No. S153846

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PAMELA MEYER ET AL.,

Plaintiffs and Appellants,

vs.

SPRINT SPECTRUM, L.P.,

Defendant and Respondent.

California Court of Appeal, Fourth Appellate District, Division Three,
Case No. G037375

Superior Court of California,
County of Orange, Case No. 04CC06254
Honorable Sheila Fell

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

To the Honorable Ronald M. George, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully applies for permission to file the accompanying brief as amicus curiae in this matter in support of the respondent.

The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

Chamber members—like most other participants in the modern economy—routinely use contracts to order their affairs. The plaintiffs here contend that the mere existence of certain provisions in those contracts

could create substantial liability for actual and punitive damages under the Consumer Legal Remedies Act, whether or not the provisions have been enforced, and whether or not any consumer has been adversely affected by the provisions. That position, if adopted by this Court, would transform the CLRA standing provision—which on its face appears limited to concrete damages—into a substitute for the provisions of the Unfair Competition Law that the voters repealed with Proposition 64. The Court should not through unwise statutory construction create that type of end-run around the voters' will.

Moreover, the plaintiffs' theory would apply outside the realm of contracts, imposing enormous potential liability for virtually every representation that a business makes—again, regardless of whether the representation has any actual consequences. This broad extension of liability and, as important, the accompanying costs of defending against the resulting proliferation of standing-free lawsuits, would significantly impede business operations in California.

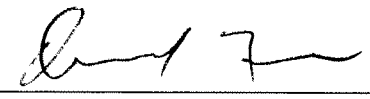
Beyond the Chamber's strong interest in the proper resolution of this case, its familiarity with consumer protection laws and its experience with consumer litigation may be of assistance to the Court. The Chamber has filed amicus briefs in numerous cases in courts around the country involving issues pertaining to standing requirements and consumer protection laws. *E.g.*, *Snowney v. Harrah's Entm't, Inc.* (2005) 35 Cal.4th

1054; *Domino's Pizza, Inc. v. McDonald* (2006) 546 U.S. 470. The Chamber therefore respectfully requests that its views be heard.

CONCLUSION

The application for permission to file brief as *amicus curiae* in support of the respondents should be granted.

Respectfully submitted.



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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is described more thoroughly in its application for leave, *ante*.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts.

Chamber members routinely use contracts to order their affairs. The plaintiffs here contend that those contracts are open to judicial scrutiny regardless of any actual concrete effects. Plaintiffs maintain that, under the Consumer Legal Remedies Act ("CLRA"), every violation creates its own "damage," and thus provides a basis for a lawsuit—and the risk of substantial liability for actual and punitive damages. Thus, the mere existence of a contract provision could prompt a lawsuit even though the provision had not harmed a single consumer. The same theory could impose a similar risk of liability on harmless representations made by a business to a consumer. Such a broad expansion of liability, and the accompanying expansion of litigation costs that would follow an elimination of the CLRA's standing requirements, would adversely affect

Chamber members throughout California. Accordingly, the Chamber has a strong interest in having its view considered by the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In adopting Proposition 64, California voters put an end to the practice that had allowed a plaintiff to bring suit under the Unfair Competition Law ("UCL") without having suffered any injury. Rejecting the resulting flood of lawyer-driven litigation alleging either abstract violations or violations that injured only nonplaintiffs (if anyone), the voters limited UCL claims to plaintiffs who have suffered an injury in fact and lost money or property from the alleged wrong.

While the former UCL persisted, the Consumer Legal Remedies Act ("CLRA") was not viewed as an equivalent precisely because the CLRA's standing provision limits claims to consumers who have "suffere[d] any damage as a result of" the use of a deceptive practice. Civ. Code § 1780(a). Thus, to claim standing under the CLRA, a plaintiff must allege not merely that a violation occurred, but also that the violation resulted in "damage" to her. And the plain meaning of "damage" requires an actual, concrete injury.

Now that Proposition 64 has removed one avenue for litigation by uninjured plaintiffs, the plaintiffs ask this Court to create another by effectively eliminating Civil Code section 1780(a)'s damage and causation requirements. In the plaintiffs' view, consumers necessarily suffer damage

whenever they are exposed to the mere existence of a deceptive practice prohibited by the CLRA, whether or not the practice concretely harms them. Thus, a consumer would have standing to sue based on the mere inclusion of allegedly unconscionable contractual provisions in one of her form contracts, even if the terms had not been enforced (or enforcement threatened) against her.

That view renders superfluous the Legislature's carefully crafted damage and causation language. Moreover, appellants' view undermines the very purpose of a standing requirement, forcing courts to hear claims that have not been sharpened by the presence of specific facts and a concrete injury.

And the consequences would be absurd. If "damage" under the CLRA is subsumed into the violation itself, lawyers could pick through form contracts looking for a provision that supports a minimally colorable claim of unconscionability, and could sue upon identifying any customer who had agreed to the contract, without the inconvenience of finding a client actually affected by the challenged provision. Likewise, a search through advertisements for statements that arguably could be construed as misleading might produce a lawsuit on behalf of any plaintiff who had merely seen or heard them—even if she did not buy the advertised product or service, believe the advertised claims, or otherwise experience any impact from the representations.

Perhaps most significant, recognizing CLRA standing for plaintiffs whose only claimed "damage" is exposure to deceptive practices would effect a blatant end-run around the reforms instituted by Proposition 64. Fee- and settlement-generating class actions on behalf of unharmed plaintiffs would return, but with even greater consequences. While the UCL's only pecuniary remedy is restitution, the CLRA provides for actual and punitive damages.

For these reasons, this Court should preserve the substance of Section 1780(a)'s standing requirement. Mere exposure to an abstract CLRA violation does not in itself cause the type of "damage" that the Legislature deemed sufficient to create standing under Section 1780(a). And without "damage" or the imminent threat of it, a plaintiff cannot bring a declaratory judgment action, either. The CLRA was intended to create a means for injured consumers to sue, not a means to bring abstract controversies into court.

ARGUMENT

I. A CONSUMER'S MERE EXPOSURE TO A DECEPTIVE PRACTICE IS NOT THE TYPE OF "DAMAGE" THAT CONFERS STANDING UNDER THE CLRA.

A. The CLRA's Standing Requirements Are Met Only When A Deceptive Practice Causes Concrete Injury To A Consumer.

Section 1780(a) of the Civil Code limits standing in CLRA actions to "[a]ny consumer who suffers any damage as a result of the use or

employment by any person of a" business practice declared unlawful by Section 1770. *See Kagan v. Gibraltar Sav. & Loan Ass'n* (1984) 35 Cal.3d 582, 593 (recognizing Section 1780(a) as the CLRA's "standing requirement"). That provision has three elements. First, only a "consumer" may bring a claim.[1] Second, the consumer must have "suffer[ed]" some "damage." And third, the damage must "result" from the "use or employment" of a practice prohibited by Section 1770. The prohibited practices include "[i]nserting an unconscionable provision in the contract," which serves as the basis for the present action. Civ. Code § 1770(a)(19).

In interpreting a statute, this Court "first consider[s] its words, giving them their ordinary meaning and construing them in a manner consistent with their context and the apparent purpose of the legislation." *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 168. Although the CLRA does not define "damage," the ordinary meaning of the term comports with common sense: "damage" means "[l]oss or injury to person or property." BLACK'S LAW DICTIONARY (8th ed. 2004) p. 416.[2]

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[1] The CLRA defines a "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Civ. Code § 1761. This element is not at issue in the present appeal.

[2] Other dictionaries are in accord. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) p. 571 (defining "damage" as "loss due to injury: injury or harm to person, property, or reputation"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.

This meaning accords with the context and purpose of the statutory standing provision. As this Court has observed, "[i]n general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some *invasion* of the plaintiff's legally protected interests." *Angelucci*, 41 Cal.4th at 175 (emphasis added, internal quotation marks omitted). An "invasion" suggests tangible harm, not mere offended sensibilities. In accord with this principle, statutory causes of action typically include standing provisions requiring that a plaintiff suffer actual injury as a prerequisite to suit. *See, e.g.*, Bus. & Prof. Code §§ 16750, 17071 (requiring that plaintiffs suffer actual injury to bring claims under the Cartwright Act and Unfair Practices Act).[3] That is to ensure that the injury supporting litigation is "of sufficient magnitude to reasonably assure the relevant facts and issues will be adequately presented" to the court. *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 874.

In addition to the state decisions examined in the Respondent's Brief, federal courts have applied a common-sense analysis to determine that Section 1780(a)'s damage requirement calls for actual, concrete injury beyond mere exposure to a Section 1770 violation. In *Chavez v. Blue Sky*

[3] Similar provisions include Bus. & Prof. Code § 17204 (requiring that plaintiffs suffer an injury in fact and loss of money or property to bring a UCL claim); and Penal Code § 502 (providing a civil remedy to victims of certain computer crimes if they "suffer[] damage or loss by reason of a violation" of the statute).

Natural Beverage Co., for example, the plaintiff contended that he suffered damage under the CLRA (and "injury in fact" under other statutes) when he purchased beverages while believing the manufacturer's false representation that the drinks originated in New Mexico. (N.D. Cal.2007) 503 F.Supp.2d 1370, 1373. Accepting the plaintiff's allegation that he bought the drinks in reliance on the misrepresentation, the court nonetheless held that the plaintiff had suffered no damage because he "did not pay a premium for [the] beverages" based on their purported geographic origin or otherwise lose real value for which he paid by reason of the misrepresentation. *Id.* at 1374.

Two recent cases have also concluded that "damage" was or would be absent from claims very similar to those raised by appellants here. In *Lozano v. AT&T Wireless Services, Inc.*, the plaintiff sought certification of a class of consumers who were allegedly damaged by a contract that was claimed to contain unconscionable arbitration provisions. (9th Cir. 2007) 504 F.3d 718. After finding that the district court improperly evaluated the class-certification requirements, the Ninth Circuit instructed that "[a]ny class certified under subsection (a)(19) [of Section 1770 of the CLRA] necessitates a class definition that includes individuals who sought to bring class actions in California, but *were precluded from doing so* because of the class action requirement waiver in [defendant's] arbitration agreement, *and suffered some resulting damage*." *Id.* at 730-31 (emphasis added). And in

rejecting a similar claim that the CLRA "presume[d] damages from the mere insertion of the allegedly unconscionable clauses in a contract," Judge Charles Breyer recently observed that "[n]o court, state or federal, has held that a plaintiff has standing in such circumstances and plaintiffs have not convinced this Court that it should be the first." *Lee v. American Express Travel Related Servs.* (N.D. Cal.2007) 2007 WL 4287557, at *5.

The natural reading of "damage" as an actual, concrete injury is also confirmed by California decisions that have applied the term in other contexts. For example, "resulting damage" is an essential element of a fraud cause of action. *Alliance Mortg. Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239. This Court has interpreted the "resulting damage" element to require that a fraud plaintiff "must suffer actual monetary loss to recover" on a cause of action for damages. *Id.* at 1240.

"Damage" is also an essential element of an action for attorney malpractice. *See Budd v. Nixen* (1971) 6 Cal.3d 195, 200, *superseded by statute on other grounds*, Civ. Code § 340.6(a)(1). In *Budd*, this Court recognized that "[t]he mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." 6 Cal.3d at 200-01. The Court also concluded that the statute of limitations for the cause of action must be tolled until the client has actually suffered the requisite "damage," which the court characterized as "*appreciable and*

actual harm." 6 Cal.3d at 201 (emphasis added); *see also Laird v. Blacker* (1992) 2 Cal.4th 606, 611. This principle has since been codified in a provision tolling attorney malpractice claims until the plaintiff has "sustained actual injury."[4] Civ. Code § 340.6(a)(1).

And relying on the *Budd* damage analysis, this Court has continued to require that "the character or quality of the injury must be *manifest and palpable*"—occurring, for example, when the plaintiff loses a right or remedy or is liable for litigation costs and fees due to the attorney's negligence. *Adams v. Paul* (1995) 11 Cal.4th 583, 589-91 (emphasis added). In other words, an attorney's mere violation of professional obligations does not trigger standing; rather, the client must have suffered "manifest and palpable" harm as a result.

In sum, the plain text of Section 1780(a), well-established principles of standing, and a wide array of case law together compel the conclusion that the CLRA's "damage" requirement is met only when a plaintiff suffers an actual, concrete injury—an appreciable, manifest, palpable harm—beyond mere exposure to a deceptive practice.

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[4] *See generally Jordache Enters., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 ("The 'actual injury' provision in section 340.6 ... effectively continues the accrual rule *Budd* established. ... The test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action ... .")

B. Equating "Damage" With Mere Exposure To Allegedly Unconscionable Contractual Provisions Would Conflict With The CLRA's Plain Text, Violate The Legislature's Intent, And Lead To Absurd Consequences.

1. The plaintiffs' position would render the standing provision surplusage.

The plaintiffs could not be clearer about their contention that a CLRA violation confers standing *per se* regardless of damage. They equate Civil Code section 1770(a)—which enumerates the "unfair methods of competition and unfair or deceptive acts or practices" that "are unlawful" in a consumer transaction—with a standing requirement. (ARB 1.) Recognizing that they are unlikely to convince this Court to ignore Section 1780(a) altogether, the plaintiffs in the balance of their briefing ask the Court to equate the fact of a violation with the "damage" required to bring an action under Section 1780(a). That is, they contend that they suffered "damage" at the instant that allegedly unconscionable provisions were inserted into their cellular telephone agreements. (AOB 29.)

"In interpreting [statutory] language," however, this Court "strive[s] to give effect and significance to every word and phrase." *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284. But equating a violation with standing would render the damage and causation language mere "surplusage" at best. *Navellier v. Sletten* (2002) 29 Cal.4th 82, 95.

The mere existence of an unenforced contractual provision, any effect of which is contingent on future events that may never occur, has no

impact on a party to the contract, much less the actual and appreciable impact that is necessary to constitute "damage." The plaintiffs suggest that in some circumstances the existence of a contract provision could "chill" or otherwise affect a party's present behavior, but they do not contend that happened here.[5] (See AOB 25.) And though they suggest that the Legislature *might* provide for standing to be satisfied by the mere violation of a statutory right, it did not do so here.

The plaintiffs' contention that a violation is damage *per se* is also inconsistent with Section 1780(a)'s causation requirement, which provides that the requisite damage must be suffered "as a result" of a violation of Section 1770. By specifying damage and a violation as separate requirements and mandating that the former be caused by the latter, the statute makes clear that a Section 1770 violation alone is not enough to create standing.

2. *Kagan* Does Not Support Plaintiffs' Position, And Should Be Disapproved In Part To The Extent That It Raises Any Contrary Suggestion.

This Court's decision in *Kagan v. Gibraltar Savings & Loan Association* (1984) 35 Cal.3d 582 does not support removing concrete injury from the definition of "damage." Properly understood, *Kagan* merely rejects a limitation of "damage" to purely "pecuniary loss." *Id.* at

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[5] For this and similar reasons, their claim for a declaratory judgment is too abstract to survive.

593. The Court's *reason* for broadening the type of damage that is sufficient to meet Section 1780(a)'s standing requirement—that the CLRA gives consumers a general "legal right not to be subjected" to a Section 1770 violation—should not be read out of context to define the term "damage" itself.

Instead, *Kagan* is properly read as extending the meaning of "damage" to any damage resulting from a Section 1770 violation, whether or not pecuniary in nature. Indeed, the plaintiff in *Kagan* claimed to have been fraudulently induced into opening a bank account by false promises that fees would not be charged, only to be told after signing up that fees were impending. When challenged, the bank waived the fees, but the Court held that the plaintiff's "damage" persisted enough to support her bringing an action. In effect, the Court merely disapproved what it viewed as an effort to "pick[] off" potential class representatives by engaging in piecemeal settlements. *Id.* at 593.

In this case, by contrast, there are no allegations that the purportedly unconscionable contractual provisions caused any party to change its behavior, nor any allegations that concrete economic harm was impending. The plaintiffs here could not have standing under *Kagan* unless the *Kagan* plaintiff had decided against opening a bank account in the first place. But this Court did not extend CLRA standing nearly so far.

To the extent *Kagan* could be construed to remove the "damage" requirement altogether, the relevant passages should be disapproved and the plain meaning of Section 1780 confirmed. As explained above, any such broad result was unnecessary to the result, and therefore dicta. Moreover, no one could claim to have planned and engaged in primary conduct in reliance on a broader ability to sue than the statutory language justifies. Indeed, the precedential opinions applying *Kagan* on this point recognize that Section 1780(a) "does not create an automatic award of statutory damages upon proof of an unlawful act," *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754, but rather "requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm," *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292. *Accord Buckland v. Threshold Enters., Ltd.* (2007) 155 Cal.App.4th 798, 809.

3. The plaintiffs' position would undermine the purpose of standing provisions to limit the judicial role appropriately.

Standing requirements exist "to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." *Common Cause of Cal. v. Bd. of Supervisors of L.A. County* (1989) 49 Cal.3d 432, 439. A plaintiff who has suffered no injury as a result of an unlawful practice has little interest in the dispute itself, apart from its swift and

remunerative settlement for her attorneys' benefit. As California's experience with the UCL shows, extending standing to such parties merely allows attorneys to pursue their own interests.

This Court has recognized "the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion." *Pacific Legal Found. v. Cal.Coastal Comm'n* (1982) 33 Cal.3d 158, 170. A rule that equated standing with the presence of an abstract violation would require courts to adjudicate the wide range of deceptive acts prohibited by Section 1770 before the alleged misrepresentations have any real-world consequences on a consumer. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court," *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 (internal quotation marks omitted). This Court should not depart from that principle by permitting the adjudication of a hypothetical arbitration-clause dispute that may never materialize.

4. Equating standing with exposure to a violation would have additional deleterious effects.

This Court has also counseled that a statute should be interpreted "to make it workable and reasonable," and "to avoid an absurd result." *Wasatch Prop. Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1122. Yet equating the existence of a Section 1770 violation with standing to sue would lead to absurd consequences. Section 1770 prohibits 23 widely

varied practices, including various acts of "[m]isrepresenting," "[r]epresenting," and "[a]dvertising" information. Were the plaintiffs here to prevail, enterprising lawyers could bring class actions on behalf of every consumer who saw or heard an advertisement, limited only by the lawyer's ability to craft a reason why the advertised claim might be false. It would not matter if the consumer believed the claim, if the claim induced the consumer to actually purchase the product or service that was advertised, or if the claim were actually true.

Equating standing with the existence of a violation would have another unintended consequence. Where an action involves the purported unconscionability of a contract term, as this one does, the statute of limitations might well run before the relevant consumers were even aware of the provision's effect. If consumers suffer damage at the moment that an unconscionable provision is inserted into their contracts, consumers would have a complete cause of action at that instant and would have three years to bring their claims. Civ. Code § 1783 (providing for a three-year statute of limitations). Those who were provided with the full text of their contracts and who were not misled by unfairly hidden contractual provisions would have no basis to toll the limitations period. In effect, the plaintiffs' position would impose an affirmative duty on such consumers to contemplate the possible effects of each provision within three years of signing to determine whether any basis exists for an unconscionability

claim under the CLRA. Consumers who later suffer actual damages would be out of luck.

To equate an abstract violation with "damage" here could have far-reaching effects because several other statutes use similar standing language. For example, Penal Code section 502(e)(1) extends a civil cause of action for unauthorized computer access to those who "suffer[] damage or loss by reason of a violation of" the statutory prohibitions against such access. The statute provides for possible remedies including actual damages, attorney's fees, and punitive damages. Penal Code § 502(e). Similarly, Business and Professions Code section 6175.4(a) permits clients to sue attorneys for violating certain disclosure requirements if they "suffer[] any damage as the result of a violation," with actual damages, punitive damages, and other relief available.[6] If this Court construes "damage" to refer to the violation of a statutory prohibition alone, these and similar standing requirements would become meaningless.

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[6] *See also, e.g.*, Civ. Code § 3343.5(a) (granting standing to those "who suffer[] any damage proximately resulting" from certain unlawful acts of motor vehicle subleasing); Ins. Code § 1216.5(a)(2) (authorizing government action where a policyholder "has suffered any loss or damage" from an insurer's material noncompliance with the statute"); Penal Code § 4030(p) (authorizing suit by persons "who suffer[] damage or harm as a result of" a violation of prohibitions against unlawful strip and body cavity searches); Veh. Code § 11203.5 (authorizing suit by the state if it "suffers any loss or damage by reason of" certain fraudulent misrepresentations involving traffic violator school owners); Veh. Code § 11711 (permitting actions by persons who "suffer any loss or damage by reason" of a fraud perpetrated by a car dealer).

II. PERMITTING PLAINTIFFS TO PURSUE CLRA CLAIMS WITHOUT SUFFERING CONCRETE "DAMAGE" WOULD SANCTION AN END-RUN AROUND THE REFORMS INSTITUTED BY PROPOSITION 64.

Until 2004, the UCL authorized "any person acting for the interests of itself, its members or the general public" to file a civil action for relief from unfair business practices. Former Bus. & Prof. Code § 17204, *amended by* Prop. 64, § 3; *see Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223. Without any need to find plaintiffs who were actually harmed by a UCL violation, attorneys flooded the courts with lawsuits that generated attorneys' fees without providing any public benefit. *See* Prop. 64, § 1; *Mervyn's*, 39 Cal.4th at 228 (discussing the findings of those who voted for Proposition 64). To stem the tide of these "shakedown" lawsuits, California voters passed a measure that added a standing requirement to the UCL. Specifically, Proposition 64 limited UCL actions to plaintiffs who suffered an "injury in fact" and "lost money or property as a result of unfair competition." Bus. & Prof. Code § 17204; *see Mervyn's*, 39 Cal.4th at 228.

To date, the CLRA's standing requirement has kept the CLRA from becoming the mirror-image of the former UCL. By wisely limiting CLRA lawsuits to plaintiffs who have suffered damage as a result of an unlawful business practice, the legislature ensured that courts would be able to concentrate their resources on resolving actual, fully developed disputes.

The CLRA's standing limitation also protects small businesses from expending desperately needed funds to resolve allegations of the kind of harmless, technical CLRA violations that pose no threat to the public.

But the CLRA would substitute for the most vexatious aspects of the former UCL if any consumer who arguably has some connection to an alleged CLRA violation could sue, without being harmed by the challenged practice. And a close substitute it would be, for the CLRA also outlaws a broad (though not unlimited) array of "unfair methods of competition and unfair or deceptive acts or practices." Civil Code § 1770(a). Moreover, the stakes would often be higher: the CLRA authorizes actual and punitive damages, ramping up the potential consequences to the business community while giving plaintiffs' attorneys more incentive to file weak claims and more leverage to extract large settlements.

This Court should not transform the CLRA in a way that effectively nullifies Proposition 64.

III. AN ABSTRACT VIOLATION POSING NO ACTUAL OR IMMINENT HARM CANNOT SUPPORT A DECLARATORY JUDGMENT.

For similar prudential reasons, the Court should not open the declaratory judgment procedure to purely abstract claims without any identifiable prospect of probable, concrete harm. Even more than the proposed dilution of the CLRA standing provision, a diluted declaratory judgment standard would open the courts to the most ethereal claims. A

plaintiff at least has to allege that the defendant is about to do something that *would* damage the plaintiff. It is one thing to say that a declaratory judgment action should not be dismissed merely because the plaintiff is not entitled to relief in his favor on the merits. But sustaining a demurrer when the plaintiff lacks *standing* to bring the underlying action is another matter altogether. If that is not enough to support dismissal, the courts would have to entertain every declaratory judgment action brought before them, as the limitation of the declaratory judgment power to "cases of actual controversy" is no stricter than that.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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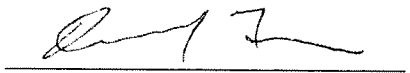
CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1))

According to the word-count facility in Microsoft Word 2002, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), is 4,409 words long, and therefore complies with the 14,000-word limit contained in Rule 8.520 (c)(1).



Donald M. Falk
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE
S153846

I, Kristine Surzynski, declare:

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On February 4, 2008, I served a copy of the within document(s):

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

☐ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.

☒ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an overnight service agent for delivery.

☐ I caused the above listed documents to be served by **PERSONAL DELIVERY** on the following individuals:

J. David Franklin
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Attn: Hon. Sheila Fell

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on February 4, 2008 at Palo Alto, California.

Kristine Surzynski