No. 22-447

In the Supreme Court of the United States

JOHNSON & JOHNSON, a New Jersey Corporation;
ETHICON, INC., a New Jersey Corporation;
AND ETHICON US, LLC,
Petitioners,

v.

STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
FOURTH DISTRICT, DIVISION ONE

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether California's Unfair Competition Law and False Advertising Law and their accompanying remedial provisions, Cal. Bus. & Prof. Code §§ 17200, 17206, 17500, & 17536, satisfy the fair notice requirements of the Due Process Clause by informing the public of what conduct constitutes a violation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED....................................i

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Court's Review Is Needed Because California's Unfair Competition And False Advertising Laws Have Become Standardless Enforcement Mechanisms For Expansive Litigation, In Defiance Of Due Process. 5

A. The UCL And FAL Are So Amorphous And Elastic As To Give Rise To Nearly Limitless Substantive Reach. 5

B. The California Legislature's Unchecked Expansion Of The Two Statutes' Enforcement Mechanisms Has Incentivized Due Process Abuses By Would-Be Plaintiffs, Including Government Entities................................. 8

1. As Originally Enacted In 1933, California's UCL Authorized Only Injunctive Relief................................... 9

2. A Series Of Amendments In The 1970s Expanded The UCL's Reach. .. 10

3. The Latest Amendment Effective January 1, 2023, Continues The Trend Of Aggressive Expansion........ 11

II. Unchecked UCL/FAL Enforcement Has Severe, Far-Reaching Consequences........... 13

A. Companies Face Increasingly Substantial Judgments And Settlements Under California's Consumer Protection Laws..................... 13

B. States Across The Country Are Engaging In Similar Overreach In The Name Of Consumer Protection............... 17

III. This Court's Review Is Needed To Ensure That Consumer Protection Laws Are Robustly Enforced Without Flouting Due Process. 21

IV. The Current Trajectory Of Notice-Free UCL Enforcement In California And Beyond Stands To Impose Crippling Economic Effects Absent This Court's Intervention... 23

CONCLUSION... 25

TABLE OF AUTHORITIES

Page(s)

Cases

Bardin v. DaimlerChrysler Corp.,
39 Cal. Rptr. 3d 634
(Cal. Ct. App. 2006) 6, 7

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989)..21

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185 Cal. Rptr. 3d 684
(Cal. Ct. App. 2015) 6

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48 Cal. Rptr. 3d 770
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973 P.2d 527 (Cal. 1999)..5

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567 U.S. 142 (2012)..1

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567 U.S. 239 (2012)..2

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137 Cal. Rptr. 3d 293
(Cal. Ct. App. 2012) 7

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55 F. Supp. 3d 1230 (C.D. Cal. 2014)....................5

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Life Ins. Co.,
128 Cal. Rptr. 2d 463
(Cal. Ct. App. 2002) 22

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__ F. Supp. 3d __, 2022 WL 3348573
(N.D. Cal. Aug. 12, 2022)..............................17, 18

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208 Cal. Rptr. 3d 303
(Cal. Ct. App. 2016) 6

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Charitable Servs.,
87 Cal. Rptr. 2d 253
(Cal. Ct. App. 1999) 7

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Campbell,
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Health Ins. Co.,
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(Cal. Ct. App. 2008) 6

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777 S.E.2d 176 (S.C. 2015) 19

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15 U.S.C. §§ 41–58..23

U.S. Sup. Ct. R. 37.6 1

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Cal. Bus. & Prof. Code § 16759................................10

Cal. Bus. & Prof. Code § 17200..........................2, 5, 6

Cal. Bus. & Prof. Code § 17204................................10

Cal. Bus. & Prof. Code § 17206............................2, 11

Cal. Bus. & Prof. Code § 17500..............................2, 5

Cal. Bus. & Prof. Code § 17536..................................2

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Cal. Civ. Code § 3369 ....9, 10, 11

Cal. Civ. Code § 3370.1 10

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Reg. Sess. (Cal. 2022) 12

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Civil Code, Relating to Specific and
Preventive Relief, ch. 953, § 1,
1933 Cal. Stat. 2482 9

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Add Section 3370.1 to, the Civil
Code, Relating to Specific or
Preventive Relief, ch. 1084, § 2,
1972 Cal. Stat. 2020 10

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3370.1 of the Civil Code, Relating to
the Specific or Preventive Relief,
ch. 746, § 1, 1974 Cal. Stat. 1654.......................10

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17206, and 17207 of the Business
and Professions Code, and to Amend
Section 533.5 of the Insurance Code,
Relating to Regulation of Commerce,
ch. 1195, § 1, 1991 Cal. Stat. 5799...............10–11

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An Act to Amend Sections 17204, 17206, and 17207 of the Business and Professions Code, and to Amend Section 533.5 of the Insurance Code, Relating to Regulation of Commerce, ch. 1195, § 2, 1991 Cal. Stat. 5799 11

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An Act to Add Section 17536 to the Business and Professions Code, Relating to False or Misleading Advertising, ch. 827, § 1, 1965 Cal. Stat. 2419 12–13

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters nationwide, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF has appeared many times as an *amicus* before this Court to insist that due process affords *all* defendants the right to know what conduct the law forbids and what the likely punishment for that conduct will be. *See, e.g.*, *Yates v. United States*, 574 U.S. 528 (2015); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). And WLF's Legal Studies Division, its publishing arm, has produced timely papers on how the unrestrained, expansive use of state consumer protection laws deprives defendants of basic due process. *See, e.g.*, Jeffrey Margulies, *California High Court Imperils Jury-Trial Right in State Civil Litigation with Unfair Competition Act Ruling*, Wash. Legal Found. Legal Backgrounders (May 21, 2020), https://bit.ly/3uATtR6.

WLF supports traditional state efforts to protect the public from harms by unfair and deceptive

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[1] Following timely notice, counsel for the parties have consented to this brief. Under Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

business practices, which are anathema to a healthy free market. But recent statutory and prosecutorial overreach by some state Attorneys General has radically transformed well-intentioned consumer-protection laws into a trap for the wary and unwary alike. As state coffers swell with revenue streams from massive civil penalties that dwarf any actual harm to consumers, this Court's intervention is sorely needed.

INTRODUCTION AND SUMMARY OF ARGUMENT

A law "is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). From small and modest beginnings nearly 90 years ago, California's Unfair Competition Law (UCL) and False Advertising Law (FAL) and their accompanying remedial provisions have evolved into textbook examples of this species of vagueness—making possible the kind of blatant violation of the Due Process Clause that the Petition describes here.

The UCL and FAL include terminology that fails to put the public on fair notice of what kind of conduct actually constitutes a violation. With no definition of a "violation" in the UCL and FAL for purposes of assessing penalties, courts are left to

interpret and apply amorphous, elastic, and imprecise language, such as whether a business act or practice is "unlawful," "unfair," or "fraudulent," on a case-by-case basis, which deprives businesses of fair notice.

Unsurprisingly, this vagueness has resulted in an increasingly standardless and often arbitrary application of these laws by California state courts and, at times, their federal counterparts. The chaos has snowballed over time, providing ever greater opportunities and incentives for abuse of the judicial process by government entities and others who seek to enforce one or both statutes. A careful review of both statutes' legislative history reveals that this standardless and often arbitrary application of these laws by both state and federal courts was not the California Legislature's original intent. Indeed, what began as a relatively modest statutory regime authorizing only select individuals and entities to seek injunctive relief—thereby putting future actors on adequate notice of prohibited conduct—has morphed into a broad scheme authorizing the pursuit of civil penalties by an ever-longer list of individuals and entities for past conduct based on vague terms, without even a gesture towards fair notice.

As the Petition convincingly shows, should the UCL's and FAL's extreme overreach remain unchecked, eye-opening ramifications will come at the expense of fundamental fairness and

constitutional due process. Government entities and others will have greater incentives to seek the maximum civil penalty under one or both statutes, then aggregate that amount per "violation." This ongoing abuse will continue in the form of substantial judgments and settlements—as large as $800 million or more in a single lawsuit—collected from businesses of all sizes and industries with no meaningful way to anticipate their liability.

Simply put, California's UCL and FAL have evolved from commonsense consumer protections to a punitive statutory scheme of such gargantuan overreach that it is increasingly impossible for businesses to meaningfully predict their exposure to significant penalties in a State that, on its own, is the world's fourth largest economy.

And the consequences of the UCL's and FAL's extreme overreach extend far beyond just California. Attorneys General across the country are using their own States' vague consumer protection laws to engage in similar overreach that routinely violates the fundamental principles of due process. This has become a nationwide civil justice crisis. Now is the optimal time for this Court to intervene, to interpose some basic due process guardrails.

ARGUMENT

I. This Court's Review Is Needed Because California's Unfair Competition And False Advertising Laws Have Become Standardless Enforcement Mechanisms For Expansive Litigation, In Defiance Of Due Process.

A. The UCL And FAL Are So Amorphous And Elastic As To Give Rise To Nearly Limitless Substantive Reach.

California's UCL contains many vague terms resulting in a broad substantive reach and uncertainty in litigation. The UCL defines "unfair competition" as any one of the following wrongs: (1) an "unlawful" business act or practice; (2) an "unfair" business act or practice; (3) a "fraudulent" business act or practice; (4) "unfair, deceptive, untrue or misleading advertising"; and (5) any act prohibited by §§ 17500 through 17606. Cal. Bus. & Prof. Code § 17200. The California Supreme Court has explained that the statute operates in the disjunctive, so that, for example, a practice would be prohibited as "unfair" even if not "unlawful" and vice versa. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999); *see also Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d 1230, 1242 (C.D. Cal. 2014) (holding that complaint need not specify which prong a UCL claim invokes).

Given that the UCL does not even define what a violation is, *see* Pet.24, it is difficult, if not impossible, to know when a violation occurs under these prongs. *First*, the UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Moran v. Prime Healthcare Mgmt., Inc.*, 208 Cal. Rptr. 3d 303, 311 (Cal. Ct. App. 2016) (citation omitted). "Virtually any law—federal, state or local—can serve as a predicate for an action under Business and Professions Code section 17200." *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 72 Cal. Rptr. 3d 888, 895 (Cal. Ct. App. 2008).

Second, as even California appellate courts admit, the UCL's "unfair" prong is "something of a moving target," *CADC/RADC Venture 2011-1 LLC v. Bradley*, 185 Cal. Rptr. 3d 684, 698 (Cal. Ct. App. 2015), with three distinct lines of cases offering equally arbitrary and ambiguous definitions of the term. Some courts consider whether the injury is substantial, is not outweighed by any countervailing benefits, and could not have reasonably been avoided by the plaintiff. *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 777 (Cal. Ct. App. 2006). Others require that the public policy underlying the claim "be tethered to specific constitutional, statutory, or regulatory provisions." *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634, 636 (Cal. Ct. App. 2006). Still others consider whether the practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers . . . weigh[ing]

the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* This scattershot approach to liability deprives parties of fair warning.

Third, the UCL's "fraudulent" prong does not even require actual falsity. All a consumer has to show to prove her claim is that the challenged business practice is "likely to deceive the public." *Klein v. Chevron U.S.A., Inc.*, 137 Cal. Rptr. 3d 293, 324 (Cal. Ct. App. 2012) (citation omitted).

Fourth, false advertising operates similarly. "Allegations of actual deception, reasonable reliance, and damage are unnecessary." *People v. Orange Cnty. Charitable Servs.*, 87 Cal. Rptr. 2d 253, 268 (Cal. Ct. App. 1999) (citation omitted). There is, however, no meaningful way of determining what is "likely" to deceive the public. In effect, "[w]hat exists today is an open ended, case-by-case standard that deprives businesses of fair notice of how violations will be assessed and penalties imposed" under the UCL and FAL. Pet.26; *accord* Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission," Commission File No. P221202, at 3, 5–6 (Nov. 10, 2022) (criticizing "near-per se" approach to unfair competition laws in antitrust context as "unstructured 'I know it when I see it'").

B. The California Legislature's Unchecked Expansion Of The Two Statutes' Enforcement Mechanisms Has Incentivized Due Process Abuses By Would-Be Plaintiffs, Including Government Entities.

As it exists today, California's UCL is virtually unrecognizable from the modest statute initially enacted by the Legislature in 1933. What started out as a tightly circumscribed injunctive relief statute has transformed into a legislative behemoth, authorizing potentially massive civil liability even when a defendant's conduct does not violate existing state statutes or judicial decisions—and as Petitioners rightly emphasize—even when a defendant or potential defendant has zero notice of its potential liability. Pet.14–29. These days the UCL and its companion statute, the FAL, have become a powerful cudgel that can be passed indiscriminately amongst various state actors and deployed to extract massive sums of money from businesses operating within California's borders. This unfettered expansion of the UCL's reach is due, in large part, to a series of aggressive amendments made to the California Civil Code over a six-year period in the 1970s, which have now become deeply entrenched in the case law. In the ensuing decades, the government entities empowered by these amendments have steadily expanded the scope of their ambition, at times achieving absurd results entirely divorced from considerations of basic due

process. Petitioners' case is a textbook example of the extremes to which these cases are trending.

1. As Originally Enacted In 1933, California's UCL Authorized Only Injunctive Relief.

The California Legislature first evinced a desire to prevent unfair competition in 1933 when it amended former Civil Code § 3369, which addressed the availability of injunctive relief in general. The 1933 enactment authorized the Attorney General, District Attorneys, and private persons to seek injunctions in cases of "unfair competition."[2] Perhaps anticipating the potential for overzealous future lawmakers to allow the UCL to go unchecked, the Legislature chose to couch unfair competition within its existing injunctive relief statute, rather than create an entirely new cause of action with its own separate enforcement regime. Any efforts by the Legislature of 90 years ago to keep the UCL self-contained have, however, proven futile. Subsequent amendments have done nothing but bolster the UCL's power and expand its reach.[3]

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[2] 1933 Cal. Stat. 2482.

[3] *See infra* Section I.B.2–3. The California Legislature's view of the UCL stands in stark contrast to that of the California public. Indeed, the only time the UCL has appearedon the ballot for public vote was in 2004, when Californians voted to *restrict* it by overwhelmingly approving Proposition 64, a ballot initiative requiring that an individual,

2. A Series Of Amendments In The 1970s Expanded The UCL's Reach.

In 1972, the Legislature beefed up the UCL's enforcement regime by enacting Civil Code § 3370.1 to allow recovery of civil penalties for violations of § 3369, on top of injunctive relief.[4]

Two years later, the Legislature expanded the government's enforcement power to allow specified City Attorneys (as well as District Attorneys and the Attorney General) to seek injunctions under the statute.[5] Two years after that, the Legislature added restitutionary damages as an available remedy under the statute.[6] In 1978, the Legislature added § 16759 to the Business and Professions Code, granting pre-litigation subpoena power (previously reserved only for the California Attorney General) to District Attorneys who reasonably believed § 3369

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other than the Attorney General or a local public prosecutor, must suffer injury or financial loss to have standing to sue a company under the UCL. *See* Kevin Shelley, Cal. Sec'y of State, Statement of Vote: Presidential General Election: November 2, 2004, at 43–45.

[4] 1972 Cal. Stat. 2020, 2021.

[5] 1974 Cal. Stat. 1654, 1654–55. In 1991, the Legislature again amended § 3369—newly reenacted as Business and Professions Code § 17204—to add County Counsels to the list of state actors permitted to prosecute actions for injunction under the statute. 1991 Cal. Stat. 5799, 5799.

[6] 1976 Cal. Stat. 2378, 2378–79.

had been violated.[7] And the next year, the Legislature again expanded the government's enforcement power under the UCL, this time amending § 3369—newly reenacted as Business and Professions Code § 17206—to allow City Attorneys (as well as District Attorneys and the Attorney General) to seek civil penalties.[8] As explained by Petitioners and noted *infra* in Part II, the current UCL provides these individuals with "vast discretion to seek hundreds of millions of dollars in civil penalties." Pet.19.

3. The Latest Amendment Effective January 1, 2023, Continues The Trend Of Aggressive Expansion.

Most alarming of all, this trajectory of wanton expansion shows no sign of stopping. Indeed, it continues to ramp up. Followed to its logical conclusion, one would reasonably fear that the last of the 1970s amendments—the formidable weapon of pre-litigation subpoena power—would eventually be extended to include those City Attorneys already empowered to seek injunctions and civil penalties under the statute. And just two months ago, with the

[7] 1977 Cal. Stat. 1746, 1746–47.

[8] 1979 Cal. Stat. 3101, 3101–02. In 1991, the Legislature again amended § 17206 to add County Counsels to the list of state actors permitted to prosecute actions for civil penalties under the statute. 1991 Cal. Stat. 5799, 5799–800.

passage of Assembly Bill 2766, the California Legislature did just that.[9]

In short, the Legislature continues to throw caution to the wind as it further expands the UCL and FAL.[10] This latest enactment enables yet another state actor to utilize threats of limitless pre-litigation depositions and document productions to bully businesses of all sizes into paying massive settlements into state coffers—all in the name of some amorphous notion of "unfair competition." If the Court does not intervene and put a stop to this rampant expansion, the State will have no reason to refrain from weaponizing the UCL and FAL against any business perceived as standing in the way of its latest policy goals and objectives, however quixotic.

The UCL's and FAL's slow transformation from commonsense consumer protection laws into

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[9] Assemb. B. 2766, 2021–22 Leg., Reg. Sess. (Cal. 2022).

[10] California's FAL has followed a nearly identical enforcement trajectory as the UCL. *See* 1941 Cal. Stat. 727, 727–29 (permitting Attorney General and district attorneys to prosecute actions for injunction under the FAL); 1965 Cal. Stat. 2419, 2419 (amending FAL to permit actions for civil penalties, which may be prosecuted by Attorney General or district attorneys); 1972 Cal. Stat. 494, 494–95 (amending FAL to permit county counsel, city attorney, or city prosecutor to prosecute actions for injunction); 1972 Cal. Stat. 1299, 1299–300 (amending FAL to permit county counsel or city attorney to prosecute actions for civil penalties); 1972 Cal. Stat. 1299, 1300 (amending FAL to permit actions for restitutionary damages).

California's preferred means of imposing arbitrary liability on unsuspecting businesses warrants this Court's review.

II. Unchecked UCL/FAL Enforcement Has Severe, Far-Reaching Consequences.

A. Companies Face Increasingly Substantial Judgments And Settlements Under California's Consumer Protection Laws.

Petitioners in this case were held liable for civil penalties in the amount of $302,037,500, payable to "the People." Pet.App.103a. Yet this jaw-dropping sum is just a drop in the bucket. In California, as is progressively true in other States, the Attorney General as well as local County Counsel and City Attorneys are increasingly relying on homegrown consumer protection laws to collect substantial judgments and settlements from businesses—largely untethered to any actual harms suffered by consumers and without any meaningful way for those businesses to anticipate their liability. To take just a handful of examples:

- In March 2021, the California Attorney General announced a $188.6 million settlement with Boston Scientific Corporation. Press Release, Cal. Dep't of Just., California Department of Justice Announces $188.6 Million Multistate Settlement (Mar. 23, 2021),

https://bit.ly/3FxGK80. In its complaint, the State alleged the company violated California's consumer protection laws by deceptively marketing its transvaginal surgical mesh devices. *Id.* California received $19.3 million from the settlement. *Id.*

- In September 2020, the California Attorney General announced a $60 million settlement with medical technology company C.R. Bard, Inc., and its parent company, after alleging that the company deceptively marketed its transvaginal surgical mesh devices. Press Release, Cal. Dep't of Just., Attorney General Becerra Announces $60 Million Multistate Settlement (Sept. 24, 2020), https://bit.ly/3h40abo. California received $5.02 million from the settlement. *Id.*

- In December 2016, the California Attorney General announced a $19.5 million multistate settlement agreement with biopharmaceutical company Bristol-Myers Squibb tied to the company's marketing of its atypical antipsychotic drug Abilify. Press Release, Cal. Dep't of Just., Attorney General Kamala D. Harris, 42 Other Attorneys General, Announce $19.5 Million Settlement (Dec. 8, 2016), https://bit.ly/3FIbLGF. Specifically, the

company was targeted for promoting Abilify—which the FDA had approved to treat schizophrenia, bipolar disorder, and major depressive disorder—for certain off-label uses and allegedly misleading doctors and patients about the drug's risks and side effects. *Id.* California received $1.3 million from the settlement. *Id.*

- In August 2015, the California Attorney General announced a $71 million settlement with pharmaceutical company Amgen Inc. over its marketing of the drugs Aranesp and Enbrel. Press Release, Cal. Dep't of Just., Attorney General Kamala D. Harris, 48 State Attorneys General Announce a $71 Million Consumer Settlement (Aug. 18, 2015), https://bit.ly/3Y4U2A7. California received $4.6 million from the settlement. *Id.*

Beyond the healthcare sector, many other businesses have, in recent years, found themselves paying out substantial sums to resolve consumer protection claims under the UCL and FAL. For example, in October 2017, the California Attorney General announced a $120 million multistate settlement with General Motors Company over allegations that the company violated the State's consumer protection laws by failing to disclose risks associated with defective ignition switches in its vehicles. Press Release, Cal. Dep't of Just., Attorney

General Becerra Announces $120M Multistate Settlement (Oct. 19, 2017), https://bit.ly/3uw93gR. California received more than $7 million. *Id.*

Moreover, the Orange County District Attorney's office separately obtained a $13.9 million settlement from General Motors based on those same allegations. Press Release, Off. of Dist. Att'y Orange Cnty., OCDA Obtains $13.9 Million Settlement (Oct. 27, 2017), https://bit.ly/3VC9PVq. Showcasing the substantial temptation for overreach that the UCL poses to cash-strapped local government officials, the District Attorney's office proudly announced that it intended to use the massive sum it extracted from General Motors to fund its own basic operating costs, including "the enforcement of California consumer protection laws and economic crimes, and the information technology to support these operations. A portion of the settlement is also allocated to the Orange County Gang Reduction Intervention Partnership." *Id.*

As these examples show, there is seemingly no limit to California's ability to extract astronomical settlements from across industries under its anything-goes consumer protection laws. The time has come for this Court to scrutinize this disturbing trend by granting the Petition.

B. States Across The Country Are Engaging In Similar Overreach In The Name Of Consumer Protection.

As California goes, so goes the nation. Attorneys General across the country are using their States' consumer protection laws to engage in similar overreach, with no end in sight. The judgments and settlements that States have collected from businesses are immense, often bearing little or no relation to the effects of the allegedly unfair marketing practices on actual consumers. In early 2021, for example, the Hawaii Attorney General announced a massive $834 million judgment against Bristol-Myers Squibb Company and three U.S.-based subsidiaries of French pharmaceutical company Sanofi. Press Release, Haw. Dep't of Att'y Gen., $834 Million Order Entered in Hawaii State Court Against Bristol-Myers Squibb and Sanofi (Feb. 15, 2021), https://bit.ly/3iKx7Kn. That case arose from allegations that the companies falsely advertised the drug Plavix, making misleading claims about its efficacy and failing to disclose on the drug's FDA-approved label that it had diminished or no effect on part of the patient population. *Id.* Following a four-week trial, a judge determined that each individual distribution of Plavix constituted a separate violation of Hawaii law and imposed a penalty of $1,000 per violation, for a total of $834,012,000. *Id.*

While not all cases yield so outsized a judgment as the Plavix suit, recent state enforcement actions

have consistently resulted in judgments and settlements in the millions. In 2015, the South Carolina Attorney General obtained a judgment of over $124 million against pharmaceutical company Janssen, after a jury determined the company engaged in unfair or deceptive practices related to its marketing of the antipsychotic drug Risperdal. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 777 S.E.2d 176, 182, 204 (S.C. 2015). The court assessed $100 for each of the 228,447 "sample boxes" of Risperdal that Janssen distributed to South Carolina prescribers, $4,000 for each of the 7,184 "Dear Doctor Letters" Janssen sent to South Carolina physicians, and $2,000 for each of the company's over-36,000 follow-up doctor visits. *Id.* at 203–05.

Similar cases abound. State Attorneys General have collected, for instance, $100 million from Abbott Laboratories for its alleged off-label marketing of seizure-disorder drug Depakote, *see* Press Release, Iowa Dep't of Just. Off. Of Att'y Gen., Miller, State Attorneys General Reach $100 Million Settlement (May 7, 2012), https://bit.ly/3HiOxb9; $60 million from Pfizer for its alleged false marketing of anti-inflammatory drugs Celebrex and Bextra, *see* Press Release, Wash. State Off. of Att'y Gen., AG McKenna Announces $60 Million Settlement (Oct. 22, 2008), https://bit.ly/3HhESS4; $62 million from Eli Lilly relating to its alleged improper marketing of antipsychotic drug Zyprexa, *see* Press Release, Cal. Dep't of Just., Attorney General Brown

Announces $62 Million Multi-State Settlement (Oct. 7, 2008), https://bit.ly/3HgkrFa; and $13.5 from Boehringer Ingelheim Pharmaceuticals, Inc., over alleged deceptive claims concerning four of the company's prescription drugs, *see* Press Release, Tex. Att'y Gen., AG Paxton Announces $13.5 Million Settlement (Dec. 21, 2017), https://bit.ly/3UFSg5J.

Besides generating millions upon millions of dollars flowing directly into state coffers, these settlements have also allowed state governments to obtain even greater regulatory power over companies than what is available to the federal agencies charged with overseeing them. For instance, after several Attorneys General obtained $60 million from Pfizer, Pfizer entered a consent judgment allowing various Attorneys General to "enforce violations of FDA regulations," requiring Pfizer to "submit all television advertising campaigns for *any* Pfizer prescription drug or biological product to the FDA for pre-review," and prohibiting the company from, among other things, providing any sales force incentives for increasing the off-label use of a product. Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209, 233–34 (2016); Stipulated General Judgment, Oregon ex rel. Myers v. Pfizer Inc., No. 08C23533 (Or. Cir. Ct. Oct. 22, 2008). Beyond imposing substantial financial burdens on businesses, state consumer protection enforcement actions can result

in additional regulatory burdens for already heavily regulated companies.

Indeed, state consumer protection laws can prompt requests for unconstitutionally excessive statutory penalties even in private enforcement suits. For instance, in a federal class action bringing claims under New York's consumer protection statutes, plaintiffs alleged that a beverage manufacturer made false claims about its product's ability to provide "joint pain and arthritis relief." *Montera v. Premier Nutrition Corp.*, __ F. Supp. 3d __, 2022 WL 3348573, at *6 (N.D. Cal. Aug. 12, 2022). The jury found that the class's actual damages, that is, the amount of money class members spent on the product during the class period, amounted to nearly $1.49 million. *Id.* at *3. But after trial, the class requested an additional award of over $91 million in statutory damages—a sum over 60 times greater than plaintiff's actual damages—which the District Court rightfully rejected as unconstitutionally excessive. *Id.* at *3, *6.

In light of these trends, the Petition offers the Court an ideal vehicle for providing much needed clarity to businesses and state governments about the bounds of due process and fair notice, as well as valuable guidance to lower courts grappling with these vital questions.

III. This Court's Review Is Needed To Ensure That Consumer Protection Laws Are Robustly Enforced Without Flouting Due Process.

Under many state consumer protection laws, including California's, a business can face civil penalties even if it did not intend to deceive the State's consumers and no consumer was actually harmed by the business's conduct. *See, e.g.*, *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463, 470–71 (Cal. Ct. App. 2002) (explaining that a violation "can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage" (citation omitted)); D.C. Code Ann. § 28-3904 ("It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby . . . ."). As shown, the sheer breadth of these laws can pressure companies into large settlements and can lead judges and juries to render extraordinary judgments lacking any connection to the alleged misconduct, such as the over $300 million judgment entered against Petitioners here.

Yet this draconian approach is not necessary to protect the public from bad actors in the marketplace. Other consumer protection regimes still provide for robust enforcement without giving rise to overreach concerns.

Take, for example, the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41–58, the basis for most state consumer protection laws. The FTC Act resolves some of the issues associated with broader, more ambiguous state consumer protection statutes: for one thing, it allows the Federal Trade Commission to seek civil penalties based on allegedly unfair or deceptive practices only where the business had "actual knowledge that such act or practice is unfair or deceptive and is unlawful." *Id.* § 45(m)(1)(B)(2). Penalties are unavailable under the Act unless the company "violate[s] a cease-and-desist order, consent agreement, or had clear notice that conduct is prohibited." Silverman & Wilson, *supra*, at 213. And, unlike state consumer protection laws, the FTC Act cannot be enforced by private attorneys hired to represent the government on a contingency-fee basis, thus minimizing the risk that counsel will needlessly seek maximum civil penalties where a mere injunction might be appropriate to address "a government-identified need to protect consumers." *See id.* at 215, 217; Pet.35.

Relatedly, some state consumer protection laws attempt to protect against overreach by expressly requiring evidence that a business knowingly or intentionally engaged in unfair or deceptive conduct before civil penalties may be assessed. *See, e.g.*, Ariz. Rev. Stat. § 44-1531(A) (civil penalties available only where defendant commits a willful violation); Del. Code tit. 6, § 2522(b) (same); 73 Pa. Stat. § 201-8(b) (same). Others prohibit statutory damages in private

consumer class actions, Colo. Rev. Stat. § 6-1-113(2), or limit a private plaintiff's potential recovery to "his or her actual financial loss proximately caused by the offense or violation," Ark. Code § 4-88-113(f)(1).

These protections, while theoretically still subject to overreach and even abuse, comport far better with traditional notions of fair notice under the Due Process Clause, as espoused by this Court. They also provide a roadmap for the kinds of guardrails this Court should impose on the enforcement of state consumer protection laws, starting with reining in California's abuses in this egregious case.

IV. The Current Trajectory Of Notice-Free UCL Enforcement In California And Beyond Stands To Impose Crippling Economic Effects Absent This Court's Intervention.

As a matter of policy, States' overzealous and unpredictable enforcement of broad consumer protection laws harms businesses in myriad ways.

First, it goes without saying that most companies will not survive without being able to engage in some degree of marketing of their products and services. Without notice of how much civil liability it might face should a judge or jury decide its business practices are "likely to deceive" consumers, a company cannot be expected to price its products accurately and get them to market in a timely fashion.

Second, as Petitioners rightly point out, Pet.36–39, these behemoth awards (and the threat of them) create a chaotic and uncertain business environment, which has a chilling effect on research and development across a broad array of industries. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages." (citations omitted)); *see also* Alexander N. Cross, *Federalizing "Unfair Business Practice" Claims Under California's Unfair Competition Law*, 2013 U. Chi. Legal F. 489 (explaining that unfair competition laws' "expansive and unpredictable reach threatens legitimate businesses, unaware of the laws' boundaries").

Third, even for those companies that can reasonably anticipate facing some type of consumer protection claim during the life of their business, the inability to predict potential exposure under broad state consumer protection regimes will make it difficult to purchase insurance policies for the right type and amount of coverage—if such coverage is even available in the first place. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 377–78 (2009).

Fourth, and perhaps most fundamentally, removing foreseeability by imposing liability arbitrarily, without any attention to how businesses must operate, will result in less innovation and a net loss to society. The costs and concerns associated with consumer protection litigation may prevent businesses from getting off the ground in the first place—not to mention force some businesses to shut down following lengthy litigation, an adverse judgment, or a hefty settlement. *See, e.g.*, Terry Jones, *Another Big Company Departs California—Will Last One to Leave Shut the Lights?*, Investor's Business Daily (Feb. 3, 2017), https://bit.ly/3hgdPvZ.

"The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto Ins. Co.v. Campbell*, 538 U.S. 346, 418 (2007) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). Arbitrary—and thus unpredictable—civil penalties violate due process. The time has come for this Court to take seriously California's lack of fair notice, starting with the massive civil penalty that Petitioners incurred here.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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