No. 21-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

California Insurance Code § 533.5 prohibits private parties from using insurance proceeds to defend themselves against a wide range of claims brought by the State. The statute requires no hearing or showing of probable cause or reasonable suspicion. Parties who face such claims may thus be stripped of a standard means of funding their defense, even if purchased with untainted funds, based on the State's mere allegation of wrongdoing. Moreover, the statute's history reveals that California enacted the statute for the sole purpose of discouraging parties from mounting a vigorous defense in cases in which the State was experiencing a "specific problem"—namely, that such cases were proving "impossible to settle." *Mt. Hawley Ins. Co.* v. *Lopez*, 215 Cal. App. 4th 1385, 1402, 1403 (2013), as modified (May 29, 2013).

In the decision below, the Ninth Circuit recognized that, in enacting § 533.5, "California has stacked the deck against defendants facing these lawsuits filed by the state" without having "prove[d] any of [its] allegations," but held that the law was not sufficiently "extreme" to violate due process because petitioners were able to hire counsel using other resources. App. 9a, 12a. The question presented 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 only where the State itself is the opposing party, without providing a hearing or requiring any evidentiary showing of wrongdoing.

RELATED PROCEEDINGS

United States District Court (C.D. Cal):

Adir Int'l, LLC v. *Starr Indem. & Liab. Co.*, No. 2:19-CV-04352-R-PLA (Sept. 10, 2019)

United States Court of Appeals (9th Cir.):

Adir Int'l, LLC v. *Starr Indem. & Liab. Co.*, No. 19-56320 (April 15th, 2021)

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INTRODUCTION

This case presents a critically important question regarding the due process rights of businesses and executives sued by the government. Like businesses in any other State, California companies can spend thousands of dollars annually on directors and officers (D&O) liability insurance, and that insurance is lawful and enforceable when such companies or their executives are sued by private plaintiffs. But unlike the law of *any* other State, California law stacks the deck against the very same defendants, in numerous cases involving the very same claims, by invalidating that insurance when the State *itself* sues. California thus strips defendants of the ability to defend themselves adequately—a particularly harsh consequence for individual executives and smaller businesses, for whom D&O insurance is frequently the only means of countering litigation backed by the State's vast resources.

Section 533.5 of the California Insurance Code arms the State's Attorney General and other attorneys with the ability to bar insurers from complying with their contractual duty to defend. All the government needs to do is accuse the defendant of violating the State's expansive unfair competition or false advertising law. No hearing, evidence, probable cause, or reasonable suspicion is required, so the claims may prove utterly baseless. And since California broadly defines "unfair competition" to sweep in "any unlawful, unfair or fraudulent business act or practice," the State can deprive businesses and their executives of D&O coverage—a standard means of paying counsel in the modern world—in nearly any case. The Attorney General's purpose in lobbying for and obtaining such a law? To give the State leverage in cases that, by his lights, were "impossible to settle."

Here, for example, after the State sued petitioners ("Adir"), their insurer—respondent Starr Indemnity ("Starr")—initially paid $2 million under their insurance policy to help them mount a vigorous defense against the State, which ultimately served more than 1,000 written discovery demands and took nearly 40 depositions. But when the Attorney General informed Starr that its actions violated § 533.5, Starr stopped paying and demanded repayment of the $2 million. Adir thus filed this lawsuit, seeking to enforce its policy and challenging the constitutionality of § 533.5.

The Ninth Circuit acknowledged that "California has stacked the deck against defendants facing these lawsuits filed by the state." App. 9a. The court also acknowledged that § 533.5 grants California "the power * * * to deny insurance coverage that Adir paid for to defend itself" even though the State "has yet to prove any of [its] allegations." *Ibid.* Nevertheless, the court rejected Adir's due process claim, reasoning that invalidating Adir's insurance coverage without any showing of wrongdoing or use of tainted funds was not one of those "extreme scenarios" where the State "actively prevents a party who is willing and able to obtain counsel from doing so." App. 12a.

That decision calls out for review. The "right to assistance of counsel is a fundamental constituent of due process," and it includes "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Luis* v. *United States*, 136 S. Ct. 1083, 1093 (2016) (plurality opinion). Indeed, if the right to counsel does not "protect[] the prerequisite right to use one's financial resources for an attorney," then that right is nothing more than "a flimsy parchment barrier." *Id.* at 1098 (Thomas, J., concurring in judgment).

Further, due process demands a level playing field, particularly when the government, armed with nearly unlimited resources, is on the other side of the *v*. The decision below conflicts with this Court's decisions holding that due process requires an even "balance of forces between the accused and his accuser," and thus bars the State from giving itself a leg up in litigation. *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973). By invalidating otherwise lawful insurance only when the State *itself* has a vested interest in the outcome, California has intentionally handicapped businesses' ability to defend themselves, all with the explicit goal of bolstering the State's leverage to extract a settlement —a flagrant violation of the principle that the government must "hold the balance nice, clear and true between the State and the accused." *Connally* v. *Georgia*, 429 U.S. 245, 249 (1977) (per curiam).

This due process violation is exacerbated by the fact that California's Unfair Competition Law ("UCL") "borrows" from *all* other statutes—federal, state, and local—which essentially means the State can always add a UCL claim on top of any other alleged statutory violation. California can thus deny private businesses access to insurance without any showing of wrongdoing whenever the government's lawyer so chooses. But even apart from the due process problems with granting the State unfettered discretion to create an uneven playing field, the statute flouts this Court's due process decisions in the forfeiture context. Under those decisions, the government may restrain property before trial only by showing that the defendant has committed an offense with the subject property, or at least that the property has *some* connection to an offense. By contrast, § 533.5 precludes defendants

from relying on insurance purchased with entirely lawful funds.

It is for good reason that no other State has passed a law like § 533.5. Permitting that law to stand would incentivize States to rig the rules of litigation to coerce defendants to settle. This Court's intervention is needed to confirm that due process bars the government from stacking the deck in its favor by preventing private parties from using untainted funds to defend themselves against the State's unproven allegations.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a-25a) is reported at 994 F.3d 1032. Its order denying rehearing or rehearing en banc (App. 44a) is unreported. The district court's opinion (App. 26a-38a) is unreported.

JURISDICTION

The Ninth Circuit issued its judgment on December 11, 2020, and denied en banc review on May 28, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

Section 533.5 of the California Insurance Code provides:

> (a) No policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty, or restitution in any criminal action or proceeding or in any action or proceeding brought pursuant to [California's Unfair Competition Law (UCL) or False Advertising Law (FAL)] by the Attorney General, any district attorney, any city prosecutor, or any county counsel, notwithstanding whether the exclusion or exception regarding this type of coverage or indemnity is expressly stated in the policy.
>
> (b) No policy of insurance shall provide, or be construed to provide, any duty to defend, as defined in subdivision (c), any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to [California's UCL or FAL] in which the recovery of a fine, penalty, or restitution is sought by the Attorney General, any district attorney, any city prosecutor, or any county counsel, notwithstanding whether the exclusion or exception regarding the duty to defend this type of claim is expressly stated in the policy.
>
> (c) For the purpose of this section, "duty to defend" means the insurer's right or obligation to investigate, contest, defend, control the defense of, compromise, settle, negotiate the compromise or settlement of, or indemnify for the cost of any aspect of defending any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to [the UCL or FAL] in which the insured

> expects or contends that (1) the in-surer is liable or is potentially liable to make any payment on behalf of the insured or (2) the in-surer will provide a defense for a claim even though the insurer is precluded by law from indemnifying that claim.
>
> (d) Any provision in a policy of insurance which is in violation of subdivision (a) or (b) is contrary to public policy and void.

California's Unfair Competition Law provides in relevant part:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.

Cal. Bus. & Prof. Code § 17200.

California's False Advertising Law provides in relevant part:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or

> concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

Cal. Bus. & Prof. Code § 17500.

STATEMENT

A. California "stacks the deck" against insurance coverage if, and only if, a state governmental entity is the plaintiff.

This lawsuit challenges the constitutionality of California Insurance Code § 533.5, which—uniquely among all 50 States' laws—purports to "bar[] insurance companies from paying legal defense fees for certain consumer protection lawsuits brought by the state." App. 9a. Significantly, § 533.5 strips litigants of the benefits of insurance based on the State's mere allegation of wrongdoing, without evidence, with no hearing on likelihood of success, and no requirement of probable cause. The target may be wholly innocent but still face a torrent of legal bills, despite having paid for insurance, based merely on the State's say-so.

Moreover, § 533.5 kicks in only when the State itself is the plaintiff. Specifically, § 533.5(b) provides: "No policy of insurance shall provide, or be construed

to provide, any duty to defend, as defined in subdivision (c), any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to [the UCL or FAL] in which the recovery of a fine, penalty, or restitution is sought by the Attorney General * * * notwithstanding whether the exclusion or exception regarding the duty to defend this type of claim is expressly stated in the policy." Thus, the statute does not apply to identical UCL or FAL claims asserted by private parties; insurance coverage of those claims is perfectly lawful. As the court below put it, California law "stack[s] the deck" against defendants who face suits alleging violations of California's UCL and FAL, but *only* in cases where a California governmental entity is itself an interested party. App. 9a.

The history of § 533.5 reveals California's self-interested motivations for enacting it. As the California courts have explained, California's "Legislature enacted section 533.5 to address a problem the Attorney General had encountered (only) in UCL and FAL actions and to address a specific problem that public entities were experiencing when they brought unfair competition or false advertising actions, whether civil or criminal, against individuals and businesses." *Mt. Hawley Ins. Co.* v. *Lopez*, 215 Cal. App. 4th 1385, 1402 (2013), as modified (May 29, 2013). What was that problem? That defendants were using insurance to help defend themselves, resulting in cases that—from the Attorney General's perspective—were "impossible to settle." *Id.* at 1403.

Before 1988, when § 533.5 was first enacted, defendants sued by state authorities under California's UCL or FAL would argue "that the conduct involved [wa]s covered by their business insurance policy." *Id.* at 1402-1403 (citing Office of the Atty. Gen., Stmt. AB

3920 before Assem. Com. on Finance and Ins. (1989–1990 Reg. Sess.) (Apr. 19, 1988)). Accordingly, those defendants would "tender[] defense of the action[s] to insurers whose policies provide general liability coverage which may include coverage for advertising and unfair competition claims." *Id.* at 1403 (citing Office of the Atty. Gen., Bill Proposal Summary of AB 3920, at 1 (1989–1990 Reg. Sess.) (undated)). With the benefit of insurance, defendants were more likely to litigate than to give in to the State's settlement demands. *Ibid.* That state of affairs caused the California Attorney General, the law's "sponsor and principal supporter," to complain that UCL and FAL cases "consume[d] a large measure of prosecutorial resources during extensive litigation." *Ibid.* (citing Bill Proposal Summary, *supra*, at 1).

The Attorney General thus lobbied for and obtained a law that would eliminate insurance coverage for defending UCL and FAL claims brought by state entities, making those claims easier to pursue. According to the Attorney General, "section 533.5 was intended to facilitate 'the consumer protection activities of our office and local district attorneys and city attorneys.'" *Id.* at 1402. It accomplished that goal by "preclud[ing] insurers from providing a defense in civil and criminal UCL and FAL actions brought by" such attorneys and (later) by "county counsel." *Id.* at 1410. Stripped of insurance, defendants targeted by the State faced immense financial pressure to settle, regardless of whether they did anything wrong—thereby solving California's "problem" of obtaining victory in court or a favorable settlement. *Id.* at 1402.

Both the UCL and the FAL permit private parties to file civil suits. Cal. Bus. & Prof. Code §§ 17204, 17535. Yet insurers remain free to cover those claims,

as § 533.5 "limits the statute's scope to unfair competition and false advertising actions *brought by the government*, not those brought by private parties." *Bodell* v. *Walbrook Ins. Co.*, 119 F.3d 1411, 1421 (9th Cir. 1997) (Kozinski, J., dissenting) (emphasis added). Thus, defendants facing identical claims filed by both private parties and the State can use insurance coverage for one defense, but not the other.

The breadth of the State's power to nullify defendants' insurance coverage under § 533.5 is exacerbated by the scope of California's UCL. That statute expansively defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. Code § 17200; see *Sandoz Inc.* v. *Amgen Inc,* 137 S. Ct. 1664, 1673 (2017) (discussing the statute's breadth). "By proscribing 'any unlawful' business practice, 'section 17200 borrows violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." *Cel-Tech Comm'ns, Inc.* v. *Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). As the Attorney General's Office put it in its letter to Starr: "An 'unlawful' business act or practice" under the UCL "includes any activity that is forbidden by *any* law." App. 163a (emphasis added).

Under the terms of § 533.5, then, California may strip businesses and their individual officers and directors of insurance coverage simply by choosing to plead a UCL claim against them, rather than (or in addition to) a claim under the predicate statute. The scope of that power is virtually unlimited: apart from the filing attorney's ethical obligation not to file frivolous claims, the government has unbridled discretion to repackage any statutory violation as a UCL claim.

Obviously, this gives the State immense leverage to coerce settlement.

B. Adir purchases litigation insurance and California nullifies it.

Petitioner Adir International operates Curacao, a retail chain with 12 stores in California, Nevada, and Arizona. Curacao sells items such as electronics, home goods, and children's supplies.

As part of its business operations, Adir purchased an insurance policy from respondent Starr Indemnity to protect itself against the costs of potential litigation. Such insurance policies, which are nearly ubiquitous, reflect the commercial reality that businesses depend on insurance to manage their exposure to litigation risks and keep their operations stable.

The policy that Adir obtained from Starr contained a D&O Liability Coverage Section stating "that Starr would defend and indemnify Adir and its executives for losses arising from certain claims alleging wrongful acts." App. 5a; see also App. 63a. The policy contained no exceptions for claims brought under either California's UCL or its FAL. App. 63a-64a. Businesses routinely rely on rely on this legitimate form of insurance. *E.g.*, *Unified W. Grocers, Inc.* v. *Twin City Fire Ins. Co.*, 457 F.3d 1106, 1110 (9th Cir. 2006) (applying D&O policy obtained by large grocer).

D&O insurance is vital for corporate governance: because individual executives ordinarily lack the means to defend themselves against significant litigation, "[u]nless directors can rely on the protections given by D & O policies, good and competent men and women will be reluctant to serve on corporate boards." *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455,

469 (S.D.N.Y. 2005); see also *Homestore, Inc.* v. *Tafeen*, 888 A.2d 204, 211 (Del. 2005). And D&O insurance is especially necessary to protect against the "uncertainties created by 'fertile legal imaginations' conceiving 'novel and alarming theories of liability.'" *Mt. Hawley Ins. Co.* v. *Fed. Sav. & Loan Ins. Corp.*, 695 F. Supp. 469, 484 (C.D. Cal. 1987) (citation omitted).

In 2017, California's Attorney General "sued Adir and its Chief Executive Officer, [petitioner] Ron Azarkman," alleging that they engaged in "unfair and misleading business tactics." App. 4a. "The complaint alleged violations of California's Unfair Competition Law (UCL) and False Advertising Law (FAL), and sought restitution, civil penalties, costs of suit, and other equitable relief." App. 4a-5a.

California's UCL claim borrowed from nearly a dozen other statutes, including the Consumer Legal Remedies Act (Civil Code § 1770 et seq.); the California Translations Act (Civil Code § 1632 et seq.); Business & Professions Code §§ 9855.2 and 9855.3; California Code of Regulations § 2758; California Civil Code § 1723; the Rosenthal Fair Debt Collection Practices Act (Civil Code § 1788 et seq.); the Song-Beverly Consumer Warranty Act (Civil Code § 1790 et seq.); and the Small Claims Act (Code of Civ. Procedure § 116.110 et seq.). App. 133a-137a. The Attorney General did not plead violations of any of those statutes as separate charges; he relied on them solely to support the UCL claim. App. 132a-138a.

After the State filed suit, "Adir tendered the complaint to Starr and asked it to defend Adir against the lawsuit" under its policy. App. 5a. In response, Starr acknowledged that the action presented a claim under the terms of the policy and agreed to provide a defense

(subject to a reservation of rights not relevant here). App. 5a. Starr raised no concern about § 533.5 or any other suggestion that it was barred from providing coverage. On the contrary, Starr actively participated in Adir's defense: it "approved [Adir's] preferred law firm to represent them," "negotiated underlying defense counsel's billing rates," and "regularly requested and received updates" on matters concerning the litigation, mediation, and settlement negotiations. 2 ER 34 (9th Cir.). Starr also reviewed and paid petitioners' legal bills. *Ibid.*

While Starr was actively supporting Adir's defense, the Attorney General sent Starr a missive warning that Starr's coverage of the claims against Adir violated § 533.5. App. 139a-141a. The Attorney General also sent a letter to Starr's counsel, stating: "It is our office's position that Insurance Code section 533.5 clearly prohibits any defense or indemnity coverage for *People* v. *Adir International, LLC*." App. 158a.

Upon receiving this letter, Starr did an about-face: it "informed Adir that it would 'stop making any payments for defense costs' and reserved 'its rights to seek reimbursement of all amounts paid to date.'" App. 6a-7a. After several rounds of correspondence between the parties, Adir sued Starr in state court seeking enforcement of its insurance policy. App. 7a. Starr removed the case to federal court. *Ibid.*

C. The lower courts permit California to tip the scales in its favor by interfering with Adir's defense.

Adir and Starr submitted dueling motions for summary judgment in the district court. Starr sought the repayment of the roughly two million dollars it had

already spent on Adir's defense, while Adir sought to hold Starr to its duty to defend.

In support of its position, Adir argued that § 533.5 violates due process and fundamental fairness by giving California the power to interfere with Adir's choice of counsel for no legitimate purpose—only the State's desire to coerce settlement, saving it from having to overcome a vigorous defense and tipping the scales in its favor. Adir also argued that, as a matter of statutory construction, § 533.5 applies exclusively to actions involving only monetary relief. App. 34a.

The district court ruled for Starr without addressing Adir's constitutional arguments. App. 26a-38a. The court also approved of the parties' stipulation to a supersedeas bond of roughly $2.2 million (an amount of 105% of the Amended Judgment against Adir). Dkt. Nos. 59, 61.

On appeal, the Ninth Circuit recognized that the district court wrongly failed to consider Adir's constitutional argument "that the state unfairly stripped it of insurance defense coverage based on unproven allegations in the complaint." App. 4a. The panel thus addressed the issue, but affirmed. As the panel's published opinion stated, "[a]lthough the Attorney General has yet to prove any of the allegations in his lawsuit, he has invoked the power of the state to deny insurance coverage that Adir paid for to defend itself." App. 9a. The panel acknowledged that, in so doing, "California has stacked the deck against defendants facing these lawsuits filed by the state." *Ibid.*

Nevertheless, focusing on what it called the "narrow scope of the due process right to retain counsel" in civil cases, the court found no due process violation.

App. 12a. Citing cases involving courts' administrative ability to regulate a defendant's choice of counsel, the panel reasoned that the right to select counsel is implicated "only in extreme scenarios where the government substantially interferes with a party's ability to communicate with his or her lawyer or actively prevents a party who is willing and able to obtain counsel from doing so." *Ibid.*

The court thus held that due process did not prevent the State from creating a lopsided playing field. App. 15a. It acknowledged that § 533.5 "makes it harder" for defendants to defend themselves where a California entity is the opposing party. Nevertheless, it reasoned that, so long as defendants can ultimately secure representation, a State is free to hamstring their ability to fund their defense without violating the right to counsel in civil cases. App. 15a. In particular, the court declared that due process is violated "only if the government actively thwarts a party from obtaining a lawyer or prevents it from communicating with counsel." App. 4a. And having held that "[t]he limited right to retain counsel does not include the indirect right to fund and retain counsel through an insurance policy," the court did not otherwise analyze whether due process prohibited California from "stack[ing] the deck" in its own favor in a broad range of cases. App. 9a, 14a.

Adir's petition for rehearing or rehearing en banc was denied. App. 44a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case approved of a California law with the actual and intended effect of "stacking the deck" against defendants in cases where California entities are themselves the plaintiffs. In cases arising under California's expansive unfair competition and false advertising laws, the State's mere accusation of wrongdoing—without a hearing and unsupported by probable cause or even reasonable suspicion—can strip private parties of litigation insurance coverage purchased with untainted funds. The effect is to deprive California's opponents of coverage, frequently worth millions of dollars, without the slightest proof of wrongdoing—and thus to generate pressure to settle on terms favorable to the State regardless of whether its case has merit.

No other State has enacted such a law, so there will never be a square circuit split on the question of its constitutionality—though the decision below is in tension with circuit authority on similar questions. *E.g.*, *United States* v. *Stein*, 541 F.3d 130, 151 (2d Cir. 2008). This Court should intervene and invalidate California's outlier statute, which violates principles of due process and fundamental fairness by interfering with defendants' ability to pay their counsel *only* in cases where California itself has a vested interest in the outcome.

I. This Court should grant certiorari to protect businesses and executives from California's effort to tip the scales in its favor by interfering with the right to counsel.

A. The Ninth Circuit's decision conflicts with this Court's precedents holding that the right to counsel includes the right to pay counsel with untainted funds.

1. The Constitution safeguards defendants' right to counsel in both civil and criminal litigation, and this Court has long held that "the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment." *Powell* v. *Alabama*, 287 U.S. 45, 60, 71 (1932). That is because, in both civil and criminal cases, due process requires a hearing, which "[h]istorically and in practice, * * * has always included the right to the aid of counsel when desired and provided by the party asserting the right." *Id.* at 68-69. Without "a fair opportunity to secure counsel of his own choice," a litigant suffers "a clear denial of due process." *Id.* at 53, 71; see *Guajardo-Palma* v. *Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) ("[*Powell*] was based on the due process clause rather than the Sixth Amendment (which had not yet been held applicable to the states), and its logic embraces civil litigation."). As the Fifth Circuit has explained, "the right to counsel in civil matters includes the right to choose the lawyer who will provide that representation"; that "right is one of constitutional dimensions and should be freely exercised"—it "may not be impinged without compelling reasons." *Tex. Catastrophe Prop. Ins. Ass'n* v. *Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (cleaned up)).

The principle that civil litigants' constitutional right to hire counsel of their choice includes the right to pay those attorneys is grounded in general legal principles, precedent, and common sense. The "predicate-act canon" has long taught that "[a]uthorization of an act also authorizes a necessary predicate act." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012). Under this "ancient" maxim, when a right is conferred, "every particular power necessary for the exercise of" that right "is also conferred." *Ibid.* (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 63 (1868)). For example, "[w]here the king is to have mines, the law giveth him power to dig in the land." Henry Finch, *Law, or a Discourse Thereof* 63 (1759).

It follows that "[c]onstitutional rights implicitly protect those closely related acts necessary to their exercise." *Luis*, 136 S. Ct. at 1097 (Thomas, J., concurring in judgment) (citation omitted). To cite an obvious example, because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," the right to free speech includes the right to pay to speak. *Buckley* v. *Valeo*, 424 U.S. 1, 19, 58-59 (1976).[1] Likewise, because "retaining an attorney requires resources" (*Luis*, 136 S. Ct.

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[1] Michael W. McConnell, *Reconsidering* Citizens United *As A Press Clause Case*, 123 Yale L.J. 412, 421 (2013) ("[W]e need to use things, including money (and paper, and sidewalks, and telephones, and shoe leather), to make our views known, and governmental restrictions on the use of resources *for the purpose of communicating a message* are properly understood as restrictions on speech.").

at 1097 (Thomas, J., concurring in judgment)), the right to retain counsel includes the right to spend money to do so. Indeed, unless the right to counsel "also protects the prerequisite right to use one's financial resources for an attorney," that right is but "a flimsy parchment barrier." *Ibid.* (cleaned up).

2. Given the relative dearth of cases addressing the due process right to counsel under the Fifth and Fourteenth Amendments—a fact that itself supports review—Sixth Amendment right-to-counsel cases are especially instructive. The Court has explicitly linked the protections of these amendments, explaining that the Sixth Amendment "defines the basic elements of a fair trial" that the Due Process Clause guarantees. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 633 (1989) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984)). Thus, although the Sixth Amendment and due process rights differ in certain ways, courts often view the Sixth Amendment as a guide in discerning the scope of the due process right to counsel. See *Anderson* v. *Sheppard*, 856 F.2d 741, 747-748 (6th Cir. 1988); *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) ("Notwithstanding the civil-criminal dichotomy, an analogy can be drawn between the criminal and civil litigants' respective rights to counsel."). "In each instance, the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." *Ibid.*; see also *Anderson*, 856 F.2d at 748. And the analogy to the civil right to counsel is especially strong where the issue is a criminal defendant's right to hire an attorney that he can afford—a right common to the due process right—as opposed to the Sixth Amendment right to *appointed* counsel.

The precedents of both this Court and the courts of appeals confirm that the right to choose an attorney cannot be divorced from the right to pay that attorney. In the criminal context, for example, the Court has explicitly held that a pretrial restraint on untainted assets violates the right to hire counsel. *Luis*, 136 S. Ct. at 1096, 1103. As the plurality in *Luis* explained, the "right to assistance of counsel is a fundamental constituent of due process of law," which "includes the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." *Id.* at 1093 (plurality opinion) (cleaned up). As the plurality concluded, "the Government * * * undermine[s] the value of that right by taking from [the defendant] the ability to use the funds she needs to pay for her chosen attorney." *Id.* at 1089. Indeed, "the restraint itself suffices to completely deny this constitutional right." *Id.* at 1094. That is especially so because the government's pretrial restraint of legitimate funds "is not merely an incidental burden on the right to counsel of choice; it targets a defendant's assets, which are necessary to exercise that right." *Id.* at 1102 (Thomas, J., concurring in judgment).

3. Litigants need not show that they could not obtain counsel without the restrained funds for the restraint to be unconstitutional. Rather, as the Second Circuit has held, because "[v]irtually everything the defendants do in this case may be influenced by the extent of the resources available to them," defendants "need not make a 'particularized showing' of how their defense was impaired." *Stein*, 541 F.3d at 151 (alteration in original; citation omitted).

In *Stein*, the government threatened a third party who was paying the defendants' legal fees with legal consequences if it did not stop. *Id.* at 143. Faced with

that threat, the third party complied. But as the Second Circuit held, the government's actions violated the defendants' right to counsel "irrespective of the quality of the representation they receive[d]." *Id.* at 151. The court so held in part because "[t]he goal [of the right to counsel] is to secure 'a defendant's right to spend his own money on a defense.'" *Ibid.* (citation omitted). The right to counsel thus "protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain." *Id.* at 156.

4. This Court should grant certiorari and confirm that the principles that governed the outcome in *Luis* and *Stein* likewise govern here. In the modern world, insurance coverage is businesses' principal means of paying for civil litigation defense. *Supra* at 11-12. For defendants who are individuals, it is practically a necessity. See *Mt. Hawley*, 156 Cal. Rptr. 3d at 799.[2] Moreover, the government has no legitimate interest in preventing a company or its executives from using otherwise lawful insurance purchased with untainted funds to defend themselves when charged with civil violations, let alone absent proof of wrongdoing.

To begin with, it should go without saying that the government's role in litigation is not merely to obtain a victory, but to arrive at the truth, and "[the right to counsel] is generally designed to elicit truth and protect innocence." *Luis*, 136 S. Ct. at 1094 (quoting

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[2] See Lucy Lazarony, *Directors and Officers Insurance Explained*, Forbes Advisor (Aug 6, 2021), https://www.forbes.com/advisor/business-insurance/directors-and-officers-insurance/ ("To attract and retain qualified executives and board members, a company needs to have a D&O insurance policy in place.").

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643 (1996)). Indeed, the right to counsel is inherent in due process precisely because it facilitates obtaining the truth via the "adversarial testing" that is so foundational to our system. *Strickland*, 466 U.S. at 685.

Even assuming, arguendo, that California could interfere with the insurance coverage of a party found to have behaved illegally, nothing justifies prohibiting lawful businesses from using untainted funds to pay legitimate insurance companies for coverage to help defend themselves against civil litigation brought by the government. A rule under which the government could restrain funds before it showed any wrongdoing would "unleash a principle of constitutional law that would have no obvious stopping place," and "could well erode the right to counsel to a considerably greater extent than" appears at first glance. *Luis*, 136 S. Ct. at 1094 (plurality opinion).

Such a rule would also stand in serious tension with this Court's forfeiture jurisprudence, which permits "[p]retrial restraints on forfeitable property * * * only when the Government proves, at a hearing, that (1) the defendant has committed an offense triggering forfeiture, and (2) 'the property at issue has the requisite connection to that crime.'" *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1633 (2017) (quoting *Kaley* v. *United States*, 571 U.S. 320, 323-324 (2014)); see *Luis*, 136 S. Ct. at 1100 (Thomas, J., concurring) ("the civil *in rem* forfeiture tradition tracks the tainted-untainted line"); *United States* v. *Monsanto*, 491 U.S. 600, 615 (1989). Here, § 533.5 bars insurance coverage without any finding of wrongdoing whatsoever, much less a finding that the assets used to purchase the insurance were somehow tainted.

Moreover, this Court has previously recognized in the criminal context that, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 U.S. 159, 170-71 (1985). Section 533.5 "circumvents and thereby dilutes the protection afforded by the right to counsel" on its face. It allows the State, simply by making an *accusation*, to gut a defendant's ability to finance its defense. As the Second Circuit has observed, "the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason." *Stein*, 541 F.3d at 154. Yet that is precisely what California law does.

The effects of stripping Adir and Azarkman of their defense coverage were especially severe here. California served over 1,000 substantive written discovery demands, leading to production of over 310,000 pages of documents, and took nearly 40 depositions. Def. Azarkman MSJ 13, *People of The State of Cal.* v. *Adir Int'l LLC et al.*, No. BC680425 (Sup. Ct. L.A. Cnty. Sept. 20, 2019); Def. Azarkman Reply ISO MSJ 4, *Adir Int'l*, No. BC680425 (Sup. Ct. L.A. Cnty. Nov. 27, 2019). Not surprisingly, many defendants, bombarded by the State's discovery requests, choose to settle rather than risk being driven bankrupt—even if they are innocent of any wrongdoing.

In sum, the right to counsel includes the right to make provision for paying counsel in case it is needed, which in the modern world means insurance. Naturally, California can regulate insurance, just as it can regulate lawyers' fees, but not for the purpose of giving itself a litigation advantage. California allows the very same defendants to purchase the very same D&O

insurance to defend the very same claims, if asserted by *private* plaintiffs. And California cannot identify a legitimate reason that such insurance should be unavailable for this broad class of cases only when *the State* is on the other side of the *v*.

What next? Barring defendants from relying on a defense fund when the government sues? After all, as with insurance, defense funds rely on pooling money. Although that hypothetical measure would bolster the government's negotiating leverage, it would nonetheless conflict with the right to counsel, which "prohibits the government from interfering with financial donations by others, such as family members and neighbors—and employers." *Stein*, 541 F.3d at 156. And if a State cannot stop a party from using *donated* funds to pay for counsel, it should follow a fortiori that it cannot stop a party from using funds it has paid for *itself*, by purchasing insurance.

B. The Ninth Circuit's decision conflicts with this Court's precedents holding that due process and fundamental fairness require a level playing field in litigation.

1. As this Court has long recognized, one touchstone of due process is the principle that the scales of justice weigh impartially, without regard to the parties to a case. The principle that "the law is no respecter of persons" is deeply rooted "in the tradition of this country's dedication to due process," and in our nation's laws. *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956). To cite just one obvious example, each "justice or judge of the United States" promises to "administer justice without respect to persons." 28 U.S.C. § 453. Indeed, this fundamental principle is wholly intuitive to those raised in our legal tradition.

It is also settled that "due process" encompasses principles of fairness that extend beyond merely following procedures laid down by law. In *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, for example, this Court called it "manifest" that, under the Fifth Amendment's Due Process Clause, "it was not left to the legislative power to enact any process which might be devised." 59 U.S. (18 How.) 272, 276 (1856). Instead, the Fifth Amendment "is a restraint on the legislative as well as on the executive and judicial powers of the [federal] government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." *Ibid.*[3] The same is true of the Fourteenth Amendment's Due Process Clause, which "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981).

2. The due process principle of fundamental fairness is supported by consistent historical practice and has been recognized in numerous contexts. For example, this Court has invoked the principle to uphold the prohibition on "conclusive" jury instructions that shift the burden of proof to the defendant on an element of a crime,[4] the prohibition on "compel[ling] an accused

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[3] The Fifth Amendment's due process guarantee thus broke from earlier English understandings, under which enactments of Parliament constituted the "law of the land" and could not violate due process. See Nathan S. Chapman, Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1679-1694 (2012).

[4] *Sandstrom* v. *Montana*, 442 U.S. 510, 515 (1979), holding modified by *Boyde* v. *California*, 494 U.S. 370 (1990).

to stand trial before a jury while dressed in identifiable prison clothes,"[5] the "requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt,"[6] and a defendant's right to a timely "instruction on the presumption of innocence."[7]

Likewise, this Court has invoked the principle of fundamental fairness in a series of due process cases holding that adjudicatory decisions must be made by an impartial judge. See *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process was violated by a state justice's failure to recuse himself from a case when the "justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages"); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 816 (1986) (reversing a decision of the Supreme Court of Alabama upholding a jury award of "$3.5 million in punitive damages" because of the potential bias of a justice); *Ward* v. *Vill. of Monroeville*, 409 U.S. 57, 57 (1972) (holding that an "Ohio statute that authorize[d] mayors to sit as judges in cases of ordinance violations and certain traffic offenses" violated due process); *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887) (noting that, in a capital trial, "[b]etween [the accused] and the state the scales are to be evenly held"); see also *Tumey* v. *State of Ohio*, 273 U.S. 510, 514-515 (1927). A neutral magistrate is

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[5] *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976).

[6] *In re Winship*, 397 U.S. 358, 361 (1970).

[7] *Taylor* v. *Kentucky*, 436 U.S. 478, 490 (1978).

a necessary predicate for upholding the due process requirement to "hold the balance nice, clear and true between the State and the accused." *Connally*, 429 U.S. at 249.

3. States cannot, consistent with these decisions, pass laws designed to stack the deck in their favor in litigation. States cannot, for example, forbid adverse litigants from paying their lawyers more than $50 per hour, or forbid their lawyers from spending more than 20 hours preparing their case. Rather, as this Court has held, when the government tilts the playing field in its favor, it violates due process.

In *Wardius* v. *Oregon*, for example, a criminal defendant was barred "from introducing any evidence to support his alibi defense as a sanction for his failure to comply with [Oregon's] notice-of-alibi rule." 412 U.S. 470, 471 (1973). That rule required the defendant to give "the district attorney a written notice of his purpose to offer such evidence" five days before trial. Ore. Rev. Stat. § 135.875. The Court had earlier upheld a similar Florida rule, but noted that "the constitutionality of such rules might depend on 'whether the defendant enjoys reciprocal discovery against the State.'" *Wardius*, 412 U.S. at 471 (quoting *Williams* v. *Florida*, 399 U.S. 78, 82 n.11 (1970)). Oregon's rule "made no provision for reciprocal discovery." *Id.* at 472.

The Court thus held that the notice-of-alibi provision violated due process—solely because the statute gave Oregon an unfair advantage. As the Court explained, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded," but "it does speak to the balance of forces between the accused and his accuser." *Id.* at

474 (citation omitted). Thus, although the Court declined to "suggest that the Due Process Clause of its own force requires Oregon to adopt [certain discovery] provisions," due process prohibited Oregon from "insist[ing] that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." *Id.* at 475. See also *United States* v. *Harbin*, 250 F.3d 532, 540 (7th Cir. 2001) (applying *Wardius* to invalidate a system that allowed only the prosecution to "save[]" a peremptory challenge to eliminate a juror late in trial and stating that, "although peremptory challenges are not constitutionally required, due process may be violated by a system of challenges that is skewed towards the prosecution if it destroys the balance needed for a fair trial"). In short, due process prohibits States from giving themselves a leg up in litigation.

Here the Ninth Circuit acknowledged that California "has stacked the deck" in its own favor by giving its attorneys the unilateral ability to bar defendants from using insurance to defend themselves against claims under California's UCL or FAL—even though that same coverage is lawful as applied to identical *private* suits. App. 9a. Yet the court below believed that the right to counsel in civil cases must be construed "very narrowly," and that this was not one of the "extreme scenarios" in which it is violated. App. 12a. The court thus framed the due process issues raised by § 533.5 as whether there was "any way to fit Adir's proposed right—which really boils down to an indirect right to fund and retain the counsel through an insurance contract—into the existing due process right" to counsel in civil cases. App. 14a.

As explained above, the Ninth Circuit's ruling that § 533.5 does not violate due process conflicts with this

Court's right-to-counsel decisions. But the ruling also conflicts with the Court's longstanding holdings that States violate due process by giving themselves a distinct advantage against opposing parties. Due process does not require the State to pay a civil defendants' lawyers, but it requires a just "balance of forces between the accused and his accuser." *Wardius*, 412 U.S. at 474 (citation omitted); cf. *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 547 (2001) (citing due process concerns with funding conditions that undermine the "adequacy and fairness" of the representation). That balance is disrupted when California takes away a critical means of funding counsel, so as to ease the State's path to a favorable settlement.

5. For that reason, the Ninth Circuit erred in relying on right-to-counsel cases from other contexts. App. 11a-12a (citing, *e.g.*, *Guajardo-Palma*, 622 F.3d at 803 (cleaned up) (a court "may not refuse to accept filings" from a civil litigant's retained lawyer); *CFTC* v. *Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995) ("A district court may * * * forbid or limit payment of attorney fees out of frozen assets," but must still exercise "discretion."); *Anderson*, 856 F.2d at 748 (trial court erred in refusing to give a civil litigant extra time to retain new counsel after original counsel withdrew before trial); *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) (no due process violation where district court did not prohibit the defendant from obtaining counsel). In each of those civil cases, the relevant question was whether a court had interfered with the constitutional right to counsel. But in none of those cases did the court make that decision to secure an advantage for the government.

Here, in contrast, California passed § 533.5 for just that reason. As the California courts have explained,

the entire purpose of § 533.5 is to ratchet up the settlement pressure on defendants in UCL and FAL cases—which the legislature declared were "consuming a large measure of prosecutorial resources"—by strengthening the State's litigation hand for reasons having nothing to do with the actual merits of any particular case. See *Mt. Hawley Ins. Co.*, 215 Cal. App. 4th at 1405; see State of California Amicus Br. 19 (9th Cir.) (acknowledging that § 533.5 is designed "to avoid prolonged litigation between public prosecutors and insurance companies"). The notion that due process permits that result cannot be squared with this Court's precedents.[8]

C. Section 533.5 violates due process by precluding defendants from accessing their insurance based solely on the Attorney General's discretionary pleading choices.

Review is also warranted to confirm that a private defendant's ability to rely on D&O insurance cannot be left to the State's discretionary pleading decisions.

1. Under § 533.5, defendants cannot use their insurance when the State's lawyer chooses to plead substantive legal violations as violations of the UCL—an

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[8] The history of § 533.5 is reminiscent of the history of the statute in *Ward*, where a "responsibilit[y] for village finances" raised the specter of inappropriate bias on behalf of the mayor-judge. 409 U.S. at 57. Here, a concern for "prosecutorial resources" led California to adopt a rule designed to solve "impossible to settle" cases. *Mt. Hawley Ins. Co.*, 215 Cal. App. 4th at 1405. In both instances, it is "fundamentally unfair" for the government to enact procedures that give it an unearned advantage over its opponent. *Wardius*, 412 U.S. at 476.

umbrella statute available whenever the government can find some way to allege, as a predicate offense, "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. Code § 17200; see *Cel-Tech Commc'ns*, 20 Cal.4th at 180; *supra* at 10. But D&O insurance is an otherwise lawful asset, and due process does not allow States to bar insured parties from accessing their own assets based on mere accusations.

Because the UCL reaches *any* act that violates *any* law, § 533.5 gives the Attorney General the discretion to arbitrarily impede the use of insurance to defend against any claim, merely by pleading it as a UCL claim rather than as an independent violation. That legislative scheme—which essentially grants the Attorney General a superpower to revoke a defendant's insurance (or not) depending solely on whether the State invokes a statute that applies in virtually every business case—is inherently unfair to defendants. Indeed, the very same insurance contracts that California's attorneys may declare out of bounds when the government sues impose an entirely lawful duty to defend *identical* claims asserted by *private* parties. See Cal. Bus. & Prof. Code §§ 17203, 17535.

2. For that reason, the restrictions of § 533.5 cannot be analogized to either allowing the forfeiture of ill-gotten funds or prohibiting certain forms of insurance *per se*. This Court has understandably held that a criminal defendant "has no Sixth Amendment right to use funds" that he has stolen to pay his preferred counsel. *Caplin & Drysdale*, 491 U.S. at 626. Likewise, a criminal suspect has no right to access "forfeitable assets" to secure his choice of counsel. *Id.* at 625. But that rule applies to "assets adjudged forfeitable" based on evidence presented at a hearing. *Id.* at 632. Here, by contrast, California can cancel a defendant's

insurance just by accusing it of wrongdoing—with no hearing and no probable cause, or even reasonable suspicion. He can do so, moreover, not because the subject insurance is by its nature illegal, but precisely because *he* is the one suing.

However laudable California's consumer protection goals may be, it may not pursue them by fundamentally unfair means. This Court has repeatedly rejected the argument that because a given technique is "useful" to law enforcement it should be upheld; even when that is so, due process prohibits "tipp[ing]" the "scales of justice." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 171 (1972). This Court should grant review to curb California's violation of the due process rights of those sued directly by the State.

II. This Court's guidance is vitally important to businesses and executives operating in California that are targeted by the State.

Because UCL claims may be tacked on to *any* case alleging *any* "unlawful, unfair or fraudulent" business practice, § 533.5's ban on using insurance coverage to defend claims filed by the State is truly breathtaking. The ramifications for companies and executives doing business in California—the largest State in the Union, and the fifth largest economy in the world—are enormous.

UCL claims arise with incredible frequency: in 2021 alone, there have already been almost 1,000 decisions in federal and state courts referencing the statute. See Bus. & Prof. Code § 17200 (citing references). This Court recognized the expansive scope of California's UCL in *Sandoz* v. *Amgen*, where Amgen sued Sandoz for patent infringement, tacking on two

UCL claims. As the Court there explained, "[a] 'business act or practice' is 'unlawful' under the unfair competition law if it violates a rule contained in some other state or federal statute." 137 S. Ct. 1664, 1673 (2017) (quoting *Rose* v. *Bank of America, N. A.*, 57 Cal.4th 390, 396 (Cal. 2013)). The UCL thus reached claims grounded in *federal patent law*—namely, that Sandoz "engaged in 'unlawful' conduct when it" (1) "failed to provide its application and manufacturing information under [42 U.S.C.] § 262(*l*)(2)(A)," and (2) "provided notice of commercial marketing under § 262(*l*)(8)(A) before, rather than after, the FDA licensed its biosimilar." *Ibid.*

Recent Ninth Circuit UCL cases confirm that the statute touches all manner of claims, including claims alleging (1) violations of the Cable Communications Policy Act of 1984 and the California Invasion of Privacy Act, based on data collected from cable television subscribers,[9] (2) mislabeling honey products,[10] (3) a pharmacy's "fraudulent[] inflat[ion] [of] the reported prices of prescription drugs to insurance companies,"[11] and (4) that a smartphone credit-building app was a "high-tech debt trap."[12] Cases brought by California state entities—those for which insurance coverage is precluded—are similarly wide-ranging, and

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[9] *Hodges* v. *Comcast Cable Commc'ns, LLC*, ___ F.4th ___, 2021 WL 4127711, *2 (9th Cir. Sept. 10, 2021).

[10] *Moore* v. *Trader Joe's Co.*, 4 F.4th 874, 877 (9th Cir. 2021) (affirming dismissal of claims).

[11] *Stafford* v. *Rite Aid Corp.*, 998 F.3d 862, 863 (9th Cir. 2021).

[12] *DiCarlo* v. *MoneyLion, Inc.*, 988 F.3d 1148, 1152 (9th Cir. 2021).

include claims that companies "intentionally delayed the sale of a generic version of a popular pharmaceutical drug to maximize their profits,"[13] "overstated the amount of savings a consumer could reasonably expect to receive,"[14] and "misclassified [truck] drivers as independent contractors."[15]

As is evident from this diverse but non-exhaustive list of cases, virtually any case against a business can be styled as a UCL-claim. "The UCL's 'scope is broad,' and its coverage is 'sweeping.'" *Pac Anchor*, 329 P.3d at 188 (quoting *Cel-tech*, 20 Cal.4th at 180). "The UCL does not mention" any particular industry; "it is a law of general application." *Ibid.* "By proscribing 'any unlawful' business practice, [the UCL] 'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable." *Rose*, 304 P.3d at 185 (citation and quotation marks omitted). As commentators put it, the "UCL contains a unique provision that effectively incorporates all other local, state, and federal consumer protections." James Horner, Christine Kwon, *The Reach of Local Power*, 128 Yale L.J. Forum 610, 611 (2018)). Not surprisingly, the statute has repeatedly come under criticism for "particular risk of being used to prevent not

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[13] *Abbott Labs.* v. *Superior Ct. of Orange Cty.*, 9 Cal. 5th 642, 648 (Cal. 2020) (case brought by Orange County District Attorney).

[14] *Nationwide Biweekly Admin., Inc.* v. *Superior Ct. of Alameda Cty.*, 462 P.3d 461, 465 (Cal. 2020) (claims brought by four district attorneys).

[15] *People ex rel. Harris* v. *Pac Anchor Transp., Inc.*, 329 P.3d 180, 183 (Cal. 2014) (claim brought by Attorney General).

unfairness but competition itself." See, *e.g.*, Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. Rev. 71, 86 (2020) (noting that the UCL does not define what business acts are "unfair").

This case thus presents the combined effect of two far-reaching statutes: although the UCL's broad scope might be problematic on its own, it dramatically exacerbates the constitutional problems posed by § 533.5. Because the statute kicks in before a court has determined whether the State has valid grounds for pursuing a UCL claim, the potential for abuse is rampant. For every UCL claim discussed above—and myriad others—companies face the specter of defending themselves against the State, armed with its vast resources, without insurance. Certiorari is needed to rein in that arbitrary exercise of state power.

III. This case is an excellent vehicle for evaluating the constitutionality of California Insurance Code § 533.5.

This suit directly raises the constitutionality of § 533.5, which the Ninth Circuit squarely addressed. This case is thus an excellent vehicle for this Court's review.

First, it is undisputed that Starr initially covered Adir's expenses as it defended itself against the State, and that Starr retracted its coverage (and sought repayment) only after the State warned Starr that § 533.5 barred its coverage of Adir's defense. Thus, the record is clean, and one way or another, the statute's constitutionality will dispose of this entire case.

Second, there is no need to await a conflict among the courts of appeals on the precise legal question pre-

sented (see Sup. Ct. R. 10(a))—though the Ninth Circuit's decision upholding that law is in serious tension with Second Circuit precedent. *Stein*, 541 F.3d at 151. No other State has passed a comparable law, let alone one that incorporates the expansive reach of an umbrella statute like the UCL. The Court has frequently granted certiorari to review the constitutionality of a unique but important state law. *E.g.*, *Carney* v. *Adams*, 141 S. Ct. 493, 496 (2020) (involving the constitutionality of Delaware's two-party system for selecting state court judges); *Santosky* v. *Kramer*, 455 U.S. 745, 749-51 (1982) (reviewing a due process challenge to a New York law that terminated parental rights "with less proof" than was required by "[t]hirty-five States, the District of Columbia, and the Virgin Islands"); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 202 (1961) (reviewing whether an Alaskan tax law unduly burdened interstate commerce "because of the importance of the ruling to the new State of Alaska").

Finally, now that the Ninth Circuit has definitively ruled, businesses and executives will face even greater pressure to settle unfounded claims rather than play the odds of defeating an 800-pound Californian gorilla with one arm tied behind their backs. Thus, this Court should intervene now—before further damage is done.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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