IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN BANKERS MANAGEMENT COMPANY, INC., Plaintiff/Appellant, vs. ERIC L. HERYFORD, in his official capacity as District Attorney, Trinity County, California, Defendant/Appellee.	No. 16-16103 U.S. District Court Case No. 2:16-cv-00312-TLN-EFB

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE COUNTY OF SANTA CLARA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

On Appeal from the United States District Court
for the Eastern District of California

The Honorable Troy L. Nunley

DENNIS J. HERRERA, State Bar #139669
City Attorney
YVONNE R. MERÉ, State Bar #173594
Chief of Complex and Affirmative Litigation
AILEEN M. McGRATH, State Bar #280846
Deputy City Attorney
Fox Plaza, 1390 Market Street, Sixth Floor
San Francisco, California 94102-5408
Tel: (415) 554-4236
Fax: (415) 437-4644
E-Mail: aileen.mcgrath@sfgov.org

Attorneys for CITY AND COUNTY OF SAN FRANCISCO

(additional counsel listed on subsequent page)

JAMES R. WILLIAMS, County Counsel
State Bar #271253
GRETA S. HANSEN, Chief Assistant County Counsel
State Bar #251471
DANNY Y. CHOU, Assistant County Counsel
State Bar #180240
LAURA S. TRICE, Deputy County Counsel
State Bar #284837
OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street, East Wing, Ninth Floor
San Jose, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Attorneys for COUNTY OF SANTA CLARA

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Federal Due Process Does Not Bar Contingency-Fee Counsel In Public Law Enforcement Actions. 5

A. No Court Has Ever Endorsed The Constitutional Bar Bankers Seeks. 5

B. Federal Due Process Does Not Require The Disinterested Advocate Bankers Seeks. 8

II. Consumer Protection Actions Under Section 17200 Are Not "Quasi-Criminal" Matters. 14

A. Civil Penalties Do Not Trigger Heightened Constitutional Protections. 14

B. The Availability Of Injunctive Relief Does Not Make Consumer Protection Matters "Quasi-Criminal." 21

CONCLUSION 22

STATEMENT OF RELATED CASES 24

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Federal Cases

Aetna Life Insurance Co. v. Lavoie
475 U.S. 813 (1986) 9

Bhd. of Locomotive Firemen & Enginemen v. United States
411 F.2d 312 (5th Cir. 1969) 11

Caperton v. A.T. Massey Coal Co., Inc.
556 U.S. 868 (2009) 8, 10, 11

Corder v. United States
107 F.3d 595 (8th Cir. 1997) 19

Duncan v. Norton
974 F. Supp. 1328 (D. Colo. 1997) 18

Feltner v. Columbia Pictures Television, Inc.
523 U.S. 340 (1998) 18

First Am. Bank of Va. v. Dole
763 F.2d 644 (4th Cir. 1985) 19

Friedman v. Rite Aid Corp.
152 F. Supp. 2d 766 (E.D. Pa. 2001) 20

Ganger v. Peyton
379 F.2d 709 (4th Cir. 1967) 11, 12

Hudson v. United States
522 U.S. 93 (1997) 15

Humanitarian Law Project v. U.S. Treasury Dep't
578 F.3d 1133 (9th Cir. 2009) 16

Hurles v. Ryan
752 F.3d 768 (9th Cir. 2014) 10

Kennedy v. Mendoza-Martinez
372 U.S. 144 (1963) 15

Marshall v. Jerrico, Inc.
446 U.S. 238 (1980) 9

Reiserer v. United States
479 F.3d 1160 (9th Cir. 2007) 16, 17, 19

Republican Party of Minn. v. White
536 U.S. 765 (2002) 11

Rex Trailer Co. v. United States
350 U.S. 148 (1956) 15

Tull v. United States
481 U.S. 412 (1997) 18

Tumey v. Ohio
273 U.S. 510 (1927) 8, 9

U.S. ex rel. Fallon v. Accudyne Corp.
921 F. Supp. 611 (W.D. Wisc. 1995) 20

U.S. ex rel. Kelly v. Boeing Co.
9 F.3d 743 (9th Cir. 1993) 20

U.S. ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.
961 F.2d 46 (4th Cir. 1992) 20

United States v. AM Gen. Corp.
34 F.3d 472 (7th Cir. 1994) 19

United States v. Kojayan
8 F.3d 1315 (9th Cir. 1993) 10

United States v. Ward
448 U.S. 242 (1980) 15, 16, 17

Venegas v. Skaggs
867 F.2d 527 (9th Cir. 1989) 13

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens
529 U.S. 765 (2000) 20

Virginia State Bd. of Pharmacy v. Va. Consumer Council, Inc.
425 U.S. 748 (1976) 22

Ward v. Village of Monroeville
409 U.S. 57 (1972) 8, 9

White v. City of Richmond
713 F.2d 458 (9th Cir. 1983)..13

Withrow v. Larkin
421 U.S. 35 (1975) 8, 10

Women's Med. Ctr. of Nw. Houston v. Bell
248 F.3d 411 (5th Cir. 2001)..19

Young v. United States ex rel. Vuitton et Fils S.A.
481 U.S. 787 (1987) 12

State Cases

County of Santa Clara v. Superior Court
50 Cal. 4th 35 (2010).. 2, 6, 7, 11, 21

Garrity v. Md. State Bd. of Plumbing
135 A.2d 452 (Md. Ct. App. 2016) 18

Int'l Paper Co. v. Harris County
445 S.W. 3d 379 (Tex. App. 2013) 6

Kasky v. Nike, Inc.
27 Cal. 4th 939 (2002)..22

Korea Supply Co. v. Lockheed Martin Corp.
29 Cal. 4th 1134 (2003)... 16, 17

People ex rel. Clancy v. Superior Court
39 Cal. 3d 740 (1985)...6, 7

People ex rel. Fahner v. Walsh
122 Ill. App. 3d 481 (1984)...18

People v. Eubanks
14 Cal. 4th 580 (1996)..13

People v. Merritt
19 Cal. App. 4th 1573 (1993) 13

People v. Municipal Court (Byars)
77 Cal. App. 3d 294 (1978) 7

People v. Pac. Land Research
20 Cal. 3d 10 (1977) 16

People v. Peoples
62 Cal. 4th 718 (2016) 11

People v. Superior Court (Greer)
19 Cal. 3d 255 (1977) 13

People v. Superior Court (Kaufman)
12 Cal. 3d 421 (1974) 15, 17

People v. Superior Court (Olson)
96 Cal. App. 3d 181 (1979) 22

Philip Morris Inc. v. Glendening
709 A.2d 1230 (Md. 1998) 6

State by Humphrey v. Alpine Air Prods., Inc.
500 N.W.2d 788 (Minn. 1993) 18

State ex rel. Celebrezze v. Hughes
58 Ohio St. 3d 273 (1991) 18

State of California v. Altus Finance, S.A.
36 Cal. 4th 1284 (2005) 18

State of Rhode Island v. Lead Indus. Ass'n, Inc.
951 A.2d 428 (R.I. 2008) 7

West Virginia ex rel. Discover Fin. Servs. Inc. v. Nibert
744 S.E.2d 625 (W.Va. 2013) 6

Federal Statutes
31 U.S.C. § 3729 20

31 U.S.C. § 3730 .... 19, 20

State Statutes and Codes
Cal. Civil Code § 731 22

Cal. Code Civ. Proc. § 128 6

Cal. Bus. & Prof. Code § 17200 .... *passim*

Cal. Bus. & Prof. Code § 17203 21

Cal. Bus. & Prof. Code § 17206 .... 14, 15, 16, 17, 20

Cal. Bus. & Prof. Code § 17535 21

Other References
Voter Information Guide for 2004, General Election, at 40 16

INTEREST OF AMICI CURIAE

Local government law offices in California frequently pursue civil law enforcement cases—under California's consumer protection statute and other laws—against large corporations with ample resources. In some circumstances, these offices choose to partner with private counsel on a contingency-fee basis, in part to address the resource disparity that may exist between the parties. These partnerships are one of the critical tools that public law offices use to pursue a broad range of civil law enforcement cases on behalf of the public. Plaintiff-Appellant American Bankers Management Company ("Bankers") seeks a constitutional limitation that would bar public law offices from collaborating with contingency-fee counsel in all consumer protection cases. Resolution of this case threatens to remove this important device from the arsenal government law offices can deploy in their efforts to protect the public. Indeed, it would likely preclude some public law offices from bringing large cases against sizable corporate defendants at all.

Amici curiae the City and County of San Francisco ("San Francisco") and the County of Santa Clara ("Santa Clara")[1] have entered into contingency-fee agreements with private law firms to pursue actions under various California state laws, including California Business and Professions Code Section 17200 ("Section 17200").[2] San Francisco and Santa Clara were both plaintiffs in the California

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amici* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submittal of this brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submittal of this brief. Pursuant to Rule 29(a), *amici* attest that all parties to this appeal have consented to the filing of this brief.

[2] All statutory references are to the California Business and Professions Code unless otherwise indicated.

Supreme Court case, *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), which affirmed public law offices' ability to enter into contingency-fee arrangements with private firms in civil law enforcement cases. In that litigation—which commenced over fifteen years ago and is still ongoing—*amici* and several other public entities collaborated with private counsel on a contingency-fee basis to seek over $1 billion in remediation and related costs from three lead paint manufacturers. *Amici*'s partnership with private counsel enabled them to obtain this relief and to efficiently manage the years of litigation that the case required.

The ability to partner with private counsel is often particularly important in consumer protection matters. Consumer protection litigation is an important mechanism for addressing unlawful, anti-competitive, deceptive, and fraudulent business practices. *Amici* frequently bring consumer protection and other civil law enforcement cases against large companies with substantial financial resources. Particularly because *amici* have mandatory legal obligations that must take precedence over elective litigation—for instance, *amici* are required to provide legal advice and representation to departments, officers, Board of Supervisors, commissions, and districts—*amici* are not always able to match the resources at the disposal of large companies' counsel. If the categorical constitutional bar Bankers seeks is adopted, *amici* will find it more difficult to bring consumer protection cases against large corporations. Some public law offices, in fact, would find it impossible to litigate such cases on their own. This result would impair the significant public interest that consumer protection litigation serves, as it would have the perverse effect of potentially excusing the biggest wrongdoers from having to answer for their misconduct. The harm to the public would be particularly severe, given that public civil litigation is one of the increasingly limited ways to obtain redress from large corporations for harmful business

practices, as the proliferation of arbitration clauses and class action bans in consumer agreements have limited the reach of private-plaintiff consumer protection suits. For these reasons, *amici curiae* have a substantial interest in this matter.

Amici's experience litigating civil law enforcement cases with the assistance of private counsel also makes them well-suited to respond to Bankers' unfounded assertions about the fairness ramifications of these arrangements. *Amici* take seriously their responsibility to serve the public interest and their obligations as officers of the court. *Amici* are therefore well-versed in the protections defendants are owed in civil consumer protection matters, and well-equipped to illustrate for this Court why those protections do not include a categorical ban on contingency-fee partnerships with private counsel.

INTRODUCTION AND SUMMARY OF ARGUMENT

Bankers asks this Court to announce a far-reaching new rule barring public law offices from partnering with private lawyers on a contingency-fee basis to litigate consumer protection actions—actions Bankers compares to criminal prosecutions. Bankers' assertion is dramatic not only in its breadth but also in its purported basis: Bankers argues that the federal Due Process Clause requires this "categorical" bar to protect defendants' fair trial rights in such actions.

This Court should reject Bankers' sweeping and ill-founded request and hold that the use of contingency-fee counsel in civil law enforcement actions does not implicate the federal Due Process Clause. No court has ever before found that due process prohibits—or even limits—government law offices from entering into contingent-fee agreements to litigate civil public law actions. In fact, no court has found these limits to exist with respect to criminal prosecutors, despite the enhanced due process protections that exist in criminal cases. Instead, the Supreme Court has found that constitutional limits on even *judicial* recusals—which implicate significantly greater concerns about bias and fairness—should be deployed in only the rarest of situations. That such a high constitutional threshold applies to judicial recusals strongly suggests that an even more demanding showing is necessary to support a rule concerning prosecutors.

But in any case, Bankers' justifications for treating civil consumer protection cases like criminal cases are unpersuasive. That Defendant-Appellee Eric L. Heryford, as the Trinity County District Attorney ("Heryford"), seeks civil penalties and injunctive relief does not entitle Bankers to heightened constitutional protections. No court has equated the remedies available under Section 17200 to criminal penalties, or otherwise suggested that consumer protection cases raise unusual due process concerns.

At its core, Bankers' invocation of due process principles is a barely veiled attempt to diminish local government law offices' ability to pursue civil law enforcement actions against large companies. Adopting Bankers' purportedly constitutional bar would hinder the ability of public law offices in California and elsewhere to pursue important civil actions that protect the public. *Amici* respectfully request that this Court reject Bankers' ill-supported arguments, hold that due process concerns are not implicated by the use of contingency-fee counsel, and affirm the district court's judgment.

ARGUMENT

I. Federal Due Process Does Not Bar Contingency-Fee Counsel In Public Law Enforcement Actions.

Bankers' request that this Court use due process principles to establish a purportedly "categorical" prohibition of contingency-fee agreements in civil law enforcement actions lacks merit for a straightforward reason: No court has ever held that *federal constitutional due process* requires such a ban. Bankers' argument improperly conflates cases limiting the use of contingency-fee counsel on other grounds—through the exercise of state-law supervisory powers, for instance—with cases recognizing that a criminal defendant's due process rights are violated when a judicial officer has a financial or other personal stake in the matter's outcome. Bankers identifies no reason to grant heightened constitutional protections in civil consumer protection actions.

A. No Court Has Ever Endorsed The Constitutional Bar Bankers Seeks.

Although Bankers claims that the rule it advocates—a categorical prohibition on the use of contingency-fee counsel in all public law enforcement cases—is an established rule with deep roots in criminal law, Bankers tellingly does not identify a single case applying that rule. This is because no such case

exists. No court has found that a government law office's contingent-fee relationship with a private law firm interfered with the due process rights of the defendant. Instead, courts from other jurisdictions have roundly rejected the argument that the presence of contingency-fee counsel in a public law enforcement case infringes on the due process rights of a defendant. *See*, *e.g.*, *West Virginia ex rel. Discover Fin. Servs. Inc. v. Nibert*, 744 S.E.2d 625, 629 n.1 (W.Va. 2013) (noting that "[p]etitioner has not cited to, nor have we found, *any* case that supports a due process violation claim through the use of special assistant attorneys general in the prosecution of civil cases");[3] *see also* Appellee's Answering Brief ("AB") at 39-42.

The California Supreme Court did not hold otherwise in either *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010) or *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985). Although Bankers claims that these cases performed the "leading analysis" of the requirements of due process when public entities engage private counsel on a contingent-fee basis, Appellant's Opening Brief ("AOB") at 20, neither *Santa Clara* nor *Clancy* is a due process case. The prosecutor in *Clancy* was not disqualified for any constitutional reason—federal or otherwise —but instead under the authority of the state court "to disqualify counsel when necessary in the furtherance of justice." *Clancy*, 39 Cal. 3d at 745 (citing Cal. Code Civ. Proc. § 128(a)(5)). One of the cases on which *Clancy* relied made this point explicitly:

[3] *See also Int'l Paper Co. v. Harris County*, 445 S.W. 3d 379, 388 (Tex. App. 2013) (noting that no court has held that federal due process "establishes a blanket prohibition" on a government law office's use of contingency-fee counsel); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1234 (Md. 1998) (rejecting argument that a contingent-fee contract between the Attorney General and a private firm "violates due process and public policy because it provides outside counsel with an improper financial stake in the outcome of the underlying litigation").

> The principle which the real parties in interest seek to extend is not constitutionally based. Disqualification of a prosecutor for a conflict of interest or appearance of impropriety alone is not a matter of due process but rather an exercise of the court's statutory and inherent power over the processes of trial.

People v. Municipal Court (Byars), 77 Cal. App. 3d 294, 299-300 (1978) (internal citations omitted).

The California Supreme Court applied the same rule of law in *Santa Clara*, which narrowed *Clancy* to hold that "retention of private counsel on a contingent-fee basis is permissible . . . if neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Santa Clara*, 50 Cal. 4th at 58. While the court set forth a supervision-and-control requirement for lawyers partnering with contingency-fee counsel in such cases, *id.* at 64, it did not draw on constitutional due process principles in doing so. Instead, the court relied chiefly on *Clancy*—which itself was not a due process case—and concluded that *Clancy*'s reasoning did not foreclose local government offices from hiring an attorney on a contingent-fee basis to try a civil case. *Id.* at 50-57. The court further relied on principles from the American Bar Association's Model Rules of Professional Conduct and its Ethics Opinions regarding those rules' applicability to contingency-fee cases. *Id.* at 60, 63. And in establishing the factors relevant to the supervision-and-control standard, the court relied on a similar case from the Supreme Court of Rhode Island, which had likewise upheld the use of contingent-fee agreements in cases brought on behalf of the public. *Id.* at 58-60, 64-65 (discussing *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008)). That decision, like *Clancy*, is rooted not in due process concepts but instead in state-law principles governing the Rhode Island Attorney General's responsibilities to the public. *Rhode Island*, 951 A.2d at 471-73. Nothing in *Santa*

Clara suggests that its holding is of federal constitutional import. Just as in *Santa Clara* and *Clancy*, there is no due process issue in this case.

B. Federal Due Process Does Not Require The Disinterested Advocate Bankers Seeks.

Bankers does discuss a number of federal due process cases, and attempts to rely on those cases to justify its proposed "categorical rule" against "interested prosecutors." AOB at 16. But these cases do not demonstrate the need for any restrictions on the use of contingency-fee counsel in actions brought on behalf of the public. Bankers cites *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009), in support of its claim that the use of contingency-fee counsel violates the constitutional requirement that a defendant receive a "fair trial in a fair tribunal." *Id.*; *see also* AOB at 18. But *Caperton* stands for a substantially different proposition: that a defendant's due process rights may be violated when a *judge or a quasi-judicial officer* will benefit from a ruling in the case or is actually biased against a party. *Caperton*, 556 U.S. at 876 (providing that due process requires recusal of a judge who has "'a direct, personal, substantial, pecuniary interest' in a case" (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *id.* at 872 (providing that recusal is necessary where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). *Caperton* drew on a line of case law holding that due process is offended when a judge or judicial officer will receive financial compensation (either directly or indirectly) from finding the defendant guilty. *Id.* at 876-79 (discussing *Tumey*, 273 U.S. at 532); *id.* at 878 (discussing *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), which held that a town mayor may not serve as a judge if fines the mayor imposes contribute to local funds subject to the mayor's control); *id.* at 879-80 (considering *Aetna Life*

Insurance Co. v. Lavoie, 475 U.S. 813, 821 (1986), which found a due process violation where a state supreme court justice stood to gain $30,000 from resolution of case). *Caperton*, and the cases it relied on, establish that judges and quasi-judicial officers are subject to a stringent standard of absolute neutrality by virtue of the federal Due Process Clause. *See Ward*, 409 U.S. at 61-62 (stating that a criminal defendant is "entitled to a neutral and detached judge in the first instance").

But the same requirement of absolute neutrality does not apply to prosecutors—including criminal prosecutors. The Court in *Tumey* distinguished between judicial and nonjudicial officers when it noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions *rewards* for thus acting in the interest of the state and the people." *Tumey*, 273 U.S. at 535 (emphasis added). Likewise, the Court affirmed in *Marshall v. Jerrico, Inc.*, that whatever limits the Due Process Clause may place on public prosecutors do not require prosecutors to lack any financial interest in the outcome of the case:

> Prosecutors need not be entirely "neutral and detached." In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.

446 U.S. 238, 248-49 (1980) (internal citation omitted.). Contrary to Bankers' argument—which Heryford amply refutes, AB at 30-33—*Marshall* establishes that a criminal defendant's federal due process rights would not be violated if a prosecutor obtained "rewards" for acting on the public's behalf. An unbiased judiciary serves as a sufficient check against overzealous prosecution in such cases. *Id.* at 250 ("[T]he strict requirements of neutrality cannot be the same for

administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."). This check must likewise be sufficient in a civil case—particularly in light of this Court's understanding of the functional distinction between criminal and civil lawyers. *See United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993) ("Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers."); *see also* pp. 17-18, *infra*.

In addition, the Supreme Court's case law governing judicial recusal counsels against the drastic expansion in procedural due process law that Bankers seeks. Even in the judicial realm, "most matters relating to judicial disqualification do not rise to a constitutional level." *Caperton*, 556 U.S. at 876. As the Court stated in *Caperton*:

> The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today. . . . . Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved *without resort to the Constitution*. Application of the constitutional standard implicated in this case will thus *be confined to rare instances*.

Id. at 889-90 (emphases added) (internal citations omitted); *see also Hurles v. Ryan*, 752 F.3d 768, 788-89 (9th Cir. 2014) ("[M]ost claims of judicial bias are resolved 'by common law, statute, or the professional standards of the bench and bar'. . . ." (quoting *Withrow*, 421 U.S. at 46)). The Court has cautioned that it is only in an "extraordinary situation where the Constitution requires recusal," and has found that only "extreme facts . . . create[] an unconstitutional probability of bias" that rises to the level of a due process violation. *Caperton*, 556 U.S. at 887. These admonitions highlight the far-reaching nature of the "categorical" ban Bankers seeks. It transcends any constitutional limitations that the Supreme Court,

or any other federal court, have found necessary, and contravenes the Supreme Court's clear reluctance to expand the reach of the Due Process Clause in the recusal context.[4]

Bankers additionally relies on federal cases that required the recusal of an "interested" criminal prosecutor. *See* AOB at 16-18. While some of those cases rested on federal due process principles, *see id.* at 17, they still fail to support Bankers' claim that a constitutional rule prohibits the use of contingency-fee counsel. Most importantly, each of these cases concerned a *criminal* prosecutor. Further, none involved a prosecutor who was operating on a contingency-fee basis, or whose remuneration was in any other regard conditioned on the outcome of the case. Rather, all of those cases involved a public prosecutor's simultaneous representation of the public in a criminal prosecution and a victim of the allegedly criminal behavior. *Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (finding due process violation where lawyers representing parties to underlying action were assigned to prosecute criminal contempt charges); *Ganger v. Peyton*, 379 F.2d 709, 714-15 (4th Cir. 1967)

---

[4] The cases that Bankers relies on in support of a constitutional limitation—like *Caperton* and *Santa Clara*—actually illustrate a very different proposition: Disqualification of lawyers in a civil law enforcement action is a matter of state, not constitutional, law. As *Caperton* teaches, the Due Process Clause provides minimal procedural protections that state courts are free to supplement with "recusal standards more rigorous than due process requires." 556 U.S. at 889 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)). *Santa Clara*'s supervision-and-control framework is an example of such a more rigorous standard. 50 Cal. 4th at 58. The California Supreme Court and the California Legislature have not hesitated to adopt recusal rules requiring disqualification in contexts where the federal Constitution would not mandate it. *See, e.g.*, *People v. Peoples*, 62 Cal. 4th 718, 787 (2016) (describing the federal due process clause as "operat[ing] more narrowly" than California statutes governing judicial recusal). To the extent that Bankers demands a more stringent standard to govern public law offices' partnerships with private counsel on a contingent-fee basis, that demand presents a question of state law—not federal constitutional law.

(holding that prosecutor's simultaneous representation of defendant's wife in divorce proceeding while prosecuting defendant in a criminal action violated due process); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 806 (1987) (holding that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order").[5]

To say, as Bankers does, that these cases involve "interested" prosecutors analogous to contingency-fee counsel is inapt and disingenuous. These cases found recusal necessary to avoid the risk of actual unfairness that would stem from the prosecutor's "attempt[] at once to serve two masters"—that is, two clients in two potentially competing actions. *Ganger*, 379 F.2d at 714. That circumstance presented the risk that the prosecuting attorney may be unduly influenced by his or her representation of the victim, such that he might "abdicate[] to" that client "the exercise of his responsibility and discretion." *Id.* at 713; *see also Bhd. of Locomotive Firemen and Enginemen*, 411 F.2d at 319 ("[T]h[e]se conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men."); *Young*, 481 U.S. at 805 (finding that simultaneous representation created a risk that "the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest"). The simultaneous representation of clients with competing interests is, as these cases acknowledge, a potentially serious ethical problem. *Young*, 481 U.S. at 805.

[5] *Young*, which Bankers relies on heavily in its brief, is not a due process case. As Bankers acknowledges, AOB at 16, the Supreme Court in *Young* required recusal under its power to supervise the appointment of prosecutors and the procedures federal courts employ in enforcing their orders. 481 U.S. at 808-09. The Court disclaimed any reliance on constitutional principles. *Id.* at 809 n.10.

By contrast, the use of contingency-fee counsel is an established practice in civil litigation. *See*, *e.g.*, *Venegas v. Skaggs*, 867 F.2d 527, 533 (9th Cir. 1989) (discussing "[t]he need for private arrangements which 'account for the risk of nonrecovery'" (quoting *White v. City of Richmond*, 713 F.2d 458, 462 (9th Cir. 1983))). Moreover, Bankers does not identify any concrete respect in which the fairness of the underlying litigation will be diminished by Heryford's decision to partner with contingency-fee counsel. While Bankers repeatedly argues that contingency-fee counsel's "direct pecuniary interest in the outcome of a case" makes it unlikely that it will receive a fair trial, Bankers' description of how fairness will be compromised is thin. The most Bankers appears to muster is the argument that private counsel may have an "incentive to maximize the civil penalties imposed." AOB at 18. But Bankers does not explain how they would do so in a manner that compromises the fairness of the proceeding. Thus, Bankers fails to make the exceedingly high showing necessary to establish a due process violation.

Perhaps because Bankers lacks a colorable argument that the use of contingency-fee counsel will prejudice this case, Bankers argues that its "categorical" rule is required to prevent the "appearance of impropriety." AOB at 20. But Bankers has no support for the claim that due process requires a categorical bar on contingency-fee counsel for this reason. Bankers misleadingly cites *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 266-67 (1977). AOB at 20. But in response to *Greer*, the California Legislature adopted Penal Code section 1424, which made it more difficult for criminal defendants to recuse prosecutors. *People v. Merritt*, 19 Cal. App. 4th 1573, 1578 (1993). Under that section, actual bias must be shown; the appearance of impropriety is not a basis for disqualification or recusal. *People v. Eubanks*, 14 Cal. 4th 580, 592 (1996). If

criminal prosecutors may not be disqualified on this basis as a matter of statutory law, there is no reason why civil attorneys should be prohibited from entering into contingency-fee arrangements as a matter of constitutional due process. *See* pp. 8-10, *supra*.

II. Consumer Protection Actions Under Section 17200 Are Not "Quasi-Criminal" Matters.

Despite the absence of any authority justifying the sweeping constitutional prohibition it seeks, Bankers nonetheless argues that the purportedly "quasi-criminal" nature of Section 17200 actions requires a categorical prohibition of contingency-fee counsel in those cases. Even if Bankers were correct that Section 17200 cases are tantamount to criminal matters, it is not clear how helpful this is to Bankers' position, as no court has found a due process violation in a similar context in a criminal case. *See* pp. 5-6, *supra*. But regardless, Bankers' argument that Section 17200 cases are equivalent to criminal actions is meritless. That government law offices may seek civil penalties and injunctive relief restraining ongoing unlawful business conduct does not transform a consumer protection case into a criminal inquest.

A. Civil Penalties Do Not Trigger Heightened Constitutional Protections.

Bankers relies primarily on the availability of civil penalties in Section 17200 cases, *see* § 17206, in arguing that heightened constitutional protections apply in those cases. Bankers claims these penalties transform consumer protection matters into criminal or "quasi-criminal" cases. Bankers, however, ignores controlling precedent establishing that Section 17200 penalties are civil in nature and do not trigger any procedural protections similar to those the Constitution affords to criminal defendants.

Section 17200 remedies are clearly civil, as well-established precedent from the Supreme Court teaches. *See United States v. Ward*, 448 U.S. 242, 248 (1980). "Whether a particular punishment is civil or criminal is . . . a matter of statutory construction." *Hudson v. United States*, 522 U.S. 93, 99 (1997). In performing that statutory construction, courts first look to the legislature's express characterization of a penalty as civil or criminal. *Id.* Although that characterization does not end the inquiry, a penalty described as civil will be treated as criminal only if "'the statutory scheme was so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Id.* at 99 (quoting *Ward*, 448 U.S. at 248 and *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)). In making the latter determination, courts consider a variety of factors the Supreme Court described in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), including: whether the penalty involves an affirmative disability; whether it has historically been regarded as punishment or promotes the traditional aims of punishment and deterrence; whether it serves a purpose other than punishment and deterrence; whether it comes into play only on a finding of *scienter*; whether it applies to criminal behavior; and whether it appears excessive in relation to its purpose. *Id.* at 168-69. "[O]nly the clearest proof" will justify "transform[ing] what has been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100 (quoting *Ward*, 448 U.S. at 249).

Under this framework, Section 17200 penalties are civil, not criminal. The California Legislature labeled the remedy a "*civil* penalty" and established that it shall be recovered "in a *civil* action." § 17206 (emphases added). Consistent with this language, the California Supreme Court has found the penalty to be "civil in nature." *People v. Superior Court (Kaufman)*, 12 Cal. 3d 421, 431 (1974). Thus,

there is "no doubt that" the California Legislature "intended to allow the imposition of" this penalty "without regard to the procedural protections . . . available in criminal prosecutions." *Ward*, 448 U.S. at 249.

Bankers cannot credibly suggest that any other aspect of the penalty renders it criminal in nature. The penalty is monetary only, and imposes no other disability or restraint. *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1150 (9th Cir. 2009). Indeed, this Court has emphasized that "monetary penalties have not been historically regarded as punishment." *Reiserer v. United States*, 479 F.3d 1160, 1163 (9th Cir. 2007). The penalty provision lacks a mens rea requirement, which weighs against treating it as criminal. *Humanitarian Law Project*, 548 F.3d at 1150. And the lack of any corresponding criminal provisions indicates that the penalty is civil in nature. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).

Section 17200 penalties also serve important public purposes beyond punishment and deterrence. They are "designed to protect the public" from unfair competition, *People v. Pac. Land Research*, 20 Cal. 3d 10, 17 (1977), and they provide public law offices with "the resources they need to increase enforcement of consumer protection laws," Voter Information Guide for 2004, General Election, at 40;[6] *see also* § 17206(c) (stating that civil penalties "shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws"). The amount of the penalty—which ranges from $0 to $2,500 per violation—is not

---

[6] Available at <http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2236&context=ca_ballot_props/>.

excessive in relation to these purposes. There is thus no reason to conclude that the civil penalties in this case are "penal." *Reiserer*, 479 F.3d at 1164.

Undeterred, Bankers claims that Section 17200 actions are "quasi-criminal" and thus subject to heightened procedural protections. It is unclear what Bankers hopes to achieve through this argument, as no court has ever found that procedural due process protections flow from a "quasi-criminal" designation. *See Ward*, 448 U.S. at 253-55. But in any case, Section 17200 penalties are not quasi-criminal. Similar to the penalties the Supreme Court addressed in *Ward*, Section 17200 penalties are correlated to the "damages sustained by society" and "the cost of enforcing the laws." *Id.* at 254; *see also* § 17206(c). In assessing the penalties, courts must consider "the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." § 17206(b). There are also no criminal penalties associated with Section 17200 violations, *Korea Supply*, 29 Cal. 4th at 1144, which strongly suggests that Section 17200 remedies are not quasi-criminal, *Ward*, 448 U.S. at 254. And for that same reason, there is no particular risk that a Section 17200 defendant "would prejudice [itself] in respect to later criminal proceedings." *Id.*

Other aspects of Section 17200 cases confirm that they are wholly civil in nature. The civil rules of pleading apply, along with civil limitations periods, discovery rules, and burdens of proof. *Kaufman*, 12 Cal. 3d at 431, n.9. Defendants in Section 17200 actions are not entitled to any other criminal protections, such as the right to confront witnesses, the right to a jury trial, or the right to protect themselves against self-incrimination. *Id.* at 431, n.9, 433. For similar reasons, courts in many other jurisdictions have held that civil penalties

authorized by consumer protection statutes—like Section 17200—are civil, and that defendants in such cases are not entitled to any heightened constitutional protections.[7]

None of Bankers' arguments to the contrary is persuasive. Bankers relies on stray references in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) and *State of California v. Altus Finance, S.A.*, 36 Cal. 4th 1284 (2005), to the purported similarity between civil and criminal penalties. AOB at 30-31. But neither case supports the conclusion that Section 17200 remedies are quasi-criminal in nature. In *Feltner*, the Supreme Court held that a jury must determine damages in a copyright action because juries had historically done so under common law. The Court noted in passing the minority opinion in *Tull v. United States*, 481 U.S. 412, 428 (1997), commenting that "the awarding of civil penalties to the Government *could* be viewed as analogous to sentencing in a criminal proceeding." *Feltner*, 523 U.S. at 355 (emphasis added). But the Court did not suggest that civil penalties necessitate any heightened due process protections. Likewise, *Altus* has nothing to do with the presence of heightened due process requirements in consumer protection cases. The California Supreme Court in *Altus* considered whether Section 17200 remedies were duplicative of remedies under the jurisdiction of the California Insurance Commissioner. Solely for the "purposes" of that question, the court found no "difference" between civil and

---

[7] *See, e.g.*, *Duncan v. Norton*, 974 F. Supp. 1328, 1336, 1338 (D. Colo. 1997) (Colorado Consumer Protection Act); *Garrity v. Md. State Bd. of Plumbing*, 135 A.2d 452, 471 (Md. Ct. App. 2016) (Maryland Consumer Protection Act); *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 792 (Minn. 1993) (Minnesota Uniform Deceptive Trade Practices Act); *State ex rel. Celebrezze v. Hughes*, 58 Ohio St. 3d 273, 277 (1991) (Ohio's Consumer Sales Practices Act and Odometer Rollback and Disclosure Act); *People ex rel. Fahner v. Walsh*, 122 Ill. App. 3d 481, 488-89 (1984) (Illinois' Consumer Fraud and Deceptive Business Practices Act).

criminal penalties—a determination that allowed the Attorney General to pursue Section 17200 civil penalties. *Altus*, 36 Cal. 4th at 1308. To suggest, as Bankers does, that this case suggests that civil penalties must receive additional procedural due process protections is incorrect and misleading.[8]

Bankers' focus on the "punitive" nature of Section 17200 penalties is also misguided. AOB at 34. The fact that a civil penalty serves punitive interests does not transform it into a criminal sanction. *Reiserer*, 479 F.3d 1164. In any case, Bankers' comparison of civil penalties to punitive damages refutes, rather than supports, its constitutional argument. AOB at 34. Defendants in punitive damages actions receive *none* of the constitutional procedural protections afforded to criminal defendants—including in cases where contingency-fee counsel stand to recover a share of any punitive damages awarded. If Bankers is correct that Section 17200 penalties are tantamount to punitive damages, then the retention of contingency-fee counsel should raise no due process concerns.

Indeed, in circumstances analogous to the use of contingency-fee counsel, this Court and others have upheld a civil prosecutor's pecuniary interest in penalties. Under the False Claims Act ("FCA"), a private person—a relator—may bring a *qui tam* action in the name of the federal government. 31 U.S.C. § 3730(b); *U.S. ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 961

---

[8] Bankers also identifies several decisions characterizing a civil penalty as quasi-criminal. AOB at 31 n.4. But all of those cases addressed the constitutionality of the penalty itself; none suggested that those penalties triggered any criminal procedural protections under the Constitution. *See Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421-22 (5th Cir. 2001) (holding that civil penalty provision was void for vagueness); *Corder v. United States*, 107 F.3d 595, 598 (8th Cir. 1997) (holding that penalty formula was "arbitrary, capricious, and contrary to the statute"); *United States v. AM Gen. Corp.*, 34 F.3d 472, 474 (7th Cir. 1994) (holding that civil penalty action "was not authorized by the statute"); *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 651-52 (4th Cir. 1985) (holding that civil penalties were improper).

F.2d 46, 49 (4th Cir. 1992) ("A *qui tam* relator is essentially a self-appointed private attorney general."). Absent government intervention, the relator has the right to conduct the action, *id.* § 3730(c)(3), and to recover all FCA remedies, including civil penalties, *see id.* §§ 3729, 3730. Although these penalties are "essentially punitive in nature," *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 784 (2000), the relator is entitled to recover "between 25 and 30 percent" of the proceeds, including the penalties, 31 U.S.C. § 3730(d)(2). Thus, the relator's pecuniary interest in those penalties is no different than contingency-fee counsel's pecuniary interest in the civil penalties in this case. *See Milam*, 961 F.2d at 49 (characterizing relator's recovery as "analogous to a lawyer's contingent fee"). This Court and others have held that the relator's pecuniary interest in the penalties does not violate due process. *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747 (9th Cir. 1993) ; *see also Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001); *U.S. ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623-24 (W.D. Wisc. 1995); *see also* AB at 21-24.[9]

Bankers ultimately lacks any basis for arguing that the availability of civil penalties raises due process concerns in this case. But even if Bankers were right that the presence of contingent-fee counsel in a Section 17200 case seeking civil penalties is problematic, the proper remedy is not to create a bar prohibiting the use of contingency-fee counsel. Instead, any due process concerns could be remedied by excluding civil penalties from counsel's share of the proceeds. Counsel would still receive a contingent share of the restitution remedy—which, as Bankers concedes, is available to any private plaintiff in a Section 17200 case. *See*

[9] This is true even though civil penalties under the FCA are much harsher than Section 17200 penalties. *Compare* 31 U.S.C. § 3729(a)(1)(G) (mandating penalty between $5,000 and $10,000 per violation) *with* § 17206 (authorizing penalty up to $2,500 per violation).

§ 17535. Counsel would have no interest in civil penalties—the only aspect of this case that sets it apart from all Section 17200 cases, *see* p. 22, *infra*—and Bankers would thus lack any basis for treating consumer protection matters as "quasi-criminal."

B. The Availability Of Injunctive Relief Does Not Make Consumer Protection Matters "Quasi-Criminal."

Bankers' other justifications for treating Section 17200 cases as "quasi-criminal" are also groundless. Bankers claims that consumer protection cases amount to "government effort[s] to limit speech" because the government has the ability to seek injunctive relief to regulate "marketing and communications" with customers. AOB at 35-36. As an initial matter, Bankers' sole authority for arguing that these characteristics of a Section 17200 case make it "quasi-criminal" for due process purposes is *Santa Clara*. *Id.*; *see also* AOB at 25-26, 37-39. But because *Santa Clara*'s framework is rooted in state rather than federal law, *see* pp. 7-8, *supra*, it provides no basis for deeming consumer protection actions "quasi-criminal" for federal constitutional purposes.

In any event, consumer protection cases remain purely civil even under Bankers' own analysis. That injunctive relief is available does not give the government a sword that ordinary civil plaintiffs lack. AOB at 36-37. Rather, injunctive relief is available to all plaintiffs in Section 17200 cases, regardless of whether they are represented by private lawyers or a public law office. § 17203. If the availability of injunctive relief restraining ongoing business operations transforms a civil consumer protection case into a "quasi-criminal" one, then heightened due process protections would apply in every Section 17200 case. Such a sweeping approach would prevent the use of contingency-fee counsel in virtually all Section 17200 cases. And because injunctive relief is available in a

wide variety of civil cases—including other civil law enforcement cases, like public nuisance actions, *see* Cal. Civil Code § 731—Bankers' argument would mean that heightened constitutional protections apply in an impossibly vast number of civil cases.

Furthermore, Bankers is wrong to suggest that there are unique First Amendment interests implicated in Section 17200 cases, such that the availability of injunctive relief requires heightened procedural protections. Bankers claims that consumer protection cases threaten "*arguably* protected speech" and therefore have the potential to interfere with protected First Amendment activity. AOB at 26, 38. But the Supreme Court has affirmed that consumer protection laws targeting false, deceptive, or misleading advertising—like Section 17200 does—"are surely permissible" and do not implicate the First Amendment. *Virginia State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 770-71 (1976). Furthermore, the California Supreme Court has disclaimed the intersection between consumer protection law and free speech protections that Bankers advocates. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 959 (2002) ("Neither the UCL nor the false advertising law on its face violates the state Constitution's free speech provision as an impermissible regulation of commercial speech."); *see also People v. Superior Court (Olson)*, 96 Cal. App. 3d 181, 193 (1979). Bankers does not identify any court that has found a potential conflict between state-law consumer protection statutes like Section 17200 and First Amendment interests. Bankers thus has no reason to suggest that heightened procedural due process protections are warranted to protect its speech-related interests.

CONCLUSION

Bankers has no basis to ask this Court to impose a sweeping constitutional ban on the use of contingency-fee counsel in consumer protection cases brought by

public law offices. No court has ever found that such a far-reaching rule—one that would hinder, or in some cases prohibit, public law offices from pursuing claims against large corporations—is necessary to protect a defendant's due process rights. Bankers does not point to any fairness interests that its proposed rule would protect, or demonstrate that Section 17200 cases are tantamount to criminal matters and thus deserving of special constitutional treatment. *Amici* respectfully request that this Court reject Bankers' attempt to constitutionalize a matter properly left to—and already dealt with by—state courts and legislatures, and affirm the district court's judgment.

Dated: November 30, 2016

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
AILEEN M. McGRATH
Deputy City Attorney

By: */s/ AILEEN M. McGRATH*
AILEEN M. McGRATH
Deputy City Attorney

Attorneys for the City and County of San Francisco

JAMES R. WILLIAMS
County Counsel
DANNY Y. CHOU
Assistant County Counsel

By: */s/ DANNY Y. CHOU*
DANNY Y. CHOU
Assistant County Counsel

Attorneys for theCounty of Santa Clara

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6880 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 30, 2016.

DENNIS J. HERRERA
City Attorney
AILEEN M. McGRATH
Deputy City Attorney

By: */s/ AILEEN M. McGRATH*
AILEEN M. McGRATH
Deputy City Attorney

Attorneys for the City and County of San Francisco

JAMES R. WILLIAMS
County Counsel
DANNY Y. CHOU
Assistant County Counsel

By: */s/ DANNY Y. CHOU*
DANNY Y. CHOU
Assistant County Counsel

Attorneys for the County of Santa Clara

CERTIFICATE OF SERVICE

I, CATHERYN M. DALY, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on November 30, 2016.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE COUNTY OF SANTA CLARA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed November 30, 2016, at San Francisco, California.

/s/ CATHERYN M. DALY
CATHERYN M. DALY