No. DAR-30645
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 DEFENDANTS-APPELLANTS/CROSS-APPELLEES' APPLICATION FOR DIRECT APPELLATE REVIEW

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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.

RULE 17(C)(5) STATEMENT

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.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses 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 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 expansive and novel construction of the restitution provision in Section 4 governing suits initiated by the Massachusetts Office of the Attorney General.

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INTRODUCTION AND ARGUMENT SUMMARY

Not satisfied with recovering civil monetary penalties in excess of $114 million, 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* allegedly deceptive statements. *See* App. for D.A.R. at 26.

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." App. For D.A.R. Add. 138, 140 (emphasis added). 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 grant direct appellate review to reject the validity of this extraordinary approach to proving (or, more precisely, not proving) reliance for purposes of restitution under Chapter 93A. 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 both 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 order thus raises issues "of such public interest that justice requires a final determination by the full Supreme Judicial Court." Mass. R. A. P. 11(a). The Court should grant direct appellate review.

ARGUMENT

I. THE COURT SHOULD CONFIRM THAT ASSUMED RELIANCE IS INSUFFICIENT TO DEMONSTRATE THE ELEMENTS OF RESTITUTION.

This Court should grant direct review to make clear that, 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 superior 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—and that is no longer good law in any event. In fact, the text and structure of Section 4 preclude any theory of assumed reliance, and the Court should correct the superior court's misapprehension of Massachusetts law before it spreads, to the detriment of businesses and consumers alike.

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." App. For D.A.R. Add. 136 (quoting *Bosland* v. *Warnock Dodge, Inc.*, 197 N.J. 543, 558 (2009)).

Second, 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)). 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 findings that asserted material misrepresentations were widely disseminated and consumers purchased the products. App. For D.A.R. Add. 138, 181. 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* App. for D.A.R. at 26.

The superior court's decision therefore reads these requirements for restitution in an attorney-general suit—that consumers suffer "ascertainable loss as a result 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. 134, 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).

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. 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* App. for D.A.R. at 19, 26.

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 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.

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 equita-

ble 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.[1]

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"

[1] To the extent the government may argue that decoupling restitution from reliance may nevertheless further some broadly defined purpose by deterring future fraudulent conduct through massive restitution awards, it is enough to observe that "[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).

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 broad powers under Chapter 93A. S*ee Franklin Off. Park Realty Corp.* v. *Comm'r of Dept. of Env't Prot.*, 466 Mass. 454, 465 (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 broad 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).[2] 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*." (Emphasis added). *See Commonwealth* v. *DeCotis*, 366 Mass. 234, 239 (Mass. 1974).

[2] 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, the superior court did not cite a single Massachusetts case that assumed reliance for restitution in a 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 General, 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").

The superior court's adoption of assumed reliance for restitution is novel in Massachusetts law, further meriting direct appellate review.

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 interpretating the Federal Trade Commission Act, or FTCA. *See* App. for D.A.R. Add. 138 (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.

First, that authority 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 24-25) 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.

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. *See* G. L. c. 93A § 2(b) ("It is the intent of the legislature that in construing paragraph (a) of this section"—that is, the substantive probation 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 federal substantive prohibition); *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).

Second, the premise underlying the superior court's line of federal 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 courts 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.").

But in 2021, the Supreme Court held that Section 13(b) of the FTCA does not authorize monetary equitable relief *at all*—never mind restitution without proof of reliance. *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.

* * *

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 persuasive authority on which the court exclusively relied. The Court should grant direct appellate review to rectify this error of law.

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 addition *$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 un-

connected 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 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 induced 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 attor-

neys 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, Empowering 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, novel in Massachusetts law, is contrary to law, logic, and sound public policy. The Court should grant direct review to ensure that it does not spread.

CONCLUSION

The Court should grant the application for direct appellate review and reverse or vacate the judgment of the superior court.

Dated: November 28, 2025

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 4338 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.

Dated: November 28, 2025

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CERTIFICATE OF SERVICE

I, Dana McSherry, hereby certify, under the penalties of perjury, that on November 28, 2025, 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, 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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