

Case No. S249895

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ABBOTT LABORATORIES; ABBVIE INC.; TEVA PHARMACEUTICALS USA,
INC.; BARR PHARMACEUTICALS, INC.; DURAMED PHARMACEUTICALS,
INC.; AND DURAMED PHARMACEUTICAL SALES CORP.,

Petitioners,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA *EX REL.* ORANGE COUNTY
DISTRICT ATTORNEY TONY RACKAUCKAS,

Real Party in Interest.

SUPREME COURT
FILED

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Deputy



After a Decision by the Court of Appeal for the Fourth District, Division One
Case No. D072577

Issuing a Writ of Mandate to Vacate an
Order of the Superior Court of Orange County
Superior Court Case No. 30-2016-00879117-CU-BT-CXC
Hon. Kim Dunning

**DEFENDANTS' CONSOLIDATED BRIEF IN RESPONSE TO
AMICI BRIEFS**

KIRKLAND & ELLIS LLP

MUNGER, TOLLES & OLSON LLP

*Michael Shipley (SBN 233674)
mshipley@kirkland.com
333 S. Hope Street
Los Angeles, CA 90071
Telephone: (213) 680-8400

*Jeffrey I. Weinberger (SBN 56214)
jeffrey.weinberger@mto.com
350 S. Grand Avenue, 50th Floor
Los Angeles, California 90071
Telephone: (213) 683-9100

Jay P. Lefkowitz (*phv forthcoming*)
Yosef Mahmood (SBN 295976)

Stuart N. Senator (SBN 148009)
Blanca F. Young (SBN 217533)

*Attorneys for Petitioners Teva Pharms.
USA, Inc.; Duramed Pharms., Inc.;
Duramed Pharms. Sales Corp.; and
Barr Pharms. Inc.*

*Attorneys for Petitioners AbbVie
Inc. and Abbott Laboratories*

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INTRODUCTION

Defendants Abbott Laboratories, AbbVie Inc., Barr Pharmaceuticals Inc., Duramed Pharmaceuticals, Inc.; Duramed Pharmaceuticals Sales Corp., and Teva Pharmaceuticals USA, Inc. (“Defendants”) submit this consolidated answer to the amicus briefs filed by: (1) Attorney General Becerra; (2) the California District Attorneys Association (“District Attorneys”); (3) the United States and the California Chambers of Commerce (the “Chambers”) (4) five city attorneys, one county counsel, the League of California Cities and the California State Association of Counties (the “Five City Attorneys”); (5) the Consumer Attorneys of California (the “CAC”); and (6) the Santa Cruz County District Attorney (the “Santa Cruz DA”).

Petitioners concur in the core points made by the Attorney General and the District Attorneys—that constitutional, statutory, structural, and accountability concerns all merit the conclusion that “the authority of a California district attorney to enforce the Unfair Competition Law . . . is limited to violations occurring within that district attorney’s local jurisdiction” (District Attorneys’ Br. at p. 2; Attorney General Br. at p. 7.) These briefs articulate the views of the Attorney General as chief law enforcement officer of the state and the collective understanding of the State’s 58 elected district attorneys – other than the outlier district attorney who is suing here, over whom he has supervisory authority. The well-stated arguments of these amici are entitled to significant weight.

Similarly well taken are the arguments of the two Chambers, who show that affording any individual district attorney authority to assert statewide claims unilaterally would raise troublesome constitutional concerns, including calling into question the fundamental structure of the California State government's executive branch, and frustrating the ability to settle UCL lawsuits brought by local prosecutors. (Chambers Br. at pp. 21–39.)

Further response is merited, however, to several of the assertions in the Five City Attorneys' Brief. The Five City Attorneys' argument that the UCL "unambiguously" grants local prosecutors the authority to sue for statewide UCL violations rests on the flawed premise that the absence of an express geographic limit on their authority means no limit at all. The law is just the opposite. Similarly unconvincing are the City Attorneys' efforts to distinguish controlling precedent and to equate the court's power to grant equitable relief with a local prosecutor's standing to seek it.

The policy arguments raised by the City Attorneys, the CAC, and the Santa Cruz DA are also unpersuasive, particularly in light of the Attorney General's statewide mandate to ensure the uniform enforcement of state law, and his position in this case (and others) that both California law and sound policy deny local prosecutors the authority to pursue state-wide UCL claims.

ARGUMENT

I.

THE ATTORNEY GENERAL'S VIEWS ON THE ALLOCATION OF PROSECUTORIAL AUTHORITY WITHIN THE EXECUTIVE BRANCH ARE ENTITLED TO GREAT WEIGHT.

The Court should afford significant weight to the Attorney General's well-articulated and long-standing view that the UCL should be read to "limit the monetary remedies local prosecutors may obtain to the jurisdictions they represent." (Attorney General Br. at p. 7 and *generally*).

When it comes to the enforcement of the State's laws, the Attorney General sits at the apex of the hierarchy. (*Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053 ["The state Constitution, in an article defining the powers and responsibilities of the executive branch and its principal officers, appoints the Attorney General as "the chief law [enforcement] officer of the State" with "direct supervision over every district attorney"].) Moreover, the proper interpretation of the UCL "is a cause of particular concern to the Attorney General." (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503.)

Thus, when Attorney General Becerra cogently argues that a trial court should only "award civil penalties and restitution under the UCL in a case brought by a district attorney only for violations occurring within the county represented by that district attorney," absent the involvement of the Attorney General or a partnership with other local prosecutors (Attorney General Br. at p. 6), his view merits significant weight. (See generally *State of California ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th

50, 71.) That is especially true when the views of his office have been longstanding and consistent throughout many administrations. (See *Napa Valley Educators' Ass'n. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251.)

On this issue in particular, the Attorney General's position has been consistent for nearly forty years. (See, e.g., *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, 738 (*Hy-Lond*) [describing consistent views of former Attorney General Deukmejian]; *California v. M & P Investments* (E.D. Cal. 2002) 213 F.Supp.2d 1208, 1214 (*M&P*) [describing consistent views of former attorney General Lockyer]; Brief Amicus Curiae of the California Attorney General in *People v. Alquist*, (9th Cir. 2003) No. 03-15205, 2003 WL 22716161 [same]; Ex. 10-A at p. A139–144 [consistent views of former Attorney General Harris]).

The California District Attorneys' Association, which "is composed of the 58 elected district attorneys, numerous city attorneys, and their respective deputies," and acts as "the principal-spokesperson[] for California's local prosecutors," (District Attorneys' Br. At p. 9) agrees with the Attorney General that local prosecutors' authority to prosecute UCL violations does not extend beyond the boundaries of their local jurisdiction. The Orange County District Attorney is the lone district attorney who claims in this case that he has the authority to prosecute violations statewide. In this case, he is joined in his view only by five other local prosecutors (four city attorneys and one county counsel), a lobbying organization for county governments, and an organization of California plaintiff attorneys. As discussed further below, these amici offer no

persuasive response to the legal and prudential arguments articulated by the Attorney General, the Orange County District Attorney's fellow local prosecutors, the California and United States Chambers of Commerce, and in Petitioners' merits brief.

II.

THE DEMOCRATIC ACCOUNTABILITY CONCERNS RAISED BY THE ATTORNEY GENERAL AND THE COALITION OF DISTRICT ATTORNEYS ARE CRUCIAL AND GO UNANSWERED BY THE DISTRICT ATTORNEY OR HIS AMICI

The Attorney General, the California District Attorney Association ("District Attorneys"), and the U.S. Chamber of Commerce and California Chamber of Commerce ("Chambers") – collectively speaking on behalf of the vast majority of the law enforcement and business communities in the State – all raise important democratic accountability concerns that would stem directly from the Five District Attorneys' interpretation of the UCL in their respective amicus briefs. (See Attorney General Br. at pp. 11-12; District Attorneys' Br. at pp. 18-20; Chambers Br. at pp. 37-38.) Both the District Attorney and his amici ignore these concerns.

The interpretation of the UCL advanced by the District Attorney and his amici would allow local prosecutors to bring suit for claims arising out of alleged harm that occurs far outside of their jurisdiction. Such a reading would allow, to borrow the District Attorneys' example (District Attorneys' Br. at p. 18), the District Attorney of Trinity County (population 13,000) to bring a controversial UCL enforcement action for violations that occurred in Los Angeles County (population 10 million). That result would be irreconcilable with the State Constitution's reservation that "[a]ll political

power is inherent in the people,” who “have the right to alter or reform [the government] when the public good may require.” (Cal. Const., art II, § 1.) What recourse would the citizens of Los Angeles have if they disagree with the Trinity County District Attorney’s action? Were the case brought by the Los Angeles District Attorney, they could vote her out of office. (See Gov. Code, § 24200). She would further be subject to recall by the voters who elected her. (See Cal. Const. art II, § 19; Elec. Code, § 11005.) But no such right exists for the citizens of Los Angeles with respect to the Trinity County District Attorney.

As the Attorney General argues, “Permitting a local prosecutor to bind the entirety of the State to a UCL judgment without also having to answer all voters in California is anathema to principles of prosecutorial accountability.” (Attorney General Br. at p. 11.) Such a reading of the UCL would “leave the vast majority of Californians without means to hold the prosecutors exercising [such broad authority] accountable for their actions.” (*Ibid.*)

Moreover, as the District Attorneys observe, allowing such broad overreach for local prosecutors, unchecked by the will of the voters in the jurisdictions where the supposed harm occurred, “could undermine voter confidence in public UCL enforcement and lead to” the weakening of the UCL, just as the numerous lawsuits “brought by private class-action litigants in the early 2000s caused widespread criticism and eroded public support . . . culminating in the 2004 passage of Proposition 64 limiting standing for private UCL plaintiffs.” (District Attorneys’ Br. at p. 20.)

Defendants too raised these same concerns in their Answering Brief on the Merits. (Answering Br. at pp. 54–58.) As noted there, the rule suggested by the District Attorney would permit the district attorney of some other county to override a decision by the local district attorney that an enforcement action is unwarranted. But no authority at all suggests that the district attorney of one county can or should be permitted an unaccountable veto over another county’s district attorney’s decision not to bring litigation he or she has determined is not in the interests of his or her constituents. (Cf. *Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753 [raising concern that extraterritorial enforcement by district attorneys could prove problematic by stepping on the rights of “fellow district attorneys to commence, when appropriate, actions” under the UCL].)

These crucial questions of accountability have been raised by several parties. The District Attorney and his amici have offered nothing in response. That absence speaks to the fundamental question at the core of this case that the District Attorney cannot answer: In light of all of the structural, constitutional, and democratic problems that would arise from statewide enforcement authority by locally elected prosecutors, would the Legislature have conveyed such authority *sub silentio*, without a single express reference to such an intent in almost ninety years of legislative history? (Answering Br. 51–53.) Of course not. Indeed, a district attorney “has no authority to prosecute civil actions absent specific legislative authorization[.]” (See, e.g., *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753.)

III.
**ROBUST PUBLIC ENFORCEMENT OF THE UCL DOES NOT
REQUIRE THAT LOCAL PROSECUTORS' AUTHORITY BE
EXPANDED BEYOND THEIR JURISDICTIONS.**

The various arguments that the Defendants' and the Court of Appeal's interpretation of the UCL "will harm California consumers" (Five City Attorneys Br. p. 35-36; CAC's Br. at pp. 10-12.) are incorrect. There is an Attorney General elected by the entire state who is expressly tasked with enforcing the state's consumer protection laws, and who has taken the opposite position in this case. It is also notable that the District Attorneys—which represent the state's 58 district attorneys—takes the position that it is the rule proposed by the Five City Attorneys and the Orange County District Attorney that would "result in substantial harm to our state's consumer protection system and ultimately to California consumers." (District Attorneys' Br., at p. 17).

There is no debate that local prosecutors play an important role in the enforcement of the UCL. But the examples touted in the Five City Attorneys' brief (Five City Attorneys' Br. at p. 3) underscore the Attorney General's role as the state's chief law enforcement officer tasked with enforcing the UCL. The *Wells Fargo* and *Target Corp.* cases cited by the Five City Attorneys (*id.* at pp. 3-4), for instance, only resulted in settlements *with the involvement* of the Attorney General. (See Attorney General Br. at pp. 17-19.) They demonstrate the efficacy of the regime in place during the forty years since *Hylond*, which mandates the Attorney General's signoff on statewide damages relief. Unilateral extraterritorial jurisdiction is thus demonstrably unnecessary to achieve the very

results the Five City Attorneys highlight. As the Attorney General explains, since *Hy-Lond*, “the understanding that the Attorney General exclusively enforces the UCL statewide—and that the district and city attorneys share enforcement authority within their localities—has fostered collaborative relationships among state and local prosecutors who share the important missions of protecting California’s consumers while promoting fair and competitive marketplaces.” (Attorney General Br. at p. 13.)

Moreover, the CAC’s concern that “meritorious cases that are beyond the resources of the Attorney General may never be brought,” (CAC’s Br. at p. 11) is completely unfounded.¹ As the District Attorneys note, “there are in place today a number of proven mechanisms that California public prosecutors employ to ensure that statewide consumer protection problems are addressed effectively.” (District Attorneys’ Br. at pp. 20-21.) For instance, the Attorney General could readily join with one or more local prosecutors in bringing an action while delegating day-to-day case management responsibilities to his subordinate district attorneys. None of these measures requires a rule that affords a local district attorney authority to act unilaterally as a statewide law enforcer.²

¹ Nor does the CAC offer any support for the idea that local prosecutors have more resources or are better positioned to handle statewide claims.

² The District Attorney’s amici rely on the Legislature’s expressed interest in the robust enforcement of the UCL. (See, e.g., CAC’s Br. at p. 10; Five City Attorneys’ Br. at p. 9.) “But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that

Finally, the Five City Attorneys are wrong in their assertion that were one county's district attorney to bring a claim and win, it would be inefficient to require other local prosecutors to bring claims of their own to litigate penalty issues arising in their respective jurisdictions. (City Attorney Br. at 35.) Like the rest of the Five City Attorneys' arguments, this one ignores the fact that there is an Attorney General, elected by all of the voters in the State, who can, if he finds it in the State's interest, bring a single statewide claim and litigate everything at once.

The argument is also in tension with another argument made by the Five City Attorneys that local prosecutors have the ability to band together and bring joint claims. Some local prosecutors might want to be in the vanguard and join such actions. Others could take a "wait and see" approach, relying on issue preclusion to potentially ease their burden if the earlier suits succeed and avoid expense if they do not. Still others might conclude that an enforcement action is inappropriate and counterproductive to their districts' interests. That should be their choice to make. Indeed, that very scenario is not uncommon in certain kinds of multi-district and mass litigation. (See generally Asim M. Bhansali, *Offensive Collateral Estoppel in Civil Antitrust Cases: Parklane Hoisery and the Seventh Amendment* (2010) 19 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 35.)

whatever furthers the statute's primary objective must be the law." (*Rodriguez v. United States* (1987) 480 U.S. 522, 525–26 (per curiam); *Cty. of Sonoma v. Cohen* (2015) 235 Cal. App. 4th 42, 48 [court's "understanding of the broad purposes of" an act cannot supplant statutory interpretation].)

IV.
EFFICIENT ENFORCEMENT OF THE UCL IS FURTHERED, NOT
HINDERED, BY GEOGRAPHIC LIMITS ON LOCAL PROSECUTORS'
AUTHORITY.

The CAC raises the specter that continuing to limit local prosecutors' authority to enforce the UCL frustrates legislative intent "to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition," and would result in inefficiencies by requiring a suit seeking statewide relief to be brought as "58 suits . . . in each of the 58 counties." (CAC's Br. at pp. 10-11.) The exact opposite is true. Geographic limits actually promote efficiency.

The Attorney General makes a directly responsive point: "Limiting district attorneys to their counties does not mean that nefarious business activity in the other 57 counties goes unpunished, nor does it mean that recalcitrant business must separately negotiate with dozens of potential government plaintiffs." (Attorney General Br. at p. 14.) On the contrary, district attorneys' offices regularly join together with each other, as well as with the Attorney General's office to investigate and resolve these matters short of litigation. This actually results in greater efficiencies as UCL and FAL investigations are "resource-intensive." "Thorough investigations conserve resources overall because claims have typically been exhaustively vetted prior to litigation, and can often resolve by stipulated judgment without a protracted lawsuit." (*Ibid.*)

On the other hand, the District Attorney's proffered approach—permitting 62 local prosecutors to each go after the same

pot of statewide penalties—raises the types of inefficiencies and conflicts that plague some private plaintiff civil litigation.³ If every local prosecutor has the power to seek statewide damages, each has a perverse incentive to win a race to the courthouse to be the first to file claims to entitle his or her county to a monetary reward. Such haste creates incentives to disregard statewide interests or the desires of voters in other counties. It will further come at the expense of the thorough pre-suit investigation UCL lawsuits require. As the District Attorneys explain, both the District Attorney and his amici “are silent on how such a chaotic allocation of standing and authority could be managed in order to prevent the duplication of efforts, conflicts among competing enforcement actions, and diminished respect for UCL law enforcement.” (District Attorneys’ Br. at p. 24.)

³ See generally Leo E. Strine, Jr. et. al., *Putting Stockholders First, Not the First-Filed Complaint* (2013) 69 Bus. Law. 1; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions* (1986) 86 Colum. L. Rev. 669, 677-79, 681-84.

V.
**THE LACK OF AN EXPRESS PROHIBITION ON THE
AUTHORITY OF LOCAL PROSECUTORS IS NOT A LICENSE FOR
THEM TO ACT BEYOND THEIR JURISDICTIONS.**

The District Attorney’s amici say over and over again that the “plain language” of the UCL permits local prosecutors to bring claims statewide. (Five City Attorneys’ Br. at pp. 9-12; Santa Cruz DA’s Br. at pp. 10-11; CAC’s Br. at p. 6.) But that is simply untrue. Without doubt, the plain language of the UCL does, in fact, permit these prosecutors to enforce the UCL and obtain remedies under it. But the text of the UCL is silent on the extent of local prosecutors’ geographical authority. So the question is what the Court should make of that silence. It does not answer that question to recharacterize the statute’s silence as a statutory authorization to unlimited geographic scope.

As Petitioners explained in their merits brief, Legislative silence is interpreted against district attorney authority, not in its favor. This Court has held that district attorneys lack plenary authority when it comes to civil litigation. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 237 (*Safer*)). When the scope of a district attorney’s authority to prosecute civil claims is at issue, California courts apply a strict interpretive rule: they expect the Legislature to “affirmatively specify the circumstances in which a district attorney can pursue claims in the civil arena, not the circumstances in which he cannot.” (*People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 42 (*Solus*)). Under that rule, the Court will “infer the district attorney’s lack of au-

thority to proceed where no authority is granted.” (Id. at 43) Legislative silence, in other words, is interpreted against district attorney authority, not in its favor.

The Five City Attorneys nonetheless make two meritless arguments that textual silence conveys statewide authority. First, they suggest that by permitting district attorneys and certain city attorneys to bring actions on behalf of “the People,” the Legislature expressed an intent for that authority to be “coextensive” with that of the Attorney General, and allows a local prosecutor “to act as the Sovereign.” (Five City Attorneys’ Br. at pp. 10-11; 15-17.) And second, they claim that when the Legislature intends to “limit [local prosecutors’] authority to bring” civil actions it includes specific language that does so. (Id. at p. 12.) Neither argument has any support.

A.

It Does Not Matter That Local Prosecutors Style Their Prosecutions as Brought in the Name of “The People”.

As Defendants stated in their Answering Brief, and as the Attorney General addressed in his Amicus, there is no doubt that “The state may, through its Legislature, and in the exercise of its sovereign power . . . apportion and delegate to the counties any of the functions which belong to it.” (*Sacramento County v. Chambers* (1917) 33 Cal.App. 142, 149.) But a delegation of some sovereign power to be exercised by a local public servant does not—as the Five City Attorneys seem to assume—automatically convey an unlimited license to exercise that power anywhere and everywhere

throughout the State. Indeed, the Five City Attorneys cite nothing to support such a radical assumption, which pervades their brief.

To the contrary, *Hy-Lond* determined that the fact that a district attorney wields a piece of the State’s sovereignty is not dispositive of anything. (*Hy-Lond, supra*, 93 Cal.App.3d at p. 751.)⁴ A district attorney’s authority to bring claims on behalf of “the People” “does not tell us who is authorized to represent ‘The People of the State of California’ in any particular action, or the limits to which such authority extends.” (*Ibid.*)⁵

⁴ The Five City Attorneys suggest various parts of *Hy-Lond*, including this determination, are “dicta.” In *Hylond*, had the Napa County District Attorney been correct that his authority to bring claims on behalf of “the People” permitted him to bring and settle claims statewide, there is little doubt that *Hy-Lond* would have come out the other way. This statement thus is clearly more than a dictum. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1047 n.3 [defining dictum as a comment “unnecessary to the decision in the case”]; *People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [reiterating *Vang*’s definition].)

⁵ The Five City Attorneys likewise cite *California v. IntelliGender, LLC* (9th Cir. 2014) 771 F.3d 1169, 1177, fn. 7 (*IntelliGender*)—a case addressing federal court removal jurisdiction under the Class Action Fairness Act—as recognizing that “actions brought by local civil prosecutors are ‘state enforcement action[s] rather than an action brought by the City for individual relief.’” (Five City Attorneys’ Br. at p. 28.) As discussed several times, above, however, knowing the formal identity of a party “does not tell us” the scope of the party’s attorney’s prosecutorial authority. (*Hy-Lond, supra*, 93 Cal.App.3d at 751.)

B.
Express Geographic Limits on District Attorneys in a Non-UCL Statute Do Not Expand Local Prosecutors' Standing Under the UCL.

The Five City Attorneys also contend that the “plain language” of the UCL is also “particularly telling” given that the “Legislature knows precisely how to invite Attorney General involvement in actions initiated by designated local prosecutors and how to limit their authority to bring those actions.” (Five City Attorneys’ Br. at p. 12.) The City Attorney cites a single statute—Code of Civil Procedure section § 731 (“§ 731”), regarding public nuisances—in support of that claim. The argument is erroneous, for several reasons.

First and foremost, this argument is irreconcilable with the rules the Supreme Court has set out for interpreting statutes that address the authority of district attorneys to participate in civil litigation. These rules dictate that the legislature’s silence regarding the scope of a district attorney’s authority means that no such authority has been granted. (See *Solus, supra*, 224 Cal.App.4th at p. 43 [noting that courts will “infer the district attorney’s lack of authority to proceed where no authority is granted.”].) That the Legislature has chosen in a rare instance to expressly limit the enforcement authority of district attorneys cannot alter the default rule—set out in this Court’s precedent—that applies when the Legislature is silent.

Indeed, section 731’s referencing that an action to recover a civil penalty can be brought by the district attorney for the county

where the violation occurred⁶ can hardly be read to mean that every single statute that permits a district attorney to seek a civil penalty on behalf of “the People” silently vests 58 different locally elected prosecutors with statewide enforcement authority. The formulation that an action to recover a civil penalty “may be brought in any court of competent jurisdiction in the name of the people of the State of California by the Attorney General or by any district attorney”—without any specific “geographical limitation”—is replete in California’s codes.⁷ It would make no sense at all for courts to interpret that silence to mean that, for example, the San

⁶ See Code Civ. Proc., § 731.

⁷ See Bus. & Prof. Code, §§ 6980.10 [violations of locksmith licensure laws]; 6980.13 [same]; 6980.14 [same]; 7502.1 [violations of repo man licensure laws]; 7502.2 [same]; 7502.6 [same]; 7523 [violations of private investigator licensure laws]; 7523.5 [same]; 7582.3 [violations of security guard licensure laws]; 7582.4 [same]; 19214 [unlawful practices in the sale of furniture]; 22442.3 [unlawful practices by immigration consultants]; 22442.6 [same]; 22445 [same]; 22500 [ticket sellers without a physical address]; Civ. Code, §§ 52.1 [deprivations of civil rights]; 1716 [unlawful solicitations posing as bills]; 1745 [art forgeries]; 1785.10.1 [violations of credit reporting laws]; 1789.5 [unlawful electronic transactions]; 1799.3 [invasion of privacy in video rentals]; 1812.33 [commercial discrimination against women]; 2944.7 [unlawful mortgage collection practices]; Food & Agric. Code, § 59246 [violations of agricultural marketing laws]; Gov. Code, §§ 4216.6 [unlawful underground excavation]; § 8314 [unlawful use of public resources for political purposes]; 54964.5 [unlawful activities by non-profit organizations]; Health & Safety Code, § 25422 [mishandling landfill gas]; Lab. Code, §§ 1309.6 [sexual exploitation of minors]; 3820 [violations of workers’ compensation laws]; Penal Code, §§ 653.59 [unlawful practices by immigration consultants]; 116840 [misuse of water treatment devices]; Pub. Resources Code, § 25967 [violations of energy efficiency laws].

Francisco City Attorney has civil enforcement authority over, for instance, pool heater pilot lights in the San Fernando Valley, (see Pub. Resources Code, § 25967, subd. (a)), or video store customer records in Sacramento, (see Civ. Code, § 1799.3, subd. (d)(1)).

The Five City Attorneys are also wrong because the “presumption of consistent usage” they invoke “can hardly be said to apply across the whole *corpus juris*.” (Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012) p. 172; (*Hy-Lond, supra*, 93 Cal.App.3d at p. 751.)) Indeed, “the application of this statutory construction tool to an entire code is questionable.” (*In re Sabrina H.* (2007)149 Cal.App.4th 1403, 1411.) Thus, it “is only when different terms are used in parts of the *same* statutory scheme that they are presumed to have different meanings.” (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 364, emphasis original.) The canon is inapplicable here because the UCL is not part of the same statutory scheme as the public nuisance statute.⁸

Even within the same statutory scheme, the “interpretive principle” invoked by the Five City Attorneys “applies only when

⁸ The Santa Cruz DA makes a similar consistency argument about Code of Civil Procedure section 731, invoking the related canon of *expressio unius est exclusio alterius*. (Santa Cruz DA Br. at p. 12.) “*Expressio unius* instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.” (2A Shambie Singer, *Sutherland Statutory Construction* (2018 online ed.) § 47:23.) But that canon generally applies only to inclusions and omissions within a specific statute or act. (*Id.* § 47:25; see also *In re Sabrina H.* (2007) 149 Cal. App. 4th 1403, 1411 [“The maxim *expressio unius est exclusio alterius* is generally applied to a specific statute, which contains a listing of items to which the statute applies.”].)

the Legislature has intentionally changed or excluded a term by design.” (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 126.) The Five City Attorneys offer nothing to suggest that, by enacting and amending the UCL while remaining silent on the geographic scope of district attorneys’ authority, the Legislature deliberately chose to depart from the geographic limits set out in the other statutes cited in the Five City Attorneys’ brief.⁹

VI.

THE SCOPE OF THE DISTRICT ATTORNEY’S AUTHORITY IS NOT “MORE APPROPRIATELY ADDRESSED BY VENUE.”

The Five City Attorneys conclusorily assert that “the Court of Appeal’s jurisdictional concerns are more appropriately addressed by traditional concepts of venue.” (Five City Attorneys’ Br. at p. 31.) This is categorically incorrect.

The venue statutes address the appropriate venue for a trial. (Code Civ. Proc., §§ 392–403.) They say nothing about who has the authority to bring statewide claims or extra-jurisdictional civil

⁹ As the Chambers Brief points out, there is a statute in the UCL’s scheme that does convey authority for district attorneys to act extra-jurisdictionally. (Chambers Br. at p. 24.) Business & Professions Code section 17207, subdivision (b), permits a district attorney (among others) to enforce an existing UCL injunction “without regard to the county from which the original injunction was issued.” (Bus. & Prof. Code § 17207, subd. (b).) Because the consistent usage canon invoked by the Five City Attorneys can apply within the same statutory scheme, one could arguably draw the negative implication that given the rest of the UCL’s silence on the issue, the Legislature meant to imbue district attorneys with extraterritorial powers only in connection with enforcing injunctions, but not in seeking UCL remedies in the first instance.

claims. Transferring venue does nothing to address the well-founded democratic accountability concerns raised by both the Attorney General and the District Attorney. A local prosecutor could still seek penalties, for actions occurring outside of his or her local jurisdiction, with no recourse for the local population to hold him or her accountable.

The Five City Attorneys say that, “if a UCL action is brought by an overzealous local prosecutor from an area that has no connection to the targeted activity, the remedy is to transfer venue of the case to a county that does.” (Five City Attorneys’ Br. at p. 31.). But the idea that a potential statutory interpretation would result in the need to have a district attorney prosecute an action in the courts of another county only shows the problematic nature of that potential statutory interpretation.

**VII.
THE SANTA CRUZ DISTRICT ATTORNEY’S CONCERNS ABOUT
“FUNDAMENTAL JURISDICTION” AND “PRIMARY RIGHTS” ARE
BESIDE THE POINT.**

The Santa Cruz DA boldly proclaims that there “is no justification to interpret into Business and Professions Code § 17204, territorial limitations to District Attorney prosecution where the legislature has stated no such exception,” because such a ruling would raise questions of “fundamental jurisdiction,” and is not necessary because of the doctrine of “primary right.” (Santa Cruz DA Br. at p. 11, 10-16, 21-23). These arguments are beside the point.

First, the Santa Cruz DA asserts that the Court of Appeal’s use of the word “jurisdictional” as creating a “limitation upon fundamental jurisdiction,” which he then equates with subject matter jurisdiction. (*Id.* at p. 8.) Putting aside the questionable reading of “jurisdictional”;¹⁰ this argument is proffered to no end. The Santa Cruz DA fails to explain why this limitation should lead to a different reading of the UCL’s grant of authority, or why such a limitation should override the established principle that requires statutory grants of civil jurisdiction to district attorneys to be read narrowly.

The Santa Cruz DA further asks, “should not those judgments that may encompass violations arising in more than one venue, if properly joined, be resolved in a single action? Should they not be accorded preclusive effect against other prosecutions arising from the same primary right?” (Santa Cruz DA Br. at p. 22.) Generally speaking, the answer to these two questions is yes. But neither matters to the merits of this case.

The first question is answered by an express legislative authorization for various district attorneys to “act jointly in prosecuting a civil cause of action of benefit to his own county in a court of the other jurisdiction.” (Gov. Code, § 26507.) Moreover, the Attorney General has the authority to bring whatever statewide claims exist in the appropriate venue.

¹⁰ See *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 120 [“As this court has cautioned on many occasions, however, the term ‘jurisdiction’ carries a variety of meanings[.]”].

The second question about primary rights is a generally correct statement of California’s “notoriously uncertain in application” law of claim preclusion. (See *Baral v. Schnitt* (2016) 1 Cal. 5th 376, 395; see also Heiser, *California’s Unpredictable Res Judicata (Claim Preclusion) Doctrine* (1998) 35 San Diego L. Rev. 559, 563.) But its predicate—that “other prosecutions aris[e] from the same primary right”—assumes that all of the alleged statewide UCL violations alleged in the District Attorney’s complaint are one single, indivisible cause of action, such that two district attorneys could not pursue enforcement actions for violations in each’s own county. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 [explaining nature of primary right].) The Santa Cruz DA provides no meaningful authority for why that should be the case.¹¹ And given that the UCL authorizes penalties for “each violation,” (Bus. & Prof. Code, § 17206 subds. (a), (b)) the District Attorney presumably disagrees that more than a single indivisible violation is at issue.

At bottom, the Court does not need to address the concerns raised by the Santa Cruz DA to hold that the UCL does not authorize a local prosecutor to bring statewide damages claims for alleged conduct and harm occurring outside of his or her local jurisdiction.

¹¹ The Santa Cruz DA’s brief also cites to *IntelliGender, supra*, 771 F.3d at p. 1173, in asserting that “defendants should be subject to providing the relief to offended consumers only once arising upon a single primary right the point.” (Santa Cruz DA Br. at p. 23.) *IntelliGender* involves the application of the Class Action Fairness Act to claims brought by a state as sovereign. A reader will search *IntelliGender* in vain to find any point about the primary rights doctrine.

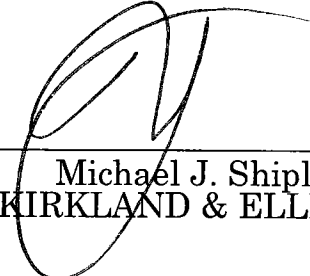
* * *

The District Attorney lacks the authority to enforce the UCL beyond the boundaries of his county. This Court should affirm the Court of Appeal's writ of mandate directing the trial court to vacate its prior ruling and to grant the motion to strike.

CERTIFICATE OF WORD COUNT

I, Michael J. Shipley, hereby certify that in accordance with California Rules of Court, rule 8.520(c)(1), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief, including footnotes, and excluding the materials excepted by Rules of Court, rule 8.204(c)(3), is 5,743 words.

Dated: May 24, 2019



Michael J. Shipley
KIRKLAND & ELLIS LLP

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 333 South Hope Street, 29th Floor, Los Angeles, California 90071.

On May 24, 2019, I hereby certify that I have electronically served the foregoing **ANSWERING BRIEF ON THE MERITS** on the following interested parties in this action in the manner set forth below:

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Jeffrey I. Weinberger
Stuart N. Senator
Blanca Fromm Young
Munger Tolles & Olson LLP
350 South Grand Avenue, 50th Fl.
Los Angeles, CA 90071

Superior Court of Orange County
Attn: Hon. Kim Dunning
Dept. CX-104
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Respondent

*Attorneys for Petitioners
Abbott Laboratories and AbbVie
Inc.*

Mark P. Robinson
Robinson Calcagnie, Inc.
19 Corporate Plaza Drive
Newport Beach, CA 92660

*Attorneys for The People:
Real Party in Interest*

Kelly A. Ernby
Orange County District Attorney
401 Civic Center Drive
Santa Ana, CA 92701

*Attorneys for The People: Real
Party in Interest*

Valerie T. McGinty
Law Office of Valerie T. McGinty
524 Fordham Road
San Mateo, CA 94402

*Attorneys for Consumer Attorneys
of California - Amicus Curiae*

Thomas A. Papageorge
San Diego Cty. Dist. Atty. Office
330 W. Broadway, Suite 750
San Diego, CA 92101

*Attorneys for CA District Attorneys
Association - Amicus Curiae*

Joseph P. D'Agostino
Orange County District Attorney
401 Civic Center Drive
Santa Ana, CA 92701-4575

*Attorneys for The People:
Real Party in Interest*

Michael M. Walsh
Office of Los Angeles City Attorney
200 North Main Street, 7th Floor
Los Angeles, CA 90012

*Attorneys for City of Los Angeles -
Pub/Depublication Requestor*

Mark Zahner
California District Attorneys Assoc.
921 11th Street, #300
Sacramento, CA 95814

*Attorneys for CA District Attorneys
Association - Amicus Curiae*

Monica Danielle Castillo
Los Angeles City Attorney
City Hall East
200 N. Spring Street, 14th Floor
Los Angeles, CA 90012

*Attorneys for City of Los Angeles -
Amicus Curiae*

Mark Ankcorn
Mara Elliott
Office of the San Diego City Atty.
1200 3rd Avenue, Suite 700
San Diego, CA 92101

*Attorneys for City of San Diego -
Amicus Curiae*

James R. Williams
Laura Trice
Santa Clara County Office
of the County Counsel
70 W. Hedding Street
East Wing, 9th Floor
San Jose, CA 95110

*Attorneys for Santa Clara County-
Amicus Curiae*

Jeremy B. Rosen
Stanley H. Chen
Horvitz & Levy LLP
3601 W. Olive Ave., 8th Floor
Burbank, CA 91505

*Attorneys for Chamber of Com-
merce of the USA; and California
Chamber of Commerce*

Heather L. Wallace
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814

*Attorneys for Chamber of Com-
merce of the USA; and California
Chamber of Commerce*

Nora Frimann
Office of the San Jose City Attorney
200 E. Santa Clara Street
San Jose, CA 95113-1905

*Attorneys for City of San Jose -
Amicus Curiae*

Jennifer Henning
CA State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

*Attorneys for California State
Association of Counties - Amicus
Curiae*

Janet Y. Galeria
US Chamber Litigation Center
1615 H Street NW
Washington, DC 20062

*Attorneys for Chamber of Commerce
of the USA; and California Chamber
of Commerce*

Dennis J. Herrera, City Attorney
Yvonne R. Meré
Owen Clements
City & County of San Francisco
Fox Plaza, 1390 Market St., 6th Fl.
San Francisco, CA 94102

*Attorneys for Consumer Attorneys of
California - Amicus Curiae*

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street, Ste. 1702
Los Angeles, California 90013-
1230
(213) 269-6000

Michele Van Gelderen
California Department of Justice
Office of the Attorney General
300 S. Spring Street, Ste. 1702
Los Angeles, California 90013
(213) 269-6000

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Supreme Court of California
350 McAllister Street
San Francisco, California
94102-4797
(415) 865-7000

Clerk of Court, Court of Appeal
of the State of California,
Fourth District, Division One,
750 B. Street, Suite 300
San Diego, California 92101
(619) 744-0760

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

Executed on May 24, 2019, at Los Angeles, California.



Keith Catuara