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IN THE SUPREME COURT OF CALIFORNIA

ABBOTT LABORATORIES et al.,
Defendants and Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D072577

APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

APPLICATION TO FILE AMICUS CURIAE BRIEF 10

AMICUS CURIAE BRIEF 13

INTRODUCTION 13

LEGAL ARGUMENT 14

I. Constitutional avoidance mandates that courts respect the Legislature's silence on the scope of a local district attorney's authority to seek statewide UCL remedies 14

A. The Attorney General's constitutional role is as the chief law officer who supervises local district attorneys 14

B. The constitutional structure is consistent with local district attorneys prosecuting cases locally 17

C. The OC District Attorney's interpretation of the UCL threatens disruption of the constitutional scheme; the petitioners' avoids the threat 21

1. The statute is silent on the scope of the district attorney's authority 21

2. Avoidance of constitutional doubt mandates that courts respect the Legislature's silence as intentional 26

3. The constitutional worry is not mitigated by the dissent's and OC District Attorney's alternative interpretation 31

4. Concerns about democratic accountability are real 37

II. The Court of Appeal's interpretation is consistent with the purposes of the UCL 39

A. The district attorneys and the Attorney General can enforce the UCL by coordinating prosecution 39

B. The broad purpose of the UCL does not mean that UCL enforcement must be pursued in any fashion 40

CONCLUSION 43

CERTIFICATE OF WORD COUNT 44

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Laboratories v. Superior Court
(2018) 24 Cal.App.5th 1 .... *passim*

Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania
(2010) 50 Cal.4th 1370 35

Barnhart v. Peabody Coal Co.
(2003) 537 U.S. 149 [123 S.Ct. 748, 154 L.Ed.2d 653] 24

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.
(1999) 20 Cal.4th 163 29

Candid Enterprises, Inc. v. Grossmont Union High School Dist.
(1985) 39 Cal.3d 878 15

Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.
(2005) 35 Cal.4th 1072 26

Collins v. Riley
(1944) 24 Cal.2d 912 31

Coulter v. Pool
(1921) 187 Cal. 181 21

County of Los Angeles v. Superior Court
(1998) 68 Cal.App.4th 1166 18

County of Madera v. Gendron
(1963) 59 Cal.2d 798 27

County of Sacramento v. C. P. R. R. Co.
(1882) 61 Cal. 250 30

Davis v. Trachsler
(1906) 3 Cal.App. 554 21

Doe v. City of Los Angeles
(2007) 42 Cal.4th 531 35

Gananian v. Wagstaffe
(2011) 199 Cal.App.4th 1532 27

Greyhound Corp. v. Superior Court
(1961) 56 Cal.2d 355 35

Howard Jarvis Taxpayers Assn. v. Padilla
(2016) 62 Cal.4th 486 24

In re Dennis H.
(2001) 88 Cal.App.4th 94 .... 22, 25

In re Marriage of Brown
(1987) 189 Cal.App.3d 491 23

Kasky v. Nike, Inc.
(2002) 27 Cal.4th 939 40

Kilgore v. Younger
(1982) 30 Cal.3d 770 17

Korea Supply Co. v. Lockheed Martin Corp.
(2003) 29 Cal.4th 1134 25

Lusardi v. Xerox Corp.
(3d. Cir. 1992) 975 F.2d 964 36

Marine Forests Society v. California Coastal Com.
(2005) 36 Cal.4th 1 .... 14, 15, 27

Pacific Gas & Electric Co. v. County of Stanislaus
(1997) 16 Cal.4th 1143 22

Pension Benefit Guaranty Corp. v. LTV Corp.
(1990) 496 U.S. 633 [110 S.Ct. 2668, 110 L.Ed.2d 579] 42

People ex rel. Deukmejian v. Brown
(1981) 29 Cal.3d 150 .... 30, 38

People ex rel. Younger v. Superior Court
(1978) 86 Cal.App.3d 180 30

People v. Casa Blanca Convalescent Homes, Inc.
(1984) 159 Cal.App.3d 509 .... 29, 30

People v. Eubanks
(1996) 14 Cal.4th 580.. 18, 24

People v. Gutierrez
(2014) 58 Cal.4th 1354... 26, 32

People v. Hy-Lond Enterprises, Inc.
(1979) 93 Cal.App.3d 734 .... 22, 29, 30, 31, 33, 37

People v. Soto
(1998) 64 Cal.App.4th 966... 36

People v. Stratton
(1864) 25 Cal. 242 27

People v. Superior Court (Solus Industrial Innovations, LLC)
(2014) 224 Cal.App.4th 33... 23

Pierce v. Superior Court
(1934) 1 Cal.2d 759 27

Pitts v. County of Kern
(1998) 17 Cal.4th 340... 22

Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP
(2011) 195 Cal.App.4th 265.. 35

Safer v. Superior Court
(1975) 15 Cal.3d 230 .... 17, 22, 25

San Diego County Veterinary Medical Assn. v. County of San Diego
(2004) 116 Cal.App.4th 1129... 15

Schabarum v. California Legislature
(1998) 60 Cal.App.4th 1205 31

Sonic-Calabasas A, Inc. v. Moreno
(2013) 57 Cal.4th 1109 42

Stambaugh v. Superior Court
(1976) 62 Cal.App.3d 231 36

Steen v. Appellate Division of Superior Court
(2014) 59 Cal.4th 1045 27

Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.
(1979) 24 Cal.3d 335 26

Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37
(2002) 105 Cal.App.4th 590 36

Trimont Land Co. v. Truckee Sanitary Dist.
(1983) 145 Cal.App.3d 330 .... 26, 28

Troensegaard v. Silvercrest Industries, Inc.
(1985) 175 Cal.App.3d 218 35

W. U. Tel. Co. v. Com. of Pa., by Gottlieb
(1961) 368 U.S. 71 [82 S.Ct. 199, 7 L.Ed.2d 139] 35

Constitutions

California Constitution
Article V, § 1 15
Article V, § 11 16
Article V, § 13 .... 15, 16
Article XI, § 1 .... 15, 16
Article XI, § 7 15

Statutes

Business and Professions Code
§ 16759 37
§ 17200 et seq. 11
§ 17203 24
§ 17204 .... 21, 29
§ 17206 .... 21, 24
§ 17206, subd. (c) 25, 37
§ 17207, subd. (b) 24

Code of Civil Procedure, § 731 24

Government Code
§ 11180 37
§ 12510 16
§ 12511 16
§ 12512 16
§ 12524 17
§ 12550 16
§ 24000 16
§ 24009 16
§ 24009, subd. (a) 16
§ 26500 .... 16, 18, 19, 24
§ 26507 17
§ 26508 17
§ 26520 16
§ 26521 16

Rules of Court

California Rules of Court, rule 8.200(c) 10

Miscellaneous

Comment, *Discretion versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials* (2018) 68 Emory L.J. 95 20

Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First* (1995) vol. 15, No. 1, Cal. Reg. L.Rptr. 1 ...... 19, 20, 36

Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws* (2013) 40 Fordham Urb. L.J. 1903 19

Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers* (2005) 38 Colum. J.L. & Soc. Probs. 365 38

65 Ops.Cal.Atty.Gen. 330 (1982) 19

Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) 42

Stern, Bus. & Prof. Code § 17200 Practice (The Rutter Group 2018) ¶¶ 9:99-9:101 34

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Under California Rules of Court, rule 8.200(c), amici curiae the Chamber of Commerce of the United States of America and the California Chamber of Commerce (collectively, the Chambers) request permission to file the attached amicus curiae brief in support of petitioners Abbott Laboratories, AbbVie Inc., Teva Pharmaceuticals, Inc., and Duramed Pharmaceutical Sales Corp.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size and sector, and in every geographic region of the country. In particular, the U.S. Chamber

has many members located in California or who conduct substantial business in California. For that reason, the U.S. Chamber and its members have a significant interest in the administration of civil justice in the California courts. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community. In fulfilling that role, the U.S. Chamber has appeared many times before the California Courts of Appeal and the California Supreme Court.

The California Chamber of Commerce (CalChamber) is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

The Chambers are vitally interested in California's Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., given that their members are frequent targets of this widely used and broadly worded consumer protection statute. Indeed, every person or entity engaged in business activity in

California has a stake in the question presented here: whether a local district attorney may unilaterally bring statewide claims under the UCL without coordinating with the Attorney General. The Chambers offer this brief to help explain why a local district attorney should not be allowed to subject businesses to unilateral, unfair, uncertain, and expensive statewide litigation without clear statutory authorization.

March 8, 2019

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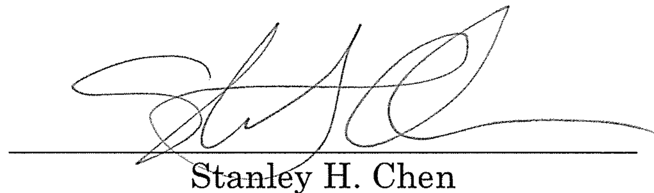

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AMICUS CURIAE BRIEF

INTRODUCTION

The Court of Appeal's majority opinion is based upon a fundamental premise behind the California Constitution: the Attorney General is the only chief law officer of the state, and is responsible for the uniformity of state law enforcement, while the 58 district attorneys are officers that operate within their own local, county jurisdictions. A majority of the court held that where the UCL is silent as to whether a district attorney has authority to unilaterally bring a statewide UCL claim, it must be interpreted to respect the constitutionally-imposed relations between the Attorney General and the several district attorneys. (See *Abbott Laboratories v. Superior Court* (2018) 24 Cal.App.5th 1, 17-31 (*Abbott*).)

The dissenting justice and the Orange County (OC) District Attorney would instead have courts treat the UCL's silence as an affirmative statement by the Legislature that a district attorney has the same statewide scope of authority as the Attorney General himself. (*Abbott*, *supra*, 24 Cal.App.5th at pp. 31-39 (dis. opn. of Dato, J.) They see no problem in allowing local district attorneys to threaten defendants with purportedly statewide UCL claims despite not being able assure settlement of those statewide claims with binding force. Any time a single district attorney is allowed to sue for statewide relief, the Attorney General could still exercise the constitutional power to bring claims for statewide relief, and 57 other counties could still bring claims for harms within their

jurisdictions. This exposes California defendants to potentially duplicative lawsuits and damages. The majority's opinion avoids these problems by permitting the Attorney General to sue for statewide relief and each of the 58 district attorneys to seek relief within their respective jurisdictions. In short, the OC District Attorney's interpretation of the UCL statute is wrong, constitutionally problematic, and unfair to California businesses, which have a basic right to negotiate with prosecutors throughout the state without subjecting themselves to legal jeopardy from potentially conflicting authorities who purport to represent the state as a whole.

LEGAL ARGUMENT

I. Constitutional avoidance mandates that courts respect the Legislature's silence on the scope of a local district attorney's authority to seek statewide UCL remedies.

A. The Attorney General's constitutional role is as the chief law officer who supervises local district attorneys.

The California Constitution provides for divided executive power. (See *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 31 (*Marine Forests*) [Constitution provides structure of "divided executive power" between the Governor and other constitutional executive officers, including the Attorney General].) However, the Constitution also explicitly provides the

Attorney General with *unitary law enforcement* power: the Attorney General is "*the* chief law officer" of the state. (Cal. Const., art. V, § 13, emphasis added.) And just as the Governor "shall see that the law is faithfully executed," the Attorney General "shall . . . see that" the laws are "uniformly and adequately enforced." (*Id.*, art. V, §§ 1, 13.)

A necessary implication of this constitutionally prescribed role for the Attorney General is that no *other* prosecutor in California—including any of the local district attorneys—is "the" chief law officer of the state. As such, no other prosecutor should be allowed to unduly impede on the chief law officer's duty to "uniformly and adequately enforce[ ]" the laws. (Cal. Const., art. V, § 13; see also *Marine Forests*, *supra*, 36 Cal.4th at p. 45 [statute should not be understood to "improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer) in the exercise of [that officer's authority]"].)

The Constitution also provides that district attorneys are elected officers of counties, which are "legal subdivisions of the State" whose police powers are to be "enforce[d] within [their] limits." (Cal. Const., art. XI, §§ 1, 7; *San Diego County Veterinary Medical Assn. v. County of San Diego* (2004) 116 Cal.App.4th 1129, 1134 [counties have plenary police power authority " 'subject only to the limitation that they exercise this power within their territorial limits' " (quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885].)

And the Attorney General has "direct supervision" over the district attorneys "in *all* matters pertaining to the duties of their respective offices." (Cal. Const., art. V, § 13, emphasis added.) When "any law of the State is not being adequately enforced *in any county*," the Attorney General "shall" exercise all the powers of the district attorney. (*Ibid.*, emphasis added.)

The Attorney General is also the only state prosecutor accountable at the ballot box to all the voters in California. (Cal. Const., art. V, § 11.) The local district attorneys are elected only by residents of their local counties. (*Id.*, art. XI, § 1; Gov. Code, § 24009, subd. (a).) Therefore, if a district attorney usurps the Attorney General's role, it can do so without ever being held accountable to a statewide voter base.

The Government Code further implements the above constitutional scheme. The code provides that the Attorney General is the sole head of the Department of Justice (Gov. Code, § 12510), has "charge" of "*all* legal matters in which the State is interested" (*id.*, § 12511, emphasis added), and prosecutes and defends "all causes" to which the State is a party (*id.*, § 12512). In contrast, local district attorneys are county officers elected by the constituents of their respective counties (*id.*, §§ 24000, 24009), render legal services to those counties (*id.*, § 26520), and defend suits "brought against the state in his or her county or against his or her county" (*id.*, § 26521). They are under the "direct supervision" of the Attorney General, who may "take full charge" of a matter when he or she deems it necessary. (*Id.*, § 12550.) The Attorney General may further call district attorneys to conference

to ensure the "uniform and adequate enforcement of the laws of this state as contemplated by . . . the Constitution." (*Id.*, § 12524; see also *Kilgore v. Younger* (1982) 30 Cal.3d 770, 784-787 (conc. & dis. opn. of Bird, C. J.) [describing supervision by the Attorney General].)[1]

Finally, as this Court has recognized, the Legislature has recognized this constitutional structure by speaking expressly when it intends to confer authority upon the local district attorneys to prosecute civil cases beyond their plenary authority in criminal cases in their local counties. (See *Safer v. Superior Court* (1975) 15 Cal.3d 230, 236 (*Safer*) ["By the specificity of its enactments the Legislature has manifested its concern that the district attorney exercise the power of his office only in such civil litigation as that lawmaking body has, after careful consideration, found essential"].)

B. The constitutional structure is consistent with local district attorneys prosecuting cases locally.

Despite the clear hierarchical structure imposed by the Constitution and supported by the Government Code and the Legislature, the OC District Attorney attempts to provide his own

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[1] The Government Code also confirms the co-equal status of the local district attorneys, providing that a district attorney may work with another to prosecute a civil case "in a court of the other jurisdiction" only if the other consents and if the case is "of benefit to his own county." (Gov. Code, § 26507.) Similarly, they may share "legal or investigative services" only if the district attorneys of both counties consent. (*Id.*, § 26508.)

alternative prosecutorial model: that California has set up a "decentralized law enforcement model" for purposes of UCL enforcement. (RBOM 16, original formatting omitted.)

However, the OC District Attorney's support for this supposed alternative appears to be merely that local district attorneys have authority to prosecute UCL claims. (See RBOM 16-17.) But the question here is not whether the UCL allows local prosecutors to bring UCL claims, but whether the district attorneys are local prosecutors *co-equal* to the Attorney General for all UCL claims, *no matter their geographic scope*. There is nothing incongruous about district attorneys prosecuting UCL claims and having territorially limited authority. (Cf. *County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1173 [no "inconsisten[cy]" between district attorneys' territorially limited authority within county and district attorneys being "state officials locally placed throughout the state"].)

Where the OC District Attorney does come right out and claim the role of chief public prosecutor (RBOM 12), he offers no substantial support for his position. He cites Government Code section 26500, which provides that the district attorney is "the public prosecutor, except as otherwise provided by law." But as petitioners aptly explain and as courts have repeatedly held, section 26500 provides that district attorneys are prosecutors of "public offenses," which are *criminal* offenses, and even with respect to criminal cases, the local district attorneys' prosecutorial authority is presumptively limited to their respective counties. (See ABOM at 18-19, 28-29; *People v. Eubanks* (1996) 14 Cal.4th

580, 589 (*Eubanks*) [district attorney's prosecutorial authority covers public offenses "within the county" (citing Gov. Code, § 26500)].)[2] The OC District Attorney says nothing in response to these well-established points. Nor does he explain the logical implication of his view that he is the chief public prosecutor—namely that his sister district attorneys are somehow *also* all the *chief* public prosecutors. This cannot be the case. Only the Attorney General is the chief public prosecutor.

The OC District Attorney also cites a number of law review articles that explain that California's prosecutorial system involves multiple local prosecutors, but only in connection with a comparison with alternative models of enforcement in other states and by the federal government. (See, e.g., Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws* (2013) 40 Fordham Urb. L.J. 1903, 1916-1917 [comparing California's UCL with the Federal Trade Commission's *sole* authority to enforce federal unfair competition laws and other state enforcement regimes that allow *only* the Attorney General to enforce such laws]; Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First*

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[2] The OC District Attorney's citation to an Attorney General opinion from 1982 does not add anything. (RBOM 12-13 [citing 65 Ops.Cal.Atty.Gen. 330 (1982)].) Indeed, the opinion confirms that "public offenses" refer to criminal violations. In it, the Attorney General addressed the question of whether a district attorney has a responsibility to prosecute certain violations of county ordinances in which *criminal* penalties apply. (65 Ops.Cal.Atty.Gen. 330.) In that context, the district attorney is of course the "public prosecutor." (*Ibid.*)

(1995) vol. 15, No. 1, Cal. Reg. L.Rptr. 1, 3-4 (hereafter Fellmeth) [similar].[3]) As explained above, the mere fact that multiple local prosecutors are used for enforcement does not speak to whether they may usurp the Attorney General's role as chief law officer in any case, especially for actions taken outside their jurisdiction.

Finally, the OC District Attorney appears to suggest that the fact that the Attorney General's authority over the local district attorneys is supervisory means that the local district attorneys are the real chief prosecutors. (RBOM 15-16.) Not so. The OC District Attorney cites no authority for his suggestion, and the law review article he appeals to itself notes that the Attorney General's supervisory authority effectively allows the Attorney General to intervene at will. (Comment, *Discretion versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials* (2018) 68 Emory L.J. 95, 122, fn. 159.)

At bottom, the OC District Attorney's attempt to highlight the undisputed fact that there *could* be less enforcement by local district attorneys in alternative enforcement regimes actually supports petitioners' position. That a potentially wide number of alternative enforcement regimes could be implemented to enforce the UCL suggests that *both* the Legislature's express words *and* the Legislature's glaring silence should be respected. Only doing the latter would give the Legislature free reign to choose which

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[3] Indeed, Fellmeth describes many policy problems associated with allowing local district attorneys and the Attorney General to have unclearly overlapping authority with respect to UCL enforcement. (Fellmeth, *supra*, vol. 15, No. 1, Cal. Reg. L.Rptr. at p. 2.)

enforcement regime it desires—that is, to legislate up to a specific amount and method of enforcement, and no further.

C. The OC District Attorney's interpretation of the UCL threatens disruption of the constitutional scheme; the petitioners' avoids the threat.

1. The statute is silent on the scope of the district attorney's authority.

Business and Professions Code sections 17204 and 17206 provide that the Attorney General and district attorneys may bring an action for injunctive relief and civil penalties for violations of the UCL. Both sections provide authority to bring such actions in the name of the "people of the State of California," (Bus. & Prof. Code, §§ 17204, 17206), but that language does not determine the scope of authority. A district attorney is a "public agent" acting "on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law." (*Coulter v. Pool* (1921) 187 Cal. 181, 187.) And the mere *presence* of agency does not determine the *scope* of the agent's authority. (See *Davis v. Trachsler* (1906) 3 Cal.App. 554, 559 [distinguishing between agency and scope of authority of agent, and noting that an "agent can only bind his principal when he acts within the scope of his authority"].)[4]

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[4] Nor does the fact that a district attorney sometimes acts as a state officer mean that he or she is not limited territorially when (continued...)

In short, just because the statute expressly speaks to who can prosecute a UCL claim does not mean that it speaks to the scope of the claims that can be prosecuted, much like just because a parent expressly gives a child permission to go to the grocery store to pick up milk does not mean that the parent has given the child permission to go to a grocery store in a town 200 miles away.

Courts, including this Court, have applied similarly restrictive principles in determining whether statutes speak to a prosecutor's authority in other contexts. For instance, in *Safer*, *supra* 15 Cal.3d at pages 239-241, this Court held that a district attorney's authority to prosecute contempt did not give the district attorney specific legislative authority to intervene in a civil contempt proceeding. Similarly, in *In re Dennis H.* (2001) 88 Cal.App.4th 94, 99-102 (*Dennis*), the court held that a district attorney did not have *specific* statutory authority to appear in dependency proceedings as a representative of the interests of a state, despite various statutes that permitted the district attorney to intervene in other circumstances, and a general statute authorizing a juvenile court to control all aspects of dependency proceedings. (See also *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1155-1156 [noting that a

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acting as that officer. (See *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359-360 [district attorneys can act as county and state officers but their authority to prosecute is territorially limited]; see also *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, 751 (*Hy-Lond*) [fact that a prosecutor has been granted authority to conduct prosecutions by the authority of the " 'People of the State of California' " does not determine "limits to which such authority extends"].)

statute generally authorizing *counties* to bring antitrust actions does not specifically authorize a *district attorney* to bring such actions]; *People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 43-44 [rejecting argument that general Labor Code statute requiring cases be referred to prosecutors for " 'appropriate action' " is specific enough to confer on a district attorney authority to prosecute civil action]; *In re Marriage of Brown* (1987) 189 Cal.App.3d 491, 495-496 [statute authorizing a district attorney to bring enforcement proceedings to *collect* spousal support not specific enough to grant district attorney authority to participate in a *modification* proceeding].)

In sum, this is decidedly not a case about whether this Court should *override* an *express* statutory mandate. It cannot be reasonably disputed that the UCL is silent as to whether a local district attorney can unilaterally bring a UCL claim with statewide remedies.

Nevertheless, both the dissent and the OC District Attorney contend that the statutory gap in the UCL described above does not exist because the question of whether the district attorney has authority to bring a statewide UCL claim is reducible to the question of whether the district attorney has standing to bring UCL claims in general and whether the court has authority to order civil penalties and the discretion to order them on a statewide basis. (See *Abbott*, *supra*, 24 Cal.App.5th at pp. 37-38 (dis. opn. of Dato, J.); OBOM 26-27; RBOM 18-20.)

As an initial matter, any suggestion that there is no such legal concept as the territorial scope of a prosecutor's authority

outside of venue statutes is belied by the fact that the Legislature sometimes *does* speak expressly to the territorial boundaries of a prosecutor's scope of authority. (See, e.g., Code Civ. Proc., § 731 [district attorneys may abate nuisances in "any county in which the nuisance exists"].)[5]

And while it is true that Business and Professions Code section 17203 generally authorizes the court to issue injunctive and restitutionary remedies and section 17206 civil penalties, the mere fact that a court is authorized to order certain *types* of

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[5] And as the majority recognized (*Abbott*, *supra*, 24 Cal.App.5th at pp. 29-30), the fact that the Legislature sometimes speak expressly as to the territorial boundaries of the district attorney's prosecutorial authority does *not* negatively imply the lack of such boundaries here. A negative implication does not arise where there is no "specific list or facially comprehensive treatment" (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514). Rather, such an inference is appropriate only when "in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of *strong contrast* to that which is omitted that the contrast enforces the affirmative inference." (*Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168 [123 S.Ct. 748, 154 L.Ed.2d 653], emphasis added, internal quotation marks omitted.)

Here, all one can infer is that, across a variety of statutes, the Legislature only sometimes speaks expressly about boundaries. (Compare Code Civ. Proc., § 731 [district attorneys may abate nuisances in "any county in which the nuisance exists"], and Bus. & Prof. Code, § 17207, subd. (b) [district attorney may enforce preexisting injunction "without regard to the county from which the original injunction was issued"], with *Eubanks*, *supra*, 14 Cal.4th at p. 589 [relying on Gov. Code, § 26500, which contains no express geographic limitation, to explain that district attorney's criminal prosecutorial authority is limited to their respective counties].)

remedies for UCL claims does not mean that those remedies are awardable in any specific case, *whatever other statutory restrictions are in place.*

For instance, if a district attorney prosecuting a UCL claim seeks civil penalties, but asks the court to issue an order for the penalties to be paid to the General Fund (contra Bus. & Prof. Code, § 17206, subd. (c)), the mere fact that there is general statutory authorization for the court to order civil penalties would surely not make a grant of the request permissible. And if a private plaintiff seeks civil penalties in a UCL claim, the mere fact that the court is generally authorized to order civil penalties would surely not allow those penalties to be awarded for that claim. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1166 [demurrer properly sustained where plaintiff without ownership interest in money sought was not authorized by statute to pursue monetary relief].)

More generally, the fact that a court would otherwise have jurisdiction over a case does not mean that the court has authority to proceed if other statutory requirements governing the prosecution of the case are not met. (See *Safer*, *supra*, 15 Cal.3d at p. 242 [where a statute authorizes prescribed procedure for prosecution and the court acts contrary to the authority thus conferred—such as by allowing a district attorney to prosecute a case in excess of his authority—the court has exceeded its jurisdiction, even if it has subject matter jurisdiction]; see also *Dennis*, *supra*, 88 Cal.App.4th at p. 102 [in holding that district attorney could not participate in juvenile dependence proceedings,

noting that general grant of authority to court to control juvenile proceedings "does not allow the juvenile court to conduct proceedings in a manner that is inconsistent with existing law; it is tempered by more specific statutes, which take precedence"].)

Thus, much as the general authority granted to a district attorney to prosecute UCL claims does not speak to the scope of that authority, the general authority granted to a court to order certain remedies does not speak to the scope of that authority where other statutory requirements are not met. This is especially so given the need for constitutional avoidance here. After all, the "Legislature may not give to [even] *courts* a jurisdiction beyond that conferred or authorized by the Constitution." (*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 347, emphasis added.)

2. Avoidance of constitutional doubt mandates that courts respect the Legislature's silence as intentional.

Courts construe statutes "with reference to the whole system of law of which it is a part." (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089.) They will not interpret a statute to abrogate long-standing legal principles unless the statute does so explicitly or by necessary implication. (*Trimont Land Co. v. Truckee Sanitary Dist.* (1983) 145 Cal.App.3d 330, 349 (*Trimont*).)

Additionally, a statute with multiple plausible readings should be interpreted to avoid constitutional problems. (*People v.*

Gutierrez (2014) 58 Cal.4th 1354, 1373 (*Gutierrez*).) In particular, a statute should not be read in a manner where it "improperly intrude[s] upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer) in the exercise of [that executive officer's authority]." (*Marine Forests*, *supra*, 36 Cal.4th at p. 45; see also *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053 (*Steen*) [separation of powers "is violated when the actions of one branch defeat or materially impair the *inherent functions* of another" (emphasis added)].)

Courts consistently construe statutes or apply legal principles in a manner that avoids unnecessarily encroaching on such core constitutional or traditional powers. (See, e.g., *Steen*, *supra*, 59 Cal.4th at pp. 1053-1054 [construing statute authorizing court clerk to issue certain complaints to require that the clerk issue them only with prosecutorial approval]; *County of Madera v. Gendron* (1963) 59 Cal.2d 798, 801-802 [interpreting a statute concerning private practice of law by district attorneys to go to their compensation, rather than their traditional duties]; *Pierce v. Superior Court* (1934) 1 Cal.2d 759, 761-762 [statute should not be interpreted to limit Attorney General's broad power, derived from common law, to bring a state law claim]; *People v. Stratton* (1864) 25 Cal. 242, 246-247 [same]; *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1540-1543 [refusing to construe a statute providing that a district attorney "shall" prosecute certain crimes in a manner that would clash with prosecutorial discretion].)

Here, the constitutional structure governing the general

powers and duties of the Attorney General and the several district attorneys indicates that only the Attorney General has plenary authority to bring statewide claims, while the district attorneys prosecute cases within their own county limits. Silence by the Legislature on the relative scope of the prosecutorial authority of the district attorneys and the Attorney General should thus be understood to *default* to their traditional and constitutionally sanctioned relative authority. (See *Trimont*, *supra*, 145 Cal.App.3d at pp. 349-350 [interpreting a statute providing a general grant of contracting power to a sanitary district as limited only to contracts that did not prefer entities outside the district, "in light of the long-recognized judicial characterization of the purpose of a sanitary district, to wit, to provide service to its own members"].)

If, in bringing unilateral statewide claims, a local district attorney has the power to bind the Attorney General and the other co-equal district attorneys to settlements or judgments pertaining to UCL violations outside the local district attorney's county, that would run directly contrary to two aspects of the constitutional structure: (1) the fact that the Attorney General is the chief law officer who is solely responsible for the uniformity of state law enforcement, and whose power thus cannot constitutionally be encroached upon by a subordinate law enforcement officer he directly supervises; and (2) the fact that every other district attorney has the power and duty to prosecute claims within his or her respective county.

The constitutional problem above is the one the court

attempted to avoid in *Hy-Lond* as it construed Business and Professions Code section 17204's grant of authority to district attorneys. There, the court was concerned with a settlement in which a district attorney had purported to sign away the right of the Attorney General to bring UCL actions against the defendant nursing facilities in the case. (*Hy-Lond, supra*, 93 Cal.App.3d at pp. 741-742 & fns. 1-2.)[6] The court explained that presuming the district attorney had the power to bind the Attorney General would run afoul of the fundamental principle that a district attorney may not "surrender the powers of the Attorney General and his fellow district attorneys to commence . . . actions in other counties." (*Id.* at p. 753.) Thus, the court refused to interpret section 17204 as authorizing district attorneys to bind the Attorney General. (*Id.* at pp. 752-753.)

The avoidance principle the court in *Hy-Lond* relied upon flows from a concern that the judiciary should not lightly encroach on or overturn the hierarchical structures within the co-equal and separate executive branch. The principle expresses itself in a number of other cases and contexts as well. For instance, in *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 521-522, 531, abrogated on another ground by *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999)

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[6] Notably, while the settlement granted the nursing facilities immunity for future actions based on future violations, it *also* absolved the facility of "all its past sins." (*Hy-Lond, supra*, 93 Cal.App.3d at p. 749.) The court expressly noted that the absolution from new UCL actions "may reach all such acts *past and prospective*." (*Id.* at p. 749, fn. 7, emphasis added.)

20 Cal.4th 163, 185, the defendant contended that estoppel precluded a district attorney's enforcement of certain state regulations because the Department of Health Services had previously enforced them. The court rejected the contention in part because the Department had "no authority to bind the district attorney or to restrain it in the enforcement of law" since "[o]ne branch of government may not prevent another from performing official acts required by law." (*Id.* at p. 531.)

Similarly, in *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 204, the court explained that the standards for disqualification of a district attorney should not be so low as to impinge on his ability to "carry[ ] out the statutory duties of his elected office." If the Attorney General could so easily be forced to do the district attorney's job, the hierarchical structure of democratic accountability between the Attorney General and the district attorneys would be undermined. (See *id.* at pp. 203-204; see also *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157-158 (*Brown*) [refusing to permit Attorney General to sue Governor, given the constitutional structure of the Governor overseeing the Attorney General]; *County of Sacramento v. C. P. R. R. Co.* (1882) 61 Cal. 250, 254 [where district attorney unilaterally accepted offer by a defendant to allow judgment for less than the amount of taxes sued for, trial court should have permitted the Attorney General to withdraw the acceptance because the "supervisory control of the Attorney General" implies "limitations upon the power of the District Attorney"].)

If, as the court in *Hy-Lond* held, district attorneys do *not*

have the power to bind other prosecutors to the full disposition of statewide claims, then they cannot properly sue on statewide claims they have no authority to settle with finality. This bridge principle is why the concern animating *Hy-Lond* should dictate the result here. The court in *Hy-Lond* itself recognized precisely what the problem would be if district attorneys lacked the power to bind other prosecutors regarding settlements of statewide claims, but continued to prosecute such claims *anyway*: "parties dealing with the state must be able to negotiate with confidence with the agent authorized to bring the suit, and without the fear that another agency or other state entity might overturn any agreement reached." (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 752.) Parties dealing with a state officer who cannot prevent further duplicative prosecutions not only cannot negotiate settlement with any confidence, they cannot conduct discovery or otherwise litigate against the State with any confidence.

3. The constitutional worry is not mitigated by the dissent's and OC District Attorney's alternative interpretation.

Responding to the above constitutional concerns, both the dissent and the OC District Attorney point to the general fact that in California, the Constitution serves only as a restriction on power, rather than a grant of power, and so courts have to be careful in cabining a Legislature's power. (*Abbott*, *supra*, 24 Cal.App.5th at pp. 38-39 (dis. opn. of Dato, J.), citing *Collins v. Riley* (1944) 24 Cal.2d 912, 916 and *Schabarum v. California*

Legislature (1998) 60 Cal.App.4th 1205, 1218; OBOM 40-41.) But insofar as the suggestion is that constitutional restrictions on a Legislature's power to do something should be *so* strictly construed that courts could never determine that a purported interpretation of a legislative grant of power is constitutionally suspect, the dissent cannot be right. After all, California courts "adhere to the precept that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (*Gutierrez, supra*, 58 Cal.4th at p. 1373, internal quotation marks omitted.)

Additionally, the general warning about taking care not to restrain the Legislature's power has no relevance here. The only alternative interpretation given by the dissent and the OC District Attorney is that the courts should interpret the UCL to encourage unilateral statewide enforcement by a local district attorney. But nowhere has the Legislature mandated that particular form of encouragement either. As explained above, statutory silence is statutory silence. And preventing the Legislature from specifically implementing statutory purposes up to a certain point—and no further than that chosen point—is itself a "restraint" on the Legislature's power.[7]

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[7] For this reason also, petitioners' interpretation of the UCL is not any more of an attempt to force the Legislature to speak clearly than the OC District Attorney's interpretation—the latter would also require a more express statement from the Legislature before the Legislature can implement an intention to stop the enforcement of the UCL at a specific point.

The dissent also dismisses the constitutional worry here because there is purportedly no serious threat to the Attorney General's constitutional role from a district attorney's *initiating* statewide claims unilaterally. (*Abbott*, *supra*, 24 Cal.App.5th at pp. 35-36 (dis. opn. of Dato, J.).) The dissent appears to suggest that one can simply kick the can " 'down the road' " (*id.* at p. 33) by allowing courts to adopt a wait-and-see strategy—that is, if the district attorney attempts to bind other prosecutors inappropriately, then he or she can be stopped later in the litigation, if the Attorney General intervenes (*id.* at pp. 33, 35-36). For similar reasons, the dissent asserts that *Hy-Lond* is inapposite just because, unlike this case, it specifically involved the scope of a settlement, rather than the question of whether a district attorney had the authority to bring a UCL claim with a certain scope. (*Id.* at p. 36.)

But as explained above, if district attorneys do not have authority to settle and bind prosecutors to statewide claims because they cannot tread on other prosecutors' core executive functions, then they have no such authority to settle at the beginning of a case either. And if they have no authority to settle the cases when they brings them, then they should have no authority to bring the cases *in the first place*.[8]

The district attorney, according to the dissent, may *threaten* civil litigants with the prospect of potential statewide claims while

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[8] Again, the court in *Hy-Lond* itself recognized this by discussing the importance of certainty *prior* to settlement. (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 752.)

at the same time forcing the litigants to wait—potentially after much discovery, motion practice, and even trial preparation—to discover whether there really is going to be binding effect for the statewide claims. Perhaps the Attorney General will step in to intervene against a district attorney's settlement attempts, or perhaps the Attorney General will sign off on them—nobody really knows. Worse, perhaps all defendants can hope for is some kind of informal understanding that other prosecutors will purportedly not pursue the same action. (See Stern, Bus. & Prof. Code § 17200 Practice (The Rutter Group 2018) ¶¶ 9:99-9:101, pp. 9-28 to 9-29); cf. *Abbott*, *supra*, 24 Cal.App.5th at p. 30-31, fn. 16 [noting facts concerning the Attorney General's and the district attorney's informal agreements are not in the record]).[9] Or perhaps it is defendants who are supposed to *positively invite* the Attorney General to join the prosecution? In the face of these options, it is not clear how businesses are supposed to proceed in *any* direction with any confidence.

Forcing defendants to face such a scenario is fundamentally unfair and is contrary to well-settled background principles governing the orderly and fair progression of litigation. For instance, as a matter of due process, a defendant has the right to

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[9] The Santa Cruz District Attorney asserts that "comity" between the district attorneys should ensure that no district attorney usurps statewide prosecutions or inappropriately controls state policy. (Santa Cruz County District Attorney ACB 7, fn. 1.) But he cites no authority supporting the existence of this purported "comity," and the assertion simply underscores petitioners' point: these unilateral, informal, and nonbinding assurances are not the sort of assurances a reasonable civil defendant can rely on.

be " 'protected against multiple punishment for the same act because overlapping damage awards violate the sense of fundamental fairness which lies at the heart of constitutional due process.' " *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 227-228; see also *W. U. Tel. Co. v. Com. of Pa., by Gottlieb* (1961) 368 U.S. 71, 75 [82 S.Ct. 199, 7 L.Ed.2d 139] [a state cannot subject a party to deprivation of his property without "assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment"].) This Court should not condone an interpretation of the UCL that effectively forces a defendant to accept vast uncertainty about whether a purportedly statewide claim can actually be settled with finality and thus whether its due process rights might be violated.

It is also a fundamental premise of discovery and litigation that defendants have a right to fair notice and disclosure of the extent of the relevant claims against them. (See *Ameron Internat. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1384 [parties should be given "fair notice" of claims]; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 [pleadings must be precise and particular enough is "to acquaint a defendant with the nature, source and extent of his cause of action" (internal quotation marks omitted)]; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376 [purpose of discovery is to "do away 'with the sporting theory of litigation—namely, surprise at the trial' "]; *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 279 [an

amended complaint relates back to original only if defendant gave " 'enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification' "]; *People v. Soto* (1998) 64 Cal.App.4th 966, 980 [notice and disclosure requirement in an Evidence Code section designed to " 'protect the defendant from unfair surprise' "].)

Finally, the scenario envisioned by the dissent would run counter to the State's clear public policy to encourage settlement and repose. "Few things would be better calculated to frustrate this policy, and to discourage settlement . . . than knowledge that such a settlement lacked finality and would but lead to further litigation." (*Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236; see *Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37* (2002) 105 Cal.App.4th 590, 602 ["California's public policy is to encourage settlement"]; see also *Lusardi v. Xerox Corp.* (3d. Cir. 1992) 975 F.2d 964, 984 ["Particularly in the context of a complex litigation, we should not lose sight of the principle that '[t]he central role of adversary litigation in our society is to provide binding answers' "].) Indeed, given that it is unclear "who has authority to bind anyone to peace or a final resolution," it is actually "[f]rom the defendant's perspective [that] life resembles Bosnia." (*Fellmeth, supra*, vol. 15, No. 1, Cal. Reg. L.Rptr. at p. 2; cf. *Abbott, supra*, 24 Cal.App.5th at p. 32 (dis. opn. of Dato, J.).)

4. Concerns about democratic accountability are real.

Under the OC District Attorney's interpretation, the UCL incentivizes local district attorneys to quickly strike before other district attorneys do so they can receive civil penalties, which go fully into their county's coffers if they sue without the other district attorneys or the Attorney General. (See Bus. & Prof. Code, § 17206, subd. (c).) As explained above, local district attorneys can do this while brandishing the threat of statewide penalties.[10] And they can do this without subjecting themselves to the potential ire of out-of-county voters to whom they are not electorally accountable.

This situation puts local district attorneys in the position of bargaining to increase the funding to their own counties and prioritizing their local law enforcement objectives to the potential detriment of the broader state interest. (*Hy-Lond*, *supra*, 93 Cal.App.3d at pp. 753-754.) It is for this reason that the majority concluded below that the structure of financial incentives bolsters its conclusion. (*Abbott*, *supra*, 24 Cal.App.5th at pp. 30-31.)

Both the OC District Attorney and the dissent fail to give proper due to these concerns. The dissent opines that there is nothing wrong with the Legislature's choosing to award a local district attorney for bringing a statewide claim. (*Abbott*, *supra*, 24 Cal.App.5th at 38, fn. 7 (dis. opn. of Dato, J.).) But the dissent

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[10] District attorneys also brandish powerful investigative weapons unique to prosecutors. (See Gov. Code, § 11180; Bus. & Prof. Code, § 16759.)

neither denies nor addresses the potential for the conflict of interest discussed above. (*Ibid.*)

The OC District Attorney suggests that the local district attorney's coffers are not really being lined because the funds from civil penalties are statutorily required to be used for consumer protection enforcement. (See RBOM 24, fn. 9.) But the OC District Attorney simply misses the point, which is not that a local district attorney might use such funds for other purposes, but that the Court should not lightly interpret the UCL so that the structure of its payment of penalties incentivizes local district attorneys to prioritize their own parochial consumer protection interests over broader, statewide ones, or their own views of the broader public interest—all without joining with the Attorney General and without subjecting themselves to the statewide vote.[11]

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[11] The OC District Attorney also notes that the Attorney General is sometimes put in a position of having to act in the public interest by acting against certain state officials he would otherwise have to defend. (RBOM 15, fn. 5, citing Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers* (2005) 38 Colum. J.L. & Soc. Probs. 365; *Brown*, *supra*, 29 Cal.3d at pp. 157-158 [refusing to permit Attorney General to sue Governor].) But the fact that the Attorney General is faced with a different potential conflict of interest does not speak to whether the local district attorneys should be incentivized to bargain away the broader public interest in favor of their more local interests.

II. The Court of Appeal's interpretation is consistent with the purposes of the UCL.

A. The district attorneys and the Attorney General can enforce the UCL by coordinating prosecution.

The Court of Appeal's interpretation does not mean that local district attorneys may not bring statewide or multi-county UCL claims. Rather, it means only that they may not *unilaterally* bring such claims. Wholly consistently with the UCL's broad law enforcement purposes, local district attorneys may still bring such claims when they coordinate with their sister district attorneys and/or the Attorney General. Petitioners' proffered interpretation imposes no other particular structure on the manner in which they prosecute UCL claims.

The OC District Attorney asserts that absent the extraordinary power for a single district attorney to unilaterally seek statewide relief, the broad scope of the UCL will not be able to be brought to bear. (OBOM 28-31; RBOM 25-26.) But it fails to explain why coordination of prosecution is not an option. Indeed, several amici parties have noted that coordinated UCL prosecutions are common and have given examples of them. (Santa Cruz County Attorney ACB 5-6; City Attorneys ACB in support of PWM 34-35; see also California District Attorneys Association ACB in support of PWM 20 [listing methods of statewide enforcement].)

Without anything more than protestations that they have to do more work to coordinate cases, this Court should choose to ensure that businesses operating in California are not faced with the double bind described above of either seeking interference from the Attorney General or risking potential nonfinality or an unapproved settlement somewhere down the line. The burden of coordinating prosecutions for statewide UCL claims should not, without express Legislative mandate, be transformed into a burden on defendants to play a waiting game while trading off their rights to fair notice and avoidance of duplicative prosecutions.

B. The broad purpose of the UCL does not mean that UCL enforcement must be pursued in any fashion.

The dissent notes that it is "[c]onsistent with the UCL's broad remedial purposes and the perceived need for vigorous enforcement" that the Legislature encouraged "multiple public prosecutors with overlapping lines of authority" to enforce the UCL. (*Abbott, supra*, 24 Cal.App.5th at p. 35 (dis. opn. of Dato, J.), citing *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949-950.) But while it is *consistent* with the UCL's purposes to encourage multiple avenues of prosecution, it is *also* consistent with the UCL's purposes to encourage multiple avenues of prosecution while respecting the prosecutorial hierarchy imposed by the Constitution. There is nothing about the broad remedial purposes of the UCL that suggests that the Legislature would condone

multiple avenues of prosecution where local district attorneys threaten to usurp the Attorney General's constitutional role, while dragging defendants through wide-reaching prelitigation investigation and discovery without providing them any certainty about what their settlement authority really is.

Similarly, the OC District Attorney's recitation of the UCL's legislative history results only in the conclusion that over the years the Legislature has expanded enforcement of the UCL by expanding which prosecutors are authorized to bring UCL actions. (See RBOM 27-33.) Nothing follows about whether the Legislature intended to legislate against the presumption that the constitutional prosecutorial hierarchy should not be impinged on. As explained above, the fact that the UCL provides for *multiple* prosecutors does not speak to the *hierarchical relations* among the prosecutors.

The OC District Attorney's and the dissent's proffered interpretation of the UCL is driven by the idea that "more enforcement in this context is better than less." (*Abbott*, *supra*, 24 Cal.App.5th at p. 35 (dis. opn. of Dato, J.).) That idea ignores the simple fact that the Legislature does not implement only purposes, and certainly not purposes come what may; it also implements the specific means of achieving those purposes, and may stop short where it wants to do so. Here, fundamental background principles of law, including the constitutional backdrop comprised of the hierarchical relations between the Attorney General and the several district attorneys, provide a very good reason to understand the Legislature to have *intentionally* stopped. To

ignore this merely because the UCL has a broad remedial purpose is to

> attribute[ ] to the [UCL] a purpose to "pursue that broadest goal only at the expense of harming other values that the legislature deems important. After all, no statute . . . pursues its 'broad purpose' at all costs." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 21, citing *Pension Benefit Guaranty Corp. v. LTV Corp.* (1990) 496 U.S. 633, 647 [110 S.Ct. 2668, 110 L.Ed.2d 579] [" '[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.' [Citation.]" (italics added)].).

(*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1167.)

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal's decision and confirm that a district attorney may not unilaterally bring a statewide UCL law enforcement action.

March 8, 2019

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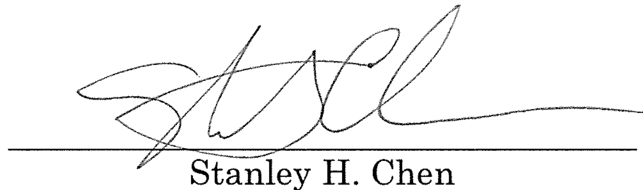
By: 
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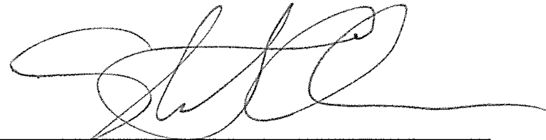

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PROOF OF SERVICE

Abbott Laboratories et al v. Superior Court of Orange County
Supreme Court No. S249895

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On March 8, 2019, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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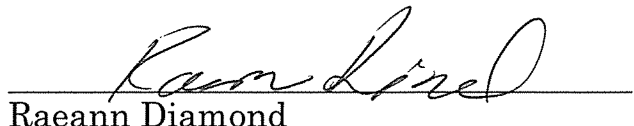

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(People of State of California)
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Hon. Kim G. Dunning Orange County Superior Court Civil Complex Center 751 West Santa Ana Boulevard Department CX-104 Santa Ana, California 92701 (657) 622–5304	Respondent • Trial Court Judge Case No. 30-2016-00879117-CU-BT-CXC
Clerk of the Court California Court of Appeal Fourth Appellate District Division One 750 "B" Street, # 300 San Diego, California 92101-8189 (619) 744-0760	Case No. D072577
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102-3600 (415) 865 7000	***Filed Original + 13 Copies by Federal Express***