No. 22-447

In the
Supreme Court of the United States

JOHNSON & JOHNSON, A NEW JERSEY CORPORATION; ETHICON, INC., A NEW JERSEY CORPORATION; AND ETHICON US, LLC,

Petitioners,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

BRIEF OF *AMICUS CURIAE* THE ADVANCED MEDICAL TECHNOLOGY ASSOCIATION IN SUPPORT OF PETITIONERS

ROBERT M. PALUMBOS
Counsel of Record
SEAN BURKE
RYAN F. MONAHAN
SHARON O'REILLY
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103-4196
(215) 979-1111
rmpalumbos@duanemorris.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

The Advanced Medical Technology Association ("AdvaMed") submits this brief in support of the Petition for Writ of Certiorari.[1]

INTEREST OF AMICUS CURIAE

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 it involves an effort to expand California's Unfair Competition Law ("UCL") and other similar state unfair competition statutes that will have broad and damaging implications for AdvaMed's members, including Ethicon, Inc. The judgment below, if upheld, would expose AdvaMed's members to the

[1] Pursuant to Sup. Ct. R. 37.2(a), amicus curiae provided timely notice of its intention to file this brief. Petitioners and Respondents consented to the filing of this brief. Counsel for amicus curiae authored this brief in whole. No person or entity other than amicus curiae, its members or counsel, made a monetary contribution to the preparation or submission of this brief.

threat of UCL liability and severe penalties untethered to any traditional principles of tort or constitutional law. AdvaMed thus submits this amicus brief providing historical and doctrinal background information regarding the appropriate basis for a court to impose liability under the UCL and the implications the lower court's broad interpretation of the UCL will have on AdvaMed's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unfair and deceptive acts and practices ("UDAP") statutes, when appropriately limited, can serve the legitimate state objective of curbing marketplace fraud and ensuring reliable information is provided to consumers. Appropriate limits are nowhere to be found in California and many other states. California's Unfair Competition Law (the "UCL") is "sweeping,'" *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Telephone Co.*, 20 Cal.4th 163, 181 (Cal. 1999), covering all sorts of businesses and their practices. By authorizing civil penalties, it functions as a mechanism for assessing tort-based liability without any of the traditional common law tort principles (*i.e.*, knowledge, causation, reliance) that have guided findings of liability for centuries. Further, it imposes damages "for each violation" of the statute, permitting (as is the case here), tens of thousands of violations for a singular potentially misleading statement.

The UCL, untethered to any limiting principles, raises significant constitutional concerns. Companies simply are not on fair notice that any business

practice can be subject to liability and that damages will be disproportionate to the *actual* harm that occurred. The consequences are obvious: Absent intervention, companies will refuse to do business in California and states with similar UDAP statutes; will provide *less* valuable information to consumers, either by cutting back on disclosure that is not required or by over-disclosing to such a degree that the significance of risks become obscured; and will lack the incentive to innovate out of concern that new practices will bring out new litigation. The Court should grant the Petition to address these pressing concerns.

REASONS TO GRANT PETITION

I. Unlike the Federal Scheme, State Unfair and Deceptive Acts or Practices Statutes Rely Upon Private Litigants, State Attorneys General, and the Courts to Interpret Broad Language.

The UCL and similar UDAP statutes broadly prohibit "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," Cal. Bus. & Prof. Code § 17200, and impose fines "for each violation" of the statute, *id.* § 17206.[2] UDAP statutes are modelled after Section 5 of the Federal Trade Commission Act

[2] All fifty states have some version of a UDAP statute that prohibits unfair, deceptive, or fraudulent practices. *See* National Consumer Law Center, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* at 5-8 (Mar. 2018) (noting features of each state statute), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.

(the "FTCA"), which also prohibits "unfair or deceptive acts or practices", 15 U.S.C. § 45(a)(1), *with one critical difference*: The FTCA is enforced by a bipartisan commission while the UCL and many other UDAP statutes are enforced by private parties and state Attorneys General. *Compare id.* at § 45(a)(2), (b) (empowering the Commission and setting forth procedures) *with* Cal. Bus. & Prof. Code § 17203-6 (conferring certain enforcement powers to persons and the state Attorney General).

Congress' reasons for empowering the FTC to enforce Section 5 *and not* private parties were clear. A statute "whose prohibitions were couched in broad, generic terms, permitting application in a wide variety of commercial contexts and coping with evasive tactics . . . might become a source of vexatious litigation." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 990 (D.C. Cir. 1973). "Expertise was called for . . . to develop a central and coherent body of precedent, construing and applying the statute in a wide range of factual contexts, so as to define its operative reach." *Id.*

Congress also limited the tools available to the FTC. For example, 15 U.S.C. § 45(l) permits the FTC to impose a penalty "for each violation" of the act, but only after an individual "violates an order of the Commission after it has become final, and while such order is in effect." 15 U.S.C § 45(m)(1)(A) similarly permits the Commission to commence a civil action to recover a civil penalty if it believes an individual committed a violation, but that individual must have acted "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that

such act is unfair or deceptive and is prohibited by such rule." Further, 15 U.S.C. § 57(b)(a)(2) permits civil penalties only when the action is brought "within three years of the underlying violation and seeks monetary relief within one year of any resulting final cease and desist order. And it applies only where 'a reasonable man would have known under the circumstances' that the conduct at issue was 'dishonest or fraudulent.'" *AMG Cap. Mgmt, LLC v. FTC*, 141 S.Ct. 1341, 1349 (2021) (citing 15 U.S.C. § 57b(a)(2)). The FTC may also seek injunctive relief while its administrative procedures are pending. *See id.*

The UCL and similar UDAP statutes do not have these same limitations. The UCL did not establish an independent, expert commission to enforce and set the outer bounds of interpretation of the statute's broad language. *See Cel-Tech Commc'ns*, 20 Cal.4th at 186 (noting lack of administrative agency). It does not have a statutorily-imposed intent or knowledge requirement as a prerequisite to civil penalties. *See* Cal. Bus. & Prof. Code § 17206 (permitting a fine for "each violation" if a person "engages, has engaged, or proposes to engage in unfair competition" and making "willfulness" a factor that may be considered when imposing a penalty). Without such limitations, the result is vague UDAP statutes left in the hands of private parties, non-expert state Attorneys General, and the courts to enforce and interpret without reference to the principles that have guided the imposition of liability and damages for centuries and have ensured due process for defendants.

II. Broad UDAP Statutes, Untethered to Tort-Based Requirements, Run Afoul of the Constitution.

A. The UCL and Similar UDAP Statutes Disregard Traditional, Common Law Tort Principles that Have Guided the Imposition of Liability and Damages for Centuries.

Before the statutory invention of "unfair and deceptive acts or practices," such conduct would have been in the province of tort law. The original form of this tort was known as "deceit." *See* Victor Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 6 (2005). "Deceit" gradually developed into the torts we recognize today: negligent or fraudulent misrepresentation. *Id.* The misrepresentation-based torts, at a minimum, require a plaintiff to prove:

1. *Knowledge.* The defendant knew, should have known, or failed to exercise reasonable care in ascertaining that its statement was false, inaccurate, or lacked basis in fact;
2. *Reliance.* the plaintiff relied upon the misrepresentation and that reliance was objectively reasonable or justifiable; and
3. *Causation.* Defendant's conduct was a substantial factor in causing a loss.

See Graham v. Bank of America, N.A., 226 Cal.App.4th 594, 605-06 (Cal. Ct. App. 2014) (stating fraudulent misrepresentation standard and requiring

intent to deceive); *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapps Ins. Assocs., Inc.*, 115 Cal.App.4th 1145, 1154 (Cal. Ct. App. 2004) (stating negligent misrepresentation standard). These tort principles are critical to a grounded, reasonable interpretation of UDAP statutes' broad language. The FTCA and UDAP statutes were not intended to supplant traditional tort-based requirements. Some state legislatures expressly incorporated tort-based requirements into the UDAP statutes to avoid the risks of supplanting common law actions. *See, e.g.*, Tex. Bus. & Com. Code § 17.50(a)(1)(B) (Vernon Supp. 2005) ("A consumer may maintain an action . . . [for] the use or employment by any person of a false, misleading, or deceptive act or practice that is . . . relied on by a consumer to the consumer's detriment."); S.D. Codified Laws § 37-24-6(1) (2020) ("It is a deceptive act or practice for any person to . . . [k]nowingly act, use, or employ any deceptive act or practice . . . .").

States like California, however, did not incorporate such tort-based requirements into their UDAP statutes. *See* Cal. Bus. & Prof. Code § 17206. As such, California courts have interpreted the UCL *not* to be restricted by any traditional tort-based requirements. *Compare Toy v. Metroplitan Life Ins. Co.*, 928 A.2d 186, 202 (Pa. 2007) (requiring fraud-based claims brought under Pennsylvania's UDAP statute to prove "traditional elements of common law fraud") *with Cel-Tech Commc'ns*, 20 Cal.4th at 181 (describing the act's coverage as "sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" (quoting *Rubin v. Green*, 4 Cal.4th

1187, 1200 (Cal. 1993))); *see also In re Morpheus Lights, Inc.*, 228 B.R. 449, 456 (Bankr. N.D. Cal. 1998) ("[U]nder the [UCL], an unfair competition claim is aimed to protect the general public as well as competitors. To state a claim under the [UCL], one need not plead and prove the elements of a tort. Instead, one need only show that members of the public are likely to be deceived."). The result is a statute untethered to any traditional benchmarks of culpability and liability. The consequences of the statute are exemplified by the results in this case—where violations were found and penalties assessed despite the fact that many of the statements at issue were never reviewed or relied upon and there was no evidence that any surgeon in the state of California found any deception. *See* Pet. 12.

B. UDAP Statutes Untethered to Common Law Tort Principles Raise Due Process and Excessive Fine Concerns.

When the UCL is interpreted to pose broad, sweeping liability untethered to traditional tort principles, robust notice standards guided by Due Process considerations are needed. Due Process requires fair notice of what constitutes a violation of a statute and, if a violation is proved, the penalties to be imposed. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "[A] legislature [must] establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358

(1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

A statute that fails to uphold these principles should be deemed unconstitutionally vague. Modern vagueness jurisprudence is rooted in two, overlapping considerations: due process and separation of powers. *First*, a failure to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" violates due process. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), *Second*, an impermissibly vague statute encourages "arbitrary and erratic arrests and convictions." *Id.*; *see also* Emily M. Snoddon, *Clarifying Vagueness: Rethink the Supreme Court's Vagueness Doctrine*, 86 U Chi L Rev 2301, 2307 (2019). Both problems rear their head here.

Petitioner and other businesses lack any notice as to what may constitute a violation given the broad language. Any help that may come from traditional tort principles of knowledge, causation, and reliance have been expressly eschewed. Moreover, the UCL *empowers* public and private enforcement based on this untethered language. Cal. Bus. & Prof. Code § 17200, *et seq*. The separation of powers issue is compounded by private attorney's efforts to take on cases on behalf of the state Attorneys General. As the U.S. Chamber of Commerce has examined:

> [A]n executive order prohibits the federal government from hiring private lawyers on a contingency fee basis to pursue consumer protection or other

> enforcement actions, this practice is widespread with respect to UDAP claims brought by state AGs. Some state AGs have hired lawyers to represent the state through no-bid contracts, providing political supporters with lucrative opportunities . . . . In some cases, AGs have even handed over to profit-driven lawyers the state's broad subpoena power, allowing lawyers to "investigate" until they reach the foregone conclusion to bring an enforcement action—the only way the law firm will get paid.

U.S. Chamber Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement? Examining the Use of Unfair and Deceptive Acts and Practices (UDAP) Laws by State Attorneys General* at 5-6 (Oct. 2016). Any purported 'checks' that a state's Attorney General may provide to abate "arbitrary and erratic arrests and convictions" are relegated in favor of profit-motivated, expansive interpretations of the UDAP statutes.

Even if fair notice is provided, there are significant constitutional issues with the imposition of excessive, disproportionate fines. The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When "a more modest punishment … could have satisfied the State's legitimate objectives," then a court should reduce the award to that amount

and "go[] no further." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction imposed … cannot be justified … without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]."); *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 513 (2008) (recognizing "the need to protect against the possibility … of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution"). Courts, therefore, have "an obligation to ensure that [punitive damages] awards for intangibles be fair, reasonable, predictable, and proportionate." *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013) (citing *Exxon*, 554 U.S. at 471)).

The UCL and other UDAP statutes assess a fine "for each violation" of the statute. Cal. Bus. & Prof. Code § 17206. Absent any limiting principle of what constitutes a 'violation', such as a misrepresentation that was *actually* and *justifiably* relied upon, plaintiffs are permitted to treat a singular, alleged misrepresentation as hundreds of "violations". This case is a perfect example of those constitutional concerns. Here, the California courts assessed tens of thousands of violations based on brochures *shipped* to California without any showing that the brochures were *distributed* to consumers. *See* Pet. 24. By the logic of California courts, a potentially misleading statement published to a Company's website could constitute millions of separate violations because of the California residents who could have theoretically accessed the website. A company is simply not on

notice that a potentially misleading statement could expose them to astronomical civil penalties.

III. A Broad Interpretation of the UCL and Similar UDAP Statutes Will Have Far-Reaching, Detrimental Consequences on Companies, Consumers, and the Public.

A. Vague UDAP Statutes Stifle Innovation and Will Deter Sales in California and Other States with Similar Statutes.

Companies rely upon sensible laws that appropriately reward innovation while deterring unjustified risks when considering whether to manufacture or market their products. UDAP statutes, without any limiting principles, create unpredictable risks that deter innovation, particularly where businesses lack fair notice of what constitutes a "violation" of these statutes. *See, e.g.*, James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 Antitrust L.J. 947, 16 (2017) ("Low quality consumer protection claims—facilitated by loose substantive standards and motivated by the promise of attorneys' fees and generous remedies—increase litigation costs for businesses that are ultimately passed on to consumers in the form of higher prices, lower product quality, and reduced innovation."); *see also* U.S. Chamber Inst. for Legal Reform, *Tort Costs in America- An Empirical Analysis of Costs and Compensation of the U.S. Tort System* at 6 (Nov. 2022) ("The risk of litigation can discourage the development and sale of new products and can slow innovation."). This will affect all levels of the

manufacturing process: companies will be less likely to invest time and resources in research, development, and marketing if they expect that they will subsequently be forced to defend their products in lawsuits.

While all types of businesses will be at risk, the prime target may be larger businesses that have the biggest pockets, to ensure the companies have the ability to pay for their "violations." *See* Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. Kan. L. Rev. 209 (2017); *see also* Cal. Bus. & Prof. Code § 17206 ("In assessing the amount of the civil penalty [for a UCL violation], the court shall consider any one or more of the relevant circumstances . . . including, but not limited to . . . the defendant's assets, liabilities, and net worth."); Cal. Bus. & Prof. Code § 17536 ("In assessing the amount of the civil penalty [for a FAL violation], the court shall consider any one or more of the relevant circumstances . . . including, but not limited to . . . the defendant's assets, liabilities, and net worth.").

Therefore, without realistic protections from unbounded liability, businesses may seek to avoid California and other states with broad UDAP statutes. This will inevitably harm consumers in need of innovative products or treatments.

B. Overbroad UDAP Statutes Will Lead to the Deprivation of Helpful Company Information and Less Useful Warnings.

Even if businesses do continue to manufacture and market their products, it is highly likely that they will alter their marketing strategies as a result of this ruling. Businesses will likely take two, equally detrimental approaches.

First, companies may limit the informational materials they distribute to the public to only that which is required by state and federal law, to avoid the risk of creating additional grounds for allegations of deception. This possibility could include ceasing to distribute materials that are not required by the FDA to be provided to the public, but are helpful to educate consumers about the products. For instance, manufacturers of medical devices often distribute helpful materials known as "surgical techniques," which, as the name suggests, offer recommendations for surgical techniques, patient selection, and avoiding complications for surgeons to consider while implanting the medical device into a patient.[3] While

---

[3] *Surgical Techniques*, Zimmer Biomet, https://www.zimmerbiomet.com/en/education-and-resources/surgical-techniques.html (last visited Dec. 8, 2022) (providing wide range of surgical technique guides for various products); *Surgical Technique Library*, Stryker, https://orthosurgicaltechnique.stryker.com/#/SurgicalTechnique Library (last visited Dec. 8, 2022) (same); *Surgical Techniques Advanced Surgical Devices*, Smith & Nephew, https://www.smith-nephew.com/professional/training-and-education/surgical-techniques-advanced-surgical-devices/ (last visited Dec. 8, 2022) (identifying surgical techniques for hips, knees, shoulders, trauma, and extremities); *Surgical Literature*

surgical techniques typically are not required by the FDA, manufacturers often provide these guides, authored by the surgeon who designed the product or other surgeon consultants with extensive experience using the device, to surgeons to educate them on helpful considerations and successful methods for implantation. Businesses will be less inclined to provide these and other types of materials to the public to avoid any unwarranted liability which could be assessed as a misrepresentation under the broad wording of the statute—ultimately resulting in a less-educated market.

Second, businesses may take a different approach and instead of limiting their marketing efforts, may over-disclose information regarding products to try to mitigate against the risk of liability. This approach would result in companies providing all sorts of irrelevant and unhelpful information in their disclosures to avoid the risk of plaintiffs alleging they failed to warn of a certain risk. The effect would be to make it more difficult for consumers to distinguish between significant and insignificant risks and benefits of the products—rendering the disclosures essentially meaningless. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]'")

---

and Videos, Anika Therapeutics, Inc., https://anika.com/medical-professionals/resources/literature-videos/ (last visited Dec. 8, 2022).

(emphasis in original) (citation omitted); *see also Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 611 (4th Cir. 1999) ("As manufacturers append line after line onto product labels in the quest for the best possible warning, it is easy to lose sight of the label's communicative value as a whole. Well-meaning attempts to warn of every possible accident lead over time to voluminous yet impenetrable labels-too prolix to read and too technical to understand.").

C. Unpredictable UDAP Statutes Could Improperly Leverage Large Settlements.

Finally, broad UDAP statutes put unwarranted pressure on companies to settle cases sooner than they typically would because of the increased and unpredictable risks associated with litigating these types of cases. *See* U.S. Chamber Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement?*, *supra*, at 1; *see also* James Cooper, *State Unfair and Deceptive Trade Practices Law*, *supra*, at 14-15 ("Moreover, elimination of the harm requirement [in UDAP statutes] allows the plaintiffs' attorneys to aggregate not only meritorious suits but also frivolous suits in order to extort settlements."). As this 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*, 552 U.S. 148, 163 (2008) (emphasis added). This "potential for uncertainty," including unpredictable litigation costs associated with broadly-sweeping statutes, will lead to premature settlements for some meritless cases, which will necessarily drag down the economy

because companies will be expending resources on nonviable lawsuits rather than spending the money on improving and marketing their products. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC v. Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (en banc) (Boudin, J., concurring).

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT M. PALUMBOS
Counsel of Record
SEAN BURKE
RYAN F. MONAHAN
SHARON O'REILLY

DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103-4196
(215) 979-1111
rmpalumbos@duanemorris.com

Counsel for Amicus Curiae