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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Courts in California and across the country are refusing to enforce meaningful due process protections in UDAP enforcement actions. Instead, they draw selectively from this Court's fair notice opinions and apply a less exacting vagueness standard. This Court should grant certiorari and hold that more robust scrutiny is required.

Rather than defending this limited scrutiny, Respondent argues that the applicable due process standard is largely irrelevant: the lenient standard states have applied in UDAP cases is practically the same as the criminal standard. BIO 18-19. That is not accurate, and this suggestion that the standard does not matter only introduces additional uncertainty. This Court should clarify that the applicable standard is an important threshold question, and that UDAP actions are subject to meaningful fair notice protections.

Applying the correct fair notice standard would require vacatur of the penalties at issue here. The award was based on each document or statement deemed "likely to deceive" consumers. Yet the California trial court imposed penalties for two categories of documents that could not possibly qualify: (1) every print marketing material shipped to California, regardless of whether it was distributed to the public; and (2) every third-party newsletter or hospital mailing circulated, regardless of whether they contained any information from Ethicon. *See* Pet. 13-15, 22. When a company's statements do not reach the public, they have no capacity to deceive anyone at all. And

Respondent's brief does not offer a single example of a case imposing penalties in like circumstances. This Court should grant the Petition and hold that there was no fair notice here.

Respondent also argues that this is a fact-bound California issue, with no broader consequences. BIO 13-17, 19-20. That is not accurate. As described in the Petition and elaborated by amici, UDAP statutes have been instruments of state overreach nationwide. Recognizing a robust fair notice standard and enforcing it in this case will go a long way toward curbing excessive and arbitrary outcomes in UDAP enforcement actions.

ARGUMENT

I. The Court Should Grant Certiorari To Clarify That Robust Fair Notice Requirements Apply To UDAP Statutes.

This Court should grant certiorari to clarify that UDAP statutes—which give states enormous discretion to penalize businesses for public statements—are subject to meaningful fair notice scrutiny.

This Court has not yet addressed the civil vagueness standard governing UDAP statutes, and its precedent does not provide a clear answer. The Court has at times stated that there is "greater tolerance" for vagueness in civil laws. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982); *see Winters v. New York*, 333 U.S. 507, 515 (1948). Yet the Court has also stated that some types of civil statutes are subject to more exacting fair notice scrutiny. *See, e.g.*,

F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253-54 (2012) (protected speech); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (deportation). Because UDAP enforcement actions generate massive civil penalties and risk chilling protected speech, rigorous scrutiny is appropriate. *See* Pet. 19. Most courts evaluating due process challenges in UDAP actions have nevertheless applied a very limited due process fair notice review. *See* Pet. 19-20.

Respondent does not defend the weak fair notice standard on the merits. Instead, Respondent suggests that the choice between standards does not matter: the Court has used "remarkably similar" language in civil and criminal cases. BIO 18-19. But this argument only highlights the need for review. Far from treating the standards as interchangeable, state courts have repeatedly relied on this Court's precedent in applying "less restrictive" vagueness scrutiny to UDAP statutes. *E.g.*, *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 600 (Mo. 1993) (discussing *Hoffman Estates*, 455 U.S. at 498-99, and giving these laws "greater leeway" under the fair notice test); *Dep't of Legal Affs. v. Rogers*, 329 So.2d 257, 264 (Fla. 1976) (discussing *Papachristou v. Jacksonville*, 405 U.S. 156 (1972)). Respondent's suggestion that the standards are essentially the same contradicts these cases and introduces additional uncertainty in need of clarification.

Moreover, the notion that the difference between standards is negligible cannot withstand scrutiny. This Court has treated the applicable vagueness standard as an important threshold determination. Two separate opinions addressed this question in

Dimaya. There, Justice Gorsuch characterized the weaker civil standard as a "feeble" and "emaciated form of review," and found that it lacked any constitutional basis. *Dimaya*, 138 S. Ct. at 1229, 1231 (Gorsuch, J., concurring in part and concurring in the judgment). Further, the United States—rather than treating vagueness standards as interchangeable—argued that a "less searching" standard applies in civil proceedings. *See* Br. for Petitioner at 17*, Dimaya*, 138 S. Ct. 1204 (No. 15-1498), 2016 WL 6768940. Whether deemed "feeble," "emaciated," or "less searching," the weakest version of due process scrutiny—currently being applied to UDAP statutes—has been treated very differently from the criminal standard in practice.

In addition to suggesting that the due process standards are interchangeable, Respondent asserts that the standard is not outcome-determinative in this case. BIO 17-18. According to Respondent, Ethicon had "ample notice" of how its violations would be counted. BIO 17. But what notice is "ample" is the parties' core dispute. In its Petition and further below, Ethicon details why notice was lacking here. In short, no one would think that a statute punishing statements "likely to deceive" consumers would assign penalties for statements that never reached consumers. Pet. 24; *infra* 6-8. Defining what notice is "ample"—by identifying the correct fair notice standard—is the critical threshold question.[1]

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[1] Respondent argues that it is "not at all clear" that the standard was outcome-determinative in *other* UDAP cases. BIO

Respondent also urges denial of this Petition because the California Court of Appeal did not specifically address the degree of fair notice scrutiny applicable to UDAP statutes. BIO 18. But Ethicon preserved the underlying fair notice challenge, *see infra* 9-10, and the applicable legal standard is a threshold question of law. Moreover, there is no need for further percolation, and this Court is already deeply familiar with fair notice standards. *See* Pet. 17-19; *Fox Television Stations*, 567 U.S. 239; *Dimaya*, 138 S. Ct. 1204. The lines have been drawn, and this Court should grant certiorari to enforce constitutional limits on UDAP enforcement actions.

II. California Law Failed To Provide Fair Notice Of The Severity Of The Penalty.

In this case, California courts held for the first time that a defendant can be punished for making statements "likely to deceive" consumers in marketing materials that never reach consumers. Pet. 24-27. Ethicon lacked fair notice of this nonsensical rule, and this Court's intervention is critical to enforcing basic due process limits.

As described in the Petition (at 24-25), California's UDAP statutes prohibit "untrue or misleading" statements made "before the public." Cal. Bus. & Prof. Code §§ 17500, 17200. Misleading statements are those that are "likely to deceive" consumers. *Shaeffer v. Califia Farms, LLC*, 258 Cal. Rptr. 3d 270, 277 (Ct.

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19 & n.8. None of those state courts addressed a similar challenge to penalties, however, so it is not clear why the outcomes in those different cases matter here.

App. 2020). Businesses are penalized for each "violation" of these laws—though the statutes do not define "violation" or describe how to count them. Cal. Bus. & Prof. Code §§ 17206(a), 17500, 17536(a). California courts previously provided some limited guidance, counting as violations only misleading marketing materials transmitted to consumers and thus theoretically capable of misleading them. Pet. 25-26. No more.

Here, the trial court assessed penalties for materials not proven to have reached the public. This applies to two categories of documents that triggered penalties: (1) every Ethicon mesh print marketing material shipped to California, regardless of whether the document was distributed to consumers; and (2) every third-party newsletter or hospital mailing circulated, regardless of whether the documents contained any information from Ethicon. *See* Pet. 13-15, 22. Businesses facing such untethered liability may now elect silence—or overwarning—to avoid this extreme exposure. *See* Pet. 38; AdvaMed Amicus Br. 14-16. This arbitrary punishment "furthers no legitimate purpose" and is inconsistent with due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

Respondent claims that Ethicon had fair notice, because "[a]nyone reading the statutes and relevant precedent" would "reasonably conclude" that a "per-communication methodology" for counting violations could be appropriate. BIO 13-14. But the word "communication"—as Respondent uses it—presupposes that the marketing materials are shared and received. Print marketing materials discarded by sales representatives, which are never distributed, are not

"communications" in this sense under the statute or common parlance. *See* Pet. 25. Thus, notice that the trial court might employ a "per-communication" counting method would not provide fair notice of the penalties at issue here.

Respondent cannot offer a single case imposing penalties in like circumstances. In Respondent's lead case, for example, the defendant was punished based on the number of "highly individualized solicitations" that were actually mailed to the public. *People v. Morse*, 21 Cal. App. 4th 259, 272-73 (1993) (cited at BIO 13-16). Respondent's remaining cases fall into the same pattern: the violation counts are based on statements transmitted to consumers. *See* BIO 13.[2] These cases offer no notice that businesses may be punished for communications not proven to have reached the public.

According to Respondents, the burden is nevertheless on defendants to *exclude* materials not sent to consumers from the violation count—otherwise "individualized proof" of violations would be required. BIO

[2] *See People v. Dollar Rent-A-Car Sys., Inc.*, 259 Cal. Rptr. 191, 198-99 (Ct. App. 1989) (violations for contracts, oral representations, and repair invoices transmitted to consumers); *People v. Overstock.com, Inc.*, 219 Cal. Rptr.3d 65, 85 (Ct. App. 2017) (violations based on number of days communications could be viewed online); *People v. Toomey*, 203 Cal. Rptr. 642, 656-57 (Ct. App. 1984) (approving "'per victim' basis of calculating violations"); *People v. Witzerman*, 105 Cal. Rptr. 284, 291 (Ct. App. 1972) (same); *People v. Superior Court (Olson)*, 157 Cal. Rptr. 628, 639 (Ct. App. 1979) (finding that "a single publication constitutes a minimum of one violation with as many additional violations as there are *persons who read* the advertisement *or who responded* to the advertisement" (emphasis added)).

16. But Ethicon's Petition is not seeking an evidentiary rule requiring individualized proof. Other courts have at least attempted to tether violation counts to the statute without imposing that requirement. *See People v. JTH Tax, Inc.*, 151 Cal. Rptr.3d 728, 757-58 (Ct. App. 2013) (approving violation-counting based on "a fraction of circulation as a proxy for readership"). There was no such discounting here.[3] Ethicon was found categorically liable for *all* materials shipped to California—regardless of whether those materials reached consumers. Ethicon lacked fair notice of those penalties.

Putting aside the merits, Respondent offers a number of reasons for ignoring the questions presented. According to Respondent, any responsibility for this issue lies with the State of California. BIO 14. But the California Supreme Court declined review of Ethicon's fair notice challenge. *Id*. As a result, only this Court's review can cure the State's unconstitutional new rule. Nothing about this request is extraordinary. To the contrary, this Court has repeatedly granted certiorari to evaluate whether state or local laws are impermissibly vague. *E.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1983); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou*, 405 U.S. 156; *Giaccio v. State of Pa.*, 382 U.S. 399 (1966).

Respondents also argue that the issue is factbound. BIO 13. But the question is purely legal: Whether due process allows California's UDAP

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[3] Because the trial court did not discount violations this way, the constitutionality of the counting method described in *JTH* is not at issue here.

statutes to punish as violations materials not proven to reach consumers. In any event, the problem goes far beyond this case. Vague UDAP statutes are pervasive, subject to extreme state overreach, and have resulted in enormous and unpredictable penalties nationwide. Pet. 29-39; *see infra* 10-11. Enforcing due process limits here is an important first step toward imposing guardrails on these arbitrary deprivations of property.

Finally, Respondent argues waiver. BIO 12-13. Ethicon repeatedly preserved this challenge, however. Ethicon argued to the California Court of Appeal that it lacked fair notice of the "severity of the penalty." C.A. Opening Br. 69 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). It explained that this was in part because "no California court had used a total-circulation counting methodology in the circumstances here." C.A. Reply Br. 53. Respondent argues that the due process argument was not framed as a violation-counting issue until Ethicon's reply. BIO 13 n.6. Violation-counting was always front-and-center, however: Ethicon's opening brief argued extensively that the violation counting method violated state law. *See, e.g.*, C.A. Opening Br. 61-66. The reply simply made clear that the same issue was part of the constitutional problem.

Ethicon timely petitioned the California Supreme Court for review on the ground that "due process prohibits the imposition of more than $300 million in penalties for conduct that Defendants had no notice violated the law." Pet. for Rev. 7. It explained that this problem included the violation-counting methodology. Pet. for Rev. 35. That is exactly what Petitioners

argue here. And contrary to Respondent's assertion (BIO 12-13), it does not matter whether Petitioners refined their due process claim as the case developed. Petitioners are "not limited to the precise arguments they made below," so long as the "federal claim is properly presented." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Petitioners preserved the question presented for review.

III. Certiorari Is Warranted Because The Question Presented Is Of Recurring Nationwide Significance.

Respondent argues that these nationwide issues are largely irrelevant, because only California's statutes are at issue here. BIO 19-20. Granting certiorari and adopting a robust fair notice standard would affect cases across the country, however, by giving courts a tool to curb arbitrary and unpredictable UDAP enforcement. It does not matter that some UDAP laws have slightly different provisions or different enforcement mechanisms. *See* BIO 20. Regardless of the exact statutory scheme, a robust fair notice standard will give defendants everywhere an important tool to protect their constitutional rights.

This Court's review is vitally needed. Across the country, UDAP statutes provide states nearly unfettered discretion to award civil penalties for "misleading" statements in marketing materials, and to determine the size of the award. Pet. 29, 31-32. "[W]hat began as a relatively modest statutory regime … has morphed into a broad scheme authorizing the pursuit of civil penalties … for past conduct based on

vague terms, without even a gesture towards fair notice." WLF Amicus Br. 3; *see id.* at 8-13; Pet. 30-31, 37.

This "broad, sweeping liability [is] untethered to traditional tort principles." AdvaMed Amicus Br. 8. "Unconstrained by any requirement of proving harm," states "seek arbitrarily large damages awards by creatively transforming a single allegedly unethical business practice into thousands or millions of individual 'violations.'" Chamber Amicus Br. 3. This practice is widespread and growing, with penalties reaching astronomical levels. Pet. 31-33; Chamber Amicus Br. 4-6; WLF Amicus Br. 17-20; NAM Amicus Br. 7-9. The unpredictable risks of UDAP enforcement deter innovation and compromise all levels of investment, research, and development. AdvaMed Amicus Br. 12-13.

Respondent contends that "there are compelling policy reasons for a false advertising statute to deviate from traditional tort principles." BIO 20. But the underlying justification for UDAP laws does not permit state overreach with respect to UDAP enforcement. *See* NAM Amicus Br. 14 ("The Court need not choose which path a state takes, but can require them to act rationally and predictab[ly] when it inflicts punishment."). Ethicon's Petition is not asking for a ruling that UDAP statutes are facially unconstitutional. It is simply asking for meaningful constitutional limits on enforcement of these broad statutes.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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