AMICI CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commissioner of Insurance argues that he is entitled to broad gap-filling authority to promulgate regulations in the absence of any plain and unequivocal statutory limitation on his rulemaking powers. Or as Professor Michael Asimow argues, the "Legislature must specifically say so if it wants to limit the scope of rulemaking power . . . ." Br. Amicus Curiae in Support of Pet., *Assoc. of Cal. Insurance Companies et al. v. Jones*, S226529. These arguments turn first principles on their head.

Administrative agencies are creatures of statute and have no power to act except as authorized by the Legislature. It is therefore vital to identify a concrete textual basis for any inferred statutory authorization to promulgate regulation. It is inappropriate, moreover, to defer to an agency on the scope of its own powers. Instead, a reviewing court should consider what interpretation is most appropriate in consideration of the canons of construction because ultimately it is the role of the court to determine questions of law.

In this case the Legislature authorized the Commissioner only to enforce a prohibition against specific statutorily defined unfair or deceptive insurance practices. Yet the Commissioner claims broad power to define *additional* unfair and deceptive insurance practices under

Insurance Code Section 790.10, which provides in relevant part: "[t]he commissioner [may] . . . promulgate reasonable rules and regulations . . . as are *necessary to administer* this article." Such an interpretation must be rejected because it would convert a basic authorization to enforce the Legislature's chosen regime into an open-ended authority, to decide fundamental questions of public policy more properly reserved for the Legislature, on the thinnest of interpretive threads.

ARGUMENT

I. State Agencies Have No Authority, Except What is Expressly Delegated.

Agencies are creatures of statute. *Am. Fed'n of Labor v. Unemp't Ins. Appeals Bd.*, 13 Cal.4th 1017, 1042 (1996) ("It is well settled that administrative agencies have only the powers conferred on them."). They exist solely by virtue of legislative enactments. For this reason they have no inherent powers or prerogatives. *See, e.g., Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429, 435–36 (2006); *Water Replenishment Dist. of S. Cal. v. City of Cerritos*, 202 Cal.App.4th 1063, 1072 (2012).

> Agencies have no inherent powers, only delegated ones. That is why they are called 'administrative agencies'—they are created to administer programs established by [the Legislature], and in doing so they act as the [Legislature's] agents. As Professor Monaghan noted, "[T]he universe of each agency is limited by the legislative specifications contained in its organic act." This means that [the Legislature] must

> delegate an agency power to act. If [the Legislature] [does] not act, the agency [has] no authority.

Nathan Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1504 (2009) (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 14 (1983)).

Accordingly, the agency bears the burden of demonstrating that it has been affirmatively authorized to undertake a challenged action. *See First Indus. Loan Co. of Cal. v. Daugherty*, 26 Cal.2d 545, 549–50 (1945) (explaining that an agency must demonstrate that a regulation "falls within the power specifically conferred upon the [agency]"). In keeping with the understanding that an agency's lawful authority is limited by the text of the governing statute, California courts hold that no deference is owed to an agency's interpretation of jurisdictional language. *See, e.g.*, *Physicians & Surgeons Labs., Inc. v. Dep't of Health Servs.*, 6 Cal.App.4th 968, 982 (1992) ("Thus, the first task of the reviewing court is to decide [whether] the agency reasonably interpreted its legislative mandate as regulations that alter or amend the statute or enlarge or impair its scope are void."); *Envtl. Prot. Info. Ctr. v. Dep't of Forestry & Fire Prot.*, 43 Cal.App.4th 1011, 1022 (1996). In the absence of a clear and unambiguous textual grant of authority, the agency bears a heavy burden to justify an

assertion of regulatory authority. *See W. States Petroleum Ass'n v. Bd. of Equalization*, 57 Cal.4th 401, 415 (2013) (affirming that courts exercise independent judgment "when an implementing regulation is challenged on the ground that it is 'in conflict with the statute' . . . or does not 'lay within the lawmaking authority delegated by the Legislature'") (quoting *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal.4th 1, 10–11 & n.4 (1998)).

Where the statute is seemingly silent on a specific matter for which an agency asserts regulatory authority, it is necessary to engage in a critical analysis of the statutory framework—employing the canons of construction to ascertain the meaning of jurisdictional language. *See Envtl. Prot. Info. Ctr*, 43 Cal.App.4th at 1022. In some cases, authority is implicitly derived from an express authorization to carry out a given act because a specific authorization necessarily entails authorization to carry out those actions necessary to adequately complete the task. *See Morris v. Williams*, 67 Cal.2d 733, 748 (1967). But in other cases—as in the present dispute—the agency invokes broad or general statutory language to carry out regulatory acts that are not, in any way, indispensable to its statutory charge. In such a case, the agency bears the burden of demonstrating that its proffered interpretation is the most reasonable—taking into account

the structure of the act as a whole, pertinent legislative history, and all of the canons of construction.

II. "Gap-Filling Authority" Must be Expressly Vested.

It is flat wrong to assume that administrative agencies have free-wielding powers to do as they like in the absence of an express statutory prohibition. Such a presumption of "gap-filling authority" would turn first principles of administrative law on their head. *State ex rel. Nee v. Unumprovident Corp.*, 140 Cal.App.4th. 442, 452–53 (2006) (reaffirming the principle that "[a] ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary . . .") (quoting *First Indus. Loan Co.*, 26 Cal.2d at 550); *see also Ry. Labors Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 659 (D.C. Cir. 1994) (reasoning that a presumption of delegated power absent an express withholding of such power "comes close to saying that the [agency] has power to do whatever it pleases merely by virtue of its existence . . . .").

A. Agencies Have Authority to Act Only Within the Scope of a Statutory Charge—to Directly Advance the Legislature's Regulatory Goals.

Statutory silence is insufficient to confer the type of gap-filling authority that the Commissioner claims here. To assume otherwise would

be to endorse an untethered theory of "gap-filling authority" that would enable an agency to write text into a statute. And that would flatly contravene the notion that agencies only have those powers that the Legislature has affirmatively delegated. Accordingly, gap-filling authority should exist only in cases where a court concludes that the agency is drawing within the statutory lines—which necessarily requires a reviewing court to decide upon the *best interpretation*, in consideration of the canons of construction.

To be sure, "[t]he Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and *to carry it into effect . . . .*" *Kugler v. Yocum*, 69 Cal.2d 371, 376 (1968) (quoting *First Indus. Loan Co.*, 26 Cal.2d at 549 (1945) (emphasis added)). Likewise, *First Industrial Loan Co.* affirmed the Legislature's power to delegate authority to an agency to promulgate rules and regulations consistent with a "policy" or "primary standard" fixed by statute, which *might* include "gap-filling authority"—if expressly conferred. 26 Cal.2d at 549. But an agency may only be delegated the authority to fill-in the details of a statute *within the scope* of a general authorization. Thus an agency simply

cannot invoke gap-filling authority to accomplish tangential goals that the Legislature never contemplated.

B. No Deference is Owed to an Agency Interpretation on the Scope of its Powers

Where an agency claims "gap-filling" authority to regulate on a matter that is arguably within the scope of a general statutory charge, California courts do not defer to that assertion of authority. *See Envtl. Prot. Info. Ctr.*, 43 Cal.App.4th at 1022 ("[The] standard of review is one of respectful nondeference."). Such deference would be inappropriate because jurisdictional language is, by its very nature, intended to *limit* the scope of powers conferred. Sales & Adler, *supra*, at 1541–43. Indeed, to defer to an agency on a question of the scope of its own powers would be to let foxes guard the hen-house. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2097 (1990) (observing that, "in Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation.").

Deference toward an agency's assertion of jurisdiction would encourage self-aggrandizement of power. Sales & Adler, *supra*, at 1501–02. It would enable an agency to exploit any ambiguity in jurisdictional language to advance its proffered policies, and, more realistically, its

institutional interests. *Id.* at 1548. For all of these reasons, California courts rightly hold that agencies are not entitled deference on questions of their own jurisdiction. *Physicians & Surgeons Labs., Inc.*, 6 Cal.App.4th at 982. And that is proper because "[h]owever much expertise agencies may have at answering technical or policy questions, they have no institutional advantage in resolving jurisdictional questions." Sales & Adler, *supra*, at 1535.

C. A General Grant of Authority Must be Construed Narrowly in Consideration of the Canons of Construction.

Every delegation of regulatory authority must be construed to have principled limitations—otherwise it would run afoul of the non-delegation doctrine. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331–32 (2000) (arguing that courts must adopt narrow constructions of otherwise open-ended grants of authority); *see also* John F. Manning, *Lessons from A Nondelegation Canon*, 83 Notre Dame L. Rev. 1541, 1566 (2008). On a more fundamental level, every delegation must be understood to entail limits because a conferral of jurisdictional authority necessarily outlines the nature—and therefore the scope—of the authority conferred. *First Indus. Loan Co.*, 26 Cal.2d at 550. But even where the text of a statute suggests a seemingly broad delegation of regulatory authority, it is important to remember that statutory provisions are never read in

isolation; instead they must be harmonized within the larger statutory regime. *Ass'n of Cal. Insurance Cos. v. Jones*, 235 Cal.App.4th 1009 (2015) ("We deduce that authority from the language of the statute itself by applying familiar maxims of statutory construction.").

This means that in many cases an otherwise broad conferral of authority must be understood as cabined by a rational construction of the Act as a whole. *Id.* That is precisely the case here. The Commissioner claims an unbounded gap-filling authority to essentially prohibit any insurance practice that he deems to be unfair or deceptive. But the Commissioner is grasping at straws. He relies principally on Section 790.10; the statutory text, however, does not fairly imply broad powers.

Section 790.10 provides merely a limited authority to promulgate regulations as may be "necessary to administer" the Act. This plainly amounts to an authorization to promulgate regulations only as may be needed to carry out and enforce the Act. And this construction is most reasonable especially in light of the fact that the Legislature already spelled out specific practices that it deemed to be unfair or deceptive in Section 790.03—implicitly omitting mention of other practices.

Accordingly, the Commissioner's interpretation must be rejected because it would improperly undermine the Legislature's policy choice. If the Legislature had intended to confer authority for the Commissioner to

add to its list of prohibited unfair and deceptive practices, it would have said so expressly. But in fact, the only provision authorizing the Commissioner to recognize novel cases of unfair or deceptive conduct is in Section 790.06—which permits only the initiation of administrative proceedings, not promulgation of regulation. This further confirms that the Legislature intended to confer only limited rulemaking powers.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the decision of the Court of Appeal.

Respectfully submitted,

Dated: April 13, 2016

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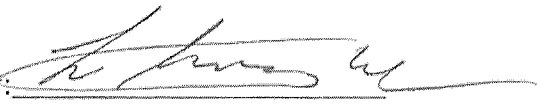
CERTIFICATE REQUIRED BY RULE 8.204(c)(1)

The text of this brief is comprised of 2,089 words as counted by the Microsoft Word® software program used to prepare this brief.

Respectfully submitted,

Dated: April 13, 2016

By: 
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PROOF OF SERVICE

CASE NO. S226529

The undersigned hereby certifies as follows:

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