No. S280018

In the Supreme Court of the State of California

TAYLOR CAPITO,

Plaintiff and Appellant,

v.

SAN JOSE HEALTHCARE SYSTEM LP,

Defendant and Respondent

Sixth Appellate District, Case No. H049646
Santa Clara County Superior Court, Case No. 20CV366981
The Honorable Sunil R. Kulkarni, Judge

BRIEF OF THE CALIFORNIA ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION AND STATEMENT OF INTEREST

As California's chief law officer (Cal. Const., art. V, § 13), the Attorney General submits this brief to assist the Court in construing the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq. This case presents important consumer protection questions, including the treatment of deception by omission in UCL cases and the standard for resolving UCL unfairness claims. The answers to these questions are of significant importance to the Attorney General's efforts to protect consumers from unfair or deceptive business acts and practices.

Plaintiff Taylor Capito sued Regional Medical Center of San Jose under the UCL for its alleged failure to disclose an "evaluation and management services" fee it charged patients admitted to its emergency room. This case presents a straightforward consumer protection issue: does compliance with industry-specific disclosure regulations immunize a business from liability for deceptive marketing and sales practices substantially premised on misleading omissions? The answer is no. The UCL prohibits unfair business acts and practices and those that are likely to deceive the public. It does so regardless of whether a business deceives the public by an affirmative statement or by omission.

In UCL deception cases involving omissions, the Courts of Appeal, including in this case, have increasingly required that plaintiffs allege that a defendant had a "duty to disclose" the omitted information. In doing so, they have applied a test

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adopted directly from tort law doctrines that the Legislature and this Court have rejected in the UCL context. The Court should make clear that this test does not apply to UCL claims. It should then hold that Capito's deception claims survive demurrer because she has sufficiently alleged that Regional Medical Center's failure to adequately disclose the evaluation and management fee was likely to deceive consumers.

The Court should also clarify the standard applicable to UCL unfairness claims in consumer cases. In the Attorney General's view, the straightforward balancing test first applied in *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740 best serves the UCL's broad consumer protection purposes and its important principles of adaptability and flexibility. But under any of the several standards California courts have applied over the years, Capito's UCL claim should survive demurrer.

Finally, the Court should reject Regional's argument that it cannot be held liable if the disclosure of its evaluation and management fee complied with industry-specific regulations. To be sure, emergency room billing disclosure rules reflect important policy considerations about informed consent to the cost of care and access to emergency medical services. But no legislative or regulatory enactment bars the application of California's generally applicable consumer laws here, so they operate as they ordinarily do. The Court should reverse the judgment below.

LEGAL BACKGROUND

A. The Unfair Competition Law

The California legislature enacted the Unfair Competition Law (UCL) as part of a wave of consumer protection reforms

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aimed at addressing widespread predatory business practices. Prior to those reforms, common law principles generally required "the purchaser to take care of his own interests." (*Barnard v. Kellogg* (1870) 77 U.S. 383, 388–389.) Under the prevailing doctrine of "caveat emptor"—let the buyer beware—it was "well-established that a seller's statements . . . even if made in bad faith would not lead to legal liability." (Petty, *The Historic Development of Modern U.S. Advertising Regulation* (2015) 7 J. Hist. Res. Marketing 524, 525–526.) Existing tort remedies required proof of intent and justifiable reliance—a "heavy burden" when "prevailing norms expected sellers to lie and buyers to distrust." (Pridgen & Alderman, Consumer Protection and the Law (2023–2024 ed.) § 2:5.) The result was that "fraudulent advertising was everywhere countenanced" and fraudulent products and services, ranging from tainted medicines to deceptive mail sales schemes, proliferated. (Hess, *History and Present Status of the "Truth-in-Advertising" Movement* (1922) 101 Annals Am. Acad. Pol. & Soc. Sci. 211, 211; Litman & Litman, *Protection of the American Consumer* (1981) 36 Food Drug Cosm. L.J. 647, 651–652; Petty, *supra*, at p. 529.)

In reaction to these widespread business practices and the deficiencies of existing remedies, a reform movement took root. Courts began applying common law unfair competition doctrine—originally a narrow doctrine addressing only businesses that "passed off" goods as those of a competitor—to a growing variety of cases involving unfairness or deception. (See Nims, The Law of Unfair Competition and Trademarks (2d. ed. 1921), pp. v–vi, 1–

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16.) Many states adopted the “Printer Ink’s Model Statute,” which imposed “absolute responsibility” for false advertising, “even absent ‘knowledge or intent to deceive.’” (*Serova v. Sony Music Entertainment* (2022) 13 Cal.5th 859, 887.) The Printer’s Ink Statute formed the basis for California’s False Advertising Law and equivalent statutes imposing strict liability for fraudulent practices in other states. (*Ibid.*; see also *Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) 9 Cal.5th 279, 305, fn. 11.)

Later statutes addressed a broad array of sharp business practices beyond advertising. In 1933, the Legislature enacted the predecessor to the modern UCL, prohibiting “unfair or fraudulent business practice.” (Stats. 1933, ch. 953, § 1, p. 2482; see *Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 129–130, superseded by statute on other grounds [see *Arias v. Superior Court* (2009) 46 Cal.4th 969, 977, 982].) At the federal level, Congress passed the Federal Trade Commission Act in 1914 and amended it to bar “unfair or deceptive acts or practices” in 1938. (15 U.S.C. § 45(a)(1).) Today, “every state in the union has passed some form of legislation aimed at protecting consumers,” many of which are “unfair and deceptive acts and practices” (UDAP) statutes.[1] (Pridgen & Alderman, Consumer

[1] Many such statutes, including California’s Consumers Legal Remedies Act (CLRA), were enacted during the civil rights movement of the 1960s and 1970s, when stronger consumer protection laws were promoted to address consumer exploitation in disadvantaged communities. (See Pridgen & Alderman, *supra*, § 2:11; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808;

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Protection and the Law, *supra*, § 2:11.) Like the UCL, these state UDAP laws typically reject tort elements in favor of a more flexible, adaptable approach to liability. (*Ibid.*)

This Court recognized the broad reach of the reformed approach to consumer protection in *American Philatelic Society v. Claibourne* (1935) 3 Cal.2d 689. It explained that “no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive.” (*Id.* at pp. 698–699, quotation marks omitted.)

The modern UCL is “intentionally framed in . . . broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man’s invention would contrive.” (*Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, quotation marks omitted.) It provides a mechanism for remediating “wrongful business conduct in whatever context such activity might occur.” (*Ibid.*, citation omitted.) The UCL prohibits “unfair competition,” defined as any “unlawful, unfair, or fraudulent business act or practice.” (Bus. & Prof. Code, § 17200.) The text “is written in the disjunctive,” so an act or practice may be challenged if it fits within any one of these three prongs of unfair competition. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 180, quotation

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Governor’s Comm’n on the L.A. Riots, *Violence in the City—An End or a Beginning?* (1965) 62–65.)

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marks omitted.) “California courts have consistently interpreted [the UCL’s] language broadly.” (*People v. McKale* (1979) 25 Cal.3d 626, 632.)

In addition to its substantive breadth, the UCL protects consumers by simplifying the common law’s approach to procedure and remedies. As this Court has recognized, “the overarching legislative concern [in enacting the UCL is] to provide a *streamlined* procedure for the prevention of ongoing or threatened acts of unfair competition.” (*Nationwide Biweekly*, *supra*, 9 Cal.5th at p. 305, brackets and italicization in original, quotation marks omitted.) “To achieve its goal of deterring unfair business practices in an expeditious manner, the Legislature limited the scope of the remedies available under the UCL,” such that “prevailing plaintiffs are generally limited to injunctive relief and restitution.” (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312, alterations omitted.)

B. Deception by omission under the UCL’s fraudulent prong

The fraudulent prong of the UCL “has been understood to be distinct from common law fraud.” (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.) Business conduct is “fraudulent” under the UCL if “members of the public are likely to be deceived.” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266–1267, quotation marks omitted.) Unlike common law fraud, the defendant’s intent is irrelevant. (*South Bay Chevrolet v. General Motors Acceptance Corp*. (1999) 72 Cal.App.4th 861, 877.) Likewise, actual deception is not required—“[t]he statute affords protection against the probability or likelihood as well as the

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actuality of deception or confusion.” (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 876, quotation marks omitted.) Reasonable reliance and damages are similarly unnecessary for liability. (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.)

This Court has never articulated a separate test under the fraudulent prong for deception by omission. However, relying on tort law, Courts of Appeal have increasingly held that deception by omission is actionable only where a business has an “affirmative duty to disclose.” (*Daugherty v. American Honda* (2006) 144 Cal.App.4th 824, 838; see also *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1276 [requiring a plaintiff to establish a plaintiff’s affirmative duty to disclose to state a violation of the CLRA].) Since *Bardin* and *Daugherty*, the Courts of Appeal and the Ninth Circuit have adopted the test articulated in *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, a tort case with no UCL or CLRA claims. (See, e.g., *People v. Johnson & Johnson* (2022) 77 Cal.App.5th 295, 325; *Hodsdon v. Mars, Inc.* (9th Cir. 2018) 891 F.3d 857, 862.) *LiMandri* enumerates four circumstances that create a duty to disclose, making omissions actionable in tort:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

(*LiMandri*, *supra*, 52 Cal.App.4th at p. 336, quotation marks and citation omitted.)

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The Ninth Circuit has imposed additional restrictions on deception-by-omission claims brought under the UCL. In *Wilson v. Hewlett-Packard Co.* (9th Cir. 2012) 668 F.3d 1136, the court held that in the absence of an affirmative misrepresentation, plaintiffs must allege that an omission poses "an unreasonable safety hazard." (*Id.* at pp. 1141–1143.) The Ninth Circuit later slightly loosened that restriction, holding that where an omission (1) is "material"; (2) concerns a "defect . . . central to the product's function"; and (3) satisfies at least one of the *LiMandri* factors, it may be actionable in the absence of a safety hazard. (*Hodsdon*, *supra*, 891 F.3d at pp. 861–864.)[2]

C. The unfair prong of the UCL

The unfair prong of the UCL "undeniably establishes . . . a wide standard to guide courts of equity[.]" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112.) While this Court has articulated an unfairness standard for antitrust cases between competitors, it has expressly refrained from defining one for cases brought by consumers. (See *Cel-Tech*, *supra*, 20 Cal.4th at pp. 185–187 & fn. 12; *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9.) "The Courts of Appeal have struggled with which test should apply in the wake of *Cel-Tech*" and have used at least three different standards in consumer unfairness cases.

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[2] The Ninth Circuit rule has drawn criticism for its "questionable" extension of *Daugherty*, for ignoring contrary decisions, and for appropriating "lawgiving judgment properly reserved to California's Legislature or Supreme Court." (Elias, *Cooperative Federalism in Class Actions* (2018) 86 Tenn. L. Rev. 1, 6–16.)

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(*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 286.)

First, some Courts of Appeal have adopted the "tethering test" laid out in *Cel-Tech*, notwithstanding this Court's disclaimer that "[n]othing we say relates to actions by consumers." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 187, fn. 12; see *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1191–1193; *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854.) Under the "tethering" test, unfair conduct either "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech*, *supra*, 20 Cal.4th at p. 187.)

Second, many courts have employed a form of equitable balancing in assessing unfairness. Their decisions simply balance the "impact of the practice or act on its victim . . . against the reasons, justifications and motives of the alleged wrongdoer[,]" or in other words, "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim[.]" (*Progressive West*, *supra*, 135 Cal.App.4th at p. 285, quotation marks and citation omitted; see also, e.g., *Motors, Inc.*, *supra*, 102 Cal.App.3d at p. 740.)

Third, some courts have applied standards rooted in Section 5 of the Federal Trade Commission Act. One variation of this approach aligns with the FTC's pre-1980 standard for unfairness under Section 5. Under that test, courts weigh whether a practice (1) "offends public policy as it has been established by statutes,

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the common law, or otherwise"; (2) "is immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers (or competitors or other businessmen)." (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 530, citing *FTC v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244, fn. 5; see also *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718–719.) Some courts have also applied the more restrictive post-1980 Section 5 test. Under that test, "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." (*Camacho v. Automobile Club of Southern Cal.* (2006) 142 Cal.App.4th 1394, 1403.)

STATEMENT OF THE CASE

In June 2020, plaintiff Taylor Capito filed a complaint against the Regional Medical Center of San Jose (Regional), challenging the hospital's "unfair, deceptive, and unlawful practice of charging . . . an 'Evaluation and Management Services Fee' . . . without any notification of its intention to charge a prospective emergency room patient such a Fee for the patient's emergency room visit." (1 AA 14–15.)[3] After Capito sought treatment at Regional twice in three days, the hospital billed her an initial total of $41,016, including two "'Level 4' Evaluation and

[3] Because the Court of Appeal affirmed a judgment of dismissal after a demurrer, the Attorney General recounts the facts as alleged by Capito, but expresses no view of their truth.

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Management Services Fee[s]" of $3,780 each. (1 AA 325.) Capito had received no "advance notice that Regional would charge the EMS fee in addition to each item of service and treatment provided by the hospital." (Opn. 3.)

Capito acknowledges that she signed Regional's "Conditions of Admission and Consent for Outpatient Care" form at admission, which indicated that patients would pay "at the rates stated in the hospital's [chargemaster] . . . for the service provided[.]" (Opn. 2.) The chargemaster listed "over 25,000 individual line items of treatment and services," nearly all of which corresponded to treatment and services provided to individual patients. (1 AA 322–323.) The exception was the evaluation and management fee, which was "automatically applied" to the bills of emergency room patients "regardless of what services and treatment [were] provided." (*Ibid.*) That fee appeared on the chargemaster as "LVL [1-5] EMER DEPT" without further description or any explanation of when it would be charged. (1 AA 318, 322–323.) Finally, Regional's website claimed that the hospital was committed to "[p]ricing [t]ransparency." (1 AA 322.)

Capito also alleged Regional failed to give any advance "notification or warning that it charges a separate EMS Fee for an emergency room visit." (Opn. 6.) She contended that "the fact Regional would charge an EMS fee was not known or reasonably accessible to herself or other class members at the time of their emergency room visits," and that she would have sought care elsewhere had she been aware of the additional cost. (Opn. 3, 6.)

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Regional demurred to the second amended complaint, and the superior court dismissed Capito's action with prejudice in December 2021. (Opn. 7–9.) The Court of Appeal affirmed. First, relying on *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, the court determined that "Regional's failure to separately disclose the possible imposition of an EMS fee before providing emergency treatment does not meet the substantive definition of an 'unfair' practice actionable under the UCL." (Opn. 15.) Declining to decide which unfairness test applied, the court concluded that Regional's failure to disclose the evaluation and management fee was not an unfair business practice no matter the applicable standard. (Opn. 10.) The court reasoned that accepting "Capito's claim under the UCL would require . . . establish[ing] a notice requirement beyond that mandated" by the preexisting "complex legislative and regulatory system relevant to emergency medical services." (Opn. 15.)

The court likewise rejected Capito's CLRA claim—and UCL claim premised on her CLRA claim—that Regional unlawfully "concealed the material fact that an EMS fee could be charged to her . . . based on a formula known exclusively to the hospital." (Opn. 15–16.) The court acknowledged an existing conflict of Court of Appeal authority on the question of whether undisclosed emergency room fees "can form the basis for a claim under the CLRA." (Opn. 16–18.) In *Torres v. Adventist Health System/West* (2022) 77 Cal.App.5th 500, the Fifth District Court of Appeal determined that a "plaintiff [had] sufficiently plead a lack of reasonable access" to the facts and formula "that would trigger

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the imposition of the EMS fee," despite the fact that the hospital's chargemaster had been publicly filed with the state. (*Id.* at pp. 512–513; see Opn. 16–17.) Rejecting the court's approach in *Torres*, the Court of Appeal here instead found persuasive the reasoning of the First District Court of Appeal in *Gray* and *Saini v. Sutter Health* (2022) 80 Cal.App.5th 1054. (Opn. 18.) *Gray* and *Saini* concluded that while a "hospital had a general duty to disclose medical fees based on exclusive knowledge of material facts," it did not have a "duty to disclose potential charges beyond the means established in the applicable regulatory scheme" requiring that the "chargemaster [be] available online *or* at the hospital." (Opn. 19, 21–22.) While Capito had alleged that the chargemaster and evaluation and management fees were not "available on [Regional's] website" or "disclosed on signage in or around the ER," the Court of Appeal rejected her claim because she had failed to allege that the chargemaster was wholly unavailable at the hospital or online. (Opn. 21–22.)

ARGUMENT

I. THE COMPLAINT STATES A CLAIM UNDER THE UCL'S FRAUDULENT PRONG

Capito alleged violations of the UCL under the "unlawful, unfair, or fraudulent" prongs. (1 AA 330–331.) While the Court of Appeal's analysis focused on the unfair prong—discussed below, see *post*, pp. 27–31—the complaint's allegations satisfy the fraudulent prong as well. To make out a claim under that prong, a plaintiff need not allege that a defendant had a tort-law "duty to disclose" omitted facts. The Court should clarify that pleading a claim for deception by omission under the UCL's fraudulent

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prong requires only alleging conduct that was "likely to deceive" the public. Under that standard, Capito's UCL claims should have survived Regional's demurrer.[4]

A. The UCL's fraudulent prong does not require plaintiffs to prove that defendants had a "duty to disclose" omitted information

This Court has never held that a plaintiff in a UCL case must satisfy a multi-part duty-to-disclose test before deception by omission becomes actionable. That is for good reason. Such a limitation would be inconsistent with the history, purpose, structure, and function of the UCL, as illustrated in this Court's decisions. The threshold "duty to disclose" test applied by the appellate courts is a recent deviation from established UCL doctrine and borrows directly from the common law tort standards that the Legislature and this Court have done away with in the UCL context. It should be rejected.

The UCL takes a simpler approach to liability than the common law of torts, discarding traditional fraud elements in favor of a single-element "likely to deceive" standard. That was a conscious choice: "the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result . . . 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." (*Bank of the West*, *supra*, 2 Cal.4th at pp. 1266–1267, quotation marks omitted.) This Court has repeatedly

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[4] The Attorney General expresses no view on the omissions standard applicable to CLRA claims. (See Civ. Code, § 1770, subd. (a).)

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emphasized that likely deception suffices for fraudulent prong liability. (*Kasky v. Nike* (2002) 27 Cal.4th 939, 951; accord, *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211; *Barquis*, *supra*, 7 Cal.3d at p. 111; *McKale*, *supra*, 25 Cal.3d at p. 635.)

Recently, however, the lower courts have deviated from that rule in cases involving deception by omission, imposing a threshold duty-to-disclose analysis taken from the tort law decisions that the Legislature and this Court have rejected in UCL cases. In evaluating omissions claims under the UCL, the Courts of Appeal have applied the four-part duty-to-disclose test taken from *LiMandri v. Judkins*, *supra*, 52 Cal.App.4th 326. (See *Johnson & Johnson*, *supra*, 77 Cal.App.5th at p. 325; *Hodsdon*, *supra*, 891 F.3d at p. 863; see also *Naranjo v. Doctors Medical Center of Modesto, Inc.* (2023) 90 Cal.App.5th 1193, 1209–1210 [applying *LiMandri* test in the context of emergency room fees].)

But *LiMandri* was a tort case, not a UCL case. The *LiMandri* court applied its duty-to-disclose test to intentional tort claims premised on "fraud and deceit" and to a cause of action for "negligent failure to disclose and suppression of fact." (*LiMandri*, *supra*, 52 Cal.App.4th at pp. 335–338.) To make matters worse, some courts have not only applied the inapposite *LiMandri* tort-law test to UCL cases, but have also added requirements not found even in *LiMandri*. For example, the Ninth Circuit has held that defendants only have a duty to disclose material facts that pose "safety concerns" (*Wilson*, *supra*, 668 F.3d at pp. 1142–1143)

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or affect the "central functionality of the product" at issue (*Hodsdon*, *supra*, 891 F.3d at p. 863).

This Court's precedent does not support those approaches. It has applied the general "likely to deceive" standard even when a marketing or sales practice deceived by omission instead of, or in concert with, false or misleading statements. In *Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, for example, the Court considered a challenge to the DMV's authority to require disclosure of whether used cars offered for sale were previously rental cars. (*Id.* at pp. 356, 363–365.) The authorizing statute prohibited dealers from making "false or misleading statements to the public," and, like the UCL, required courts to determine whether "members of the public [were] likely to be deceived" by the challenged conduct. (*Id.* at p. 363.) Recognizing that "the omission of crucial information can be as misleading as a direct misstatement of fact," the Court determined that "[t]he DMV could reasonably conclude that consumers are likely to be deceived if they are not informed that the automobile they are purchasing was formerly used in certain specified ways." (*Id.* at pp. 363–365.) That was so because "[w]here, in the absence of an affirmative disclosure, consumers are likely to assume something which is not in fact true, the failure to disclose the true state of affairs can be misleading." (*Id.* at pp. 363–364.) The Court applied no duty-to-disclose analysis; it simply treated omission as one means of deception and used the usual "likely to deceive" test.

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In *Children's Television*, *supra*, 35 Cal.3d 197, the Court similarly treated omissions and affirmative representations no differently in a UCL case. The plaintiffs in that case alleged deception through 19 misrepresentations, most of which were "implicit in the advertising[,]" rather than express, as well as a number of "concealed material facts." (*Id.* at pp. 205–207.) In reversing dismissal, the Court applied no special test to the omissions. (*Id.* at pp. 213–214.) Instead, the Court considered the alleged conduct as a whole and determined that plaintiffs stated a cause of action under the "likely to deceive" standard. (*Id.* at pp. 211, 213–214 & fn. 15.)

The Court in *Chern*, *supra*, 15 Cal.3d 866, similarly evaluated whether a business's omission was likely to deceive. The plaintiff had alleged that the defendant bank violated the UCL by initially quoting an artificially low interest rate, while omitting that it had used a 360-day year in its computation. (*Id.* at p. 870.) The Court again did not determine whether the defendant had a duty to disclose its use of a 360-day year or the higher, 365-day interest rate at an earlier time in the transaction. Instead, in keeping with the UCL's single-element test, the Court agreed with the plaintiff that the challenged conduct was actionable because it was "likely to deceive the public." (*Id.* at p. 876.)

This Court's approach in *Ford Dealers*, *Children's Television*, and *Chern* adheres both to the UCL's focus on acts or practices and to common sense. Even where it makes no representations at all, a business that sells a product or service has still engaged in

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a "business act or practice" (Bus. & Prof. Code, § 17200), namely the sale itself. Thus, the failure to correct misapprehensions stemming from background consumer assumptions can result in a misleading sales practice, even when the business is silent. (See *Ford Dealers*, *supra*, 32 Cal.3d at pp. 363–364.) Consumers are generally likely to make certain assumptions, including (among other things) that the products they purchase are safe, lawfully manufactured, and fit for their intended purposes. Where commonly held assumptions like these are not true, a business's failure to correct consumers' misperceptions may be likely to deceive the public, and thus actionable under the UCL.

An additional reason for considering representations and omissions together and holistically is that it is not always readily apparent how to distinguish between the two, especially when the representation is a partial or implied representation. As courts have recognized, "[i]t is fundamental that every affirmative misrepresentation of fact works a concealment of the true fact." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 36.) Often, a consumer may be deceived through a combination of an affirmative misrepresentation and an omission of relevant information. Establishing a different test under the UCL for affirmative misrepresentations and omissions would create difficult line-drawing problems in these and other cases.

The duty-to-disclose approach the Court of Appeal applied in this case is also less consumer-protective than the FTC Act's approach to deception by omission. The FTC Act does not require that a tort-law duty to disclose be proven as a prerequisite for

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liability premised on deception by omission. Rather, "representations are deceptive if necessary qualifications are not made, if material facts are not disclosed, or if those disclosures or qualifications are too inconspicuous." (National Consumer Law Center, Unfair and Deceptive Acts and Practices (10th ed. 2021) § 4.2.15.2.) Courts have affirmed FTC Act liability—with no duty-to-disclose showing—premised on omitted facts like "most tired people are not so because of iron deficiency anemia" (*J.B. Williams Co. v. F.T.C.* (6th Cir. 1967) 381 F.2d 884, 889); that a promised "MasterCard" was not actually a credit card (*F.T.C. v. Bay Area Bus. Council, Inc.* (7th Cir. 2005) 423 F.3d 627, 635); and that the analgesic ingredient in Midol's "exclusive formula" was actually "ordinary aspirin" (*Sterling Drug, Inc. v. F.T.C.* (9th Cir. 1984) 741 F.2d 1146, 1154). Echoing *Ford Dealers*, the FTC has opined that "pure omissions may lead to erroneous consumer beliefs if consumer[s] had a false pre-existing conception which the seller failed to correct." (*In re International Harvester* (1984) 104 F.T.C. 949, 1059.)[5]

Finally, a separate duty-to-disclose standard is not needed to prevent the UCL from reaching omissions for which businesses could not reasonably foresee liability. First, the "likely to deceive" standard itself imposes a check on runaway liability. Consumers

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[5] While the FTC pursues cases involving genuine and complete silence as unfair rather than deceptive practices, it still does not require that a duty to disclose first be shown. (See *International Harvester*, *supra*, 104 F.T.C. at pp. 1060–1062; 1064–1067 [affirming ALJ's unfairness finding without analyzing duty to disclose].)

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are unlikely to be deceived by omissions that are so inconsequential that the deception they cause is unforeseeable. Second, the fact that private UCL plaintiffs must show an economic injury caused by the challenged business act or practice provides another check on liability for trivial omissions. (See Bus. & Prof. Code, § 17204; *Kwikset v. Superior Court* (2011) 51 Cal.4th 310, 322.) Third, because they are decided by judges exercising traditional "equitable discretion and judgment[,]" UCL cases "facilitat[e] appellate review" and result in a "cumulative body of precedent that improves" consistency and "provides needed guidance." (*Nationwide Biweekly, supra,* 9 Cal.5th at p. 305.) That process can help to ensure that omissions liability is appropriately constrained and foreseeable.

For those reasons, no special limitation is necessary for omissions: if a business act or practice would be likely to deceive without additional disclosures, that should be enough for the deception by omission to be actionable. What should certainly *not* be required is the separate duty-to-disclose analysis that lower courts have erroneously imported from tort law, contrary to the purpose and history of the UCL.

B. Capito adequately alleged that Regional's failure to disclose the evaluation and management fee was likely to deceive

Under the likelihood-of-deception test, Capito adequately alleged that Regional's failure to disclose the evaluation and management fee violated the UCL. Capito contends that Regional's website touted the hospital's commitment to "[p]ricing [t]ransparency," yet provided no information about the evaluation

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and management fees. (1 AA 322.) The chargemaster—which Capito alleges was not "reasonably available to emergency room patients at the time of their emergency room visits"—contained over 25,000 line items of treatment and services, complicating efforts to find relevant charges. (1 AA 322–323.) Moreover, the evaluation and management fee is listed as "LVL [1-5] EMER DEPT" on the chargemaster, a line item that does not on its face inform a patient that they will be charged a set fee every time they seek emergency room care. (*Ibid.*) And the form that Capito signed on admission to the hospital specified only that she would have to pay "for the service provided" in "consideration of the services to be rendered to Patient," which patients might reasonably interpret as obligating them to pay for the specific treatments they receive, not an additional overhead fee. (1 AA 339.) Finally, from lived experience with charges imposed for admission to other business venues, consumers may reasonably come to expect that an emergency room admission charge would be collected in advance or at the very least prominently disclosed. (See *Ford Dealers*, *supra*, 32 Cal.3d at pp. 363–364.)

Considered together, the alleged representations and omissions suffice to state a claim, because it cannot be established as a matter of law that a consumer in Capito's position would not likely be deceived about the existence of the evaluation and management fee. At the pleading stage, nothing more is required.

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II. THE COMPLAINT STATES A CLAIM UNDER THE UCL'S UNFAIR PRONG

A. The Court should adopt a balancing test to determine what constitutes an "unfair" business act or practice in consumer cases

As this Court has observed, "[i]n the years since *Cel-Tech*, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases[.]" (*Nationwide Biweekly*, *supra*, 9 Cal.5th at p. 303.) Courts have applied "three different tests" in that context: *Cel-Tech*'s "tethering" test, a "balancing" test, and a test derived from Section 5 of the FTC Act. (*Id.* at p. 303 & fn. 10; see *ante*, pp. 13–15.) The Attorney General respectfully urges the Court to resolve that uncertainty and apply the balancing test, as articulated in cases such as *Motors, Inc.*, *supra*, 102 Cal.App.3d at page 740.

California courts have long recognized that the unfair prong must adapt flexibly to address unlawful "business practices [that] run the gamut of human ingenuity and chicanery." (*People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772.) Such flexibility ensures that "[w]hen a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one." (*Barquis*, *supra*, 7 Cal.3d at p. 112, quoting *American Philatelic*, *supra*, 3 Cal.2d at pp. 698–699.) Yet, because "courts may not apply purely subjective notions of fairness," (*Cel-Tech*, *supra*, 20 Cal.4th at p. 184), standardization and clarity is necessary to help consumers, courts, and businesses understand what conduct is

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prohibited under the UCL. Defining a uniform standard for "unfairness" in consumer cases, as the Court did for antitrust competitor cases in *Cel-Tech*, would help ensure consistent and effective enforcement of the UCL's unfair prong.

While *Cel-Tech* establishes that the "tethering" test governs UCL antitrust cases brought by competitors, "the balancing test should continue to apply in consumer cases . . . because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices." (*Progressive West*, *supra*, 135 Cal.App.4th at p. 286.) Under the balancing test, courts determine whether a business act or practice is unfair by examining "its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." (*Motors, Inc.*, *supra*, 102 Cal.App.3d at p. 740.) Courts must thus "weigh the utility of the defendant's conduct against the gravity of the harm" to the alleged victim. (*Ibid.*; accord, e.g.*, Progressive West*, *supra*, 135 Cal.App.4th at p. 285.)

In weighing these two competing interests, the balancing test maps neatly onto modes of reasoning commonly applied by courts. The test involves "a weighing process quite similar to the one" that applies under "the law of nuisance." (*Motors Inc.*, *supra*, 102 Cal.App.3d at p. 740.) The elements are broad enough to embrace consideration of new forms of consumer harm and social benefit, while still keeping courts focused on the theme of measuring victim impact against business utility. Over time, consistent application of these principles will produce a body of

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case law under the UCL unfair prong exhibiting the "orderly and regular growth" that characterizes the development of equitable doctrines. (See *Nationwide Biweekly*, *supra*, 9 Cal.5th at p. 300, quoting 1 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 59, p. 76.)

Finally, the balancing approach affords courts more flexibility to enjoin unfair practices than the more restrictive FTC Section 5 test, which should provide a federal floor, rather than a ceiling, for California consumers. The 1980 FTC policy change and the 1994 statutory amendment that codified it are recent federal glosses that substantially postdate the enactment of the UCL and do not bind California law. (See Pub. L. No. 103–312 (Aug. 26, 1994) § 9.) Nor should they. Unlike the Section 5 test, the balancing test avoids the unnecessary requirement that consumers prove that they "could not reasonably have avoided" the alleged harm. (*Camacho*, *supra*, 142 Cal.App.4th at p. 1403.) This requirement reintroduces the long-repudiated notion of caveat emptor by placing responsibility on the consumer to be on the alert. (See *Salazar v. Target Corp.* (2022) 83 Cal.App.5th 571, 578 [consumers need not be "wary or suspicious of advertising claims"]; *Vasquez*, *supra*, 4 Cal.3d at p. 808 ["Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society"].) It also acts as a duplicative barrier to recognizing consumer injuries, because the Section 5 test already requires that plaintiffs prove a "substantial consumer injury" that is not outweighed by "countervailing benefits to consumers or

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competition.” (*Camacho*, *supra*, 142 Cal.App.4th at p. 1403.) The Section 5 test’s emphasis on consumer injury also runs counter to the UCL’s “focus on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose” of consumer protection. (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.) Compared to the Section 5 test, the balancing test captures the essential elements of the unfair prong in a clearer and more straightforward way.

B. Capito adequately alleged that the challenged practice is unfair due to its impact on consumers

Capito’s UCL unfairness claim survives demurrer as a matter of law under any of the applicable tests. The process of balancing factors under the unfair prong will typically require consideration of facts supporting the utility of the defendant’s conduct, which is usually not possible “when it is sought to decide the issue of unfairness on demurrer.” (*Motors, Inc.*, *supra*, 102 Cal.App.3d at p. 740.) Here, Capito has alleged that she and similarly situated consumers suffered thousands of dollars of loss, while Regional argues that the fees are justified by the utility of immediate emergency room admissions. (1 AA 324–328; see also Answer Br. 6.) These contentions require factual determinations that “cannot usually be made on demurrer.” (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1473; accord, *Progressive West*, *supra*, 135 Cal.App.4th at p. 263 [the balancing test “is fact intensive and is not conducive to resolution at the demurrer stage”].)

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The same is true under the other proposed tests for unfairness under the UCL. The Section 5 test would require the courts to make determinations on multiple factors, including "whether [the challenged practice] causes substantial injury to consumers." (*Casa Blanca*, 159 Cal.App.3d at p. 530.) Even the *Cel-Tech* "tethering" test involves consideration of factual issues, including whether a challenged practice "significantly harms or threatens competition" or produces effects "comparable to or the same as a violation of the law." (*Cel-Tech*, *supra*, at 20 Cal.4th at p. 187.) Thus, under each of the three standards courts have applied in the wake of *Cel-Tech*, Capito has made out a sufficient UCL unfair prong claim at the pleading stage.

III. OTHER FEDERAL AND STATE HEALTHCARE LAWS DO NOT DISPLACE THE UCL OR CLRA

The Court of Appeal disclaimed reliance on the safe harbor doctrine, but in premising its rejection of Capito's claims on statutory and regulatory requirements for emergency care, it effectively held that compliance with those requirements harbored Regional from UCL and CLRA liability. (Opn. 15, 22–23; see also Opn. 11–14 [describing various provisions of state and federal law that apply to emergency room services].) This was error. "[F]ederal and state laws and regulations . . . do not provide an express safe harbor against CLRA and UCL claims so long as the hospital has complied with mandated disclosures." (*Naranjo*, *supra*, 90 Cal.App.5th at p. 1218.)

Regional concedes that existing law erects no safe harbor to the application of the UCL or CLRA. (Answer Br. 38.) That is for good reason, because none of the statutes or regulations Regional

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points to "actually 'bar[s]' the [UCL] action or clearly permit[s Regional's] conduct," as would be required to assert a safe harbor. (See *Cel-Tech*, *supra*, 20 Cal.4th at p. 183.) The "mere[]" fact that the hospital regulations "do[] not, [themselves], provide for [a UCL] action or prohibit [Regional's] challenged conduct" is not enough. (See *id.* at pp. 182–183.) Absent a safe harbor, the UCL and CLRA operate as they normally do.[6]

The policy question of how to regulate emergency room fee disclosures is a weighty one, involving considerations of informed consent and decision-making in emergency circumstances. But if Congress or the Legislature had sought to displace generally applicable consumer protection statutes, like the UCL and CLRA, they would have done so expressly. They have not.

Regional mischaracterizes the "multi-faceted" regulatory scheme as reflecting a policy choice prioritizing the "paramount objective" of immediate provision of services, even at the expense of clear billing disclosures. (Answer Br. 6.) Much of that scheme is actually aimed at preventing hospitals from rejecting or discriminating against patients on the grounds of inability to pay, not at preventing patients from declining care for the same reason. (See *id.* at pp. 6–8 [summarizing regulatory apparatus].) For example, parallel federal and state statutes require that

[6] Nor is there any preemption in this case. Regional suggests that applying the UCL and CLRA here would "conflict with the state and federal statutory and regulatory structure." (Answer Br. 25.) But it has not attempted to argue that those statutes and regulations preempt the UCL or CLRA, and the court below did not consider the issue.

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hospitals must provide emergency services and care without "questioning [the patient's] ability to pay therefor" or delay those services "in order to inquire about the individual's method of payment of insurance status." (Health & Saf. Code, § 1317, subd. (d); 42 U.S.C. § 1395dd(h).) These are sensible regulations that promote access to emergency medical services regardless of means, but nothing in them "prohibit[s a hospital] from providing additional disclosures regarding its EMS Fee billing practice." (*Naranjo*, *supra*, 90 Cal.App.5th at p. 1218.)

Moreover, a defendant's compliance with industry-specific disclosure regulations does not equate to compliance with the UCL's command to refrain from unfair or deceptive conduct. For example, in *Chern*, this Court reasoned that although the defendant bank truthfully disclosed a loan's interest rate in a federally mandated truth in lending statement, prior misrepresentations were nevertheless actionable. (*Chern*, *supra*, 15 Cal.3d at pp. 870, 873–874.) Courts have reached similar conclusions in a wide variety of circumstances. (See, e.g., *Paduano v. American Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453 [triable issue of fact existed as to UCL and CLRA claims premised on allegedly deceptive fuel mileage estimates, notwithstanding applicable federal disclosure regime]; *Nelson v. Great Lakes Educational Loan Services, Inc.* (7th Cir. 2019) 928 F.3d 639 [federal student loan servicer rules that expressly preempted "disclosure requirements of any State law" did not bar Illinois consumer-protection claims for "voluntary but

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deceptive statements"]; *Pennsylvania v. Navient Corp.* (3d Cir. 2020) 967 F.3d 273 [similar].)

Finally, a holding that compliance with a set of industry-specific disclosure regulations immunizes a business from consumer causes of action—even where its practices are actually deceptive or unfair—would substantially undermine consumer protection goals. Mandatory disclosure schemes are common across many consumer-facing industries, including in lending, timeshare sales, attorney advertising, automotive sales and finance, home mortgage origination, health club contracts, data collection and sale, rent-to-own transactions, door-to-door and telemarketing sales, and many more.[7] These schemes impose specific obligations, but there is no basis for concluding that they define the universe of unfair or deceptive practices in those industries. Such a holding would effectively exempt large portions of the consumer marketplace from the UCL and CLRA.

[7] See, e.g., 15 U.S.C. § 1601 et seq.; Bus. & Prof. Code, § 11210 et seq.; Bus. & Prof. Code, § 6157 et seq.; Civ. Code, § 2981 et seq.; 12 U.S.C. § 2601; Civ. Code, § 1812.80 et seq.; Civ. Code, § 1798.100 et seq.; Civ. Code, § 1812.620 et seq.; Bus. & Prof. Code, § 17500.3; 16 C.F.R. § 310.1 et seq.

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CONCLUSION

The judgment of the Court of Appeal should be reversed.

February 20, 2024

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Century Schoolbook font and contains 7,336 words.

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