No. B292416

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION 4

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent.

J. C. PENNEY CORPORATION, INC.; KOHL'S DEPARTMENT STORES, INC.; SEARS, ROEBUCK AND CO. AND SEARS HOLDING MANAGEMENT CORPORATION; MACY'S INC.
Real Parties in Interest.

From the Superior Court of the State of California
for the County of Los Angeles
The Honorable Carolyn B. Kuhl, Judge Presiding | Case No. BC643036

DEFENDANTS' JOINT RETURN TO PETITION FOR WRIT OF MANDATE

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I. INTRODUCTION

Business and Professions Code Section 17501 by its plain text regulates the speech a retailer may use to communicate truthful information to consumers about the prices of the products it sells.[1] Unlike other statutes that permissibly regulate commercial speech, Section 17501 is not limited to false or misleading statements. Worse still, the statute is littered with vague and undefined terms, including "prevailing market price," "locality," and "former price," that lack any objective definitions. As a result, retailers are left to guess what speech is prohibited by Section 17501, and guessing wrong could result in substantial—even criminal—penalties.

Recognizing the vagueness of Section 17501, a committee convened three decades ago by the Attorney General concluded that the statute is effectively unenforceable. The Attorney General's committee solicited opinions from "over 150 retailers, Better Business Bureaus, consumer groups and law enforcement officials" and, based on those opinions, the committee concluded that "the problems with section 17501 are many." (App. at p. 491.) For example, the Los Angeles District Attorney's Office told the

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[1] Section 17501 states, in full:

> For the purpose of this article the worth or value of any thing advertised is the **prevailing market price**, wholesale if the offer is at wholesale, retail if the offer is at retail, at the **time of publication** of such advertisement in the **locality** wherein the advertisement is published.
>
> No price shall be advertised as a **former price** of any advertised thing, unless the alleged former price was the prevailing market price as above defined **within three months next immediately preceding the publication of the advertisement** or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

(Bus. & Prof. Code, § 17501, emphasis added.)

committee that "17501 clearly is not sufficient to enforce" and that it endorsed "doing away with 17501 because we simply don't use it and it's almost impossible to use." (*Id*. at pp. 491, 538.) Since that time, the Legislature has not clarified Section 17501, and the rise of e-commerce has magnified the interpretative problems with such terms as "prevailing market price" and "locality." Yet in recent years, despite the many problems with determining what is prohibited by Section 17501—or perhaps because of them—private plaintiffs began seizing on the statute to bring class-action lawsuits against retailers.

Picking up on this trend, the Los Angeles City Attorney—represented by private law firms working on a contingency-fee basis—filed suit on behalf of the People of the State of California claiming that Defendants' advertisements of reference prices of products on their websites violated Section 17501. The People contend that determining the "prevailing market price" of the products on Defendants' websites does not require any analysis of the actual "market" for the same or similar products, but is instead calculated by reviewing the same product's price history on the retailer's own website. If, and only if, the same product was offered by the retailer on its website for 46 out of the previous 90 days can a retailer advertise that price as a former price of the product under the People's construction of Section 17501. This standard finds no support in Section 17501 or any precedent, and there is no way that Defendants or any other retailers could have learned of this interpretation of Section 17501 before the People filed their *amended* complaints (the first time the People offered this new theory). (See pp. 32-45, *post*.)

In light of the statute's many undefined and ambiguous terms, and combined with its restriction of speech protected by the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution, the Superior Court (Kuhl, J.) correctly held that Defendants

lacked adequate notice of the conduct Section 17501 prohibits, and accordingly held that the statute is void for vagueness. This Court should reach the same conclusion.

None of the statute's five key terms—(1) "prevailing market price"; (2) "time of publication"; (3) "locality"; (4) "former price"; and (e) "within three months next immediately preceding the publication of the advertisement"—has a generally accepted or statutorily codified definition. Given these vague terms, it is impossible for retailers to know *ex ante* what conduct violates Section 17501. For example, considering only the "prevailing market price" element, suppose a retailer offers a pair of socks for $5. Four months ago, the retailer first offered the socks for $10 for a month; for the next two months it offered them for $9; in the past month, it offered them for $8; and its competitors have always offered the same socks for $10. What is the "prevailing market price" for these socks? The People would contend that the answer is not $10 (the retailer's own original price and the price always offered by its competitors) or $8 (the most recent price offered by the retailer), but instead $9 (the price that the retailer offered the socks for more than 46 out of the past 90 days). Nothing in Section 17501 gives fair notice of that counterintuitive position.

In fact, not only is there no support for the People's proposed interpretation of Section 17501 in the text of the statute, but a prior interpretation by the Attorney General "substantially conflicts with the interpretation proffered in this case." (App. at p. 933.) Specifically, a 1957 Attorney General opinion came to the opposite conclusion regarding the scope of the "market," defining "prevailing market price" as "the predominating price that may be obtained for merchandise similar to the article in question on the open market and within the community where the article is sold." (30 Ops.Cal.Atty.Gen. 127.) This interpretation stands in stark contrast to the People's contention that "market" is actually limited to

the former selling price (1) of the same product (2) by the same retailer (3) in the same sales channel.

Moreover, as the Superior Court noted, "[t]he People's selection of a 46 day requirement is an arbitrary interpretation of section 17501, it is not supported by existing case law, and other enforcement authorities are not bound by that interpretation." (App. at pp. 933, 938.) The Superior Court further explained that the People's attempted application of Section 17501 here "poses the exact problem of impermissible legislative delegation of basic policy matters to enforcement authorities 'for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" (*Id.* at p. 938.) Instead, the People's interpretation of "prevailing market price" was tailor-made, out of whole cloth, to bolster their claims against Defendants. The People's fit-the-crime-to-the-charges construction is exactly the kind of arbitrary and discriminatory government action the vagueness doctrine protects the citizenry against.

In addition to being unconstitutionally vague, Section 17501 is also unconstitutional because it violates the First Amendment to the U.S. Constitution and the California Constitution's Liberty of Speech Clause by prohibiting Defendants from communicating truthful historical price information to their customers. Contrary to the People's repeated assertions, Section 17501 on its face does not contain a "false or misleading" element, which means that it plainly bans truthful speech. Under the People's construction of Section 17501, retailers cannot truthfully communicate to consumers that a pair of socks actually was offered for $10 four months ago. But the U.S. Supreme Court and California Supreme Court have repeatedly held that truthful commercial speech is entitled to constitutional protection (e.g., *Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 577–578 (*Sorrell*) ["the State may not . . . prohibit[] truthful, nonmisleading advertisements"]; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 959 (*Kasky*) [same]), and there is no

justification for Section 17501's arbitrary ban on such speech. The Superior Court did not directly resolve this issue, but this Court may deny the People's petition on this independent ground.

Because Section 17501 is void for vagueness, and also violates the First Amendment and the Liberty of Speech Clause, the order to show cause should be discharged, and no writ of mandate should issue here. The Superior Court correctly sustained the joint demurrers to the Section 17501 claim and this ruling should remain undisturbed by this Court. That result would permit the People to pursue their other claims without resort to an unconstitutional statute.

II. RETURN BY ANSWER TO PETITION FOR WRIT OF MANDATE

Real parties in interest and Defendants J. C. Penney Corporation, Inc., Kohl's Department Stores, Inc., Macy's Inc., Sears, Roebuck & Co., and Sears Holding Management Corp., in answer to petitioner the People of the State of California's petition for writ of mandate, admit, deny, and allege as follows:

1. In response to paragraph 1, Defendants admit that Business and Professions Code Section 17501 is 77 years old, and that the Superior Court ruled that the statute is unconstitutional. Defendants deny that Section 17501 has been "applied numerous times over the decades by state and federal courts." To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them. (See pp. 46-48, *post*.)

2. Defendants lack knowledge sufficient to admit or deny the allegations in the first sentence of paragraph 2 that pertain to the California Legislature's motives when it enacted Section 17501 over 75 years ago. Defendants lack knowledge sufficient to admit or deny the allegations in the second sentence of paragraph 2 that pertain to the Legislature's "aware[ness]" regarding consumers' behavior. The remaining allegations in

paragraph 2 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

3. Defendants lack knowledge sufficient to admit or deny the allegations in paragraph 3 regarding the "uncertainty" of "retailers across the state." Defendants deny that "the trial court's Demurrer Order casts uncertainty on . . . whether consumers may continue to rely on the statutory protections the Legislature intended for them." The remaining allegations in paragraph 3 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

4. Defendants admit that the People have filed a petition for writ of mandate. Defendants deny that "leaving the trial court's ruling in place would substantially harm consumers throughout California," and aver that the amended complaints allege no facts showing that any consumer incurred economic harm due to the alleged conduct. Defendants lack knowledge sufficient to admit or deny the allegations in paragraph 4 to the extent that they pertain to the People's reasons for filing that petition. Defendants admit that the Superior Court certified its order with respect to Section 17501 under Code of Civil Procedure Section 166.1. The remaining allegations in paragraph 4 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

5. The allegations in paragraph 5 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

6. The allegations in paragraph 6 (and accompanying footnote 2) are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual,

Defendants deny them. (See pp. 46-47, *post* [discussing *Haley v. Macy's, Inc.* (N.D.Cal. Dec. 21, 2017, No. 15-cv-06033-HSG) 2017 WL 6539825]; pp. 46-47, *post*.)

7. The allegations in paragraph 7 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them. (See p. 47, *post* [discussing *Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714 (*Hansen*)].)

8. The allegations in paragraph 8 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them. (See p. 47, *post* [discussing *Hansen*, *supra*, 25 Cal.App.5th 714].)

9. Defendants deny that there have been "decades of jurisprudence under Section 17501." The remaining allegations in paragraph 9 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

10. Defendants lack knowledge sufficient to admit or deny the allegations in the first sentence of paragraph 10 regarding how "critical" Section 17501 is to California consumers and businesses. Defendants lack knowledge sufficient to admit or deny the allegations in the second sentence of paragraph 10 regarding the "understanding" of retailers. Defendants deny the allegations in the third and fifth sentences of paragraph 10. The remaining allegations in paragraph 10 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

11. Defendants admit that the Superior Court certified its order with respect to Section 17501 under Code of Civil Procedure Section 166.1. Defendants admit that "[t]he People alleged three causes of action in their

Amended Complaints, but the trial court narrowed the case to two legal claims by finding Section 17501 to be unconstitutionally vague." The remaining allegations in paragraph 11 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

12. The allegations in paragraph 12 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

13. Defendants admit the allegations in paragraph 13. By way of further response, Defendants aver that the People also are represented by two private law firms working on a contingency-fee basis, Lieff Cabraser Heimann & Bernstein, LLP and Hattis Law.

14. Defendants deny engaging in "false pricing practices," and admit the remaining allegations in paragraph 14.

15. Defendants admit the allegations in paragraph 15.

16. Defendants admit the allegations in paragraph 16.

17. Defendants admit the allegations in paragraph 17.

18. Defendants admit the allegations in paragraph 18.

19. Defendants lack knowledge sufficient to admit or deny the allegations in paragraph 19, footnote 3. Defendants admit the remaining allegations in paragraph 19.

20. Defendants admit the allegations in paragraph 20.

21. Defendants admit that the People filed amended complaints against each Defendant on October 20, 2017. Defendants deny that they use "fictitious former prices" and that the People's pre-filing investigation was "extensive." The remaining allegations in paragraph 21 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

22. Defendants admit the allegations in paragraph 22.

23. Defendants admit the allegations in paragraph 23.

24. The allegations in paragraph 24 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

25. The allegations in paragraph 25 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

26. The allegations in paragraph 26 are conclusions of law for which no responsive pleading is required. To the extent these allegations are deemed in whole or in part to be factual, Defendants deny them.

27. Defendants allege the following additional facts:

(a) On December 8, 2016, the People filed their original complaints against Defendants. These complaints did not assert separate claims under Section 17501, but instead invoked that statute as a basis for liability under the "unlawful" prong of Business and Professions Code Section 17200. (Defendants' Appendix ("Defs.' App.") at p. 15.)[2] Nor did the original complaints allege that any consumer had incurred economic harm due to Defendants' alleged conduct.

(b) In its September 6, 2017 order sustaining Defendants' joint demurrers to the People's original complaints, the Superior Court ruled that the People's original complaints did not adequately put Defendants on notice "of the facts and theories on which Plaintiffs' claims are based." (Defs.' App. at p. 12.) While the People broadly alleged that they were pursuing a theory of false and misleading advertising "based on Defendants' having never charged the listed reference price," the only specific facts the People

[2] Defendants' Appendix was filed in support of their preliminary opposition on September 14, 2018.

alleged were that "Defendants advertised reference prices in online sale listings, but never charged those prices *online*"—without offering any allegations about what prices were offered in Defendants' brick-and-mortar stores. (*Id*. at p. 13, italics added.) The Superior Court went on to explain that if the People intended to limit their claims to online advertisements, then the People had to make that clear "so as to provide adequate notice of the conduct with which Defendants are charged." (*Ibid*.)

(c) The Superior Court also addressed Defendants' constitutional objections to Section 17501. The court was "particularly concerned with the provision of section 17501 that punishes a business for advertising a reference price that was truthfully charged more than three months previously unless the date when the former price was charged is stated in the advertisement." (Defs.' App. at p. 18.) "This provision," the Superior Court explained, "regulates truthful speech, and it is a high burden for the People to establish that it is misleading to truthfully state a previous price without providing the date the price was charged." (*Ibid*.)

(d) The Superior Court observed that "there is a significant question whether it is misleading to advertise a truthful reference price even though [it] was charged more than three months prior to the date of the advertisement." (Defs.' App. at p. 18.) Thus, the Superior Court noted that the People would need "to demonstrate that 'the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.'" (*Ibid*., citing *Ibanez v. Fla. Dept. of Bus & Prof. Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 142 (*Ibanez*).)

(e) The People amended their complaints in October 2017, adding a standalone cause of action under Section 17501 against each Defendant, in addition to the previously asserted violations of Sections 17200 and 17500. (E.g., App. at pp. 120-124.) In support of their Section 17501 claim, the

People claimed, for the first time, that the statute is violated if Defendants "failed to offer . . . products at (or above) the reference price for a majority of the days on which [they were] offered during the preceding 90 days"—i.e., 46 out of the previous 90 days. (*Id*. at pp. 97, 120.) The People also limited their claims to advertisements made online only. The amended complaints did not allege that any consumer incurred economic harm due to Defendants' alleged conduct.

(f) The amended complaints revealed that the People's pre-suit investigation consisted of taking daily screenshots of advertisements of products on Defendants' public websites for a period of approximately two years. (App. at p. 96.) A handful of these online advertisements were included in the amended complaints as exemplars. (*Ibid.*) The People admitted that they did not conduct an investigation of the prices charged in Defendants' brick-and-mortar stores. (*Id*. at p. 453.) Instead, the People contended that no such investigation is necessary because, in their view, whether online advertised "reference prices"[3] are false or misleading, or in violation of Section 17501, does not depend on the prices of items in Defendants' brick-and-mortar stores. (*Id*. at pp. 98–114.)

(g) Defendants filed demurrers to the amended complaints, which were granted as to the People's claims under Section 17501. The Superior Court concluded that Section 17501 "compel[s] speech in a commercial context," because it requires Defendants to list the date at which "a former price did prevail." (App. at p. 927.) As such, the People would be required to demonstrate that "the requirements of the statute are justified and are not unduly burdensome." (*Id*. at p. 928.) But the Superior Court decided that it

[3] The amended complaints define "reference price" as "a stated price presented alongside the retailer's actual sales price." (App. at p. 89.)

need not resolve whether the People carried this burden because the court concluded that the statute was unconstitutionally vague.

(h) The vagueness doctrine, the Superior Court explained, is rooted in the principles of due process and the separation of powers, and is meant to protect the public against laws that do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and that could therefore permit "arbitrary and discriminatory enforcement." (App. at p. 929.) Because Section 17501 "interferes with the right of free speech or of association," the Superior Court applied a "more stringent vagueness test." (*Ibid*., citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 499 (*Hoffman Estates*).)

(i) While the Superior Court noted that the vagueness of such a statute could sometimes be cured if the defendant had "available options for clarifying [its] meaning," the Superior Court saw no such options here for three reasons. First, although Section 17501 had been on the books since 1941, "no court decisions authoritatively interpret[ed] the statute" and thus did not provide any guidance to Defendants. (App. at pp. 930–931.) Second, the court acknowledged that there was no "administrative process" Defendants could invoke to seek clarification, and noted that a report issued by the Attorney General's Committee on Sale and Comparative Price Advertising in 1984 ("AG Report") had concluded that the statute was "hopelessly vague" and "more of a hindrance to consumer protection from misleading pricing than a help." (*Id*. at p. 933.) Third, the court determined that because "multiple public agencies can bring an action under section 17501," Defendants could not "look to one enforcement authority to construe and apply section 17501 in a consistent manner." (*Ibid*.)

(j) Having concluded that the statute "affects commercial speech and should be accorded a stepped-up standard for clarity," the Superior Court analyzed whether the statute "as applied to the transactions at issue in this

case . . . is impermissibly vague." (App. at p. 934.) Relying in part on the AG Report, the court cited a number of undefined and vague terms, including "prevailing market price," "locality," "time of publication," the "within three months" requirement, and "former price." (*Id*. at p. 935.) The court also noted that a 1957 Attorney General interpretation of Section 17501, which defined "prevailing market price" as "the price at which 'similar' products were selling 'in the open local market'" (*id*. at pp. 935–936), did not save the statute because it did not resolve any of the "misgivings and conceptual dilemmas" presented by the statute overall (*id*. at p. 936). The Superior Court also concluded that the People's view of Section 17501 "is very different from that proposed in 1957" because, in the People's opinion, "similar items sold by other retailers cannot be considered." (*Id*. at p. 934.)

(k) Next, the Superior Court analyzed "whether the Defendants have fair notice on the basis of the statute" of the People's three alleged theories of liability. (App. at p. 937.) The court concluded that Defendants could not have been on notice of the first theory—that a retailer violates Section 17501 by advertising former prices for online products if they were never sold online at that price—because the statute did not clearly prohibit retailers from defining "reference prices" in relation to those offered for similar items by other retailers. (*Ibid*.)

(l) The court then reasoned that Defendants could not be on notice of the second theory—that a retailer violates Section 17501 by advertising a former price offered for less than 46 of the previous 90 days without including the date at which the former price did prevail—because "Section 17501 provides no guidance for determining how long within a three month period[] a price must 'prevail' in order to excuse a retailer" from having to include the date at which the price prevailed. (App. at p. 938.) The Superior Court expressed concern that enforcement could be done on an "ad hoc and

subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Ibid*.)

(m) Finally, the Superior Court ruled that Defendants could not be on notice of the third theory—that they allegedly violated Section 17501 by purportedly having a "perpetual sale online even when the reference prices are being charged in brick-and-mortar stores"—because the statute provided "no clue as to how to analyze whether sales on the internet . . . are their own market." (App. at p. 938.)

(n) After noting the U.S. Supreme Court's preference to avoid "striking down a statute on its face where there are a substantial number of situations to which it might be applied"—the Superior Court concluded that "[w]ith respect to the transactions at issue in this litigation, section 17501 does not provide 'fair notice to those to whom [it] is directed,'" as it required Defendants to "guess at its contours." (App. at p. 939, citing *Grayned v. City of Rockford* (1972) 408 U.S. 104 (*Grayned*); *Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1048 (*Gentile*).)

III. PRAYER

The order to show cause should be discharged, and the petition for writ of mandate should be denied.

DATED: November 19, 2018

Respectfully Submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Mark A. Perry
Mark A. Perry

Attorneys for Real Party in Interest
J. C. Penney Corporation, Inc.

IV. VERIFICATIONS

I, Christopher Chorba, declare as follows:

I am one of the attorneys for real party in interest J. C. Penney Corporation, Inc. I have read the foregoing Return to Petition for Writ of Mandate and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and the facts pertaining to the trial court's proceedings, I, rather than any officer of J. C. Penney Corporation, Inc., verify this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 19, 2018, at Los Angeles, California.

Christopher Chorba

I, James F. Speyer, declare as follows:

I am one of the attorneys for real party in interest Kohl's Department Stores, Inc. I have read the foregoing Return to Petition for Writ of Mandate and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and the facts pertaining to the trial court's proceedings, I, rather than any officer of Kohl's Department Stores, Inc., verify this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 19, 2018, at Los Angeles, California.

James F. Speyer

I, Stephanie A. Sheridan, declare as follows:

I am one of the attorneys for real party in interest Macy's Inc. I have read the foregoing Return to Petition for Writ of Mandate and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and the facts pertaining to the trial court's proceedings, I, rather than any officer of Macy's Inc., verify this return.

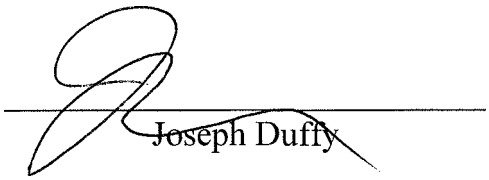
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 19, 2018, at San Francisco, California.

Stephanie A. Sheridan

I, Joseph Duffy, declare as follows:

I am one of the attorneys for real parties in interest Sears, Roebuck & Co. and Sears Holding Management Corp. I have read the foregoing Return to Petition for Writ of Mandate and know its contents. The facts alleged in this return are within my own knowledge and I know them to be true. Because of my familiarity with the rulings and the facts pertaining to the trial court's proceedings, I, rather than any officer of Sears, Roebuck & Co. and Sears Holding Management Corp., verify this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on November 19, 2018, at Los Angeles, California.



Joseph Duffy

V. ISSUE PRESENTED

The issue presented by the Superior Court's order is whether Section 17501 is unconstitutional because it is void for vagueness under the Due Process of Law Clauses of the U.S. and California Constitutions, and/or because it violates Defendants' rights to free speech as secured by the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution.

VI. MEMORANDUM OF POINTS AND AUTHORITIES

Section 17501—a statute that would restrict the dissemination of pricing information to consumers regardless of its truth or falsity—is unconstitutional. As the Superior Court correctly held, Section 17501 is void for vagueness under the Due Process Clauses of the U.S. and California Constitutions. (App. at pp. 928-939; see also par. 27, *ante* [summarizing trial court rulings].) The statute is also unconstitutional for the independent reason that it violates Defendants' right to free speech as secured by the First Amendment to the U.S. Constitution and the Liberty of Speech Clause of the California Constitution.

A. Section 17501 Is Void Because It Is Unconstitutionally Vague

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." (*FCC v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 253 (*Fox*).) Consequently, due process "requires the invalidation of laws that are impermissibly vague." (*Ibid*.) These constitutional due process protections extend to statutes, such as Section 17501, that impose civil penalties. (See, e.g., *Fox*, *supra*, 567 U.S. at p. 258 [invalidating FCC rule carrying civil sanction]; *Gentile*, *supra*, 501 U.S. at pp. 1048-1051 [finding attorney disciplinary rule impermissibly vague].)

The vagueness doctrine serves an important purpose—it is designed to protect against "seriously discriminatory enforcement" and arbitrary government action. (*Hoffman Estates*, *supra*, 455 U.S. at p. 503.) The law "assume[s] that man is free to steer between lawful and unlawful conduct." (*Id.* at p. 498.) As a result, for a law to pass constitutional scrutiny, a "person of ordinary intelligence" must have "a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Ibid*.) Without "fair notice of what is prohibited," the law is impermissibly vague and unconstitutional. (*Fox*, *supra*, 567 U.S. at p. 253.) "Vague laws may trap the innocent by not providing fair warning." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 (*Williams*).)

The doctrine is rooted in the "Constitution's guarantee of due process." (*Johnson v. United States* (2015) 135 S.Ct. 2551, 2560 (*Johnson*).) It also protects the separation of powers, because "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department." (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 7 (*Kolender*), quotation marks and citation omitted.) As the California Supreme Court has explained, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Williams*, *supra*, 5 Cal.4th at p. 567; see also *Hoffman Estates*, *supra*, 455 U.S. at p. 498 [same].)

The vagueness doctrine acts both as a check against statutes purporting to grant broad discretion in determining what conduct a statute proscribes, and to protect individuals and corporations against arbitrary and discriminatory government action. For example, in *Johnson*, the U.S. Supreme Court struck down as vague the residual clause of the Armed Career Criminal Act because it invoked "so shapeless a provision" that it "d[id] not

comport with the Constitution[]." (*Johnson*, *supra*, 135 S.Ct. at p. 2560.) In *Engert*, the California Supreme Court declared void-for-vagueness a statute imposing life imprisonment without parole for murders that are "especially heinous, atrocious, and cruel," on grounds that this failed to provide an ascertainable standard of guilt and that "[n]o person should face the potential loss either of liberty or life based on statutory language so vague that a person's fate is left to the vagaries of individual judges or individual jurors." (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 807.) Similarly, in *Kolender*, the U.S. Supreme Court struck down a loitering statute because it gave police full discretion to determine whether the suspect did or did not violate the law. (*Kolender*, *supra*, 461 U.S. at p. 358.)

The protections of the vagueness doctrine apply to both civil and criminal matters. For example, the U.S. Supreme Court has held that an attorney disciplinary rule was void for vagueness. (*Gentile*, *supra*, 501 U.S. at p. 1048.) In another case, the Court overturned a restriction on government employee speech as unconstitutionally vague. (*Keyishian v. Bd. of Regents* (1967) 385 U.S. 589, 604.) In yet another, the Court held that an indecency policy was void for vagueness, and recognized that even in the absence of criminal liability or any present monetary sanction, the stations could still make a vagueness challenge to the statute based solely on the possibility of increased future penalties and the reputational injury associated with the FCC's decision. (*Fox*, *supra*, 567 U.S. at pp. 255-256.) And in its most recent guidance, the Court held that a civil statute governing immigration removal was subject to the "most exacting vagueness standard." (*Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1212-1213 (*Dimaya*).)

In this case, the Superior Court correctly held that Section 17501 is void for vagueness because it "preclude[s] law enforcement and retailers from understanding what the statute require[s]." (App. at p. 935, citing AG Report at pp. 17-21.) And "[w]ith respect to the transactions at issue in this

litigation, section 17501 does not provide 'fair notice to those to whom [it] is directed.'" (App. at p. 939.) In other words, Defendants—reviewing the statute *ex ante*—could not ascertain what practices the statute proscribes, or conform their conduct to those evanescent proscriptions so as to avoid liability or penalties.

1. *Section 17501 Is Subject To Heightened Constitutional Scrutiny Because It Prohibits Truthful Speech*

Although Section 17501 is void for vagueness under any standard of review, it certainly cannot survive the heightened constitutional scrutiny that is applicable here because Section 17501 restricts truthful speech. While the People complain that the Superior Court applied "stepped-up" constitutional scrutiny (Pet. at pp. 29, 32), the Superior Court conducted precisely the analysis that U.S. Supreme Court precedent demands.

The communication of truthful price information is protected by the U.S. and California Constitutions because such information helps consumers to make informed purchasing decisions. (See, e.g., *Expressions Hair Design v. Schneiderman* (2017) 137 S.Ct. 1144, 1150-1152 (*Expressions Hair*) ["In regulating the communication of prices rather than prices themselves, [the statute] regulates speech."]; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 761 (*Va. State Board*); *Kasky*, *supra*, 27 Cal.4th at p. 959 ["The state Constitution's free speech provision . . . protects commercial speech, at least when such speech is 'in the form of truthful and nonmisleading messages about lawful products and services.'"].)

Moreover, it is "settled" and "beyond serious dispute" "that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." (*Va. State Bd.*, *supra*, 425 U.S. at p. 761.) The First Amendment protects advertising because it is fundamental to the public's ability to make private economic decisions. (*Id.* at p. 765 ["the free flow of commercial information is

indispensable"]; see also App. at pp. 930–931, citing *Edenfield v. Fane* (1993) 507 U.S. 761, 767 ["[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment."].) The same is true of the California Constitution's Liberty of Speech Clause because it "is broader and more protective than the free speech clause of [the First Amendment]." (*L.A. Alliance for Survival v. City of L.A.* (2002) 22 Cal.4th 352, 366-367; *Kasky*, *supra*, 27 Cal.4th at pp. 958-959 [similar].)

While the U.S. Supreme Court has made clear that there "can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity," the same is not true "[i]f the communication is neither [1] misleading nor [2] related to unlawful activity." (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of N.Y.* (1980) 447 U.S. 557, 563-564.) Section 17501, on its face, is not concerned with speech relating to unlawful activity, or that is false or misleading, and thus squarely targets speech over which "the government's power is more circumscribed." (*Ibid.*)

Further, the U.S. Supreme Court recently rejected the proposition that a "less searching form of the void-for-vagueness doctrine applies" to non-criminal statutes, holding that a statute governing immigration removal—"a civil matter"—was subject to the same "most exacting vagueness standard." (*Dimaya*, *supra*, 138 S.Ct. at pp. 1212-1213.) Here, heightened scrutiny, if not this "most exacting vagueness standard," is particularly appropriate because Section 17501 bans truthful advertisements and has the potential for significant civil penalties. (*Id*. at p. 1229 [Gorsuch, J., concurring] [noting that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes"].) Moreover, the statute here *has* criminal applications and as a result must be interpreted consistently in both the civil

and criminal contexts. (See Bus. & Prof. Code, § 17534 [violation of Section 17501 is a misdemeanor]; see also *Dimaya*, *supra*, 138 S.Ct. at p. 1217, quoting *Leocal v. Ashcroft* (2004) 543 U.S. 1, 11 fn. 8 [statute "ha[s] to be interpreted consistently with its criminal applications"]; *United States v. Thompson/Center Arms Co.* (1992) 504 U.S. 505, 517 [applying rule of lenity in civil context to tax statute with both civil and criminal penalties].)

In arguing for a lower vagueness standard, the People assert more than twenty times in the petition that Section 17501 regulates only "false or misleading" speech. (See Pet. at p. 41 [Section 17501 "only impacts unprotected false or misleading speech"]; see also, e.g., *id.* at pp. 10, 17, 29, 32, 45, 58.) The People's assertion that Section 17501 restricts only false or misleading speech is plainly wrong.

Neither the words "false" or "misleading," nor any synonyms, appear in the statutory text or the title of the statute ("Worth or value; statements as to former price"). The statute bans *all* advertisements of former prices—without respect to their truth or falsity—whenever "the alleged former price was [not] the prevailing market price . . . within three months next immediately preceding the publication of the advertisement." (Bus. & Prof. Code, § 17501.) The Legislature obviously knows how to draft a statute containing a falsity element—indeed, it did so in the immediately preceding statute (Section 17500), under which the People have alleged a separate claim not at issue in this writ proceeding. The fact that the Legislature chose not to include such an element in Section 17501 is meaningful.

Although the People contend that Section 17501 regulates only "representations of *former* prices" as opposed to current prices (Pet. at pp. 34-35, original italics), that distinction is of no consequence. The advertisement of former prices is no less deserving of constitutional protection than the advertisement of present prices.

Indeed, former prices are historical facts subject to verification; it is remarkable that public officials would even suggest that the government can suppress the dissemination of such information. The People can cite no case suggesting that speech regarding historical information is unprotected by the First Amendment and the Liberty of Speech Clause. Just as the government cannot regulate the way a news article reports on events that happened in the past, the government cannot regulate the way an advertisement truthfully states what the price of a product was in the past.

Even though Section 17501 contains no false or misleading element, the People argue that Section 17501 should be construed to regulate only false or misleading speech because it is part of an Article, encompassing Business and Professions Code Sections 17500-17509, titled "False Advertising in General." (Pet. at pp. 33, 39-40.) This argument not only ignores the explicit language of the statute, it contravenes Business and Professions Code Section 9, which provides that "[d]ivision, part, chapter, article and section headings contained herein shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of this code." Thus, the Article's title cannot bring clarity to the statute's unconstitutional vagueness.

In further support of their argument that Section 17501 restricts only false or misleading speech, the People argue that statutes should be construed "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (App. at p. 51, quoting *Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.) But this canon of construction does not give courts license to insert words into a statute that the Legislature did not enact. (E.g., Code Civ. Proc., § 1858 ["In the construction of a statute . . . the office of the Judge is . . . not to insert what has been omitted . . ."]; *People v. Garcia* (1999) 21 Cal.4th 1,

14.) And the judiciary's limited role is not expanded even if "constitutional problems may appear." (*People v. Bunn* (2002) 27 Cal.4th 1, 16.)

In their effort to show a lesser vagueness standard should apply, the People invoke cases involving statutes and ordinances that are materially distinct from Section 17501. The ordinance at issue in *Hoffman Estates* made "it unlawful for any person 'to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with *illegal* cannabis or drugs . . . without obtaining a license therefor.'" (*Hoffman Estates*, *supra*, 455 U.S. at p. 492, italics added.) That, according to the U.S. Supreme Court, was "speech proposing an illegal transaction, which a government may regulate or ban entirely." (*Id*. at p. 496.) Section 17501, by contrast, is not limited to illegal transactions, but regulates speech regarding *any* commercial retail transaction, whether for t-shirts, handbags, or washing machines.

The People also rely on *Ford Dealers Ass'n v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347 (*Ford Dealers*), and say that the "California Supreme Court refused to apply a heightened vagueness standard to a statute and regulations prohibiting false or misleading statements in automobile advertising." (Pet. at p. 33.) But unlike Section 17501, the statute at issue in *Ford Dealers* expressly limited its scope to "untrue or misleading" speech. (Veh. Code, § 11713.) No similar language appears in Section 17501, and *Ford Dealers* is therefore inapposite.

Because Section 17501 is not limited to speech that concerns unlawful activities or is false or misleading, the Superior Court correctly held that a heightened standard for clarity applies. That the People resist this conclusion is a tacit admission that they cannot defend the constitutionality of Section 17501 if a heightened standard applies.

2. *Section 17501 Is Void For Vagueness On Its Face Because It Provides No Notice Of What Speech It Proscribes*

Regardless of what standard applies, Section 17501 is unconstitutionally vague because it uses confusing, ambiguous, and undefined terms that fail to provide any retailer with sufficient notice of what types of advertisements it prohibits. None of Section 17501's key terms is defined anywhere in the statute. The result, as the AG Report recognized thirty years ago, is a complete lack of clarity as to what retailers may permissibly communicate to their customers about prices for the products they sell. Even before the advent of e-commerce, the AG Report described general "confusion surrounding sale and comparative price advertising" arising "from the existence and language of section 17501" and the dangers to "legitimate retailers who are interested in advertising honestly and effectively and for consumers." (App. at p. 484.) And based on solicitation from law enforcement, retailers, and consumer groups, the AG Report concluded that "the problems inherent with section 17501 are many." (*Id.* at p. 491.) The Superior Court recognized this reality, stating that the "Attorney General's Committee Report concluded that section 17501 was hopelessly vague and constituted more of a hindrance to consumer protection from misleading pricing than a help." (*Id.* at p. 933.)

The People have three responses to the AG Report. (Pet. at pp. 40-41.) One is that it was issued some years ago, which is an odd argument given that the statute is even older. And since the statute was enacted 77 years ago, e-commerce and the Internet have made its archaic and vague terms even more difficult to apply. The second argument is that the AG Report is non-binding, which is of course true, but even non-binding authority can and should be considered by courts for its persuasiveness. The district court's decision in *Haley v. Macy's, Inc.* (N.D.Cal. Dec. 21, 2017, No. 15-cv-06033-HSG) 2017 WL 6539825 (*Haley*), on which the People

rely, is no more binding (and much less persuasive). (See pp. 46-47, *post* [discussing *Haley*].) Third, the People say that the AG Report did not actually conclude that Section 17501 is unconstitutional; but the People admit that the AG Report concluded that "questions . . . might arise from interpreting the Section." (Pet. at p. 41.) As the Superior Court correctly ruled, those questions are so many and varied—and so incapable of principled answers—that Section 17501 cannot constitutionally be enforced.

Section 17501's key terms—(1) "prevailing market price"; (2) "locality"; (3) "former price"; (4) "within three months next immediately preceding the publication of the advertisement"; and (5) "time of publication"—individually and in combination create an incomprehensible statute that is void for vagueness on its face.

(1) "[P]revailing market price." The AG Report recognized the problems with the phrase "prevailing market price" when it concluded that the statute provides no workable definition: "Is it the price at which the greatest number of sellers offer the product for sale, or is it the price at which the greatest number of such items actually sells? What if the item does not sell for a uniform price? Is an average selling price to be arrived at? How? Do any sales of the item actually have to have been made to establish a 'prevailing' market price or is it sufficient if all merchants offer it for sale at a given price, even though no merchant actually makes any sales of the item at that given asking price?" (App. at p. 491.)

Even the term "market" is vague. Does the "market" include the Internet only, the Internet and brick-and-mortar stores, or some subset of these and other retail channels? And how is a retailer supposed to determine the "market" *ex ante* in order to comply with the statute? By way of example, is the "market" for a white t-shirt limited to the precise brand a retailer happens to sell, or does it include functionally and stylistically identical white t-shirts sold by all retailers? Is there a separate "market" for white t-

shirts that are 100% cotton as opposed to a cotton/poly blend? Section 17501 provides no answers to this fundamental question.

In the amended complaints, the People asserted that "[t]he relevant 'market' for purposes of applying Section 17501 is [Defendants'] own offers of the items." (App. at p. 122.) But construing "prevailing market price" to mean only the prices of a single retailer renders "market" in that phrase superfluous, contrary to the canon of construction that each word in a statute must be given effect. (E.g., *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.) The Legislature's inclusion of "market" suggests that what matters under Section 17501 are the prices of products offered not by the particular retailer making the advertisements at issue, but by a broader set of retailers of the same or similar products.

The People's discussion of "market" in the petition only magnifies the ambiguity inherent in the term. The People assert that other retailers "might indeed establish their advertised former prices using other retailers' offers, and . . . might legitimately claim confusion." (Pet. at p. 51.) But in *this* case, according to the People, "market" has to be limited to each Defendant's own prior prices for a given product. (*Id.* at pp. 47-51.) This is quintessential arbitrary enforcement. (See *Kolender*, *supra*, 461 U.S. at p. 357 [statutes that facilitate "arbitrary and discriminatory enforcement" are unconstitutionally vague].) Section 17501's reference to "market" cannot possibly mean one thing for J. C. Penney's brick-and-mortar stores, another for J. C. Penney's website, another for each of Macy's and Kohl's brick-and-mortar stores and websites, and something else entirely for other retailers. Yet that is what the People contend.

The People's attempted construction of "prevailing" fares no better. The People assert that a "prevailing" price is one that was offered for 46 of the preceding 90 days, but that interpretation has no grounding in either the text of Section 17501 or any precedent. As the Superior Court recognized,

"[t]he People's selection of a 46 day requirement is an arbitrary interpretation of section 17501, it is not supported by existing case law, and other enforcement authorities are not bound by that interpretation." (App. at p. 938.) The Superior Court continued, "Section 17501 provides no guidance for determining how long within a three month period, a price must 'prevail'" and the People's "theory of liability, as applied to Defendants' conduct, poses the exact problem of impermissible legislative delegation of basic policy matters to enforcement authorities 'for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" (*Id.*, quoting *Grayned*, *supra*, 408 U.S. at p. 109.)

Indeed, while the People assume "prevailing" is a reference to a period of *time* a price was the "market price," that is far from certain, as the AG Report noted. The "prevailing market price" might well refer to "the price at which the greatest number of sellers offer the product for sale" or "the price at which the greatest number of such items actually sells" or "an average selling price." (App. at p. 491.)

The People's selection of a 46-out-of-90-days definition of "prevailing" underscores the arbitrary nature by which they are attempting to enforce Section 17501. In each amended complaint, the People cited a number of statistics regarding their investigation of Defendants' online offers of items. With respect to J. C. Penney, the People allege that "[a]pproximately 98.55% of the daily offerings were offered at (or above) the represented reference price only 30 days or less during the prior 90 days." (App. at p. 98.) The days and (percentages) continue as follows: 20 days (92.444%); 14 days (75.85%); 7 days (49.07%); 5 days (42.18%); and 0 days (27.20%). (*Id*. at pp. 97-98.) Only *after* the People obtained these statistics did they announce their view that Section 17501 limited advertisements of historical prices to those prices that had been offered in 46 out of the prior 90 days—a definition that appears designed to maximize the number of

alleged violations stemming from the People's investigation of Defendants' online advertisements. But the U.S. and California Constitutions do not permit law enforcement authorities to decide what the law prohibits *after* the acts at issue have been completed.

(2) "[L]ocality." There are numerous possible meanings of "locality," particularly with respect to advertisements made via the Internet. "Locality" could mean, among other things, a specific neighborhood or area of a large metropolitan area, the formal boundaries of a city or county, the physical location of a retailer's computer servers, anywhere with Internet access, locations to which a retailer will ship merchandise, locations where the retailer has a physical presence, or locations where the retailer has its headquarters, stores, stores and online presence, or something else entirely.

The People do not attempt to interpret "locality" based on anything within the text of Section 17501, as the statute provides no guidance. Instead, the People again have construed the term in an arbitrary fashion that is designed to conform to the claims they have asserted against Defendants, as they contend that "locality" means—at least in this case—"internet advertising offers," which itself raises more questions than it answers, as there is no inherent geographic limitation on "internet advertising offers." (Pet. at p. 56.) Even assuming "internet advertising offers" were a viable definition of the geographic term "locality" (and Defendants disagree that it is), that is irrelevant to the question whether Section 17501 provides retailers with adequate notice—*ex ante*—of what it prohibits. As with the People's interpretation of "prevailing market price," there was no way for Defendants to know in advance that the relevant "locality" under Section 17501 consisted of "internet advertising offers."

In connection with their discussion of "locality," the People also take issue with the Superior Court's supposedly "remarkable proposition that technological advances might render decades-old statutes hopelessly vague."

(Pet. at p. 55.) But there is nothing remarkable at all about the proposition. In fact, the U.S. Supreme Court recently overruled a prior interpretation of the Commerce Clause adopted in *Quill Corp v. N.D. By & Through Heitkamp* (1991) 504 U.S. 298, in part because "[t]he *Quill* Court did not have before it the present realities of the interstate marketplace," and in light of the fact that "[t]he Internet's prevalence and power have changed the dynamics of the national economy." (*S.D. v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2097; see also *Carpenter v. United States* (2018) 138 S.Ct. 2206, 2222 ["When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."].)

Given this precedent, it was equally appropriate for the Superior Court to observe that Section 17501 was "enacted in 1941, provides no clue as to how to analyze . . . sales on the internet," and ultimately, "[t]he vagueness of the statute with respect to defining a 'prevailing market price' in a 'locality' increased exponentially with the rise of internet marketing." (App. at p. 938.) In any event, Section 17501 was unconstitutional when enacted in 1941, which likely explains why no enforcement authorities asserted claims under Section 17501 for decades. As the Los Angeles District Attorney's Office put it, "[e]nforcement is our problem. Are the standards sufficient to enforce? Well, 17501 clearly is not sufficient to enforce. We have enforced the false advertising laws through 17500 instead of 17501, and we have [not] relied on 'comparatives' and 'trade areas' and all the other stuff that becomes very amorphous." (App. at pp. 484-485.)

The vagueness of the term "locality" is further confirmed by the U.S. Supreme Court's decision in *Connally v. General Constr. Co.* (1926) 269 U.S. 385 (*Connally*). In *Connally*, a contractor building bridges in Oklahoma paid its laborers different rates depending on the type of work done and separate agreements. (*Id*. at p. 389.) The Oklahoma Commissioner of Labor claimed that the contractor violated an Oklahoma statute by paying some

laborers less than the current rate of wages in the "locality," as determined by the Commissioner, and threatened the contractor with criminal sanctions. (*Ibid*.) The Supreme Court held that the word "locality" was unconstitutionally vague. As it explained, in circumstances applicable equally to the People's allegations in these cases: "Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality." (*Id*. at p. 394.) The same is true with respect to the advertisements that Section 17501 purports to regulate via reference to the amorphous term "locality."

(3) "Former price." This term suffers from many of the same flaws as "prevailing market price" and the People offer the same arguments in defense. (Pet. at pp. 47-51.) Yet the AG Report recognized the many questions about this term that the text of the statute leaves unanswered, such as: "Is the 'former price' the same as the 'regular price' for the item? Is the 'regular price' established by the price at which the item was most often offered for sale during the 90 days preceding advertisement? If offered at a set price for 46 days, is a regular price established, regardless of the number of sales made? Or is it established by determining the price at which the greatest number of the item actually sold?" (App. at pp. 493-494.)

In addition to these questions, Section 17501 is silent as to *which* "former prices" matter: those offered by the retailer-defendant, or by competitors? Those at brick-and-mortar stores, or also online? Or both? And if online prices are considered, which ones count? Only the retailer's website? Competitors' websites? Any website? What about platforms authorizing third parties to sell items, such as eBay, Amazon, and Craigslist? Section 17501 provides no answers to these questions.

(4) "Within three months next immediately preceding the publication of the advertisement." The People do not make any effort to defend this statutory language in their petition, and for good reason. As the AG Report noted, this phrase also raises more questions than it answers: "Can there be a different prevailing price on every single day within the preceding three months? . . . [C]ould there be ninety different 'prevailing market prices' during the three months 'preceding the publication of the advertisement'?" (AG Report at pp. 18-19.)

For example, if "prevailing market price" means the price at which an item was offered for 46 of the preceding 90 days, as the People contend, then if on Days 1-46 an item is offered for $30 and on Days 47-90 the items is offered for $60, the "prevailing market price" on Day 91 would be $30. But could a retailer also advertise a former price of $30 on Day 136 because it was the "prevailing market price" on Day 91, which is, in fact, "*within* three months next immediately preceding" Day 136? The People would say no, because they equate "within three months" to mean "majority of days in the preceding three months." (Pet. at p. 52.) But nothing in Section 17501 provides notice to retailers that "within three months" has this counterintuitive meaning.

The People's construction of this term also raises significant questions as to how Section 17501 applies to seasonal goods like Halloween costumes or Christmas decorations. For example, if a retailer receives a stock of Halloween costumes on October 1 and sells each costume for $40 from October 1 to October 31, would the retailer be precluded from informing consumers at a clearance sale on November 1 that the "original" price was $40, because that price was charged for only 31 of the preceding 90 days? Section 17501 provides no notice that such a long-standing retail practice is prohibited, but the People's arbitrary and counterintuitive interpretation of

the statute suggests it would prohibit such advertisements even in the context of seasonal goods.

(5) "[T]ime of publication." The People also do not attempt to defend or define this crucial phrase, which could mean any number of different things in the age of e-commerce where technology provides retailers with instant feedback on consumer demand, allowing retailers to update their offering prices by the minute. What if a retailer offers a product at various prices during the same day? How does that impact the alleged calculation of the prevailing market price?

As with the term "locality," although "time of publication" may have had a more definite meaning for traditional advertisements in a Sunday newspaper, the same cannot be said for price information continually displayed in stores and certainly cannot be said for online advertisements available and subject to change 24 hours a day.

* * *

Because its key terms are devoid of any generally understood or statutorily defined meaning, Section 17501 allows individual law enforcement entities to pursue arbitrary lawsuits in which they define the statute's terms in a way that best suits the case they want to pursue. And given that multiple California law enforcement agencies have jurisdiction to enforce Section 17501, "Defendants cannot look to one enforcement authority to construe and apply section 17501 in a consistent manner." (App. at p. 933.) Today, it is the Los Angeles City Attorney, but tomorrow it could be a wholly different action "in the name of the People of the State of California . . . by any district attorney or any city attorney of a city having a population in excess of 750,000." (*Ibid.*) But Defendants are entitled to fair notice of what conduct might expose them to legal liability in advance, not after a lawsuit is filed. Section 17501 provides no such notice, leaving

Defendants and all retailers in California exposed to arbitrary government action. Section 17501 is therefore void for vagueness on its face.

3. *Section 17501 Is Void For Vagueness As Applied To Defendants*

The People's petition should be denied because Section 17501 is void for vagueness on its face, as explained above. It is also void for vagueness as applied in this case, as the Superior Court correctly held.

The People attack the Superior Court for "conduct[ing] a purported 'as-applied' analysis that failed to consider whether the statute is vague as-applied to Defendants' own conduct as alleged in the Amended Complaints." (Pet. at p. 29.) But the People are mischaracterizing the Superior Court's ruling. The Superior Court agreed with the People that even when speech is implicated, "'a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause . . . for lack of notice.'" (App. at p. 930, citing *Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 20 (*Holder*).) Then, the Superior Court expressly considered "whether the statute is impermissibly vague *as applied to the conduct alleged in the First Amended Complaints* in these cases," just as the People requested. (*Id*. at p. 936, italics added.) Specifically, the Superior Court carefully analyzed each of the People's three theories—as alleged in the amended complaints and argued in the demurrer briefing—as to why Defendants' advertisements violated Section 17501, "examin[ing]" as to each "whether the Defendants have fair notice on the basis of the statute that each of the practices violates that law." (*Id*. at p. 937.)

Despite these unambiguous statements, the People nonetheless contend that "the trial court divorced its analysis from the context of the People's well-pled factual allegations against Defendants" and "considered applications of Section 17501 that were purely hypothetical and theoretical." (Pet. at p. 42.) The Superior Court's analysis was anything but "divorced"

from the People's allegations; it was based on the exact factual averments and theories of liability the People asserted in the amended complaints. (App. at pp. 936–939.)

The Superior Court first considered the People's theory that Defendants violated Section 17501 because they "may not support the legality of their reference price based on prices charged by other local retailers for the very same item." (App. at p. 937.) The court explained that the People's interpretation "conflicts with the Attorney General's Opinion from 1957," and concluded that this attempted application of Section 17501 "is unreasonably vague" because the statute provides "no notice" that it could be applied to Defendants in this way. (*Ibid.*)

Next, the Superior Court considered whether Defendants had notice that Section 17501 could be applied to impose liability on Defendants for advertising a reference price "for a time less than 46 of the previous 90 days." (App. at p. 938.) The court noted that this theory was based on "an arbitrary interpretation of section 17501" and applying it to Defendants' conduct "poses the exact problem of impermissible legislative delegation of basic policy matters to enforcement authorities 'for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" (*Ibid.*, quoting *Grayned*, *supra*, 408 U.S. at p. 109.)

The Superior Court then analyzed whether Defendants had notice that the People would apply Section 17501 to prohibit "a 'perpetual sale online' even when the same retailer charges the reference price in its own 'brick-and-mortar' stores," based on the People's theory that "the internet is its own market for products and a retailer cannot use a price it charges in a physical store as the 'prevailing market price.'" (App. at p. 938.) The Superior Court concluded again that Defendants lacked notice that they could be held liable under this theory, reasoning that "determining 'prevailing market price' based on the 'locality' of the advertisement presented substantial predictive

difficulties" even before e-commerce, and that today the difficulties have "increased exponentially with the rise of internet marketing." (*Ibid.*, citing AG Report at pp. 17-18.)

The People also complain that the Superior Court relied on cases asserting facial, rather than as-applied, vagueness challenges. (Pet. at p. 43, citing App. at pp. 930, 939.) But *all but one* of the vagueness-doctrine cases the People complain of in fact conducted as-applied analyses as the Superior Court did here. (See *Hoffman Estates*, *supra*, 455 U.S. at p. 500 [considering ordinance as applied]; *Holder*, *supra*, 561 U.S. at pp. 21-22 [considering statute as applied]; *Parker v. Levy* (1974) 417 U.S. 733, 755–756 [considering article as applied]; *Am. Communications Ass'n v. Douds* (1950) 339 U.S. 382, 412 [considering statute in "the particular context"]; *Gentile*, *supra*, 501 U.S. at p. 1053 [considering rule as applied].) The only exception was *Grayned v. City of Rockford*, which the Superior Court quoted only for the settled proposition that a statute must provide "'fair notice to those to whom [it] is directed.'" (App. at p. 939, quoting *Grayned*, *supra*, 408 U.S. at p. 112.)

The Superior Court's well-reasoned analysis explained that Section 17501's vagueness "preclude[s] law enforcement and retailers from understanding what the statute require[s]." (App. at p. 935, citing AG Report at pp. 17-21.) The People disagree with the Superior Court and Defendants (and, apparently, the conclusions of the AG Report), but they are unable to articulate coherently what the statute *does* proscribe. Indeed, the mere fact that enforcement authorities and courts cannot reach anything close to consensus regarding the statute's meaning illustrates exactly why Section 17501 is void for vagueness.

The People's contention that Defendants' alleged conduct is "clearly proscribed" by Section 17501 is nothing other than *ipse dixit*: The People have proposed a construction of Section 17501 tailored to their limited,

online-only investigation of the particular retailers in this case. That is the very evil that the vagueness doctrine is designed to protect against: Regulated persons and entities are entitled to know what conduct is (or may be) unlawful *before* they engage in it, not after-the-fact when a lawsuit is filed. Section 17501, however, contains a series of terms that have no defined, predictable, understandable application either singly or in combination. Thus, even if the allegations in the People's amended complaints are accepted as true for present purposes, the conduct therein described is not "clearly proscribed" by Section 17501—because Section 17501 "clearly proscribes" *nothing*.

The People attempt to sidestep Section 17501's interpretative mysteries by claiming repeatedly that the statute prohibits "false advertising," "false discounts," and "non-*bona fide* former price representations." (Pet. at pp. 44-45.) But Section 17501 does not contain any such false or misleading element. (See pp. 29-30, *ante*.) Rather, Section 17501 requires proof, among other things, that the "alleged former price" was not the "prevailing market price"—a standard that does not hinge on whether a retailer offered the item at the advertised former price. So even if the Defendants' prices were "false" or "non-*bona fide*" (a charge Defendants deny), it would be of no consequence to the People's Section 17501 claim.[4]

Even as applied to the narrowest subset of Defendants' alleged conduct, Section 17501 is unconstitutionally vague. The People essentially

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[4] On the other hand, the People have asserted claims under Sections 17200 and 17500, which (unlike Section 17501) actually prohibit "untrue or misleading" statements. (Bus. & Prof. Code, § 17500.) Those claims survived Defendants' demurrers and therefore the People can continue to assert them in this litigation. The People's steadfast pursuit of a claim under the little-used and unconstitutional Section 17501 appears to be based on the fact that the provision has *no* "falsity" element and is so amorphous that the People can claim it proscribes whatever they want. Otherwise why would the People persist in pursuing this claim?

concede this, stating that "if retailers reasonably have a question as to what Section 17501 prohibits, the statute itself provides a savings clause that retailers may employ to avoid liability." (Pet. at p. 54.) This so-called "savings clause," according to the People, "authorizes retailers to publish *truthful* former prices so long as they 'clearly, exactly, and conspicuously' state when this *truthful* former price did apply." (*Ibid*., italics in original.) But far from "saving" the statute, the clause cited by the People only compounds the difficulties in applying it, as it requires disclosure of "the date when the alleged former price *did prevail*"—a term which simply refers retailers back to the unconstitutionally vague term "prevailing market price." Thus, "if retailers reasonably have a question as to what Section 17501 prohibits," it is of no use to refer them back to one of Section 17501's vague and undefined terms—"prevailing market price."

Finally, the People ignore the U.S. Supreme Court's decision in *Johnson*, which sets forth the relevant standard for both facial and as-applied vagueness challenges. (See pp. 25-26, *ante*.) The People's argument that Section 17501 is not vague because, in their view, Defendants' (alleged) conduct is "clearly proscribed" (see Pet. at pp. 42-58) was foreclosed by the U.S. Supreme Court when it held in *Johnson* that a law is not saved from a vagueness challenge merely because "some conduct . . . clearly falls within [a] provision's grasp" (*Johnson*, *supra*, 135 S.Ct. 2560-2561). Applying that standard, the Court in *Johnson* concluded that a statute imposing additional punishment on criminal defendants who had previously been convicted of a crime "that presents a serious potential risk of physical injury to another" was unconstitutionally vague, even though "some crimes clearly pose a serious potential risk of physical injury to another." (*Johnson*, *supra*, 135 S.Ct. at pp. 2558, 2560.) Thus, even if the Court could conclude that Defendants' alleged conduct clearly fell within the ambit of Section 17501, that would not save the statute from being void for vagueness.

4. *The Limited Authorities Interpreting Section 17501 Do Not Render It Any Less Vague*

The People argue that Section 17501 must not be vague because some 40 cases total have "applied" Section 17501 in 77 years on the books. (Pet. at pp. 15-16 & fn. 2.) But of all the authorities cited in the petition, *only one* even considered a constitutional challenge to Section 17501: *Haley v. Macy's, Inc.*, an unpublished federal district court decision that is nonprecedential, conclusory, and unpersuasive.

First, *Haley*'s analysis was colored by its erroneous view that Section 17501 is limited to only false or misleading advertising (it is not, as explained above). (*Haley*, *supra*, 2017 WL 6539825, at p. *6.) Second, *Haley* failed to consider that Section 17501 restricts constitutionally protected speech, and thereby failed to apply the required heightened scrutiny that was correctly applied by the Superior Court here. (See *ibid.*; see also pp. 29-30, *ante*.) Finally, *Haley* did not interpret or analyze *any* of Section 17501's numerous vague terms within the context of the statute. Nor did it confront the AG Report discussed at length by the Superior Court. Rather, in attempting to define "prevailing market rate [sic]," *Haley* relied on a single dictionary definition of "prevailing" in a vacuum. (See *id.* at p. *6.)

At bottom, *Haley*—like the People's petition—fails to come to grips with the point that a statute may be unconstitutionally vague, both on its face and in application, even if its constituent terms have dictionary definitions (as all words do). Moreover, *Haley*'s construction of "prevailing" to mean "most widely occurring or accepted," does nothing to correct the statute's unconstitutional vagueness, because *Haley*'s construction still does not explain whether a "prevailing market price" is the price at which other retailers offered similar products, as the Attorney General has previously opined (see App. at p. 936, citing 30 Ops.Cal.Atty.Gen. 127), or the price a single retailer charged for 46 of the preceding 90 days for that precise item,

as the People now claim, or anything in between. Moreover, *Haley* said nothing about Section 17501's other vague terms or their interplay among each other.[5]

The People also invoke the recent decision in *Hansen v. Newegg.com Am., Inc.* (2018) 25 Cal.App.5th 714 (*Hansen*) to argue that Section 17501 is too "importan[t]" to be unconstitutional. (Pet. at p. 39.) Setting aside the erroneous premise that a statute's "importance" could immunize it from constitutional challenge, the People's assertion is simply not borne out by the facts. As the Superior Court noted, for much of its 77-year history, this statute was not even enforced. (App. at p. 935.) Thus its goals were either not very important or were more effectively served by other statutes. In any event, *Hansen* has no bearing on the questions presented here because it did not apply, interpret, or analyze Section 17501 or any of its vague terms. (*People v. Avila* (2006) 38 Cal.4th 491, 566 ["cases are not authority for propositions not considered"].) Rather, *Hansen* was concerned with whether a private individual had standing to assert a claim under the FAL, UCL, or CLRA. (*Hansen*, *supra*, 25 Cal.App.5th at p. 721.)

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[5] *Haley* actually illustrates the dangers that retailers face as the result of the vagueness of Section 17501. While in this action the People have taken the position that "Defendants violate Section 17501 where *they* fail to offer the product at the advertised former price for the majority of days in the preceding three months" (Pet. at p. 52, italics added), the plaintiffs in *Haley* alleged that Macy's advertisement of a "reg." price for a product violated Section 17501 because *different* retailers—including 27 sellers on Amazon.com—allegedly offered the product at issue for a lower price than Macy's advertised "reg." price. (Motion for Judicial Notice, Ex. A ¶ 6.) That two sets of plaintiffs can adopt diametrically opposed constructions of Section 17501 simply confirms that the statute has no objective meaning, and that retailers have no way of knowing what they must do to comply.

None of the People's other authorities actually "applied" Section 17501 in any meaningful sense. Many cases simply quote or cite it without analysis (e.g., *Horosny v. Burlington Coat Factory of Cal., LLC* (C.D.Cal. Oct. 26, 2015, No. 15-05005-SJO) 2015 WL 12532178, at *7; *Branca v. Nordstrom, Inc.* (S.D.Cal. Oct. 9, 2015, No. 14-2062-MMA) 2015 WL 10436858, at *5), while others erroneously suggest, again, without analysis, that it prohibits false and misleading advertisements (e.g., *Safransky v. Fossil Group, Inc.* (S.D.Cal. Apr. 9, 2018, No. 17-1865-MMA) 2018 WL 1726620, at *8; *Azimpour v. Sears, Roebuck & Co.* (S.D.Cal. Apr. 26, 2017, No. 15-2798 JLS) 2017 WL 1496255, at *6; see also pp. 29-30, *ante*). *None* of these cases addresses whether Section 17501 is constitutional, facially or as-applied, and accordingly they provide no support for the statute's constitutionality.

B. Section 17501 Violates The First Amendment To The U.S. Constitution And The Liberty Of Speech Clause Of The California Constitution

For many of the same reasons discussed above in connection with vagueness, Section 17501 is also unconstitutional under the First Amendment and the Liberty of Speech Clause. Although the Superior Court twice recognized that Section 17501 implicates First Amendment concerns (Defs.' App. at p. 18; App. at pp. 928, 930), the court opted not to conduct a standalone First Amendment analysis in light of its conclusion that the statute was void for vagueness. (App. at p. 928.) While the People's petition should be denied because the Superior Court correctly ruled that Section 17501 is void for vagueness, it should also be denied for the independent, alternative reason that Section 17501 violates the First Amendment and the Liberty of Speech Clause. (See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499 [holding that, "in cases raising First Amendment issues," appellate courts have an "obligation" to conduct an "independent

examination" to determine whether there is a "forbidden intrusion on the field of free expression"]; *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 319-320 [denying writ petition based on an alternative ground not considered by the trial court].)

As discussed above, Section 17501 by its terms prohibits truthful, nonmisleading commercial speech (see pp. 29-30, *ante*.), which can only be restricted "if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." (*Ibanez*, *supra*, 512 U.S. at p. 142; see also *Kasky*, *supra*, 27 Cal.4th 939, 959 ["The state Constitution's free speech provision . . . protects commercial speech, at least when such speech is 'in the form of truthful and nonmisleading messages about lawful products and services.'"]; *Sorrell*, *supra*, 564 U.S. at pp. 577-578 ["the State may not . . . prohibit[] truthful, nonmisleading advertisements"].) As the Superior Court recognized, the People's burden in making that showing is "not slight," and requires it to demonstrate "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (Defs.' App. at pp. 17-18; quoting *Ibanez*, *supra*, 512 U.S. at pp. 142-143.)

Last year, the U.S. Supreme Court held that a regulation restricting the imposition of a credit card surcharge constitutes a regulation of speech, not conduct, because unlike a typical price regulation, the law did not tell merchants the amount they were allowed to collect, but instead told merchants how they could communicate their prices. (*Expressions Hair*, *supra*, 137 S.Ct. at pp. 1150-1152.) The Court distinguished valid pricing regulations from regulations of speech. A valid pricing regulation regulates the amount of money a store can collect ("all New York delis to charge $10 for their sandwiches"). (*Id*. at p. 1150.) Although such regulations might impact speech (stores would need to "put '$10' on their menus or have employees tell customers the price"), the effect is only incidental to the law's

primary effect on conduct. (*Id*. at pp. 1150-1151.) A regulation of speech, on the other hand, "tells merchants nothing about the amount they are allowed to collect" ("[s]ellers are free to charge $10 for cash and $9.70, $10, $10.30, or any other amount for credit"). (*Id*. at p. 1151.) What the law regulates instead, is "how sellers may communicate their prices." (*Ibid*.) For example, the law at issue in *Expressions Hair* forbade retailers from conveying a $10 cash price and $10.30 credit price any way it pleased—the retailer could not say "$10, with a 3% credit card surcharge" or "$10, plus $0.30 for credit" for example. (*Ibid*.) As a result, the Court held that the law "regulat[ed] the *communication* of prices rather than the prices themselves," and regulated speech. (*Ibid*.)

In this case, the People are attempting to use Section 17501 to regulate how Defendants may communicate price information to their customers—specifically, information about the former prices of the products they sell. Like the statute at issue in *Expressions Hair*, which forbade a sign truthfully stating "$10 plus $0.30 for credit," the People seek to prohibit Defendants from truthfully advertising "$100 original, $50 sale" where the "prevailing market price" (however defined) within three months of the publication of the advertisement was not $100. In other words, if the retailer sold the product for $100 from January through June, and for $50 from July through September, the statute precludes the retailer from advertising in October that the original price was $100. Section 17501's restrictions on free speech are even greater than the statute at issue in *Expressions Hair*, which at least permitted merchants to advertise whatever price they wanted so long as they used certain language for credit card surcharges. But under Section 17501, Defendants may not even advertise former prices *at all* unless they happen to also constitute the "prevailing market price" (whatever that means).

Recognizing that their claims may be subject to constitutional criticism, the People asserted in their amended complaints that Section 17501

provides retailers with the "option[]" to "use a reference price representing the 'prevailing market price . . . within three months next immediately preceding the publication of the advertisement.'" (App. at p. 121.) That Section 17501 permits a retailer to advertise a former price so long as it was the "prevailing market price" does nothing to reduce the statute's restriction of truthful speech. That Section 17501 permits *some* speech is not sufficient given that it bans vast amounts of truthful speech about former prices. If retailers have a constitutional right to advertise truthful "original" or "regular" prices from six months ago (and they do), it is no answer to say that they can instead can advertise a former price from the past 90 days. And simply because speech falls outside of what (in the People's view) Section 17501 permits does not mean that the statute is constitutional. As the Eleventh Circuit recently explained, speech that does not conform to a "state's preferred definition" is not "inherently misleading." (*Ocheesee Creamery LLC v. Putnam* (11th Cir. 2017) 851 F.3d 1228, 1238.) If the law were otherwise, "[a]ll a state would need to do in order to regulate speech would be to redefine the pertinent language in accordance with its regulatory goals." (*Ibid*.)

The People also claimed in the amended complaints that Section 17501 passes constitutional muster because "advertisers may advertise a reference price if they state 'clearly, exactly and conspicuously' in the advertisement the date when the alleged former price *prevailed*." (App. at p. 121, italics added.) The People *concede* that this is a "compelled commercial speech requirement," and thus subject to constitutional scrutiny. (*Ibid*.) But they say that it "is reasonably and rationally related to California's interest in preventing deception of consumers and, therefore, complies with both the First Amendment and Article I, Section 2 of the California Constitution." (*Ibid*.) But this "compelled commercial speech requirement" is no cure, as it would still prevent the communication of truthful former prices if they did not "prevail" within the meaning of Section 17501. And the People have offered

no rational basis for the three-month limitation, or the disclosure requirement. The government cannot justify Section 17501's ban on truthful speech on the ground that the statute permits different "compelled" speech.

Moreover, even if Section 17501 merely compelled commercial speech, rather than also banning it, the statute still could not survive First Amendment scrutiny. The People's amended complaints rely on *Zauderer v. Office of Discplinary Counsel* (1985) 471 U.S. 626 (*Zauderer*), which considered the regulation of commercial speech by attorneys, and assert that "regulations compelling advertisers to make truthful factual disclosures are upheld under the First Amendment so long as they are reasonably related to the State's interest in preventing deception of consumers." (App. at p. 121.) The People invoke the wrong constitutional test. As the U.S. Supreme Court recently explained, "[e]ven under *Zauderer*, a disclosure requirement cannot be unjustified or unduly burdensome," and disclosures must "extend no broader than reasonably necessary" because "[o]therwise, they risk chilling protected speech." (*Nat. Inst. of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2377, quotation marks and citation omitted.)

Section 17501 satisfies none of the above requirements. The People have not explained why compelling retailers to limit their former price advertisements to those prices that were the "prevailing market price" would directly advance the government's interest in preventing deception of consumers. In fact, the opposite is likely true. Ordinary consumers, unfamiliar with Section 17501's notion of a "prevailing market price," would likely be confused by the advertisements that the People say Section 17501 permits. And Section 17501 would still chill significant amounts of truthful speech, again to the detriment of consumers.

The People's attempted assertion of claims under Section 17501 is not only unconstitutional, but it is also premised on the belief that the Los Angeles City Attorney and its contingency-fee lawyers know better than

consumers what information is and is not useful to a purchasing decision. That paternalistic notion seriously underestimates the intelligence of 21st century consumers, who are now armed with more information than ever about prices—both historical and present—and more tools than ever to comparison shop quickly and effortlessly. (See Defs.' App. at pp. 18-19, citing *Rubenstein v. Gap, Inc.* (2017) 14 Cal.App.5th 870.) Section 17501 is the relic of a bygone era in which retailers and consumers had an information disparity regarding the price of goods—a disparity that has largely disappeared with rise of the Internet. Consumers today are able to quickly, efficiently, and accurately compare price information from multiple sellers. They can also examine price trends and discounts, compare products and services, read reviews and shopping guides, and avail themselves of innumerable other tools to inform their purchasing decisions. In addition, consumers can shop in stores, online, or both—radically altering, if not rendering obsolete, the concept of a "market" in a particular "locality."

Even if California had a substantial interest in 1941 in ensuring that retailers did not improperly exploit their information advantage, that interest has diminished in the digital age, and cannot justify Section 17501's sweeping imposition of a single, vague, state-approved definition of former prices that broadly restricts retailers from communicating true information to their customers. The vague restrictions on truthful speech imposed by Section 17501 are unnecessary to protect consumers, and the People's theory of liability, if allowed to proceed, would only serve to reduce the information available to the public—while driving up costs to retailers (and thus potentially prices to consumers). The statute is unconstitutional through-and-through.

VII. CONCLUSION

For seven decades, Section 17501 sat on the books essentially unused, and for good reason. Despite being allowed to proceed on their other claims, the People ask this Court to revive Section 17501, even though the rise of the Internet has made construction of its numerous undefined terms even more difficult while rendering its protections entirely unnecessary.

Because the Superior Court correctly concluded that Section 17501 is unconstitutional, the order to show cause should be discharged, and the petition for writ of mandate should be denied.

DATED: November 19, 2018

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT

Pursuant Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that Defendants' Joint Return to Petition for Writ of Mandate contains 13,966 words, excluding the excludable matter pursuant to Rule 8.204(c)(3), according to the word count generated by the computer program used to produce this document.

Dated: November 19, 2018

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