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.

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

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

This case concerns whether the district attorney of a single county has authority to sue and obtain penalties and restitution for alleged violations of the Unfair Competition Law that occur outside of the district attorney's home county. He does not.

In this case, the Orange County District Attorney, represented by private class action plaintiff lawyers, sued Defendants for violating the UCL by selling a pharmaceutical drug at allegedly anticompetitive prices throughout the state of California. The District Attorney's complaint demands penalties and restitution for the alleged violations on a statewide basis.

The District Attorney is not acting under the auspices of the Attorney General. Yet, he says that he can commandeer the entire state's civil law enforcement apparatus and bring claims on behalf of citizens to whom he is not accountable.

That is not what the law allows. Under the Constitution and the Government Code, district attorneys are county officers and their civil law enforcement authority is similarly limited. Forty years ago, this Court ruled that district attorneys may participate in civil litigation only to the extent that the Legislature has expressly and specifically permitted them to do so. After all, the State has an elected statewide Attorney General who has plenary authority to litigate civil claims of statewide interest.

On a few occasions, the Legislature has granted district attorneys the authority to litigate civilly outside of their home jurisdictions. But the UCL is not such a statute. These exceptions prove the rule. Nothing in its text contains the kind express and specific Legislative authorization that this Court has required for district

attorneys to act extraterritorially in civil litigation. The UCL's legislative history reflects no intent to grant such authority to local prosecutors either. And prudential and policy consideration counsel strongly against local prosecutors' pursuing claims on behalf of those to whom they are not accountable. Indeed, the upshot of the District Attorney's arguments is that, when it comes to civil enforcement, California would effectively have 59 Attorneys General. And that result would not be limited to the UCL. It would apply to the scores of other statutes that, with language similar or identical to the UCL, permit district attorneys to bring civil enforcement actions.

The cogent analysis of Court of Appeal in this case reached that very same conclusion. The Court of Appeal issued a writ of mandate directing the trial court to strike allegations from the District Attorney's complaint that implicated statewide violations and penalties. That ruling should be affirmed.

PROCEDURAL AND FACTUAL BACKGROUND

The underlying lawsuit in this case alleges violations of the UCL[1] against various companies that developed, sold, and marketed a drug called Niaspan. The complaint was brought on behalf of the "People of the State of California" by the District Attorney of Orange County, in affiliation with various private law firms. (Ex.

[1] Citations to statutory sections are to the Business and Professions Code unless otherwise specified.

7 at p. A75[2].) The operative First Amended Complaint ("Complaint") seeks, among other remedies, civil penalties and restitution. (*Id.* at p. A110.) The District Attorney does not dispute that he seeks penalties and restitution based on sales to consumers statewide, the vast majority of whom reside outside of Orange County. (Ex. 11 at pp. A193-94.)

On February 10, 2017, Defendants filed a Motion to Strike Portions of Plaintiff's First Amended Complaint (the "Motion"). (Ex. 8.) Pursuant to Code of Civil Procedure section 436, subdivisions (a) and (b), the Motion argued that certain of the Complaint's references to California should be stricken as "irrelevant," "improper matter," and "not drawn ... in conformity with the laws of this state" because district attorneys have no authority to bring claims under the UCL "outside the geographic boundaries of their local jurisdictions." (*Id.* at pp. A117-19.)

The superior court denied the motion. (Ex. 15 [transcript]; Ex. 16 [minute order] at p. A252.) Defendants timely sought writ relief in the Court of Appeal. That court issued an order to show cause, and the parties then briefed the merits. The Court of Appeal also accepted amicus briefs in support of Defendants' petition from Attorney General Becerra, the California District Attorneys' Association—which represents all 58 district attorneys in the state and numerous city attorneys—and the United States and California Chambers of Commerce. The Consumer Attorneys of California—

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[2] Citations to "Ex." are to the exhibits to Petitioners' Appendix and Supplemental Appendix, submitted as the record in the Court of Appeal.

an advocacy group for plaintiffs' attorneys— filed an amicus brief in support of the District Attorney, as did a group of four city attorneys, the Santa Clara County Counsel, and the California State Association of Counties.

The Court of Appeal held oral argument on March 16, 2018, and filed its Opinion and issued its writ of mandate on May 31, 2018.

The Opinion[3] rejected various procedural arguments that the District Attorney had made for the first time in that court. Particularly relevant here, the Opinion found that Defendants "present[ed] a concrete legal dispute over the scope of recovery that a district attorney may seek under the UCL, which is properly the subject of a motion to strike." (Opinion at pp. 9-10.) For similar reasons, it concluded the issue was ripe for review. (*Id.* at pp. 10-11.)

On the merits, the Court of Appeal held that "the District Attorney's authority to recover restitution and civil penalties is limited to violations occurring in the county in which he was elected." (*Id.* at pp. 14-38, capitalization altered.) The Court of Appeal emphasized (1) the constitutional and statutory allocation of executive power between the Attorney General and the district attorneys of each county (*id.* at pp. 15-19); (2) the rule, established by this Court in *Safer v. Superior Court* (1975) 15 Cal.3d 230, 236-37 (*Safer*), that a district attorney's authority to bring civil actions is not plenary and should be circumscribed to that specifically

[3] Citations to the "Opinion" and "Dissent" are to the slip opinion attached as Exhibit 1 to the Petition.

granted by the Legislature, (Opinion at pp. 19-21); (3) the text and structure of the UCL's remedial provisions (*id.* at pp. 21-24); (4) relevant precedent, including *People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734, 753 (*Hy-Lond*), which held that a district attorney had no right "to surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties" under the UCL (Opinion at pp. 25-32); and (5) various public policy concerns raised by the parties and their amici (*id.* at pp. 33-38).

The Court of Appeal ordered the superior court to vacate its order denying Defendant's motion to strike and to enter a new order "striking the allegations by which the Orange County District Attorney seeks statewide monetary relief under the UCL." (*Id.* at p. 39.)

Justice Dato dissented. The dissent primarily asserted that prudential reasons counseled against reaching the merits. (Dissent at pp. 2-8.) Justice Dato would have addressed the scope of available remedies only on an appeal from a final judgment. (*Id.* at p. 4.)

The dissent nonetheless went on to address the merits. It read *Hy-Lond* as limited to its facts, and thus dismissed it as irrelevant. (*Id.* at pp. 9-10.) And because the UCL's remedial statutes permit "the court" to award civil penalties and restitution (see §§ 17203, 17206, subd. (b)), the dissent found "nothing inherently problematic" in permitting the District Attorney to seek and obtain restitution or civil penalties on a statewide basis. (Dissent at pp. 10-13.)

On June 15, 2018, the District Attorney filed a Petition for Rehearing, which the Court of Appeal summarily denied on June 27, 2018. In denying rehearing, the Court of Appeal modified the Opinion without change to the judgment to correct a typographic error. The introduction to the dissent was also modified. The Court of Appeal's decision became final on June 30, 2018. (Rules of Court, rule 8.264(b)(1).) The District Attorney filed a Petition for Review on July 10, 2018, which this Court granted on August 22, 2018.

ARGUMENT

I.
DISTRICT ATTORNEYS AND OTHER LOCAL PROSECUTORS DO NOT HAVE PLENARY AUTHORITY TO LITIGATE CIVIL CASES ON BEHALF OF THE STATE.

The State Constitution and the statutes addressed to the allocation of the prosecutorial function within the executive branch of the government make clear that the Attorney General, not the state's 58 district attorneys, has plenary authority to litigate civil cases on behalf of the state. As this Court has explained, the authority of district attorneys is territorially limited, and they may institute civil litigation only to the extent that the Legislature specifically and expressly authorizes them to so.

A.
Under the State Constitution and Government Code, District Attorneys Are County Officers with Limited Civil Enforcement Authority

The Constitution makes the Attorney General "the chief law officer of the State" with "the duty ... to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) The Attorney General is elected on a statewide basis. (*Id.*,

art. V, § 11.) "[I]n the absence of any legislative restriction, [he] has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest." (*D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 14-15, quotation omitted, alteration original; see also Gov. Code, § 12512.)[4]

In contrast to the Attorney General's statewide authority, a district attorney's authority is much more limited. Counties are "legal subdivisions of the State," (Cal. Const. art. XI, § 1), and their police powers are to be "enforce[d] within [their] limits." (*Id.* § 7). A district attorney is an elected *county* official, politically accountable to only the citizens of the county that elects him or her. (See Cal. Const., art. XI, § 1 ["The Legislature shall provide for ... an elected district attorney ... in each county."]; Gov. Code, § 24009 ["county officers to be elected by the people are the ... district attorney"].) "[A] district attorney is a county officer in at least a geographic sense—that is to say, that the exercise of his powers as such is limited territorially to the county for which he has been elected." (*GameStop, Inc. v. Superior Court* (2018) 26 Cal.App.5th

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[4] Under certain circumstances, a different state actor can act under a delegation of authority from the Attorney General. (See, e.g., *California Air Res. Bd. v. Hart* (1993) 21 Cal.App.4th 289, 293.) The District Attorney does not assert that he is acting under any statewide delegation of authority here. (Cf. Ex. 7 ¶ 4 [addressing "Plaintiff's authority"].)

502, 510 ("*GameStop*"); *Singh v. Superior Court* (1919) 44 Cal.App. 64, 65-66; *Hy-Lond, supra*, 93 Cal.App.3d at p. 751.)[5]

Although district attorneys act as officers of the state under certain circumstances, such as when prosecuting crimes, *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359 (*Pitts*), their authority remains "subject to the 'direct supervision' of the state Attorney General," (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1151 (*PG&E*), citing Cal. Const., art. V, § 13.), and to territorial limits. "The district attorney is a county officer who is authorized by statute to prosecute those crimes committed within the geographic confines of his or her county." (*People v. Superior Court (Jump)* (1995) 40 Cal.App.4th 9, 13, citing Gov. Code, §§ 2400, 26500, 26502.); *Pitts, supra*, 17 Cal.4th at p. 359 ["California district attorneys are given complete authority to enforce the state criminal law *in their counties*." Emphasis added; quotation omitted]; *People v. Bradford* (1976) 17 Cal.3d 8, 14 ["As applied to felonies triable in the superior court, the 'jurisdictional territory' is the county, and the county in which the crime was committed is the proper venue, except where some other statute provides an alternative venue."].)

A district attorney's authority to pursue civil litigation is even more restricted. "If in areas related to criminal prosecution

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[5] For instance, District Attorney Rackauckas, who originally brought this action, appears to have lost reelection when the plurality of the citizens of his own county voted for a different candidate. (See Orange County 2018 General Election November 6, 2018, Unofficial Results for Election, *available at goo.gl/uxZMGr.*) The citizens of the 57 other counties, on whose behalf he purported to act, had no say in that decision.

the district attorney's authority has been subject to limitations, then even stronger considerations dictate such limitations in non-criminal sectors in which he possesses only narrow and specific authorizations." (*Safer, supra,* 15 Cal.3d at p. 237, footnote omitted.) Thus, a district attorney "has no authority to prosecute civil actions absent specific legislative authorization[.]" (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753 (*Humberto S.*); *Hy-Lond, supra,* 93 Cal.App.3d at p. 751 (actions for "collection of civil penalties by the district attorney ... must be expressly authorized" by statute); *People v. Superior Court (Solus Industrial Innovations, LLC)* (2014) 224 Cal.App.4th 33, 43 (*Solus*) [Government Code § 26500, which authorizes district attorneys to prosecute crimes, does not "give district attorneys plenary authority to pursue any and all" civil penalties.].) Because "the district attorney's authority is territorially limited" even when performing his most basic criminal prosecutorial functions, (See *Pitts supra,* 17 Cal.4th at 361, *see also GameStop, supra,* 26 Cal.App.5th at 511 & n.6), it is at least as limited in the civil context, unless the legislature has specified otherwise.

In the context of these general principles, the Government Code authorizes a district attorney to conduct extra-territorial civil litigation activities only narrowly and with conditions. For instance, a district attorney may "act jointly [with district attorneys for other counties] in prosecuting a civil cause of action of benefit to his own county in a court of the other jurisdiction[.]" (Gov. Code, § 26507.) And a district attorney may provide "legal or investigative services, or both, pertaining to the prosecution of a civil cause

of action in the other county by the district attorney of that county." (Gov. Code, § 26508.) Both provisions require, at minimum,[6] the affirmative consent of the district attorney in the other jurisdiction. (Gov. Code, §§ 26507, 26508.) No provision, in any code, authorizes a district attorney to bring civil claims seeking statewide relief for conduct and injuries occurring outside of his or her jurisdiction.

B.
A District Attorney Must Have Specific Legislative Authorization to Bring Civil Actions.

1.
The Rule of *Safer v. Superior Court.*

In *Safer v. Superior Court*, this Court established that in bringing and prosecuting civil claims, a "district attorney enjoys neither plenary power nor unbridled discretion." (*Safer*, *supra*, 15 Cal.3d at p. 236.) "An examination of the types of civil litigation in which the Legislature has countenanced the district attorney's participation reveals both the specificity and the narrow perimeters of these authorizations." (*Ibid.*) "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." (*Ibid.*) Thus, in the absence of a specific Legislative authorization, a district attorney "lacks the necessary authorization to proceed" in a civil case. (*Id.* at p. 235.)

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[6] Government Code section 26508 also requires the consent of "the boards of supervisors of both affected counties[.]"

For example, the Legislature has not specifically authorized district attorneys to bring a civil contempt claim "stemming from private civil litigation." (*Id.* at p. 237.) A district attorney may not "participate in ... juvenile dependency proceedings to represent state interests unless there is express statutory authorization." (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 102 ("*Dennis H.*").) He or she may not represent third parties in writ proceedings related to criminal discovery. (*Bullen v. Superior Court* (2008) 204 Cal.App.3d 22, 25.) And this District Attorney in particular could not bring an action seeking civil penalties for occupational safety violations when the action was not authorized by any statute. (*Solus, supra*, 224 Cal.App.4th at p. 43.)

As is clear from this Court's precedents, in determining whether a district attorney has authority to bring civil litigation, courts must look to whether the action is specifically and affirmatively authorized by statute. (*See, e.g., Humberto S., supra*, 43 Cal.4th at p. 753; *PG&E, supra*, 16 Cal.4th at pp. 1155-1156; *People v. McKale* (1979) 25 Cal.3d 626, 633 (*McKale*); *Safer, supra*, 15 Cal.3d at pp. 235-237.) Court of Appeal decisions, including the Opinion, have uniformly interpreted *Safer*[7] to mean that Legislative silence means the district attorney has no authority to bring civil claims. As the Court of Appeal explained in another case where this District Attorney exceeded his authority to bring civil

[7] The District Attorney's Brief refers to this interpretive cannon as the "*Safer* rule." (See Opening Br. at pp. 34-38.) For consistency and brevity, Defendants follow the same convention.

litigation, "[t]he Legislature's traditional practice has been to affirmatively specify the circumstances in which a district attorney *can* pursue claims in the civil arena, not the circumstances in which he *cannot*." (*Solus*, *supra*, 224 Cal.App.4th at p. 42, original italics; see also Opinion at pp. 19-20.)

These well-established principles resolve the question presented here. As the Opinion explains, and as discussed, *infra,* in section II, "[t]he text of the UCL provides no basis to conclude the Legislature intended to grant local prosecutors extraterritorial jurisdiction to recover statewide monetary relief." (Opinion at p. 32.) This conclusion was supported in the Court of Appeal by the Attorney General and the California District Attorneys' Association, reflecting an overwhelming consensus among the prosecutors at all levels of state government charged with enforcing the UCL.

2.
The District Attorney's Arguments Against the Application of the *Safer* Rule Have No Merit.

The District Attorney concedes that, under this Court's precedents, a "district attorney has no authority to prosecute civil actions absent specific legislative authorization," but nonetheless contends that the Opinion's "reliance on the '*Safer* rule' is erroneous." (Opening Br. at p. 35.) He contends that: (1) the *Safer* rule applies only to a district attorney's "civil representation of private parties"; (2) a 1980 amendment to Government Code section 26500 somehow abrogates the rule; (3) the UCL, as interpreted by the Court of Appeal in *Blue Cross of California v. Superior Court*, is inconsistent with the *Safer* rule; and (4) UCL civil actions are in

furtherance of criminal prosecutions, and thus outside of the rule. None of these arguments has any merit.[8]

a.

The *Safer* Rule Applies to All Civil Actions Brought by District Attorneys.

The District Attorney's claim that *Safer's* rule is limited to the district attorney's representation of "private parties in private civil matters," has no support. Indeed, although *Safer* involved a district attorney's representation of a private party, both this Court and the Court of Appeal have applied the rule in the context of actions brought on behalf of the public.

Safer did not limit the rule it enunciated to its specific facts. To the contrary, in "set[ing] forth illustrative statutes which specifically empower a district attorney to bring a civil action," *Safer* listed numerous permitting district attorneys to bring civil enforcement actions—it did not limit these illustrations representations of private parties. (*Safer, supra,* 15 Cal.3d at p. 236 [citing, *inter alia,* Bus. & Prof. Code, § 16754, which permits a district attorney to "enforce certain business regulation laws"; Gov. Code, § 26521, which authorizes a district attorney to bring actions to

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[8] Nor were any of these arguments raised in the Court of Appeal. (See Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."]; *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726 [declining to address issue petitioner did not brief to the court of appeal]; *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 180 [declining to reach theories undeveloped in the lower courts].)

collect fines; and Gov. Code, § 26528, which authorizes suits by district attorneys to abate public nuisances "in the name of the People"].)

Given *Safer's* reasoning, it is no surprise that its rule has been applied broadly—including by this Court in a UCL case brought by a district attorney. In *People v. McKale*, for instance, a district attorney sought civil penalties and injunctive relief under the "unlawfulness" prong of the UCL for violations of the Mobile Home Parks Act. (*McKale, supra*, 25 Cal.3d at pp. 630-31.) Citing *Safer*, the Court held that although "a district attorney may prosecute civil actions only when the Legislature has specifically authorized, specific power exists in the instant case" because the UCL specifically authorized the district attorney to seek civil relief against "unlawful" activity. (*Id.* at p. 633.)[9]

Similarly in *PG&E*, the Court invoked the *Safer* rule to explain how it is that counties may bring Cartwright Act claims on their own behalf. (*PG&E, supra*, 16 Cal.4th at p. 1156-57.) Section 16750, subdivision (g) authorizes "a district attorney to prosecute Cartwright Act claims on behalf of a city or public agency or political subdivision ... whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within [the district attorney's] county[.]" § 16750, subd. (g).

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[9] In *McKale* the Riverside County District Attorney alleged UCL violations at a single mobile home park in Riverside County. (*McKale, supra*, 25 Cal.3d at pp. 630-31.) The Court had no occasion to decide whether the UCL authorized the district attorney to bring similar claims against a mobile home park in some other county.

A question in *PG&E* was whether the county's authority to sue on its own behalf was precluded by district attorneys' authority under subdivision (g).

This Court held that the answer lay in the interplay between the explicit grant of authority to the district attorney in subdivision (g), on the one hand, and the more general grant of standing in subdivisions (a) and (b). (*PG&E*, *supra*, 16 Cal.4th at p. 1156) These latter subdivisions, respectively, give "any person" who has been injured the right to sue, and define "person" to include local governments. (*Ibid.*) As the Court explained, the district attorney's authority is governed by subdivision (g) while the authority of the County—which could be exercised by other officials like County counsel—is governed by subdivisions (a) and (b). The reason that subdivision (g) was necessary was because, under the *Safer* rule, the general grant of standing to an injured county under subdivisions (a) and (b) was not the explicit legislative authorization required for the district attorney to bring a civil action. (*Ibid.* [if "subdivision (g) of section 16750 did not exist, a district attorney of a county would be unable to bring civil actions for antitrust violations of the state Cartwright Act on behalf of these entities." citing *Safer*].)

The Court of Appeal has similarly held that the *Safer* rule requires legislative authorization for district attorneys to participate in civil proceedings, even when representing public, not private, interests. (*Dennis H.*, *supra*, 88 Cal.App.4th at p. 102 ["Given the absence of statutory authorization and the fairness concerns

expressed in *Safer,* we conclude the district attorney may not participate in the juvenile dependency proceedings to represent state interests unless there is express statutory authorization."]; *Solus, supra,* 224 Cal.App.4th at p. 43 [holding that, in the absence of specific authorization, *Safer* rule would not permit a district attorney "to pursue claims for civil penalties under Labor Code sections 6428 and 6429" on behalf of "the People"].) Thus, there is no support for limiting the *Safer* rule to instances where a district attorney seeks to represent private parties.

b.

The *Safer* Rule Was Not Abrogated by the 1980 Amendments to Government Code Section 26500.

Next, the District Attorney argues—again citing no case law in support—that a 1980 amendment to Government Code section 26500 affords him plenary authority to bring civil claims as the "public prosecutor, except as otherwise provided by law." (Opening Brief at p. 36-37.) But as *Safer* itself explains, section 26500's reference to "public prosecutor" applies only to "matters criminal"; it does not address civil enforcement at all. (*Safer, supra,* 15 Cal.3d at p. 237 fn. 11.)

The 1980 amendment did not alter that rule. The bill—which added the phrase "except as otherwise provided by law" to the end of the first sentence of section 26500—was principally addressed to technical changes in the manner in which misdemeanors charges are filed. (Stats. 1980, ch. 1094, § 1, p. 3507.) Nothing in the bill or its legislative history[10] purports to redefine "public

[10] See Defendants' Request for Judicial Notice ("RJN") Ex. 29.

prosecutor," or to legislatively reverse *Safer*, decided just five years earlier. Indeed, given that being the "public prosecutor" has always entailed only criminal prosecution, the Legislature's 1980 addition of the phrase "except as otherwise provided by law" suggests a Legislative recognition that a district attorney's civil litigation activity must, in contrast, be expressly authorized by statute.

The District Attorney's suggestion that the Legislature drastically changed the law without expressing any clear intent to do so "suffers from a surface implausibility." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 260.) It would be "unusual in the extreme," for the Legislature "to adopt such a fundamental change only by way of implication," in a bill "facially dealing with" completely unrelated matters. (*Ibid.*) The "drafters of legislation 'do not, one might say, hide elephants in mouseholes.'" (*Id.* at p. 260-61, brackets omitted, quoting *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468; see also *In re Christian S.* (1994) 7 Cal.4th 768, 782 ["We are not persuaded the Legislature would have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law."].)

A 2014 Court of Appeal decision directly rejects the District Attorney's argument. In *Solus*, the District Attorney argued that he could bring civil claims for violations of workplace safety laws, even without express authorization. (*Solus, supra,* 224 Cal.App.4th at pp. 40-41.) Like here, the District Attorney argued that section 26500's references to a "public prosecutor" and "public offenses" gave him both criminal and civil enforcement authority.

(Id. at p. 41.) The Court of Appeal rejected that argument, because (1) the use of "public offenses" in a related statute made clear that the reference was to only criminal cases; (2) the argument was foreclosed by *Safer*; and (3) the existence of numerous statutes that specifically authorize district attorneys to bring civil actions shows that section 26500 does not generally authorize them to bring civil claims. (*Id.* at pp. 41-43.)

It is thus unsurprising that post-1980 decisions of this Court continue to read section 26500 as applying only to criminal matters. (See *Pitts, supra,* 17 Cal.4th at p. 359 [citing § 26500 as addressed to the district attorney's role "when prosecuting criminal violations of state law"].) And even after the 1980 amendment, this Court has continued to apply the *Safer* rule to situations where district attorneys pursue civil litigation. (See *PG&E, supra,* 16 Cal.4th at p. 1156 [district attorneys can bring Cartwright Act claims only because a statute expressly authorizes them to do so, citing *Safer*].)

The District Attorney's argument based on section 26500 has no merit. Indeed, even under the broader authority that section 26500 accords district attorneys to prosecute crimes on behalf of the People, that authority is still territorially limited. (*Supra,* Section I.A.; *see also 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 Gov. Code, § 26500].)

c.

Blue Cross Is Fully Consistent with the *Safer* Rule.

The District Attorney's reliance on *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 138 (*Blue Cross*) is also misplaced. *Blue Cross* did not eschew the *Safer* rule and hold that a local prosecutor is authorized to bring UCL claims so long as "no statute provides to the contrary." (Opening Br. at pp. 37-38.) *Blue Cross* concerned an entirely different question from the one presented here: whether a city attorney's authority to allege "unlawful"-prong UCL violations is vitiated when the statute that makes the conduct unlawful expressly designates enforcement authority to a public agency other than the city attorney. (180 Cal.App.4th at p. 1249.) The question here is not whether the District Attorney can bring "unlawful" UCL claims predicated on violations of the antitrust laws; he can. The question is whether his authority to bring UCL claims extends beyond his county. *Blue Cross* simply did not address that question.

In *Blue Cross*, a city attorney brought a UCL claim against a managed healthcare service plan predicated on violations of the Knox-Keene Act, Health & Safety Code, section 1340 et seq. (*Blue Cross, supra*, 180 Cal.App.4th at pp. 1242-44.) The defendants acknowledged that section 17204 of the UCL specifically authorized the city attorney to bring claims to enjoin conduct made unlawful by another statute, but argued that the Knox-Keene Act "displac[ed] and subordinat[ed]" that authority with respect to UCL claims based on Knox-Keene Act violations by giving the California Department of Management Health Care regulatory and enforcement authority over health plans. (*Id.* at p. 1249.)

The court disagreed, explaining, that "the fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive." (*Ibid.* [quoting *State of California v. Altus Fin.* (2005) 36 Cal.4th 1284, 1303 (*Altus*)].) In the absence of a statute stating that a city attorney could *not* use the Knox-Keene Act as the basis of an unlawfulness claim, the grant of authority in section 17204 was all the authority the city attorney needed to seek injunctive relief. (*Blue Cross, supra,* 180 Cal.App.4th at pp. 1251-55; cf. *Altus, supra,* 36 Cal.4th at p. 1304 [finding that an exclusive remedies provision in the Insurance code was such an exception].)

This holding is fully consistent with *Safer* and the Opinion, because section 17204 provided the required express authorization for the city attorney to bring the unlawfulness claim he alleged. (Accord *McKale, supra,* 25 Cal.3d at p. 633.) But it is a different question—not presented in *Blue Cross*—whether an authorization for a local prosecutor to bring claims somewhere is an authorization for him to bring them statewide. As explained herein, it is not.

d.

Public Enforcement Actions Under the Unfair Competition Law Actions Are Not Ancillary Proceedings in Support of Criminal Law Enforcement.

There is also no merit to the District Attorney's contention that the Opinion is contrary to a rule that "a district attorney has the authority to participate in noncriminal actions or proceedings that are in aid of or auxiliary to the district attorney's usual duties." (Opening Brief at pp. 38-39, quoting *People v. Parmar* (2001) 86 Cal.App.4th 781, 798 (*Parmar*).) None of the three cases cited

by the District Attorney have anything to do with UCL actions, let alone support his claim that "UCL actions, although civil in nature, are 'in aid of or auxiliary to' the district's exercise of his police power in criminal prosecutions" (Opening Br. at p. 38).

Two cases address a district attorney's authority to bring claims for public nuisance—authority that, consistent with *Safer*, is expressly provided statute. (See *Parmar*, *supra*, 86 Cal.App.4th at p. 798 [noting authority provided to district attorney by Gov. Code, § 26528 and Civ. Code, § 731]; *Bd. of Sup'rs of Los Angeles Cty. v. Simpson* (1951) 36 Cal.2d 671, 675 [same].)

The third permitted a district attorney to represent his county in administrative welfare benefit proceedings, as auxiliary to his duty to prosecute welfare fraud and to collect unpaid child support in that county. (*Rauber v. Herman* (1991) 229 Cal.App.3d 942, 951-53.) The Court of Appeal subsequently distinguished *Rauber*, holding that absent specific statutory authorization, the *Safer* rule barred district attorneys from representing the interests of the state in other civil proceedings less intertwined with criminal enforcement and where the county was already represented by counsel. (See *In re Dennis H.*, *supra*, 88 Cal.App.4th at p. 102.) The narrow *Rauber* holding does not provide the kind of plenary civil enforcement authority the District Attorney ascribes to it. Nowhere does the District Attorney show a close relationship between the UCL and any relevant criminal enforcement scheme that district attorneys are required to enforce, that would make authority under the UCL "auxiliary" to that scheme.

In sum, the District Attorney offers no cogent reason why the *Safer* rule does not apply to the circumstances of this case.

II.
THE UNFAIR COMPETITION LAW DOES NOT AUTHORIZE LOCAL PROSECUTORS TO BRING EXTRATERRITORIAL OR STATEWIDE ACTIONS.

The UCL does not provide the district attorney the specific and express authorization that *Safer* requires. Neither the text, structure and history of the relevant statutes, nor judicial interpretations of those statutes, nor the legislative history of the UCL, supports any Legislative intent to authorize local prosecutors to bring actions for penalties or restitution for violations occurring outside of their territorial jurisdiction.

A.
The Text, Structure, and History of the Unfair Competition Law Do Not Authorize District and City Attorneys to Seek or Obtain Statewide Relief.

There is no dispute that the UCL authorizes various state and local officials, including the Attorney General, all district attorneys, and certain city attorneys, to prosecute actions on behalf of "the People" for civil penalties and restitution. (§§ 17204[11],

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[11] Section 17204 says, in full: "Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or by a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered

17206[12].) But the UCL does not expressly authorize local prosecutors to bring claims for violations occurring outside their territorial jurisdictions. The question is how to interpret the UCL's silence on this issue. The District Attorney would have the Court read sections 17204 and 17206 to mean that the prosecutors listed in those sections can seek restitution and penalties statewide and perhaps even beyond the state's borders. (Opening Br. 24.) That is not and cannot be the law.

1.
The Unfair Competition Law Is Insufficiently Specific to Convey Statewide Authority Under the *Safer* Rule.

The District Attorney argues that the "clear and unambiguous language of the UCL expressly confers authority, standing and jurisdiction on 'any district attorney' to pursue UCL violations and remedies without any geographic limitations on the relief demanded." (Opening Br. at p. 25.) But that is not what the UCL

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injury in fact and has lost money or property as a result of the unfair competition."

[12] Section 17206, subdivision (a) says, in full: "Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction."

says. The UCL does permit "any district attorney" to bring UCL claims for both injunctive relief and penalties. (§§ 17203, 17206.) But nowhere does it say, much less unambiguously say, that "any district attorney" can pursue claims under the UCL regardless of where the alleged violations occur.

As discussed above, it is the Attorney General who has plenary "power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests." (*Pierce v. Superior Court* (1934) 1 Cal.2d 759, 762; see also Gov. Code, § 12511.) Within their counties, district attorneys have similar authority in the criminal context (Gov. Code, § 26500), subject to the supervisory authority of the Attorney General (Gov. Code, § 12550). But the *Safer* rule makes clear that district attorneys lack plenary authority for civil litigation. (*Safer, supra,* 15 Cal.3d at p. 237.[13]) If and when the Legislature intends to authorize a dis-

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[13] The District Attorney argues that "there is no difference between criminal and civil law enforcement actions for penalties." (Opening Br. at p. 32.) That is irreconcilable with the logic *Safer*, which emphasized that the authority of a district attorney is narrower in the civil context. (*Safer, supra,* 15 Cal.3d at p. 237 & fn. 11.) The Opening Brief cites *Altus Finance* for the proposition that the Court "fail[ed] to discern a difference, for present purposes, between the Attorney General's seeking criminal penalties or civil penalties." (Opening Br. at pp. 32-33, citing *Altus Fin., supra,* 36 Cal.4th at p. 1306.) As the quote from *Altus Finance* makes clear, however, that case was brought by the Attorney General, and "the present purposes" in that case had nothing to do with the geographic scope of a district attorney's authority.

trict attorney to prosecute civil claims, it does so by enacting a statute that specifically says so; a district attorney "has no authority to prosecute civil actions absent specific legislative authorization[.]" (*Humberto S.*, *supra*, 43 Cal.4th at p. 753; *Safer, supra*, 15 Cal.3d at p. 237; *Solus, supra*, 224 Cal.App.4th at p. 43.)

In this context, Legislative authorizations are not liberally construed. The Legislature has "countenanced the district attorney's participation" with "specificity and narrow perimeters." (*Safer, supra*, 15 Cal.3d at p. 236.) Thus, when the scope of a district attorney's authority to prosecute civil claims is at issue, California courts apply a strict interpretive rule: The Legislature must "affirmatively specify the circumstances in which a district attorney *can* pursue claims in the civil arena, not the circumstances in which he *cannot*." (*Solus*, *supra*, 224 Cal.App.4th at p. 42.) Under that rule, the Court will "infer the district attorney's lack of authority to proceed where no authority is granted." (*Id.* at p. 43.) Legislative silence, in other words, is interpreted *against* district attorney authority, not in favor of it.[14]

Unlike the few, narrow statutes that expressly authorize a district attorney to act extraterritorially (see Gov. Code, §§ 26507, 26508), the UCL does not contain any such express authorization. Given district and city attorneys' statutory and constitutional roles

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[14] For this reason, the District Attorney's claim that the Court of Appeal "read into a statute a limitation that is not there" (Opening Br. at p. 25), has no merit. The rule that a "district attorney has no authority to prosecute civil actions absent specific legislative authorization" (*Humberto S.*, *supra*, 43 Cal.4th at p. 753), is, in fact, an appropriate limitation on a general statute that lacks a "specific authorization."

as local officials enforcing laws within their particular jurisdiction and the rule of narrow construction, statutory silence on the issue cannot equate to Legislative consent.

2.
The Unfair Competition Law's Authorizing District Attorneys to Bring Claims on Behalf of "The People of the State of California" Does Not Vest District Attorneys with Statewide Enforcement Authority.

The Opening Brief argues that the UCL conveys statewide enforcement authority on district and city attorneys because it permits them to bring claims on behalf of "the People of the State of California." (Bus. & Prof. Code, §§ 17204, 17206; see also Gov. Code, § 100, subd. (b) ["The style of all process shall be "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority."].) The District Attorney argues that, in so doing, he "represents the State, not the county." (Opening Br. at p. 33, quoting *People v. Garcia* (2006) 29 Cal.4th 1070, 1080-81.) But the manner in which a district attorney is authorized to style litigation does not mean that he has the authority to bring civil litigation for violations anywhere and throughout California.

It has long been settled law that in prosecuting crimes, a district attorney "acts by the authority and in the name of the people of the state." (*Pitts*, *supra*, 17 Cal.4th at p. 359, quoting *County of Modoc v. Spencer* (1894) 103 Cal. 498, 501.) The district attorney "represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 122, quoting

Fleming v. Hance (1908) 153 Cal. 162, 167.) And when the Legislature permitted the Attorney General, district attorneys, and certain city attorneys to *civilly* enforce the UCL by authority and in the name of "the People of the State of California," it authorized bringing that sovereignty to bear. But the source of the district attorney's power does not dictate the scope of that power.

"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 District Attorney seems to assume—automatically convey an unlimited license to exercise that power anywhere and everywhere throughout the State. That assumption is not only unsupported, it bucks decades of precedent acknowledging that district attorneys may prosecute actions on behalf of "the People" only for offenses within their counties. *See supra,* Section I.A.

It also runs contrary to the only other published appellate decision to specifically address the geographic limits on a district attorney's authority to enforce and obtain remedies under the UCL, the Court of Appeal's 1978 decision in *People v. Hy-Lond Enterprises. Inc.* In *Hy-Lond*, the Napa County District Attorney entered into a statewide settlement of UCL claims against a chain of 18 hospitals in 12 different counties, including Napa. (*Hy-Lond, supra,* 93 Cal.App.3d at p. 740.) The settlement resolved all claims statewide for $40,000 in penalties and various injunctive relief, in

return for "absolution for all its past sins, whether fancied or actual, in all 12 counties in which it owned facilities." (*Id.* at pp. 741-42 & fn. 2, 749 & fn. 7.)

After judgment was entered, the Attorney General—acting in the interests of the State Department of Health Services—moved to intervene and vacate the settlement under Code of Civil Procedure section 663. (*Hy-Lond, supra*, 93 Cal.App.3d at p. 742.) The Attorney General argued that the "district attorney had exceeded his authority in stipulating away certain rights and duties reserved to the office of Attorney General and to the Department respectively." (*Id.* at p. 745.) Because "there still was an alleged lack of authority [by the district attorney] to effect the settlement on the terms embodied in the judgment" (*id.* at p. 747), the Attorney General asked the superior court to vacate the judgment in its entirety, or at least to amend the judgment "to the extent that it purports to bind governmental officials and agencies who were not parties to the action." (*Id.* at p. 743.) The trial court denied the motion and the Attorney General appealed.

The Court of Appeal explained that it was "called upon to determine the authority conferred on the district attorney by ... § 17204[.]" (*Id.* at p. 752.[15]) The Court first dispensed with the argument the District Attorney makes here: that in bringing a claim on behalf of the "People of the State of California," a district attorney has authority to act statewide. (*Hy-Lond, supra*, 93 Cal.App.3d

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[15] *Hy-Lond* also addressed a nearly identical provision in section 17535, which is not at issue here and has no bearing on the analysis. (*See Hy-Lond, supra*, 93 Cal.App.3d at p. 747.)

at p. 751.) Government Code section 100 requires all process to be styled in that matter. But that styling did not delimit "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.*)[16]

Instead, as here, the question turned on the district attorney's statutory authority—specifically, whether section 17204 authorized the district attorney to bring and compromise a statewide action, which would have the effect of binding the Attorney General, other state agencies, and other district attorneys. (*Hy-Lond, supra*, 93 Cal.App.3d at pp. 751-752.) As the court explained, while section 17204 authorized a district attorney to prosecute some action under the UCL, it did not afford him "uncircumscribed authority" to "restrain the powers of other public officials and agencies." (*Id.* at 752.) Section 17204 did not permit "the district attorney to surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other

[16] The Court of Appeal recently reaffirmed that even when a district attorney acts as a state officer in bringing UCL actions as "a representative of the People of the State of California," it still "is true" that "the district attorney's territorial jurisdiction is limited to the county in which he or she serves[.]" (*GameStop, supra*, 26 Cal.App.5th at p. 511 n.6).

counties under [the UCL][17]." (*Id.* at 753, discussing *Sacramento Cty. v. Cent. Pac. R. Co.* (1882) 61 Cal. 250, 255.)[18]

Finally, *Hy-Lond* expressly noted the conflict of interest that would result from "put[ting] the initiating district attorney in the position of bargaining for the recovery of civil penalties that would flow into his county's coffers, at the expense of surrendering the rights and duties of the state to control the respondent's activities generally through the powers of the Attorney General (other district attorneys) and the Department." (*Hy-Lond*, *supra*, 93 Cal.App.3d at p. 753.) This concern is especially prescient where, as here, a district attorney relies on a cadre of private attorneys to press claims under a curious compensation structure,[19] adding yet

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[17] During the pendency of the appeal in *Hy-Lond*, the UCL was moved from its original location in the Civil Code to the Business & Professions Code. (*See Hy-Lond*, *supra*, 93 Cal.App.3d at p. 739.) The recodification does not affect the analysis.

[18] Although *Hy-Lond* features prominently in the Opinion and dissent, the Opening Brief does not mention the case, let alone discuss it. Elsewhere the District Attorney has suggested that various parts of *Hy-Lond* are "dicta," and Defendants expect he will do so on reply. Had the district attorney in *Hy-Lond* 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. That makes the ruling more than dictum. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1047 fn.3 [defining dictum as a comment "unnecessary to the decision in the case"]; *People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [same].)

[19] Under the District Attorney's fee agreement with his outside counsel, counsel are not paid an hourly rate or a contingency. They are instead permitted to "apply for an award of attorneys' fees and costs as against one or more of the defendants in the Litigation pursuant to Code of Civil Procedure Section 1021.5[.]" Ex. 20

another layer of potential conflicts. (Cf. *Cty. of Santa Clara v. Superior Court* (2006) 50 Cal.4th 35, 62 ("*Santa Clara*") [recognizing the "possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary reward"].)

Moreover, if authorizing "any district attorney" to bring civil litigation on behalf of "the People" were to convey specific Legislative permission for statewide enforcement by 58 different locally elected prosecutors (and certain city attorneys too), that broad authority would by no means be limited to enforcing the UCL. 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.[20] It would make no sense at

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§ 7.1.1.1. A government plaintiff suing private defendants, however, can never recover its fees under section 1021.5. (Code Civ. Proc., § 1021.5 ["With respect to actions involving public entities, this section applies to allowances *against, but not in favor of,* public entities," emphasis added]; see also *City of Carmel-By-The-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 254 [so holding].) Nor is there any other basis for the District Attorney to recover his outside counsel's fees from the defendants. (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 889 [holding that the UCL itself does not permit public prosecutors to recover attorneys' fees].) The upshot of this curious arrangement is that if this case is taken to trial and judgment, the District Attorney's outside counsel will not get paid.

[20] See, e.g., 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];

all for courts to interpret that silence, in every single one of these provisions, to imbue a local district attorney (and sometimes city attorneys as well) with power to enforce these laws statewide. For instance, if the District Attorney's construction of the UCL is correct, it would follow that the Humboldt County District Attorney has civil enforcement authority over pool heater pilot lights in the San Fernando Valley, (see Pub. Res. Code, § 25967, subd. (a)), or video store customer records in Irvine (see Civ. Code, § 1799.3, subd (d)(1)). Such a result would make no sense.

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 & Saf. Code, §§ 25422 [mishandling landfill gas]; 116840 [misuse of water treatment devices]; Lab. Code, §§ 1309.5 [sexual exploitation of minors]; 3820 [violations of workers' compensation laws]; Penal Code, § 653.59 [unlawful practices by immigration consultants]; Pub. Res. Code, § 25967 [violations of energy efficiency laws].

3.
The Availability of Statewide Injunctive Relief Does Not Mean That a District Attorney Has the Authority to Seek Penalties or Restitution Statewide.

Defendants do not dispute that a public prosecutor, and indeed any private plaintiff with standing, can obtain an order enjoining a defendant from violating the UCL. (See §§ 17203, 17204.) So long as the plaintiff can show that a violation is likely to recur (*Madrid v. Perot Sys. Corp.* (2005) 130 Cal.App.4th 440, 465), an injunction will generally take the form of an order prohibiting the defendant from engaging in whatever activity has been found to violate the UCL. (See, e.g., *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 530 (*Fremont Life*) [in a UCL action based on fraudulent marketing of insurance products, the court "enjoined numerous acts, ranging from the conduct of insurance agents in the residence of a prospective customer and disclosures in policies and brochures, to the size of the margin on the annuity policy"]; *People v. Los Angeles Palm, Inc.* (1981) 121 Cal.App.3d 25, 27 [in a UCL violation based on Labor Code violations "the court enjoined defendant from crediting tips against wages owed"].) Defendants also do not dispute that once such an injunction is issued, an action to seek redress for a violation of that injunction can be brought in any court of competent jurisdiction in the state where the violation occurs. (§ 17207, subd. (b).)

But the District Attorney's action in the trial court is not to enforce an injunction arising from a violation of the UCL. It is to try to prove that UCL has been violated and to obtain remedies for that alleged violation. (See generally Ex. 7.) None of the three cases

cited in the Opening Brief stands for the proposition that a local prosecutor may obtain an injunction under the UCL based on conduct that occurred outside his territorial jurisdiction. Instead, each stands only for the uncontroversial, but inapposite, proposition—set forth in section 17203—that "[a]ny person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." (See § 17203; *Churchill Vill., L.L.C. v. Gen. Elec. Co.* (N.D.Cal. 2000) 169 F.Supp.2d 1119, 1126 [quoting former version of § 17203]; *Comm. On Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 209 [quoting 1972 case that quoted former version of § 17203]; *People ex rel. Mosk v. Nat'l Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771 [relying on former Civil Code, § 3369, subsequently recodified at § 17203].)

4.

Statutory Authorizations for "the Court" to Award Penalties and Restitution Are Not Express Authorizations for Every Local Prosecutor to Obtain Them.

The District Attorney erroneously claims that because the UCL's remedial provisions are framed in terms of the authority of "the court" to award restitution (§§ 17203, 17206), a court may award restitution for any purported violation, regardless of whether the particular plaintiff itself is permitted to seek or obtain it. (See Opening Br. at p. 27 ["Restitution is a matter expressly vested in the sound discretion of the trial court ... , regardless of the attorney that files the case."].) This argument is manifestly wrong.

A statutory authorization for "the court" to award a type of relief is not a license for that court to grant that relief to anyone who states an actionable claim. Statutory references to a "court may" or a "court must" in the context of remedial statutes are common in California.[21] They simply reflect a common drafting practice employed to authorize courts to award remedies to a plaintiff who is permitted to obtain them and under facts that merit the award. These general authorizations do not preclude courts from determining that a plaintiff lacks standing to recover a particular court-awardable remedy at the pleading stage. (See, e.g., *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1284 [affirming an order granting a motion to strike plaintiffs' prayer for attorneys' fees, where the Elder Abuse Act, Welf. & Inst. Code, § 15657, pro-

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[21] See generally Bus. & Prof. Code, § 22948.23 [a "court may enjoin a person" who provides the operation of a voice recognition feature without informing the consumer of the feature]; Civ. Code, § 1695.7 ["the court may award exemplary damages or equitable relief" for violations of the Home Equity Sales Contracts Act]; Civ. Code, § 1798.90.54 ["The court may award" a number of remedies for harm caused by unauthorized access to an automated license plate recognition system.]; Corp. Code, § 5420 [court "may award punitive damages" where party, intending to defraud the corporation, made a distribution]; Fin. Code, § 4978 [a "court may, in addition to any other remedy, award punitive damages to" a consumer harmed by predatory lending]; Gov. Code, § 11130.5 [a "court may award costs and reasonable attorney's fees to the plaintiff" for violation of the Open Meetings Act]; Labor Code, § 1073 ["The court may preliminarily or permanently enjoin the continued violation of this chapter."]; Pub. Res. Code, § 25966 ["The court may make such orders or judgments ... as may be necessary to prevent" the sale of residential gas appliances with a pilot light.].

vided that "[t]he court shall award to the plaintiff reasonable attorney's fees and costs," but the plaintiffs, whose relative was subject to elder abuse, lacked standing to obtain that relief under the Act].)

Notably, the Opening Brief cites no case adopting the District Attorney's position that a court may automatically award any relief mentioned in the UCL regardless of the plaintiff's standing to seek it. In fact, that position is inconsistent with this Court's longstanding interpretation of the UCL. In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 (*Korea Supply*), the Court held that a demurrer was properly sustained where the plaintiff sought restitution that was not available *to it*, even though the court was authorized under Business & Professions Code section 17203 to award that relief had it been sought by the appropriate plaintiff.

There, the plaintiff, Korea Supply, alleged that the defendant, its competitor, violated the UCL when it won a competitive bid for a Korean government defense contract by bribing Korean officials. (*Id.* at p. 1140.) It was undisputed that the allegations, if true, would violate the UCL. But Korea Supply did not have an ownership interest or any other vested interest in the money it sought to recover from the defendant, and so it did not have a claim to restitution—the only form of monetary relief authorized in an individual UCL action. (*Id.* at pp. 1148-1149.) Because the UCL did not authorize a plaintiff in Korea Supply's position to pursue

monetary relief under the statute, the trial court appropriately resolved the issue at the pleading stage by granting defendant's demurrer on the UCL claim. (*Id.* at p. 1166.)

As now, the UCL's remedial provisions authorized "[t]he court" to "make such orders or judgments, ... as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (§ 17203.) But that did not require the trial court in *Korea Supply* to hear the case through trial or authorize it to *sua sponte* fashion a remedy in that action for anyone who might have been affected by the alleged violation. Instead, the Court confirmed that such remedies should be sought in due course by the "direct victims" authorized to pursue them. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1152 [emphasizing that the UCL allows "any consumer to combat unfair competition by seeking an injunction against unfair business practices" and that "[a]ctual direct victims of unfair competition may obtain restitution as well."].) The procedural posture here is not meaningfully distinguishable from *Korea Supply*. (See also *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1006 (*Feitelberg*) [affirming grant of motion to strike prayer for nonrestitutionary disgorgement from plaintiff's complaint].)

In arguing otherwise, the District Attorney misleadingly cites cases that do not stand for the propositions he asserts. For instance, he says that "[u]nless the law states otherwise, government prosecutors have the same broad legislative mandate to seek restitution on behalf of the People of California, not just residents

of a particular geographic area, in UCL actions." (Opening Br. at p. 26; see also *id.* at p. 27 ["There is accordingly no intended geographic limitation on the scope of restitution that may be granted in a UCL action."].) In support that that proposition, he cites *Altus* and *Fremont Life.* But neither case actually says that or even stands for any remotely related proposition.

The cited pages from *Altus* contain a discussion regarding whether the Attorney General can obtain restitution under UCL for insurance law violations even though Insurance Commissioner has the exclusive right under the Insurance Code to seek consumer relief. (*Altus, supra,* 36 Cal.4th at pp. 1303-07.) And the cited part of *Fremont Life* explains that a court can award restitution without proof of individualized causation. (*Fremont Life, supra,* 104 Cal.App.4th at p. 531.) How those discussions support the stated proposition is not clear. Indeed, both cases were brought by the Attorney General. They thus have nothing to say about the scope of a district attorney's authority to obtain extraterritorial remedies.

The other two cases cited by the District Attorney stand for the unremarkable proposition that, even without statutory authorization, courts may, in their discretion, award restitution to identifiable victims as an equitable remedy in an action brought by the Attorney General under the False Advertising Law. (See Opening Br. at p. 27, citing *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 19 fn. 9[22] and *People v. Superior Court (Jayhill)* (1973)

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[22] The Opening Brief refers to this case as *People v. Kraus, Co.*, but the citation is to *Pacific Land Research.*

9 Cal.3d 283, 286 (*Jayhill*).) Of course, the mere fact that such discretion may exist, wherever in the State the victims reside, in an Attorney General action, does not mean that such discretion exists in cases brought by local prosecutors. Nor does it mean that such discretion would exist in a case brought by a private plaintiff individually—a point rejected in *Korea Supply*. The Opening Brief cites no authority, because there is none, to suggest that a district attorney's power to obtain restitution is as broad as that of the Attorney General.

5.
Geographic Limits on District Attorneys' UCL Enforcement Authority Are Not Inconsistent with Proposition 64.

There is also no merit to the Opening Brief's suggestion that a geographic limit on a district attorney's enforcement authority would somehow be inconsistent with the UCL as amended by Proposition 64. Opening Br. at pp. 21-22).

Proposition 64 amended the UCL to provide that only a person who "has suffered injury in fact and has lost money or property as a result of the unfair competition" may bring a private action under the UCL. (§§ 17203, 17204). The amendment clarified that "these limitations do not apply" to UCL claims by public prosecutors, § 17203, but that molehill is not the mountain the District Attorney makes it out to be. "[T]hese limitations"—i.e., the requirements of section 17204 that the person bringing the action show injury and causation—are simply not at issue here. Defendants are not arguing that the District Attorney must show that he was personally injured by the allegedly anticompetitive conduct.

They are arguing that, while the District Attorney is authorized to bring actions on behalf of the public despite lacking any such injury, the scope of that authority stops at the county line. Proposition 64 had nothing to say about that subject.

Requiring the District Attorney to establish that UCL violations occurred within his county is not inconsistent with Proposition 64 or any other aspect of the UCL. To the contrary, the same kind of proof is required in state-wide actions brought by the Attorney General because the UCL does not operate extraterritorially. (See *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207.)

6.

The Legislative History of the Unfair Competition Law Offers No Support for the District Attorney's Position.

The Opening Brief argues that the "so-called 'geographic boundaries' limitation that Defendants proposed" is not supported by "the legislative history of the UCL ... ." (Opening Br. at p. 24.) But the District Attorney has not actually submitted any legislative history to support that point.

The UCL has been amended many times since its original 1933 enactment in Civil Code section 3369. (See generally Wesley Howard, *Former Civil Code Section 3369: A Study in Judicial Interpretation* (1979) 30 Hastings L.J. 705; Thomas Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awaits* (1982) 4 Whittier L. Rev. 561.) These amendments have included various expansions of the UCL's remedial provisions. (See *Jayhill, supra,* 9 Cal.3d at p. 287 fn. 2 [discussing origin of the UCL's civil penalties provision]; *People v. Superior Court (Cahuenga's The*

Spot) (2015) 234 Cal.App.4th 1360, 1379 [discussing legislative history of UCL remedies in general].)

The authority for the Attorney General and district attorneys to seek injunctive relief was present in the original 1933 enactment. (See Stats. 1933, ch. 953, p. 2482 [codifying Civil Code, § 3369, subd. (5)].) Over the years, the Legislature made many changes to the lists of prosecutors permitted to civilly enforce the UCL, including several amendments after *Hy-Lond* held that the UCL did *not* authorize statewide enforcement by district attorneys. (See, e.g., Stats. 1974, ch. 746, §§ 1, 2, pp. 1654-55 [adding city attorneys for cities with populations over 750,000 and civil penalty provisions]; Stats. 1977, ch. 299, pp. 1201-04 [codifying the UCL in the Business & Professions Code and giving enforcement authority to various local prosecutors]; Stats. 1988, ch. 790 p. 2557 [affording standing to San Jose City Attorney]; Stats. 2007, ch. 17, p. 64 [ensuring that San Francisco City Attorney had standing to bring UCL action, even if county population fell below 750,000].) None of these bills added text that expressly says a district attorney can bring statewide claims.

Moreover, the authority the District Attorney claims is contrary to the Attorney General's longstanding view of prosecutorial hierarchy within the executive branch of state government.[23] Un-

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[23] The California Attorney General has long history of intervening when his institutional prerogatives of the office vis-a-vis district attorneys are at stake. Specifically, his office has done so in a number of court cases to confirm that a district attorney's enforcement authority under the UCL is limited to her or his county. (See, e.g.,

der the circumstances, if anyone believed that the Legislature intended to enact such a dramatic change in the law, some evidence of that intent would be expected in the legislative history. Yet, despite all the legislative activity and the extensive legislative history that accompanied it, there is not a single suggestion that the Legislature, any individual legislator, any official in the executive branch, or even any public comment ever expressed any belief or concern that permitting district and city attorneys to enforce the UCL entailed an authorization for them to seek or obtain statewide relief restitution or civil penalties. (See generally RJN Exs. 1-28 [complete legislative history of the UCL].) The deafening silence in the legislative record weighs strongly against the District Attorney's construction of the UCL. (See *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 163 [the "absence of legislative history" supporting a "radical" change in law weighs against reading a statute to make such a change]; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169 [declining to construe a statute in a manner that would "substantially change[ ] the law" when the purported change " left no trace in the legislative history."].)

Hy-Lond, supra, 93 Cal.App.3d at 738 [describing views of former Attorney General Deukmejian]; *California v. M & P Investments* (E.D.Cal. 2002) 213 F.Supp.2d 1208, 1214 [describing consistent views of former attorney General Lockyer]; Ex. 10-A at pp. A139-144 [consistent views of former Attorney General Harris].) But the legislative history of the amendments to the UCL contain no materials from the Attorney General expressing a concern that the statutory text would somehow up-end the traditional division of authority between the Attorney General and local prosecutors. (See RJN Ex. 1-28.)

B.
Constitutional and Prudential Concerns Weigh Against the Right of Local Prosecutors to Seek or Obtain Statewide Relief.

The Opening Brief spills much ink arguing that the UCL is constitutional. (Opening Br. pp. 39-46.) But this is a strawman argument. Defendants have never argued, and the Court of Appeal did not hold, that the UCL violates the State Constitution.

What Defendants did argue, instead—consistent with the views of the Attorney General as an *amicus curiae*—is that given the hierarchical structure of the prosecutorial function within California's executive branch, one would expect more than an authorization to style litigation as being brought on behalf of "the People" before the Legislature deputized 58 separate locally elected district attorneys and four city attorneys to bring claims to redress violations of the UCL occurring outside their respective localities.

Indeed, in the absence of specific express legislative authorization otherwise, territorial limitations on the power local prosecutors in civil actions are both commonsensical and in furtherance of basic tenets of democratic accountability. In *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 ("*Younger*"), the Court of Appeal addressed the inverse question of when a court could force the Attorney General to use his supervisory authority (*see* Gov. Code, § 12550) to take over an otherwise local criminal prosecution due to disqualification of the entire district attorney's office. (86 Cal.App.3d at p. 203.) In explaining why courts should be wary of doing so, the Court of Appeal noted that it is the local district attorney—not the Attorney General—who

"has been chosen by vote of the electorate as the person to be entrusted with the significant discretionary powers of the office of district attorney and he is accountable to the electorate at the ballot box for his performance in prosecuting crime within the county." (*Ibid.*) If the "Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county." (*Id.* at p. 204.) "The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county." (*Ibid.*)

Younger's point is just as true in the inverse. Because the District Attorney is "accountable at the ballot box exclusively to the electorate of the county," (*Id.* at p. 203), unlike the Attorney General, he lacks democratic accountability to exercise prosecutorial discretion over civil litigations on behalf of residents of other counties in the state. Residents of Tulare County have no vote for or against the tactics employed by the Orange County District Attorney in this litigation, even though he purports to sue on their behalf. As the Attorney General explained in his amicus brief to the Court of Appeal:

> While residents of a county may express their pleasure or displeasure and hold their district attorney politically accountable for cases that the district attorney prosecutes, Californians outside of that county have no means to do so. Allowing that district attorney to have statewide UCL enforcement authority

> would thereby leave the vast majority of Californians without means to hold the prosecutor accountable. This fact underscores the constitutional limits on district attorneys' authority to prosecute violations of the UCL. Their authority should extend as far as their accountability—to their respective county's geographical limits, and no farther.

(Br. of the California Attorney General as Amicus Curiae in *Abbott Labs., et al. v. Superior Court* (filed Dec. 29, 2017) No. D072577 (*Becerra Amicus*) at p. 18.)

If a local district attorney decides that no action is merited, another district attorney in the state should not be permitted to veto that decision. Without doubt, the structure of state government subjects a local prosecutor's discretion to bring or not bring a civil action to the higher authority of the Attorney General. (Gov. Code, § 12550.) 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].)

Vesting statewide enforcement authority in sixty-two different local prosecutors with potentially conflicting interests also raises due process concerns over the preclusive scope of any judgment. After all, if the District Attorney has the authority to bring a statewide UCL case and obtain statewide relief on behalf of all of "the People" in the State, due process would generally require a

defense judgment in such a case to carry an equal preclusive weight. (See generally *W. U. Tel.* Co. *v. Com. of Pa., by Gottlieb* (1961) 368 U.S. 71, 75); see also *GameStop, supra,* 26 Cal.App.5th at p. 511 & fn. 6 [recognizing that "the People" could bring actions against a defendant "in the other counties within the state where it does business" "because the district attorney's territorial jurisdiction is limited to the county in which he or she serves"].) The District Attorney seems to acknowledge as much. (Opening Br., at p. 31, n.6) ["There is nothing ... that renders the Attorney General or other state prosecutors immune from the doctrines of collateral estoppel and res judicata."]) If the District Attorney can bring a statewide claim, he must be able to lose a statewide claim as well. But as the Attorney General put it, "[p]ermitting a local prosecutor to bind the entirety of the State without also having to answer to all voters in California is anathema to principles of prosecutorial accountability." (*Becerra Amicus* at p. 18.)

These concerns are heightened by the fact that, since 1974, the UCL's enforcement provisions grant enforcement power to the city attorneys of large cities using the same language that the District Attorney seizes upon to argue that he has state-wide enforcement authority under the UCL. (§§ 17204, 17206; see also Stats. 1974, ch. 746, § 1, p. 1654.) District attorneys lack statewide democratic accountability. But at least they are subject to the "'direct supervision' of the state Attorney General," who does. (See *PG&E, supra,* 16 Cal.4th at p. 1151, citing Cal. Const., art. V, § 13.) The Attorney General, however, has no such authority over city attorneys. (*See Daly v. Superior Court* (1977) 19 Cal.3d 132, 149 fn. 14

[noting that the "Constitution and Government Code do not provide for supervision by the Attorney General over city attorneys or city prosecutors"].)[24]

Had the Legislature authorized the city attorneys of the four largest cities in California to unilaterally enforce the UCL, unconstrained, on a statewide basis, one would expect that to garner at least some measurable amount of public controversy. (Nobody who has driven through the San Joaquin Valley from San Francisco to Los Angeles could claim ignorance of what the citizens of the less urban parts of this state think of the politicians elected by its metropolises.) Yet, there is no evidence, in the legislative history or otherwise, of any such contention. That silence, again, speaks loudly.

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[24] This absence of accountability is more severe under other statutes like the False Advertising Law, which, using language similar to §§ 17203, 17204, and 17206, further extend the ability to bring claims on behalf of "the People" to every city or county attorney in the State. (See, e.g., § 17535.5, subd. (b) [penalties "shall be assessed and recovered in a civil action brought ... in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney[.]"]; see also Health & Saf. Code, § 116840 [safety of water treatment systems]; Civ. Code, §§ 1716 [solicitations of orders]; 1812.33 [credit transactions involving women]; Lab. Code, § 1309.6 [child pornography]; Pub. Res. Code, § 25967 [gas pilot lights].) Many of these officials are appointed, not elected (see, e.g., Gov. Code, § 27640 ["In any county a county counsel may be appointed by the board of supervisors."]), and some, like the city attorneys of many smaller cities are private practitioners working under contract. (See 99 Ops.Cal.Atty.Gen. 35 (2016) ["Cities without sufficient legal work to support the employment of a full-time city attorney often contract with a private attorney to perform city attorney legal services at an agreed-upon rate."].)

III.
THE FORM OF THE ATTORNEY GENERAL'S AUTHORIZATION FOR A DISTRICT ATTORNEY TO ACT ON HIS BEHALF IS NOT PRESENTED IN THIS CASE.

The Opinion states that "in the absence of written consent by the Attorney General and other county district attorneys, the District Attorney must confine ... monetary recovery [under the UCL] to violations occurring within the county he serves." (Opinion at pp. 4-5.) The District Attorney attacks the Court of Appeal for inventing a "written consent requirement" that does not appear in any statute. (Opening Br. at pp. 47-50.) But the form in which the Attorney General (or other district attorneys) should consent to the extraterritorial enforcement of the UCL by a district attorney has no bearing on the disposition of this appeal. The record is clear in this case that the District Attorney has never obtained any consent, whether in writing, orally, or implicitly.

Moreover, the District Attorney is ascribing more importance to a brief passage in the Opinion than the Court of Appeal seemed to intend. The allegedly objectionable language is just a summary of a later section of the Opinion that makes clear that there remain available procedural avenues for a local prosecutor who believes "there is public benefit to a multi-jurisdictional action." (Opinion at pp. 37-38 & fn. 37.) The Opinion's non-controversial observation that a district attorney may pursue relief for UCL violations outside his county by joining with other local prosecutors or the Attorney General was collateral to its holding, and does not justify reversal.

IV.
A MOTION TO STRIKE WAS THE APPROPRIATE PROCEDURAL VEHICLE FOR DEFENDANTS TO OBTAIN A RULING ON THE PURELY LEGAL ISSUE OF GEOGRAPHIC SCOPE OF THE DISTRICT ATTORNEY'S AUTHORITY.

Finally, the District Attorney contends that a motion to strike was an improper procedural vehicle for Defendants to obtain a ruling on the limits of his authority. (*See* Opening Br. at p. 51.) This too is incorrect.

This Court recently recognized that a "defective portion of a cause of action is subject to a conventional motion to strike[.]" (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 (*Baral*), citing *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 (*PH II*).) Strike-able "defects" include allegations implicating relief that the plaintiff lacks standing or authority to obtain as a matter of law. (See, e.g., *Pac. Gas & Elec. Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 27; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 385; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 213-215.)

As the Court of Appeal explained in *PH II*, a motion to strike is the appropriate remedy when "a portion of a cause of action [is] substantively defective on the face of the complaint." (*PH II*, *supra*, 33 Cal.App.4th at p. 1682.) "[I]n such cases, the defendant should not have to suffer discovery and navigate the often dense thicket of proceedings in summary adjudication." (*Ibid.*) "[W]hen a substantive defect is clear from the face of a complaint, such as a ... purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to

strike." (*Id.* at p. 1683.) That is precisely the relief Defendants sought in the superior court.

The Complaint included numerous references to "California Niaspan users, their insurers, public healthcare providers and other government payors" as well as acts alleged to have occurred "in California," "within California," and "across and within California." (Ex. 7 ¶¶ 1, 2, 3, 17, 40, 114, 123, 132, 133, 134-40, 141, 151, 154, 155, 165.) The clear implication of these allegations is that the District Attorney is seeking relief for UCL violations occurring entirely outside of Orange County. Because Defendants contended (correctly) that the District Attorney lacks authority to bring those claims or seek that relief, Defendants properly moved under Code of Civil Procedure section 436, subdivisions (a) and (b), to strike these allegations as "irrelevant" and "improper matter" and "not drawn ... in conformity with the laws of this state." (Ex. 8 at p. A118.)[25]

In the superior court, the District Attorney did not deny that these allegations constituted an effort to bring statewide claims. His only opposition to the motion to strike was to argue that he did, in fact, have authority to obtain the relief he sought. (See generally Ex. 11.) He made no procedural objection at all. His after-the-fact attempt to characterize these allegations as being relevant

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[25] The Opening Brief complains that the allegations at issue were "truthful factual allegations." (Opening Br. at p. 50.) The purpose of striking them, however, is not that they are false, but that, even if true, they are "irrelevant" because they address relief that the District Attorney cannot obtain as a matter of law. (Code Civ. Proc., § 436.)

for some other purpose, *i.e.* for seeking statewide injunctive relief and for the court to consider in setting a penalty (Opening Br. at pp. 51-52), is disingenuous.

Moreover, not every one of the sixteen allegations that were the subject of Defendants' motion implicates the scope of injunctive relief or the court's discretion to award penalties. For instance, Defendants moved to strike the words "in California" from paragraph 165 of the Complaint. (Ex. 8 at p. A118 [motion]; Ex. 7 at p. A109 ¶ 165 [allegation].) That paragraph alleges that harm Defendants caused throughout California outweighs the justifications for their practices and thus violates the "unfair" prong of the UCL under one test articulated in the case law. (See *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839 [setting out test quoted in the pleading].) In the context of the Complaint, the unambiguous purpose of that paragraph is to allege liability based on statewide conduct. The allegation is irrelevant to the superior court's discretion to assess a civil penalty for violations within Orange County. Indeed, the civil penalty allegations are stated later in the First Cause of Action, in paragraph 168. (Ex. 7 at p. A109 ¶ 168.)

Similarly, paragraph 155 does not allege statewide harm, or even violations. It says only that "Defendants transmitted funds and contracts, invoices, and other forms of business communications and transactions in a continuous and uninterrupted flow of commerce across and within California in connection with the sale of Niaspan." (Ex. 7 at p. A107 ¶ 155.) Regardless of the breadth of the superior court's discretion to award penalties, the transmission of documents "across and within California" has no logical bearing

on it. Once again, the only apparent purpose of this allegation is to allege state-wide UCL violations, which the District Attorney has no the authority to pursue.

It would be inequitable to force Defendants to submit to discovery and go to trial on expansive statewide claims the District Attorney has no authority to litigate. A late-developed contrivance that facial allegations of statewide violations might also tangentially relate to other issue does not merit a reversal of the Court of Appeal. Civil procedure is not a game that "reward[s] artful pleading" (*Baral, supra*, 1 Cal.5th at p. 393), which is exactly what the District Attorney is attempting through this argument.

CONCLUSION

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 13,952 words.

Dated: November 21, 2018

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 November 21, 2018, 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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[X] BY ELECTRONIC SERVICE ON STATE OF CALIFORNIA DEPARTMENT OF JUSTICE: I caused the above listed document to be electronically uploaded to the State of California Department of Justice website: https://oag.ca.gov/services-info/17209-brief/add.

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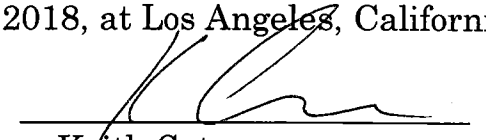
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 21, 2018, at Los Angeles, California.



Keith Catuara