SERVICE ON ATTORNEY GENERAL AND DISTRICT ATTORNEY REQUIRED BY BUS. & PROF. CODE, §17209 AND CAL. RULES OF COURT, RULE 8.212(C).

D077945

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHNSON & JOHNSON, a New Jersey Corporation; ETHICON, INC., a New Jersey Corporation; ETHICON US, LLC; and DOES 1 through 100, inclusive,
Defendants and Appellants,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent.

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
EDDIE C. STURGEON, JUDGE • CASE NO. 37-2016-00017229-CU-MC-CTL

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ADVAMED IN SUPPORT OF APPELLANTS JOHNSON & JOHNSON, ETHICON, INC., AND ETHICON US, LLC; [PROPOSED] ORDER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Advanced Medical Technology Association (AdvaMed) requests permission under California Rules of Court, rule 8.200(c), to file the attached amicus curiae brief in support of defendants and appellants Johnson & Johnson, Ethicon, Inc., and Ethicon US, LLC (collectively, Johnson & Johnson).[1]

AdvaMed is a trade association that leads the effort to advance medical technology in order to achieve healthier lives and healthier economies around the world. AdvaMed's membership has reached over 400 members with a global presence in countries and regions including the United States, Europe, India, China, Brazil, and Japan. AdvaMed's member companies range from the largest to the smallest medical technology innovators and companies. AdvaMed acts as the common voice for companies producing medical devices, diagnostic products, and digital health technologies.

AdvaMed's members operate in heavily regulated fields, and they seek to comply in good faith with applicable state and federal law. AdvaMed has a strong interest in this case because

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[1] No party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than AdvaMed or its members (excluding Johnson & Johnson, which is a member of AdvaMed), made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

it involves an effort to expand California's Unfair Competition Law (UCL) to punish conduct expressly approved by federal regulators. Affirming the judgment below would expose AdvaMed's members to the threat of UCL liability even when they have complied with applicable federal law. AdvaMed thus submits this amicus brief providing historical and doctrinal background information regarding the UCL safe harbor doctrine and urging this court to hold that a business's compliance with federal law and the guidance of federal regulators confers "safe harbor" protection from UCL liability.

September 24, 2021

HORVITZ & LEVY LLP
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AMICUS CURIAE BRIEF

INTRODUCTION

The scope of California's Unfair Competition Law (UCL) is not limitless. The courts and voters of this state have endeavored to cabin the UCL's reach to ensure that the legitimate activities of heavily-regulated businesses are not penalized. This case, in which the Attorney General seeks to punish a company under the UCL for activity approved by federal regulators, illustrates the need for vigilance in enforcing the UCL's limits.

One critical limitation on UCL liability is the safe harbor doctrine, which precludes the imposition of liability for conduct that has been authorized by state or federal legislation or agency action. A robust safe harbor doctrine is necessary to ensure that the UCL's prohibitions do not reach legitimate and legally-compliant business conduct.

The UCL's history illustrates the need for a strong safe harbor doctrine. The Legislature modeled the UCL on the Federal Trade Commission (FTC) Act, which similarly prohibits "unfair or deceptive acts or practices." (15 U.S.C. § 45(a)(1).) Unlike the UCL, however, the FTC Act is not enforceable by private litigants or nonexpert law enforcement agencies. Instead, the FTC Act is enforceable only by the FTC, which Congress entrusted to exercise the discretion necessary to pursue a coherent and predictable enforcement plan. Because the UCL lacks such a limitation, it is essential for courts to apply rules of law such as the safe harbor doctrine that protect heavily-regulated defendants from the threat of limitless liability

notwithstanding their earnest efforts to comply with applicable law.

In view of this historical and doctrinal background, the Attorney General's arguments against applying the safe harbor doctrine in this case are untenable. Contrary to the Attorney General's contention, the safe harbor doctrine encompasses federal legislation and agency action, not merely state legislation. Moreover, the Attorney General is incorrect in suggesting that the safe harbor doctrine applies only when federal law preempts state law. If the safe harbor doctrine were as narrow as the Attorney General urges, then it would provide little protection from UCL liability. Fortunately for regulated companies like Johnson & Johnson that strive to comply in good faith with applicable state and federal laws, the doctrine's protection is sturdier than the Attorney General posits here.

Because the Food and Drug Administration (FDA) approved the very communications that the trial court penalized in this case, the safe harbor doctrine bars this UCL action. This court should reverse the judgment.

ARGUMENT

I. The Unfair Competition Law is not limitless, and its history illustrates the need for cabining its reach.

A. The UCL prohibits unlawful, unfair, or fraudulent business conduct.

The UCL, codified at Business and Professions Code section 17200, is one of California's "most prominent consumer protection statutes." (*Nationwide Biweekly Administration, Inc.*

v. Superior Court of Alameda County (2020) 9 Cal.5th 279, 292 (*Nationwide Biweekly Administration*).) Its purpose is " ' "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." ' " (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1359.)

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311 (*Tobacco II*).) As relevant here, a business practice is "fraudulent" under the UCL if it is likely to deceive the public. (*Tobacco II*, at p. 312.)[2]

B. The Legislature modeled the UCL on the Federal Trade Commission Act, which is enforceable only by an expert federal agency, the FTC.

The UCL "is known as California's 'little FTC Act,' which mirrors its federal counterpart, the Federal Trade Commission (FTC) Act, 15 United States Codes section 45 et seq." (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 786; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (*Bank of the West*).) Because California's UCL parallels section 5 of the FTC Act, federal precedents applying the FTC Act are " 'more than ordinarily persuasive' " in construing the UCL (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185 (*Cel-Tech*)). Reviewing

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[2] "A violation of the UCL's fraud prong is also a violation of the false advertising law ([Bus. & Prof. Code,] § 17500 et seq.)." (*Tobacco II*, *supra*, 46 Cal.4th at p. 312, fn. 8.)

the history and scope of the FTC Act thus sheds light on the proper interpretation of the UCL.

Congress enacted section 5 of the FTC Act in 1914, directing the FTC "to prevent '[u]nfair methods of competition in commerce.' " (*F.T.C. v. Colgate-Palmolive Co.* (1965) 380 U.S. 374, 384 [85 S.Ct. 1035, 13 L.Ed.2d 904] (*Colgate-Palmolive*), quoting 38 Stat. 719 (1914).) In 1938, Congress amended the FTC Act "to extend the [FTC's] jurisdiction to include 'unfair or deceptive acts or practices in commerce.' " (*Ibid.*, quoting 52 Stat. 111 (1938).) This "significant" amendment reflected "Congress' concern for consumers as well as competitors." (*Ibid.*)

Through its broad terms, the FTC Act "necessarily gives the [FTC] an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations." (*Colgate-Palmolive*, *supra*, 380 U.S. at p. 385.) But while the FTC has broad power to enforce the FTC Act, private litigants do not. (*Dreisbach v. Murphy* (9th Cir. 1981) 658 F.2d 720, 730; *Alfred Dunhill, Ltd. v. Interstate Cigar Co.* (2nd Cir. 1974) 499 F.2d 232, 237; *Holloway v. Bristol-Myers Corp.* (D.C. Cir. 1973) 485 F.2d 986, 992–1002 (*Holloway*).) There is no private right of action under section 5 of the FTC Act—the exclusive remedy is administrative. (*Holloway*, at p. 997 [Congress intended enforcement "to rest wholly and exclusively with the Federal Trade Commission"].)

The FTC's exclusive power to enforce the FTC Act was integral to Congress's purpose. By vesting enforcement power in the FTC, Congress recognized that "there is need to weigh each

action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC." (*Holloway*, *supra*, 485 F.2d at p. 997.) On the other hand, Congress recognized that "[p]rivate litigants are not subject to the same constraints," and therefore "may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program." (*Id.* at pp. 997–998.) Congress feared that scattershot private litigation "would burden not only the defendants selected but also the judicial system." (*Id.* at p. 998.) "It was to avoid such possibilities of lack of coherence that Congress focused on the FTC as the exclusive enforcement authority." (*Ibid.*) This rationale applies equally to enforcement by nonexpert state and local law enforcement authorities, whose idiosyncratic litigation decisions could result in a similarly unpredictable patchwork of regulation (as illustrated in this case by the California Attorney General's expansive UCL theories).

In precluding private enforcement of the FTC Act, Congress also recognized the FTC's "role in providing certainty and specificity" to the broad terms of the FTC Act. (*Holloway*, *supra*, 485 F.2d at p. 998.) "The FTC, as a quasi-judicial tribunal, has the ability to provide for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations." (*Ibid.*) The FTC may also give helpful guidance to businesses seeking to comply with the law. (*Ibid.*) "These advantages would be endangered if th[i]s central administrative tribunal were replaced by the various Federal courts invoked by private parties." (*Ibid.*)

C. Because of its formerly relaxed standing requirements, the UCL was prone to abuse.

Although the UCL generally parallels the FTC Act (*Bank of the West*, *supra*, 2 Cal.4th at p. 1264), the Legislature parted company with Congress in a critical respect—"the two statutes are enforced in significantly different ways" (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 185–186). As discussed above, private litigants may not enforce the FTC Act through a private right of action. (See *ante*, Section I.B.) Instead, such enforcement actions must be undertaken by the FTC. By contrast, "California has no administrative agency equivalent to the [FTC]." (*Cel-Tech*, at p. 186.) Both private litigants and state law enforcement officials may bring suit to enforce the UCL. (Bus. & Prof. Code, § 17204; *Tobacco II*, *supra*, 46 Cal.4th at p. 315.)

Before November 2004, the UCL permitted " 'any person "acting for the interests of itself, its members or the general public" ' " to bring suit. (*Tobacco II*, *supra*, 46 Cal.4th at p. 314; *Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228 (*Mervyn's*).) Thus, private lawyers could scour the universe of California business practices and sue for anything they could argue was unlawful, unfair, or fraudulent and extort a settlement from the allegedly offending business—even if no actual harm to competition or consumers had occurred. (See *Tobacco II*, at p. 316.)

D. The Legislature, courts, and voters of this state have limited the reach of the UCL.

1. Only equitable remedies are available in UCL actions, and private litigants may not recover civil penalties.

Our Supreme Court has cautioned that "an action under the UCL 'is not an all-purpose substitute for a tort or contract action.' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150 (*Korea Supply*).) To that end, the Court has emphasized that UCL claims are equitable in nature, and the remedies available under the UCL "are generally limited to injunctive relief and restitution. [Citations.] Plaintiffs may not receive damages." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 179; accord, *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1402, fn. 14 ["compensatory damages are not recoverable as restitution]; *Korea Supply*, at p. 1144.)

Applying "fundamental equitable principles, including inadequacy of the legal remedy," courts reject UCL actions when plaintiffs have other claims available that provide an adequate remedy. (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1249–1250; see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179 ["equitable defenses" apply to UCL claims].) Courts may abstain entirely from adjudicating UCL actions if " ' "granting the requested relief would require a trial court to assume the functions of an administrative agency" ' " or "if ' "the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency." ' " (*Hambrick v.*

Healthcare Partners Medical Group, Inc. (2015) 238 Cal.App.4th 124, 147.) Abstention is also warranted where " ' "granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress." ' " (*Id.* at pp. 147–148.) Relatedly, under the doctrine of primary jurisdiction, courts may stay UCL claims implicating the special competence of an administrative body pending the administrative body's resolution of the issues. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390–392.)

Moreover, while the UCL authorizes the Attorney General and other public officials to recover civil penalties, those penalties are not available to private plaintiffs. (*Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 652 ["While the UCL provides for both public and private enforcement, authorized public prosecutors have an additional tool to enforce the state's consumer protection laws: civil penalties"]; see Bus. & Prof. Code, § 17206, subd. (a).)

2. Proposition 64 limited the universe of private plaintiffs with standing to bring suit under the UCL.

In November 2004, the voters of this state passed Proposition 64, which "worked a sea change in litigation to enforce the unfair competition law." (*Tobacco II*, *supra*, 46 Cal.4th at p. 329 [conc. & dis. opn. of Baxter, J.].) Proposition 64 made two important changes limiting the reach of the UCL.

First, Proposition 64 amended the UCL to restrict standing to assert a claim to the Attorney General or to private plaintiffs " 'who [have] suffered injury in fact and [have] lost money or property as a result of unfair competition.' " (*Mervyn's*, *supra*, 39 Cal.4th at p. 228.) Second, and relatedly, Proposition 64 required private litigants seeking redress on behalf of others to comply with California's class-action standards. (See Bus. & Prof. Code, §§ 17203, 17204; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 977–980.) Proposition 64 thus limited the reach of the UCL by mandating that "private persons may no longer sue on behalf of the general public." (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 240.)

In sum, Proposition 64 reflected voters' intent to rein in UCL litigation by prohibiting suits by uninjured plaintiffs and requiring non-class actions for the benefit of the general public to be brought only by the Attorney General and local public officials. (*Tobacco II*, *supra*, 46 Cal.4th at p. 317; *Mervyn's*, *supra*, 39 Cal.4th at p. 228.)

II. The safe harbor doctrine further restricts the UCL's reach when a plaintiff challenges conduct otherwise authorized by state or federal law.

A. The safe harbor doctrine precludes the imposition of UCL liability for conduct authorized by state or federal law.

In *Cel-Tech*, *supra*, 20 Cal.4th at pages 182–184, our Supreme Court further narrowed the "expansive scope of the language of the UCL" (*Nationwide Biweekly Administration*, *supra*, 9 Cal.5th at p. 301) by articulating the safe harbor

doctrine. The Court acknowledged that "[a]lthough the unfair competition law's scope is sweeping, it is not unlimited" and courts "may not simply impose their own notions of the day as to what is fair or unfair." (*Cel-Tech*, at p. 182.)

To this end, *Cel-Tech* held that "[i]f the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination" under the auspices of applying the UCL. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 182.) To the contrary, "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." (*Ibid.*; see *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 566 ["the UCL cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law"], superseded by statute on another ground as stated in *Mervyn's*, *supra*, 39 Cal. 4th at p. 277; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283 [a plaintiff may not "plead around" a bar to relief simply "by recasting the cause of action as one for unfair competition"].) *Cel-Tech* clarified that in order "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct." (*Cel-Tech*, at p. 183.) The Court explained that if "the Legislature considered certain activity in certain circumstances and determined it to be lawful, courts may not override that determination under the guise of the unfair competition law." (*Ibid.*; see, e.g., *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1126 ["The UCL cannot properly be

interpreted to impose on retailers a duty with respect to sales tax that is contradicted by the statutory scheme governing the sales tax"].)

Although the Attorney General suggests otherwise (RB 70–71), the safe harbor doctrine encompasses not just California statutes, but also federal laws, regulations, and official agency statements. The following cases illustrate the breadth of the doctrine's application:

- *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1141–1142, 1148 (*Byars*) (federal Real Estate Settlement Procedures Act and HUD Statement of Policy in Federal Register);
- *Ebner v. Fresh, Inc.* (9th Cir. 2016) 838 F.3d 958, 963 (*Ebner*) (federal packaging requirements);
- *Hauk v. JP Morgan Chase Bank USA* (9th Cir. 2009) 552 F.3d 1114, 1122–1123 (federal Truth in Lending Act);
- *Webb v. Smart Document Solutions, LLC* (9th Cir. 2007) 499 F.3d 1078, 1082–1083, 1088 (*Webb*) (federal HIPAA regulations).

The broad applicability of the safe harbor doctrine to federal statutes and agency actions is essential to its purpose. Insulating businesses from UCL liability when they have complied in good faith with applicable state or federal law encourages such compliance and fosters a predictable regulatory environment in which businesses can operate responsibly. Moreover, interpreting the UCL to create liability when other

laws preclude it would improperly transform the UCL into an " 'all-purpose substitute' " for other, more narrowly targeted claims. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1150.) The result would be regulatory incoherence and potentially limitless exposure to liability for even the most conscientious businesses.

A robust safe harbor doctrine protects the broader California economy as well. As the United States Supreme Court has observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." (*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta* (2008) 552 U.S. 148, 163 [128 S.Ct. 761, 169 L.Ed.2d 627].) These litigation costs—which result from weak lawsuits commenced by government agencies as well as private plaintiffs—necessarily drag down the economy. "No one sophisticated about markets believes that multiplying liability is free of cost." (*SEC v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 (en banc) (conc. opn. of Boudin, J.).) The safe harbor doctrine ensures that defendants are exposed to UCL liability only when their conduct has not been approved by state or federal law or regulation.

B. The safe harbor doctrine applies even when federal law does not preempt the UCL.

There is no merit to the Attorney General's contention that a business's compliance with a federal regulation can yield safe harbor protection from UCL liability only when the federal regulation preempts California law. (See RB 70–71.) The safe harbor doctrine arises from California law, not federal law, and

the California Supreme Court articulated the doctrine in order to protect businesses from UCL liability when their conduct has been otherwise legally authorized. (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 182–183.) Preemption, by contrast, addresses whether Congress (or a federal agency) intended to *displace* state law in order to further a federal regulatory objective. (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 308 ["Preemption is foremost a question of congressional intent: did Congress, expressly or implicitly, seek to displace state law"].) While discerning Congressional intent is paramount in preemption cases (*ibid.*), doing so is unnecessary in UCL safe harbor cases because the applicability of the safe harbor doctrine is a question of California law (see *Cel-Tech*, at pp. 182–183).

Relatedly, federal preemption of state law implicates sensitive federalism concerns that California's safe harbor doctrine does not. "[B]ecause the States are independent sovereigns in our federal system, [the Supreme Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [116 S.Ct. 2240, 135 L.Ed.2d 700].) Courts presume that Congress has not preempted state law absent a clear indication otherwise. (*Ibid.*; accord, *Wyeth v. Levine* (2009) 555 U.S. 555, 565 [129 S.Ct. 1187, 173 L.Ed.2d 51].)[3] By contrast, determining

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[3] Where a federal statute contains an express preemption provision, courts "do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-

application of the safe harbor doctrine by reference to federal preemption principles makes no sense because there is no presumption against applying the doctrine, which concerns the proper interpretation of California law, not the displacement of California law by federal law. A party claiming federal preemption thus faces a higher bar than a party seeking the protection of the safe harbor doctrine. The Attorney General errs in conflating the two distinct doctrines.

Indeed, if the preemption and safe harbor doctrines were coextensive, then the safe harbor doctrine would be superfluous in UCL cases involving federal law. When federal law preempts state law (including the UCL), the state law is "invalidate[d]." (*Oneok, Inc. v. Learjet, Inc.* (2015) 575 U.S. 373, 376 [135 S.Ct. 1591, 191 L.Ed.2d 511]; accord, *Arizona v. United States* (2012) 567 U.S. 387, 399 [132 S.Ct. 2492, 183 L.Ed.2d 351] [a preempted state law must "give way to federal law"].) The UCL does not apply at all when it is preempted by federal law, so there is no need to conduct a safe harbor analysis in those circumstances. (See, e.g., *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032, 1036–1038 [federal National Bank Act preempts UCL claims].) Yet, in multiple cases, courts have analyzed whether federal law grants safe harbor protection from UCL liability, irrespective of preemption. (E.g., *Byars*, *supra*, 109 Cal.App.4th at pp. 1141–1142, 1148; *Webb*, *supra*, 499 F.3d at pp. 1082–1083, 1088.) Thus, in *Ebner*, the Ninth Circuit treated the applicability

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emptive intent.' " (*Puerto Rico v. Franklin California Tax-Free Trust* (2016) 579 U.S. __ [136 S.Ct. 1938, 1946, 195 L.Ed.2d 298].)

of the UCL's safe harbor doctrine and federal preemption as distinct issues and analyzed them separately. (*Ebner*, *supra*, 838 F.3d at pp. 963–965.) These cases show that the scope of federal preemption and the UCL safe harbor doctrine are not coextensive.

C. The safe harbor doctrine bars UCL liability in this case.

Because the FDA reviewed (and sometimes wrote) the relevant patient brochures and Instructions for Use at issue in this case, the trial court's imposition of UCL liability punishes Johnson & Johnson for complying in good faith with federal regulators. (See AOB 60–61; see also ARB 39–40.) The safe harbor doctrine also applies to the extent the FDA considered whether to require physician or patient labeling changes for certain devices and decided not to do so. (See AOB 61; see also ARB 40–41.) In sum, the safe harbor doctrine precluded the trial court from imposing liability where a federal agency considered the situation and concluded that no changes to Johnson & Johnson's communications were necessary. (See *Cel-Tech*, *supra*, 20 Cal.4th at p. 182.)

CONCLUSION

For the foregoing reasons, this court should reverse the judgment.

September 24, 2021

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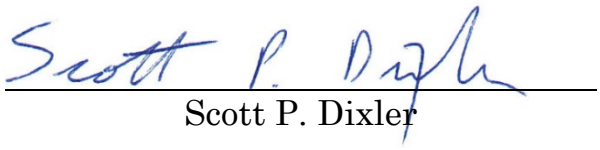
By: 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c).)

The text of this brief consists of 3,966 words as counted by the program used to generate the brief.

Dated: September 24, 2021

Scott P. Dixler

D077945

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHNSON & JOHNSON, a New Jersey Corporation; ETHICON, INC., a New Jersey Corporation; ETHICON US, LLC; and DOES 1 through 100, inclusive,
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v.

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Plaintiff and Respondent.

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
EDDIE C. STURGEON, JUDGE • CASE NO. 37-2016-00017229-CU-MC-CTL

[PROPOSED] ORDER

The application to file an amicus curiae brief submitted by AdvaMed is GRANTED.

IT IS SO ORDERED.

Dated: _____, 2021

_____
Presiding Justice

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On September 24, 2021, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ADVAMED IN SUPPORT OF APPELLANTS JOHNSON & JOHNSON, ETHICON, INC., AND ETHICON US, LLC; [PROPOSED] ORDER** on the interested parties in this action as follows:

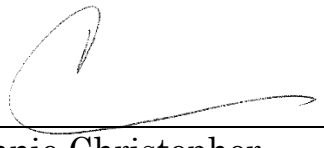
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 24, 2021, at Burbank, California.



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Case No. D077945

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Superior Court of California
County of San Diego
Hall of Justice, Dept. C-67
330 West Broadway
San Diego, CA 92101

Trial Judge
Case No.: 37-2016-00017229-CU-MC-CTL

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