No. 22-447

IN THE
Supreme Court of the United States

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

v.

CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of vital concern to the nation's business community.

The Chamber's members have an interest in the reasonable interpretation of state statutes prohibiting unfair and deceptive acts and practices ("UDAP statutes"). Plaintiffs—including states and localities, as well as private plaintiffs—take advantage of the vagueness and breadth of UDAP statutes to inflict unexpected and unfair liability on businesses. Some states bring UDAP claims alleging thousands, if not millions, of individual violations for practices that cause no real-world harm. These lawsuits often seek per-violation civil penalties, yielding gargantuan damages awards. Private plaintiffs allege that virtually every

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[1] Counsel for *amicus* sought consent from counsel for all parties 9 days before the filing of this brief. All parties promptly consented. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

business practice under the sun is "unfair" as a basis for bringing class actions. The Chamber recognizes the value of consumer protection laws, but such laws should provide fair notice of their coverage and should ensure that remedies are proportional to violations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber submits this brief to draw the Court's attention to the abusive nature of contemporary UDAP litigation. California's capacious unfair competition law ("UCL") has "led to abusive litigation and unpredictable liability for" businesses that operate in California. Alexander N. Cross, *Federalizing "Unfair Business Practice" Claims Under California's Unfair Competition Law*, 1 U. Chi. Legal F. 489, 490 (2013). Businesses facing vague UDAP laws in other states face similar challenges. Some states use UDAP laws to impose millions of dollars in civil penalties for practices that cause no harm. Meanwhile, vague laws prohibiting "unfair" practices are putty in the hands of creative class-action lawyers, who can characterize even the most commonplace and innocuous business practice as "unfair" in an effort to extract a settlement. Whether the plaintiff is the state or private individuals (represented by canny private law firms)—or both, as when states engage in the troubling practice of hiring private law firms on a contingency basis to pursue UDAP claims—the risk of massive judgments unfairly forces businesses to settle meritless claims. The Chamber submits this brief to highlight the harms that UDAP statutes impose on businesses.

ARGUMENT

I. Some States Misuse UDAP Statutes.

UDAP statutes are designed to protect consumers from deceptive and unethical businesses practices. But some states—often delegating their authority to contingency-fee outside counsel—have turned such statutes into Swiss Army knives. When these states (or their contingency-fee lawyers) feel that businesses are doing something wrong but cannot locate any specific law the businesses are violating, they declare the businesses' conduct "unfair" or "deceptive" under a UDAP law. They then use these UDAP laws as revenue-generation tools. In many cases, as Petitioners explain, states do not have to prove reliance, causation, or damages in order to obtain civil penalties. Pet. 33–35. An allegedly false statement whispered in a forest may not make a sound, but it can still support a civil penalty under a UDAP statute. Unconstrained by any requirement of proving harm, some states then seek arbitrarily large damages awards by creatively transforming a single allegedly unethical business practice into thousands or millions of individual "violations."

Moreover, states, unlike private plaintiffs, also have the authority to serve pre-lawsuit subpoenas to investigate potential violations. *See* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 Kan. L. Rev. 209, 219 (2016). States' ability to rummage through businesses' private documents—and then bring a lawsuit to challenge any "unfair" practice—exposes

businesses to unlimited and unpredictable liability. The problem is exacerbated when some states choose to deputize private plaintiffs' attorneys as "special assistant AGs," granting these attorneys unprecedented access to corporations' files—even as these very same attorneys are pursuing private litigation against them. *See* Editorial, *The Tort Bar's Legal Double Dipping*, Wall St. J. (Dec. 9, 2022), https://bit.ly/3uMEJ1z.

This case amply illustrates how states can abuse UDAP laws. Working closely with the FDA and relying on the FDA's extensive feedback, Ethicon developed marketing materials and brochures for its pelvic mesh products. Yet a California court found that Ethicon's materials were misleading—and that Ethicon had violated California law a remarkable *200,000* times. This included not only every piece of marketing Ethicon sent into California (regardless of whether delivered, read, or relied on), but also *every single hospital newsletter*—regardless of whether those newsletters included any Ethicon-related information—simply because the hospitals *may* have incorporated information from Ethicon's public relations kits into those newsletters. *See* Pet. 13–14. As a result, California can inject $300 million in civil penalties into the state treasury, without regard to whether that amount has the slightest relationship to the harm that Ethicon actually caused, or whether Ethicon had the slightest notice that its press kits could yield such harsh liability.

This case is far from the first example of a state-brought UDAP suit that generates these unexpected penalties. The decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 777 S.E.2d 176

(S.C. 2015), which petitioners address, *see* Pet. 32–33, illustrates the pathologies of UDAP litigation. There, Ortho-McNeil-Janssen Pharmaceuticals ("Janssen") released a new drug in full compliance with the FDA's myriad requirements. "[F]ederal regulations set forth detailed requirements as to the content, the formatting, and the order of required information about potential risks and the safe and effective use of a drug." *Wilson*, 777 S.E.2d at 183. To comply with those regulations, a manufacturer must submit *the exact text* it intends to use to the FDA for regulatory approval. *Id.* at 184. Janssen dutifully complied with FDA requirements. *Id.* at 186–87. Nonetheless, South Carolina's AG brought a UDAP claim against Janssen because, despite using the FDA-approved label, the company provided additional clarification to prescribing physicians that the AG found misleading. *Id.* at 188.

A jury found Janssen liable, finding that both its (FDA-approved) label and its letters to physicians were misleading. *Id.* The trial court assessed over $327 million in civil penalties. *Id.* Why was the penalty so high? Because every single communication to every single physician, and every single use of a sample box of the medication, constituted its own discrete statutory violation. *Id.* at 203. The South Carolina Supreme Court acknowledged that, despite the whopping verdict, there was an "absence of significant actual harm" stemming from Janssen's conduct. *Id.* at 204. But all the court did to address the mismatch between the negligible "actual harm" and the verdict was to reduce the judgment from $327 million to $124 million. *Id.* at 207. In short, a company that strictly complied with the intricate FDA

regulations governing pharmaceuticals and caused no injury was still forced to pay a nine-figure penalty.

States can also wield UDAP statutes as weapons in the culture wars. Some state attorneys general have sued energy companies under UDAP laws, alleging they are deceiving the public by failing to warn the public sufficiently about the ills of climate change. *See, e.g.*, *Connecticut v. Exxon Mobil Corp.*, Case No. HHD-cv20-6132568-S (Conn. Super. Ct. filed Sept. 14, 2020); *Massachusetts v. Exxon Mobil Corp.*, 187 N.E.3d 393 (Mass. 2022); *see also* Morgan Conley, *Conn. Latest State to Target Exxon with Climate Fraud Claims*, Law360 (Sept. 14, 2020), https://bit.ly/3FPpVFP. These states allege that energy companies employed an undefined "campaign of lies and deception" to sell fossil fuels. Meanwhile, other state attorneys general have sued technology companies under UDAP laws, with Texas now seeking billions of dollars in civil penalties based on Meta's purported misuse of facial recognition technology. *See, e.g.*, *Texas v. Meta Platforms, Inc.*, No. 22-0121 (Tex. 71st Judicial Dist., Harrison Cnty., filed Feb. 14, 2022), *available at* bit.ly/3YjQsCp. There appears to be bipartisan agreement that local juries will fine disliked out-of-state businesses for being vaguely "unfair"—thus allowing untold sums to flow from out-of-state defendants into the local treasury.

Another troubling aspect of UDAP litigation is that many lawsuits in the name of states are actually prosecuted by private law firms, often on a contingency basis. Indeed, private attorneys are often themselves the ones pitching creative UDAP suits to state attorneys general. *See* Silverman & Wilson, *supra*, at

217. These private firms then obtain no-bid contracts that can, in some cases, reap tens or hundreds of millions of dollars for the firms. *See id.* (discussing Cohen Milstein's partnership with Pennsylvania); *see also* Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times (Dec. 18, 2014), https://bit.ly/3W9SrqQ (discussing former attorney general turned plaintiffs' attorney's arrangement with Louisiana).

These arrangements, in addition to raising ethical concerns about pay-to-play, *see* Editorial, *The Pay-to-Sue Business*, Wall St. J. (Apr. 16, 2009), https://bit.ly/3HyTqNn, are troubling because they eliminate a crucial guardrail that protects businesses. As noted above, states, unlike private plaintiffs, have the authority to seek virtually limitless damages without proving causation, reliance, or damages. In theory, that extraordinary authority is tempered by the fact that the lawyers bringing such claims are state officials, charged with protecting the public interest. In practice, however, private law firms often drive such litigation, and the higher the civil penalty, the higher the law firm's contingency payment. Any business unlucky enough to receive a subpoena in a UDAP investigation driven by a plaintiffs' law firm can be certain that the subpoena will transform into a damages lawsuit. And any business named as a defendant in such a lawsuit knows that the plaintiff will seek the highest possible civil penalties, irrespective of whether another remedy, such as injunctive relief, would better serve the public. Silverman & Wilson, *supra*, at 221–22.

Yet another troubling feature of modern UDAP litigation centers on how states use the money they collect. Because state statutes often do not regulate how money collected in settlements (as opposed to tax revenue) is used, state officials are often free to spend the money as they wish. Unsurprisingly, the money is often used to enhance incumbents' political standing or further their personal aims. As just one example, when the Michigan Attorney General collected millions in a settlement with Countrywide Financial, he diverted those revenues to park improvements in a city filled with swing voters—a maneuver widely understood to be an effort to support his gubernatorial run. *See* Jim Harger, *State, Local Legislators Call for Reevaluation of Countrywide Mortgage Settlement Funds After Surprise Parks Money*, Grands Rapid Press (Mar. 19, 2009), https://bit.ly/3FRDg0w; Emily Zoladz, *Countrywide Money for Parks Draws Criticism; Secchia Defends Millennium Donation Because of its Urban Location*, Grand Rapids Press (Mar. 18, 2009), https://bit.ly/3VYrcA0. Meanwhile, in Arkansas, the AG took money from a settlement regarding alleged health violations from Dannon's products and donated it to local hunger relief organizations—one of which was lucky enough to have the AG's wife as a board member. U.S. Chamber of Commerce Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement?* 32 (Oct. 2016), https://bit.ly/3YmaE6M.

To sum up, as this case illustrates, UDAP lawsuits brought by states expose businesses to liability that is both unpredictable and potentially backbreaking.

II. Private Plaintiffs Misuse UDAP Statutes.

Like most state UDAP statutes, California's UCL includes a private cause of action. In the hands of plaintiffs' lawyers, that private cause of action has proven dangerous. California's UCL has an "expansive and unpredictable reach," which "threatens legitimate businesses, unaware of the laws' boundaries." Cross, *supra*, at 489. Indeed, any creative class-action lawyer who can identify a business practice that is arguably "deceptive" or "unfair" can bring a lawsuit. Just a brief look at several recent UCL suits reveals how businesses can unwittingly find themselves susceptible to crushing liability for reasonable conduct.

Consider, for example, a recent class action against Hewlett-Packard. There, plaintiffs asserted that the company had violated California's UCL because of a quirk of its printers. Hewlett-Packard's printers stopped printing when the ink cartridges indicated that they were empty (sensibly enough). Consumers claimed that they discovered, however, that sometimes the cartridges were not *actually* empty, but rather had some remaining dregs of ink. Hewlett-Packard promptly addressed the programming in the printers, providing an override setting that would allow users to keep printing until the ink ran dry—but this was not enough to stave off the various class actions that had cropped up. *See, e.g.*, *Baggett v. Hewlett-Packard Co.*, No. 07-cv-667 (C.D. Cal. Filed June 6, 2007). The district court confronting these alleged UCL violations partially granted Hewlett-Packard's motion to dismiss, and then fully granted its motion for summary judgment, finding no UCL violations. *Baggett*, No. 07-cv-667, 2009 WL

3178066 (C.D. Cal. Sept. 29, 2009). While the plaintiffs' appeals were pending, however, the company settled the various disputes for $5 million. *See* Keith Goldberg, *HP Settles Ink-Jet Cartridge Class Actions for $5M*, Law360 (Sept. 2, 2011), https://bit.ly/3HCR4gq. The fact that HP decided to settle the case for $5 million even *after* winning in the district court illustrates the extreme settlement pressure that UDAP suits inflict.

A recent suit against Whole Foods reveals a common form of UCL suit. In *Warren v. Whole Foods Market California, Inc.*, No. 21-cv-4577 (N.D. Cal. Filed June 15, 2021), plaintiffs alleged that a vanilla-flavored coffee creamer that contained the label "[n]aturally [f]lavored" violated the UCL because, in fact, chemical testing showed some synthetic vanilla flavoring, as well. *Warren*, No. 21-cv-4577, 2022 WL 2644103, at *1 (N.D. Cal. July 8, 2022). Plaintiffs also alleged that even labeling the creamer "vanilla" flavored was false and misleading because it led consumers to think that the taste came "exclusively or predominately" from vanilla. Compl. ¶¶ 35, 48, 84, *Warren*, No. 21-cv-4577 (N.D. Cal. June 15, 2021), ECF No. 1.

By the time this suit was brought, courts had routinely held that simply marketing a product as "vanilla" flavored would not suggest to ordinary consumers that there was only vanilla and nothing *but* vanilla. *See, e.g.*, *Fahey v. Whole Foods Mkt., Inc.*, No. 20-cv-6737, 2021 WL 2816919, at *2 (N.D. Cal. June 30, 2021); *Steele v. Wegmans Food Mkts., Inc.*, 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020); *Dashnau v. Unilever Mfg. (US), Inc.*, 529 F. Supp. 3d 235, 245 (S.D.N.Y. 2021). Nonetheless, the district court denied Whole Foods'

motion to dismiss, permitting the plaintiffs' allegation that "testing suggest[ed]" the coffee creamer contained a compound "that is *mostly* not from the vanilla plant." *Warren*, 2022 WL 2644103, at *5 (emphasis added). Because the creamer said not just "vanilla" flavored, but "[v]anilla [n]aturally [f]lavored," the court deemed the avalanche of contrary cases distinguishable and permitted the suit to proceed to discovery. *Id.* at *8.

Vanilla flavoring has been a popular basis for UDAP litigation. Earlier this year, a court permitted plaintiffs' *fourth* bite at the apple against Chobani to proceed past a motion to dismiss. *See Nacarino v. Chobani, LLC*, No. 20-cv-7437, 2022 WL 344966 (N.D. Cal. Feb. 4, 2022). There, plaintiffs similarly alleged that simply representing a product as "vanilla," without qualifiers, was deceptive if the product contained "other non-vanilla plant flavoring." *Id.* at *1. The court recognized that "no reasonable consumer would take the Product's use of the word 'vanilla' on the front and the package's vanilla imagery as indicating that the Product's flavor is derived *exclusively* from the vanilla plant," because "the Product does not display any statements 'even arguably conveying that vanilla bean or extract is the exclusive source of its vanilla flavor.'" *Id.* at *2 (quoting Aug. 9, 2021 Order). For that reason, the court dismissed the majority of plaintiffs' claims—and yet it still permitted plaintiffs' UCL claim to proceed. *Id.*

Plaintiffs have also taken issue with claims that ingredients are "natural"—even when, in fact, they overwhelmingly are. Plaintiffs sued JM Smucker, the maker of Jif peanut butter, because *one* component of *one* ingredient had been genetically modified. *See*

Forsher v. J.M. Smucker Co., No. 19-cv-194 (N.D. Ohio filed Dec. 17, 2015). Specifically, Mr. Forsher contended that he bought Jif peanut butter because the label described it as "natural." Imagine his horror, then, when he learned that the peanut butter *may* contain sugar *derived* from bioengineered beets. *Forsher*, No. 19-cv-194, __ F. Supp. 3d __, 2020 WL 1531160 (N.D. Ohio Mar. 31, 2020). Forsher then sought to certify not one but two classes—one of California consumers, and the other of customers in 44 states. *Id.* at *2. Despite the fact that the FDA has already expressly opined that sugar derived from bioengineered beets would not contain any "detectable genetic material" qualifying as bio-engineered or genetically modified, *id.* at *1, Forsher contended that reasonable consumers like him would assume that "natural" meant that there was not even a remote possibility of ingredients that had ever had a brush with genetic modification. The court correctly held that there were no allegations as to why plaintiff's "subjective definition of the term 'natural' as free from GMOs is shared by a reasonable consumer." *Id.* at *4.

And plaintiffs have brought UDAP claims against businesses seeking to penalize them for labeling their vegetarian options as "veggie." *See Kennard v. Kellogg Sales Co.*, No. 21-cv-7211 (N.D. Cal. Filed Sept. 17, 2021). The claim was not that the "veggie" products contained meat. Rather, the claim was that including beans in "veggie" patties is misleading because beans are legumes, not vegetables. The court dismissed this seemingly absurd claim, Minute Order, *Kennard*, No. 21-cv-7211, 2022 WL 4241659 (N.D. Cal. Sept. 14, 2022), but

it amply illustrates the types of UDAP suits that businesses face.

Many suits stretch the bounds of credulity—not only as it relates to deceptive conduct, but also as to basic injury. Consider a recent case against Walmart alleging that its products marketed as "hypoallergenic" in fact contain allergens. *See Brito-Munoz v. Walmart, Inc.*, No. 21-cv-903 (M.D. Pa. filed May 18, 2021). The plaintiffs—who were not themselves allergic to any of the relevant ingredients, but professed concern for their children—made *no* allegations that their children were in fact allergic to the products, suffered any harm, or even experienced a shred of discomfort from the products. *Brito-Munoz*, No. 21-cv-903, 2022 WL 2111344, at *5 (M.D. Pa. June 10, 2022). Plaintiffs instead alleged that they paid more than they would have without the "hypoallergenic" moniker, but they notably failed to allege that the non-hypoallergenic products were any less expensive. *Id.*. Indeed, Brito-Munoz even conceded that she *wanted to keep buying these very products* regardless of their price. *Id.* at *5 n.10. The court correctly dismissed the claim, but only after more than a year of litigation.

In California, several aggrieved plaintiffs filed a suit against SeaWorld, alleging that SeaWorld violated the UCL by painting a rosy portrait of the orca whales' quality of life. *See Anderson v. SeaWorld Parks & Ent.*, No. 15-cv-2172 (N.D. Cal. Filed May 14, 2015). This suit was just one of several that arose after the 2013 documentary *Blackfish*—when California plaintiffs sought to express their moral opposition in the guise of a UCL suit. *See* Fola Akinnibi, *Judge Rules SeaWorld*

Can't Shed Ticket Buyers' Claims, Law360 (Jan. 31, 2017), https://bit.ly/3uTRAyV. One plaintiff based her economic injury on the cost of a Shamu plush toy she purchased. *See* Findings of Fact & Conclusions of Law, *Anderson*, No. 15-cv-2172 (N.D. Cal. Oct. 13, 2020), ECF No. 554. After five years of litigation—and after denying the defendant's motions to dismiss and for summary judgment—the court finally ruled in SeaWorld's favor, holding that plaintiffs never had Article III standing or statutory standing to seek relief. *Id.* at 1, 19–28.

Crucially, it is easier to bring these types of lawsuits under UDAP statutes than under traditional common law causes of action. In class action cases, courts frequently dismiss common law fraud and negligence claims at the pleadings stage, based on failure to allege traditional requirements of those torts such as reliance, while nonetheless permitting UDAP claims to proceed. *See, e.g.*, *Nacarino*, No. 20-cv-7437, 2022 WL 344966, at *6 (N.D. Cal. Feb. 4, 2022) (noting that the UCL does not always require the classic objective test—the "reasonable consumer test"—for reliance, nor that the "public be likely to experience deception"). Once past a motion to dismiss—and especially, once past class certification—UDAP class actions almost always settle, regardless of their ultimate merit. UDAP statutes therefore open up entirely new vistas of litigation possibilities for the plaintiff's bar.

Because there are so many different UDAP statutes, there are often a multitude of overlapping class actions arising from the same business conduct—and when a particular lawsuit fails, plaintiffs will try and try again.

Litigants will file a smattering of near-identical suits in several different courts, hoping to find just one court amenable to their novel claims. Consider the spate of UCL suits arguing that various liquors were not sufficiently "handmade" or "handcrafted." Plaintiffs across the country sued under both California's UCL and New York's General Business Law. *See, e.g.*, *Welk v. Beam Suntory Import Co.*, No. 15-cv-328 (S.D. Cal. 2015 filed Feb. 17, 2015) (Jim Beam bourbon); *Hofmann v. Fifth Generation, Inc.*, No. 14-cv-2569 (S. D. Cal. filed Oct. 28, 2014) (Tito's Handmade Vodka); *Cabrera v. Fifth Generation, Inc.*, No. 14-cv-2990 (S.D. Cal. filed Dec. 22, 2014) (same); *Pye v. Fifth Generation, Inc.*, No. 14-cv-493, 2015 WL 5634600 (N.D. Fla. Sept. 23, 2015) (same); *Singleton v. Fifth Generation, Inc.*, No. 15-cv-474 (N.D.N.Y. filed Apr. 17, 2015) (same); *Salters v. Beam Suntory, Inc.*, No. 14-cv-659, 2015 WL 2124939 (N.D. Fla. May 1, 2015) (Maker's Mark whiskey); *Nowrouzi v. Maker's Mark Distillery, Inc.*, No. 14-cv-2885, 2015 WL 4523551 (S.D. Cal. July 27, 2015) (same). Although many of these suits have been dismissed, there are so many of them that exhausted defendants have begun paying settlements in an effort to make them go away. *See* Order Dismissing Case by Reason of Settlement, *Singletary*, No. 15-cv-474 (N.D.N.Y. Mar. 22, 2018), ECF No. 172 (settling even after class certification was denied); *see also* Rick Archer, *Tito's Handmade Vodka False-Ad Suit Settles*, Law360 (Mar. 22, 2018), https://bit.ly/3hi093L.

And once a particular UCL theory proves to have any success, it proliferates. Over one four-year period, for example, lawsuits raising claims of "slack-fill"—

allegations that containers are less full of product than they ought to be—grew by over 600%. *See* Joyce Hanson, *Slack-Fill Suits See Boom Despite Few Class Wins*, Law360 (Apr. 17, 2017), https://bit.ly/3YiNXjH. This despite the fact that several judges had dismissed suits like these out of hand, with one saying that the complaint did not "pass the proverbial laugh test." *Fermin v. Pfizer, Inc.*, 215 F. Supp. 3d 209, 212 (E.D.N.Y. 2016). (In *Fermin*, plaintiffs alleged that the Advil bottle was too large for the number of pills inside, regardless of the fact that the packages clearly stated how many pills were inside.) All it takes are one or two massive settlements—like the $12 million judgment against Starkist Co. for allegedly underfilling its tuna cans—for attorneys to smell blood in the water. *See Hendricks v. Starkist Co.*, No. 13-cv-729, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016).

Indeed, plaintiffs' firms have perfected their "precise template" for these lawsuits, ready to slot allegations in regarding the specific good. Hanson, *supra*; *see also* U.S Chamber of Commerce Inst. for Legal Reform, *The Food Court: Trends in Food and Beverage Class Action Litigation* 12 (Feb. 2017), https://bit.ly/3ByEb3e (identifying 14 "cut-and-paste slack fill class actions filed by" one law firm). And plaintiffs' firms have identified their court of choice: the Northern District of California. (Recall the Chobani and Whole Foods litigation discussed *supra*, both of which enjoyed success in that jurisdiction.) One report identified that as of 2013, roughly 60% of food-related class actions were filed in or removed to federal courts in California, with the Northern District playing host to two-thirds of

California's litigation (and one-third of the nation's). *Id.* at 11. Today, the Northern District of California continues to host roughly 20% of all active food class actions. *Id.*

Nor is this limited to California's Unfair Competition Law, although California's statute has proven most friendly to litigants. Only weeks ago, a plaintiff sued Kraft Heinz Co. in the Southern District of Florida. *See* Compl., *Ramirez v. Kraft Heinz Food Co.*, No. 22-cv-23782 (S.D. Fla. Nov. 18, 2022), ECF No. 1. The plaintiff alleged that Kraft had violated Florida's UCL by marketing its macaroni and cheese as "ready in 3 ½ minutes," when in fact the *microwave* time is 3 ½ minutes. The plaintiff argued that Kraft's representation was unfair and deceptive because the other steps involved (namely, pulling off the lid and adding water) added time to the purported 3 ½ minutes. The plaintiff purported to represent a class of injured individuals whose aggregate damages exceeded $5 million. *Id* ¶ 17. Put another way, the plaintiff asserts that she and fellow consumers suffered over $5 million in injury thanks to the added 30 seconds it took to add water to a cup of macaroni.

These examples—just a handful of the scores and scores of UDAP suits filed every year—illustrate the perils of these suits. They are often meritless to the point of frivolousness; they proliferate once a theory has proven to have any persuasive power at all; they take advantage of favorable courts to strong-arm settlements, even on the basis of a theory that most courts have rejected; and they are often divorced from any

actual real-world injuries to consumers—the very thing the statutes purport to protect.

CONCLUSION

UDAP statutes, while well-intentioned, can be misused and cause significant harm to the business community. This Court should grant the petition for review.

Respectfully submitted,

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