No. B292416

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent.

J.C. PENNEY CORPORATION, INC., ET AL.,

Real Parties in Interest

Appeal from the Superior Court of the County of Los Angeles,
Case No. BC643036, The Honorable Carolyn B. Kuhl

AMICI CURIAE'S BRIEF IN SUPPORT OF THE REAL PARTIES IN INTEREST

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INTRODUCTION

The heart of Business and Professions Code Section 17501 is a blanket prohibition on advertising discounts: "No price shall be advertised as a former price[1] of any advertised thing." If Section 17501 stopped there, it unquestionably would be unconstitutional. Moreover, it indisputably would inflict severe harm on retailers, such as amici's members, and their customers, who have a strong interest in talking and hearing about sales. This kind of speech may not be important to the Los Angeles City Attorney and the private counsel to whom he has given his voice. But to business and consumer alike, it is speech that matters. Retailers have the right—under the U.S. and California Constitutions—to advertise a product as "70% off" when it is, in fact, being sold for 70% less than either its past price or the price offered by a competitor.

There are two holes in Section 17501's blanket prohibition on advertising discounts: a retailer is permitted to speak if (1) "the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement" or (2) "the date when the alleged former price did prevail is clearly, exactly and

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[1] By regulation, "[t]he term 'former price' as used in Section 17501 of the Business and Professions Code and in this article includes but is not limited to the following words and phrases when used in connection with advertised prices; 'formerly -,' 'regularly -,' 'usually -,' 'originally -,' 'reduced from _____,' 'was _____ now _____,' '____% off.'" (Cal. Code Regs., tit. 4, § 1301.)

conspicuously stated in the advertisement." The question is whether these exceptions are broad enough to let through the full range of truthful commercial advertising protected by free speech, and clear enough to provide the guidance required by due process. The answer is no.

Exactly *what* Section 17501 prohibits and permits is anyone's guess, and such ambiguity renders the law unenforceable under due process principles. Thirty years ago, in hopes of figuring the statute out, Attorney General John K. Van de Kamp convened a committee to gather insights from "over 150 retailers, Better Business Bureaus, consumer groups, and law enforcement officials." (Report of the Attorney General's Committee on Sale and Comparative Price Advertising (1984) ("Attorney General Report" or "AG Report") (Appen. 475).) This sophisticated and diverse group—operating outside of litigation and behind the veil of ignorance as to what interpretation would best fit with a theory of liability or defense—could not determine what the statute meant. They could say only that "the problems with section 17501 are many." (*Ibid.*) Their solution was simple: "Repeal Business and Professions Code section 17501." (Appen. 593.)

No one has since solved the "many" interpretive problems with Section 17501. Petitioner boasts that the statute has, "over the decades," been "applied numerous times in California federal and state courts." (Pet. 13, 16.) But the Petition's string cite for this proposition deflates the boast. Only one of the cited cases

comes from a California court, and the vast majority are no more than a few years old. (See Pet. 16, fn. 2.) And the lack of any description of the cited cases—even in a parenthetical—is telling. Petitioner cannot cite them as *resolving* Section 17501's ambiguities because almost none of the decisions interpret the statute at all. (See, e.g., *Brazil v. Dell Inc.* (N.D. Cal., Dec. 21, 2010, No. C-07-01700 RMW) 2010 WL 5258060, *4 (*Brazil*) [noting that, as of 2010, Section 17501 "has yet to be construed by any court"].)

For that reason, Petitioner does not ask this Court to adopt a definition from one of these purportedly "numerous" cases "applying" Section 17501, let alone some consensus definition broadly shared among them. Instead, Petitioner offers its own novel interpretation of Section 17501, which Defendants contend was gerrymandered to fit the complaint's factual allegations. Whether gerrymandered or not, Petitioner's interpretation of the statute's many vague terms—in particular "prevailing market price" and "within the three months next immediately preceding the publication of the advertisement"—is simply *wrong*. That is not only fatal to the Petition, but illustrative of the inherent and hopeless ambiguities of Section 17501. And even if Petitioner's novel interpretation were *permitted* by the nebulous language of Section 17501—and, to be clear, it is not—that would only establish that the statute can mean anything and everything.

Contrary to Petitioner's claims, Section 17501 cannot, and need not, be saved. Lacking any established meaning, it has

offered neither meaningful protection to the public nor meaningful guidance to retailers. For that reason, it has gone unenforced for almost all of its 77-year history. The recent effort of plaintiffs' lawyers to exhume, remake, and jolt life into the law's dead (and ambiguous) letters will not help the public. But it will seriously harm retailers, large and small, which will be (1) subjected to retroactive enforcement of an entirely unprecedented theory of liability and (2) forced, going forward, to substantially curb their truthful speech to avoid future liability under this vague statute. Larger chains that "speak" in multiple California jurisdictions will be left guessing what definition will be used to bring suit against them this time; and smaller mom-and-pop stores may simply throw up their hands at trying to figure out how to prove the "prevailing market price" over a three-month span for a given product in their "locality."

False or misleading commercial speech can harm retailers and their valued customers alike. But Section 17501—with its sweeping prohibition and vague carve-outs—mostly bans truthful commercial speech that is a practical necessity for retailers. Other California consumer-protection and false-advertising laws serve the purpose that Petitioner invokes and amici respect. Section 17501, by contrast, is unworkable and unconstitutional. For that reason, amici urge the Court to deny the Petition.

ARGUMENT

I. Commercial Speech Is a Public Good and Constitutional Right

A. Price Advertising Is Protected Speech

Amici's members include national, regional, and local businesses, some large, some small, encompassing every kind of retail activity. These members can survive only by offering quality goods at competitive prices. They understand through hard-won experience the value of using a discount pricing strategy to reach consumers because *everyone* wants a bargain. Whether through coupons, sales, promotions, discount brands, or outlet stores, retailers use discount pricing strategies to reach consumers interested in purchasing their wares at the right price.[2]

Consumers want to hear about sales as much as retailers want to speak about them: a "particular consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate." (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 763 (*Virginia Pharmacy Board*).) "[S]ociety also may have a strong interest in the free flow of commercial information." (*Id.* at p. 764.) "Advertising, however tasteless and excessive it sometimes may

[2] *See* Rafi Mohammed, *The Art of Strategic Discounting*, American Management Association <https://www.amanet.org/training/articles/the-art-of-strategic-discounting.aspx> (as of Dec. 2, 2018).

seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price"—information that is essential "[s]o long as we preserve a predominantly free enterprise economy." (*Id.* at p. 765.) Even Petitioner acknowledges that it "help[s] consumers in making informed purchasing conditions." (Appen. 86, 127, 164, 202.)

For all these reasons, the First Amendment gives substantial protection to commercial advertising. (*Virginia Pharmacy Board, supra*, 425 U.S. at p. 765.) Indeed, "[e]ven when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." (*Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 562 (*Central Hudson*).) And even an important government interest does not necessarily entitle the government to suppress advertisements conveying such information.[3] Further, the California "Constitution's free

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[3] See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 188–189 ("alleviating the social costs of casino gambling" insufficient to justify "broadcasting restrictions … concerning casino gambling"); *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 504 ("promoting temperance" insufficient to justify alcohol "price advertising ban"); *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 485–486 ("protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength" insufficient to justify banning advertising of alcohol percentage in beers); *People v. Mobile Oil Corp.* (1979) 48 N.Y.2d 192, 200–201 ("insuring that the consumer's decision is

speech provision is 'at least as broad' as [citation] and in some ways is broader than [citation] the comparable provision of the federal Constitution's First Amendment." (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 958–959.)

In sum, the advertising of sale prices is constitutionally protected speech.

B. Section 17501's Prohibition on Price Advertising Is Not Exempt from Constitutional Scrutiny

In an effort to undermine the free speech and due process protections asserted by Defendants, Petitioner suggests that Section 17501 only "addresses *false and misleading* commercial speech." (Pet. 29, italics changed.) On its face, Section 17501 itself refutes this argument.

Section 17501 is strikingly different from California laws actually tailored to preventing false advertising (e.g., Bus. & Prof. Code, § 17500) or false advertising of sales prices (e.g., Civ. Code, § 1770, subd. (a)(13)). The prohibitions in those statutes have a limited scope expressly defined by, inter alia, the falsity of the speech at issue. For instance, the Consumers Legal Remedies Act prohibits the "unfair or deceptive act[]" of "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions." (Civ. Code, § 1770, subd. (a)(13).) Under that kind of law, all commercial speech is

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based on facts not advertising 'puff'" insufficient to justify prohibition on price advertisements outside gas stations).

permitted *unless it is false* in the ways specified by the statute. Section 17501 takes the opposite approach.

Under Section 17501, *all* discount advertising is presumptively forbidden, whether true or false: "No price shall be advertised as a former price of any advertised thing." Having started by forbidding everything, the statute then grants reprieve to a subset of discount advertising: that in which "the alleged former price was the prevailing market price," either (1) "within the three months" before the advertisement or (2) on some other date "clearly, exactly and conspicuously stated in the advertisement." Exactly what speech this permits is so ambiguous as to violate due process. (Post, Section III.B.) But the speech Section 17501 forbids plainly encompasses constitutionally protected truthful advertising because the statute makes no reference to falsity whatsoever.

As Defendants point out, "[t]he Legislature obviously knows how to draft a statute containing a falsity element"—having done so in other statutes regulating retail price advertising—but chose not to do so in drafting Section 17501. (Ret. 31.) The Legislature could easily have replaced "unless the alleged former price was the prevailing market price" with "unless the alleged former price is not false or misleading," but it did not do so. Indeed, presumably the reason that Petitioner has pleaded a Section 17501 claim *in addition* to a Section 17500 claim is in order to avoid having to prove falsity. That Section 17501 encroaches on protected truthful speech may make it

easier for Petitioner to establish liability, but it also makes the statute unconstitutional.

The commercial nature of the advertising forbidden by Section 17501 does not strip retailers of their free speech or due process protections against vague laws. Petitioner invokes *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489 (*Hoffman Estates*), for the proposition that, as an "economic regulation," Section 17501 should be "subject to a less strict vagueness test" than laws targeting speech. (Pet. 32.) But *Hoffman Estates* is far different from this case, and it hurts, rather than helps, Petitioner's argument.

Petitioner asserts that "the statute in *Hoffman Estates*, [like] Section 17501[,] regulate[d] false and misleading *speech*." (Pet. 35, italics added.) This simply is not true. The ordinance at issue in *Hoffman Estates* "license[d] and regulate[d] the *sale* of items," specifically drug paraphernalia, without any reference to truth or falsity. (*Hoffman Estates, supra*, 455 U.S. at p. 496, italics added.) The U.S. Supreme Court explained that because "[t]his ordinance simply regulates business *behavior*," it was not subject to the heightened test applicable when a regulation applies to speech. (*Id* at p. 499, italics added.) By contrast, had the law "interfere[d] with the right of free speech … a more stringent [vagueness] test [w]ould apply." (*Ibid*.) The ordinance did not do so, and so the more stringent test did not apply. After all, the Court explained, the only speech even *conceivably* (and indirectly) affected by the conduct-regulating ordinance would be

"speech proposing an illegal transaction, which a government may regulate or ban entirely." (*Id.* at p. 496.) Despite Petitioner's representation, no mention is made anywhere in *Hoffman* of "false and misleading speech."

In contrast to the ordinance in *Hoffman*, which regulated nothing but "business *behavior*," Section 17501 targets nothing but commercial *speech*, regardless of its truth or falsity. Retailers may sell their products at whatever price they wish; but they cannot describe that price as a discount unless they first establish a "prevailing market price" (under Section 17501's vague standards) to which that discount applies. That is not a regulation of "behavior," but of speech. And it is regulation of speech that proposes a *lawful* commercial transaction. *Hoffman Estates* is simply not apposite.

Petitioner also misreads *Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347 (*Ford Dealers*). Petitioner suggests that "the California Supreme Court refused to apply a heightened vagueness standard … '[b]ecause regulations governing false and misleading advertising are directed only at unlawful business practices….'" (Pet. 33, quoting *Ford Dealers*.) Not so. As explained on the page and footnote Petitioner cites, the Court *did* decline to "apply a heightened vagueness standard"—the one applicable to a "criminal statute." (*Ford Dealers*, at pp. 366–367 & fn. 12.) The Court did so not because the law was "directed only at unlawful business practices" but because "only the civil, administrative aspects of

the statute are presently before the court." (*Ibid.*) The quoted language about "false and misleading advertising" went to a separate point about the First Amendment overbreadth doctrine. (*Id.* at p. 366.) *Ford Dealers* is inapposite here because the Superior Court did not apply a heightened standard on the ground that Section 17501 was a "criminal statute." It invoked a different doctrine, holding that more due process scrutiny is given to a vague law that implicates speech.[4]

In short, Section 17501 directly implicates—and violates—both the right to engage in commercial speech and the right not to be punished under vague laws that fail to provide adequate notice of what is permitted and what is forbidden.

II. Petitioner's Description of Section 17501's History and Importance Is Both Incorrect and Internally Inconsistent

Petitioner attempts to defend Section 17501 by misstating its history and overstating its importance. A short clarification is in order.

Section 17501 was enacted in 1941. It has never been amended. As previously noted, in 1984, Attorney General John K. Van de Kamp commissioned a comprehensive report addressing the statute. (Appen. 473–656 [AG Report].) The

[4] Even accepting Petitioner's premise that, on a spectrum of concern, a vague law regulating non-commercial speech is subject to closer scrutiny than a vague law regulating commercial speech, both of those laws would be subject to closer scrutiny than a law that regulates only *conduct*.

Attorney General Report, unlike the briefs before this Court, was not an interested party's litigation position. Rather, it represented the work of senior officials in the Attorney General's office (Appen. 477), weighing input solicited from "over 150 retailers, Better Business Bureaus, consumer groups and law enforcement officials" (Appen. 475), along with legislative history, statutory texts from California and elsewhere, judicial opinions, and numerous exhibits.

The Report explained that in the decades between 1941 and 1984, there was "only [one] reported case which mention[ed] section 17501," and it did so only "tangentially." (Appen. 479.) This lack of precedent apparently resulted from law enforcement's determination that Section "17501 clearly is not sufficient to enforce" because its standards were too "amorphous." (Appen. 484.) Law enforcement relied, instead, on Section 17500 with its "more readily understandable language." (Appen. 482.)

In 2010, a federal district court noted that Section 17501 *still* had "yet to be construed by *any* court." (*Brazil, supra*, 2010 WL 5258060 at p. *4, italics added.) In 2017, another federal court noted that "[f]ew cases" had even "*addressed* § 17501." (*Haley v. Macy's, Inc.* (N.D. Cal., Dec. 21, 2017, No. 15-CV-06033-HSG) 2017 WL 6539825, at *6 (*Haley*), italics added.) And as of the Superior Court's 2018 decision in this case, "no court decisions [had] authoritatively interpreted the statute." (Appen. 931–932.)

What this history tells us is that while consumers, the retail community, and law enforcement made a Herculean effort to understand Section 17501 in the 1980s, the law defied understanding. Mired in hopeless ambiguity, it may have remained on the books—notwithstanding the Attorney General Report's recommendation that it be repealed (Appen. 593)—but it *never* served as a meaningful guide to retailers, a meaningful assurance to consumers, or a meaningful tool to law enforcement. To be sure, retailers do their best to follow laws regulating their speech and do not *ignore* Section 17501; but as the Attorney General Report made clear, the statute's vagueness frustrates even their best efforts to comply.

Petitioner tells a different, internally contradictory, history. Petitioner claims that "[r]etailers have operated for decades with the understanding that they must comply with Section 17501's advertising requirements for the benefit of consumers." (Pet. 18.) But Petitioner also claims that Defendants—venerable California retailers—have "systematically, and as a routine business practice" flouted Section 17501. (Pet. 11.) Petitioner then claims that consumers have long "rel[ied] on the statutory protections" of Section 17501. (Pet. 14.) But—precisely because Section 17501 is both vague and eccentric—it is extraordinarily unlikely that consumers have assumed that "30% off" stickers on sale items mean "30% off the historically prevailing market price" (Petitioner's proposed definition) rather than just "30% off the price this store charged before the sticker was affixed to this item." What consumers have *actually* relied on, as the Petition

itself acknowledges, are California's "multiple statutes that specifically prohibit the use of deceptive former price information." (Pet. 17.)

In lieu of evidence of consumers' purported long reliance on Section 17501's uncertain protections, Petitioner says that the statute has been "applied numerous times over the decades" by "California federal and state courts." (Pet. 13, 16.) The string cite in the supporting footnote tells a very different story, however. Only *one* of the cases is from a "California … state court[]": *People v. Columbia Research Corp.* (1977) 71 Cal.App.3d 607 (*Columbia*). (See Pet. 16, fn. 2.) *Columbia* is the very case that the Attorney General Report correctly described as having "mentioned" Section 17501 only "tangentially." (Appen. 479; see *Columbia,* at p. 611.)

All of the other cases are federal decisions, and several of those are not even from "California federal … courts." (Pet. 16.) For instance, Petitioner cites *Nunez v. Best Buy Co., Inc.* (D. Minn. 2016) 315 F.R.D. 245, 250 (*Nunez*), a decision from a Minnesota federal district court. The extent of that case's "appli[cation]" (Pet. 16) of California's Section 17501 is a footnote that says that one of the allegations in the plaintiff's complaint "tracks the language of" Section 17501 (*Nunez*, at p. 249, fn. 4). The court held that the allegation was insufficient as a matter of law. (*Id.* at p. 250.) Petitioner also cites cursory federal district court decisions from Oregon and Georgia. (Pet. 16, fn. 2.)

Of equal import to the non-precedential nature and thinness of the purported "application" of Section 17501 in these cases is *when* the cases were decided. Other than *Columbia* (1977) and *Faberge, Inc. v. Saxony Products, Inc.* (C.D. Cal., July 28, 1971, No. 70-2683) 1971 WL 16493 (*Faberge*),[5] not a single one is more than five years old. The notion of "decades" of "California … state court[]" decisions applying Section 17501 "numerous times" is just not true. (Contra Pet. 13, 16.) What the Petition shows instead is a flurry of putative federal class actions brought by the plaintiffs' bar, with mixed success, in the past few years. While the Los Angeles City Attorney is now a client in such a suit, the Petitioner's string cite only confirms that the enforcement agencies protecting consumers continued to eschew Section 17501 in the decades after the Attorney General Report, just as they had in the decades before it.

Petitioner's litigating position before this Court is wrong, and the authoritative Attorney General Report was right: Section 17501 has never been an effective consumer protection

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[5] *Faberge* dealt with one corporation suing another that had tried to pass its cologne off as the plaintiff's by, inter alia, falsely asserting that its cologne had previously sold for the exact same price as the plaintiff's. The extent of the application of Section 17501 consists of: "The defendant's acts of price and value marking and advertising as described in Findings No. 8, No. 9 and No. 10 constitute a violation of the False Advertising Statutes of California, particularly Business and Professions Code, §§ 17500 and 17501 and also constitute Unfair Competition under California Civil Code, § 3369." (*Faberge, supra*, 1971 WL 16493, at p. *3.)

law. Instead, its application in recent years represents a novel effort by plaintiffs' lawyers to exploit a hopelessly vague statute repudiated decades ago by those entrusted to enforce it.

III. Section 17501 Imposes Liability for Protected Speech Under Ambiguous Circumstances

Section 17501 unambiguously punishes truthful commercial speech. It also *ambiguously* exempts some subset of truthful commercial speech from its otherwise-blanket prohibition on advertising discounts. Exactly what speech falls within that exempted subset is far from clear, for it is described in a series of undefined and uncertain terms that compound into a whole that is more indeterminate still. Such a law violates retailers' rights to free speech and due process.

A. Section 17501 Punishes Truthful Commercial Speech

Under Section 17501, "[n]o price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement."[6] (Bus. & Prof. Code, § 17501.)

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[6] Notwithstanding the suggestion that "prevailing market price" is "above defined," Section 17501's preceding paragraph provides no definition of "prevailing market price." To the contrary, the paragraph *uses* "prevailing market price" *as the definition* of *another* term, namely "worth or value": "For the purpose of this

This means that no discount can be advertised unless the base price being discounted "was the prevailing market price … in the locality wherein the advertisement is published" either (1) "within three months" prior to the publication or (2) on some more distant date that is "clearly, exactly, and conspicuously stated in the advertisement."

Thus, if a retailer charging $40 for a product on Thanksgiving wants to advertise the product as "half off" on Black Friday, it risks significant Section 17501 liability. Even if its factually accurate "half off" sticker is not intended to deceive and does not confuse any customers, Section 17501 may *still* impose liability for the "half off" sticker unless, by happy coincidence, $40 was previously the "prevailing market price … in the locality"—either "within [the prior] three months" or on a date "clearly, exactly and conspicuously" included on the sticker. Punishing such truthful speech is unconstitutional.

B. A Reasonable Retailer Cannot Anticipate What Truthful Speech Section 17501 Permits and Forbids

Even if a retailer were prepared to forgo the wide swath of truthful advertising forbidden by Section 17501 and limit itself *only* to the narrow subset of permitted speech, the retailer would have no clear guidance as to what it could and could not say.

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article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published." (Bus. & Prof. Code, § 17501.)

While "[n]o price shall be advertised as a former price" is clear, the carve-outs for permissible advertising are so vague that Section 17501 as a whole fails to provide retailers "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) For that reason, it violates due process.

Decades ago, the Attorney General Report comprehensively documented Section 17501's many flaws and ambiguities. That Report came not from interested parties locked in litigation but from California's most senior law enforcement officials drawing upon wisdom gleaned from representatives of the whole community. The Report sought not to impose liability or defend against it, but to make sense of Section 17501. It could not do so. Warning that "the problems inherent with section 17501 are many" (Appen. 491), the Report laid out those problems with care and in detail. As the Report documented, the statute could be neither enforced (by authorities) nor complied with (by retailers) nor relied upon (by consumers) because no one could be sure what it meant. The Los Angeles District Attorney's Office urged California to "do[] away with 17501" because "it's almost impossible to use." (Appen. 538.) The Report agreed, concluding that it was necessary to "[r]epeal Business and Professions Code section 17501." (Appen. 593.)

Amici, representing retailers throughout California and the nation as a whole, echo the concerns ably laid out in the Attorney General Report and Defendants' Return. Section 17501 is,

indeed, hopelessly ambiguous. And Petitioner, in attempting to clarify it, has instead misinterpreted several of its key terms.

First, the concept of a "prevailing market price" is imported from the sale of commodities. But how that concept can be applied to *retail* pricing is utterly unclear. Petitioner asserts that a retailer can be held liable under Section 17501 simply by showing that the retailer *itself* had not previously charged the former price. "Prevailing market price" does not give a retailer any notice of such a theory of liability.

Second, when Section 17501 calls for the "prevailing market price" to be determined "within the three months next immediately preceding the publication of the advertisement," that temporal provision only amplifies the statute's ambiguity. Petitioner has asserted that the temporal provision requires a price to have prevailed "for the majority of days in the preceding three months." (Pet. 52.) In doing so, Petitioner has misread both "within" and "three months," proving the statute's vagueness and the impermissibility of Petitioner's approach. But if Petitioner's interpretation were correct, it would actually *worsen* rather than improve Section 17501's problems.

Third, Section 17501 further aggravates the abject uncertainty of "the prevailing market price" by requiring it to be determined for "the locality wherein the advertisement is published." In the 1940s, when Section 17501 was enacted, advertisements would often be local (published in a local circular or newspaper, transmitted over a local radio station, posted in a

shop window). In 2018, however, most retailers publish their prices on the internet. The internet has no "locality." As the medium's name suggests, an advertisement on the *World Wide* Web is arguably "published" everywhere in the world. If Section 17501 requires a retailer to ascertain the "prevailing market price" *over the entire world* when it publishes its prices online, then it is impossible to apply. If "locality" means something different—something wholly undefined and unknown—then it is impossible to understand.

As explained in the Attorney General's Report and the Defendants' Return, these are not the only ambiguities in Section 17501. But they are bad enough. Together, they leave retailers in an impossible quandary. Retailers know their speech—even if truthful and not deceptive—may be punished if it does not fall within the subset of advertising permitted by Section 17501. But that subset is defined by a series of terms that are vague in themselves and vaguer still when put together. As a result, Section 17501 gives no guidance as to what speech it permits and what speech it punishes. Put simply, Section 17501 combines potentially draconian liability with whimsical uncertainty. Principles of free speech and due process forbid such a law.

1. "Prevailing Market Price"

Section 17501 fails to give retailers reasonable notice of what commercial speech the statute permits under the concept of "prevailing market price."

In the commodities context, the term "prevailing market price" typically means the clearing price of a generic good exchanged in a competitive market. That definition is reflected in cases predating Section 17501's enactment[7] and other statutes using the term.[8] In 1957, then-Attorney General (and future-Governor) Edmund G. Brown opined that Section 17501 adopted this meaning: "The phrase 'prevailing market price' contained in section 17501 of the Business and Professions Code means the predominating price that may be obtained for merchandise similar to the article in question on the open market and in the community where the article is sold." (30 Ops.Cal.Atty.Gen. 127, 127 (1957) (1957 Opinion).) Explicitly analogizing to commodities, the 1957 Opinion argued that, "[b]y definition, the market price must evolve of itself from market condition of

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[7] See, e.g., *Bailey v. John W. Sward, Inc.* (1920) 184 Cal. 395, 399 ("prevailing market price" for rice); *Alamitos Land Co. v. Texas Co.* (1936) 11 Cal.App.2d 614, 617 ("prevailing market price" for gas within a competitive marketplace); *Lund v. Lachman* (1915) 29 Cal.App. 31, 35 ("prevailing market price" for wine bottles).

[8] See, e.g., Bus. & Prof. Code, § 17077 ("prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition"); Fish & G. Code, § 12163 ("prevailing market price for legal birds, mammals, fish, reptiles, or amphibians in effect on the date of seizure"); Food & Agric. Code, § 40872 ("prevailing market price for tomatoes of the grade, quality, and condition which is specified in the contract"); Pub. Res. Code, § 6913 ("prevailing market price" for "geothermal resources" sold "in the same market area, and under the same marketing conditions").

supply and demand" as determined through "investigation of the local … market." (*Id.* at pp. 127–129.)

Presumably recognizing the near or actual impossibility of making a commodities-market-like determination in the highly differentiated retail sector, Petitioner insists that "the 1957 Opinion is irrelevant" because Defendants did "not rely on offers for 'similar' products selling 'in the open and local market' to set their former prices." (Pet. 50, fn. 16.) Petitioner submits that Section 17501 permits a retailer to be held liable based on what *the retailer* is "referring to." (Pet. 47.) If the retailer is "referring to their *own* previous price for that product" (*ibid.*), then, per Petitioner, the prevailing market price is defined by whatever *that retailer* "offer[ed] consumers" (Pet. 24). If retailers "rely on other retailers' prices" for the same product "to establish their advertised former prices," then those competitors' prices for the same product define the "prevailing market price." (Pet. 47) And if retailers "rely on offers for '*similar*' products 'selling in the open and local market' to set their former prices," then those offers apparently become the "prevailing market price." (Pet. 50, fn. 16, italics added.)

Amici wholeheartedly agree that when a retailer advertises a product as "half off" because the retailer has, in fact, reduced its price by half, that truthful speech cannot lawfully be punished. Nor can a retailer be punished when it considers what its competitors are doing and truthfully advertises its own price as a

"savings of over 20%." To punish a retailer for such an advertisement would violate its right to free speech.

But that does not mean Petitioner can establish *liability* under *Section 17501* by showing what a retailer did or did not "refer to" or "rely on." A retailer can certainly *defend* itself against liability by reference to its own prices, but a party seeking to *impose* liability under Section 17501 has the burden—at a minimum—of proving the "prevailing *market* price." Whatever that standard means, Petitioner cannot meet it solely with reference to a retailer's price-setting process or subjective mental state. To interpret "prevailing market price" that way would "do[] violence to the reasonable meaning of the language." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.)

In fact, contrary to Petitioner's argument that the 1957 Opinion is "irrelevant," that Opinion speaks directly to this question. It explains that a retailer's *own* former price may not control, for Section 17501 purposes, "[u]nless the price which he advertises as the former price actually coincides with the 'prevailing market price.'" (1957 Opinion, *supra*, at p. 129.) The 1984 Attorney General Report likewise noted that Section 17501 "seems to say that one can only advertise a 'former price' which was the 'prevailing market price,'" suggesting that "a retailer cannot advertise his own former selling price for an item unless it was also the prevailing market price." (Appen. 492.) Again, that does not mean that a retailer lacks a defense based on its price process or mental state. But due process does not permit liability

to be imposed on a retailer without the plaintiff, at a minimum, establishing a market and a prevailing price in that market. Nothing in Section 17501 would give warning that the statute would support liability without such a showing.

Petitioner cites no authority to support its interpretation of "prevailing market price," let alone authority clear enough to justify holding retailers liable under an approach that contradicts the careful analyses issued under two of California's most storied Attorneys General. If anything, the fact that Petitioner's theory of liability contradicts those analyses shows, definitively, that Section 17501 does not give adequate notice to retailers.

While Petitioner's interpretation of "prevailing market price" contravenes precedent and the statutory text, the term's commodities-market meaning *also* fails to give notice because it is unconstitutionally vague when applied to the retail market. By relying upon that concept, Section 17501 conditions the right to speak on first determining an essentially unknowable fact: the commodity-like clearing price of a retail good.

That commodity-pricing concept is nearly impossible to apply to retail. *First*, it is unclear how to define the "good" whose "prevailing market price" is being investigated because retail involves distinctive products, coupled with distinctive services, sold in distinctive environments. An identical television may be competitively offered at different prices depending on whether the retailer operates online or through a brick-and-mortar store, whether it offers knowledgeable and trained sales staff to assist

with the purchase, how it charges for delivery and installation, when and how it permits returns, and what sort of warranty it provides. (See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007) 551 U.S. 877, 890–891 [discussing differences between high-service and low-service retailers].) One federal court has proposed "tak[ing] into account not just the item itself (*i.e.*, a blue cotton shirt of a certain type) but the offer as a whole (*i.e.*, a blue cotton shirt of a certain type sold in a certain channel of distribution)." (*Spann v. J.C. Penney Corp.* (C.D. Cal. 2015) 307 F.R.D. 508, 526, mod. (C.D. Cal. 2016) 314 F.R.D. 312.) It is unclear whether *any* retailer can define and value this "offer as a whole" in a generically fungible way, and many smaller retailers will lack the resources even to try.

Second, even if one can define the generic "offer as a whole," the myriad channels of retail commerce mean that there is no commodities-like clearinghouse to which one can look for "the prevailing market price" of that conceptual generic good. As the Attorney General Report asked, "[W]hat is the 'prevailing market price'? Is it the price at which the greatest number of sellers offer the product for sale, or is it the price at which the greatest number of such items actually sells? What if the item does not sell for a uniform price? Is an average price to be arrived at? How?" (Appen. 491) These questions are not academic to retailers with tight margins who face open-ended liability if they fail to correctly guess how a plaintiff's lawyer, city attorney, or superior court judge will answer them.

Petitioner insists that *Haley v. Macy's, Inc.*, *supra*, 2017 WL 6539825, will "provide guidance to sellers about" what "prevailing market price" means. (Pet. 37–38.) *Haley* is an unpublished federal district court decision not binding on any federal court, let alone any California state court, so relying on it for guidance would give no legal security to a retailer. Moreover, a retailer *cannot* rely on *Haley* because it provides no meaningful "guidance" about the term "prevailing market price":

> The ordinary meaning of the term further guides the analysis as the Oxford English Dictionary defines "prevailing" as "[p]redominant in extent or amount" and "most widely occurring or accepted." See THE OXFORD ENGLISH DICTIONARY ONLINE, (2d ed., 1989). To be sure, the statute does not define "prevailing" any more granularly than it defines "misleading" or "false." That does not, however, render the statute unconstitutionally vague.

(*Id.* at p. *6.)

This "guidance" begs the questions identified in the Attorney General Report rather than answering them. Is a price "most widely occurring" when it is offered by the most retailers? When it is accepted by the most customers? What if the "most widely occurring" price (the mode) is neither the median nor the mean? For instance, if Retailer A sells 1,000 units of Product X at $10, Retailer B sells 700 units at $15, and Retailer C sells 500 at $20, which is the "prevailing market price": $10 (the mode), $15 (the median), or $13.86 (the mean)? (See, e.g., *Chowning v. Kohl's Department Stores, Inc.* (C.D. Cal., Apr. 26, 2016, No. CV 15-8673 RGK (SPX)) 2016 WL 9180374, at *3–4 ["reject[ing] [a]

measure of retail value" because "[it] did not provide any reliable basis for concluding that the mode price, as opposed to the average price, is an accurate measure of retail value"].)

As the Attorney General Report explains, Section 17501 does not offer "a workable definition" of prevailing market price. (Appen. 538.) "*[A]ll* law enforcement witnesses agreed" that "any definition [must] be 'narrow'" in order "to develop an enforceable standard." (Appen. 539, italics added.) The statutory language, standing alone, did not meet that test. Due process forbids punishing retailers under a statute that fails to give adequate notice of what it prohibits and permits.

2. "Within Three Months Next Immediately Preceding the Publication of the Advertisement"

Section 17501 only amplifies the ambiguity of "the prevailing market price" by requiring that it be determined "within three months next immediately preceding publication of the advertisement."

(a) Petitioner's Proposed Interpretation of "Within [the Prior] Three Months" is Wrong

In an effort to clarify Section 17501, Petitioner insists that "three months" means "90 days" (Appen. 97; see also, e.g., Appen. 96, fn. 5, 120, 127) and that the phrase as a whole requires a former price to have been the prevailing market price "for a *majority* of [those 90] days" (Pet. 52–53, original italics). The Superior Court rightly rejected this as "an arbitrary

interpretation of section 17501." (Appen. 933, 938.) But it is also simply an *incorrect* interpretation of "three months" and "within."

First, "three months" almost certainly means "three calendar months," not "90 days." "Calendar month" is the definition of "month" provided in: (1) the Code of Civil Procedure, the Civil Code, the Government Code, and the Penal Code (Code Civ. Proc., § 17, subd. (b)(4), Civ. Code, § 14, subd. (b)(4), Gov. Code § 6804, Pen. Code, § 7(12)); (2) another subdivision of the Business and Professions Code (Bus. & Prof. Code, § 10242.5); (3) numerous cases decided before Section 17501's enactment (see, e.g., *Hayward Lumber & Investment Co. v. Corbett* (1934) 138 Cal.App. 644, 651 [collecting cases]); and (4) an Attorney General Opinion issued just after Section 17501's enactment (6 Ops.Cal.Atty.Gen. 157, 158 (1945) [describing that definition as "well settled"]). If Petitioner's definition is right, then Section 17501 fails to give adequate notice of its unusual use of "month." If Petitioner's definition is wrong, that error shows that even the *easy* terms of Section 17501 are not consistently understood.

Second, for a price to prevail "*within* [the prior] three months," it need only prevail on *any date* within that timespan, not on *the majority of dates* within that timespan. "*Any date* which falls between the beginning point and the ending point is 'within' the designated time period." (*Wilson v. Gentile* (1992) 8 Cal.App.4th 759, 762 (*Wilson*), italics added.) Similar use of "within" in other statutes plainly requires something to be true *at*

any time within a period rather than *throughout* the period.[9] And in the context of Section 17501, *Wilson*'s definition makes some sense of the two exceptions. A retailer may advertise a former price if it was the prevailing market price *either* (1) on any date within the last three months or (2) on any more distant date, provided that date is mentioned in the advertisement.

Plaintiff's reading fails as a matter of plain language as well as precedent and statutory usage. Under Petitioner's definition, the answer to the question, "Have the Red Sox been the prevailing baseball team in the World Series within the past three years?" is, apparently, "No." This would be good news for Dodgers fans, but bad news for language. And even if "within" meant "throughout"—which it does not—Section 17501 would not require a count of how many *days* a particular price had prevailed. Under Petitioner's definition, the answer to the question, "What was the most popular baby name throughout the past three years?" would require figuring out the most common

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[9] See, e.g., Bus. & Prof. Code, § 17592, subd. (e)(4) (defining "established business relationship" as requiring a "subscriber's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call"); Pen. Code, § 422, § 646.9 (defining "immediate family" to include, inter alia, a "person who regularly resides in the household, or who, within the prior six months, regularly resided in the household"); Lab. Code, § 1400, subd. (a) (defining "covered establishment" as "any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons").

baby name on each day of the past three years, and then figuring out which name won the most days. No one answers the question that way. Instead, people look to the most common name over the *entire timespan*.[10]

So too with prices. If tens of thousands of units of Product X are sold at $10 for 44 out of 90 days, and a few dozen units are sold at $100 for the remaining 46 days, Petitioner's approach concludes that the only "prevailing market price within [the prior] three months" for Product X was $100, even though vastly more units of Product X were sold at $10 in that timeframe. Ordinary language tells us that $10 and $100 were *each* "the prevailing market price" on some date "within [the prior] three months," just as the Red Sox, Astros, and Cubs were each the prevailing baseball team in the World Series at some date within the past three years. But if you had to pick between $100 and $10, Petitioner's answer of $100 seems flat wrong.

Amici thus submit that Petitioner's "prevailing on 46 out of 90 days" interpretation of Section 17501 is *not* "a reasonable interpretation." (Pet. 52.) It is not even a permissible interpretation. (Cf. Appen. 933, 938 [Superior Court deeming it "arbitrary"].) And, in any case, it is certainly not a sufficiently

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[10] See Social Security Administration, *Top Names Over the Last 100 Years*, <https://www.ssa.gov/oact/babynames/decades/century.html> (as of Dec. 2, 2018) ("show[ing] the 100 most popular given names for male and female babies born during the last 100 years" in a single ranked list totaling the names' usage over that century).

clear interpretation for Section 17501 to give adequate warning that liability might be imposed based upon on it. For that reason, Petitioner's own effort at clarification shows the statute to be impermissibly vague.

(b) Under Any Interpretation of "Within [the Prior] Three Months," Ambiguity Remains as to "the Time of Publication"

Even if a retailer could know what length of time was meant by "within three months next immediately preceding publication of the advertisement," there would still be fatal ambiguity as to "the time of publication of such advertisement." The Attorney General Report recognized this as among the "readily apparent" problems with Section 17501 (Appen. 491, 493), and matters have only grown worse since 1984 because of the persistent nature of online advertising.

Suppose, in order to stir excitement about an upcoming sale, a hypothetical electronics retailer changes the front page of www.AHypotheticalElectronicsRetailer.com, on November 16, 2018, to read: "All in-store prices 50% off from Black Friday (11/23/18) through Cyber Monday (11/26/18)." At 12:00 a.m. on November 27, 2018, after the sale has ended, the retailer removes the advertisement from its website.

When did the "publication of the advertisement" occur? Only on November 16, 2018, when the website was changed to add it? Each time a web browser loaded the website with the advertisement between November 16 and November 27? *All*

times during those dates that the website was *available* to be loaded by a web browser?

The question's answer is essential to a retailer hoping to comply with Section 17501 because the date of publication defines the date from which the retailer must look back for purposes of determining the "three months next immediately preceding." The problem is especially severe under Petitioner's "prevailing market price *throughout*" approach, for a retailer cannot possibly figure out a single prevailing market price *throughout* a three-month timespan without knowing the exact parameters of the timespan. Here, too, is fatal ambiguity.[11]

3. "Locality"

Section 17501's requirement that the prevailing market price be determined "in the locality wherein the advertisement is published" denies clear notice, particularly given today's technology. Even before the internet changed the nature of retail

[11] Petitioner suggests Section 17501's temporal vagueness can be avoided by recourse to its phrase permitting a sale to be advertised if the date when the alleged former price did prevail is "'clearly, exactly and conspicuously stated in the advertisement.'" (Pet. 54.) Not so. Section 17501's scope is defined by *both* exceptions, and there is no savings clause in the statute indicating that it can stand if one exception is struck down as unconstitutional. Moreover, compelling the inclusion of a prevailed-on date unconstitutionally burdens all retailers, no matter how small, with figuring out the "prevailing market price" on a particular date before they can speak.

sales, the Attorney General Report decried the vague nature of this term:

> What is the "locality of advertisement" when the Los Angeles Times has a San Diego County Edition, with Los Angeles advertisements, or when television stations broadcast for hundreds of miles? Is a relatively small retailer located forty-five (45) miles from Sacramento and one hundred thirty (130) miles from San Francisco, competing with advertisers in San Francisco and Sacramento? His customers seem to think so.

(Appen. 491–492.) As the Report explained, "it was clear from law enforcement testimony and that of some other witnesses" that if some sort of "trade area" standard "is to be kept a consideration, some attention must be given to an adequate definition of this concept." (Appen. 544.) "There is a real problem in determining the locality wherein the advertising is published." (Appen 487.)

The problem is not that "locality" lacks a plain meaning, it is that the word's plain meaning does not give clarity to Section 17501. Black's Law Dictionary, for instance, defines "locality" to mean "[a] definite region; vicinity; neighborhood; community." (Black's Law Dictionary (10th ed. 2014), p. 1081, col. 1.) That definition would not answer the Attorney General Report's questions in 1984, and the advent of the internet has made the definition even more question-begging in 2018. In what "definite region," "vicinity," "neighborhood," or "community" does www.macys.com advertise? The whole world? Can a region so huge that it encompasses every place commerce occurs even be

deemed a "locality" rather than a "totality"? And if Section 17501 forbids a retailer from advertising its discounts online until it first determines the prevailing market price over the entire world, the statute either operates as a total ban on such advertising or imposes liability without giving any notice as to what the statute permits and forbids. Either way, it is unconstitutional.

* * *

Each of these ambiguities, standing alone, dooms Section 17501. And "their sum makes a task for us which at best could be only guesswork." (*United States v. Evans* (1948) 333 U.S. 483, 495.) Due process does not permit Section 17501 to put retailers at the mercy of such uncertainty. As Attorney General Van de Kamp put it: "If I were a retailer … want[ing] to do an honest, straightforward job, I would like to have some guidelines," not just to know what a retailer itself can do, but to know what its competitors can do. (Appen. 546 [AG Report].) Due process makes such guidelines not only commercially desirable but also constitutionally mandatory.

CONCLUSION

Section 17501 does not target false advertising intended to mislead consumers. Instead, it subjects retailers to caprice and deprives consumers of truthful information about discounts. Section 17501 is thus doubly improper, for it violates retailers' rights to both due process and free speech. But it is also unnecessary, for other, clearer California statutes have long

addressed the dangers of false price advertising. The Superior Court got it right: Section 17501 is unconstitutional. This Court should deny the petition.

DATED: December 3, 2018 Respectfully submitted,

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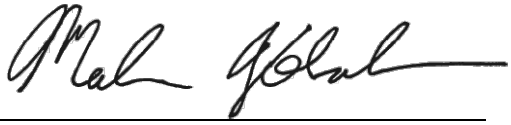
By: 
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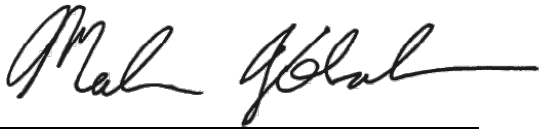
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8,358 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

By: 

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On December 3, 2018, I served true copies of the following document(s) described as follows:

AMICI CURIAE'S BRIEF IN SUPPORT OF THE REAL PARTIES IN INTEREST

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on December 3, 2018, at Los Angeles, California.

Cynthia S. Soden

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