No. 21-537

In the Supreme Court of the United States

ADIR INTERNATIONAL, LLC, DBA CURACAO, FKA LA CURACAO, A DELAWARE LIMITED LIABILITY COMPANY; RON AZARKMAN, AN INDIVIDUAL, PETITIONERS

v.

STARR INDEMNITY AND LIABILITY COMPANY, A TEXAS CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AND THE CATO INSTITUTE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

California's Unfair Competition Law ("UCL") allows state and local enforcers in California to borrow from and enforce any and all federal, state, or local statutes, and to pursue under the UCL the relief available in any of those statutes. California's False Advertising Law ("FAL") prohibits making false statements or statements likely to mislead consumers and often greatly overlaps with the UCL. This case involves a provision of the California Insurance Code that robs defendants in civil suits brought by the State under UCL and FAL of insurance coverage to defend themselves, merely on the State of California's say-so.

The provision at issue is California Insurance Code § 533.5, which the Ninth Circuit upheld below. On a mere *allegation* by public enforcers of wrongdoing, defendants are stripped of the means to defend themselves. No hearing is required, nor is a showing of probable cause or reasonable suspicion. Indeed, nothing more is required than California's mere "*J'accuse!*" *See* Émile Zola, *Open Letter in Defense of Alfred Dreyfus* (1898).

The question presented in this case is whether the Due Process Clause of the Fourteenth Amendment permits a State to prohibit private parties from using untainted funds, such as otherwise lawful insurance, to defend themselves against lawsuits where (and only where) the State itself is the opposing party, without providing a hearing or requiring any evidentiary showing of wrongdoing.

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INTERESTS OF *AMICI CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, equal protection of the laws, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts too frequently have neglected them.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and submits *amicus* briefs.

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1 More than 10 days prior to filing this brief, NCLA notified counsel for the parties of its intent to file. Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

NCLA rarely files *amicus* briefs at the certiorari stage. But this case is particularly important, and it arises in a posture that could not surface outside the Ninth Circuit because it involves a California law that is (thankfully) unique among the 50 States.

The uniqueness of this California law is precisely what makes it so pernicious. Fundamental rights of due process are violated where the State of California can opt to use its ubiquitous UCL (ubiquitous because it can be used to borrow *any other source of law*—federal, state, or local) and/or its very broad FAL to simply tap the insurer of a defendant on the shoulder in such a case and say "excuse us, but under Insurance Code § 533.5, please turn off our litigation target's business insurance, which it is using (or plans to use) to defend itself in a UCL/FAL suit we have brought or intend to bring." This demand then lets the insurance company off the hook, allowing it to no longer meet its obligations to its insureds and leaving the insureds who purchased coverage high and dry.

As long as a UCL/FAL defendant purchased directors and officers ("D&O") liability insurance with untainted funds, it should be able to use those funds and insist on its insurer meeting its contractual obligations to provide a defense in covered litigation that the insured defendant is embroiled in, regardless of whether a California government enforcement action results in a win, loss, or draw for the defendant. Yet Insurance Code § 533.5(a) provides that California government enforcers can strip defendants of their coverage or indemnity rights if such a defendant loses an action requiring the payment of fines, penalties, or restitution.

That is bad enough, but Insurance Code § 533.5(b)-(d) makes the due process violation even worse. Those provisions purport to inhibit insurance companies from upholding their contractual duty to defend against UCL and FAL claims, even when the State, the defendant, the courts, and the world at large remain behind the veil of ignorance as to whether the outcome of a judicial enforcement proceeding will result in the defendant prevailing against the State or instead losing to it and being declared liable. All that the State has to do—acting through either the Attorney General, any district attorney, any city prosecutor, or county counsel—is *seek* to hold a defendant liable for a violation of the UCL or FAL and any contractual duties to defend purchased from an insurance company are nullified. This provision raises unfairness to an exponential level. And litigating to counter such un-American, unconstitutional unfairness is NCLA's raison d'être.

To be sure, *amici* favor experimentation at the state level. It can lead to important policy innovations and is a vital part of interstate competition:

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try

> novel social and economic experiments without risk to the rest of the country.
>
> This Court has the power to … strike down the statute which embodies [an experiment] on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure.

New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (paragraph break added); *see also* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLIT. ECON, 416 (1956) (federalism protects the ability of citizens in their capacity as taxpayers and regulated parties to "vote with their feet"). But the fact that no other State in the Union has adopted anything like Section 533.5 of the California Insurance Code marks that provision as a Frankenstein-style experiment no State should replicate, as opposed to a praiseworthy innovation that other States should emulate.

NCLA and Cato's principal interest participating in this litigation is to vindicate Petitioner Adir International's due process rights and the rights of any individual or entity defendant whose business actions have been or might be chilled because its insurance coverage can be turned off at will by California enforcers without regard to whether a violation of the UCL and/or FAL by that defendant has actually occurred.

California Insurance Code § 533.5 has no redeeming features and should be invalidated. Not every legal policy experiment by the States succeeds—and not every such experiment is constitutional. Section 533.5 confers arbitrary power on California enforcement officials. And this arbitrary power can only be tamed by overturning the statute as unconstitutional because even a defendant opting to litigate and then prevailing cannot erase the harm it incurred from having lost access during the pendency of such litigation to the insurance rights it lawfully purchased.

Hence, NCLA and Cato pray that this Court will grant the writ of certiorari, reverse the Ninth Circuit, and invalidate this aberrant California Insurance Code provision that denies basic rights of self-defense in litigation without any prior proof of wrongdoing.

SUMMARY OF THE ARGUMENT

California Insurance Code Section 533.5 violates more facets of the Due Process Clause than can be quickly catalogued. For that reason, *amici* group the violations into two buckets.

First, Section 533.5 saddles defendants who stand accused of violating the California UCL and FAL and wish to fight such claims with the special burden of being stripped of their lawfully acquired insurance proceeds. To do that is to penalize a defendant's choice to insist on a final judicial resolution of the claims brought against it rather than to quickly pay government officials with their hands out for an easy settlement. There is no valid neutral purpose for such a statute. It represents nothing more than an attempt by California to disadvantage UCL/FAL defendants so that the State can notch settlements faster than it otherwise could. *See* Section I, *infra*.

Second, Section 533.5 deprives UCL/FAL defendants of their choice of counsel because money is the veritable life's blood of mounting any legal defense, especially when governments often have immense resources that can seem from the perspective of any single business defendant to be effectively unlimited. California produces nearly 15 percent of the nation's wealth and thus is a particularly formidable litigation foe. *See* Statista, *Which States Are Contributing the Most to U.S. GDP?*, *available at* https://www.statista.com/chart/9358/us-gdp-by-state-and-region/ (Apr. 12, 2021). California hardly needs another institutional advantage over individual litigants, and the power Section 533.5 claims over litigation insurance as revealed by this case is extraordinary.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION RUNS CONTRARY TO THIS COURT'S LANDMARK *EX PARTE YOUNG* DECISION AND THE DECISIONS OF OTHER COURTS OF APPEAL

This Court's watershed *Ex parte Young* decision is most famous for permitting state actors to be sued for prospective injunctive relief when they violate federal constitutional rights, the Eleventh Amendment notwithstanding. 209 U.S. 123, 155-56 (1908). But the century-old decision is also a landmark for a second reason: It is the case where this Court crystallized the principle that due process does not permit States to shield their laws or laws' application from judicial review by enacting onerous enforcement regimes designed to make mounting a defense in court a game not worth the candle. It is now well established that the Due Process Clause prohibits States from making it perilous for regulated parties to stick their heads above the legal trench line where they have every right to defend themselves and advance their own interests in court.

In *Ex parte Young*, a Minnesota state law regime significantly reduced railroad rates and tried to insulate the new rate regime that was less profitable for railroads (and which shareholders in the railroads sought to challenge as confiscatory) from judicial review by adopting a draconian system of penalties. Writing for the Court, Justice Peckham identified the key feature of the constitutional problem, namely to ask whether the State had created a playing field where "[i]t would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to the act and orders in question." *Id.* at 145.

In the modern world, the ability of corporations to secure the services of highly competent directors and officers depends on them being able to protect their agents using directors and officers ("D&O") insurance, which it has long been prudent for businesses to procure. *See* Pet. 1, 11-12, 21 n.2, 32-35; *see also* Note, *Liability Insurance for Corporate Executives*, 80 HARV. L. REV. 648 (1967) ("not only is [D&O] liability insurance now regarded by most businessmen as a common and necessary form of protection, but it also protects the corporation from uncollectible losses suffered at the hands of its executives.").

Especially under the expansive terms of California's UCL and FAL, *see Sandoz, Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1673 (2017), directors and officers—and the corporations with which they are affiliated—are forced into a "target rich" environment, because their actions are never free from being second-guessed by creatively minded enforcers in light of the expansive terms in which California has framed the UCL and FAL. *See, e.g.,* Joshua D. Taylor, Note, *Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction*, 52 HASTINGS L.J. 1131, 1144 (2001) (one of the UCL's core problems is that it is "an over-broad law giving a plaintiff a means [by] which to assert his own policy agenda"). California Insurance Code § 533.5 is a species of the trend (identified by this commentator) of the State freely wielding its powers to define "public policy." Subsection (d) states: "Any provision in a policy of insurance which is in violation of subdivision (a) or (b) is contrary to public policy and void."

Thus, by striking at the availability of D&O insurance on the ground that such insurance violates the State's public policy in certain instances, California Insurance Code § 533.5 falls into the constitutional rut that this Court recognized and acted to correct in *Ex parte Young*. There, this Court invalidated a state statute designed to place the judicial review necessary to resist new railroad rates beyond the reach of the regulated railroads. As Adir International rightly notes throughout its Petition, California was not shy about why it adopted Section 533.5: As California sees it, the prevalence of D&O insurance in the pre-Section 533.5 era meant that a "specific problem" requiring a solution kept cropping up—*i.e.,* that UCL and FAL cases were purportedly "impossible to settle." *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1403, 1405 (2013).

In other words, when it adopted Section 533.5, California walked right into an *Ex parte Young* problem because that statute imposes a special disability on UCL and FAL defendants that tends to force them to capitulate to government demands faster and with less fuss. In the words of *Ex parte Young* as applied to Section 533.5, "[i]t would be difficult, if not impossible, for the company to obtain officers, agents, or employees willing to carry on its affairs except in obedience to," 209 U.S. at 145, the substantive legal standards set by *any source of law, federal, state or local*, since all of those sources of law can be enforced through UCL. *See* California Bus. & Prof. Code § 17200.[2]

And that is no way to run an enforcement railroad—or at least no way to run an enforcement railroad consistent with the due process of law under the United States Constitution.

The Ninth Circuit previously summarized *Ex parte Young*'s merits holding as follows:

> [R]ailroads should not be forced to violate the statute and then assert their constitutional claims as a defense to the state enforcement action. *Id.* at 165. The Court thought the railroads should not have to bear the risk of large losses by having to disobey the act and then proceed in state court. *Id.* The Court noted that

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[2] Nor is this a merely theoretic problem. For in this case, California's UCL claim against Adir International piggybacked on almost a dozen other statutes. *See* Pet. at 12. California could have proceeded under those statutes alone. But pleading the requirements of those other statutes instead as the building-block ingredients in a UCL action is what allows the State to trigger Insurance Code Section 533.5 and turn off Adir International's insurance coverage.

> the suit raised significant questions of federal law within the meaning of the jurisdictional statute. *Id.* at 161–62.[3]

Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 511 (9th Cir. 1990) (paragraph break added).

This dispute fits comfortably within the span of *Ex parte Young* because California law strips parties like Mr. Azarkman and Adir International (and other defendants in UCL and/or FAL enforcement cases brought by California public enforcers) of the D&O insurance protections they purchased *before* any finding of liability has been made. *Ex parte Young* unmistakably holds that hampering the railway companies there (or any of their servants or employees) "from resorting to the courts for purpose of determining the validity" of the law they were contesting was unconstitutional. 209 U.S. at 144. *Compare* App. 9a, 12a, where the Ninth Circuit admitted that "California has stacked the deck against defendants facing these lawsuits filed by the state," even though it has not yet "prove[]d any of [its] allegations." Unfortunately, while correctly diagnosing this problem, the Ninth

[3] In the course of resolving the issue of whether a federal question was presented, *Ex parte Young* made clear that "the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution, nevertheless, is one which raises a Federal question." 209 U.S. at 144.

Circuit did nothing to alleviate it. And the district court tried to sweep Adir International's constitutional defense under the rug entirely. *See* App. 4a.

Ex parte Young fleshed out the constitutional defect as follows:

> The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. *The result would be a denial of any hearing to the company.*

209 U.S. at 145-46 (emphasis added). *See also id.* at 146 (if such penalties were "imposed *only after* there has been a final determination of the validity of the statute, the question would be very different than that here presented.") (emphasis added).

But here, of course, the whole point of California Insurance Code Section 533.5 is to deprive insureds who become defendants in public UCL and/or FAL actions of their insurance protections *before* the validity of the charges against them has been adjudicated.

This is because California, dissatisfied with its prior track record of obtaining voluntary settlements when defendants relied on insurance to defend themselves, changed the law to let them turn off such insurance at will and thus artificially force more settlements. Of course, it is not rocket science for California to have realized that if it can strip defendants of their ability to make use of D&O insurance—especially since the State's enforcers can nullify such insurance without probable cause, reasonable suspicion, or a hearing—it would win more often, whether by leveraging more settlements or by facing off against lawyers charging lower rates.

And so, with this legal tool in hand, all the California Attorney General needed to do in its case against Adir International was to send notices to Starr Indemnity asserting that Insurance Code Section 533.5 prohibits defense or indemnity coverage for its UCL suit against that company. *See* App. 139a-141a, 158a.

It is no answer to say that the criminal penalties at issue in *Ex parte Young* were more onerous than the loss of D&O insurance coverage and that Insurance Code Section 533.5 only nullifies such insurance when public enforcers happen to plead a violation of federal, state, or local law through the intermediary device of the UCL. *Ex parte Young* premised its ruling on broader principles than mere onerousness alone. Said the Court:

> In *McGahey v. Virginia*, 135 U.S. 662–694 [(1890)], it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy ….

Ex parte Young, 209 U.S. at 147. In this situation, when the California Attorney General, district attorney, city prosecutor, or county counsel opt to do so, a UCL/FAL defendant's D&O contract for insurance is also rendered worthless in such an enforcement action.[4] Section 533.5 thus fundamentally changes the nature of what such defendants contracted with their insurance companies to cover.

We recognize that *McGahey* is a case decided under the Contract Clause. *Ex parte Young* was not a Contract Clause case, yet it relied on *McGahey*. Why?

As revealed by the Court's ensuing discussion of *Chicago Minneapolis & St. Paul Railway Co. v. Minnesota ex rel. R.R. & Warehouse Commission*, 134

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[4] *Ex parte Young* hinges on whether the relevant penalties to a party exercising its procedural options are "so potent as to amount to a denial of the right to judicial review …." *United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 431 n.14 (1921). And by California's own admission here, the purpose of Insurance Code Section 533.5 is to deny insurance coverage to browbeat UCL/FAL defendants into settlement so that they opt to lay aside their rights to a judicial resolution.

U.S. 418 (1890), the *Ex parte Young* Court was focused on teasing out a general principle from several prior cases. Namely, the Court deduced that it was unconstitutional for the States to heap burdens on private parties as a way of avoiding or at least badly disincentivizing judicial review. This can be seen in *Ex parte Young*'s construing *Chicago Minneapolis and St. Paul Railway* as standing for the proposition that where "intimidat[ion of] the company and its officers from resorting to the courts to test the validity of the legislation [occurs], the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. And that is plainly a due process violation, as *Chicago Minneapolis and St. Paul Railway* makes clear. 134 U.S. 418 (referencing "due process" eight times). Due process inherently depends on a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Section 533.5 is designed to disrupt that balance and give California public enforcers a significant edge against UCL/FAL targets.

More specifically, California Insurance Code Section 533.5, in both its effect and design, significantly burdens the ability of companies that have purchased D&O insurance to defend themselves in litigation by denying them the right to call on the contractual "duty to defend" they had the foresight to procure in those insurance contracts. It depends on a rigged playing field that does not "hold the balance nice, clear and true between the State and the accused." *Connolly v. Georgia*, 429 U.S. 245, 249 (1977).

Even going beyond the precedent of this Court, the Ninth Circuit itself has recognized the grave dangers of a state regime that tries to insulate itself from judicial review by imposing burdens on the exercise of a party's procedural rights to defend itself. "Liability to a penalty for violation of such orders, *before their validity has been determined*, would put the party affected in a position where he himself must at his own risk pass upon the question." *Wadley Southern Railway Company v. Georgia*, 235 U.S. 651, 662-63 (1915); *see also United States v. Pacific Coast European Conf.*, 451 F.2d 712 (9th Cir. 1971) ("Defendants ought not to have to pay a statutory penalty for non-compliance with the 1961 Act during the time they were judicially testing the validity of that Act, and enjoying the benefits of any additional agency procedures secured to them in that litigation.") (citing *Ex parte Young* and *Wadley Southern*).

California Insurance Code Section 533.5 does not impose "liability" using that precise term but in reality that is still what the statute does. Section 533.5 functions exactly as if it required a defendant, at the outset of a public UCL and/or FAL action and prior to any judicial resolution, to destroy assets equal in value to the payment of a fine measured by the total insurance premiums a defendant company had paid for D&O insurance before such an enforcement action commenced. *See also Missouri Pac. R. Co. v. Tucker*, 230 U.S. 340 (1913) (*Ex parte Young* similarly required invalidation of a Kansas statute specifying the payment of $500 in liquidated damages for violating a rate regime because the Kansas law was "repugnant to the due process of law and equal protection").

Similarly here, California has given itself the power to turn off insurance that has been bought and paid for at the cost of accumulated premiums that Insurance Code Section 533.5 pays no heed to in the enforcement calculus. In other words, nothing in Section 533.5 prevents California state and local enforcers from turning off $2 million worth of insurance coverage in a dispute where the relief sought is only $100,000 or less. The magnitude of lost insurance thus bears no necessary relationship to the gravity of the purported UCL/FAL offense that California asserts. And under *Missouri Pacific Railroad* and *Ex parte Young*, where the connection between the conduct and punishment bear no relationship to each other, the Due Process Clause has been violated.

Lastly, as reflected by the fact that California assembled a hybrid case for liability based on about a dozen separate statutes awkwardly stitched together by the UCL, the UCL's purpose as a legal device is not to sharpen the lines of statutes but instead to allow its plaintiffs (public or private) to "regulate by litigation," *i.e.*, to exploit ambiguity. *See Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 538 (D. Ariz. 2021) (defining "regulation by litigation" as a process where "groups seek to gain by judicial decree policy goals which, from constitutional defect or lack of political power, are unattainable through the legislative process.").

In sum, California cannot constitutionally turn off D&O insurance in UCL/FAL cases without even giving defendants who purchased such insurance the ability to establish that they have not violated the UCL and/or FAL. Doing so violates the Due Process Clause as explicated in (1) *Ex parte Young*, (2) *Wadley*, (3) *Chicago Minneapolis & St. Paul Railway*, (4) *Missouri Pacific Railroad* and (5) *Pacific Coast European Conference*. As a result, the Court could simply take this case and invalidate the statute as a whole.

II. THE NINTH CIRCUIT'S OPINION INTERFERES WITH THE RIGHT TO COUNSEL

Modern law firms are stratified based on their profitability, which traces directly to their billing rates—in other words, how much it costs to retain their services. *See, e.g., The 2021 Am Law 200*, AMERICAN LAWYER, *available at* https://www.law.com/americanlawyer/rankings/the-2021-am-law-200/ (May 18, 2021). To deny a company insurance coverage it purchased to defend itself against possible litigation is thus to reduce, at the margins, the quality of legal defense that a defendant can mount. That handicap represents its own due process problem. The Ninth Circuit's pressing ahead to sustain California's litigation insurance regime is flawed on numerous grounds but especially because it essentially holds that imposing *incidental burdens* on the right to seek counsel is permissible: "In civil cases, courts have recognized a denial of due process only if the government *actively thwarts* a party from obtaining a lawyer or prevents it from communicating with counsel … . While it cannot tap into its insurance coverage, Adir has managed to obtain and communicate with counsel." App. 4a (emphasis added).

The notion that there is no due process problem because Adir International did ultimately find counsel that it was still able to afford and thus to defend itself against California is a benighted legal proposition. Such an approach would make due process rights hinge on the depths of a defendant's pockets. Under the Ninth Circuit's approach, *see* App. 15a, those with significant resources beyond their insurance proceeds can lawfully be stripped of their due process rights to counsel with impunity because they can just use other dollars in their coffers; but those lacking such alternative resources, who will thus not be able to afford any counsel without access to their pre-purchased insurance proceeds, would presumably retain due process rights to make use of their insurance proceeds. That cannot be the law.

Going further, the Ninth Circuit's approach is inconsistent with the law of this Court and that of other circuits, on several grounds.

First, *Powell v. Alabama*, 287 U.S. 45, 53, 71 (1932) (emphasis added), holds that a defendant has to be given "a fair opportunity to secure counsel *of his own* *choice*," otherwise he suffers "a clear denial of due process." *See also Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) ("the right to counsel in civil matters includes the *right to choose the lawyer* who will provide that representation") (emphasis added). The right to select counsel must necessarily include the right to pay for that selected counsel through resources the defendant has marshaled for that purpose. For this reason alone, this Court should grant certiorari in this case and reverse the Ninth Circuit's holding that due process is satisfied as long as a UCL/FAL defendant can secure *some counsel, any counsel*, even if such a defendant is unfairly stripped of the right to make the counsel choice it would have made had it not been abruptly deprived of insurance coverage.

Second, due process is obviously premised on balance and fairness. A State cannot claim that it is acting constitutionally as long as it allows a UCL/FAL defendant the ability to pay the most marginal lawyer it might locate in the market, especially not when defendants in UCL/FAL actions brought by *private* plaintiffs face no restrictions at all on their choice of counsel. *See* Pet. 8; App. 9a ("As Adir points out, California has stacked the deck against defendants facing these lawsuits *filed by the state ....*") (emphasis added); *see also* California Ins. Code 533.5(a)-(b) (nullifying insurance in UCL or FAL cases only if relief under those causes of action is sought by California's "Attorney General, any district attorney, any city prosecutor, or any county counsel"); *Bodell v. Walbrook*

Ins. Co., 119 F.3d 1411, 1424 (9th Cir. 1997) (Kozinski, J., dissenting) (recognizing that Section 533.5 advantages government plaintiffs over private plaintiffs).

Indeed, Section 533.5's rigged nature is compounded by the fact that it only applies if a government enforcer in California opts to bring an action under the UCL or FAL in the first place. Accordingly, Section 533.5 represents not just a "superpower," Pet. 31, that applies in all enforcement cases where the government is the plaintiff, it represents a superpower on steroids because it applies *only in* the cases where California government lawyers affirmatively choose to nullify D&O insurance, *i.e.,* where the government taps a business defendant on the shoulder to say "sorry, we have decided to utilize the UCL or FAL to go after you, not just the underlying federal, state, or local statute we think you've violated, so now your insurance company's duty to defend you goes 'poof.'"

In other words, D&O insurance that is purchased to cover a certain type of conduct or to defend against a certain type of lawsuit is not defined *ex ante* as void for public policy, it is instead *voidable ex post* at the mere whim of California's state and local enforcers. This is precisely why this case below shows that Starr Indemnity initially paid $2 million under its policy to allow Adir International to defend itself against California, before the California Attorney General threatened Starr Indemnity. *See* Pet. 2; *see also id.* at 12-13.

Not only are *amici* not aware of any statute like California Insurance Code Section 533.5 that has been adopted and is being applied elsewhere in the Union, *amici* are also unaware of a statute defining the concept of what is void for reasons of public policy based on a public policy that gives enforcement executives a magic wand to turn the relevant public policy off or on at their option.

If that concept exists in other States, it is surely rare, for the legal concepts of voidability and void *ab initio* (the latter of which is how public-policy bans typically work, as every American law student learns in first-year contracts class) are typically understood as *legal contrasts*, not as legal birds of a feather. *See, e.g.*, *Griffin v. Coca-Cola Refreshments USA, Inc.*, 989 F.3d 923, 935 (11th Cir. 2021) ("The assignments here … do not contravene public policy …. Accordingly, the assignments here are merely voidable rather than void *ab initio* ...."); *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 431-32 (1998) (Breyer, J., concurring) (explaining the same distinction between contracts void *ab initio* for violating public policy as against contracts that are merely voidable, comparing 1 RESTATEMENT (SECOND) OF CONTRACTS, § 7, Comment b (voidable) with 2 *id.*, § 178, and Comment d (void)).

Due process is concerned with avoiding arbitrariness, yet Insurance Code Section 533.5 gets invoked only where public enforcers have already made the standardless discretionary choice to pursue a defendant under the UCL, for neither Section 533.5 nor the UCL constrains the choice California enforcers possess between proceeding with or without use of an UCL overlay. That choice is simply left to their unreviewable discretion. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("The Due Process Clause also forbids arbitrary deprivations of liberty."); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (land-use regulations violate the Due Process Clause where they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."). *Cf. Ponte v. Real*, 471 U.S. 491, 498 (1985) (due process right of an inmate to call witnesses at a disciplinary hearing, even while circumscribed given the prison as a setting, could not be transformed "into a privilege conferred in the unreviewable discretion of the disciplinary board").

On the issue of the right to counsel, the Ninth Circuit's decision below stands in starkest contrast to the Second Circuit's approach in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).[5] In *Stein*, a third party paying a defendant's legal fees caved to a government threat of adverse consequences if it did not stop doing so. There the federal government had forced an accounting firm to implement an evolving policy that

[5] *Stein* was a Sixth Amendment criminal case but Adir International explains well how the civil due process of law similarly embraces the right of counsel and the interconnections in those bodies of cases. *See* Pet. 17-18.

moved from imposing conditions on fee advancements to employees that were indicted, to capping such fees, and finally to ending such advancements altogether *See id.* at 135, 157.

The Second Circuit reacted to this set of facts by holding that the government's actions violated the defendant's right to counsel. Writing for the court, Judge Jacobs highlighted that this right is vital "irrespective of the quality of the representation [defendants] receive[d]." *Id.* at 151. And his opinion for the court also stressed the unfettered use of monetary resources for legal defense (something that California Insurance Code Section 533.5 is designed to thwart): "The goal is to secure a defendant's right to spend his own money on a defense." *Id.* (cleaned up). And relatedly, the right to counsel exists to "protect[] against unjustified government interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain." *Id.* at 156.

Reducing the case to its analytical essence and comparing it to Adir International's case here, *Stein* dealt with an accounting firm's self-insurance regime designed to protect an accounting firm's employees from being caught up in costly litigation without adequate financial resources to defend themselves. *Stein* then went on to invalidate as unconstitutional case-specific government action that undermined that private contractual arrangement, which otherwise "would have paid defendants' legal fees and expenses without regard to cost." *Id.* at 135. By contrast, California Insurance Code Section 533.5 is a statute of general applicability that deprives insureds of third-party insurance purchased in the marketplace. Despite these contrasts, nothing of constitutional moment should hinge on those differences of (i) self-insurance versus third-party insurance or (ii) case-specific government coercion stripping a defendant of insurance proceeds versus a statutory provision doing the same thing as a general matter. To deny financial resources contractually promised to prospective defendants when actual litigation begins, however one slices it, intrudes on the sacred right of private parties to pick their own legal counsel.

CONCLUSION

This Court should grant Adir International's Petition because California Insurance Code Section 533.5 deprives insured businesses of due process in numerous respects. It is a provision of law no other State has put in place and it serves no function except the unconstitutional one of unfairly disadvantaging private defendants who seek to defend themselves in litigation. The fact that California has enunciated that its purpose in enacting this provision of law was to drive settlements that would not otherwise occur if public plaintiffs and private defendants faced off on a level playing field not tilted by Section 533.5 cannot save the statute. Instead, California's statement starkly demonstrates that it is seeking to bias court proceedings to its own advantage—a motivation that cannot survive due process scrutiny.

Respectfully submitted.

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