S256927

IN THE SUPREME COURT OF CALIFORNIA

IXCHEL PHARMA, LLC,
Plaintiff and Appellant,

v.

BIOGEN, INC.,
Defendant and Respondent.

ON REQUEST FOR A DECISION ON A QUESTION OF CALIFORNIA LAW
NINTH CIRCUIT CASE NO. 18-15258

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF QUIDEL CORPORATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), Quidel Corporation requests leave to file the attached amicus curiae brief in support of neither side.[1]

Quidel is a California-based, leading diagnostic healthcare manufacturer and is the defendant in *Quidel Corp. v. Superior Court* (2019) 39 Cal.App.5th 530[2], review granted November 13, 2019, S258283 (*Quidel*), on hold in this Court for the decision in this case. Quidel thus has a direct interest in the decision here.

Since the early 2000s, Beckman and Quidel (including its predecessor) have collaborated to develop, manufacture, and market a new test to detect congestive heart disease. Using Quidel's proprietary materials and know-how, Beckman manufactures the tests. Quidel in turn sells the tests, which run on Beckman's diagnostic machines.

As part of their contract, the parties included a common exclusivity provision to, among other things, prevent Beckman from expropriating the rewards of Quidel's efforts, protect confidential and trade secret information, and to encourage

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[1] Quidel certifies that no person or entity other than Quidel and its counsel authored this proposed brief in whole or in part and that no person or entity other than Quidel, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

[2] Beckman Coulter Inc. is plaintiff and real party in interest.

cooperation. Under the exclusivity provision, Beckman was required to supply the test only to Quidel and to refrain from developing a direct substitute for the product during the term of their relationship.

During the term of the agreement, however, Beckman sought to void the exclusivity provision under California Business and Professions Code section 16600. The trial court granted summary adjudication for Beckman, but the Court of Appeal reversed in a published decision.

Besides raising the question certified by the Ninth Circuit of *whether* section 16600 applies to disputes between businesses, *Quidel* brings up *how* section 16600 applies in disputes between businesses in an ongoing relationship. As we will show, the answer to that question is vital not only to Quidel, but to companies across California, to consumers who enjoy their products, and to the state's economy.

February 27, 2020

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AMICUS CURIAE BRIEF

INTRODUCTION

The Ninth Circuit's certified question asks this Court to determine whether Business and Professions Code section 16600[3] applies to contracts between two businesses. Given this Court's prior precedent going back over one hundred years, both parties properly agree that the answer is yes. The parties, however, disagree, on how section 16600 applies to such contracts. Relying on this Court's decision in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 (*Edwards*), Ixchel urges this Court to make a dramatic change in the law and hold, for the first time, that section 16600 voids *all* restraints in business contracts, regardless of context, purpose, or effect. (RBOM 8-10.) Quidel files this amicus brief to explain that section 16600 does not automatically void all contractual restraints in ongoing business relationships.

In *Edwards*, this Court held that under section 16600, "an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the [statutory] exceptions to the rule." (*Edwards*, *supra*, 44 Cal.4th at pp. 946-947.) That holding was nothing new. California courts have long applied section 16600 to void posttermination restraints on former employees. In dicta this Court stated that the enactment of Civil Code 1673, the predecessor to section 16600, "rejected the common law 'rule of

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[3] All future statutory references are to the Business and Professions Code unless otherwise stated.

reasonableness.' " (*Id.* at p. 945.) Ixchel and others claim this statement means that section 16600 creates a per se bar to *all* restraints, even those governing ongoing business relationships.

Reading Business and Professions Code section 16600 as a per se ban on all restraints of trade in the context of ongoing business relationships would nullify another statute in the same part of the Business and Professions Code—section 16725—which explicitly allows restraints that are procompetitive: "*It is not unlawful to enter into agreements . . . , the purpose and effect of which is to promote, encourage or increase competition.*" (Emphasis added.) It would also nullify California Uniform Commercial Code section 2306 which recognizes that exclusive contracts that restrain parties in an ongoing business relationship, such as requirements and output contracts, may be lawful. Moreover, reading a per se ban into section 16600 is inconsistent with its legislative history, would overturn over 160 years of precedent from this Court and the Court of Appeal, and conflicts with judicial interpretations of parallel statutes nationwide.

Banning all contractual restraints in ongoing business relationships would void thousands of contracts across the state, in every industry. Procompetitive restraints are common—appearing in franchise, distribution, and supply agreements, to name just a few. Of course, all contracts restrain—that is the nature of a contract. But as this Court and courts nationwide have recognized, some restraints are necessary to allow businesses to work with each other to, for example, develop new products and

provide services. Voiding all these contracts would devastate the state's economy.

Indeed, with the stakes so high, the Court should consider whether this case, given its posture, is the best vehicle to decide how section 16600 applies to ongoing business relationships as opposed to simply answering the Ninth Circuit's question of whether section 16600 applies to disputes between businesses at all. This case comes to this Court on a motion to dismiss from federal court with no factual record about the purpose or effect of the agreement. By contrast, *Quidel* involves a commonly used exclusivity provision that allowed the parties to integrate their resources to develop a new and societally beneficial product that otherwise would not exist. The *Quidel* record contains extensive evidence—including expert testimony—about the context, purpose, and effect of the challenged restraint.

Since *Edwards*, many plaintiffs continue to argue that section 16600 not only creates a per se bar on posttermination restraints on employment, but also creates a similar per se rule governing restraints in ongoing business and employment relationships. The Courts of Appeal have uniformly rejected such an overreading of *Edwards*. (See, e.g., *Quidel*, *supra*, 39 Cal.App.5th at p. 544; *Angelica Textile Servs., Inc. v. Park* (2013) 220 Cal.App.4th 495, 509 (*Angelica Textile*); *Techno Lite, Inc. v. Emcod, LLC* (2020) 44 Cal.App.5th 462, 471 (*Techno Lite*).) This Court should clarify, either here or in *Quidel*, that such a per se bar on any restraints in ongoing relationships has never been, and is not, the law.

Indeed, the Court of Appeal's opinion in *Quidel* is instructive. Based on a comprehensive review of precedent and legislative history, the court held that "outside the employment context," "courts have followed a rule of reason" in applying section 16600. (*Quidel*, *supra*, 39 Cal.App.5th at pp. 537, 541.) That rule considers, among other things, whether the contract "tends to restrain trade more than promote it," whether it is designed to protect the parties in dealing with each other, and whether the contract forecloses a substantial share of the line of commerce. (*Id.* at p. 544.) This Court should confirm the correctness of the Court of Appeal in *Quidel*.

LEGAL ARGUMENT

I. Business and Professions Code section 16600 permits reasonable procompetitive contractual restraints in ongoing business relationships.

A. The plain text of section 16600 does not per se bar all restraints.

1. The statutory context of section 16600 precludes an interpretation that creates a per se ban on restraints involving ongoing business relationships.

"[S]tatutory language, even if it appears to have a clear and plain meaning when considered in isolation, may nonetheless be rendered ambiguous when the language is read in light of the statute as a whole or in light of the overall legislative scheme."

(*People v. Valencia* (2017) 3 Cal.5th 347, 360.) Thus, " ' "[i]t is an established rule of statutory construction that similar statutes should be construed in light of one another." ' " (*People v. Tran* (2015) 61 Cal.4th 1160, 1167-1168.)

Here, the overall legislative scheme at issue is the part of the Business and Professions Code entitled "Preservation and Regulation of Competition." (Bus. & Prof. Code, Div. 7, Pt. 2 [covering sections 16600-17365]; see *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.* (1975) 52 Cal.App.3d 1, 6 (*Dayton*); *Comedy Club, Inc. v. Improv West Associates* (9th Cir. 2009) 553 F.3d 1277, 1293, fn. 17 (*Comedy Club*).) Section 16600 provides, "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Section 16725 authorizes contracts furthering trade: "It is not unlawful to enter into agreements . . . , the purpose and effect of which is to promote, encourage or increase competition in any trade . . . , or which are in furtherance of trade."

If, as Ixchel contends, literally "every" contract restraining trade were "void" under section 16600 (OBOM 16), that would sweep in "agreements . . . , the purpose and effect of which is to promote, encourage or increase competition." But section 16725 affirmatively permits such contracts. In other words, Ixchel urges the Court to insert the following new limitation into section 16725:

> It is not unlawful to enter into agreements . . . , the purpose and effect of which is to promote, encourage or increase competition, ***unless those agreements restrain trade.***

This Court should not rewrite the statute in this way. (See, e.g., *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 892 [this Court "cannot, however, rewrite the statute to create an exception the Legislature has not enacted"].)

Likewise, California Uniform Commercial Code section 2306, subdivision (1) endorses the use of exclusive purchasing and sales contracts, such as requirements and output contracts. The statute also recognizes that an exclusive dealing contract (e.g., where a reseller agrees to carry only the supplier's brand) can be a "lawful agreement." (Cal. U. Com. Code, § 2306, subd. (2).) Ixchel's reading of Business and Professions Code section 16600 would nullify this statute because, in Ixchel's view, all exclusive contracts restrain the parties' ability to buy and sell goods.

2. The established interpretations of other antitrust laws confirm that section 16600 should not be interpreted to void procompetitive restraints.

Section 16600 is not unusual. Statutes governing restraints of trade were enacted widely in the late 1800s and early 1900s, and include not only the Cartwright Act, but also the federal Sherman Act and parallel state statutes nationwide. All of these statutes include language that would ban any restraint of trade if read literally. Yet no court has adopted such a literal reading.

a. The Cartwright Act does not bar all restraints.

The Cartwright Act (enacted in 1907) prohibits any "combination" (i.e., agreement) that creates "restrictions in trade." (§ 16720.) As this Court has explained, although the "express terms" of the statute "forbid all restraints on trade," the statute "has been interpreted to permit by implication those restraints found to be reasonable." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853 (*Corwin*).)

Thus, although the law may be "framed in superficially absolute language, deciding antitrust illegality is not as simple as identifying whether a challenged agreement involves a restraint of trade." (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 145-146 (*In re Cipro*); see also *People v. Building Maintenance etc. Assn.* (1953) 41 Cal.2d 719, 726-727.) Instead, the statute bars only " 'unreasonable' " restraints of trade. (*In re Cipro*, at p. 146.)[4]

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[4] Of course, some restraints are per se unlawful under the Cartwright Act. " '[C]ertain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.' " (*Corwin*, *supra*, 4 Cal.3d at p. 853, quoting *Northern Pacific Railway Company v. United States* (1958) 356 U.S. 1, 5 [78 S.Ct. 514, 2 L.Ed.2d 545] superseded by statute on another ground as stated in *Texas Instruments, Inc. v. Hyundai Electronics Industries, Co.* (E.D.Tex. 1999) 49 F.Supp.2d 893, 912.)

b. Other state laws like section 16600 do not bar procompetitive restraints.

Other states have enacted statutes with language identical to that in section 16600, including the words "every" and "any."[5] But no court has interpreted these statutes to invalidate all restraints on businesses applied during an ongoing business relationship.[6] Rather, courts have rejected the "literal interpretation" of the language and upheld reasonable restraints. (*Tomlinson v. Humana, Inc.* (Ala. 1986) 495 So.2d 630, 631-632;

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[5] See N.D. Cent. Code, § 9-08-06 (originally enacted in 1877; derived from California Civil Code section 1673); Okla. Stat. tit. 15, § 217 (adopted from Oklahoma Statutes section 886 (1890)); Mont. Code Ann., § 28-2-703 (enacted in 1895 and "modeled after sections 1673, et seq., California Civ.[ ]Code" [*Treasure Chem. v. Team Lab. Chemical Corp.* (Mont. 1980) 609 P.2d 285, 287]); Ala. Code, § 8-1-190 (originally enacted in 1923 as Ala. Code, § 6826); Fla. Stat., § 542.33 (formerly Fla. Stat. § 542.12).

[6] Even outside the antitrust context courts often limit the superficially wide reach of such words. (See, e.g., *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825-828 [despite its use of " 'every person,' " statute proscribing lewd conduct should not be interpreted to cover certain First Amendment activities]; *Small v. U.S.* (2005) 544 U.S. 385, 388-389 [125 S.Ct. 1752, 161 L.Ed.2d 651] [explaining that the word " 'any' " may be limited to those objects the legislature intended; statute referencing " 'any court' " does not include foreign court]; *Foley Bros. v. Filardo* (1949) 336 U.S. 281, 287-288 [69 S.Ct. 575, 93 L.Ed. 680] [phrase " 'every contract' " does not apply to contracts for work performed in foreign countries].) The same is true for generic nouns such as "restraint." (See *Yates v. U.S.* (2015) 574 U.S. 528, [135 S.Ct. 1074, 1081-1085, 191 L.Ed. 64] [" 'tangible object' " in statute does not "cover[ ] the waterfront, including fish from the sea," but is limited to information-preserving objects].)

see also *Terre Haute Brewing Co. v. McGeever* (Ala. 1916) 73 So. 889 [upholding exclusive dealing contract], abrogated on another ground in *Sevier Ins. v. Willis Corroon Corp.* (Ala 1998) 711 So.2d 995, 999; *O'Neill v. Ferraro* (Mont. 1979) 596 P.2d 197, 199 ["a reasonable and limited covenant restraining trade will be considered valid"]; *Outdoor Resorts, etc. v. Outdoor Resorts, etc.* (Fla.Dist.Ct.App. 1980) 379 So.2d 471, 472 [recognizing that "[t]echnically, any exclusive arrangement in a contract is in restraint of trade," but refusing to apply such a mechanical reading of the statute and upholding exclusive dealing contract unless "unreasonable, detrimental to the public welfare and obnoxious to public policy"]; *Westgo Indus., Inc. v. W. J. King Co.* (D.N.D., Mar. 31, 1981, No. A3-7582) 1981 WL 2064, at pp. *5, *7 [upholding restriction on distributor precluding sale of competing products].)

As one state supreme court recognized, in "construing statutes and contracts against monopolies or in restraint of trade both state and federal Courts in this country have applied the rule of reason rather than the literal import of the statute, and have said in substance that it must amount to an undue or unreasonable restraint of trade." (*Lee v. Clearwater Growers' Ass'n* (Fla. 1927) 111 So. 722, 723.) Indeed, in so holding, several courts have relied on this Court's interpretation of Civil Code section 1673 in *Great Western etc. v. J. A. Wathen D. Co.* (1937) 10 Cal.2d 442 (*Great Western*) and the Court of Appeal's interpretation in *Keating v. Preston* (1940) 42 Cal.App.2d 110 (*Keating*), which we explain in greater detail below. (See *Pensacola Associates v. Biggs Sporting Goods* (Fla.Dist.Ct.App. 1978) 353 So.2d 944, 946, 948 [statute

cannot "be mechanically applied without considering the circumstances or the reasonableness of the restriction," citing as authority *Great Western* and *Keating*]; *Utica Square, Inc. v. Renberg's Inc.* (Okla. 1964) 390 P.2d 876, 881 [citing *Great Western* and *Keating* in upholding "reasonable limited restrictions" in contracts intended to "promote and increase business"].)

c. Federal antitrust law likewise does not literally bar every restraint.

Federal courts have repeatedly recognized that the broad words used in the 1890 federal Sherman Act (i.e., "[e]very contract . . . in restraint of trade . . . is declared to be illegal" (15 U.S.C. § 1)) must not be read in rigid fashion because to do so would cause absurd results Congress never intended.[7] (See *Leegin Creative Leather Products v. PSKS, Inc.* (2007) 551 U.S. 877, 885 [127 S.Ct. 2705, 168 L.Ed.2d 623] ["While § 1 [of the Sherman Act] could be interpreted to proscribe all contracts, [citation], the Court has never 'taken a literal approach to [its] language,' [citation]. Rather, the Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.' "]; *National Soc. of Professional Engineers v. United States* (1978) 435 U.S. 679, 688 [98 S.Ct. 1355, 1363, 55 L.Ed.2d 637, 648] ["[R]ead literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that

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[7] As under the Cartwright Act, some types of restraints "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se" under the Sherman Act. (*State Oil Co. v. Khan* (1997) 522 U.S. 3, 10 [118 S.Ct. 275, 139 L.Ed.2d 199].)

establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively."]; *Texaco Inc. v. Dagher* (2006) 547 U.S. 1, 7-8 [126 S.Ct. 1276, 164 L.Ed.2d 1] [restraints "ancillary to the legitimate and competitive purposes" of a "legitimate business collaboration, such as a business association or joint venture" are valid]; *Broadcast Music, Inc. v. Columbia Broadcasting* (1979) 441 U.S. 1, 19-23 [99 S.Ct. 1551, 60 L.Ed.2d 1] [restraints in "[j]oint ventures and other cooperative arrangements" are not unlawful where they are reasonable].)[8]

This Court likewise rejects statutory readings that would produce absurd results. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 [literal meaning of statutes should not be applied if it " ' "would result in absurd consequences" ' "]; see *Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532, 543 [courts should avoid interpretations that " 'would lead to absurd

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[8] It is unsurprising that California courts take a similar approach. (*Corwin, supra,* 4 Cal.3d at p. 853 ["Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable"].) Although the Cartwright Act was not modeled on federal antitrust law, California courts have a long history of drawing analogies to federal antitrust statutes in interpreting California antitrust laws. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 84, 90 [federal antitrust law "useful" and "often valuable" in interpreting Cartwright Act]; *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 334-335 [California and federal antitrust law " 'share similar language and objectives' " and both " 'generally distinguish between conduct that is per se unlawful and conduct that is evaluated under the rule of reason' "].)

consequences' "]; *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 614 ["The courts resist blind obedience to the putative 'plain meaning' of a statutory phrase where literal interpretation would defeat the Legislature's central objective"].) And an overly literal reading of section 16600 would similarly lead to absurd results.

After all, statutes governing restraints of trade are *quintessential* legislative delegations of responsibility to apply general principles in common-law fashion. Even those who call for courts to hew closely to the "plain" text recognize the importance of a different approach in the antitrust context. "[A] statute [may] leave a matter to future common-law development by the courts—either expressly or (where the statute deals with a traditional field of common-law jurisprudence) by implication. An example of the latter is the Sherman Act, whose reference to 'restraint of trade' has always been taken to refer to activity (so denominated) that the common law made unlawful—and to authorize continuing development of that common law by federal courts." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 96.) So too here.

B. The legislative history of Civil Code section 1673 (the precursor to section 16600) confirms that the Legislature did not intend to eliminate procompetitive agreements between businesses in ongoing relationships.

Ixchel suggests the Legislature intended for all contractual restraints to be void. (RBOM 8-9.) Ixchel is wrong. Former Civil Code section 1673, enacted in 1872, provided that "[e]very contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind . . . is to that extent void." As we explain, section 1673 did not eliminate the rule of reason for evaluating contracts in ongoing business relationships.

First, in explaining the purpose of Civil Code section 1673, the Commissioners of the Code cited approvingly cases applying the rule of reason. The Commissioners stated that *Wright v. Ryder* (1868) 36 Cal. 342, 358, which held that the test was whether a restriction was "reasonable" or "unreasonable" and *More v. Bonnet* (1870) 40 Cal. 251, 254, which upheld a restriction on a business "because the limits are not unreasonable," correctly applied the law as the Legislature intended. (Code commrs. note foll. 1 Ann. Civ. Code, § 1673 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) p. 503 (hereafter Haymond & Burch).)

Second, the Commissioners stated that Civil Code section 1673 was enacted in response to certain "modern decisions." (Haymond & Burch, *supra*, at p. 502.) But they were not referring to cases establishing the rule of reason that had been recognized more than 200 years earlier. (See *Rogers v. Parrey* (1613) 2 Bulst.

136.) And it was firmly established by 1711 when the Queen's Bench held in a landmark decision that "there may happen instances wherein [restraints of trade] may be useful and beneficial." (*Mitchel v. Reynolds* (1711) 24 Eng.Rep. 347, 350.) As the court explained, "in cases where the special matter appears so as to make it a reasonable and useful contract," there is no presumption against restraints of trade. (*Id.* at p. 351.) *Mitchel* thus recognized the "analysis of the reasonableness of a restraint 162 years before section 1673 was enacted in 1872. (See Filipp, Covenants Not to Compete (4th ed. 2019-2 supp.) p. 1-10; see also *id.* at pp. 1-5- to 1-6 [although restraints on an individual's ability to engage in a trade were void without exception in the 15th and 16th centuries, that per se rule was abandoned in the 17th and 18th centuries]; Jolly, Contracts in Restraint of Trade (3d ed. 1914) p. 5 [after *Mitchel*, restraints were upheld "if reasonable both in the interests of the contracting parties and of the public"].)

Third, by 1872, "modern decisions" were still applying the rule of reason to ongoing business relationships. For instance, courts had long upheld exclusive dealing agreements between businesses. (See, e.g., Of Contracts Operating in Restraint of Trade (1839) 21 Law Mag. Quart. Rev. Juris. 306, 317 [courts "uniformly upheld" contracts that bound a party "to trade exclusively with another"]; see also Greenhood, Doctrine of Public Policy in the Law of Contracts (1886) pp. 677-680 [citing cases starting from 1800 holding that many exclusive dealing provisions would be lawful and not constitute impermissible restraints of trade].) And just a few years before Civil Code section 1673 was

enacted, this Court upheld a contract requiring a reseller to purchase a product from only one supplier and restraining the supplier from selling the product in competition with the reseller. (See *Lightner v. Menzel* (1868) 35 Cal. 452, 453-454, 457-458.)

Fourth, the "modern decisions" that concerned the Legislature were those allowing restraints of trade to a "dangerous extent." (Haymond & Burch, *supra*, at p. 502.) None of the cases cited by the Commissioners involved an ongoing business relationship. Instead, the Commissioners noted that this Court had held valid an agreement by a boat owner not to compete anywhere in California in exchange for a cash payment. There was no ongoing business relationship. (See *Cal. Nav. Co. v. Wright* (1856) 6 Cal. 258, 259, 261-262.) The Commissioners thought the restraint should have been "limited to a specified county." (Haymond & Burch, *supra*, at pp. 502-503.) The Commissioners also cited a New York Court of Appeal decision upholding a boat buyer's agreement not to compete anywhere within a large area, even after the association that sold the boat dissolved. (See *Dunlop v. Gregory* (1851) 10 N.Y. 241.) And the Commissioners noted that an English court had upheld an agreement by an attorney who sold his practice not to practice law anywhere in England. (See *Whittaker v. Howe* (1841) 49 Eng.Rep. 150.) All these decisions were criticized for stretching the rule of reason beyond its proper bounds. The Legislature did not criticize or seek to eliminate the rule of reason itself.

In sum, in enacting Civil Code section 1673, the Legislature was concerned that some courts had not properly followed the

common law to void unreasonable restraints. Nothing in the legislative history shows any intent to upend the long-developed rule of reason.

C. From the inception of Civil Code section 1673, this Court made clear that the section did not bar reasonable procompetitive restraints in ongoing business relationships but did bar unreasonable restraints and posttermination limits on employment.

1. Reasonable restraints in ongoing business relationships are permissible.

In applying Civil Code section 1673, courts consistently struck down posttermination limits on employment. (See, e.g., *Chamberlain v. Augustine* (1916) 172 Cal. 285, 288-289 (*Chamberlain*) [invalidating agreement to pay former employer liquidated damages if individual accepted employment or an interest in a competing business]; *Merchants' Ad-Sign Co. v. Sterling* (1899) 124 Cal. 429, 433-434 [invalidating agreement by former manager and stockholder not to compete with plaintiff], superseded by statute on another ground as stated in *Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 902-903.) When it came to businesses in ongoing relationships, however, this Court consistently assessed the purposes and effects of contractual restraints and upheld reasonable restraints. (E.g., *Great Western*, *supra*, 10 Cal.2d at pp. 444-445.)

In *Great Western, supra,* 10 Cal.2d at pages 444-445, for example, this Court evaluated an agreement that restrained plaintiff from purchasing whiskey from anyone but defendant and restrained defendant from selling its whiskey to anyone but plaintiff and one other. This Court evaluated the " 'purpose and effect' " of the agreement and upheld the restraint on defendant. (*Id.* at p. 446.) The agreement "create[d] an instrumentality by which the [whiskey would] be exploited and sold" (*ibid.*), and sought to "develop a market for the sale of the [whiskey]," in practical effect making plaintiff an "exclusive agent" (*id.* at p. 450). Consistent with " 'reason and common sense,' " this Court would not void as a restraint of trade a contract the purpose and effect of which was to " 'promote and increase business in the line affected.' " (*Id.* at p. 446.)

This Court distinguished restraints that tended instead to promote monopoly, holding that restraints that do not stifle competition to "secur[e] a monopoly" and are "not greater than protection" the parties need in dealing with one another are valid. (*Great Western, supra,* 10 Cal.2d at pp. 448-449 [noting that Civil Code section 1673 "must be construed in the light of such well-settled principles"].) By contrast, the Court also discussed *Chamberlain, supra,* 172 Cal. 285, calling the postemployment restraint there (i.e, not a dispute between two businesses engaged in an ongoing relationship) "directly within the contemplation of said [Civil Code] section 1673." (*Great Western,* at p. 448.)

Similarly, in *Grogan v. Chaffee* (1909) 156 Cal. 611, 615 (*Grogan*), this Court explained that "not every limitation on

absolute freedom of dealing . . . is prohibited." Only " 'unreasonable' " restraints are void, such as those that have a "tendency to create monopoly." (*Id.* at pp. 613-614.) And it explained that former Civil Code section 1673 must be "construed in light of these principles." (*Id.* at p. 615.)

This Court has consistently applied these principles to restraints governing ongoing business dealings. (See *Associated Oil Co. v. Myers* (1933) 217 Cal. 297, 299, 304-305 [upholding agreement that restrained a lessee's ability to sell gasoline purchased from other vendors; agreement was not "unreasonable" and did not "secure a complete monopoly and stifle competition"]; *Herriman v. Menzies* (1896) 115 Cal. 16, 19-23 [contract between businesses engaged in stevedoring to work together and share profits and losses is not improper restraint of trade so long as it does not promote a monopoly and is reasonable]; *Schwalm v. Holmes* (1875) 49 Cal. 665 [upholding exclusive dealing agreement that restrained a supplier from selling to any other purchaser during the life of the agreement].) This Court should do the same here.[9]

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[9] See also *Keating*, *supra*, 42 Cal.App.2d at pp. 122-124 [upholding a provision barring a lessor hotel from leasing space to competing restaurant businesses because the provision's " 'purpose and effect' " was to " 'promote and increase business' "]; *United Farmers Assn. of Cal. v. Klein* (1940) 41 Cal.App.2d 766, 769-770 [Civil Code section 1673 not violated if the challenged provision was not "unreasonable"]; Greenhood, Doctrine of Public Policy in the Law of Contracts, *supra*, at pp. 677-680 [showing through a set of examples based on the caselaw at that time the many exclusive dealing provisions that would be lawful and not constitute impermissible restraints of trade].

2. Restraints that promote monopoly are void.

In its letter to this Court in this case insisting that section 16600 per se voids all restraints, regardless of the context, Beckman Coulter states that "this Court repeatedly applied the predecessor to Business and Professions Code section 16600, former Civil Code section 1673, to void non-compete agreements between businesses." (8/5/19 letter of Beckman Coulter 5.) Beckman overstates its claim, overlooking the fact that this Court voided only those challenged agreements that would lead to a monopoly or restricted a business after the relationship ended.

For instance, in *Vulcan Powder Co. v. Powder Co.* (1892) 96 Cal. 510, 513-515 (*Vulcan Powder*), this Court considered a cartel agreement among manufacturers a restraint of trade in violation of Civil Code section 1673. The Court examined the agreement's purposes and effects and found that the production quotas, horizontal allocation, and express price fixing terms made the contract illegal, a conclusion "too obvious to need argument, authorities, or elucidation." (*Id.* at pp. 514-515.) As this Court later explained, the "objectionable feature" of the agreement in *Vulcan Powder* was that it would lead to a monopoly. (*Grogan, supra*, 156 Cal. at p. 613.)

Similarly, in *Getz Bros. & Co. v. Federal Salt Co.* (1905) 147 Cal. 115, 118-119, one salt company paid another not to trade in salt from any other company and to "actively [ ] discourage" the trade of salt "by any other person" in " 'any possible manner.' " This Court determined that there was "no doubt" that paying

someone to stymie other competitors was illegal. (*Id.* at p. 118; see also *In re Cipro, supra,* 61 Cal.4th at pp. 148-149 [citing *Vulcan Powder* and *Getz* as authority on the illegality of restraints of trade that establish or maintain monopolies]; *Rolley, Inc. v. Merle Norman Cosmetics* (1954) 129 Cal.App.2d 844, 848 (*Rolley*) [contract in *Getz* had "monopoly aspects"].)

For these reasons, a restraint in an ongoing business relationship that will lead to "a monopoly," is generally unreasonable. (*Grogan, supra,* 156 Cal. at p. 613; see *Endicott v. Rosenthal* (1932) 216 Cal. 721, 729; *Morey v. Paladini* (1922) 187 Cal. 727, 736.) But applying these same standards, this Court has also recognized that restraints in ongoing business relationships, such as exclusivity provisions, can be lawful and " 'promote and increase business.' " (*Great Western, supra,* 10 Cal.2d at p. 446.) The question is whether the restraint is reasonable. As the 1922 edition of California Jurisprudence on Contracts explains, "[i]t has been said that no better test [under Civil Code section 1673] can be applied to the question than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." (6 Cal. Jur. (1922) Contracts, § 94, pp. 136-137.)

Finally, it is true that there were no statutory exceptions to the rule set forth in former Civil Code section 1673 other than those set forth in former Civil Code sections 1674 and 1675. (See 6 Cal. Jur., *supra,* Contracts, § 93, pp. 134-136.) That is irrelevant, however, because Civil Code section 1673 (now section 16600) does

not void restraints that promote competition in the first place. There is thus no need to reach the statutory exceptions. Nor is there some kind of clear negative implication from the statutory exceptions, which all address the winding down or transferring of a business. By their terms, the exceptions leave untouched restraints within the terms of an ongoing business relationship that are governed by the rule of reason, as this Court has held for over one hundred years. (See *ante*, pp. 32-34.)

D. Section 16600 codified existing case law confirming that reasonable restraints in ongoing business relationships are lawful.

1. The Legislature repealed Civil Code section 1673 and added section 16600 as part of a revision and codification without substantive effect.

In 1941, the Legislature repealed Civil Code section 1673 and enacted section 16600 as part of the California Code Commission's long-time " 'work of revision and codification.' " (Cal. Code Com., Rep. to the Governor and Leg. (1941) pp. 7-8 (hereafter Cal. Code Com. Rep.).) In particular, the Code Commission made clear that it had " 'adopted a definite policy not to make substantive changes, but to confine its work to a compilation, consolidation, and clarification of the existing law.' " (*Id.* at p. 8.)

Indeed, it was the Commission's expectation that its work in "revision and codification will present the existing law in such form

as to facilitate greatly the making of such substantive changes as are found to be necessary." (Cal. Code Com. Rep., *supra*, at p. 8.)

The Legislature thus reenacted Civil Code section 1673 as Business and Professions Code section 16600, adopting the interpretation given to it by this Court and the Court of Appeal that a rule of reason analysis applies to restraints governing ongoing business relationships. "[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, superseded by statute on another ground as stated in *People v. Jones* (2016) 246 Cal.App.4th 92, 96.) That is the situation here.

2. Courts continued to apply section 16600 to bar posttermination restraints on employment but not reasonable restraints in ongoing business relationships or restraints on competing against one's current employer.

After Civil Code section 1673 was reenacted as Business and Professions Code section 16600, most cases interpreting the statute "deal[t] with post-contract or post-employment covenants not to compete." (*Comedy Club, supra*, 553 F.3d at p. 1290.) And courts consistently have held that section 16600 bars restrictions on the practice of a profession by former employees or partners.

(See, e.g., *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242-243 [invalidating employment contract that forfeited employee's pension rights if employee worked for competitor]; *D'Sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927 (*Playhut*) [employment covenants not to compete invalid]; *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 855 (*Metro Traffic*) [same]; *Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284, 292 (*Bosley*) [agreement by medical practitioner not to compete with former medical group invalid]; *KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 848 [statute presents "an absolute bar to postemployment restraints"].)

By contrast, courts treated restraints in ongoing business relationships as not "per se against public policy if no significant impairment of free market activity obtains from the agreement." (*Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 69 & fn. 2 [collecting cases]; see *Martikian v. Hong* (1985) 164 Cal.App.3d 1130, 1134 ["Exclusive distributorships are not illegal per se"]; *Dayton, supra,* 52 Cal.App.3d at pp. 6-7 [exclusive dealing contract proscribed only when it "will foreclose competition in a substantial share of the affected line of commerce"; but "post-franchise anti-competitive provision" violated section 16600]; *Rolley, supra,* 129 Cal.App.2d at pp. 851-852 [exclusivity agreement not barred when it increases competition and does not create a monopoly].)

Similarly, courts have held that section 16600's prohibition "does not affect limitations on an employee's conduct or duties *while* employed." (*Angelica Textile, supra,* 220 Cal.App.4th at

p. 509; see *Techno Lite, supra,* 44 Cal.App.5th at p. 471 [holding that agreement barring employee from competing with employer during term of employment did not violate section 16600; "the statute does not affect limitations on an employee's conduct or duties *while employed*"]; *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44 [same].)

As we explain, this Court's decision in *Edwards* did not change the prior 100 plus years of precedent permitting reasonable restraints in ongoing business relationships and simply confirmed that posttermination restraints on employment are invalid.

3. *Edwards* limited its holding to the validity of posttermination employment non-compete agreements.

Ixchel asserts that this Court's decision in *Edwards* controls the decision here. (See RBOM 8-9.) It does not. At stake in *Edwards* was an agreement Arthur Andersen required its employee to sign restraining the employee from soliciting certain of its clients after he was terminated. (*Edwards, supra,* 44 Cal.4th at pp. 942-943.) In granting review, this Court expressly "limited" its review to whether section 16600 "prohibit[s] employee noncompetition agreements." (*Id.* at p. 941.) The parties therefore briefed only that issue and did not address any of the cases involving ongoing business relationships that we have discussed in this brief. (See Opening Brief on the Merits, *Edwards v. Arthur Andersen LLP* (Jan. 26, 2007, S147190) 2007 WL 1221499; Answering Brief on the Merits, *Edwards v. Arthur Andersen LLP*

(Mar. 27, 2007, S147190) 2007 WL 1335190; Reply Brief on the Merits, *Edwards v. Arthur Andersen LLP* (Apr. 13, 2007, S147190) 2007 WL 5288759.) And in its opinion, this Court emphasized the limited scope of its ruling *two more* times.[10]

This Court's cabined approach continued as it discussed the general principles that would govern noncompetition agreements such as the one at stake in the case. (*Edwards*, *supra*, 44 Cal.4th at pp. 945-946.) *Every single case* the Court discussed or cited in its opinion for a substantive proposition addressed only restraints on the rights of former employees or partners to pursue a profession.[11]

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[10] *Edwards*, *supra*, 44 Cal.4th at p. 945 ["As initially discussed, we *limited* our review to resolve" whether section 16600 invalidated the employee's noncompetition agreement (emphasis added)]; *id.* at p. 950, fn. 5 [explaining that *Boughton v. Socony Mobil Oil Co.* (1964) 231 Cal.App.2d 188, 190, which concerned a restrictive covenant in a deed, did not provide guidance on "the issue of noncompetition agreements, largely because [it did not] involve[ ] noncompetition agreements *in the employment context*" (emphasis added).]

[11] See *Muggill*, *supra*, 62 Cal.2d at pp. 242-243; *Chamberlain*, *supra*, 172 Cal. at pp. 288-289; *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 47-48; *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, 1080; *Bosley*, *supra*, 161 Cal.App.3d at p. 291; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123, fn. 12 [noting that noncompetition covenants are "largely illegal," citing cases involving postemployment restraints] superseded by statute on another ground as stated in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 918.

In particular, in describing the important policies behind its application of section 16600 to employee noncompetition agreements, this Court was abundantly clear about what was at stake. It cited *only* cases about employee mobility and pulled from those cases the principles that section 16600 (1) "protects Californians and ensures 'that every *citizen* shall retain the right to pursue any lawful *employment* and enterprise of their choice' "; (2) "protects 'the important legal right of *persons* to engage in businesses and *occupations* of their choosing' "; and (3) "evinces a settled legislative policy in favor of open competition and *employee mobility*." (*Edwards*, *supra*, 44 Cal.4th at p. 946, emphasis added, citing *Playhut*, *supra*, 85 Cal.App.4th at p. 933, *Morlife, Inc v. Perry* (1997) 56 Cal.App.4th 1514, 1520, and *Metro Traffic*, *supra*, 22 Cal.App.4th at p. 859.)

Edwards's holding was equally clear and equally *specific*: "We *conclude* that section 16600 prohibits *employee* noncompetition agreements unless the agreement falls within a statutory exception." (*Edwards*, *supra*, 44 Cal.4th at p. 948, emphasis added.)

In short, *Edwards* did not decide whether restraints involving ongoing relationships, let alone ongoing *business* relationships, can be valid, much less whether all of them are void per se. (See, e.g., Perry & Howell, *A Tale of Two Statutes: Cipro, Edwards, and the Rule of Reason* (2015) 24 No. 2 Competition: J. Anti., UCL & Privacy Sec. St. B. Cal. 21 [article explaining that *Edwards* solely addressed post termination employee noncompetition agreements and did not overrule long established

authority permitting reasonable restraints in ongoing business relationships]; *Techno Lite, supra,* 44 Cal.App.5th at p. 472 [*Edwards*'s "declaration that noncompetition agreements were 'invalid under section 16600 in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions of section 16601, 16602, or 16602.5' thus defined a category of agreements that could not be enforced against former employees who sought to compete with their former employers after leaving their employment. [Citation.] *Edwards* did not address—much less invalidate—agreements by employees not to undermine their employer's business by surreptitiously competing with it *while being paid by the employer.*" (Emphasis added)].)

This Court's decision is authority only for what it "*actually involved* and actually decided." (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61; see also *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626 (*McWilliams*) [cases not authority for propositions not considered].) This Court made *no statements* at all—not even stray ones—about restraints related to ongoing business arrangements such as exclusivity provisions.

4. *Edwards*'s dicta on the broader purpose of section 16600 does not alter the clear precedent and legislative history confirming that section 16600 permits reasonable restraints in ongoing business relationships.

Given the foregoing, it is plain what *Edwards* meant when it cited *Bosley* for the proposition that the Legislature "rejected" the common-law " 'rule of reasonableness' " when it enacted section 1673. (*Edwards, supra,* 44 Cal.4th at p. 945.) The Court was referring to restraints on "employee mobility." (*Id.* at p. 946.) That is plain from the Court's pointing to *Bosley, supra,* 161 Cal.App.3d at page 288, which did not involve an ongoing business relationship. It involved a doctor's agreement not to compete with a medical group for three years after he left. (*Id.* at pp. 286-287.) In that context, *Bosley* explained that the common law had allowed "restraint[s] on the practice of a trade or occupation, even *as applied to a former employee,*" if the restraint was reasonable. (*Id.* at p. 288, emphasis added.) *That* was the issue *Bosley* said Civil Code section 1673 was designed to address, not the effect of a restraint of trade on an ongoing business relationship.[12]

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[12] The " 'rule of reasonableness' " reference in *Edwards* refers to a three part test applicable to posttermination employee non-competition agreements used in some jurisdictions that permits such agreements if reasonable in terms of duration, geographic scope, and the type of employment impacted. (*Edwards, supra,* 44 Cal.4th. at p. 945, citing *Bosely, supra,* 161 Cal.App.3d at p. 288.)

Further, the *Bosley* court's statement cannot be read to apply to restraints in ongoing business relationships because the sole cited authority—a 1953 law review note—says nothing about rejecting the common-law rule in that context. (See *Bosley*, *supra*, 161 Cal.App.3d at p. 288, citing Note, *Case Notes* (1953) 26 So.Cal. L.Rev. 196, 208-210.) In fact, the note cited many authorities that did not apply a rule of per se invalidity in such cases. (Note, at pp. 208-209.)

Thus, neither *Edwards* nor *Bosley* considered anything besides postemployment restraints on the practice of a profession. To the contrary, *Edwards* explained that section 16600 has a "plain meaning" and is "unambiguous": "*Under the statute's plain meaning, therefore, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule.*" (*Edwards*, *supra*, 44 Cal.4th at pp. 946-947, emphasis added.) In that context—and only that context—did *Edwards* hold that "restrain[t]" meant prohibition, barring even narrow restraints that do not completely bar a former employee from practicing his or her profession. (*Id.* at p. 947; see also *id.* at pp. 948-950 [discussing the Ninth Circuit's contrary "narrow-restraint" interpretation].)

Yet *Edwards* addressed none of the ample precedent of this Court and others treating ongoing business relationships differently than posttermination covenants. (*Ante*, pp. 32-34, 39-40.) That deafening silence, coupled with this Court's limitations on the scope of its review and the vast policy consequences at stake

(at pp. 46-50, *post*), confirm that *Edwards* was not overruling settled precedent sub silentio. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 924 ["we do not lightly overturn our prior opinions"]; *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1332 ["If the California Supreme Court intended to overrule these cases, it is unlikely that it would do so . . . sub silentio"]; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 287 ["precedent cannot be overruled in dictum"].) When *Edwards* meant to address contrary precedent, it did so expressly—speaking of its "disapproval" of two Court of Appeal cases that suggested that the "narrow-restraint" exception adopted by the Ninth Circuit was California law. (*Edwards*, *supra*, 44 Cal.4th at pp. 949-950 & fn. 5.) Ixchel is thus mistaken to say that *Edwards* silently overruled case law it did *not* discuss.

In sum, *Edwards* does comment on the broad scope of "restraint" in section 16600, but not in the context of ongoing business relationships. *Edwards* left that issue alone, and it left the extensive precedent governing that issue untouched. (See *McWilliams*, *supra*, 56 Cal.4th at p. 626.)

E. Categorically barring any contractual restraints in ongoing business relationships would cause severe consequences to California's economy.

Beyond misreading *Edwards*, there is good reason no court has adopted Ixchel's suggested interpretation of section 16600. It would void ubiquitous business arrangements across the state that

depend on exclusivity or loyalty between the parties during the term of their ongoing business relationships.

A requirement to be loyal to a particular relationship, venture, brand, or product line is a "restraint" on trade—as a matter of logic, common sense, and business reality. (See *In re Cipro*, *supra*, 61 Cal.4th at p. 146 [" '[*e*]*very* agreement concerning trade . . . restrains' " (quoting *Board of Trade of City of Chicago v. United States* (1918) 246 U.S. 231, 238 [38 S.Ct. 242, 62 L.Ed. 683])].)

Such arrangements are common and accepted. (See *Exclusive Dealing or Requirements Contracts*, Federal Trade Commission <https://bit.ly/39MoPI4> [as of Feb. 25, 2020] (hereafter *Exclusive Dealing*); Heide et al., *Exclusive Dealing and Business Efficiency: Evidence from Industry Practice* (1998) 41 J.L. & Econ. 387, 387-388.)

For instance, companies at opposite ends of a supply chain, or with differing areas of expertise, often enter exclusivity agreements to develop products. (*Exclusive Dealing*, *supra*; see also vol. 2, exh. 16, pp. 227-232 [declaration of Prof. Joel Hay].)[13] Firms in the biotech, telecommunications, and microelectronics industries all benefit from such protective arrangements—as do consumers who buy their products. (See, e.g., Lerner & Merges, *The Control of Technology Alliances: An Empirical Analysis of the Biotechnology Industry* (1998) 46 J. of Industrial Economics 125;

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[13] All record cites in this brief are to the record in *Quidel*, which this Court should have received from the Court of Appeal.

Dutta et al., *Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence* (1999) 63 J. of Marketing 121.)

Parties also commonly bargain to become exclusive suppliers, sellers, dealers, agents, or developers. (See *Exclusive Dealing*, *supra.*) Joint venturers commonly agree to avoid competing with the venture during the term of the joint venture. (See, e.g., ABA Section of Antitrust Law (8th ed. 2017), Antitrust Law Developments, at 492 & fn. 230 ["Agreements among the parents not to compete with the joint venture . . . generally have been upheld as reasonable"].) And parties often exclusively license intellectual property. (See, e.g., World Intellectual Property Organization, Successful Technology Licensing (2015) at pp. 21-22 <https://bit.ly/2HQuqkR> [as of Feb. 25, 2020]; vol. 1, ex. 15, p. 187 [declaration of Prof. Michael Risch].)

Exclusive dealing is also at the heart of franchising. (See LaFontaine & Slade, *Franchising and Exclusive Distribution: Adaptation and Antitrust*, p. 6 <https://bit.ly/2uYQreh> [as of Feb. 25, 2020].) McDonald's franchisees cannot sell Burger King's fries. Ford dealers cannot sell Cadillacs. Franchised businesses significantly contribute to the California economy. (PwC, *The Economic Impact of Franchised Businesses: Volume IV, 2016* (Sept. 15, 2016) pp. I-11 to I-12, I-34 <https://bit.ly/3bRHmVm> [as of Feb. 25, 2020].)

Other examples of excusive arrangements include a smartphone manufacturer exclusively using a specific chipset company for its phone components, a luxury brand manufacturer using exclusive retail showrooms, or a biotech company that

develops analytics software exclusively collaborating with a pharmaceutical company to discover and develop new pharmaceutical compounds using its software.

Nor is it surprising that exclusivity provisions are so widespread. They encourage companies to cooperate, outsource research and development, and invest in a market and product. They foster relationships and loyalty. They protect against third parties stealing confidential information and intellectual property. They foster innovation and provoke competition. (See generally Klein & Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty* (2007) 74 Antitrust L.J. 473.)

As a result, courts in California and elsewhere have repeatedly acknowledged the benefits of exclusivity. (See *Great Western, supra*, 10 Cal.2d at p. 446 [exclusivity may " 'promote and increase business in the line affected' "]; *Webb v. West Side District Hospital* (1983) 144 Cal.App.3d 946, 950-951, 953-954 [exclusive recruiter contract protects recruiter from unfair exploitation of original investment in recruitment and placement], disapproved of on another ground in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 32; *Dayton, supra*, 52 Cal.App.3d at p. 6 ["Exclusive-dealing contracts . . . may provide an incentive for the marketing of new products and a guarantee of quality-control distribution"]; *Rolley, supra*, 129 Cal.App.2d at p. 852 [exclusivity franchise will prompt competitor "to build a better mousetrap, and that after all is the essence of competition"]; *MM Steel, L.P. v. JSW Steel (USA) Inc.* (5th Cir. 2015) 806 F.3d 835, 849 [exclusive dealing arrangements

"frequently have procompetitive justifications, such as limiting free riding and increasing specialization"]; *Stop & Shop v. Blue Cross & Blue Shield of R.I.* (1st Cir. 2004) 373 F.3d 57, 65 [exclusive dealing arrangements "can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices)"]; *Omega Environmental Inc. v. Gilbarco, Inc.* (9th Cir. 1997) 127 F.3d 1157, 1162 [noting the "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition"]; *Roland Machinery Co. v. Dresser Industries* (7th Cir. 1984) 749 F.2d 380, 395 [exclusive dealing may increase competition and prevent free-riding].)

All these well-known benefits of restraints governing ongoing business relationships would be swept away by Ixchel's novel reading of section 16600. The Court should reject that reading in favor of the reading long adopted by this Court and relied on across the State.

II. *Quidel* provides a better vehicle to address how to apply section 16600 to disputes in ongoing business relationships.

Indeed, so important are these issues that the Court should consider whether the Ninth Circuit's certified question is the best vehicle for addressing them (assuming the Court does not conclude that, as we have shown, the law is already clear enough). *Quidel*—decided just before this Court accepted the Ninth Circuit's certified question—presents a better vehicle. Because *Quidel* was decided in the context of a motion for summary adjudication, it has a rich

record about the purposes and effect of the exclusivity provisions at issue. We provide here a brief summary of that record to show the procompetitive issues raised in agreements of this sort—agreements that would be impossible under Ixchel's interpretation of section 16600.

Quidel involved an arrangement through which two companies worked exclusively together to develop and commercialize an important test. (See *Quidel*, *supra*, 39 Cal.App.5th at p. 534.) Under the exclusivity terms, Beckman needed to supply the test only to Quidel (which would sell the test) and to refrain from developing a direct substitute for the test. Among other things, that would prevent Beckman from expropriating the rewards of Quidel's efforts, protect confidential and trade secret information, and encourage cooperation. (See *id.* at pp. 534-535.)

Combining its own know-how and know-how from another company, Quidel's predecessor in interest, Biosite, was the first to develop and commercialize a medical test (called an "assay") to diagnose congestive heart failure using something called a B-type natriuretic peptide, or BNP. (Vol. 1, exh. 13, pp. 156-158; vol. 2, exh. 17, pp. 333-334.)

Biosite, however, did not manufacture laboratory analyzers, sophisticated machines that run assays in large volumes. (Vol. 2, exh. 17, pp. 346-347.) Beckman did manufacture laboratory analyzers but did not have a BNP assay. (Vol. 1, exh. 13, p. 159.) At the time, Beckman faced competition from large life-sciences companies that were pursuing their own BNP assays that could

run on their competing laboratory analyzers, as well as so-called NT-proBNP assays, direct substitutes for BNP assays. (*Ibid.*; vol. 2, exh. 17, p. 341.)

To compete against these companies, Biosite and Beckman joined forces to develop, obtain approval for, commercialize, and sell a BNP assay to run on a Beckman laboratory analyzer. (Vol. 1, exh. 13, pp. 159, 164-165; vol. 2, exh. 17, pp. 346-347.)

As a critical part of their agreement, Biosite and Beckman negotiated mutual exclusive dealing provisions. One provision states that Beckman will supply only Quidel, cannot manufacture or sell a BNP or NT-proBNP assay for its analyzers or assist another company in doing so, and cannot research and develop such assays until two years before the BNP agreement expires. (Vol. 1, exh. 13, p. 162; vol. 2, exh. 17, pp. 329-330.) Beckman is free, however, to research, develop, manufacture, or sell other assays for congestive heart failure diagnosis, such as ST2 or Galectin 3. (Vol. 2, exh. 17, p. 330.)

For many reasons, Biosite would not have entered into the collaboration with Beckman, and the parties would have never developed the BNP assay for Beckman analyzers, without the exclusivity provision. (Vol. 1, exh. 13, p. 161; vol. 2, exh. 17, p. 348.) First, the provision helps guarantee that Beckman does not breach (and thus jeopardize) the critical patent and know-how license. (Vol. 1, exh. 13, p. 162; vol. 2, exh. 17, p. 348.) Second, the provision helps guarantee that Beckman does not misappropriate Biosite's confidential know-how regarding the development of the assay to develop its own substitute assay

(Vol. 1, exh. 13, pp. 171-172; vol. 2, exh. 16, pp. 233-234; exh. 17, pp. 337-339.) Third, the provision allowed Biosite (and now Quidel) to share confidential pricing and business strategies with Beckman. (Vol. 1, exh. 13, pp. 166-167, 171, 173; vol. 2, exh. 17, p. 324.) Without the exclusivity provision, Beckman could replace the BNP assay with its own substitute assay. (Vol. 1, exh. 13, pp. 170-171; vol. 2, exh. 16, p. 235-236.)

The provision also helps incentivize the parties to commit to and maintain the ongoing business relationship. (Vol. 1, exh. 13, pp. 166-171; exh. 15, p. 192; vol. 2, exh. 16, pp. 234-235.) It prevents Beckman from simply expropriating Quidel's investments by cannibalizing BNP assay customers for itself and shutting Quidel out. (Vol. 2, exh. 17, pp. 325, 330, 334, 343, 348.)

Although successful, the BNP assay developed by the parties is only one of several available BNP and NT-proBNP assays on the market, and Quidel's market share among such assays was only about 8 percent in 2017. (Vol. 1, exh. 13, p. 174; vol. 2, exh. 17, pp. 334-335.)

The record in *Quidel* therefore gives the Court concrete examples of the reasons and effects of restraints governing an ongoing business relationship. Full briefing in that case would thus help the Court decide how section 16600 applies to ongoing business relationships.

CONCLUSION

For all these reasons, if this Court reaches the question of how section 16600 applies to businesses, it should hold that section

16600 does not categorically bar every contractual restraint in an ongoing business relationship and that reasonable restraints that promote competition are valid. To help the Court decide this issue, this Court should order full briefing in *Quidel*.

February 27, 2020

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CERTIFICATE OF WORD COUNT
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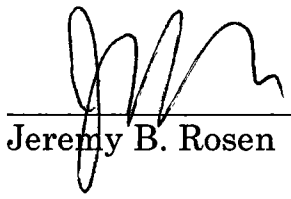
The text of this brief consists of 9,150 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: February 27, 2020



Jeremy B. Rosen

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

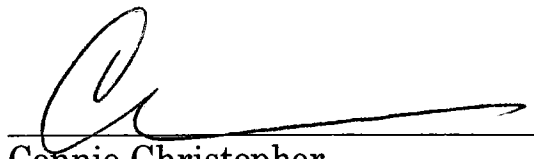
On February 27, 2020, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF QUIDEL CORPORATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 27, 2020, at Burbank, California.



Connie Christopher

SERVICE LIST
Ixchel Pharma, LLC v. Biogen, Inc.
Case No. S256927

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Ninth Circuit Court of Appeals Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Case No.: 18-15258