Case No. E073700

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

vs.

JAMES RUTHERFORD, an individual; THE ASSOCIATION FOR EQUAL ACCESS, an unincorporated entity; LAW OFFICES OF BABAK HASHEMI; BABAK HASHEMI, an individual; MANNING LAW APC; JOSEPH R. MANNING JR., an individual; MICHAEL J. MANNING, an individual; CRAIG COTE, an individual; and DOES 1-25, inclusive,
Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR RIVERSIDE COUNTY, HONORABLE SUNSHINE SYKES, JUDGE, CASE NO. RIC1902577.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANT

FRED J. HIESTAND (SBN 44241)
COUNSELOR AT LAW
fred@fjh-law.com
3418 Third Ave., Suite 1
Sacramento, CA 95817
Tel: (916) 448-5100

General Counsel for *Amicus Curiae*
The Civil Justice Association of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes

Articles, Texts and Miscellaneous

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

vs.

JAMES RUTHERFORD, an individual; THE ASSOCIATION FOR EQUAL ACCESS, an unincorporated entity; LAW OFFICES OF BABAK HASHEMI; BABAK HASHEMI, an individual; MANNING LAW APC; JOSEPH R. MANNING JR., an individual; MICHAEL J. MANNING, an individual; CRAIG COTE, an individual; and DOES 1-25, inclusive,
Defendants and Respondents.

INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC") welcomes the opportunity to address as *amicus curiae*[1] the issue this case presents — Does the "litigation privilege" (Civil Code § 47) bar a district attorney from prosecuting under the Unfair Competition Law ("UCL"; B & P Code § 17200 et seq.) colluding plaintiffs and their counsel for implementing a scheme of "shakedown" ADA lawsuits against small businesses?

---

[1] By separate accompanying application, CJAC asks the court to accept this brief for filing.

"Shakedown" litigation has sadly become common enough to have earned judicial recognition as "[T]he 'I get rich' lawsuit brought by a person who has had no business dealings with the proprietor being sued, but who . . . notice[d] . . . the hapless proprietor is out of compliance with a particular law." *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2018) 214 Cal.App.4th 544, 547. In popular usage, shakedown lawsuits are "frivolous lawsuits ginned up by unethical plaintiffs' attorneys seeking easy settlements." David Reyes, *Business Owners Rally Around Initiative to Limit Lawsuits*, *L.A. TIMES* (Orange County), Sept. 16, 2004, at B3.

Nonetheless, the superior court here ruled the litigation privilege[2] precluded the District Attorney's effort through the UCL to stop respondents' predatorily unlawful business practices, a conclusion that, if affirmed, will leave small businesses preyed upon by respondents and their law firms powerless to do anything when hit by such litigation except surrender in settlement or default. After all, these businesses were targeted by respondent lawyers precisely because they

---

[2] Civ. Code § 47 reads, in pertinent part, that "[a] privileged publication . . . is one made (a) [i]n the proper discharge of an official duty; (b) in any . . . (2) judicial proceeding . . .."

cannot afford to defend themselves in litigation. Instead of "too big to fail" – the moniker attached to large corporate institutions receiving federal bailout assistance during the 2007-2008 financial meltdown – they are marked by the respondents here as susceptibly vulnerable because they are "too small to succeed."

CJAC believes and will show that the lower court judgment is wrong, a miscarriage of justice arrived at by misreading the scope and application of the litigation privilege in the context of the civil enforcement authority conferred by the UCL upon law enforcement, specifically the Attorney General and the 58 district attorney offices in California.

CJAC is no stranger to shakedown lawsuits.[3] Indeed, seventeen years ago we supported the Attorney General's prosecution under the UCL against the Trevor Law Group and other firms of their ilk who abused the UCL itself to extort settlements from nail salons, travel agencies and other

---

[3] CJAC is a nonprofit organization whose members are businesses, professional associations and financial institutions. Our principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some occasions harm to others – more fair, certain, and economical. Toward this end, we regularly appear as amicus curiae in cases of interest to its members, including those that concern the scope and application of the UCL.

businesses. See, *e.g.*, *American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP* (2005) 134 Cal.App.4th 1332, 1347.[4] This led the following year to Proposition 64, a successful popular statewide initiative that amended the UCL to curb shakedown lawsuits.[5] A key feature of Proposition 64 removed the former "universal standing" of anyone, private and public, to pursue a UCL claim regardless of whether they suffered "actual injury" and instead "allow only the Attorney General, district attorneys and other public officials to file [such] lawsuits [with a relaxed 'standing" requirement] on

---

[4] "In 2002 and 2003, the Trevor Law Group found financial success by abusing California's unfair competition law. 'The abuse is a kind of legal shakedown scheme: Attorneys form a front 'watchdog' or 'consumer' organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business . . ., and point out that a quick settlement . . . would be in the business's long-term interest.' *People ex. Rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317."

[5] "Proposition 64 was sponsored by the Civil Justice Association of California, which had been working for close to ten years to curb 'shakedown' lawsuits." William R. Shafton, *California's Uncommon Common Law Class Action Litigation* (2008) 41 *LOY. L.A. L. REV.* 783, 835-836.

behalf of the People . . .."[6]

If allowed to stand, the lower court's judgment will effectively eviscerate Proposition 64's exclusive conferral upon government prosecutors under the UCL to protect the public from shakedown lawsuits and give an unwarranted green light to their resumption.

SALIENT FACTS AND PROCEDURE

This case comes before this court from a judgment sustaining respondents' general demurrer, which means all material facts properly pleaded in the complaint must be accepted as true. *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967. These undisputed facts constitute a scathing indictment of respondents' conduct, justifying the condemnation that if that conduct does not give rise to a viable UCL claim by the District Attorney against respondents, then "the law is a ass – a idiot." *Estate of Wilson v. Aiken Industries, Inc.* (1978) 439 U.S. 877, 879 fn. 3, quoting C. Dickens, *OLIVER TWIST* 377 (1912).

Respondents are three individual plaintiffs – James Rutherford, Craig Cote and Joseph R. Manning, Jr. – an organization, The Association for Equal Access ("A4EA")

---

[6] http://vigarchile.sos.ca.gov/2004/general/propositions/prop64-arguments.htm.

founded by Rutherford – and several named lawyers and law firms representing them in their collective practice of filing hundreds of unlawful Americans with Disability Act ("ADA"; 42 USC § 1281 et seq.) and Unruh Act (Civ. Code § 51 et seq.) lawsuits against businesses in Riverside County. CT 6-7.

The named plaintiffs falsely claim in these lawsuits featuring "boilerplate" complaints that they were denied, by way of "architectural barriers," full access to, or full enjoyment of, the services offered by the businesses; and demand in them injunctive relief, damages and attorney fees. CT 9. Respondents colluded and conspired and have achieved in their "ADA lawsuit scheme" to "extort money settlements from Riverside County individuals and businesses." CT 10.

What renders respondents' business practices to carry out their scheme so patently "unlawful" under the UCL is, for instance, that respondent Rutherford was:

- Not denied by way of any architectural barrier, full and equal access to, or enjoyment, of any of the facilities, services or goods at the business he and other respondents sued (CT 10: Complaint ¶ 23);

- Observed on multiple occasions, walking and ambulating without difficulty (CT 11: Complaint ¶ 28);

- Observed entering a particular business, bypassing

the two sets of "handicap doors" that open automatically by pressing a large round disc with the blue and white handicap symbol, and instead manually grabbing and pulling open two sets of non-automatic doors (CT 11: Complaint ¶ 30);

- Witnessed leaving the MacArthur Centre (the former location of respondent Manning Law), holding his cane (not relying on it) and bypassing the handicap lift near the stairwell to instead walk down the middle of the flight of stairs, without using the handrails on either side of the stairs, to his vehicle in the parking lot that was not parked in an available handicapped designated parking space (CT 11: Complaint ¶ 32);

- Has not, and does not, use or rely upon a rollator walker or wheelchair (CT 12: Complaint ¶ 33);

- Never accessed or attempted to access the grounds at a particular business he sued while claiming falsely that he did so (CT 12: Complaint ¶ 37);

- In most instances, if not all, never stepped foot inside the businesses sued in his federal ADA lawsuits and, at most, if at all, drove his vehicle into the parking lots of the businesses sued (CT 13: Complaint ¶ 40).

This aforementioned litany of business practices by respondents, along with other acts set forth in the complaint

about these "drive by" ADA lawsuits,[7] are proscribed as "unlawful" and "fraudulent" under the UCL. Specifically, the District Attorney's complaint and supporting briefs reference criminal statutes that are "borrowed" or "bootstrapped" to the various prongs of the UCL for civil enforcement: Penal Code § 6128 (prohibition of deceit and collusion by attorneys); Penal Code §§ 523 and 519 (extortion); and Penal Code § 484 (fraud).

Respondents demurred to the complaint arguing, *inter alia*, that it was barred by the litigation privilege (CT 23, 37-42); and the People opposed. CT 46-62. As previously mentioned, the lower court sustained the demurrer on that ground (CT 78-79, 82-83, 86-88) and the District Attorney timely appealed. CT 94-95.

---

[7] "Since 2013, there has been a continuous surge in ADA litigation, specifically regarding Title III—Places of Public Accommodation. Entrepreneurial attorneys and lawsuit-friendly plaintiffs have combined forces to bring thousands of businesses, both large and small, into court over allegations of ADA violations. Known as 'drive-by lawsuits,' the number of these lawsuits that actually go to trial is dubious, though attorneys' fees are recoverable. The main goal of these lawsuits is to shake down businesses and strong-arm financial settlements under the guise of ADA compliance." Phoebe Joseph, *An Argument for Sanctions Against Serial ADA Plaintiffs* (2019) 29 *U. FLA. J.L. & PUB. POL'Y* 193.

SUMMARY OF ARGUMENT

As amended by Proposition 64 in 2004, the UCL confers broad and exclusive authority upon public prosecutors to sue sham plaintiffs and their attorneys who collude to implement "shakedown" lawsuits against hundreds of hapless small businesses. This authority includes not just those who abuse the UCL itself but, as happened here, those who fraudulently claim under the ADA and its state analogue, the Unruh Act, that they have been denied through physical barriers access to facilities and services of the defendants.

Applying the "litigation privilege" to preclude UCL prosecution by the District Attorney of those engaging in the unlawful business practice of gouging defendants through ADA shakedown lawsuits and ensuing extortionate settlements, cuts the heart out of Proposition 64. Ample case authority underscores that a District Attorney's UCL action against shakedown litigators is outside the litigation privilege. The District Attorney's UCL lawsuit is not, for example, a "derivative tort action for money damages," the touchstone for invocation of the litigation privilege. It is solely an equitable action that also permits the imposition of civil penalties; and the District Attorney does not "stand in the shoes" of parties to the shakedown litigation practices to derive his authority from them, but is an unrelated neutral party pledged to act

evenhandedly in the People's interest.

The court should hold that Proposition 64 authorizes the District Attorney to prosecute pursuant to the UCL those who, like respondents, prey on business through shakedown lawsuits notwithstanding the litigation privilege.

ARGUMENT

I. THE INTENT AND PURPOSE OF PROPOSITION 64 WAS TO CLARIFY AND STRENGTHEN THE UNIQUE ROLE OF PUBLIC PROSECUTORS IN ENFORCING THE UCL TO PROTECT THE PUBLIC FROM "SHAKEDOWN" LAWSUITS LIKE THOSE CONCOCTED AND PURSUED BY RESPONDENTS.

In interpreting a voter initiative, courts apply the same principles that govern statutory construction. See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 ("*Horwich*"). Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." *People v. Birkett* (1999) 21 Cal.4th 226, 231. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. *Horwich*, *supra*, 21 Cal.4th at 276. When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet. (*Birkett*, *supra*, 21 Cal.4th at 243.)" *People v. Rizo* (2000) 22 Cal.4th 681, 685.

Turning first to "the language" of Proposition 64 shows it added text to B & P Code §§ 17203, 17204 and 17535 clarifying that private plaintiffs acting as representatives of the public can no longer bring suits under the UCL unless they themselves have "suffered injury in fact . . . and lost money or property as a result of . . . unfair competition." Nor can they any longer bring such "representative actions" without complying with the requirements for filing "class actions" under section 382 of the Code of Civil Procedure.

These limitations, however, are expressly *not* applied to certain public prosecutors, including the Attorney General and District Attorneys. In fact, the role of these public prosecutors in enforcing criminal laws by "borrowing" and "bootstrapping" them to the various prongs of the UCL (*e.g.*, "unlawful," "unfair" and "fraudulent") for civil enforcement has been strengthened.

Any doubts about the manifest intent of Proposition 64 are clarified by the "findings and declarations" of the initiative and "the ballot summaries and arguments [that] may be considered when determining to the voters' intent and understanding of [the] measure." *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14.

Proposition 64 contains eight "Findings and Declarations of Purpose" specifying its intent. One of these, Finding 4, is to "eliminate frivolous lawsuits," (Prop. 64, § 1(d)), which are defined in Finding 2 as those filed to "generate attorney's fees without creating a corresponding public benefit;" "where no client has been injured in fact;" and where the clients "have not used the defendant's product or service . . . or had any other business dealing with the defendant," the very conduct by respondents described in the complaint here. Prop. 64, § 1(b). Finding 5 further states that "it is the intent of 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 under the standing requirements of the United States Constitution." Prop. 64, § 1(e).

The last three specified purposes of Proposition 64 make clear the voters' intent to *enhance* the role of government prosecutors to protect the public from shakedown lawsuits. Finding 6, for instance, states "it is the intent of . . . th[is] act that *only* the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Prop. 64, § 1(f); italics added. Finding 7 further clarifies that it intends for "the Attorney General , district attorneys [and other

specified government officers] [to] maintain their public protection authority and capability under the [UCL]." Prop. 64, § 1(g). Finally, finding 8 states, "It is the intent of . . . voters in enacting the act to require that civil penalty payments be used by the Attorney General, district attorneys . . . [and other specified government counsel] to *strengthen the enforcement* of California's unfair competition and consumer protection laws." Prop. 64, § 1(h); italics added.

The ballot arguments in favor of Proposition 64 confirm the intent of the voters that it be used by public prosecutors to go after those, who like respondents, "file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled." See *ante*, fn. 6. "Public prosecutors have a long, distinguished history of protecting consumers and honest businesses. Proposition 64 will give those officials the resources they need to increase enforcement of consumer protection laws by designating penalties from their lawsuits to supplement additional enforcement efforts, above their normal budgets." *Id.*

Thus, while Proposition 64 amended the UCL to stop its abuse by private attorneys like the Trevor Law Firm, it simultaneously buttressed the ability of public prosecutors to wield the UCL in prosecuting attorneys who misuse laws to file frivolous lawsuits for clients who lack standing.

A. The Litigation Privilege Does not Apply to this UCL Suit against Respondents because it is not a Derivative Tort Action, but an Equitable One Prosecuted by the District Attorney who is not a Party nor Counsel to any of Respondents' Shakedown ADA Lawsuits.

The litigation privilege is broad and, when it applies, absolute; but it does not always apply to cases in which a party to a lawsuit is sued later by one not a party, or counsel to (or related to) a party in the previous lawsuit. "While the litigation privilege is called 'absolute,' this characterization somewhat overstates the matter." Witkin, 5 *SUMMARY 11TH TORTS* § 666 (2020), citing *Mattco Forge v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406. For example, the litigation privilege is not a defense in a UCL action based upon an attorney's unlawful conduct of litigation or prelitigation tactics and brought by one who was *not a party to the earlier litigation* (or proposed litigation). *American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP*, *supra*, 134 Cal.App.4th at 1346-1347; italics added. The court opined that to hold otherwise would, as in this case, effectively create an immunity from statutory liability for unlawful of fraudulent business practices (see B & P Code § 17200) that happened to occur in connection with the separate litigation. See also discussion in *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 921-924.

Moreover, the litigation privilege does *not* extend to acts done in violation of the Rosenthal Fair Debt Collection Practices Act (Civ. Code § 1788 et seq.) or the Federal Fair Debt Collection Practices Act (15 USC § 1692 et seq.). The protections afforded debtors by these Acts would, as with the protections against shakedown lawsuits afforded by the UCL to public prosecutions, be rendered meaningless if the privilege applied. *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267, 1275-1277.

Neither does the litigation privilege bar an abuse of process action based on the manipulation of multiple lawsuits. In *Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1373, a wheelchair-bound plaintiff claimed defendant restaurant failed to provide a parking space for disabled patrons and had a counter too high to be reached from a wheelchair. This "nuisance" complaint was filed in September and served several days afterwards before being settled in November. Defendant was then sued by a different plaintiff, represented by the same attorney, later in September of the same year but not served until December, after the first suit was settled. The defendant's cross-complaint against the second plaintiff for abuse of process was deemed not barred by the litigation privilege.

Finally, *People ex. rel. Alzayat v. Hebb* (2017) 18 Cal.App.5th 801 disallowed application of the litigation privilege in a qui tam suit action against the plaintiff's employer and his supervisor, alleging violations of the Insurance Frauds Prevention Act ("IFPA"; Ins. Code § 1871 et seq.). There the claim was that the supervisor gave false statements in an incident report submitted in response to plaintiff's workers' compensation claim, statements the supervisor repeated in deposition. Defendants moved for judgment on the pleadings, arguing that the litigation privilege barred the claim because all of the statements were made in connection with the workers' compensation proceeding. The appellate court affirmed the trial court's judgment that claims under the IFPA are an exception to the litigation privilege, and to allow them to be barred would contravene the purposes of the IFPA. Similarly, allowing the litigation privilege to prohibit public enforcement of the UCL by district attorneys would negate its intent and purpose to protect the public from shakedown lawsuits.

Respondents cite a bevy of cases to support their contention that the litigation privilege bars "derivative civil tort lawsuits." See, *e.g.*, RB 32. But the UCL action here does not sound in tort to seek compensation from respondents: it is entirety an equitable action for injunction, restitution to the

extorted and defrauded businesses, and civil penalties that are recoverable only by public law enforcement officials. B & P Code § 17206. "A UCL action is equitable in nature; damages cannot be recovered." *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144.

Neither is the District Attorney's suit a "derivative" action in any legal sense. His office does not "stand in the shoes" of the defendants sued by respondents through shakedown lawsuits in the same way shareholders may bring "derivative" actions against their corporate boards who act unlawfully and contrary to their fiduciary duties to shareholders. The District Attorney has been charged with exclusive responsibility under the UCL to protect the public from predatory legal practices by craven plaintiffs and their attorneys who have ginned-up "get rich quick" schemes involving fraudulent and extortionate lawsuits. His duty is one of "neutrality," "born of two fundamental aspects of his employment:" he is a "representative of the sovereign [who] must act with the impartiality of those who govern;" and "he must refrain from abusing that power by failing to act evenhandedly." *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746.

The District Attorney is one of the designated public officers vested with responsibility by the UCL to act as a

corrective and countervailing power to the documented abuses by respondents. “Not only is a government lawyer’s neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole.” *Id.* The litigation privilege should not be allowed to thwart or frustrate that solemn responsibility.

Amicus believes the aforementioned authorities provide sufficient basis to *harmonize* the “litigation privilege” with the public enforcement actions of the UCL against respondents for implementing their ADA shakedown lawsuit scheme. “When possible, courts seek to harmonize inconsistent statutes, construing them together to give effect to all of their provisions.” *Lopez v. Sony Electronics, Inc*. (2018) 5 Cal.5th 627, 634. After all, it cannot be gainsaid that the specific crimes the District Attorney has borrowed and bootstrapped to the UCL in this action against respondents are *not*, when prosecuted as crimes per se, barred by the litigation privilege. See RB 32, citing and quoting from *Silberg v. Anderson* (1990) 50 Cal.3d 205, 218-219. As crimes, however, they cannot be enjoined because equity will not restrain the violation of a penal law. Civ. Code § 3369(1).

But if these crimes are part of a "business practice," which they are when bootstrapped to the "unlawful" prong of the UCL, the mere fact that criminal exposure exists will not bar civil injunction, restitution, and penalties. *People v. E.W.A.P, Inc.* (1980) 106 Cal.App.3d 315, 320. The UCL, then, though purely a civil statute, expressly permits government prosecutors to use its civil enforcement provisions in matters that might also be prosecuted criminally. "By proscribing 'any unlawful' business practice, [Business and Professions Code] section 17200 'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 395.

If the court holds, as respondents contend it should, that the litigation privilege does not bar enforcement of these crimes as crimes but *does* bar their civil enforcement when "tethered" to the UCL, it will rend the UCL asunder in contravention of its very purpose.

B. Assuming *Arguendo* there is an Irreconcilable Conflict Between the Litigation Privilege and the UCL; then this Court can and should Construe the Privilege to Permit this UCL Action to Proceed.

Even if the "litigation privilege" is found to be irreconcilable with the UCL when it comes to civilly

prosecuting those who engage in the business practice of implementing ADA shakedown lawsuits, the litigation privilege should bow here to the primacy of the UCL. This court has the inherent authority to construe the statutory litigation privilege in this manner and to that effect. That is because the litigation privilege "derives from common law principles . . .." *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241. "[T]he litigation privilege [is] a codified extension of the common law's defense to defamation actions." *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 44. And *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 ("*Li*") holds that courts have broad discretion to amend statutes based on the common law "so as to give dynamic expression to [their] fundamental precepts." *Id.* at 822.

Li involved the judicial interpretation of a statute, Civ. Code § 1714, that for more than a century had been read to codify the defense of *contributory* negligence and to instead provide for *comparative* fault. The court's meta-magical transformation to the new meaning it gave this aged text was professedly made possible by "the [civil] code's peculiar character as *a continuation of the common law*." *Li, supra* at 822; italics added. A "fundamental precept" of the litigation privilege codified in Civ. Code § 47 is, as the previous case

authorities make clear, that it not be used to create an immunity from statutory liability for unlawful of fraudulent business practices.

In addition, there is authority that when, as here, an initiative measure like Proposition 64 readjusts the balance of authority between public and private parties for its enforcement, prior statutes that irreconcilably conflict with that readjustment are "implicitly repealed." See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038: "Notwithstanding the presumption against repeals by implication, repeal may be found where (1) the two acts are so inconsistent that there is no possibility of concurrent operation, or (2) the later provision gives undebatable evidence of an intent to supersede the earlier."

To the extent the statutory litigation privilege interferes with or thwarts the ability of the District Attorney to civilly prosecute under the UCL those engaged in the unlawful business practice of implementing ADA shakedown lawsuits – and barring civil enforcement altogether is penultimate interference – its application should be deemed "implicitly repealed."

CONCLUSION

For all the aforementioned reasons, amicus urges the court to hold that the litigation privilege does not prevent the District Attorney from prosecuting respondents under the UCL for their unlawful business practices of implementing ADA shakedown lawsuits.

Dated: July 8, 2020

/s/

Fred J. Hiestand
CJAC General Counsel

CERTIFICATE OF WORD COUNT

I certify that this document, based on the word processing program used to compose it, contains approximately 4,900 words, exclusive of the caption, tables, certificate and proof of service.

Dated: July 8, 2020

/s/
Fred J. Hiestand
CJAC General Counsel

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On July 8, 2020, I served the foregoing document(s) described as: AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PLAINTIFF AND APPELLANT in *The People of the State of California v. James Rutherford, et al.*, E073700 on all interested parties in this action electronically as follows:

Michael A. Hestrin
Timothy S. Brown
Emily R. Hanks
Office of the District Attorney
3960 Orange Street
Riverside, CA 92501
michaelhestrin@RivCoDA.org
timothybrown@RivCoDA.org
emilyhanks@RivCoDA.org
Attorneys for Plaintiff/Appellant

Drew A. Harbur
David J. Darnell
Callahan & Blaine, APLC
3 Hutton Centre Drive, Ninth Floor
Santa Ana, CA 92707
dharbur@callahan-law.com
ddarnell@callahan-law.com
Attorneys for Defendants/Respondents

Appellate Defender's Inc.
eservice-court@adi-sandiego.com

Benjamin L. Price
Courtney M. Serrato
Bremer Whyte Brown & O'Meara
20320 SW Birch Street, 2nd Floor
Newport Beach, CA 92660
bprice@bremerwhyte.com
cserrato@bremerwhyte.com
Attorneys for Defendants and Respondent

Attorney General's Office
sdag.docketing@doj.ca.gov

Riverside County Superior Court
appealsteam@riverside.courts.ca.gov

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
(Via TrueFiling)

[X](VIA E-SERVICE) I electronically served the foregoing documents via the TrueFiling website.

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

Executed this 8th day of July 2020 at Sacramento, California.

/s/
David Cooper