of specially injured persons are different from public prosecutor UCL actions. Unlike a private representative action, a public prosecutor UCL action is not brought on behalf of injured persons or the "general public" at large but "in the name of the people." Bus. & Prof. Code § 17204. It "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (1977); *Payne v. National Collection Systems, Inc.*, 91 Cal.App.4th 1037, 1045 (2001) ("An action brought pursuant to . . . section 17200 et seq. by a prosecutor is fundamentally different from a class action *or other representative* litigation." (emphasis added)); 1046 ("an unlawful competition law lawsuit commenced by a prosecutor is brought fundamentally for the benefit of the public and as a law enforcement action"). Any individual restitution or benefit to those who have been specially injured is purely incidental, and prosecutors are free to sacrifice the interests of injured persons in their pursuit of what they believe to be the public interest. *Pacific Land*, 20 Cal.3d at 17-18 & n.6 (p. 17, restitution "is not the primary object of the suit, as it is in most private class actions"; p. 18, the prosecutor's "role as a protector of the public may be inconsistent with the welfare of the [injured persons] so that he could not adequately protect their interests"); *Payne*, 91 Cal.App.4th at 1045-47.

These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 (2000).

Proposition 64 has abolished the right of persons not personally injured to bring UCL actions on behalf of the general public, whether to seek relief for injured persons or for the public at large. Extinguishing the right to bring an action that a person previously possessed is an impermissible retroactive effect because it " 'substantially affect[s] existing rights and obligations.' " *Elsner*, 34 Cal.4th at 936-937. To apply Proposition 64 now to bar actions properly filed before its enactment would impair the rights that the plaintiffs in those pending UCL actions possessed when they acted and filed suit. It would therefore be a retroactive effect because "a retroactive effect is one that 'impair[s] rights a party possessed *when he acted*.' " *Myers*, 28 Cal.4th at 847 (emphasis original); *accord*, *Aetna*, 30 Cal.2d at 391 ("A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."). It is an impermissible retroactive effect because of the absence of retroactive intent by the voters. *McClung*, 34 Cal.4th at 475 ("a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature' ").

In addition, many nonparties have relied on UCL lawsuits brought by others that were pending at the time of Proposition 64's enactment to remedy acts of unfair competition and prevent unlawful conduct. Those nonparties would also be prejudiced if Proposition 64 were applied retroactively. In particular, many UCL actions that injured nonparties

could have brought on their own behalf, including class actions, will now be barred by the statute of limitations.

II. Proposition 64 Authorizes Associational Standing By Organizations Like Californians For Disability Rights, CBD, EPIC, And EFF To Represent Their Injured Members

Even if Proposition 64 were retroactive, organizations like Californians for Disability Rights, CBD, EPIC, and EFF would still have standing to represent their injured members in UCL actions. Proposition 64 authorizes representative actions that comply with Code of Civil Procedure section 382. As amended by Proposition 64, section 17203 provides in part: "Any 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 Code of Civil Procedure Section 382 . . . ."

Code of Civil Procedure section 382 provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Although Code of Civil Procedure section 382 is commonly thought of as a class action statute, it is a broad authorization for representative actions that is not limited to class actions; indeed, it nowhere uses the terms "class" or "class action." Representative actions can take many forms. One form that California has long recognized is associational standing, by which an organization has standing to represent the interests of its injured members. *Associated Builders & Contractors v. San Francisco Airports Comm'n*, 21 Cal.4th 352, 361 (1999); *National Audubon Society v.*

Superior Court, 33 Cal.3d 419, 431 n.11 (1983); *Residents of Beverly Glen, Inc. v. Los Angeles*, 34 Cal.App.3d 117, 125-26 (1973).

Even before the 1872 code enactment of section 382, representative actions had long been recognized in equity. In particular, actions by voluntary associations were a well-established form of representative action: "Mr. Justice Story, in his valuable treatise on Equity Pleadings . . . arranges the exceptions to the general rule [of complete joinder of parties], as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. *Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole*; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1854) (emphasis added); *accord*, *Von Schmidt v. Huntington*, 1 Cal. 55, 66-67 (1850) (citing Justice Story).

Section 382 codified this equity rule, as this Court has noted. "The propriety of representative or class suits has long been recognized in our statutory law as embraced in section 382 . . . . [T]his statute is based upon the doctrine of virtual representation, which, as an exception to the general rule of compulsory joinder of all interested parties, 'rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.' Even before the cited statute [i.e., section 382], as plaintiffs note, this doctrine found expression in this state . . . . [T]he cited statute . . . thus reenacts the long-prevailing equity rule . . . ." *Weaver v. Pasadena Tournament of Roses Assoc.*, 32 Cal.2d 833, 836-837 (1948) (citations omitted); *see also Bowles v. Superior Court*, 44 Cal.2d 574, 587 (1955); *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian*

Church, 39 Cal.2d 121, 139-40 (1952); *Jellen v. O'Brien*, 89 Cal.App. 505, 509 (1928).

Proposition 64 could have limited representative actions to only class actions by expressly using the words "class action." It did not, and instead only requires that a representative claim "compl[y] with Code of Civil Procedure Section 382," a criterion that embraces associational standing. Thus, organizations like Californians for Disability Rights, CBD, EPIC, and EFF continue to have associational standing to represent those of their members "who ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204.

III. This Court Should Consider Expediting Consideration Of This Appeal

As the Court is well aware from the many petitions for review that have already been filed presenting the issue of Proposition 64's retroactivity, there are numerous pending cases in which this issue will have a significant, if not determinative, impact. Amici respectfully suggests that the Court consider expediting consideration of this appeal to minimize the necessity for retrials or other duplicative proceedings in the many pending UCL actions filed before Proposition 64's enactment.

CONCLUSION

For the foregoing reasons, amici respectfully requests that this Court affirm the judgment of the Court of Appeal.

Dated: September 21, 2005 Respectfully submitted,

s/

Richard R. Wiebe
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Center For Biological Diversity, Inc.;
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c), I certify that this brief contains 6854 words.

_____s/_____

Richard R. Wiebe

CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On the date set forth below, I served true and correct copies of the following documents:

APPLICATION AND BRIEF AMICI CURIAE OF AMICI CENTER FOR BIOLOGICAL DIVERSITY, INC.; ENVIRONMENTAL PROTECTION INFORMATION CENTER; ELECTRONIC FRONTIER FOUNDATION

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 21, 2005 _____s/_____

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