No. S256927

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IXCHEL PHARMA, LLC,

Plaintiff and Appellant,

v.

BIOGEN, INC.,

Defendant and Respondent.

On Certified Questions from the United States Court of Appeals for the Ninth Circuit, Case No. 18-15258
Judge William B. Shubb, Case No. 2:17-cv-00715-WBS-EFB

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF CALIFORNIA CHAMBER OF COMMERCE AND CALIFORNIA BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF RESPONDENT BIOGEN, INC.

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The California Chamber of Commerce ("CalChamber") and the California Business Roundtable ("the Roundtable") respectfully request permission to file the attached amici curiae brief in support of Defendant and Respondent Biogen, Inc., pursuant to California Rules of Court, rule 8.520(f).

CalChamber is a non-profit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. Although CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber advocates for the interests of its members by filing amicus curiae briefs in cases, like this one, involving issues of significance to the California business community.

The California Business Roundtable is a nonpartisan organization comprised of the senior executive leadership of major employers throughout the State, with a combined workforce of over 750,000 employees. For more than 40 years, the Roundtable has identified the issues critical to a healthy

business climate and provided the leadership needed to strengthen California's economy and create jobs. Among other things, the Roundtable concerns itself with policies and conditions that undermine economic efficiency and structural stability, diminish the total economic surplus created by California's economy for the collective benefit of all its participants, and place California at a competitive disadvantage in the U.S. and global economies.

There are two certified questions before this Court: (1) whether Section 16600 of the California Business and Professions Code voids a contract by which a business is restrained from engaging in a lawful trade or business with another business; and (2) whether a plaintiff must plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time. These questions are of central importance to the California business community because the answers will impact the legality of long-standing, pervasive, and common procompetitive business ventures and the contours of competition for business contracts within California. CalChamber and the Roundtable, therefore, seek to submit this brief to assist the Court in its review of these questions with a focus on the impact the Court's ruling could have on the California economy and its participants. As shown in their proposed brief, adoption of the novel legal positions advanced by Plaintiff and Appellant Ixchel Pharma, LLC would reverse decades of precedent relied upon by those conducting business within the state and place California law far outside the mainstream,

imposing substantial burdens on a wide array of legitimate procompetitive business activities, harming consumers, chilling investment, and threatening to drive innovation and legitimate business collaboration arrangements to other jurisdictions. Vigorous competition for at-will business contracts would become subject to civil liability, and indispensable provisions of garden-variety business arrangements like franchise agreements and joint ventures would become *per se* unlawful. The proposed brief shows that these results pose an existential threat to commerce in California.

For these reasons, and those more fully expressed in the brief, CalChamber and the Roundtable respectfully request leave to file their amici curiae brief in support of Defendant.[1]

DATED: February 28, 2020

Respectfully Submitted,

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[1] No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, their counsel in this appeal, and Apple Inc., made a monetary contribution intended to fund the preparation or submission of this brief. (*See* Cal. Rules of Court, rule 8.520(f)).

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Antitrust laws and business torts must strike a careful balance between protecting competition and preventing unfair conduct. In this case, Plaintiff and Appellant Ixchel Pharma, LLC ("Ixchel") seeks to upend that balance. First, Ixchel's lawsuit aims to overturn more than a century of antitrust precedent by claiming that Section 16600 of the Business and Professions Code ("Section 16600") constitutes a *per se* ban on any contractual provisions within business-to-business agreements that can be characterized as restricting a party's business activities or options. Second, Ixchel asks this Court to adopt a test for tortious interference with at-will contracts that would outlaw the very heart of competition: earning business away from one's competitors by offering better terms. Adopting Ixchel's positions would existentially threaten a wide array of long-standing, well-established, procompetitive business structures and ventures commonly entered into by businesses in California and elsewhere.

California law has historically permitted reasonable restraints on competition within business-to-business agreements. Far from endorsing the extreme position advocated by Ixchel, this Court has applied a rule-of-reason analysis to determine whether a provision in a business-to-business agreement violates Section 16600. Conversely, this Court has applied a rule of *per se* invalidity under Section 16600 *only* in the context of post-employment non-compete restrictions placed on natural persons and naked restraints on

competition. Consistent with the statutory history of Section 16600 and both federal and state antitrust law, other restrictions that are ancillary to broader business-to-business relationships have been analyzed under an antitrust rule-of-reason approach.[2]

Despite Ixchel's argument, the standard for whether a contract violates Section 16600 is not whether the contract's provisions restrain trade in any way; every contract necessarily restrains business activity in some manner while promoting it in others. Rather, the standard as articulated in long-standing California jurisprudence is whether the contract *unreasonably* restrains trade.[3]

Ixchel's proposed rule of *per se* illegality for restrictions within business-to-business agreements would run contrary to the policy and rationale of the *per se* rule, which is intended to address conduct that has no procom-

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[2] A naked restraint of trade is an agreement "with no purpose except stifling of competition." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 671 n.20, affd. (1986) 475 U.S. 260.) Ancillary restraints, by contrast, are those that are "incidental to another legitimate purpose" (*id.* at p. 665), for example, a lease agreement that places limitations on the products the lessee may sell (*Martikian v. Hong* (1985) 164 Cal.App.3d 1130, 1133).

[3] (*Great W. Distillery Prods. v. John A. Wathen Distillery Co.* (1937) 10 Cal.2d 442, 448; *Martikian*, *supra*, 164 Cal.App.3d at 1133; *Centeno v. Roseville Cmty. Hosp.* (1979) 107 Cal.App.3d 62, 69–72; *Dayton Time Lock Serv., Inc. v. Silent Watchman Corp.* (1975) 52 Cal.App.3d 1, 6; *Gatsinaris v. ART Corp. Sols. Inc.*, (C.D. Cal. July 10, 2015, No. SA CV 15-0741-DOC) 2015 WL 4208595, at *13–14.)

petitive effects or redeeming virtues. The scope of common California business agreements that would suddenly become void as *per se* unlawful would be extensive, including numerous arrangements that are typically pro-competitive and have to this point been evaluated under the rule of reason, such as joint venture exclusivity provisions, exclusive territory agreements for distributors or retailers of a particular brand, and exclusive dealing provisions like those commonly found in franchise agreements. By preventing one company from free-riding off the knowledge, research, development, training, marketing, and other investments made by a collaborating company, exclusivity provisions can provide the protections necessary to incentivize investments aimed at developing innovative technology, creating new products, and enhancing interbrand competition. The resulting lower costs, improved service, reduced prices, increased output, and expanded choices all increase consumer welfare. These everyday contractual arrangements—which permeate countless commercial relationships throughout California—promote competition and further trade. Ixchel nonetheless asks this Court to condemn them all as unlawful in one fell swoop.

Similarly, Ixchel's theory of tortious interference with at-will contracts, if adopted, would serve only to restrain competition. Eliminating the need to demonstrate an independently wrongful act to state a claim for or prove tortious interference with at-will business-to-business contracts would

deter vigorous competition for such contracts and expose businesses to liability for procompetitive, fair, and efficient efforts to win customers and form mutually beneficial business relationships.

California has the fifth-largest economy in the world—59% larger than the next U.S. state in real GDP. It is hard to overstate the potentially disastrous consequences if common and typically procompetitive business arrangements are suddenly deemed *per se* unlawful, and competition for at-will contracts *itself* becomes subject to civil liability in California (in contrast to the more permissive approach followed by countless other jurisdictions). In this integrated U.S. and world economy, businesses may choose to avoid California and many businesses already here may have no choice but to consider relocating aspects of their operations elsewhere. These potentially catastrophic results are easily avoided. This Court should hold that ancillary restraints on competition within business-to-business agreements remain subject to an antitrust rule-of-reason analysis under Section 16600, and that an independently wrongful act is an essential element of a claim for tortious interference with an at-will business-to-business contract.

II. ARGUMENT

A. Section 16600 Should Be Construed To Apply The Antitrust Rule Of Reason Analysis To Ancillary Non-Compete Restrictions In Business-To-Business Agreements.

1. This Court Should Address How Section 16600 Applies To Non-Compete Restrictions On Businesses.

Ixchel attempts to narrow the scope of this Court's inquiry to a yes-or-no question: *Does* Section 16600 apply to business-to-business contracts? (Reply Br. at pp. 6–7.) But, as Ixchel acknowledges, the certified question before the Court is "Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business?" (Opening Br. at p. 5.) Central to that question is *what substantive legal standard* Section 16600 applies to a non-compete restriction that is ancillary and subordinate to a broader, legitimate business-to-business relationship—*i.e.*, whether Section 16600 *automatically* voids such a restriction, as Ixchel maintains, or instead requires analysis of its competitive effects consistent with California's other competition laws and this Court's longstanding interpretation of Section 16600.

This Court's answer to the actual question at issue—namely, what standard applies to business-to-business agreements under Section 16600—is necessary to resolve this litigation, guide other ongoing litigation (*e.g.*, *Quidel Corp. v. Superior Court* (2019) 39 Cal.App.5th 530, 542, review

granted Nov. 13, 2019, 451 P.3d 776), and provide clarity for thousands of California businesses regarding whether the traditional antitrust rule-of-reason standard applicable to ancillary contractual restraints will continue to govern their business relationships as it has for over a century, or whether a wide array of common contractual terms will suddenly be invalidated by the adoption of Ixchel's novel and destructive *per se* rule. The Court should resolve the confusion and uncertainty this high-profile dispute has generated within the business community and bring clarity to this important issue by confirming that Section 16600 requires ancillary business-to-business restraints to be evaluated under the antitrust rule of reason.

2. This Court Historically Has Applied The Antitrust Rule Of Reason To Ancillary Restraints On Competition Within Business-To-Business Agreements Under Section 16600's Predecessor.

As Defendant and Respondent Biogen, Inc. ("Biogen") aptly explains, the text, context, and history of Section 16600 require applying the antitrust rule of reason to restraints on competition that are ancillary to business-to-business agreements. (Answering Br. at pp. 47–68.) This Court's decision to apply a rule of *per se* invalidity under Section 16600 in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945, is not to the contrary. That decision was limited to post-employment non-compete restrictions on natural persons. Historically, only restraints on the employment opportunities of

natural persons, together with naked restraints of trade, have been condemned as *per se* unlawful under Section 16600. (*See* Answering Br. at pp. 51–52; *see also Artec Grp., Inc. v. Klimov* (N.D. Cal., Dec. 22, 2016, No. 15-CV-03449-EMC) 2016 WL 8223346, at *3 [considering *Edwards* and declining to find non-compete provision in business-to-business contract unenforceable as a matter of law under Section 16600].)

What is now Section 16600 was originally enacted as Civil Code Section 1673. (*Edwards*, *supra*, 44 Cal.4th at pp. 945–946.) Section 1673 superseded the common law "rule of reasonableness" (*id.* at p. 945) that had previously applied to "an agreement by an employee or independent contractor not to compete with his employer after leaving that employment." (*Bosley Med. Grp. v. Abramson* (1984) 161 Cal.App.3d 284, 288.) Accordingly, this Court's decisions applying Section 1673 condemned as *per se* unlawful all post-employment non-compete restrictions on natural persons to which no statutory exception applied. (*Chamberlain v. Augustine* (1916) 172 Cal. 285, 287–288). Section 1673 also condemned as *per se* unlawful naked restraints of trade, such as market divisions and price-fixing (*Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510, 515) and monopolies (*Morey v. Paladini*, (1922) 187 Cal. 727, 737). By contrast, this Court consistently embraced the antitrust rule of reason in applying Section 1673 to restraints on competition that were ancillary to broader business-to-business agreements, such as exclusivity provisions that were ancillary to a business lease

agreement, declining to void such restraints as a matter of law where "competition is not stifled." (*Associated Oil Co. v. Myers* (1933) 217 Cal. 297, 299–300, 306.)

Thus, for example, in *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co.* (1937) 10 Cal.2d 442, this Court expressly rejected the assertion that Section 1673 mandated a rule of *per se* invalidity for exclusivity provisions in a dealership contract. The Court explained that "[t]he decisions in this state have recognized and applied the distinction made by authority elsewhere that if the public welfare be not involved and the restraint upon one party be not greater than protection to the other requires, the contract will be sustained although it in some degree may be said to restrain trade." (*Id.* at pp. 448–449.) Accordingly, the Court concluded, "the code sections here involved must be construed in the light of such well-settled principles." (*Id.* at p. 449.)

The *Great Western* Court then proceeded to apply that antitrust rule-of-reason standard to the exclusivity clause at issue, which expressly precluded the defendant from supplying its product to competitors of the plaintiff distributor within a specified geographic area. Far from applying the *per se* rule urged by Ixchel, the Court instead concluded that the exclusivity provision "would [not] have any tendency to stifle competition or create a monopoly in that class of commodity," and thus "in the absence of an attack

upon the validity of the apparent purpose of the contract, it must be considered valid." (*Ibid.*) On its own, *Great Western* is fatal to the erroneous interpretation advanced by Ixchel.

Not long thereafter, the Legislature renumbered Civil Code Section 1673 as Section 16600 of the Business and Professions Code, placing it in the same part of the Code as the California Cartwright Act, but without changing its substance. (§ 16600, added by Stats. 1941, ch. 526, § 1; §§ 16720 *et seq.*, added by Stats. 1941, ch. 526, § 1.) The Legislature had an opportunity to revise the statute but chose not to, reinforcing the antitrust rule-of-reason's application to restraints in business-to-business agreements. "[W]hen a statute has been construed by the courts and the Legislature thereafter reenacts the statute without changing the interpreted language, a presumption is raised that the Legislature was aware of and has acquiesced in that construction." (*People v. Bonnetta* (2009) 46 Cal.4th 143, 151.) This Court's previous construction of Section 1673 therefore governs the proper interpretation of Section 16600: post-separation non-compete restrictions on natural persons to which no statutory exceptions apply and naked restraints of trade are *per se* unlawful, but restraints on competition ancillary to legitimate business-to-business agreements are subject to an antitrust rule-of-reason analysis.

3. Applying The Antitrust Rule Of Reason To Restraints Within Business-To-Business Agreements Is Consistent With Longstanding California And Federal Antitrust Law.

Adherence to this Court's historical approach is necessary to prevent Section 16600 from diverging widely from the broader fabric of California antitrust law (and the antitrust laws of other jurisdictions). "Though the Cartwright Act" (Bus. & Prof. Code, §§ 16720 *et seq.*), much like Section 16600, "is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal." (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.) The Cartwright Act is patterned after the federal Sherman Act, "and decisions under the latter act are applicable to the former." (*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.* (1971) 4 Cal. 3d 842, 852.) The plain language of Section 1 of the Sherman Act, too, appears to bar any and all "restraint[s] of trade or commerce" (15 U.S.C. § 1), but more than a century of United States Supreme Court precedent and other federal courts' interpretations establishes that only a limited category of restraints is *per se* unlawful. (*E.g.*, *Chi. Bd. of Trade v. United States* (1918) 246 U.S. 231, 238; *see also Polk Bros. v. Forest City Enters., Inc.* (7th Cir. 1985) 776 F.2d 185, 188 ["Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment."]). Certain restraints on competition, like horizontal agreements among competitors to fix prices, are *per se* unlawful

because they almost "always ha[ve] anticompetitive effects and almost never ha[ve] procompetitive effects or 'redeeming virtue[s].'" (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 668.) All other restraints on competition are unlawful only if they violate the antitrust rule of reason, *i.e.*, if their anticompetitive effects outweigh any procompetitive benefits of the agreement. (*Chi. Bd. of Trade*, *supra*, 246 U.S. at p. 238.)

This Court has recognized that the Cartwright Act "effectively codifies" this same approach in California via Section 16725 of the Business and Professions Code. (*In re Cipro Cases I & II*, *supra*, 61 Cal.4th at p. 137 n.5.) Section 16725 expressly declares the view of the Legislature that "[i]t is *not* unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade." (Bus. & Prof. Code, § 16725 [emphasis added].) In other words, Section 16725 recognizes that business-to-business agreements that might be viewed as imposing a restraint but that have the effect of promoting competition or furthering trade will not be considered categorically unlawful under California law.

Ixchel altogether ignores this provision in its opening and reply briefs. In fact, it makes no attempt to square the novel *per se* treatment it seeks with this unambiguous expression of Legislative intent. "A statute must be construed 'in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.'" (*People v. Woodhead* (1987)

43 Cal.3d 1002, 1009 [quoting *People v. Shirokow* (1980) 26 Cal.3d 301, 307].) This principle of statutory interpretation is designed to avoid highly disfavored repeals by implication (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 43), but the need to harmonize Section 16600 and Section 16725 is even more pressing because they were re-enacted simultaneously (*see* Stats. 1941, ch. 526, § 1).

In short, Section 16725 is simply irreconcilable with an interpretation of Section 16600 that would impose a sweeping rule of *per se* illegality for ancillary non-compete restrictions in business-to-business agreements. Ixchel fails to offer any plausible explanation for why the Legislature should be deemed to have enacted incompatible statutes *in the same bill.*

Other provisions of the Cartwright Act confirm that the Legislature did not intend Section 16600 to operate as a categorical ban on business-to-business contractual restraints in the absence of meaningful harm to competition. For example, Section 16727 prohibits certain exclusive dealing agreements "where the effect of such . . . agreement . . . may be to *substantially lessen competition.*" (Bus. & Prof. Code, § 16727 [emphasis added].) This provision would be entirely superfluous if, as Ixchel argues, all exclusive dealing agreements—which by their terms prohibit dealing with others—and similar restraints must be condemned as *per se* unlawful under Section 16600 even *absent* any threatened harm to competition.

There is no reason to manufacture a conflict between Section 16600 and the Cartwright Act by adopting a default rule of *per se* invalidity for all restraints on competition within a business-to-business agreement. Doing so would upset more than a century of precedent, which has informed businesses' understandings of what constitutes lawful and procompetitive business arrangements in California and is the foundation upon which these same businesses have relied to execute their current and future business strategies. Countless business arrangements that traditionally have been analyzed in California and federal courts under the antitrust rule of reason would be presumptively invalidated by Ixchel's interpretation of Section 16600, thereby supplanting and disrupting the long-established legal regime governing such arrangements and upsetting the reasonable investment-backed expectations of thousands of California businesses.

For example, when otherwise competing companies collaborate to expand output to consumers, such as by building a joint retail facility, courts have recognized that ancillary agreements not to compete can "play[] an important role in inducing" that "productive cooperation." (*Polk Bros.*, *supra*, 776 F.2d at p. 190.) In *Polk Brothers*, two retailers agreed to construct a joint facility and agreed that one retailer would not compete with the other in sales of certain products. (*Id.* at pp. 189–190.) By preventing free-riding on one retailer's expensive advertising and demonstration efforts, the parties assured greater information to consumers in addition to the creation of new retail

outlets and greater access to products. (*Id.* at p. 190.) The ancillary restraint on competition "made the cooperation possible" and provided increased output to consumers; the court held that it therefore could not be condemned as *per se* unlawful. (*Ibid.*) If the Court adopted Ixchel's view, this agreement would be categorically unlawful despite its potential benefits to consumers because one retailer was restricted from selling a limited category of products.

Ixchel seeks to turn the bedrock of American antitrust jurisprudence on its head, and upend a principle this Court has explained succinctly and unambiguously: "injury to competition," not "[i]njury to a competitor," is "the proper focus of antitrust laws." (*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 186.) Federal law is to the same effect: as the U.S. Supreme Court has explained, the antitrust laws "were enacted for 'the protection of competition[,] not competitors.'" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, (1977) 429 U.S. 477, 488 [quoting *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 320].) Ixchel's proposed new rule would allow competitors to use laws intended to shield and promote competition as a sword to advance their own parochial interests at the expense of broader procompetitive goals.

The problems with Ixchel's arguments are not limited to business arrangements like joint ventures. Further examples of long-standing business arrangements that would be invalidated by Ixchel's interpretation of Section

16600 abound. Exclusive territory agreements for distributors involve a trade-off between competition at different levels in the supply chain, which courts have long refused to hold *per se* unlawful because they can have beneficial procompetitive effects by enhancing interbrand competition. (*E.g.*, *Great W. Distillery Prods.*, *supra*, 10 Cal.2d at pp. 446–447; *In re Sulfuric Acid Antitrust Litig.* (7th Cir. 2012) 703 F.3d 1004, 1012–1013.) As is well recognized, territorial restrictions can facilitate entry of new competitors into markets by insulating distributors or retailers of new brands from intrabrand competition. (*In re Sulfuric Acid Antitrust Litig.*, *supra*, 703 F.3d at p. 1013.) Indeed, this Court long ago rejected the contention that agreements providing for exclusive sales territories violated Section 16600's predecessor where such an agreement was "entered into, not for the purpose of restricting any trade or business, but for the purpose of promoting one." (*Great W. Distillery Prods.*, *supra*, 10 Cal.2d at pp. 446–447.) Ixchel's rule of *per se* invalidity for such restraints would foreclose any factual analysis of the purpose and effects of the broader agreements to which they attach, and effectively foreclose all such widely used, procompetitive business arrangements.

Similarly, other exclusive dealing arrangements, including exclusive distributorships and franchise agreements, reflect common methods of placing limited restraints on intrabrand competition to better position an enterprise for interbrand competition. (*E.g.*, *Cont'l T. V., Inc. v. GTE Sylvania Inc.* (1977) 433 U.S. 36, 38, 54–59; *UAS Mgmt., Inc. v. Mater Misericordiae*

Hosp. (2008) 169 Cal.App.4th 357, 365; *Redwood Theatres, Inc. v. Festival Enters., Inc.* (1988) 200 Cal.App.3d 687, 703.) They "are not deemed illegal per se [under the Cartwright Act] but may be illegal if they unreasonably restrict competition in a particular market." (*UAS Mgmt.*, *supra*, 169 Cal.App.4th at p. 365.) In distribution agreements, for instance, these restraints can incentivize distributors' investment of capital and labor in ways that ultimately benefits consumers, including advertising that provides greater information to consumers, enhanced service and repair facilities, and the like. (*Sylvania*, *supra*, 433 U.S. at pp. 54–55.)

Additionally, courts have long recognized the procompetitive justifications for exclusive dealing provisions in franchise agreements, which facilitate broader distribution of products and enable "the public [to] identify each [franchisee] outlet as one of a chain which offers identical products at a uniform standard of quality." (*Susser v. Carvel Corp.* (2d Cir. 1964) 332 F.2d 505, 517.) Thorough economic analysis is necessary to determine whether these limited restraints do more harm to competition than good (*Sylvania*, *supra*, 433 U.S. at pp. 58–59; *UAS Mgmt.*, *supra*, 169 Cal.App.4th at p. 365); but Ixchel's interpretation of Section 16600 would outlaw them outright.

The broader statutory context of Section 16600 compels the conclusion that unless (1) the purpose of an agreement is facially anticompetitive, or (2) a specific type of agreement is expressly condemned by statute without

reference to its effects, the only way to assess whether an agreement is lawful is to analyze its actual effects on competition—*i.e.*, to conduct a fact-based analysis and apply the antitrust rule of reason. Accordingly, this Court should hold that such analysis applies to restraints on competition within business-to-business agreements and reject Ixchel's position that "there is no 'rule of reason' in Section 16600." (Reply Br. at p. 8.) Ixchel's interpretation of Section 16600 would render California an outlier in this area of antitrust law, with concrete and serious consequences for commerce within the state. (*See* Section II.C., *infra.*) The legality of countless traditional business arrangements—including joint ventures with ancillary non-compete agreements, distributorships with exclusive territories, and franchise agreements—would be called into grave doubt, and unhappy contracting parties could invoke Section 16600 to void existing contracts altogether and escape their agreed-upon obligations. The legal regime on which California businesses have relied to structure their affairs for more than a century would be upended. These disastrous results are easily avoided by declining Ixchel's invitation to depart from this Court's longstanding precedent.

B. Proof Of An Independently Wrongful Act Is A Necessary Element Of A Claim For Tortious Interference With An At-Will Business-To-Business Contract.

As this Court has held, parties must be permitted to compete for at-will relationships as long as they do not act wrongfully. (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1144–1145, 1148; *see also* Restatement (Second) of

Torts § 768.) This Court has long recognized "the dangers inherent in imposing tort liability for competitive business practices" (*Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1136–1137), but that is precisely what Ixchel asks this Court to do in seeking to impose tort liability for inducing termination of an at-will contract in the absence of any wrongful conduct. This Court's precedents setting forth the elements of the interference torts point clearly in the other direction (*see* Answering Br. at pp. 30–32), and this case presents the opportunity to clarify the important principle that robust—but not independently wrongful—competition for at-will business-to-business contracts is not actionable.

More than twenty years ago, this Court assessed California's law of interference torts with an eye toward the evolution of the doctrine in the lower courts of appeal and in other jurisdictions. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 378, 392.) The Court recognized that the then-existing elements of interference with prospective economic relations too easily permitted meritless litigation targeting legitimate business conduct and held that a plaintiff must be required to prove that a defendant's interference was objectively wrongful "by some measure beyond the fact of the interference itself." (*Id.* at pp. 384, 392–393 [internal quotation marks omitted].) In so holding, this Court expressly cited the public benefits of business competition, which require cabining the interference

torts to "maximize[] areas of competition free of legal penalties." (*Id.* at p. 392.)

Roughly nine years later, this Court clarified that a plaintiff must establish wrongful means to state a claim for intentional interference with an at-will employment contract. (*Reeves*, *supra*, 33 Cal.4th at pp. 1144–1145.) Because the very nature of at-will contracts are that the parties are free to terminate them, inducing such termination is "'primarily an interference with the future relation of the parties,'" for which those parties have "'no legal assurance.'" (*Id.* at p. 1151 (quoting Rest.2d Torts, § 768, com. i.)) This Court explained, therefore, that "an interference with an at-will contract properly is viewed as an interference with a prospective economic advantage"—which requires proof of wrongful means. (*Id.* at p. 1152.) The Court again acknowledged the societal benefits of free competition for at-will contractual relationships. (*Id.* at p. 1151.)

These precedents and the principles underlying them logically lead to the conclusion that a plaintiff must prove independently wrongful means to state a claim for interference with an at-will contract, regardless of whether that contract is for employment. As this Court has explained, the "social rewards of commercial contests" require courts to "draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." (*Della Penna*, *supra*, 11 Cal.4th at p. 392.) Requiring a party to plead an independently wrongful act to prevail on a claim for tortious interference

with an at-will contract is necessary to preserve competition for business and to promote procompetitive business ventures.

In addition to the myriad of commonplace business arrangements that would be outlawed by Ixchel's interpretation of Section 16600, Ixchel's expansive version of tortious interference would subject businesses to potentially ruinous civil liability whenever their lawful efforts to compete for business cause a customer or supplier to terminate an at-will contract with a competitor in order to enter into a new and more beneficial business relationship with the defendant. Seeking to win customers by offering a better deal than that provided by a competitor is the essence of competition. Ixchel asks this Court to transform such lawful and beneficial competition into an actionable civil wrong. In doing so, Ixchel's model of tortious interference poses a direct threat to the heart of competition by creating liability for businesses that commit no wrong greater than offering a potential business partner a more enticing deal.

The existential threat to vigorous business competition that Ixchel's interpretation poses is not its only fatal flaw. It also creates a legal artifice that undermines the nature of terminable-at-will contracts and their bargained-for terms. By definition, parties to at-will agreements have no legal expectation of future relations. (*See Reeves*, *supra*, 33 Cal.4th at pp. 1151–1152.) But Ixchel's version of tortious interference would conjure up a legally-protected expectation of future relations, effectively nullifying at-will

termination provisions by providing a cause of action when a business dares to exercise its bargained-for right to terminate one at-will contract in favor of another. This result is nonsensical and would incentivize costly gamesmanship in contract negotiation and business competition. It is no surprise, then, that many other jurisdictions have declined to impose liability for inducing termination of at-will contracts without proof of independently wrongful conduct or intent. (*See* Answering Br. at pp. 36–37 [collecting authorities].)

Accepting Ixchel's artificial legal expectation of future dealings in terminable-at-will agreements would impose enforceable protections that contracting parties *expressly bargained away*, thereby restricting businesses' ability to freely negotiate lawful and advantageous contractual terms that preserve businesses' competitive options. The essence of competition is to earn business away from one's competitors, and the "social rewards" of that competition ultimately flow to consumers. (*See Della Penna*, *supra*, 11 Cal.4th at p. 392.) This Court should hold that, absent independently wrongful conduct, there can be no liability for tortious interference with at-will contracts.

C. Adopting Appellant's Legal Positions Would Harm California Businesses And Consumers.

Ixchel's interpretations of Section 16600 and tortious interference law would place California starkly at odds with other states in the market for

business and investment. If this Court adopted Ixchel's positions, many traditional, long-standing forms of business ventures—such as franchise agreements, joint ventures, distributorships that depend on exclusivity arrangements, and terminable-at-will business relationships—would be outlawed or restrained. As a result, innovation would be stunted, consumers would be harmed, and California would become an increasingly difficult jurisdiction in which to conduct business for small and large businesses alike. Simply put, businesses would start to invest elsewhere, putting California at an economic disadvantage.

Applying a rule of presumptive invalidity to restraints on competition within business-to-business agreements would disrupt longstanding business structures in California. Examples abound. Franchise agreements, which often include exclusivity and non-compete provisions, provide opportunities for aspiring small business owners to collaborate with and benefit from established brands. In particular, franchise businesses provide a path to business ownership for racial minority groups and women. In 2012, 30.8 percent of franchisees were owned by people who identified themselves as racial minorities, compared to 18.8 percent of non-franchised businesses. (International Franchise Association Foundation, *Franchised Business Ownership by Minority and Gender Groups* (2018), p. 1, <https://www.franchise.org/sites/default/files/2019-05/Franchise%20Business%20Ownership%202018.pdf>.) Additionally, 45.4 percent of franchised businesses

were female-owned or equally male-and-female-owned, compared to 43.5 percent of non-franchised businesses. (*Id.* at p. 6.) The percentages of franchised businesses owned by racial minorities and women have increased significantly since 2007, indicating remarkable momentum toward equal opportunities for business ownership facilitated by the franchise model. (*Id.* at p. 1.) But Ixchel's interpretation of Section 16600 would nullify franchise agreement exclusivity provisions that franchisors often consider crucial to brand success, because such provisions promote important uniformity and consistency among businesses carrying the franchisor's brand name.

Joint venture agreements provide another example of procompetitive business structures that can include ancillary restraints on competition, which are necessary to ensure that the benefits of the venture are shared by the parties. Indeed, in some cases, limited "horizontal restraints on competition are essential if the product is to be available at all." (*Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma* (1984) 468 U.S. 85, 101.) Courts have long recognized and upheld as reasonable restraints on competition within joint venture relationships which incentivize investments that ultimately benefit consumers. (*E.g.*, *Polk Bros.*, *supra*, 776 F.2d at p. 190.)

For example, in the realm of intellectual property, such as the case at bar, the Department of Justice and Federal Trade Commission have recognized that exclusive dealing arrangements may be procompetitive because

they can "encourage[] licensees to develop and market the licensed technology" or "increase[] . . . incentives to develop or refine the licensed technology." (U.S. Dep't of Justice and Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 12, 2017), p. 30, <https://www.justice.gov/atr/IPguidelines/download>.) The benefits of these technology advancements flow to consumers whose access to new inventions or drugs would otherwise be delayed or foreclosed entirely—benefits that Ixchel's interpretation of Section 16600 would prevent.

Vertical integration can also result in intrabrand efficiencies that benefit consumers and promote interbrand competition. To be sure, "[e]very extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement." (*Brown Shoe Co.*, *supra*, 370 U.S. at p. 324.) But to condemn those vertical restraints without analyzing their procompetitive benefits would run afoul of the fundamental principle that the antitrust laws are "enacted for 'the protection of competition[,] not competitors.'" (*Brunswick Corp.*, *supra*, 429 U.S. at p. 488 [quoting *Brown Shoe Co.*, *supra*, 370 U.S. at p. 320]; *accord Cel-Tech Commc'ns*, *supra*, 20 Cal.4th at p. 186.)

Ixchel dismisses the potential negative impact of its rule on vigorous competition for business in California as conjecture, claiming that this Court has thus far declined to hold that an independently wrongful act is required

to state a tortious interference claim. (Reply Br. at p. 15.) Despite Ixchel's claim, this Court has never affirmatively held that competing for an at-will non-employment contract is actionable absent proof of wrongful conduct, and lower courts have expressly rejected that view. (*See San Francisco Design Ctr. Assocs. v. Portman Cos.* (1995) 41 Cal.App.4th 29, 40.) Thus, it is hardly surprising that the harms resulting from Ixchel's view have not materialized. And while Ixchel asserts that "no . . . public policies" counsel in favor of this Court holding that independently wrongful conduct is required to state a claim for intentional interference with an at-will business-to-business contract (Reply Br. at p. 13), that is plainly wrong. California businesses, including members of CalChamber and the Roundtable, *will* hesitate to compete for at-will contracts if they face the likelihood of litigation costs and potential liability that Ixchel's rule would impose.

At bottom, Ixchel invokes laws designed to promote competition—and its consequent benefits to society—to protect itself from the operation of the market and the bargained-for terms of its own contract. This Court should decline Ixchel's invitation to fundamentally alter competition law and disrupt commerce in California.

III. CONCLUSION

For all of the foregoing reasons, this Court should reject Ixchel's overly narrow interpretation of the certified questions, and should hold that

(1) ancillary restraints on competition within business-to-business agreements are subject to an antitrust rule-of-reason analysis under Section 16600, and (2) an independently wrongful act is an essential element of a claim for tortious interference with an at-will business-to-business contract.

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CERTIFICATION OF WORD COUNT

Pursuant Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this Brief for Amici Curiae California Chamber of Commerce and California Business Roundtable contains 5,710 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: February 28, 2020

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PROOF OF SERVICE

I, Deborah Hensley, declare as follows:

I am employed in the District of Columbia; I am over the age of eighteen years and am not a party to this action; my business address is 1050 Connecticut Avenue N.W., Washington, D.C. 20036-5306, in said District. On February 28, 2020, I served the following documents:

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF CALIFORNIA CHAMBER OF COMMERCE AND CALIFORNIA BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF RESPONDENT BIOGEN, INC.

on counsel stated below, by the following means of service:

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☑ **BY MAIL:** By placing a true and correct copy thereof enclosed in a sealed envelope addressed as above, with postage thereon fully prepaid, in the U.S. Mail at Washington, D.C. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Washington, D.C., in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing as stated in affidavit.

☐ **BY ELECTRONIC SERVICE:** On the above-mentioned date, I caused the document to be sent to the person at the electronic notification addresses shown above.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct. Executed on February 28, 2020 at Washington, D.C.

Deborah Hensley