Case No. 26-1519

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE JUUL LABS, INC. ANTITRUST LITIGATION

On Rule 23(f) Interlocutory Appeal from the United States District Court for the Northern District of California, San Francisco Division
No. 3:20-CV-02345-WHO
The Honorable William H. Orrick

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF DEFENDENTS/ PETITIONERS

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RULE 26.1 DISCLOSURE STATEMENT

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

GI is a nonprofit, nonpartisan public policy and research foundation established in 1988, dedicated to advancing the principles of limited government, economic freedom, and individual liberty. GI advances these principles through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are affected.

One of GI's main objectives is the protection and promotion of economic liberty, and particularly the vindication of a rational, predictable, and just antitrust legal regime. To that end, GI has litigated and appeared as amicus curiae in cases involving antitrust issues, and particularly state antitrust and/or "unfair competition" laws. *See, e.g., Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021); *Mississippi Dep't of Health v. Jackson HMA,* Nos. 2025-IA-00266-SCT & 2025-IA-00502-SCT (Miss., filed Jan. 9, 2026) (pending); *Goldwater Inst.b.a. v. Arizona,* No. CV 2025-061461 (Maricopa Cnty. Super Ct., filed Nov. 12, 2025) (pending).

GI has appeared before this Court, representing parties or as amicus, in many other cases, as well. *See, e.g., Advanced Integrative Med. Sci. Inst., PLLC v.*

[1] No party's counsel authored any part of this brief. No one, apart from the Goldwater Institute and its counsel, contributed money intended to fund the brief's preparation or submission.

U.S. Drug Enf't Admin., 128 F.4th 1133 (9th Cir. 2025); *United States v. California Stem Cell Treatment Ctr., Inc.*, 117 F.4th 1213 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 318 (2025); *Crowe v. Oregon State Bar*, 112 F.4th 1218 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2848 (2025); *Goldwater Inst. v. U.S. Dep't of Health & Hum. Servs*., 804 F. App'x 661 (9th Cir. 2020).

GI Scholars have also published extensively on antitrust and "unfair competition" laws, and focusing particularly on their vague and often unjust standards. *See, e.g.,* Timothy Sandefur, *Why We Shouldn't Abandon the Consumer Welfare Standard,* The Dispatch (Dec. 22, 2020)[2]; Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism: North Carolina Board of Dental Examiners v. FTC*, Cato Sup. Ct. Rev. (2014-2015); Timothy Sandefur, *The Right to Earn A Living* (2010).

The question before the Court in this appeal—whether California's antitrust regime, which is not dependent on the long-standing principle of the "consumer welfare standard," should be inflicted upon other states, where it will clash with those states' antitrust legal regimes—is thus an important one for GI's institutional pursuits.

[2] https://thedispatch.com/article/why-we-shouldnt-abandon-the-consumer/.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court said in *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1067 (9th Cir. 2021), that when adjudicating class certification in a multi-state antitrust case, a District Court must consider, among other things, the "differences in relevant state [antitrust] laws." If these are too great, there may be no "predominance" for purposes of Rule 23(b)(3). In *Stromberg*, the relevant differences included the fact that California's Cartwright Act allows for treble damages, which federal law does not, and neither did the laws of many of the other states at issue in that case. *See* 14 F.4th at 1064.

Here, the differences are greater and more fundamental. In fact, the Cartwright Act is so out of step both with federal antitrust law and the consumer protection laws of other states that applying extraterritorially, as the decision below permits, drastically violates federalism principles. Specifically, that act does not consistently follow the "consumer welfare standard," which is "[t]he primary goal" of federal antitrust law. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007). Indeed, state courts have expressly rejected the approach that federal antitrust law takes. *See, e.g., Redwood Theatres, Inc. v. Festival Enters., Inc.*, 248 Cal. Rptr. 189, 203 (App. 1988) (Cartwright Act is concerned with "[t]he protection of the entrepreneur's right to compete" rather than consumer welfare).

That makes California's law anomalous. The rationale behind it is that the state's economic regulations are focused on *social* as well as economic considerations; namely, the protection of small business owners against their larger rivals. *See, e.g., ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*, 931 P.2d 290, 297 (Cal. 1997). Whatever the merits of such a policy goal, it shows why extraterritorial operation of the Cartwright Act is unjustifiable. The choice to prioritize such considerations over economic efficiency is a "'fundamental substantive social polic[y]'" that should not be imposed on other states. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (citation omitted). To expand the Cartwright Act's reach via this class action would effectively impose social policy preferences in other states, even where plaintiffs never visited California, never did business in California, and—being indirect purchasers—may never have even done business with a firm located in California.

This goes beyond the kinds of "material differences … between California's Cartwright Act and the antitrust laws of other states" that were found fatal in *Stromberg,* 14 F.4th at 1068. Those were quantitative, whereas these are qualitative differences.

In fact, extraterritorial application of the Cartwright Act would even conflict with the rationale that California courts *themselves* originally relied upon when first holding that the act could be applied outside of the state's borders. California courts originally said extraterritorial application wasn't a problem because state and federal antitrust laws are parallel. *R.E. Spriggs Co. v. Adolph Coors Co*., 112 Cal. Rptr. 585 (App. 1974). But that's no longer true. *See Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 n.4 (9th Cir. 2014) ("[It was once believed] that the interpretation of California's antitrust statute was coextensive with the Sherman Act. This is no longer the law in California"). On the contrary, California's antitrust laws are, in important ways, *contrary* to federal laws, as well as those of other states where class members are domiciled. That makes certification improper.

ARGUMENT

I. The Cartwright Act is out of step with federal antitrust law.

A. Federal law uses the consumer welfare standard.

In *R.E. Spriggs, supra,* the California Court of Appeal was asked to decide whether it was proper to apply the Cartwright Act against the Coors Company, which did all its manufacturing and bottling in Colorado. 112 Cal. Rptr. at 586. The court held that federalism concerns were not a bar to such extraterritorial application because the act "is complementary to the relevant provisions of the federal antitrust statutes." *Id.* at 588. Since the act's "'provisions [are] substantially the same as those of a federal act,'" there could be no concern about interstate application. *Id.* at 592 (citation omitted).

But in the years since, it has become clear that the Cartwright Act does indeed diverge from—is perhaps contrary to—federal antitrust law. *See, e.g., Cianci v. Superior Ct.*, 710 P.2d 375, 384 (Cal. 1985) ("the Cartwright Act is broader in range and deeper in reach than the Sherman Act."). In fact, the two conflict on what may be the most important element of all antitrust law: the "consumer welfare standard." This principle, which governs federal antitrust rules, holds that the goal of the antitrust law is to improve economic efficiency, as measured in terms of value to the consumer,[3] instead of the preservation of firms as entities in the marketplace.

Federal antitrust law did once aim at protecting the interests of firms, rather than consumers. That was why, for example, the Aluminum Company of America ("Alcoa") was persecuted for offering low prices and more efficient production. *See United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). *See also Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962) (antitrust law exists to protect "small, locally owned businesses."). But in the 1980s, that view was abandoned, as courts

[3] The operative complaint here frames the allegations as asserting a "per se" antitrust violation (where the rule of reason's consumer welfare standard would not apply), but that is not accurate. If anything, the allegations suggest an *ancillary* restraint, not a *naked* restraint, and ancillary restraints are subject to rule-of-reason analysis. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985). At least, that's true under federal antitrust law. California courts have not clearly said whether this is also true under the Cartwright Act. In any event, the complaint also asserts rule-of-reason claims. Indirect Purchaser Plaintiffs' Amended Consolidated Class Action Complaint [Doc. No. 271] ¶ 188.

and scholars realized that focusing on protecting businesses meant shielding them from legitimate competition—worsening of inefficiency and harming consumers.

Federal antitrust law therefore "shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986). After all, if antitrust law aimed at protecting firms instead of consumers, "the antitrust laws would be holding an umbrella over inefficient competitors," *id.*, and punishing more efficient businesses for the virtue of being more efficient. Today, federal antitrust statutes prohibit anti-competitive actions, but that phrase must be understood in terms of what is best for the *consumer*, not firms as entities. In other words, "reduction of competition does not invoke [federal antitrust laws] until it harms consumer welfare. Consumer welfare is maximized when economic resources are allocated to their best use, and when consumers are assured competitive price and quality." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (citations omitted).

Nowadays, under the consumer welfare standard, even actions that might at first seem anti-competitive may not actually be, because such conduct actually increases efficiency or has some other legitimate explanation. So, for example, in *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Supreme Court said that where a firm limits access to inputs that competitors need, that might seem anticompetitive, but that such action "might have nothing to do with exclusion." *Id.* at 414. It might simply be that a firm wants to use these inputs itself in ways that improve efficiency. The Court warned that to simply *assume* the firm is engaged in illicit behavior would be both hasty and dangerous, "given the incessant, complex, and constantly changing interaction of competitive and incumbent [firms]" in the marketplace. *Id.* Businesses in competition—especially those heavily regulated by the federal government—"are threatened with 'death by a thousand cuts'—the identification of which would surely be a daunting task for a generalist antitrust court." *Id.* (citations omitted).

Likewise, in an "actual potential competition" case, where a plaintiff claims that a business bought out a rival in order to prevent cost-cutting competition, the plaintiff must prove that, absent the acquisition of its rival, the dominant firm would likely have entered the market in the near future, and that this would have a substantial likelihood of bringing about procompetitive effects that the acquisition prevented. *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982). Because making such a case depends on so much conjecture about the future market, the Federal Trade Commission has applied a heightened standard of proof. *In re B.A.T. Indus., Ltd.*, 104 F.T.C. 852, 1984 WL 565370 at *38 n.341 (1984). Because economic analysis shows that "acquisitions to preempt competition are … improbable," courts require extensive evidence in order to prevent inefficiencies resulting from the misapplication of the antitrust laws. Geoffrey A. Manne, *et al., Technology Mergers and the Market for Corporate Control*, 86 Mo. L. Rev. 1047, 1079 (2021).

B. Other states have also adopted the consumer welfare standard—including states whose residents are class members here.

Other states, including those where class members here reside, have also adopted the consumer welfare standard into their state antitrust laws. For example, Wisconsin interprets its state laws in conformity with the Sherman Act, including applying the consumer welfare standard. *See Conley Publ'g Grp., Ltd. v. J. Commc'ns, Inc*., 665 N.W.2d 879, 890 ¶ 28 (Wis. 2003).[4] Florida has also adopted the consumer welfare standard for application of its state antitrust laws. *See Okeelanta Power Ltd. P'ship v. Florida Power & Light Co*., 766 So.2d 264, 268 (Fla. App. 2000); *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc*., 457 So.2d 1028, 1047 (Fla. App. 1984).

New York, *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 823 N.Y.S.2d 79, 84 (App. 2006), Massachusetts, *Whitehall Co. v. Merrimack Valley Distrib. Co.,* 780 N.E.2d 479, 487 (Mass. App. 2002), Oregon, *Redmond*

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[4] The Wisconsin Supreme Court abrogated a different portion of *Conley Pub. Grp.* in *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 158 ¶ 85 (Wis. 2005), in which it—perhaps ironically—explained the circumstances in which Wisconsin antitrust law could be applied extraterritorially.

Ready-Mix, Inc. v. Coats, 582 P.2d 1340, 1348 (Or. 1978), and Arizona have all adopted the consumer welfare standard, as well. *Pasco Indus., Inc. v. Talco Recycling, Inc.*, 985 P.2d 535, 546 ¶ 48 (Ariz. App. 1998).

Tennessee was directly asked by the Sixth Circuit whether that state's antitrust laws focused on protecting consumers or competitors, and it answered that it uses the consumer welfare standard. *Ghem, Inc. v. Mapco Petroleum, Inc.,* 850 S.W.2d 447, 452-53 (Tenn. 1993). Rhode Island has said the same. *ERI Max Ent., Inc. v. Streisand*, 690 A.2d 1351, 1353 (R.I. 1997).

So have Iowa, *State v. Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 129 (Iowa 1981), Michigan, *Putman v. Hills & Dales Gen. Hosp.,* No. 365711, 2024 WL 3844739, at *2 (Mich. App. Aug. 15, 2024), Nebraska, *Credit Bureau Servs., Inc. v. Experian Info. Sols., Inc.*, 828 N.W.2d 147, 152 (Neb. 2013), West Virginia, *Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 690 S.E.2d 587, 598 (W. Va. 2009), and North Carolina, *Dicesare v. Charlotte-Mecklenburg Hosp. Auth.,* No. 16 CVS 16404, 2017 WL 1359599, at *16 (N.C. Super. Apr. 11, 2017).

This has significant consequences. For example, *MPHlex, LLC v. Sovereign Int'l, Inc.,* 695 S.W.3d 157 (Mo. App. 2024), involved—like this case—an alleged "market allocation" antitrust violation under Missouri's state antitrust law. The court rejected the claim, based on application of the rule-of-reason—i.e., consumer welfare—standard. It said that some purported market allocations are "'legitimate'" because they ultimately make businesses more efficient and benefit consumers. *Id*. at 164 (quoting *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981)).

Likewise, in *Three Phoenix Co. v. Pace Indus., Inc*., 659 P.2d 1258, 1261-62 (Ariz. 1983), the Arizona Supreme Court rejected a case alleging "market allocation" under state law because, under the consumer welfare standard, "[some] partial restraints on trade are perfectly consistent with public convenience and the general interest…. Thus, even though [it] may produce some division of the markets served, society's interest in promoting the free transferability of business assets is sufficient to justify a rule of reason approach in these circumstances."

Illinois courts have reached the same conclusion under that state's antitrust laws, *Health Pros., Ltd. v. Johnson,* 791 N.E.2d 1179, 1189-90 (Ill. App. 2003), and Connecticut courts have said the same under that state's antitrust laws. *Elida, Inc. v. Harmor Realty Corp.*, 413 A.2d 1226, 1229-32 (Conn. 1979).

C. California law rejects the consumer welfare standard.

But California law takes a different approach. State courts have *rejected* the consumer welfare standard, and held that California's competition laws are concerned with "the protection of smaller, independent retailers … against … [their] large [rivals]." *ABC Int'l Traders*, 931 P.2d at 297. California courts have held that the state's antitrust and consumer welfare laws are focused not primarily on economic efficiency but on "[s]ocial[]" policies—namely, on preventing larger, more economically efficient firms from "dominat[ing]" the market and thus reducing the power of the "endangered middle class" or "'*bourgeois* class.'" *Id.*[5]

As the California Court of Appeal has put it, "it is well settled that under the federal cases, '[t]he Sherman Act protects competition, not competitors' … [but] California's antitrust laws are not as clearly aligned with the protection of competition." *Unit Process Co. v. Raychem Corp*., No. A092407, 2002 WL 173286, at *10 (Cal. App. Feb. 5, 2002) (citation omitted).

That explains why, in *Bay Guardian Co. v. New Times Media LLC*, 114 Cal. Rptr.3d 392, 405 (App. 2010), the court explained that while federal antitrust laws "seek[s] to prevent anticompetitive acts that impair competition or harm competitors," California state law is focused on "the maintenance of 'fair and honest competition,'"—i.e., social, as opposed to economic considerations. *Id*. (citation omitted). California law is therefore *not* "merely 'intended to protect the

[5] True, California courts have said that consumer welfare is *one* goal of the Cartwright Act. *See, e.g., Cianci v. Superior Ct.*, 710 P.2d 375, 383 (Cal. 1985) ("Consumer welfare is a principal, if not the sole, goal of antitrust laws."). But even the *Cianci* decision was scaled back just three years later, in *State ex rel. Van de Kamp v. Texaco, Inc*., 762 P.2d 385 (Cal. 1988). The lack of clarity on this subject is unsurprising, given "the confusion and incomplete scholarship" regarding the origin and meaning of the Cartwright Act. Don T. Hibner, Jr. & Heather M. Cooper, *"Per Se" or Not "Per Se"—A Historical "Quick Look" at Minimum RPM Under California Law*, 19 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 30, 39 (2010).

public, [as opposed to] individual competitors.'" *Id*. *See also Redwood Theatres*, 248 Cal. Rptr. at 203 (Cartwright Act is concerned with "[t]he protection of the entrepreneur's right to compete" rather than consumer welfare); *Marin Cnty. Bd. of Realtors, Inc. v. Palsson*, 549 P.2d 833, 842 (Cal. 1976) ("'destruction'" of "'just one merchant'" would violate Cartwright Act even if it "'makes little difference to the economy.'" (citation omitted)).

Fisherman's Wharf Bay Cruise Corp. v. Superior Ct., 7 Cal. Rptr.3d 628 (App. 2003), is another good example of how California's choice not to (consistently) adopt the consumer welfare standard affects Cartwright Act litigation. That case involved two companies that carry tourists to Alcatraz Island. The plaintiff argued that the defendant made exclusive dealing arrangements for so-called "wholesale" tickets to hotel concierges and others from whom tourists bought the tickets. *See id.* at 634. In assessing the plaintiff's Cartwright Act claim, the court said that this was not a "per se" violation, and therefore was subject to the rule-of-reason analysis. *Id.* at 649. But in conducting that analysis, the court declined to focus on consumer welfare alone, choosing instead to apply "a wide-ranging inquiry into the structure of the relevant market." *Id*. at 651. Relying on *Redwood Theaters, supra*—a case that expressly rejects the consumer welfare standard—it eschewed "a rigid mathematical formula based on the percentage of market foreclosure," and said instead that a contract that "place[s] so much of an available market … in the hands of a small group of dominant distributors, that it [makes] it difficult for [firms] who were not favored with exclusive contracts to continue to compete effectively, or even to exist, in the relevant market" would violate the act. *Id*.

In particular, the court said that the defendant's success in the "wholesale" market for tickets made it hard for the plaintiff to compete, since "without success in both wholesale and retail markets, a provider of bay cruises cannot cover its fixed operating costs and will eventually fail." *Id.* at 652. This, the court concluded, was proof of a violation.

Needless to say, this is an *entirely* different approach than would govern if the case were determined by the consumer welfare standard, which focuses on whether consumers have a wide range of choices and low prices. Under that standard, "[a] successful business justification need not improve market efficiency overall…. [A] firm is under no obligation to sacrifice its own profits in order to make the overall market larger." 3 P. Areeda & H. Hovenkamp, *Antitrust Law* 658f at 131-32 (2d ed. 2002).

California's divergent interpretation of the Cartwright Act is not surprising. In 1988, the state Supreme Court said that despite some "past statements" which "suggested that the Cartwright Act is patterned after the Sherman Act," it actually was *not*, and therefore that "the Sherman Act is not, contrary to our past statements, directly probative on interpretation of the Cartwright Act." *Texaco, Inc.*, 762 P.2d at 395, 398.[6]

The refusal of California courts to fully adopt the consumer welfare standard has made the Cartwright Act attractive for litigants who cannot show harm to consumers. *See, e.g.,* Ted Bolema, *California May Be Trying to Evade the Consumer Welfare Standard in its Antitrust Lawsuit against Amazon*, Mercatus Center Policy Report 1 (Jan. 2023)[7] ("California's antitrust and unfair competition law is less reliant on the consumer welfare standard, so evidence of harm is less important. This … is likely a key reason why the California attorney general brought the case … under state law."). Indeed, the way state courts have treated the Cartwright Act has rendered California's antitrust law "a very supple instrument," with courts "free to follow the decisions under the Sherman Act and free to ignore them." Moses Lasky, *Folklore and Myth in Judicial Opinions,* 20 U.C. Davis L. Rev. 591, 598 (1987).

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[6] This Court therefore erred in *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001), when it said that "[t]he analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act ... was modeled after the Sherman Act"—as indeed it later acknowledged in *Samsung*, 747 F.3d at 1205 n.4. *See further* Jonathan M. Eisenberg, *The Cartwright Act,* Cal. Anti. & Unfair Comp. L., 2014 WL 9967404, at § 1.05 (2025) ("[T]he Cartwright Act is not derived from the Sherman Act, but rather from the laws of other states, and the Cartwright Act and the Sherman Act differ in wording and scope.").

[7] https://www.mercatus.org/research/policy-briefs/california-antitrust-lawsuit-evading-consumer-welfare-standard.

Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co., 265 Cal.Rptr.3d 495 (App. 2020), offers a good example of how critical this divergence is. There, one insurance company sued another for adopting a rule forbidding the sale of certain kinds of insurance. The court ruled for the plaintiff. Yet at virtually no point in its ruling did the court address harms to consumers. Instead, based on the proposition that "[the] beneficiary of antitrust law is the competitor himself," the court focused almost exclusively on the effects of the rule on the plaintiff's business. *Id*. at 506 (quoting *Palsson*, 549 P.2d at 842).

To add to the complexity, California courts at one time held that the Cartwright Act codified common law rules against restraint of trade, *Speegle v. Bd. of Fire Underwriters*, 172 P.2d 867 (1946), but forty years later said the Cartwright Act is neither "confined by, or as broad as, the common law." *Texaco, Inc.*, 762 P.2d at 396. That means that even actions legal at common law can be forbidden by the Cartwright Act.[8]

This Court has acknowledged that "'the more restrictive definition of "antitrust injury" under federal law does not apply' to the Cartwright Act," *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 991 (9th Cir. 2000)

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[8] Similarly, California courts have held that employee non-competition agreements are subject to a different standard under the Cartwright Act than under federal law because the act "reject[s] the common law '"rule of reasonableness."'" *Ixchel Pharma, LLC v. Biogen, Inc.*, 470 P.3d 571, 587 (Cal. 2020) (citation omitted).

(quoting *Cellular Plus, Inc. v. Superior Court*, 18 Cal. Rptr.2d 308, 313 (App. 1993)),[9] but it has failed to appreciate that many other *state* antitrust laws are also more restrictive than the Cartwright Act (as listed above).

These distinctions show that even under California's own rationale, the extension of California's antitrust regime past state borders cannot be justified. The *R.E. Spriggs* court—writing in 1974—saw no harm in doing so because it thought state and federal antitrust laws were aligned. But in the decades that followed, it became clear that federal and state antitrust law are different, if not downright contrary.[10] Only in 1988 did the California Supreme Court acknowledge in *Texaco, Inc.* that the Cartwright Act was not based on the Sherman Act. And it was also around that time that federal courts began embracing the consumer welfare standard. The two statutes are therefore not parallel.

[9] This Court has encountered divergences between the Cartwright Act and federal antitrust law before. In *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482-83 (9th Cir. 1986), it criticized California courts for using a *per se* rule under the Cartright Act for certain types of alleged market allocation, urging California courts to adopt a rule of reason approach, instead. California courts appear not to have followed that advice.

[10] The D.C. Circuit went so far as to call the federal courts' choice to focus on "the goal of increasing consumer welfare in the economic efficiency sense" (as opposed to "contrasting goals such as protecting small competitors or preventing the concentration of economic or political power without regard to economic efficiency") a "radical change." *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 453-54 (D.C. Cir. 2010).

That means the problems raised by applying the Cartwright Act outside of California's borders are much greater in an indirect-purchaser case, which involves plaintiffs who never came to California, never did business in California, and may never have done business with a California-based entity—who invoke California law from across state lines simply because that gives them an advantage in court that isn't provided by their own home state laws. That raises serious federalism concerns.

II. Applying California's distinctive antitrust regime in other states contradicts federalism.

A. Since other states, unlike California, have adopted the consumer welfare standard, applying the Cartwright Act beyond state borders is unjustifiable.

More than four decades ago, Professor Hovenkamp warned that "indirect purchaser lawsuits under state law can play havoc with federal created mechanisms for improving the efficiency of private antitrust enforcement and damages allocation." Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 378 (1983).[11] Worse, he noted, such lawsuits threaten to undercut the

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[11] The problem of dis-united antitrust enforcement is well known—especially in the realm of mergers. As Professor Rose noted, "dual antitrust enforcement regarding mergers presents distinctive problems," in part because of "the state standards and philosophies are not only different, but stricter" than federal rules, meaning that "federal and state evaluation could lead to different results." Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 Wayne L. Rev. 71, 117 (1994). And because the economic consequences can be different from state to state, or at the state and national levels, "the potential for 'balkanized' enforcement

authority of sister states to legislate for themselves. The question is not one of judicial jurisdiction, he noted, but of *legislative* jurisdiction—i.e., the power of California to make choices for the people of other states—and the risk that the kind of expansive application of the Cartwright Act attempted in this case would effectively make that act into a substitute for federal law.

In words that seem to have anticipated this lawsuit, Hovenkamp wrote that "a rule that an indirect purchaser in California could use the California antitrust law to reach a conspiracy elsewhere when the defendants have made no direct sales into California" would allow the state legislature "to condemn antitrust violations nationwide; as a result, the Cartwright Act would then reach as far as the Sherman Act." *Id.* at 394.

Such a rule "would make it 'unnecessary for any other state or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated … according to the wishes of the legislature of [California].'" *Id.* at 394 n.110 (quoting *In re Grice*, 79 F. 627, 639 (N.D. Tex. 1897)).

These concerns apply with much greater force when one considers that the Cartwright Act is not focused on promoting economic efficiency, which is at least

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between federal and state authorities and among different states is troublesome." *Id.* at 118.

quantitative, empirically measurable, and invariant from one state to the next. Instead, the act is concerned with *social* goals, such as the protection of a "bourgeois class" against their economic competitors, *ABC Int'l Traders,* 931 P.2d at 297, and for that reason, different considerations can apply when determining liability.

Obviously California is free (within constitutional boundaries not at issue here) to adopt rules in order to pursue social goals, such as the privileging of small businesses against competition from big ones, but other states are entitled to pursue their own goals, as well.

Our federalist system is not intended to permit states to impose their social policies beyond their borders. *Cf. 3D Sys., Inc. v. Aarotech Lab'ys, Inc*., 160 F.3d 1373, 1380 (Fed. Cir. 1998) ("A clash between the fundamental social policies of a forum state and another state related to the action could constitutionally trump jurisdiction."); *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979) ("California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities."). In other words, "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.'" *Stromberg*, 14 F.4th at 1069 (citation omitted).

As one scholar has put it, "expanded jurisdictional competence permits forums to export social policy—in economic terms, states can externalize the costs of their laws to a variety of unwilling defendants residing in other states." Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments,* 23 Melb. U. L. Rev. 416, 425-26 (1999).

In particular, a state law that imposes liability on a business for actions that may have legitimate economic rationales, just because those actions might cause smaller competitors to lose business, reflects a choice to forego economic efficiency in the name of other values. It's a choice that states adopting the consumer welfare standard have rejected, but that California embraces. Extraterritorial application of the act would therefore enable California to externalize the costs of its *social* policies onto other states.

B. Proper application of choice of law rules weighs against including class members from states beyond California.

Given the significant difference in antitrust regimes between federal law and the Cartwright Act, applying the latter to class members whose contacts with California are indirect and attenuated threatens federalism values and conflicts with California's own choice of law rules. Most obviously, consideration of "'the nature and strength of the interest of each jurisdiction in the application of its own law'" counsels in favor of federalism and against unified treatment. *Stromberg*, 14 F.4th at 1068 (citation omitted).

As *Stromberg* acknowledged, "other states … have an interest in how their markets are managed and how best to enforce antitrust violations and regulate commerce in their states." *Id*. at 1069. And that interest is most obviously expressed in the analytical tests and theories that courts use when deciding whether something is an illegal restraint of trade or actually an efficient allocation of resources within legitimate business judgment.

States can and do differ regarding the types of economic arrangements they proscribe or permit. *See id.* at 1070. If the District Court in *Stromberg* "improperly elevated state interest in consumer protection to a superordinate level while giving too little weight to each state's interest in promoting business," then surely this case presents an even greater risk of that. *Id.* California's antitrust regime is not centered around economic efficiency, but also promotes other values—quintessentially social or cultural values that certainly differ from state to state.

In finding no legal conflict in applying California law to out-of-state class members, the District Court found that there "cannot be a true conflict simply because some states have *not* addressed [a matter] by statute or in judicial authority." *In re JUUL Labs, Inc. Antitrust Litig*., No. 20-cv-02345-WHO, 2026 WL 539344, at *19 (N.D. Cal. Feb. 26, 2026). This was shortsighted. That law imposes an idiosyncratic social/economic policy, one not focused on objectively measurable qualities like efficiency and consumer welfare—matters that don't stop at a state's borders—but on social policy and subjective concepts of fairness which certainly do.

CONCLUSION

Class certification should be *reversed*.

RESPECTFULLY SUBMITTED this 28th day of July, 2026 by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

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