

No. SJC-13863
Appeals Court Case No. 2025-P-1336

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee / Cross-Appellant,
v.

THE MEGA LIFE AND HEALTH INSURANCE COMPANY, MID-WEST NATIONAL
LIFE INSURANCE COMPANY OF TENNESSEE,
Defendants,
HEALTHMARKETS, INC., THE CHESAPEAKE LIFE INSURANCE COMPANY, AND
HEALTHMARKETS INSURANCE AGENCY, INC. F/K/A INSPHERE INSURANCE
SOLUTIONS, INC.,
Defendants-Appellants / Cross-Appellees.

On Appeal from Judgment of the
Superior Court for Suffolk County No. 0684cv04411-BLS1

**BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA IN SUPPORT OF DE-
FENDANTS-APPELLANTS/CROSS-APPELLEES**

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CORPORATE DISCLOSURE

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in the interpretation and administration of consumer fraud laws such as Chapter 93A of the Massachusetts General Laws: Many of its members are consumer businesses and will be adversely affected by the superior court's expan-

¹ No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person or entity, other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund the preparation or submission of the brief. Neither *amicus curiae* nor its counsel has represented a party to the present appeal in another proceeding involving similar issues. Neither *amicus curiae* nor its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal. See Mass. R. A. P. 17(c)(5).

sive and novel construction of the restitution provision in Section 4 governing suits initiated by the Massachusetts Office of the Attorney General.

TABLE OF CONTENTS

CORPORATE DISCLOSURE.....	2
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	3
TABLE OF AUTHORITIES	6
INTRODUCTION AND ARGUMENT SUMMARY	10
ARGUMENT.....	12
I. Assumed reliance is insufficient to demonstrate the elements of restitution.	12
A. The statute’s text, structure, and purpose are incompatible with assumed reliance for restitution.	13
B. There is no basis in Massachusetts case law for assumed reliance.	24
C. Federal FTCA case law is both abrogated and inapplicable to Chapter 93A restitution.....	27
II. Assumed reliance invites sprawling liability for businesses, with costs passed down to consumers.	34
CONCLUSION	37
CERTIFICATE OF COMPLIANCE.....	39
CERTIFICATE OF SERVICE	40

TABLE OF AUTHORITIES

Cases

<i>Am. Express Co. v. Italian Colors Rest.</i> , 570 U.S. 228 (2013)	19
<i>AMG Cap. Mgmt., LLC v. FTC</i> , 593 U.S. 67 (2021)	32
<i>Amgen Inc. v. Conn. Ret. Plans and Tr. Funds</i> , 568 U.S. 455 (2013)	36
<i>Aspinall v. Philip Morris Cos.</i> , 442 Mass. 381 (2004)	26
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011)	35
<i>Barron v. Fidelity Magellan Fund</i> , 57 Mass. App. Ct. 507 (2003)	17
<i>Bos. Police Patrolmen’s Ass’n, Inc. v. City of Bos.</i> , 435 Mass. 718 (2002)	16
<i>Boss v. Town of Leverett</i> , 484 Mass. 553 (2020)	19
<i>Bridge v. Phoenix Bond & Indem. Co.</i> , 553 U.S. 639 (2008)	15, 29
<i>Burrage v. United States</i> , 571 U.S. 204 (2014)	15, 29
<i>Casavant v. Norwegian Cruise Line Ltd.</i> , 460 Mass. 500 (2011)	26
<i>Ciani v. MacGrath</i> , 481 Mass. 174 (2019)	28
<i>Commonwealth v. AmCan Enters., Inc.</i> , 47 Mass. App. Ct. 330 (1999)	24, 31
<i>Commonwealth v. Crowther</i> , 2018 WL 3520805 (Mass. App. Ct. July 23, 2018)	25

Cases—continued

<i>Commonwealth v. DeCotis</i> , 366 Mass. 234 (1974).....	22, 26, 27
<i>Commonwealth v. Fall River Motor Sales, Inc.</i> , 409 Mass. 302 (1991).....	19, 31
<i>Commonwealth v. Fleury</i> , 489 Mass. 421 (2022).....	21
<i>Commonwealth v. Manolo M.</i> , 486 Mass. 678 (2021).....	17
<i>Commonwealth v. Maroun</i> , 2022 WL 18145481 (Mass. Super. Ct. Mar. 18, 2022).....	25
<i>Commonwealth v. Purdue Pharm., L.P.</i> , 2019 WL 5495716 (Mass. Super. Ct. Oct. 8, 2019).....	30
<i>Commonwealth v. Rossetti</i> , 489 Mass. 589 (2022).....	13
<i>Conservation Comm. of Norton v. Pesa</i> , 488 Mass. 325 (2021).....	21
<i>Darviris v. Petros</i> , 442 Mass. 274 (2004).....	22
<i>Dep. Chief Counsel for Pub. Def. v. Dist. Ct.</i> , 477 Mass. 178 (2017).....	16
<i>Depianti v. Jan-Pro Franchising Intern., Inc.</i> , 465 Mass. 607 (2013).....	21, 24
<i>Franklin Off. Park Realty Corp. v. Comm’r of Dept. of Env’t Prot.</i> , 466 Mass. 454 (2013).....	21
<i>FTC v. Figgie Int’l, Inc.</i> , 994 F.2d 595 (9th Cir. 1993).....	27, 32
<i>FTC v. ZAAPPAAZ, LLC</i> , 140 F.4th 675 (5th Cir. 2025).....	33
<i>Halebian v. Berv</i> , 457 Mass. 620 (2010).....	30

Cases—continued

<i>Hinchliffe v. Am. Motors Corp.</i> , 440 A.2d 810 (Conn. 1981)	14
<i>Kattar v. Demoulas</i> , 433 Mass. 1 (2000)	22
<i>McGregor v. Chierico</i> , 206 F.3d 1378 (11th Cir. 2000)	27, 32
<i>Roberts v. Enter. Rent-A-Car Co. of Bos., Inc.</i> , 438 Mass. 187 (2002)	21, 24
<i>State v. New Beginning Credit Ass’n</i> , 2006 WL 1472284 (Tenn. Ct. App. 2006)	14

Statutes, Rules and Regulations

15 U.S.C.	
§ 45(a)(1)	29, 30
§ 45(l)	28, 31
§ 53(b)	32
§ 57b(b)	28, 29, 33
G. L. c. 93A,	
§ 2	22
§ 2(a)	29, 30
§ 2(b)	29, 30
§ 4	10, 13, 15, 23, 28, 32
§ 9	23, 26
1967 Mass. Acts. c. 813, § 4	18
1969 Mass. Acts. c. 814, § 3	18
Mass. R. A. P.	
17(a)	10
17(c)(5)	3
940 MA ADC 3.16	22

Other Authorities

Ascertain, <i>Black’s Law Dictionary</i> (4th rev. ed. 1968)	14
Ascertain, <i>Oxford English Dictionary</i> (2d ed. 1989)	14
Means, <i>Black’s Law Dictionary</i> (4th Rev. ed. 1968)	15

Other Authorities—continued

Reason, <i>Black's Law Dictionary</i> (4th Rev. ed. 1968).....	15
Restitution, <i>Black's Law Dictionary</i> (4th Rev. ed. 1968).....	19, 20
Ralph K. Winter, <i>Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America</i> , 42 Duke L.J. 945 (1993)	36-37

INTRODUCTION AND ARGUMENT SUMMARY²

The government in this case sought—and the superior court granted—over \$50 million in purported restitution, on top of what the Attorney General has trumpeted as “the largest total of civil penalties in an action brought by the Attorney General’s Office under the Massachusetts Consumer Protection Act.” Massachusetts, Office of the Attorney General, *Superior Court Orders Health Insurance Companies To Pay Over \$165 Million For Deceptive Sales Scheme That Cheated Massachusetts Customers*, perma.cc/5NU3-P7MZ (Jan. 6, 2025).

But one thing was lacking for that restitution award: proof that Massachusetts consumers actually suffered ascertainable loss as a result of defendants’ allegedly deceptive promotions. To the contrary, as Defendants have explained, a significant number of the consumers who testified at trial disclaimed ever even *hearing* the allegedly deceptive statements. *See* Defs.’ Principal Br. at 38; Defs.’ Reply Br. at 18-19.

² The Court solicited amicus briefs on the question of “[w]hether the Superior Court erred in calculating restitution, including whether the court erred in applying a framework of ‘assumed reliance’ in calculating restitution pursuant to G. L. c. 93A, § 4.” Dkt. No. 37. The Chamber submits this amicus brief in response to that question. *See* Mass. R. A. P. 17(a) (“A brief of an amicus curiae may be filed ... when solicited by the appellate court.”).

The superior court brushed aside this lack of proof by applying a theory, apparently novel in Massachusetts law, of “assumed reliance,” under which “a *presumption* of actual reliance is established once the Commonwealth has proven that: (1) Defendants made material misrepresentations; (2) the misrepresentations were widely disseminated, and (3) consumers purchased Defendants’ product.” RA22/192 (emphasis added); *see also* RA22/190. That is, under the superior court’s decision, the government can recover millions of dollars in restitution for countless Massachusetts consumers—an equitable remedy intended to restore the status quo—without proving that any consumer even was *exposed* to the alleged deception, much less that the deception actually induced the consumer into making a purchase.

This Court should reject the validity of this extraordinary approach to proving (or, more precisely, not proving) causation for purposes of restitution under Chapter 93A and vacate the superior court’s decision. Relieving the government of its burden to prove losses caused by the defendant in order to recover restitution is contrary to the statutory text, finds no support in Massachusetts case law, and was justified by the superior court solely by relying on Federal Trade Commission Act precedents that are inapposite to the differing text of Chapter 93A and have been abrogated by the Supreme Court in any event. Moreover, the superior court’s

approach, if accepted, will expose businesses to huge and unwarranted restitution judgments without any tie to actual harm to consumers, stifling growth and innovation to the detriment of all. The Court should reverse.

ARGUMENT

I. ASSUMED RELIANCE IS INSUFFICIENT TO DEMONSTRATE THE ELEMENTS OF RESTITUTION.

The superior court's approach was wrong as a matter of law: In an action by the Attorney General under Section 4 of Chapter 93A, a court may not simply assume that consumers relied on a defendant's statements to award restitutionary relief.

The court below appears to have broken with all existing Massachusetts precedent by relieving the government of its burden to prove that the defendant caused consumers ascertainable losses, instead *assuming* that every single purchase of Defendants' products was induced by Defendants' alleged misstatements. The lower court did so based solely on outdated federal FTCA case law that is incompatible with the materially different text of the Massachusetts statute. In fact, the text and structure of Section 4 preclude any theory of assumed reliance.

A. The statute’s text, structure, and purpose are incompatible with assumed reliance for restitution.

1. The plain language of Section 4 requires more than assumed reliance before restitution may be ordered. “Where the language of a statute is clear ... courts must give effect to its plain and ordinary meaning.”

Commonwealth v. Rossetti, 489 Mass. 589, 593 (2022).

Section 4 states, in relevant part, that in an action brought by the Attorney General, the superior court

may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders or judgments as may be necessary **to restore** to any person who has suffered any **ascertainable loss by reason of** the use or employment of such unlawful method, act or practice **any moneys** or property, real or personal, **which may have been acquired by means of** such method, act, or practice.

G. L. c. 93A, § 4 (emphases added).

This provision makes clear that a remedy “to restore” losses to a person—in other words, restitution—is only available where a consumer has “suffered an[] ascertainable loss by reason of” the unlawful act, and that the “moneys or property” to be “restore[d]” to the consumer through restitution must have been “acquired by means of” the unlawful act. *Id.*

Section 4 is thus flatly incompatible with the superior court’s assumed-reliance approach. First, the requirement of an “ascertainable loss” mandates that a consumer’s injury be actual, not presumed. At the

time of enactment in 1969 (and now), to “ascertain” something meant “[t]o fix; to render certain or definite” or “to clear of doubt or obscurity.” Ascertain, *Black’s Law Dictionary* (4th rev. ed. 1968); *accord* Ascertain, *Oxford English Dictionary* (2d ed. 1989) (“To make (a thing) objectively certain, to fix.”). Indeed, the superior court recognized as much: “[A]scertainable loss ... means that plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical.” RA22/188 (quoting *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 558 (2009)); *see also* *State v. New Beginning Credit Ass’n*, 2006 WL 1472284, *8 (Tenn. Ct. App. 2006) (“An ascertainable loss is a deprivation, detriment, or injury that is capable of being discovered, observed, or established” and “is measurable”); *Hinchliffe v. Am. Motors Corp.*, 440 A.2d 810, 814 (Conn. 1981) (“loss is ascertainable if it is measurable”).

The OAG cites (at 23-24) a host of out-of-state authorities for the proposition that “ascertainable loss” does not require a “specific dollar amount” and includes injuries such as “out of pocket loss”—but that is quite beside the point. The problem is not that ascertainable loss must be proven to the dollar; it is that ascertainable loss must be *actual*, not hypothetical (as under an assumed-reliance approach).

Moreover, that actual, non-hypothetical monetary loss must have been suffered “*by reason of* the use or employment of [the defendant’s

unlawful] method.” G. L. c. 93A, § 4 (emphasis added). For alleged misstatements, that requires actual reliance—or at the least, some other means of proving that the defendant’s misstatements actually caused the ascertainable losses. *See Reason, Black’s Law Dictionary* (4th Rev. ed. 1968) (“[A]n inducement, motive, or ground for action.”); *cf., e.g., Burrage v. United States*, 571 U.S. 204, 213 (2014) (“[T]he phrase, ‘by reason of,’ requires at least a showing of ‘but for’ causation.”) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (“[B]y reason of” requires “a showing that the defendant’s violation not only was a ‘but for’ cause of his injury, but was the proximate cause as well”). Similarly, the amount of restitution is limited to “moneys or property” that were “acquired *by means of*” the unlawful “method,” further requiring direct causation. G. L. c. 93A, § 4 (emphasis added); *see, e.g., Means, Black’s Law Dictionary* (4th Rev. ed. 1968) (“That through which ... an end is attained.”).

The superior court’s assumed-reliance approach nullifies these requirements. Rather than requiring *proof* that consumers “suffered an[] ascertainable loss by reason of” the allegedly unlawful conduct, or that the “moneys” to be “restore[d]” were “acquired by means of such method,” the superior court simply *assumed* those facts to be true, based on find-

ings that asserted material misrepresentations were widely disseminated and consumers purchased the products. RA22/190; RA23/47. But of course, those findings cannot substitute for the elements required by the statute; as the Defendants explain, the relevant proof at trial tends to demonstrate that many consumers *were not even exposed* to the alleged falsehoods, much less that their purchases were induced by them. *See* Defs.’ Principal Br. at 38; Defs.’ Reply Br. at 18-19.

The superior court’s decision therefore reads these requirements for restitution in an attorney-general suit—that consumers suffer “ascertainable loss by reason of” the alleged unlawful conduct, and that the restitution be limited to “moneys ... acquired by means of” that conduct—out of the text of Section 4, in derogation of fundamental statutory interpretation principles. *See, e.g., Bos. Police Patrolmen’s Ass’n, Inc. v. City of Bos.*, 435 Mass. 718, 721 (2002) (“We interpret statutes so as to avoid rendering any part of the legislation meaningless.”) (quoting *Victory Distribs., Inc. v. Ayer Div. of Dist. Ct. Dep’t*, 435 Mass. 136, 140 (2001)); *Dep. Chief Counsel for Pub. Def. v. Dist. Ct.*, 477 Mass. 178, 187 (2017) (“The carving out of any exceptions to a clear statutory mandate is for the Legislature, not the judiciary.”) (quoting *D’Avella v. McGonigle*, 429 Mass. 820, 822 (1999)) (alterations incorporated).

Indeed, the flaw in the superior court’s assumed-reliance approach is illustrated by the inherently irreconcilable position the OAG must take in defense of it: The OAG agrees that restitution must “be measurable and causally related to the consumer loss suffered due to the violative conduct,” but claims that this test can be met by “individual customers” who never “actually saw or heard” the allegedly misleading promotion. OAG Br. at 22. But the OAG never explains—because it makes no logical sense—how a consumer who never “actually saw or heard” a misleading promotion *could have* “suffered” *any* “loss ... due to” that promotion, or how restitution for that person would be “causally related” to that hypothetical loss.

2. Adopting an assumed-reliance rule is also inconsistent with the statutory purpose. *See, e.g., Commonwealth v. Manolo M.*, 486 Mass. 678, 683 (2021) (In addition to text, “[w]e also consider the cause of the statute’s enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.”) (quotation marks omitted; alteration incorporated).

“Chapter 93A was enacted in 1967 for the purpose of *protecting consumers* from unfair and deceptive acts and practices in the conduct of any ‘trade or commerce.’” *Barron v. Fidelity Magellan Fund*, 57 Mass. App. Ct. 507 (2003) (emphasis added). That is, the law is centered on shielding

consumers from actual harm, not punishing businesses.³ But by assuming reliance by *all* purchasers of a defendant's products, the superior court's rule authorizes the government to recover monetary equitable relief for consumers who need no protection at all—consumers who have never been exposed to an allegedly false statement or who are completely satisfied with the product they purchased. *See* Defs.' Principal. Br. at 25, 38; Defs.' Reply Br. at 18-19.

Similarly, the restitutionary remedy in Section 4 in particular was enacted as part of a law entitled “An Act amending the consumer protection act and *providing restitution to a consumer who has suffered loss due to a deceptive act or practice.*” 1969 Mass. Acts. c. 814, § 3 (emphasis added); *compare* 1967 Mass. Acts. c. 813, § 4 (prior version of Section 4, without any provision for restitution). The self-evident purpose of Section 4 in its current form is thus to “provid[e] restitution” to consumers who have “*suffered loss due to a deceptive act or practice*” (1969 Mass. Acts. c. 814, § 3 (emphasis added)), further underscoring the need to prove—and not simply assume—both a specific loss and causation through reliance

³ Indeed, even the OAG acknowledges that Chapter 93A has a “strong remedial purpose,” not a punitive one, and the involvement of the Attorney General is intended to provide a “solution to the *alleged wrong*” with relief “in favor of all *wronged persons*,” not just any person. OAG Br. at 21 (emphasis added).

by specific consumers. *See, e.g., Boss v. Town of Leverett*, 484 Mass. 553, 562 (2020) (“Although the title of an act does not control the language in the act, it provides some guidance regarding the intent of the legislature at the time.”). Again, the superior court’s novel assumed-reliance approach runs counter to that purpose.

The OAG’s invocation of the statute’s “strong remedial purpose” (OAG Br. 21) is therefore mistaken. To be sure, the purpose is to remedy *actual* losses *actually* caused by the unlawful conduct, but the OAG’s rule does not do that. Instead, it *assumes* both actual loss and causation, severing the supposed restitution from the circumstances (or even existence) of any “wronged persons” (*id.*), and instead effectively imposes a second statutory penalty unmoored from the equitable principles upon which restitution is based. And of course, “[n]o legislation pursues its purposes at all costs.” *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (quotation marks omitted).

Moreover, if deterrence and retribution are permissible goals for Chapter 93A overall, they are appropriately furthered by the act’s civil monetary penalty provisions, *not* by the explicitly compensatory equitable remedy of restitution. *Compare, e.g.,* Restitution, *Black’s Law Dictionary* (4th Rev. ed. 1968) (in the context of “[e]quity”: “Restoration of both parties to their original condition”), *with Commonwealth v. Fall*

River Motor Sales, Inc., 409 Mass. 302, 313 (1991) (in evaluating propriety of civil monetary penalty under Chapter 93A, considering whether “the civil penalty ... would vindicate the authority of the Commonwealth by deterring future violations”). The purpose of the restitution provisions in particular is plainly to place actually harmed consumers back “to their original condition” (Restitution, *Black’s Law Dictionary* (4th Rev. ed. 1968)), and assumed reliance—which does not require proof of ascertainable consumer loss caused by the defendant—does not serve that purpose.

The premise of the OAG’s policy argument that “[r]equiring individualized proof would ... thwart the Legislature’s manifest purpose of deterring misconduct” (OAG Br. 22) is therefore false. Whatever it might have been doing with the provisions for statutory penalties to the government and damages for private plaintiffs, the legislature’s purpose in imposing restitution as an additional remedy was—definitionally—not to deter, but rather to cancel out the actual effects of actual harm on actual individuals, restoring them to the status quo ante. And in any event, the OAG’s parade of horrors (*id.*) can be safely disregarded: It has not identified a single case in the over 50 years since the enactment of Chapter 93A in which it sought restitution under an assumed-reliance theory, yet there is no evidence that its predicted harms have materialized.

3. Finally, the structure of Chapter 93A further confirms that restitution under Section 4 cannot be sustained by assuming reliance. As this Court has explained, “[a] statute must be interpreted as a whole” rather than “confin[ing] interpretation to the single section to be construed.” *Commonwealth v. Fleury*, 489 Mass. 421, 429 (2022) (quotation marks omitted); see also, e.g., *Conservation Comm. of Norton v. Pesa*, 488 Mass. 325, 335 (2021) (adopting construction that “is consistent with the over-all statutory scheme”). Further, “respect for the Legislature's considered judgment dictates that [courts] interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation.” *Depianti v. Jan-Pro Franchising Intern., Inc.*, 465 Mass. 607, 620 (2013) (citation omitted). As this Court has stated, “[w]e cannot ignore the practical effect of [a party's proposed] interpretation.” *Roberts v. Enter. Rent-A-Car Co. of Bos., Inc.*, 438 Mass. 187, 194 (2002).

Here, failure to give meaning to the textual limitations written into Section 4 would remove critical guardrails on the Attorney General's otherwise undisputedly “broad” (OAG Br. at 21) powers under Chapter 93A. See *Franklin Off. Park Realty Corp. v. Comm'r of Dept. of Env't Prot.*, 466 Mass. 454, 463 (2013) (rejecting a statutory interpretation as unreasonable because “it fail[ed] to consider the other exceptions set forth” in the

section and “swe[pt] so broadly as to make nearly all conduct subject to penalty without notice”).

Chapter 93A confers wide-ranging authority on the Attorney General in several respects. *First*, the conduct proscribed by Chapter 93A is incredibly broad: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” G. L. c. 93A, § 2. “Chapter 93A does not define what constitutes an ‘unfair or deceptive act or practice,’” and, indeed, “[t]here is no limit to human inventiveness in this field.” *Kattar v. Demoulas*, 433 Mass. 1, 13 (2000) (quotation marks and citation omitted).⁴ The expansive definitions of “trade” and “commerce” further stretch the bounds of proscribed conduct; Section 1 of Chapter 93A states that “trade” and “commerce” “shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.” *See Commonwealth v. DeCotis*, 366 Mass. 234, 239 (1974).

⁴ The regulation defining Section 2’s proscribed practices only underscores the breadth of the statute, encompassing the failure “to comply with existing statutes, rules, regulations or laws, meant for the protection of the public’s health, safety, or welfare ... intended to provide the consumers of this Commonwealth protection.” 940 MA ADC 3.16. By its terms, the regulation “could be interpreted to include a violation of any statute in the Commonwealth.” *Darviris v. Petros*, 442 Mass. 274, 282 n.9 (2004).

Second, under Section 4, the Attorney General need only have “reason to believe” that a person is engaging in or about to engage in proscribed conduct in order to bring suit. *See* G. L. c. 93A, § 4; *cf. id.* § 9 (as to private civil actions, requiring that the plaintiff have been “injured by another person’s use or employment of any method, act or practice declared to be unlawful by section two”). And the Attorney General also has at her disposal the powerful tool of civil monetary penalties of up to \$5,000 per individual violation (*see id.* § 4)—which, as demonstrated by the over \$114 million civil monetary penalty award here, can create massive liability.

The Attorney General’s broad authority to enforce Chapter 93A is exactly the reason that the clear statutory limits on her authority that *do* exist must be enforced. The legislature struck a finely tuned balance: It conferred wide-ranging power on the Attorney General to enforce Chapter 93A but concurrently imposed limits on such authority to protect the rights of businesses accused of violations. *See, e.g.,* G. L. c. 93A, § 4 (requiring that a suit brought by the Attorney General “be in the public interest”; requiring “ascertainable loss” and causation for restitution).

The superior court’s assumed-reliance approach upsets that balance. Under the court’s approach, the Attorney General can bring suit for

nearly any statutory violation by a consumer business and obtain massive restitution amounts based on total revenues without even allegations of individualized losses. These “practical effects” of the superior court’s interpretation (*Roberts*, 438 Mass. at 194) show that it is “[in]sensible” (*Depianti*, 465 Mass. at 622).

In all, each of the traditional tools of statutory interpretation supports a construction of Section 4 that requires proof of actual, ascertainable loss that is actually caused by the defendant’s conduct in order for a court to award restitution, contrary to the superior court’s novel assumed-reliance approach.

B. There is no basis in Massachusetts case law for assumed reliance.

Tellingly, neither the superior court nor the OAG cited a single Massachusetts case that assumed reliance for restitution in a Section 4 Chapter 93A suit. Indeed, it appears that no other Massachusetts court has done so.

Instead, Massachusetts courts have consistently awarded restitution only for specific ascertainable losses proven to be caused by the alleged wrongdoing. *See, e.g., Commonwealth v. AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 332, 331-332 (1999) (in action by the Attorney Gen-

eral, superior court “determined that the defendants had violated [Section 2] at least 2,345,000 times,” but awarded restitution only “to those persons (nine) who had filed affidavits setting forth the amount paid to defendants”); *Commonwealth v. Maroun*, 2022 WL 18145481, at *1, *30 (Mass. Super. Ct. Mar. 18, 2022) (“account[ing]” for the fact that defendant immigration lawyer’s “unfair or deceptive conduct ... likely impacted dozens more ... clients” through the imposition of civil monetary penalties, but awarding restitution only with respect to “the testifying clients”); *cf. Commonwealth v. Crowther*, 2018 WL 3520805, at *7 (Mass. App. Ct. July 23, 2018) (unpublished) (all individuals “in the final restitution pool” submitted specific testimony “via affidavit or sworn questionnaire response”).

That the OAG disclaims (at 27) ever having “attempted to obtain restitution on behalf of more consumers than those who ultimately received it” in these cases proves the point: Even the OAG has long believed restitution is only available for ascertainable losses caused by the specific alleged wrongdoing. Indeed, the Commonwealth’s arguments in *Crowther* reflect that understanding. *See* Commonwealth Br. 41-42, *Commonwealth v. Crowther*, No. 2017-P-0029 (Mass. App. Ct. Apr. 10, 2017) (Dkt. No. 24) (arguing that superior court’s remedy “would force

clients to sustain a loss directly caused by Defendants’ conduct”); Commonwealth Reply Br. 37-38, *Commonwealth v. Crowther*, No. 2017-P-0029 (Mass. App. Ct. Oct. 23, 2017) (Dkt. No. 42) (“[T]he record below contains testimony ... from over 100 clients as to how they were deceived and the harm caused by such deception.”).

For its part, the OAG does not identify a single decision that assumed reliance for restitution in a Chapter 93A Section 4 suit. All it can muster are inapposite cases involving *private plaintiff* suits—which may be brought by persons “injured by” the alleged wrongdoing, without the additional text in Section 4 emphasizing the need for close causation (G. L. c. 93A, § 9). And the Court in those private plaintiff suits stated only that *actual reliance* is not required for an award of *damages*. OAG Br. at 21-22 (citing *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503 (2011); *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394 (2004)). Indeed, the OAG’s cited cases affirm the key requirement that there be “a causal connection between the seller’s deceptive act and the buyer’s injury or loss.” *Casavant*, 460 Mass. at 503; *Aspinall*, 442 Mass. at 401 (“[O]ur own decisions have made perfectly clear ... [that] causation is a required element of a successful G. L. c. 93A claim.”).

Failing all else, the OAG elevates a statement from *DeCotis* that relief in a Section 4 suit “is not intended to be limited ... to those persons

who are listed in the Attorney General’s bill.” OAG Br. at 28. But that statement means only what it says; as the Court made clear, it does not mean that relief can somehow expand beyond “wronged persons” (*DeCotis*, 366 Mass. at 245-246). In *DeCotis*, because the alleged wrongdoing was “the practice of charging a fee for no service whatsoever” (*id.* at 241), “the collection of resale charges by the defendants” was itself the unfair act (*id.* at 242), and all individuals who paid such charges were “wronged persons” (*id.* at 245-246). Not so here.

The superior court’s adoption of assumed reliance for restitution strayed from established Massachusetts precedent, further warranting vacatur.

C. Federal FTCA case law is both abrogated and inapplicable to Chapter 93A restitution.

With no basis to be found in the text of Section 4 or Massachusetts case law, the superior court based its adoption of the assumed-reliance theory solely on a line of federal cases interpreting Section 13(b) of the Federal Trade Commission Act, or FTCA. *See* RA 22/190 (adopting the rule of *McGregor v. Chierico*, 206 F.3d 1378 (11th Cir. 2000) and *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993), that “[a] presumption of actual reliance arises once the [FTC] has proved that the Defendant made material misrepresentations, that they were widely disseminated,

and that consumers purchased the Defendant’s product”). But that case law cannot support the result here, for two reasons: It is inapplicable to the divergent text of Chapter 93A, and its underlying premise has been undermined by subsequent federal-law developments.

1. Chapter 93A differs importantly from the FTCA.

First, the OAG’s federal authority interpreting the FTCA is inapposite with respect to Section 4 of Chapter 93A. Those cases involved Section 13(b) of the FTCA, and notably lacking from that section (because it does not discuss restitution at all, *see infra* pages 32-33) are the specific textual prerequisites for restitution that appear in the Massachusetts statute. *See* Section I.A, *supra*. Naturally, a statute containing specific restrictions should be construed more narrowly than one without them. *Cf., e.g., Ciani v. MacGrath*, 481 Mass. 174, 180 (2019) (Legislature’s choice of “different words strongly suggests that it intended to convey a different meaning”). And the FTCA provisions that do explicitly authorize restitution under specified circumstances, such as violation of a regulation or administrative cease-and-desist order (*see* 15 U.S.C. §§ 45(l), 57b(b)), similarly lack key features of Chapter 93A Section 4, in particular the requirement of “ascertainable loss” suffered “by reason of” the prohibited practice. G. L. c. 93A, § 4.

The OAG’s characterization of both statutes as generally requiring “harm and causation” paints with too broad a brush. The “ascertainable loss” language present in Section 4 and absent from 15 U.S.C. § 57b(b) uniquely emphasizes that a consumer’s injury must be actual, not hypothetical. *Supra* at 13-14. And the “resulting from” language in 15 U.S.C. § 57b(b) does not require the same degree of causation as the “by reason of” language in Section 4 of Chapter 93A. *See Burrage*, 571 U.S. at 212-213 (“courts regularly read phrases like ‘results from’ to require but-for causality,” whereas “‘by reason of’ requires *at least* a showing of ‘but for’ causation” (emphasis added)); *Bridge*, 553 U.S. at 654 (“[B]y reason of []” requires “a showing that the defendant’s violation not only was a ‘but for’ cause of his injury, but was the proximate cause as well”).

Moreover, while Chapter 93A directs courts to “be guided by” interpretations of the FTCA under certain circumstances (G. L. c. 93A, § 2(b)), that direction is limited to interpretations of the identical state and federal *substantive* prohibitions on “[u]nfair methods of competition” and “unfair or deceptive acts or practices” (*id.* § 2(a); 15 U.S.C. § 45(a)(1))—not interpretations of remedial provisions, which differ between the statutes. That is, Section 2(b) of Chapter 93A provides that “[i]t is the intent of the legislature that in construing paragraph (a) of this section”—Chap-

ter 93A’s substantive prohibition on unfair competition and unfair or deceptive practices—“the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)),” which contains the corresponding federal substantive prohibition. G. L. c. 93A, § 2(b). This makes sense: the text of Section 2(a) of Chapter 93A is *identical* to that of Section 5(a)(1) of the FTCA save for some jurisdictional language:

G. L. c. 93A, § 2(a)	15 U.S.C. § 45(a)(1)
“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”	“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

The remedial language, on the other hand, differs significantly from the federal statute, indicating a different intent from the Legislature. *See supra* pages 13-17, 28-29. That is, the legislature’s “express” instruction that Section 5(a)(1) of the FTCA guide courts in construing unfair competition and unfair or deceptive practices “implies the exclusion of” that instruction with respect to other sections of Chapter 93A. *Halebian v. Berv*, 457 Mass. 620, 628 (2010); see also *Commonwealth v. Purdue*

Pharm., L.P., 2019 WL 5495716, at *3 & n.2 (Mass. Super. Ct. Oct. 8, 2019) (declining to construe Section 4 in parallel with federal interpretations of FTCA’s procedural provisions).

Again, the OAG’s cases do not counsel otherwise. *See* OAG Br. 26-27 (citing *Commonwealth v. Fall River Motor Sales*, 409 Mass. 302 (1991), and *Commonwealth v. AmCan Enters.*, 47 Mass. App. Ct. 330 (1999)). In *Fall River*, the Court “consider[ed]” the “neither exclusive nor binding” federal interpretation of 15 U.S.C. § 45(l) regarding factors for determining the penalty for a party violating a consent decree only because “the parties [had] specifically directed the judge’s attention to th[ose] factors.” 409 Mass. at 311. In *AmCan*, the trial judge merely “considered the factors set forth in [*Fall River*],” and because neither party challenged the use of those factors as impermissibly applying FTCA standards to Chapter 93A, the court of appeals had no occasion to address the issue. *AmCan*, 47 Mass. App. Ct. at 338-339. In neither case was the incorporation of federal law a contested point.

2. *The OAG’s federal authority is of questionable ongoing validity.*

Apart from the important differences between Section 4 and the FTCA, and taking the superior court’s line of federal cases on its face, the

premise underlying those cases has been abrogated by the U.S. Supreme Court.

Unlike Section 4 of Chapter 93A, the analogous provision in the FTCA, Section 13(b), does not explicitly authorize restitution, instead discussing only injunctive relief. *Compare* G. L. c. 93A, § 4, *with* 15 U.S.C. § 53(b). But most federal courts of appeals had held that “consumer redress”—that is, equitable monetary relief like restitution or disgorgement—was nevertheless authorized by Section 13(b) as ancillary to the injunctive relief explicitly specified by the statute. *E.g.*, *McGregor*, 206 F.3d at 1387 (collecting cases). And it was that implied Section 13(b) restitution authority that the cases cited by the superior court had interpreted not to require proof of reliance. *Id.*; *see also Figgie*, 994 F.2d at 605 (“It is well established with regard to Section 13 of the FTC Act ... that proof of individual reliance by each purchasing customer is not needed.”); RA22/192; RA23/47.

But in 2021, the U.S. Supreme Court held that Section 13(b) of the FTCA does not authorize monetary equitable relief *at all*—never mind restitution without proof of causation. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021) (“The question presented is whether [Section 13(b)] authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement. We conclude that it does

not.”). The sole authority invoked by the superior court for its assumed-reliance rule is therefore critically undermined.

The OAG acknowledges that “the Supreme Court ... rejected restitution” under Section 13 of the FTCA in *AMG* but argues that courts continue to apply the “presumed reliance” approach under Section 19 of the FTCA (15 U.S.C. § 57b(b)). OAG Br. 21 n.1 (citing *FTC v. ZAAPPAAZ, LLC*, 140 F.4th 675, 679 n.2 (5th Cir. 2025)); *but see ZAAPPAAZ*, 140 F.4th 675, 686 n.6 (Englehardt, J., dissenting in relevant part). That is beside the point; the superior court relied only on authority construing Section 13(b) of the FTCA, *not* Section 19. And FTCA Section 19 authorizes “the payment of damages” (15 U.S.C. § 57b(b))—it is not, like Section 4 of Chapter 93A, narrowly drawn to permit only injunctive and restorative relief, and it lacks the specific text, discussed above, emphasizing the necessity of close causation. *See* pages 14-15, 29, *supra*.

And in any event, even the courts lately adopting this rule have made clear that the “presumption of consumer reliance” is “rebuttable” (*ZAAPPAAZ*, 140 F.4th at 679-680), whereas here, as Defendants explain, the superior court brushed aside evidence tending to *disprove* reliance, effectively rendering the presumption conclusive. Defs. Reply Br. 18-19.

* * *

In sum, the superior court’s adoption of an assumed-reliance rule for restitution under Section 4 is contrary to the statutory text, has no basis in Massachusetts precedent, and is unsupported even by the out-of-state authority on which the court exclusively relied. The Court should vacate the superior court’s erroneous decision.

II. ASSUMED RELIANCE INVITES SPRAWLING LIABILITY FOR BUSINESSES, WITH COSTS PASSED DOWN TO CONSUMERS.

Finally, not only is the superior court’s approach wrong as a matter of Massachusetts law, it also makes little practical or policy sense. Indeed, this case is emblematic of the massive and unwarranted liability for businesses that will result if assumed reliance for restitution is widely adopted, with consumers ultimately suffering the costs.

The Attorney General here obtained “the largest total of civil penalties in an action brought by the Attorney General’s Office under the Massachusetts Consumer Protection Act.” Massachusetts, Office of the Attorney General, *Superior Court Orders Health Insurance Companies To Pay Over \$165 Million For Deceptive Sales Scheme That Cheated Massachusetts Customers*, perma.cc/5NU3-P7MZ (Jan. 6, 2025). Notwithstanding a \$114 million civil monetary penalty award, assumed reliance

permitted the government to tack on an additional *\$50 million* of purported restitution without proving that a single consumer was induced to purchase insurance through the alleged deceptive practices here.

This practice—using gross receipts to calculate many-million-dollar restitution awards with no attempt to find a link to individual losses—sweeps far too broadly and exposes businesses to liabilities that are unconnected to the harms they allegedly caused. Tens or hundreds of thousands of consumers (or more) may have purchased a product or a service. Indiscriminately using the consumer base as the multiplier for restitution amounts, without requiring any proof of harms actually caused by the allegedly wrongful conduct, easily leads to restitution judgments in excess of tens and hundreds of millions of dollars. Such gargantuan punitive judgments will do more than harm a business’s bottom line—they will lead to increased costs for consumers, closed businesses, and a sluggish economy.

Faced with the specter of such massive judgments, many consumer businesses will predictably be pressured to settle, even if they are not liable, before the government presents a grain of evidence. *Cf., e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (“[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.

Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”); *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 474 (2013) (“[C]lass actions can entail a risk of in terrorem settlements.”) (quotation marks omitted). And attorneys general of other states are likely to copy this tactic, exposing businesses to potentially ruinous liability—unconnected to consumer harm—not only in Massachusetts, but nationwide.

The unfortunate upshot is that consumers will suffer. Faced with increased costs, a business has only two choices: internalize those costs or pass them on to their customers. If businesses pass increased costs down to consumers, that will obviously harm those consumers directly. But if businesses internalize these massive costs, they will have to divert resources from the productivity and cutting-edge research that makes Massachusetts a hub for American innovation and the U.S. economy the envy of the world. It may even threaten businesses’ viability, leading in the long term to fewer businesses in the marketplace, decreased competition, and increased prices, harming consumers as well.

In all, the chilling effect wrought by the superior court’s assumed-reliance approach could well decrease both supply and market innovation, to the detriment of all. *Cf.* Ralph K. Winter, *Paying Lawyers, Em-*

powering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945, 947-948 (1993) (critiquing bodies of law that “expose investors to unjustified civil and criminal liability which benefits only the legal profession”). If restitution is to be ordered, it must be tied to compensating consumers who were *actually* harmed by reason of the allegedly deceptive practices—indeed, that is the very nature of restitution.

The superior court’s adoption of an assumed-reliance theory of restitution is contrary to law, logic, and sound public policy. The Court should so hold and accordingly vacate the superior court’s decision to ensure that it does not spread.

CONCLUSION

The Court should vacate the judgment of the superior court.

Dated: September 18, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of amicus briefs, including Rules 17 and 20.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. A. P. 20(a)(2)(D), the brief contains 5,979 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, version 2507, build 19029.20244, in 14 point New Century Schoolbook font. The undersigned has relied on the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I, Dana McSherry, hereby certify, under the penalties of perjury, that on September 18, 2026, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, and I served two copies on the following counsel either by first-class mail or its equivalent, pursuant to Mass. R. A. P. 13(c) and 19(d)(1), or by electronic mail with consent of the counsel being served, pursuant to Mass. R. A. P. 13(c):

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