D072577

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

ABBOTT LABORATORIES et al.,
Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE,
Respondent,

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

ORANGE COUNTY SUPERIOR COURT
KIM DUNNING, JUDGE • CASE NO. 30-2016-00879117-CU-BT-CXC

APPLICATION TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules of Court

Miscellaneous

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APPLICATION TO FILE AMICI CURIAE BRIEF

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 from every 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.

The California Chamber of Commerce (CalChamber) is a non-profit 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, seventy-five 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.

January 17, 2018

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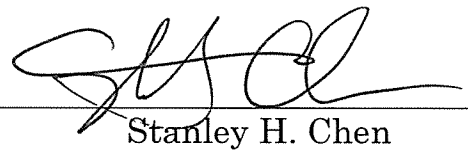
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

In this case, the Orange County (OC) District Attorney is asking the court to ignore the foundational premise governing the constitutional authority of both the Attorney General and the 58 district attorneys in this state: namely, that 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.

Instead, the OC district attorney would have the court treat a statute's silence on whether a district attorney has authority to bring an extraterritorial UCL claim as an affirmative statement that a district attorney has the same statewide scope of authority as the Attorney General himself. The district attorney's position is directly contrary to the views of his own supervisor, the Attorney General,[1] as well as to the views of the California

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[1] The Attorney General has consistently interpreted the powers of district attorneys to prosecute UCL actions to be territorially limited, including in the brief filed by the Attorney General in this matter. (See Atty. Gen. ACB 5 & fn. 1; PA 138-144 [former Attorney General Kamala Harris's amicus brief]; *California v. M & P Investments* (E.D.Cal. 2002) 213 F.Supp.2d 1208, 1214 [referencing former Attorney General Bill Lockyer's amicus brief].) The Attorney General's considered, consistent opinion is "entitled to great weight." (*Napa Valley Educators' Ass'n. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251.)

District Attorneys Association (CDAA), an organization representing the interests of his 57 co-equal district attorneys in other counties.

The Chambers submit this brief to the court to explain why the OC district attorney's interpretation of the UCL statute is constitutionally suspect, textually inaccurate, unsupported by case law, 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. THE ATTORNEY GENERAL HAS EXCLUSIVE AUTHORITY TO ENSURE STATE LAW IS UNIFORMLY ENFORCED ACROSS THE STATE; DISTRICT ATTORNEYS ARE LOCAL PROSECUTORS IN THEIR OWN COUNTIES.

A. The Constitution dictates that the Attorney General has plenary authority to bring statewide cases, must ensure state law is uniformly and adequately enforced, and supervises local district attorneys.

The California Constitution provides that the Attorney General is "*the* chief law officer" of the state. (Cal. Const., art. V,

§ 13, emphasis added.) 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." (Cal. Const., art. V, §§ 1, 13; see *Marine Forests Soc. v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 31 (*Marine Forests*) [Constitution provides a structure of "divided executive power" between the Governor and other constitutional executive officers, including the Attorney General].) This power to enforce state law is "broad" and "derived from the common law." (*Pierce v. Superior Court* (1934) 1 Cal.2d 759, 761-762 (*Pierce*).)

By contrast, the Constitution provides that counties are "legal subdivisions of the State." (Cal. Const., art. XI, § 1; *Pitchess v. Superior Court* (1969) 2 Cal.App.3d 653, 656 ["Counties are political subdivisions of the state for purposes of government"].) Their police powers are to be "enforce[d] within [their] limits." (Cal. Const., art. XI, § 7; *San Diego County Veterinary Medical Ass'n. v. Cty. of San Diego* (2004) 116 Cal.App.4th 1129, 1134.) And district attorneys are elected officers of those same counties enforcing their limited police powers. (Cal. Const., art. XI, § 1.)

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.) Indeed, the Attorney General can, and "shall," exercise the powers of any district attorney when "any law of the State is not being adequately enforced *in any county*." (*Ibid.*, § 13, emphasis added.)

The Constitution thus clearly contemplates that the Attorney General oversees district attorneys operating within their own counties, and can exercise their powers within those counties if necessary, pursuant to the exercise of his exclusive authority as the chief law officer to ensure the uniform and adequate enforcement of state law.[2] This constitutional structure provides the backdrop by which the court must interpret the UCL provisions at stake in this case.

B. The Government Code confirms and implements this constitutional scheme by giving the Attorney General statewide authority over local district attorneys.

The statutory scheme governing the general powers, duties, and operations of the Attorney General and the district attorneys provides that the Attorney General is the head of the Department of Justice (Gov. Code, § 12510), has "charge" of "*all* legal matters

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[2] For example, the Attorney General can take over an investigation where the local district attorney has a perceived conflict of interest. (See San Roman, *CA Attorney General Takes Over Tony Rackauckas Fundraiser Hit-And-Run Probe* (June 14, 2017) OC Weekly <https://goo.gl/jMaUNV> [as of Jan. 16, 2018]; Houston, *Attorney General's Office takes over Public Administrator's investigation* (Aug. 4, 2017) Times Standard News <https://goo.gl/HWVS6P> [as of Jan. 16, 2018].) The Attorney General also takes over if the local district attorney's office is recused. (Ferner, *California AG Will Not Appeal Ejection of Orange County DA in Notorious Mass-Murder Case* (Jan. 4, 2017) HuffPost <https://goo.gl/4WKwU4> [as of Jan. 18, 2018].)

in which the State is interested" (*id.*, § 12511, emphasis added), and must prosecute and defend "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.) They are to render legal services to their respective counties (*id.*, § 26520), and they defend suits "brought against the state in *his or her county* or against *his or her county* wherever brought" (*id.*, § 26521, emphases added).

The Attorney General has "direct supervision" over the district attorneys "of the several counties." (Gov. Code, § 12550.) He may "take full charge" of a matter otherwise within the district attorney's powers when he deems it necessary (*ibid.*), and employ special counsel if a district attorney is disqualified to conduct a criminal prosecution (*id.*, § 12553). He may further call district attorneys to conference "with the view of uniform and adequate enforcement of the laws of this state *as contemplated by Section 13 of Article V of the Constitution*." (*Id.*, § 12524, emphasis added; see also *Kilgore v. Younger* (1982) 30 Cal.3d 770, 784-787 (conc. & dis. opn. of Bird, C.J.) [describing other areas of supervision by the Attorney General].)

The code also provides that a district attorney may work with another district attorney to prosecute a civil case "in a court of the other jurisdiction," *if* the other district attorney consents *and* if the case is "of benefit to his *own* county." (Gov. Code, § 26507, emphasis added.) A district attorney may similarly provide "legal or investigative services" for a cause of action "in [another] county by the district attorney of that county," *if* the

other district attorney and the boards of supervisors of *both* counties consent, *and* if the county is compensated. (*Id.*, § 26508.)

Thus, the Government Code's provisions on the general powers of the Attorney General and the district attorneys confirm what is already clear in the Constitution: that the district attorneys are co-equal to each other and are to operate within their county lines, overseen by the Attorney General, who has exclusive authority to ensure the uniform and adequate enforcement of state law.

Given the above constitutional and statutory structure, it is no surprise that even where a district attorney's power is at its *most* traditional and plenary—that is, when he or she prosecutes crimes (*People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 753 [district attorney "has no authority to prosecute civil actions absent specific legislative authorization"])—he or she still prosecutes them only within his or her own territory (*People v. Superior Court* (*Jump*) (1995) 40 Cal.App.4th 9, 13; *Singh v. Superior Court in and for Glenn County* (1919) 44 Cal.App. 64, 65).

II. A LOCAL PROSECUTOR MAY NOT UNILATERALLY BRING STATEWIDE UCL CLAIMS.

A. The text of the UCL does not expressly give local prosecutors statewide authority.

The central question before this court is how, given the above constitutional and statutory backdrop, the court should interpret the Legislature's grant of authority to certain prosecutors to bring claims under the UCL. (See Bus. & Prof. Code, §§ 17204, 17206.)[3]

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." Both the OC district attorney and the amici city attorneys contend that sections 17204 and 17206 unambiguously give local prosecutors authority to bring statewide UCL claims. (Return 41; City Attys. ACB 13.) That is incorrect.

To begin, the fact that certain prosecutors have the authority to bring a suit in the name of the "people of the State of California" does not explain or determine the scope of that authority. A district attorney is a "public agent" acting "on behalf of his principal, the public, whose sanction is generally

[3] Henceforth, relevant provisions of the UCL will be cited by their section numbers alone.

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.) 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 (*Davis*) [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]

Nor does the fact that a district attorney acts as *both* a county officer and a state officer mean that the district attorney is not limited territorially when acting as a prosecutor. (See *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359-360 [explaining both that a district attorney can act as a county and a state officer and that a district attorney's authority to prosecute is territorially limited]; *County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1173 [noting that there is no "inconsisten[cy]" between district attorney's limited authority in the territory of the county and district attorneys being "state officials locally placed throughout the state"].)

Thus, petitioners are correct that the UCL provisions at stake here are silent as to the territorial scope of district

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[4] In addition, implying into sections 17204 and 17206 a statewide scope of authority for district attorneys on the basis of the silence of the provisions would prove too much. Few Penal Code sections explicitly recite that a district attorney must prosecute crimes within county limits. Their silence surely cannot entail that district attorneys have no territorial limits in prosecuting crimes. (See also pp. 20-21, *post*.)

attorneys' authority to prosecute UCL claims. (Reply 17-18; *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, 751-752 (*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 "the limits to which such authority extends"].)

B. The UCL's silence regarding the territorial limits of a district attorney's power does not mean district attorneys may act statewide outside the jurisdiction of their county.

Unlike the OC district attorney, the amici city attorneys claim that because the Legislature has sometimes used geographically limiting language when granting a district attorney power to pursue civil claims—for instance, Code of Civil Procedure section 731 provides that district attorneys may abate nuisances in "any county in which the nuisance exists" (City Attys. ACB 16)—and because Business and Professions Code sections 17204 and 17206 do *not* use such limiting language, the latter must be interpreted to mean that a district attorney has broad statewide authority to bring UCL claims. (City Attys. ACB 16-17.) The city attorneys are wrong. After all, Government Code section 26500 is a broadly worded statute that contains no express geographic limit, providing that the district attorney is a public prosecutor who "shall initiate and conduct on behalf of the people *all* prosecutions for public offenses" (Gov. Code, § 26500,

emphasis added), yet no one would seriously suggest that the OC district attorney could prosecute a shoplifting that occurred in Placer County. Indeed, the city attorneys note that such a limitation on district attorneys' authority to prosecute crimes is "unremarkable." (City Attys. ACB 22, fn. 4.) The Supreme Court agrees. (See *People v. Eubanks* (1996) 14 Cal.4th 580, 589 ["The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses *within the county*" (emphasis added)], citing, not quoting, Gov. Code, § 26500.) Similarly, the UCL provisions here should not be read to permit such broad assertion of power by a district attorney.

The city attorneys' argument also fails for another, independent reason. Although it is sometimes appropriate to invoke the interpretive canon *expressio unius est exclusio alterius*, the Supreme Court has made it clear that a negative implication "arises only when there is some reason to conclude an omission is the product of intentional design." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514.) To be indicative of such "intentional design," the text of the statute in question "must contain a specific list or *facially comprehensive treatment*." (*Ibid.*, emphasis added.) For this reason, the canon makes little sense when it is applied to "an entire code." (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1411 [canon should be applied to " ' "a specific statute," ' " not an "entire code"].) Thus, the city attorneys' citations to disparate parts of the Code (City Attys. ACB 16-17 & fn. 2) shows *only* that the Legislature sometimes

speaks explicitly about the geographical limitations of a district attorney's authority and sometimes does not. Here, the Legislature simply has not. (See §§ 17204, 17206.)

The city attorneys' other arguments based on the *expressio unius* canon also fail. For instance, the provisions the city attorneys cite in the UCL (sections 17209 and 17508) that require the Attorney General be notified of certain UCL proceedings do not speak to the authority of district attorneys to act outside their jurisdictions. (See *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168 [123 S.Ct. 748, 154 L.Ed.2d 653] [negative implication " ' "properly applies 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" ' "].) The notification provisions of the UCL certainly are not inconsistent with limiting the UCL enforcement authority of local prosecutors to the boundaries of their local jurisdictions. It makes perfect sense that the Legislature would require the Attorney General to be notified of UCL proceedings, so that the Attorney General can determine if the alleged violations implicate state-wide interests that only he is authorized to prosecute, and otherwise execute his supervisory role over district attorneys.

The fact that section 17204 provides that certain county prosecutors have the authority to bring UCL actions only upon consent of a district attorney (City Attys. ACB 17-18) also does not speak to the scope of that authority (see *ante*, pp. 18-19). Indeed, a negative implication could be drawn the other way. In

section 17207, the Legislature does speak to the territorial jurisdiction of a district attorney. (See § 17207, subd. (b) [expressly providing that a district attorney may enforce a preexisting injunction "without regard to the county from which the original injunction was issued"].) It has not similarly allowed a district attorney to deal with extraterritorial matters in sections 17204 or 17206. Thus, under the city attorney's logic, there is no power for district attorneys to do so.

C. The UCL must be interpreted in light of long-standing legal principles to avoid serious constitutional problems.

1. The UCL should not be excluded from the basic constitutional structure that grants the Attorney General statewide authority and confines district attorneys to actions within their territory.

Courts construe statutes "with reference to the whole system of law of which it is a part." (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089.) Courts 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*).) In addition, a statute with

multiple plausible readings should be interpreted to avoid constitutional problems. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.)

In considering whether a statute encroaches impermissibly on constitutional separation of powers, the court considers whether 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.) Courts consistently use the above principles to construe statutes or apply legal principles in a manner that avoids unnecessarily encroaching on a governmental branch's or officer's core constitutional or traditional powers. (See, e.g., *Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053-1054 (*Steen*) [construing statute authorizing judicial clerk to issue certain complaints to require that the clerk issue them only with prosecutorial approval]; *Madera County 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 duties]; *Pierce*, *supra*, 1 Cal.2d at pp. 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 ex rel. Pixley 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 result that follows from applying these principles is clear: as explained above, everything about the constitutional structure and statutory scheme 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 preference 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"].)

Moreover, if in bringing such 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.

Contrary to the OC district attorney's suggestion (Return 50), this argument is not undercut by the fact that sometimes a district attorney can bind the State and the Attorney General. It is uncontroversial that an agent ordinarily has the power to bind a principal when acting within the scope of the agent's authority. (*Davis, supra*, 3 Cal.App. at p. 559; see *People v. Mendez* (1991) 234 Cal.App.3d 1773, 1783-1784 (*Mendez*) [noting that "[t]he People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney," but holding that it would be inappropriate to bind the People where the district attorney had stipulated "[b]y virtue of a mistake of law"]; cf. *In re Stier* (2007) 152 Cal.App.4th 63, 73-74 [where district attorney was representing city of San Francisco, district attorney's statement in court that the "People" are withdrawing an objection to a petition was not binding on the Attorney General, who represented the State].) With respect to that which is within his constitutionally permissible scope of his authority—namely, in-county violations he prosecutes—the OC district attorney ordinarily does have the power to bind the State.[5]

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[5] In this connection, the OC district attorney attempts to rely on the "recognized authority" of William L. Stern to suggest that *Hy-Lond* is "questionable" in light of *Mendez*. (Return 48 & fn. 2.) Not only does the citation to *Mendez* in Mr. Stern's treatise provide no serious fodder for the OC district attorney's arguments, Mr. Stern advocated *in favor of* petitioners' position (continued...)

2. *Hy-Lond* confirms the constitutional problem with affording district attorneys power to act outside of their jurisdictions.

The constitutional problem above is the one the court attempted to avoid in *Hy-Lond* as it construed 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

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(...continued)
in the two Superior Court cases petitioners cite as examples of the conflict in the trial courts regarding the central issue in this case. (See PWM 14-15; PA 146-167; Petitioners' RJN, exh. 1; *People v. Uber Technologies, Inc.* (Super. Ct. S.F. County, No. CGC-14-543120) [docket showing Stern as counsel of record]; *People v. Monster Beverage Corporation* (Super. Ct. S.F. County, No. CGC-13-531161 [docket showing declaration of Stern in support of Monster].) He can hardly be said to support the OC district attorney's position here.

[6] The OC district attorney and amici city attorneys suggest that the court in *Hy-Lond* might only have been concerned with the district attorney signing away the right to sue for *future* violations. (See Return 49-50; City Attys. ACB 20-21.) Not so. While the settlement in *Hy-Lond* granted the nursing facility 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 actions for unfair competition "may reach all such acts *past and prospective*." (*Id.* at p. 749, fn. 7, emphasis added.)

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; see also *Steen*, *supra*, 59 Cal.4th at p. 1053 [separation of powers "does not prohibit one branch from taking action that might affect another, [but] the doctrine is violated when the actions of one branch defeat or materially impair the *inherent functions* of another" (emphasis added)].) Thus, the court refused to interpret section 17204 as authorizing district attorneys to bind the Attorney General. (*Hy-Lond*, 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) 20 Cal.4th 163, 185, the defendant contended that equitable estoppel precluded a district attorney's enforcement of certain regulations by the state because the Department of Health Services had previously enforced them via licensing inspections. 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 the district attorney's ability to "carry out the statutory duties of his elected office." If the Attorney General could be forced to do the district attorney's job without very good reason, the court explained, 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 [refusing to permit Attorney General to sue Governor, given the constitutional structure of the Governor overseeing the Attorney General]; *Sacramento County v. Central Pac. R. Co.* (1882) 61 Cal. 250, 254 [where district attorney unilaterally accepted offer of a defendant to allow judgment taken for less than the amount of taxes sued for, the 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* correctly held, district attorneys do *not* have the power to bind other prosecutors to the full disposition of statewide claims, then they cannot properly be suing on 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 an agent of the state 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.

Such a situation would not merely be an inconvenience; it would be fundamentally unfair and violate due process principles. (See *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 227-228 [defendant has right to be " 'protected against unlimited multiple punishment for the same act . . . simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process' "]; 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"].)

Such a situation would also 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' "].)

III. A CONTRARY INTERPRETATION OF THE UCL WOULD CONDONE UNFAIRLY LEVERAGED NEGOTIATIONS AGAINST BUSINESSES BY FINANCIALLY INCENTIVIZED GOVERNMENT OFFICIALS WITH NO POWER TO ASSURE REPOSE.

The OC district attorney asserts that absent the extraordinary power granted to a single district attorney to seek statewide relief, the broad scope of the UCL will not be able to be brought to bear. (See Return 45-46.) It obviously can. Indeed, amici city attorneys themselves give examples of coordinated UCL prosecutions.[7] (City Attys. ACB 34-35; see also CDDA ACB 20 [listing methods of statewide enforcement].)

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[7] What they fail to give is any analyses about why a territorial (continued...)

The UCL provides significant powers to district attorneys. Notably, local prosecutors have the power to issue administrative subpoenas without formally filing a complaint. (Gov. Code, § 11180; Bus. & Prof. Code, § 16759.) Unlike private plaintiffs, they do not need to obtain class certification. (Bus. & Prof. Code, § 17203.) Unfortunately, such power can also be abused. Were the OC district attorney's position adopted, district attorneys would be directly incentivized by the UCL 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. (*Id.*, § 17206.)[8]

The practical effect of this would be undeniable. A local district attorney could quickly and unilaterally send an enforcement letter, utilize its subpoena powers, and no matter how little activity the business engaged in within that county, threaten the business with statewide action. Whether or not the claims are ultimately meritorious, the threatened scope of discovery would thus be statewide, with its concomitant expected

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(...continued)
limit would have made those prosecutions harder, more expensive, or impossible. For instance, they tout past UCL litigation against tobacco companies, but describe that litigation as having proceeded in a piecemeal fashion, eventually being consolidated under with a subsequent action brought by the Attorney General. (City Attys. ACB 35.) It is not clear why that is a point *against* encouraging the state's law enforcers to coordinate.

[8] The fact that proceeds can be shared if prosecutors act jointly (see City Attys. ACB 32-33) says nothing about why district attorneys are not incentivized to line their own coffers.

cost. Asked whether a single district attorney can at least bind *other* prosecutors, the district attorney must say no, while perhaps pointing to some undisclosed and vague "informal" understanding that other prosecutors will not pursue the same action. (See Stern, Cal. Practice Guide: Business & Professions Code Section 17200 Practice (The Rutter Group 2017) ¶¶ 9:99-9:101.) The business could try to get the Attorney General to join the negotiations in order to gain more certainty, but only at the risk of inflating the price of settlement. (*Ibid.*) In the face of this, it is not clear how the business is supposed to proceed in *any* direction with any confidence. The absurdity of the situation is patent.

In addition, a district attorney would be able to engage in these unfair prosecutorial practices without worrying about drawing the ire of out-of-county voters to whom he or she is not electorally accountable. Amici city attorneys suggest that there can be no worry about democratic accountability where the Legislature has delegated statewide UCL enforcement powers to district attorneys. (City Attys. ACB 34.) This misses the point. Here, the Legislature has not spoken, let alone spoken clearly, and a system whereby district attorneys race to pursue statewide claims to be awarded monies for their own counties without being subject to statewide electoral approval creates an obvious potential for corruption, especially when private counsel gets involved. (See CDDA ACB 17-19.) The court should not just presume the Legislature has condoned this.

The Supreme Court has commented that "the authority to settle [a] case involves a paramount discretionary decision and is an important factor in ensuring that defendants' constitutional right to a fair trial is not compromised by overzealous actions of an attorney with a pecuniary stake in the outcome." (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 63 (*Santa Clara*).) Although the Supreme Court was discussing the important need for prosecutors to control private outside counsel, a similar point applies here: there is an important need to encourage the Attorney General to control overzealous actions of district attorneys who have a parochial pecuniary stake in the outcome and little incentive to truly represent the interests of the people of the entire state.

In dismissing petitioners' worries about "rogue" district attorneys (City Attys. ACB 34-35), amici city attorneys fail to provide *any* information on how many *total* enforcement actions have been brought (or letters sent) by local district attorneys—especially those of the tiniest counties in the state—based on statewide allegations of UCL violations and demands for civil penalties. Many of those cases may very well have settled, leaving their merits untested, and many may very well have settled under the highly uncertain conditions laid out above.

This court should ensure that businesses operating in California are not faced with the double bind of either seeking interference from the Attorney General or risking potential non-finality or an unapproved settlement somewhere down the line. Nor should it be the judiciary's job, without express statutory

guidance, to continuously sort out what basic permissions were granted by the Attorney General or other district attorneys in the middle of litigation and negotiations. The onus would be put much more efficiently and fairly on prosecutors—all working, consistent with their constitutional authority, in a single Department of Justice under the supervision of a single chief law officer—to make clear *upfront* who is suing for what and with what power to bind, and then to match the scope of their claims to the scope of that authority. That is surely not too much to ask of public prosecutors who owe a duty to the public to "ensure that the judicial process remains fair and untainted by an improper motivation." (*Santa Clara*, *supra*, 50 Cal.4th at p. 57.)

CONCLUSION

For the foregoing reasons, the court should grant the writ and confirm that a district attorney may not unilaterally bring a statewide UCL law enforcement action.

January 17, 2018

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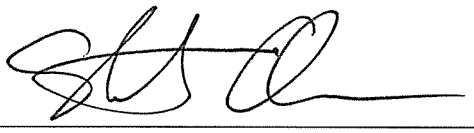
By: 
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CERTIFICATE OF WORD COUNT
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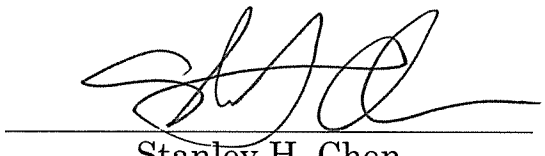
Dated: January 17, 2018



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PROOF OF SERVICE

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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, California 91505-4681.

On January 17, 2018, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE** on the interested parties in this action as follows:

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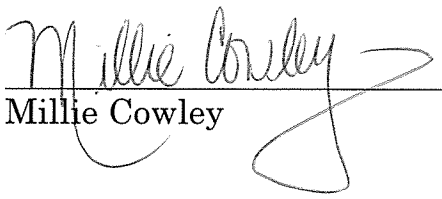

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Case No. 30-2016-00879117-CU-BT-CXC
Service via U.S. Mail