No. 21-537

In the Supreme Court of the United States

ADIR INTERNATIONAL, LLC, ET AL., PETITIONERS,

v.

STARR INDEMNITY AND LIABILITY COMPANY.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state insurance statute that prohibits insurance policies that fund counsel in one category of civil cases facially violates any constitutional rights of litigants, in all of the statute's applications, including in applications where litigants can readily secure highly skilled counsel through other funds.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Starr Indemnity and Liability Company states that it is wholly owned by Starr Global Financial, Inc., the common stock of which is wholly owned by Starr Insurance Holdings, Inc., which, in turn, is wholly owned by Starr Global Holdings AG. No publicly held corporation owns ten percent or more of Respondent's stock.

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INTRODUCTION

Petitioners brought a facial challenge to a 30-year-old insurance law, California Insurance Code § 533.5, which prohibits parties in California from contracting for insurance coverage for one category of civil cases. All of the arguments that Petitioners raise are novel, and do not implicate any circuit split or conflict with any of this Court's cases. That is why Petitioners and their *amici* must stretch to invoke inapposite cases from far-flung areas of law, such as the Sixth Amendment, forfeiture, *Ex Parte Young*, and the like, several of which Petitioners did not raise below. And if this Court were inclined to look at the merits, each argument is wrong, including for failure to satisfy the demanding standard for facial invalidity under *United States v. Salerno*, 481 U.S. 739 (1987). After all, if defendants—like Petitioners themselves—have ample funds to obtain sophisticated counsel without resorting to insurance coverage and do, in fact, obtain such counsel, there is no reasonable argument that Section 533.5 unduly burdened those defendants' rights.

This Court should deny the Petition.

STATEMENT

A. The regulation of "the business of insurance" traditionally belongs to the States, which have the authority to enact insurance regulations that they "deem[ ] necessary to the public welfare," in their "legislative judgment." *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109–10 (1951); *see also Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952); *see generally* 1 Couch on Ins., § 2:2 (3d ed. 2019). This traditional state authority over insurance is "extremely broad," subject only to "specific constitutional prohibitions" and "valid and controlling federal laws." *Day-Brite*, 341 U.S. at 423.

California enacted Section 533.5 over 30 years ago under this broad authority, choosing not to allow parties to contract for insurance coverage for one limited category of civil cases. *See Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1401–02 (2013). Section 533.5(a) provides that no insurance policy may apply to "the payment of any fine, penalty, or restitution" in any criminal action, or in any civil action brought by, as relevant here, the California Attorney General under California's Unfair Competition Law or its False Advertising Law. Cal. Ins. Code § 533.5(a). It then states that no insurance policy may provide "any duty to defend" any claim in, as relevant here, any civil action brought by the Attorney General under the Unfair Competition Law or the False Advertising Law that seeks "recovery of a fine, penalty, or restitution." *Id.* § 533.5(b); *see id.*

§ 533.5(c). Any insurance policy that violates Section 533.5(a) or (b) "is contrary to public policy and void." *Id.* § 533.5(d); *see generally Mt. Hawley Ins.*, 215 Cal. App. 4th at 1403.

B. Petitioner Adir International ("Adir") operates a chain of retail stores, with Petitioner Ron Azarkman serving as Adir's chief executive officer (hereinafter, collectively, "Petitioners"). Pet.App. 4a, 117a. Petitioners sell "basic big-ticket household necessities" to a mostly low-income customer base "who lack access to traditional credit." Pet.App. 4a, 117a. Petitioners have purchased an insurance policy from Respondent, which provides that Respondent will "defend and indemnify [Petitioners] from certain claims alleging wrongful acts" against either Adir or its executives, Pet.App. 5a, subject to the limitations of the policy, Pet.App. 69a; *see* Pet.App. 45a–115a (full policy). As relevant here, the policy provides that "[a]ny terms" that "are in conflict with the terms of any applicable laws . . . are hereby amended to conform to such laws." Pet.App. 74a. So, under this limitation, Petitioners' policy never included coverage of claims within Section 533.5's terms, and Petitioners never paid Respondent for such coverage.

In 2017, the California Attorney General filed a civil action against Petitioners in California Superior Court under California's Unfair Competition Law and its False Advertising Law. Pet.App. 4a–5a; Pet.App. 116a–38a (complaint). Petitioners tendered the Attorney General's complaint to Respondent, and

Respondent initially declined to defend Petitioners, since such a defense fell outside the terms of the policy. Pet.App. 28a, 146a. However, after subsequent correspondence, Respondent agreed to provide Petitioners with a defense while expressly reserving Respondent's rights under the policy and applicable law. Pet.App. 5a, 28a, 146a.

In March 2019, the Attorney General sent Respondent a letter correctly noting that coverage of Petitioners' defense would violate Section 533.5. Pet.App. 5a; *see* Pet.App. 139a–41a (letter); *see generally* Pet.App. 5a (explaining that Petitioners "also apparently received a copy of the same letter"). Some weeks after receiving the Attorney General's letter, Respondent informed Petitioners that it would stop covering Petitioners for representation in the Attorney General's action and that it reserved its right to seek reimbursement for its previous expenditures, under the terms of the policy and applicable law. Pet.App. 6a–7a, 142a–56a; *see generally* Pet.App. 8a, 36a–38a, 43a.

Petitioners then sued Respondent in California state court, seeking a judgment that the policy required Respondent to provide them with representation. Pet.App. 7a, 26a–27a. Respondent removed the case to federal court and argued that, as relevant here, Respondent never had to provide a defense to Petitioners. Pet.App. 7a. The district court granted Respondent's motion for summary judgment, holding that Respondent had no duty to defend or

indemnify Petitioner. Pet.App. 7a, 32a–36a. Then, the district court concluded that Respondent had the right to reimbursement from Petitioners for all previous expenditures that it had made for Petitioners' representation. Pet.App. 8a, 36a–38a, 43a. The district court did not address Petitioners' constitutional challenge to Section 533.5, Pet.App. 7a, which Petitioners had only perfunctorily raised, *see* Adir's Partial SJ Mem. at Ex. A, 19–20, *Adir Int'l, LLC v. Starr Indemnity & Liability Co.*, No.2:19cv4352, ECF #29-1, 2019 WL 5580791 (C.D. Cal. Aug. 13, 2019).

Petitioners appealed to the Ninth Circuit, arguing, as relevant here, that Section 533.5 facially violated an insurance holder's alleged "due process right to retain and fund the counsel of its choice" in a civil case, Pet.App. 8a–9a, with the California Attorney General appearing as amicus to defend Section 533.5, Br. Of California As *Amicus Curiae* In Support Of Appellee, *Adir Int'l, LLC v. Starr Indemnity & Liability Co.*, No. 19-56320, ECF #18, 2020 WL 3493671 (9th Cir. June 18, 2020). The Ninth Circuit rejected Petitioners' constitutional argument and affirmed the district court's judgment. Pet.App. 9a–10a; *see also* Pet.App. 16a–23a (also rejecting Petitioners' statutory-interpretation argument).

The Ninth Circuit noted that Petitioners had presented only a facial challenge to Section 533.5, not an as-applied challenge. Pet.App. 4a, 9a–10a, 15a n.5. Petitioners had thus made "no allegation that

[they] cannot afford competent counsel" in the Attorney General's action "absent coverage under the policy" with Respondent. Pet.App. 9a–10a. Further, Petitioners "ha[d] not alleged how [Section 533.5] ha[d] impaired [their] ability to retain [civil] counsel" in any way. Pet.App. 15a n.5.

The Ninth Circuit then explained that both this Court and the various Courts of Appeals have interpreted the due-process right to civil counsel as more "limited" than the Sixth Amendment right to counsel for criminal defendants. Pet.App. 9a–11a, 13a–14a. This Court has held that courts may not "arbitrarily [ ] refuse to hear a [civil] party by counsel." Pet.App. 10a (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). Courts of Appeals have held that courts may not: refuse to accept filings from counseled civil parties, Pet.App. 11a (citing *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010)); prohibit a civil party from communicating with counsel, Pet.App. 11a (citing *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1119 (5th Cir. 1980), and *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 (5th Cir. 1981)); arbitrarily dismiss civil counsel, Pet.App. 11a–12a (citing *Ky. W. Va. Gas Co. v. Penn. Pub. Util. Comm'n*, 837 F.2d 600, 618 (3d Cir. 1988)); or fail to provide an adequate opportunity to retain civil counsel, Pet.App. 11a–12a (citing *Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir. 1988), and *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986)).

The Ninth Circuit further explained that "the original public meaning of the term 'due process'" supports this Court's and the Circuit Courts' narrow understanding of the due-process right to civil counsel. Pet.App. 12a. This Court held long ago that the Framers understood "due process" in the Constitution to mean the same thing as "the law of the land" clause in the Magna Carta, which required a hearing before any condemnation could occur. Pet.App. 12a–13a (citing, among other authorities, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856), and *Powell*, 287 U.S. at 68). Historically, the right to a "hearing" included only the "'the right to the aid of counsel *when desired and provided by the party asserting the right*,'" not a "broad or unfettered right to counsel in civil cases." Pet.App. 13a (quoting *Powell*, 287 U.S. at 68 (emphasis supplied by the Ninth Circuit)). Thus, the original public meaning of "due process" only "bars the government from actively preventing a party from obtaining counsel or communicating with his or her lawyer in civil cases." Pet.App. 13a–14a.

The Ninth Circuit then held that Section 533.5 does not facially violate this narrow due-process right to civil counsel. Pet.App. 14a–15a. Section 533.5 only prohibits "use [of] insurance proceeds to pay for legal fees" in one set of circumstances; it "does not actively prevent [a civil party] from obtaining counsel or communicating with its lawyers," which is all that the Due Process Clause protects in this context. Pet.App. 14a. Petitioners "ha[ve] not alleged that the

government actively thwarted [them] from obtaining counsel," "that [Section 533.5] precluded [them] from communicating with counsel," or that "[Section 533.5] has impaired [their] ability to retain counsel." Pet.App. 15a & n.5. Petitioners' challenge "really boils down to" a claim that Section 533.5 infringes the alleged "indirect right to fund and retain [civil] counsel through an insurance contract," but there is "no reason to enlarge the limited due process right to retain counsel to include" this asserted right. Pet.App. 14a. Finally, the Ninth Circuit distinguished *Luis v. United States*, 136 S. Ct. 1083 (2016), and *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)—both "criminal cases interpreting the Sixth Amendment right to counsel"—which decisions Petitioners "relie[d] heavily" upon. Pet.App. 14a–15a.

Petitioners petitioned the Ninth Circuit for panel rehearing, with a suggestion for rehearing en banc. Pet.App. 44a. The Ninth Circuit rejected both requests, with no judge calling for a vote on the suggestion for rehearing en banc. Pet.App. 44a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Implicates No Division Of Lower-Court Authority

The Ninth Circuit held that Section 533.5 did not facially violate any Due Process Clause protection of the right to civil counsel. It understood this right to prohibit the State from "actively prevent[ing] a party

who is willing and able to obtain [civil] counsel from doing so" or from "substantially interfer[ing] with a party's ability to communicate with his or her lawyer." Pet.App. 12a. Section 533.5 does not facially infringe any such protections because it only prohibits one source of funding to retain civil counsel, without disturbing the other funding sources. *See* Pet.App. 15a. Petitioners "ha[ve] not alleged how" Section 533.5 "impaired [their] ability to retain [civil] counsel" in the Attorney General's action, Pet.App. 15a n.5; have made no "allegation that [they] cannot afford competent counsel" as a result of Section 533.5, Pet.App. 9a–10a; and did not show how the "law precluded [them] from communicating with counsel" in any way, Pet.App. 15a. At bottom, Petitioners' claim "really boils down to an indirect right to fund and retain [civil] counsel through an insurance contract," but there is "no reason to enlarge the limited due process right to retain counsel to" cover this purported right. Pet.App. 14a.

Before this Court, Petitioners claim only that a single lower-court decision—the Second Circuit's decision in *Stein*—is in "tension" with the Ninth Circuit's decision below. Pet. 16, 20–21. But there is no such conflict. *See* Sup. Ct. Rule 10(a)–(b).

In *Stein*, the Second Circuit considered a criminal defendant's right to counsel under the Sixth Amendment, not a civil litigant's right to counsel under the Fourteenth Amendment's Due Process Clause. 541 F.3d at 135. There, the government had

forced an employer to end its policy of providing counsel to its employees when facing indictments from the government. *See id.* at 153. As a result of this coercion, certain employees subsequently indicted by the government "were unable to retain the counsel of their choosing," *id.* at 157, "even if" they had "liquated all property owned by [them]," *id.* at 145 (citation omitted). Other subsequently indicted employees had "been forced to limit their defenses for economic reasons" as a result of the government's conduct. *Id.* at 157 (alterations omitted). The Second Circuit concluded that the government's coercive action violated the Sixth Amendment rights of both groups of indicted employees. *Id.*

The Ninth Circuit's decision below does not conflict with *Stein*. *See* Pet. 20–21. As an initial matter, *Stein* rested on "[t]he Sixth Amendment's explicit guarantee of counsel in criminal cases," which is both separate and "broader than the judicially constructed right under the Due Process Clause" at issue here. Pet.App. 15a; *accord Potashnick*, 609 F.2d at 1118; *Anderson*, 856 F.2d at 747–48. Further, before finding a right-to-counsel violation, *Stein* considered whether the defendants either "were unable to retain the counsel of their choosing" or had "been forced to limit their defenses" due to the government's conduct. 541 F.3d at 157; *contra* Pet. 20 (quoting *Stein*'s summary of the district court's holding, 541 F.3d at 151, not *Stein*'s own holding). Here, the Ninth Circuit limited its holding to the conclusion that Section 533.5 did not facially violate

the due-process right to civil counsel, noting that there is "no allegation that [Petitioners] cannot afford competent counsel" in the Attorney General's action because of Section 533.5, or that this Section "impaired [their] ability to retain [civil] counsel" in any way. Pet.App. 9a–10a, 15a n.5.

Petitioners also cite statements from the Fifth Circuit's decision in *Texas Catastrophe Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), Pet. 17, but this decision also does not conflict with the Ninth Circuit's decision below, *see* Sup. Ct. Rule 10(a)–(b). *Texas Catastrophe* held that a statute requiring a private entity to "rely exclusively on the Texas Attorney General for legal representation" likely violated the due-process protections for civil counsel of choice, 975 F.2d at 1180–83—circumstances that are far afield from the case here, where Petitioners have made no allegation that Section 533.5 deprived them of private counsel.

II. That Petitioners And Their *Amici* Resort To Citing A Grab Bag Of Inapposite Doctrines Shows That This Case Raises Novel Issues, And Thus There Is No Conflict With This Court's Decisions

States have the general authority to regulate "the business of insurance" in the manner they "deem[ ] necessary to the public welfare," in the exercise of their "legislative judgment." *Maloney*, 341 U.S. at 109–10; *see also Day-Brite*, 342 U.S. at 423. So, when

this Court considers a State's insurance regulation—such as Section 533.5 here—it does not "sit as a super-legislature to weigh" the regulation's "wisdom" or decide whether the regulation's "policy . . . offends the public welfare." *Day-Brite*, 341 U.S. at 423 (citing, among other authorities, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)). Rather, this Court will only curtail the State's "extremely broad" authority in this sphere if an insurance statute violates "specific constitutional prohibitions" or runs afoul of "valid and controlling federal laws." *Day-Brite*, 341 U.S. at 423.

Further, as a matter of the Constitution's original meaning, the phrase "due process of law" imposes few restrictions on the States with respect to the right to civil counsel. *See* Pet.App. 12a–13a. The Framers understood "due process of law" to be coextensive with the Magna Carta's "law of the land" clause, which protected—as relevant here—only "'the right to the aid of counsel *when desired and provided by the party asserting the right*,'" not a "broad or unfettered right to counsel in civil cases." Pet.App. 13a (quoting *Powell*, 287 U.S. at 68 (emphasis supplied by the Ninth Circuit)). So, under its original public meaning, "due process" only "bars the government from actively preventing a party from obtaining counsel or communicating with his or her lawyer in civil cases." Pet.App. 13a–14a. Section 533.5 does not conflict with this original understanding, as the Ninth Circuit explained. Pet.App. 13a–14a.

Petitioners and their *amici* do not squarely address the originalist grounds for the Ninth Circuit's decision. Instead, they cite a series of doctrines, some of which are not grounded in the Fourteenth Amendment's Due Process Clause. Petitioners' and their *amici*'s reliance on this series of inapposite doctrines only shows that there is no conflict between the Ninth Circuit's decision below and any decision of this Court. *See* Sup. Ct. Rule 10(c). Indeed, each of the doctrinal bases that Petitioners and their *amici* rely upon raises novel legal issues that this Court has never addressed, and which lack merit, especially in the context of a facial challenge like this one.

A. Fourteenth Amendment Right To Counsel In Civil Cases

Petitioners base their lead argument upon the novel theory that Section 533.5 facially violates the right to civil counsel found in the Fourteenth Amendment's Due Process Clause by analogy to this Court's Sixth Amendment right-to-criminal-counsel case law. Pet. 2, 17–24. Even if this Court's Sixth Amendment cases could support in any way a Due Process Clause principle by analogy clearly enough to warrant this Court's review to address a "conflict[ ] with relevant decisions of this Court," Sup. Ct. Rule 10(c)—which is highly doubtful, given that the Sixth Amendment, unlike the Due Process Clause, explicitly guarantees "the assistance of counsel," U.S. Const. amend. VI—the Sixth Amendment cases that Petitioners cite do not support their argument here.

This Court's Sixth Amendment case law generally establishes the principle that a State may not substantially burden a defendant's right to criminal counsel. In *Luis*, a plurality of this Court concluded that such a burden existed when the government froze "untainted assets" of the defendant that were "needed to retain counsel of choice." 578 U.S. at 1088 (plurality op.); *accord id.* at 1098 (Thomas, J., concurring in the judgment); *compare Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623–33 (1989) (concluding that such a burden did not occur when the government froze tainted assets). And in *Maine v. Moulton*, 474 U.S. 159 (1985), this Court held that such a burden existed where the government deliberately elicited incriminating statements from a criminal defendant outside the presence of his or her attorney. *Id.* at 171–77.

This Court's Sixth Amendment jurisprudence does not support the conclusion that Section 533.5 is facially invalid. As an initial matter, "the Sixth Amendment does not govern civil cases." *Turner v. Rodgers*, 564 U.S. 431, 441 (2011). And, in any event, Section 533.5 does not substantially burden the right to counsel, especially in the context of this facial challenge, because Petitioners have not shown that "no set of circumstances exists under which" Section 533.5 would impose such a burden. *Salerno*, 481 U.S. at 745. Section 533.5 only prohibits parties contracting for insurance coverage for one category of civil cases: certain enforcement actions brought by the State or local government bodies for violations of

specified consumer protection laws. Thus, there is no burden on any limited due-process right to counsel in civil cases where a civil litigant has other sources of funds available to secure counsel. *See* Pet.App. 15a.

And to the extent there are cases in which the cost of civil litigation is so high that a particular litigant could only secure counsel if it obtained the limited type of insurance coverage barred by Section 533.5, that litigant may bring an as-applied challenge. *See* Pet.App. 15a n.5. In this case, however, Petitioners brought only a facial challenge and made "no allegation that [they] cannot afford competent counsel" due to Section 533.5, Pet.App. 9a–10a, or that Section 533.5 "impaired [their] ability to retain counsel" in any way, Pet.App. 15a n.5.

B. Forfeiture Case Law

Petitioners claim that the Ninth Circuit's decision below "stand[s] in serious tension with this Court's forfeiture jurisprudence," citing *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), and *United States v. Monsanto*, 491 U.S. 600 (1989). Pet. 22. In those cases, this Court explained that the State may only impose "[p]retrial restraints on forfeitable property" in a defendant's possession when the government proves at a hearing that the defendant committed the offense triggering forfeiture and that the property has the requisite connection to the crime. *Honeycutt*, 137 S. Ct. at 1633; *see Monsanto*, 491 U.S. at 615.

Section 533.5 does not facially conflict with this jurisprudence. Consistent with the State's broad authority to regulate insurance, Section 533.5 defines the lawful scope of insurance coverage that persons and entities may purchase. *See, e.g.*, *Maloney*, 341 U.S. at 109 n.2 (collecting examples of state insurance regulations upheld by this Court). Section 533.5 further provides that any insurance policy that violates Section 533.5(a) or (b) "is contrary to public policy and void." Cal. Ins. Code § 533.5(d). So, when a policyholder purchases insurance coverage in the State, it never pays for insurance coverage in violation of Section 533.5, *see* Pet.App. 74a, which is an over 30-year-old statute, *Mt. Hawley Ins.*, 215 Cal. App. 4th at 1401–02. This point is further underscored here in that the insurance policy Petitioners purchased expressly provides that "[a]ny terms" that "are in conflict with the terms of any applicable laws . . . are hereby amended to conform to such laws." Pet.App. 74a. Accordingly, Section 533.5's operation does not cause the restraint or forfeiture of any property in the policyholder's possession, meaning that *Honeycutt*'s and *Monsanto*'s protections on the pre-trial restraint or forfeiture of property do not apply. *Contra* Pet. 22.

C. "Fundamental Fairness" Doctrine

Petitioners claim that this Court's "fundamental fairness" jurisprudence facially invalidates Section 533.5, Pet. 24–30, but Petitioners forfeited

this argument by failing to raise it below, *see McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017).

In any event, this Court's fundamental fairness case law does not facially invalidate Section 533.5. In *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), this Court held that the Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Id.* at 33. When considering whether a particular government practice violates "fundamental fairness," a court must "view [ ] all the[ ] circumstances" and the "particular situation" presented by the case at hand. *Id.* at 25, 33. Applying these standards, this Court has held, for example, that "fundamental fairness" does not categorically require appointment of counsel "when a State seeks to terminate an indigent's parental status." *Id.* at 31, 33–34.

Here, Section 533.5 prohibits only one source of funding for retaining civil counsel, leaving all other sources intact. Pet.App. 15a. So, given that Section 533.5 permits litigants to obtain civil counsel, it clears the "minimal[ ]" protections that the Due Process Clause requires to secure "fundamental fairness." *Lassiter*, 452 U.S. at 31, 33–34. And that is especially so under the "particular situation" here, *id.* at 25, as Petitioners made "no allegation that [they] cannot afford competent counsel absent coverage under the policy" or that their "ability to

retain [civil] counsel" was "impaired" in any way, Pet.App. 9a–10a, 15a n.5.

Petitioners' contrary arguments fail. Petitioners first list categories of this Court's "fundamental fairness" jurisprudence—such as cases considering the presumption of innocence or the beyond-reasonable-doubt standard—with no apparent relevance to the issues here. *See* Pet. 25–27 (collecting cases). Petitioners then make an argument based on *Wardius v. Oregon*, 412 U.S. 470 (1973), but this fails to show that Section 533.5 is facially invalid. Pet. 27–29. In *Wardius*, this Court considered Oregon's notice-of-alibi rule, which required defendants to disclose the details of their alibi defense to the State in advance of a criminal trial without providing "reciprocal discovery rights" into the State's case. 412 U.S. at 471–73, 476. This Court invalidated this asymmetrical discovery rule because it unfairly tilted "the balance of forces between the accused and his accuser." *Id.* at 474–76. Section 533.5 does not alter any evidentiary rights or place any special burdens in litigation, as a facial matter, but prohibits insurance coverage for enforcement actions brought by the State or local government bodies under specified consumer-protection laws. That is not facially unconstitutional, and it would not be unconstitutional as-applied in a case—such as this one—where the defendant can mount a vigorous, counseled defense without such coverage.

D. Selective-Enforcement Case Law

Petitioners argue that this Court's protections against selective-enforcement actions facially invalidate Section 533.5 because the Attorney General has discretion to invoke Section 533.5 by pleading a case under the Unfair Competition Law or the False Advertising Law. *See* Pet. 3, 30–32.

Section 533.5 does not facially violate this Court's selective-enforcement jurisprudence. "[T]he Government retains 'broad discretion' as to whom to prosecute" and "the decision whether or not to prosecute, and what charge to file," will "generally rest[ ] entirely in [the State's] discretion." *Wayte v. United States*, 470 U.S. 598, 607 (1985). This Court thus will only permit selective-enforcement claims against enforcement actions when the State's enforcement decisions are "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Id.* at 608 (citations omitted). And to prove such a claim, the challenger must "show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* Section 533.5 does not suggest that the Attorney General should or must file claims under the Unfair Competition Law or the False Advertising Law based on unjustifiable or arbitrary standards. *See id.* Nor does Section 533.5 suggest that its enforcement would have a discriminatory effect along such criteria.

Compare id. at 609. Section 533.5 thus does not violate this Court's protections against selective enforcement, especially in the context of a facial challenge.

Petitioners do not meaningfully address this precedent, but offer only unpersuasive arguments that are especially weak for a facial challenge. Petitioners' sole complaint is about the breadth of California's Unfair Competition Law, which gives the Attorney General discretion to transform certain enforcement actions into an action under this law, thereby triggering Section 533.5. Pet. 31, 33–35; *accord* NCLA Am. Br. ii, 2–3, 8–10; LLF Am. Br. 5–6. Yet, under this Court's jurisprudence, the breadth of a statute alone does not support a selective-enforcement claim. *See Wayte*, 470 U.S. at 607–09. Rather, Petitioners must show that the Attorney General enforced the law with a discriminatory intent, and that such enforcement had a discriminatory effect, which Petitioners do not even attempt to do here. *Id.* at 608.

E. *Ex Parte Young*

Amici the New Civil Liberties Alliance and the Cato Institute argue that *Ex Parte Young*, 209 U.S. 123 (1908), facially invalidates Section 533.5. NCLA Am. Br. 7–18. Petitioners did not raise an *Ex Parte Young* argument before the Ninth Circuit, so this argument is not properly before this Court now. *See McLane*, 137 S. Ct. at 1170. In any event,

Section 533.5 does not violate *Ex Parte Young* because civil litigants may readily test the validity of this Section in court by, *inter alia*, bringing a lawsuit against any state official responsible for enforcing that provision.

F. First Amendment

Finally, *amici* led by the Landmark Legal Foundation argue that this Court's First Amendment jurisprudence facially invalidates Section 533.5. Specifically, these *amici* claim that Section 533.5 "creates an unnecessary chilling effect for individuals who might otherwise serve on a board of directors in violation of the First Amendment." LLM Am. Br. 10–11 (citing *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021)). This argument is not properly before this Court either, as no party raised it before the Ninth Circuit. *See McLane*, 137 S. Ct. at 1170. Further, Section 533.5 does not implicate the First Amendment, as it is a generally applicable regulation of nonspeech, not of expressive conduct. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705–07 (1986); *accord Minneapolis Star & Trib. Co. v. Minn. Com'r of Rev.*, 460 U.S. 575, 581 (1983).

III. This Case Is A Poor Vehicle For Reviewing The Novel Issues That Petitioners Raise

Even if this Court were inclined to review the novel issues that Petitioners raise, this case is a poor vehicle for three separate reasons.

First, this Court's review of the novel issues that Petitioners raise would benefit from further percolation, as no court has decided those issues in any prior case. Such percolation would "allow" the lower courts to "further study" the various issues that Petitioners have brought before this Court, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari), "assist[ing]" this Court in any "review" it deems appropriate in the future, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring in denial of certiorari); *contra* Pet. 19; LLF Am. Br. 12. While Petitioners claim that no percolation is possible because Section 533.5 is apparently unique, Pet. 16, they fail to recognize that the Supreme Court of California could independently consider Section 533.5's constitutionality because it is not bound to follow the Ninth Circuit's opinion below. And, in any event, given the breadth and diversity of the many issues that Petitioners have raised here, such issues could well come up in a variety of other contexts.

Second, an as-applied challenge to Section 533.5 would serve as a far better vehicle for this Court to decide the issues that Petitioners have raised. With an as-applied challenge, the litigant would presumably argue that Section 533.5 burdened its ability to engage civil counsel, based on specific and established facts. *See generally* Pet. 1, 11 (arguing that insurance is "frequently the only means" of obtaining civil counsel for "individual executives and

smaller businesses"); *accord* LLF Am. Br. 3–4, 8–10. Here, in contrast, Petitioners have raised only a facial challenge to Section 533.5, making "no allegation that [they] cannot afford competent counsel" or that Section 533.5 "has impaired [their] ability to retain counsel" in any way. Pet.App. 9a–10a; 15a n.5.

Finally, Petitioners failed to raise before the Ninth Circuit several of the arguments that they and their *amici* have now put before this Court. Petitioners did not present their "fundamental fairness" arguments before the Ninth Circuit or the *Ex Parte Young* or First Amendment arguments of their *amici*—thus, none of these arguments are properly preserved for this Court's review here. *See McLane*, 137 S. Ct. at 1170; *supra* Parts II.C, E–F. Instead, Petitioners focused their constitutional challenge below largely around their right-to-civil-counsel arguments, citing many of the same key authorities there as in their Petition here. *See* Appellants' Opening Br. at 20–36, *Adir Int'l, LLC v. Starr Indemnity & Liability Co.*, No. 19-56320, ECF #6, 2020 WL 1283391 (9th Cir. Mar. 16, 2020); Appellants' Reply Br. at 1–18, *Adir Int'l, LLC v. Starr Indemnity & Liability Co.*, No. 19-56320, ECF #33, 2020 WL 5579424 (9th Cir. Sept. 8, 2020).

CONCLUSION

This Court should deny the Petition.

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