**Case No. S249895**

# IN THE SUPREME COURT OF CALIFORNIA

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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.*

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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

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## ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS


INTRODUCTION ..... 9

PROCEDURAL AND FACTUAL BACKGROUND ..... 11

ARGUMENT ..... 15

I. REVIEW BY THIS COURT IS UNNECESSARY TO SECURE UNIFORMITY IN CALIFORNIA LAW OR TO SETTLE AN IMPORTANT QUESTION OF LAW ..... 15

A. The Court of Appeal's Opinion Is Grounded in Settled Principles Embodied in the Constitution, the Text of the Pertinent Statutes, and the Available Precedent. ... 15

B. Review of the Court of Appeal's Opinion Is Unnecessary to Resolve Inconsistencies in California Law. ..... 18

1. The Only Other Published Court of Appeal Decision Addressing the Geographic Scope of District Attorneys' Civil Enforcement Authority Is in Accord. ..... 19

2. The Prior Conflict In Superior Court Decisions Is Irrelevant. ..... 20

3. There Is No Other Split of Authority. ..... 20

a. There Are No "Conflicting Interpretations" of the *Safer* Rule. 20

b. The Opinion Is Not Inconsistent with "Law Governing UCL Enforcement Actions." 27

C. The District Attorney's Contentions that the Opinion "Is Legally Erroneous" Do Not Merit Review. ..... 29

1. Statutory Authorizations for Courts to Award Certain Forms of Relief Do Not Expand Local Law Enforcement Officials' Powers to Obtain It. ..... 29

2. The Petition's Other Contentions of Error Do Not Merit Review. ..... 33

II. THE COURT OF APPEAL HAD JURISDICTION TO ENTERTAIN THE PETITION AND GRANT THE WRIT..... 35

CERTIFICATE OF WORD COUNT ..... 39

CERTIFICATE OF SERVICE ..... 40

ANSWER TO PETITION FOR REVIEW..... 40

## TABLE OF AUTHORITIES

**Page(s)**

### California Cases

*Alch v. Superior Court* (2004)
122 Cal.App.4th 339 ..... 32

*Angelucci v. Century Supper Club* (2007)
41 Cal.4th 160 ..... 20

*Auto Equity Sales, Inc. v. Superior Court* (1962)
57 Cal.2d 450 ..... 19

*Baral v. Schnitt* (2016)
1 Cal.5th 376, 393 ..... 35

*Bd. of Sup'rs of Los Angeles Cty. v. Simpson* (1951)
36 Cal.2d 671 ..... 25

*Blue Cross of California, Inc. v. Superior Court* (2009)
180 Cal.App.4th 138 ..... 20, 21

*Briggs v. Brown* (2017)
3 Cal.5th 808, 861 ..... 28

*Caliber Bodyworks, Inc. v. Superior Court* (2005)
134 Cal.App.4th 365 ..... 35

*California Redevelopment Assn. v. Matosantos* (2011)
53 Cal. 4th 231 ..... 23, 24

*In re Christian S.* (1994)
7 Cal.4th 768 ..... 24

*Clements v. T. R. Bechtel Co.* (1954)
43 Cal.2d 227 ..... 34

*Commodore Home Systems, Inc. v. Superior Court* (1982)
32 Cal.3d 211 ..... 36

*D'Amico v. Bd. of Med. Examiners* (1974)
11 Cal.3d 1 ..... 15

*In re Dennis H.* (2001)
88 Cal.App.4th 94 ..... 26

*Feitelberg v. Credit Suisse First Boston, LLC* (2005)
134 Cal.App.4th 997 ..... 31, 32

*Korea Supply Co. v. Lockheed Martin Corp.* (2003)
29 Cal.4th 1134 ..... 30, 31, 32

*Kraus v. Trinity Mgmt. Servs., Inc.* (2000)
23 Cal.4th 116 ..... 31, 32

*Metcalf v. Cty. of San Joaquin* (2008)
42 Cal.4th 1121 ..... 34

*Pacific Gas & Electric Co. v. County of Stanislaus* (1997)
16 Cal.4th 1143 ..... 16, 25

*People v. Davis* (1905)
147 Cal. 346 ..... 28

*People v. Eubanks* (1996)
14 Cal.4th 580 ..... 15

*People v. Hy-Lond Enterprises. Inc.* (1979)
93 Cal.App.3d 734 ..... *passim*

*People v. McKale* (1979)
25 Cal.3d 626 ..... 16, 22, 23, 26

*People v. Parmar* (2001)
86 Cal.App.4th 781 ..... 25

*People v. Superior Court (Humberto S.)* (2008)
43 Cal.4th 737 ..... 15, 16

*People v. Superior Court (Solus Industrial Innovations, LLC)* (2014)
224 Cal.App.4th 33 ..... 16, 24

*PH II, Inc. v. Superior Court* (1995)
33 Cal.App.4th 1680 ..... 36

*Pitts v. Cty. of Kern* (1998)
17 Cal.4th 340 ..... 24

*Quiroz v. Seventh Ave. Center* (2006)
140 Cal.App.4th 1256 ..... 29

*Rauber v. Herman* (1991)
229 Cal.App.3d 942 ..... 25

*Safer v. Superior Court* (1975)
15 Cal.3d 230 ..... *passim*

*State of California v. Altus Fin.* (2005)
36 Cal.4th 1284 ..... 22, 33

*Sullivan v. Oracle Corp.* (2011)
51 Cal.4th 1191 ..... 27

*In re Tobacco II Cases* (2009)
46 Cal.4th 298 ..... 26, 27

*Wilson v. 21st Century Ins. Co.* (2007)
42 Cal.4th 713 ..... 20

**Federal Cases**

*Whitman v. American Trucking Assns., Inc.* (2001)
531 U.S. 457 ..... 24

**Constitutional Provisions**

Cal. Const., art. V, § 11 ..... 15

Cal. Const., art. V, § 13 ..... 15, 26

Cal. Const., art. XI, § 1 ..... 15

**California Statutes**


Bus. & Prof. Code
§ 16750 ..... 17
§ 16754 ..... 22
§ 16760 ..... 17
§ 17200, *et seq.* ..... *passim*
§ 17203 ..... 14, 28, 31, 32
§ 17204 ..... 21, 22
§ 17206 ..... 28, 32
§ 22948.23 ..... 29

Civ. Code
§ 731 ..... 25
§ 1695.7 ..... 29
§ 1798.90.54 ..... 29

Code Civ. Proc.
§ 436 ..... 11, 36

Corp. Code
§ 5420 ..... 29

Fin. Code
§ 4978 ..... 29

Gov. Code
§ 11130.5 ..... 29
§ 24009, subd. (a) ..... 15
§ 26057 ..... 17
§ 26500 ..... 23, 24
§ 26508 ..... 17
§ 26528 ..... 25

Health & Safety Code
§ 1340 ..... 21

Labor Code
§ 1073 ..... 29

Pub. Res. Code
§ 25966 ..... 29

**Court Rules**

Rules of Court, rule 8.264 ..... 14

Rules of Court, rule 8.500 ..... *passim*

**Other Authorities**

1980 Stats., ch. 1094, p. 3507 ..... 23

9 Witkin, California Procedure (2018 online ed.),
Appeal § 915 ..... 14

9 Witkin, California Procedure (2018 online ed.)
Appeal, § 916 ..... 35

## INTRODUCTION

The District Attorney of Orange County seeks review of a Court of Appeal decision that applied basic Constitutional principles and this Court's settled precedent to find that the District Attorney does not have authority to pursue relief under the Unfair Competition Law, Business & Professions Code section 17200, et seq. ("UCL"), for violations outside of Orange County, and that the trial court should have stricken from the Complaint allegations to the contrary. The Court of Appeal's straightforward conclusion was overwhelmingly endorsed by amici public prosecutors—including the Attorney General—and it is consistent with the only other published Court of Appeal decision on the issue. There is no unsettled question for this Court to resolve and no split of authority below. Review should therefore be denied. (Rules of Court, rule 8.500(b)(1).).

The District Attorney, under a murky fee arrangement with private plaintiffs' lawyers, filed the instant action demanding relief he has no authority to obtain. In particular, the District Attorney's Complaint demands restitution and civil penalties under the UCL for transactions with consumers statewide, including in the fifty-seven counties whose citizens he does not represent and where the citizens have not elected him.

Defendants objected to the District Attorney's attempt to prosecute this action in excess of his constitutional and statutory authority. The Attorney General agreed with Defendants, as did the California District Attorneys Association ("CDAA"), which "is composed of the 58 elected district attorneys, numerous city

attorneys, and their respective deputies, who are charged with criminal and civil law enforcement in California."

The Court of Appeal agreed too. It held that a district attorney's authority to recover restitution and civil penalties under the UCL is limited to violations occurring in the county that elected the district attorney. Consistent with this determination, it issued a writ requiring the trial court to grant a motion to strike the Complaint's contrary allegations.

Nothing in the Court of Appeal's decision merits the attention of this Court. The Court of Appeal's decision simply implemented the constitutional and statutory allocation of authority between the Attorney General and the district attorneys of each county, consistent with existing precedent. It faithfully followed this Court's holdings that a district attorney may not bring civil suits except as clearly and explicitly authorized by the Legislature. It tracked the text of the UCL, which by its plain terms does not give a local prosecutor the power to act extraterritorially. It is consistent with the holding of the only other decision of the Court of Appeal that addressed the scope of a district attorney's enforcement authority under the UCL. And it is correct in all respects.

The District Attorney's Petition for Review ("Petition") raises more than a dozen arguments, but fails to offer a single compelling reason justifying this Court's review. The Petition claims that the Opinion creates splits with various lines of precedent. But those "conflicts" are imagined: nothing in the precedent cited by the District Attorney is irreconcilable with the

Opinion. The Petition also raises various claims of "error," but there was no error, and even if there had been, mere "error" is not a sufficient basis for review. (Rules of Court, rule 8.500(b)).

Indeed, the Petition underscores why the Court should not grant review. The Petition's procedural quibbles with the Court of Appeal's reaching the merits are not review-worthy, and show that substantive issues are not, either. Moreover, most of the Petition's arguments—both procedural and substantive—are new in this Court. "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." (Rules of Court, rule 8.500(c)(1)).

The petition should be denied.

## 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. 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 for and restitution based on sales to consumers statewide, the vast majority of whom reside outside

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[1] Unspecified citations to statutory sections are to the Business and Professions Code.

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

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.) Under the authority of Code of Civil Procedure section 436, subdivisions (a) and (b), the Motion sought to strike certain references to California from the Complaint. The Motion argued they were "irrelevant," "improper matter," and "not drawn . . . in conformity with the laws of this state." (*Id.* at pp. A117–19.) Under the California Constitution, the rules of construction that apply to statutes granting civil law enforcement authority to local prosecutors, and appellate court precedent, district attorneys have no authority to bring claims under the UCL "outside the geographic boundaries of their local jurisdictions." (*Ibid.*)

The District Attorney opposed the Motion on the merits and the superior court denied it. (Ex. 15 [transcript]; Ex. 16 [brief] 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. Briefs in support of Defendants' petition were submitted by Attorney General Becerra; the California District Attorneys' Association, which represents all of the 58 district attorneys in the state and numerous city attorneys; and the Chamber of Commerce of the United States of America and the California Chamber of Commerce. Two amicus briefs were filed in support of the District Attorney, one by the Consumer Attorneys of California, an advocacy group for plaintiffs' attorneys, and one on behalf 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 the case was submitted. The Court of Appeal 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 considered: (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 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 in particular its prior decision in *People v. Hy-Lond Enterprises. Inc.* (1979) 93 Cal.App.3d 734, 753, which held that the district attorney had no right "to

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

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 structural and public policy concerns raised by the parties and their amici, (*id.* at pp. 33–38).

Taking these principles into account—including (and especially) the constitutional problems that could arise from finding the District Attorneys to have unbounded extraterritorial authority—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 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. His dissent primarily asserted that prudential reasons counseled against the Court of Appeal's having reached Defendant's substantive objections to the trial court's ruling. (Dissent at pp. 2–8.) The dissent would have addressed remedial issues only after a trial and entry of judgment (*Id.* at p. 4.)

The dissent nonetheless went on to address the merits. It read *Hy-Lond* as limited to its particular facts and procedural posture, and thus found it to be 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.

## ARGUMENT

### I. REVIEW BY THIS COURT IS UNNECESSARY TO SECURE UNIFORMITY IN CALIFORNIA LAW OR TO SETTLE AN IMPORTANT QUESTION OF LAW.

"The first and basic ground" for granting review—"[w]hen necessary to secure uniformity of decision or to settle an important question of law"—is not present here. (9 Witkin, California Procedure (2018 online ed.) Appeal, § 915, quoting Rules of Court, rule 8.500(b)(1).). The Court of Appeal's Opinion is grounded in settled constitutional principles and longstanding precedent; and is consistent with other appellate decisions in California.

#### A. The Court of Appeal's Opinion Is Grounded in Settled Principles Embodied in the Constitution, the Text of the Pertinent Statutes, and the Available Precedent.

The Court of Appeal's Opinion reflects a straightforward application of the Court's long-established interpretations of

constitutional, structural, and statutory principles. The Opinion is hardly revolutionary in concluding that a locally elected official cannot bring civil enforcement actions to recover remedies on behalf of the citizens of fifty-seven other counties whom he does not represent and who never cast a single vote for his office.

As the Opinion explains, the State 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.)

In contrast to the statewide authority expressly vested in the Attorney General, 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." (*People v. Eubanks* (1996) 14 Cal.4th 580, 589.) As a county official, a district attorney is elected by the citizens of only his or her county. (Cal. Const., art. XI, § 1; Gov. Code, § 24009, subd. (a).) Although district attorneys' criminal enforcement powers are plenary, their authority to bring civil actions is not. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753 (*Humberto S.*).) Indeed, "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." (*Safer*, *supra*, 15 Cal.3d 230 at p. 236.)

Thus, as is clear from this Court's precedents, in examining a district attorney's 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; *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1155–1156 (*PG&E*); *People v. McKale* (1979) 25 Cal.3d 626, 633 (*McKale*); *Safer*, *supra*, 15 Cal.3d at pp. 235–237). Subsequent Court of Appeal decisions, including the Opinion, have uniformly understood this rule[4] to mean that Legislative silence means the district attorney has no authority to bring civil claims. (See, e.g., *People v. Superior Court* (*Solus Industrial Innovations, LLC*) (2014) 224 Cal.App.4th 33, 42 (*Solus*), review denied Jun. 18, 2014, S217653. ["*Safer* . . . makes clear that the 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*." emphasis original]; see also Opinion at pp. 19–20.)

The Legislature has enacted several statutes that expressly expand district attorneys' authority to act jointly with others to

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[4] The District Attorney's Petition refers to this interpretive cannon as the "*Safer* rule." (See Petition at pp. 26–32.) For consistency and brevity, Defendants will follow the same convention.

bring claims outside of his or her home county in specifically enumerated circumstances. (Gov. Code, §§ 26057, 26508.) Similarly, other statutes passed by the Legislature expand district attorneys' authority to enforce specific laws extraterritorially. (See, e.g., § 16750, subd. (g), § 16760, subd. (g).) These statutes show that by "specifying a county district attorney's duties with respect to civil matters, the Legislature recognizes the" ordinary jurisdictional limitations that apply to the civil authority of district attorneys. (Opinion at p. 20.)

As the Opinion explains, these well-established principles resolve the question presented by Defendants' writ petition. "The 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 prosecutors at all levels of state government who are charged with enforcing the UCL. The Opinion merely reinforces what the Constitution, the text of the statute, and relevant precedent already make clear.

### B. Review of the Court of Appeal's Opinion Is Unnecessary to Resolve Inconsistencies in California Law.

The Opinion does not create a split in authority among decisions of the Court of Appeal. The only other Court of Appeal decision that addresses whether a district attorney has authority to enforce the UCL outside of his own county is *Hy-Lond,* which agrees that a district attorney does not. Unable to identify any

inconsistency in the decisions of the Court of Appeal, the District Attorney claims that the Opinion is at odds with various other principles and legal rules. The "conflicts" proposed by the District Attorney, however, do not exist. Indeed, the District Attorney did not even raise most these purported "conflicts" below, which both is an independent reason for denying review and shows that they are not conflicts at all. (Rules of Court, rule 8.500(c)(1).)

### 1. The Only Other Published Court of Appeal Decision Addressing the Geographic Scope of District Attorneys' Civil Enforcement Authority Is in Accord.

As noted, there is no split in the Court of Appeal as to whether the District Attorney may pursue statewide relief under the UCL. The only other published decision on the issue is *Hy-Lond*, *supra*, 93 Cal.App.3d 734, which concluded that the Napa County District Attorney had no authority to "surrender the powers of the Attorney General and his fellow district attorneys to commence, when appropriate, actions in other counties." (*Id.* at p. 753.) The Court of Appeal had "no difficulty applying *Hy-Lond*'s principles to bar a district attorney's unilateral effort to seek restitution and civil penalties for UCL violations occurring outside his or her own jurisdiction." (Opinion at p. 25–30).

The District Attorney does not, and cannot, argue that *Hy-Lond* conflicts with the Court of Appeal's Opinion. Instead, he proclaims that *Hy-Lond*'s distinct procedural posture renders the portions of it relied upon in the Opinion "dicta." (Petition at p. 18; see also Dissent at pp. 9–10.) While it is true that *Hy-Lond* arose in the context of a district attorney's state-wide settlement of

UCL claims for monetary and injunctive relief, that does not render *Hy-Lond*'s determination "dicta." And it certainly does not mean that *Hy-Lond* is in conflict with the Opinion; it is not.

### 2. The Prior Conflict In Superior Court Decisions Is Irrelevant.

Unable to cite a single published Court of Appeal decision holding that a district attorney has unilateral authority to seek statewide relief under the UCL, the District Attorney points to conflicting trial court orders that predate the Opinion. (Petition at pp. 22–24.) The Court of Appeal's resolution of that conflict, however, is a reason for this Court to deny review, not to grant it.

It is well established that "[d]ecisions of every division of the District Courts of Appeal are binding upon all the . . . superior courts of this state[.]" (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Guidance from this Court is unnecessary to "secure uniformity of decision" among the superior courts, (Rules of Court, rule 8.500(b)(1)): the Court of Appeal's decision already did that.

### 3. There Is No Other Split of Authority.

The District Attorney alternatively suggests that the general principles relied upon by the Court of Appeal are subject to "conflicting interpretations" or otherwise unsettled. Again, he is wrong.

#### a. There Are No "Conflicting Interpretations" of the *Safer* Rule.

As discussed *supra,* § I.A, this Court has long held that district attorneys may prosecute civil litigation only when and to the extent they are specifically authorized to do so by the

Legislature. For the first time in his Petition, the District Attorney claims that the Court of Appeal inconsistently or incorrectly applied this so-called *Safer* rule. He is wrong.

As an initial matter, the Court should not consider this argument because the District Attorney did not raise it below. (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 an issue that petitioner did not brief to the court of appeal]; *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 180 [declining to reach various theories undeveloped in the Court of Appeal or trial court].) Defendants' writ petition extensively discussed *Safer* and its progeny, (see Petition for Writ of Mandate at pp. 29–34), but the District Attorney's return in the Court of Appeal did not cite *Safer*, let alone raise the many arguments about *Safer* that now appear in the Petition. (See generally Return to Petition for Writ of Mandate or Prohibition at pp. 5–7 [table of authorities].) In addition to affording a procedural basis to deny review, the District Attorney's failure to address address *Safer* before the Court of Appeal also speaks volumes as to the weakness of his argument.

On the merits, the Court of Appeal did not err in applying *Safer*. First, contrary to what the Petition claims, *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 138 (*Blue Cross*) did not eschew the *Safer* rule in favor of permitting a local prosecutor to bring UCL claims so long as "no statute

provides to the contrary." (Petition at pp. 27–28.) *Blue Cross* concerned whether a wholly different statute could be interpreted to "strip" a local prosecutor of the authority the UCL otherwise granted to him; it did not address the powers granted to the local prosecutor under the UCL itself, which is the issue here.

In *Blue Cross*, a city attorney brought a claim against a managed health care service plan under the "unlawful" prong of the UCL, 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 by giving the California Department of Management Health Care regulatory and enforcement authority over health plans. (*Id.* at p. 1249).

The court disagreed, explaining, "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 said a city attorney could *not* use the Knox-Keene Act as the basis of UCL unlawfulness claim, the grant of authority in section 17204 of the UCL 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, surpa,* 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 express authorization for the city attorney to bring the unlawfulness claim he alleged. (Accord *McKale, supra,* 25 Cal.3d at p. 633.)

The District Attorney also erroneously claims that the *Safer* rule applies only to a local prosecutor's representation of private parties in civil litigation, not to his bringing actions in the name of "the People." (Petition at p. 29.) But he cites no case to support this proposition and *Safer* certainly does not suggest that its holding was so limited. To the contrary, *Safer* rested on the principle—equally applicable to actions in the name of "the People"—that "[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." (*Safer, supra,* 15 Cal.3d at p. 236). Indeed, in "set[ing] forth illustrative statutes which specifically empower a district attorney to bring a civil action," *Safer* listed a wide variety of civil enforcement actions—it did not limit these illustrations of its rule to the narrow circumstances proposed by the District Attorney. (*Ibid.* [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 collect fines; 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 it has been applied broadly—including by this Court in a UCL enforcement case brought by a district attorney. (See *McKale, supra,* 25 Cal.3d at p. 633.)

Next, the District Attorney—again citing no case in support—argues 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." (Petition at p. 30–31.) 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 was principally addressed to technical changes in the manner in which misdemeanors charges are filed. (Stats. 1980, ch. 1094, p. 3507.) Nothing in the bill or its legislative history[5] purports to redefine "public prosecutor," or to legislatively reverse this Court's decision in *Safer*, decided just five years earlier.

Under the circumstances, the District Attorney's suggestion that the Legislature so drastically changed the law without expressing a clear intent to do so "suffers from a surface implausibility." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 260.) Indeed, it would be "unusual in the extreme," for the Legislature "to adopt so fundamental of a change only by way of implication," in a bill "facially dealing with" completely unrelated matters. (*Ibid.*) The "drafters of

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[5] See Request for Judicial Notice in Support of Defendants' Answer to Petition for Review, Ex. A.

legislation 'do not, one might say, hide elephants in mouseholes.'" (*Id.* at p. 261, 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."].).)

It is thus unsurprising that more recent decisions of both this Court and the Court of Appeal continue to read Government Code section 26500 as applying only to criminal matters. (See *Pitts v. Cty. of Kern* (1998) 17 Cal.4th 340, 359 [citing § 26500 as addressed to the district attorney's role "when prosecuting criminal violations of state law"]; *Solus*, *supra*, 224 Cal.App.4th at pp. 41–42 [rejecting the District Attorney's argument that § 26500 provides him plenary power to bring civil enforcement cases "except as otherwise provided by law"].)

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 non-criminal litigation activity must, in contrast, be expressly authorized by statute—which essentially codifies *Safer*. Thus, 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 [recognizing that district attorneys can bring claims under the Cartwright Act only because a statute expressly authorizes them

to do so, citing *Safer*].)

Finally, the District Attorney contends 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." (Petition at p. 31, quoting *People v. Parmar* (2001) 86 Cal.App.4th 781, 798 (*Parmar*).) Although the District Attorney characterizes three cases as supporting the proposition 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," (Petition at p. 31), none of them support his claim. Nor do they have anything at all to do with "UCL actions." 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 case permitted a district attorney to represent the county of his jurisdiction in connection with 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.)[6]

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[6] The Court of Appeal subsequently distinguished *Rauber*, holding that absent specific statutory authorization, the *Safer* rule barred district attorneys from representing county wards in other civil proceedings less intertwined with criminal enforcement and where the county was already represented by counsel. (See *In re Dennis H.* (2001) 88 Cal.App.4th 94, 102.) As noted above, the California constitution assigns to the Attorney

Regardless, this Court has applied the *Safer* rule to the question of what civil litigation claims a district attorney may pursue under the scope of authority afforded by the UCL. (*McKale, supra,* 25 Cal.3d at p. 633.)

In sum, the Petition does not identify any inconsistency in the Opinion's application of the *Safer* rule; there is none.

**b. The Opinion Is Not Inconsistent with "Law Governing UCL Enforcement Actions."**

Nor is there a conflict between the Opinion and *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320 (*Tobacco II*). The Petition argues that, by requiring the District Attorney to establish that UCL violations occurred in Orange County, the Opinion somehow runs afoul of *Tobacco II*'s rule that "under the UCL, relief is typically 'available without individualized proof of deception, reliance and injury.'" (Petition at pp. 25–26, quoting *Tobacco II, supra,* 46 Cal.4th at p. 320.) But this conflates the elements of a fraud-based UCL claim (the likes of which are not asserted here) with the extent of the District Attorney's authority and is not inconsistent with the Opinon.

*Tobacco II* concerned the extent to which the typical fraud concepts of reliance and causation are also applicable to UCL claims that are based on deceptive advertising. (*Tobacco II, supra,* 46 Cal.4th at p. 312 ["We are here concerned with the third prong of the statute—an allegation of a fraudulent business act or practice"]; *id.* at pp. 321–22.) Here, by contrast, the District

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General the duty to enforce non-criminal California law on a statewide basis.

Attorney's theory centers on an allegedly anticompetitive settlement of patent litigation that allegedly denied consumers access to a lower-priced generic version of Niaspan. (See Ex. 7 at pp. 86–102.) The fraud concepts addressed in *Tobacco II* are irrelevant here.

The Petition also cites Justice Baxter's concurring and dissenting opinion in *Tobacco II*. (Petition at pp. 35–36.) But read in context, the general proposition in the cited language—that "*Public* enforcement suits are not constrained by Proposition 64's class action restrictions, and in such actions, the court may order the full range of remedies specified in the statute"—has no bearing on whether the remedial provisions of the UCL permit local prosecutors to seek statewide relief. (See *Tobacco II, supra,* 46 Cal.4th at p. 337 (conc. & dis. opn. of Baxter. J), italics original.) That issue was not addressed in *Tobacco II,* a private enforcement action.

Moreover, there is nothing unusual about the Opinion's requirement that the District Attorney prove that a UCL violation occurred within his jurisdiction. The same requirement would exist with respect to statewide claims, because the UCL does not operate extraterritorially. (See *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207.) The District Attorney alleged that Niaspan was sold throughout the United States. (See Ex. 8 at p. 106.) Just as it would not offend the UCL to require the Attorney General to prove conduct within California's borders to bring a statewide claim relating to sales of Niaspan, it does not offend the UCL to require the District Attorney to prove violations

within Orange County.

### C. The District Attorney's Contentions that the Opinion "Is Legally Erroneous" Do Not Merit Review.

Review in this Court also is not merited based on the District Attorney's contention that the "Opinion is legally erroneous[.]" (Petition at p. 34.) As an initial matter, the hodgepodge of "errors" asserted in the Petition are not errors at all. In any event, none of these meets the prerequisites for review in this Court. (Rules of Court, rule 8.500(b)(1); see *Briggs v. Brown* (2017) 3 Cal.5th 808, 861; *People v. Davis* (1905) 147 Cal. 346, 348.)

#### 1. Statutory Authorizations for Courts to Award Certain Forms of Relief Do Not Expand Local Law Enforcement Officials' Powers to Obtain It.

The District Attorney claims that because the UCL's remedial provisions are framed in terms of the authority of "the court" to award relief, (see §§ 17203, 17206), a court may award any relief authorized by the UCL, regardless of whether a particular plaintiff itself is permitted to seek or obtain it. The only prerequisites, according to the Petition, are that the plaintiff has standing to bring some UCL claim and that the court has jurisdiction to entertain it. (Petition at p. 35.) This argument was not raised in the District Attorney's briefing below, (Compare Petition at pp. 34–36 with Return to Petition for Writ of Mandate or Prohibition), and the Court should not consider it (Rules of Court, rule 8.500(c)(1)). It is, in any event, manifestly wrong.

A statutory authorization for a court to award a type of

relief is not a license for a court to grant that relief to anyone who states an actionable claim. References to a "court may" or a "court must" in the context of remedial statutes simply reflect a common drafting practice employed to permit a court to award the remedies to a plaintiff who is permitted to obtain it and under facts that merit the award.[7] 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, provided that "[t]he court shall award to the plaintiff reasonable attorney's fees and costs," but the Court of Appeal held that plaintiffs, whose relative was

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[7] (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 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].)

subject to elder abuse, lacked standing to obtain relief under the Act].)

Notably, neither the dissent nor the Petition cites any case adopting the District Attorney's position that a court may 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, the Court held that a demurrer was properly sustained where the plaintiff sought monetary relief that was not available *to it*, even though the court could have imposed monetary relief had it been sought by another plaintiff.

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 the 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].)

The scant authority cited by the District Attorney does not support his position. In fact, *Kraus v. Trinity Mgmt. Servs., Inc.* (2000) 23 Cal.4th 116, actually cuts against his argument. In *Kraus*, the Court ruled that a single plaintiff bringing a pre-Proposition 64 representative action could not obtain an order requiring a defendant to disgorge all of its UCL-violative profits into a "fluid recovery fund." (*Id.* at p. 137.) As in *Korea Supply*, the Court effectively held that, notwithstanding the trial court's "broad equitable powers" under the UCL, the trial court could not award a plaintiff relief she had no legal right to recover. (*Kraus*,

*supra*, 23 Cal.4th at p. 137.) As the Court explained, "[t]he court's inherent equitable power may not be exercised in a manner inconsistent with the legislative intent underlying a statute[.]" (*Id.* at p. 132 fn. 14.) And although *Kraus* was an appeal of a post-judgment decision, nothing in the opinion suggests the trial court needed to hold a trial before the legal issue could be appropriately decided. (Cf. *id.* at p. 123 & fn. 4 [noting, without apparent controversy, that the trial court had sustained a demurrer to a paragraph of the complaint demanding a civil penalty, presumably because that relief is not available to a private litigant under § 17206]. Later cases have had no difficulty applying *Kraus* to the pleadings. (See *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 408 [affirming grant of demurrer based on *Kraus*'s limits on relief under § 17203]; *Feitelberg, supra*, 134 Cal.App.4th at p. 1006 [affirming motion to strike based on *Kraus*].) So too here, the District Attorney has no ability to seek some of the relief he seeks under the UCL, a pleading defect properly resolved at the pleading stage. (See *Korea Supply, supra*, 29 Cal.4th at pp. 1148–1149)

### 2. The Petition's Other Contentions of Error Do Not Merit Review.

The other supposed "errors" identified in the Petition are likewise neither erroneous nor appropriate grounds for review.

First, the Petition makes the claim that the Opinion invented a new "written consent requirement" when it explained 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." (See Petition at p. 36, citing Opinion pp. 4–5.) But this limitation was already in place under settled Constitutional principles and longstanding precedent and is consistent with appellate decisions in California. The language cited in the Petition summarizes a later section of the Opinion that made clear that it was not removing available procedural avenues for a local prosecutor who believes "there is public benefit to a multi-jurisdictional action." (Opinion at 37–38 & fn. 37.) Its 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 review.

Next, the District Attorney argues that the Attorney General does not have exclusive standing to bring statewide UCL actions. (Petition at p. 38.) He relies on *Altus*, *supra*, 36 Cal.4th 1284, which held that a legislative grant of exclusive enforcement authority to the Insurance Commissioner was an "express limit on the authority of the Attorney General to seek a restitutionary remedy under the UCL." (*Id.* at p. 1303.) But there is nothing unusual about the legislature's decision to vest statewide enforcement authority in a different statewide elected constitutional officer, who is tasked by the state constitution to oversee a specific subject area like insurance. Nor does this suggest that the UCL silently vests the District Attorney with the authority to bring extraterritorial and statewide claims. It does not, and it certainly does not merit granting review.

The District Attorney also argues that the trial court was

within its discretion to deny Defendants' motion to strike because the allegations subject to the motion are potentially relevant to various issues raised in the Complaint other than the geographic scope of available monetary relief. (Petition at pp. 39–40.) Given that the clear aim of the allegations was to seek statewide relief—the District Attorney's superior court opposition brief did not contest the point (see Ex. 11 at p. 196)—the District Attorney offers no explanation why the allegations are nonetheless so "essential to a cause of action," that a trial court could not strike them. (See *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 242). And regardless, the Petition offers no reason for this Court to step in to evaluate such a fact-bound, case-specific procedural issue. (See *Metcalf v. Cty. of San Joaquin* (2008) 42 Cal.4th 1121, 1129 [a "fact-specific issue does not present an issue worthy of review"].)

Finally, the District Attorney makes the conclusory claim that the Opinion is bad policy. (Petition at 40.) This too is both incorrect and not an argument that merits review.

## II. THE COURT OF APPEAL HAD JURISDICTION TO ENTERTAIN THE PETITION AND GRANT THE WRIT.

The District Attorney also invokes Rules of Court, rule 8.500(b)(2), which authorizes review when the Court of Appeal did not have jurisdiction. (Petition at pp. 32-34). But that rule is a vestige of the past that has no application here. The "reason for this provision"—to allow the Supreme Court to hear cases that should have been directly appealed to it, but were mistakenly filed in the Court of Appeal—"has ceased to exist" in civil cases, as the Constitution no longer allocates appellate jurisdiction

between the Supreme Court and the Court of Appeal based on the nature of the action or proceeding. (9 Witkin, California Procedure (2018 online ed) Appeal, § 916.) "It is difficult to conceive of a situation in which the rule would now apply," (*ibid.*) and the Petition fails to explain why it has any relevance here.

The Petition's argument that the Court of Appeal should not have granted the writ because the issues were purportedly not ripe (Petition at p. 32) is just a claim of procedural error, which does not merit this Court's review. The Petition essentially acknowledges as much: despite "maintain[ing] that the Writ Petition was premature," the Petition urges the Court to bypass that question and "proceed based on the appellate record." (*Id.* at p. 33). As discussed above, however, there is no reason to review the merits of the Court of Appeal's decision.

The Court of Appeal acted well within its jurisdiction to entertain the petition and issue the writ. A motion to strike is an "appropriate procedural device" to challenge allegations that purport to seek relief that is unavailable to the plaintiff as a matter of law.[8] (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 385; see also *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 ["the conventional motion to strike . . . is well understood as a way to challenge particular allegations"]; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 [defective

[8] The Petition repeatedly complains that the allegations at issue were "true factual allegations." (Petition at pp. 7, 12, 36.) The purpose of striking them, however, is not that they are false, but that, even if true, they are "irrelevant" because they address

portion of a cause of action is subject to a conventional motion to strike].) And it is well within the Court of Appeal's power to address such issues on a writ petition, particularly where, as here, they relate to the trial court's proper exercise of its jurisdiction. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 213–215 [considering petition of writ of mandate challenging superior court's denial of motion to strike portions of the complaint relating to punitive damages, and deciding on the merits whether such damages were recoverable]; *Safer, supra,* 15 Cal.3d at p. 242 [For the superior court to permit a district attorney to prosecute an action outside the scope of the "statutorily authorized procedures for such proceedings and in excess of his authority" "establishes grounds for our issuance of a writ of prohibition"]).

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relief that the District Attorney cannot obtain as a matter of law. (Code Civ. Proc., § 436.)

* * *

The Court should deny the District Attorney's petition for review.

Respectfully Submitted,

Dated: July 30, 2018

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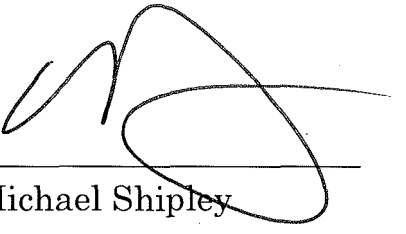
## CERTIFICATE OF WORD COUNT

I, Michael Shipley, hereby certify that in accordance with Rules of Court, rule 8.504(d)(1), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief—including footnotes but not including materials exempted under Rules of Court, rule 8.504(d)(3)—is 7,635 words.

Dated: July 30, 2018

By: 
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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 July 30, 2018, I hereby certify that I have electronically served the documents listed below in the manner set forth below.

**ANSWER TO PETITION FOR REVIEW**

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**[X] U.S. MAIL:** I placed the document(s) listed above in a sealed envelope in the United States mail to the addressee(s) above. Under the firm's practice of collection and processing of documents for mailing, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

**[X] BY ELECTRONIC SERVICE TO INTERESTED PARTIES:** I caused the document(s) listed above to be served by electronic means on all interested parties via the email addresses indicated above.

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

**[X] U.S. MAIL:** I also placed the document(s) listed above in a sealed envelope in the United States mail to the addressee(s) set forth below. Under the firm's practice of collection and processing of documents for mailing, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

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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 July 30, 2018, at Los Angeles, California.

Keith Catuara

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **ABBOTT LABORATORIES v. S.C. (RACKAUCKAS)**
Case Number: **S249895**
Lower Court Case Number: **D072577**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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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.

7/30/2018

Date

/s/Michael Shipley

Signature

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Last Name, First Name (PNum)

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Law Firm