

No. 26-1519

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE JUUL LABS, INC.
ANTITRUST LITIGATION

On Petition to Appeal from the United States District
Court for the Northern District of California
(Case No. 3:20-cv-02345) (District Judge William H. Orrick)

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING PETITIONERS AND
LEAVE TO APPEAL UNDER RULE 23(F)**

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae to oppose improperly certified classes. *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Stromberg v. Qualcomm, Inc.*, 14 F.4th 1059, 1074 (9th Cir. 2021).

INTRODUCTION & SUMMARY OF ARGUMENT

So much class litigation ignores the basic reality that most claims just aren't amenable to class-wide resolution. A class action is "an exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." *Dukes*, 564 U.S. at 348 (cleaned up). That is why Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). There is thus an "inherent tension" between "representative suits" and our "deep-rooted historic tradition that

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

everyone should have his own day in court.” *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 846 (1999). When that tension runs too high, it is the privilege of bringing a class action that must give way and the right to a fair legal process that must stand firm.

This antitrust litigation stems from Altria’s 2018 investment in Juul after independently shuttering its uncompetitive Nu Mark division amid forecasted losses and increased FDA scrutiny of youth vaping. Over Altria’s cogent and repeated objections, the district court approved a nationwide direct-purchaser class plagued with atypical representatives—three individual online purchasers purporting to represent large distributors who, comprising nearly 93% of all purchases, negotiated contracts with bespoke provisions for advertising, reselling, and rebate programs—as well as disparate arbitration and forum-selection clauses that erode commonality and superiority.

Exacerbating this error, the court also certified two multistate Cartwright Act classes for indirect purchasers and resellers across 27 jurisdictions. Despite California’s attenuated interest in out-of-state transactions between non-California parties, the district court improperly extended California law beyond its territorial limits, sweeping aside crucial conflict-of-law concerns. The district court’s rationale—that stark

differences in treble damages, scienter, limitations periods, and statutory standing are all somehow manageable with the aid of a state-specific verdict questionnaire—ignores their outcome-determinative impact and the resulting unfairness to Altria.

By extending California law to out-of-state conduct and harms, the certification order flouts the Constitution’s federalist structure, which preserves for each State the right to make its own reasoned judgment about what conduct is permitted or proscribed within its borders. “Perhaps most important, the variation in policies of punishment, even where the conduct is unlawful in all states, amounts to an important distinction in policy.” *White v. Ford Motor Co.*, 312 F.3d 998, 1017 (9th Cir. 2002). Simply put, a district court errs when it “app[ies] California law” to claims that should be governed by other States’ laws. *Qualcomm*, 14 F.4th at 1074. Doing so “improperly impair[s]” those States’ policy choices “by allowing California to set [] enforcement policy for the entire country.” *Id.*

The district court’s failure to take seriously these concerns also conflicts with California’s own choice-of-law rules. Under those rules, California courts have consistently refused to extend the State’s laws beyond its borders. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207–08 (2011); *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 96–97 (2010). By

“bootstrapping” California law for certification purposes, the district court’s order effectively modifies substantive rights to fit procedural ends. But *Erie Railroad v. Thompkins*, 304 U.S. 64, 78 (1938), prohibits federal courts from disregarding substantive distinctions in state law. For Altria, a Virginia corporation with attenuated ties to California, the district court’s decision inflicts a grave injustice.

Finally, under the Due Process Clause, California must have “a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (cleaned up). Yet the district court relieved plaintiffs of their constitutional burden to prove that *each* claim has sufficient California ties. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1187 (9th Cir. 2001). That error was “dispositive” of certification here. *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005).

Review is warranted. “Differences across state lines may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.” *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). The variations in state antitrust laws pose insuperable obstacles rendering class litigation both unmanageable and unconstitutional.

ARGUMENT

RULE 23(F) REVIEW IS WARRANTED BECAUSE THE CERTIFICATION ORDER IMPROPERLY ANOINTS CALIFORNIA AS MULTI-STATE ANTITRUST ENFORCER.

A. Federalism Prohibits Imposing California's Policy Judgments on Other States' Citizens.

The district court's certification order effectively converts California's Cartwright Act into a roving federal common law, imposing California's antitrust views on other States. This violates the principles of horizontal federalism that are key to our democratic form of government.

State laws “have no force of themselves beyond the jurisdiction of the state which enacts them.” *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). Neither California nor the U.S. District Court for the Northern District of California is a nationwide lawmaker. “The courts, no less than the political branches of the government, must respect the limits of their authority.” *U.S. Catholic Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

States must “recognize, and sometimes defer to, the laws, judgments, or interests of another.” Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1309 (2015). So “while an individual state may make policy choices for its own

state, a state may not impose those policy choices on the other states.” Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275, 292 (1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996)).

As the petition shows, the district court failed to respect those limits here. Yet “[i]t is hard to see why the laws of other states should be tossed overboard and their residents remitted to California law for transactions that, for individual consumers, are local in nature.” *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007). These same defects afflict the direct-purchaser class, where certification would allow individual online purchasers to represent large distributors with negotiated contract terms and unique commercial harms, further eroding each State’s policy choices on effective deterrence.

Make no mistake, once litigants (and their attorneys) become aware that California’s federal courts are giving extraterritorial effect to California law, lawsuits demanding extraterritorial effect will soon arise everywhere. And other States in this circuit (and beyond) will be motivated to try to legislate for the rest of the country, not just on antitrust but on every issue from arbitration to workers’ compensation. To prevent such a race to the bottom, the Court should grant interlocutory review.

B. The District Court's Certification Order Flouts California's Choice-of-Law Rules.

Humility is a judicial virtue. Judges are not lawmakers or philosopher kings; they are honor bound to apply the law, not to invent it. In diversity jurisdiction cases, *Erie* requires federal courts to apply the substantive law of the State where the suit arises, rather than the court's own interpretation of the common law. 304 U.S. at 78. *Erie's* lesson is as wise as it is settled, and its rule applies no less here. Yet by uncritically accepting Plaintiffs' one-size-fits-all choice of law, the district court granted California causes of action to many claimants who have none.

"[T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." *McCann*, 48 Cal. 4th at 97. California's choice-of-law rules, when properly applied, are fatal to multistate antitrust class actions seeking to apply California law to out-of-state injuries. "Even among repealer states, there are significant variations in the scope of repealer laws." *Stromberg*, 14 F.4th at 1068. Here "the relevant interests are not," as the district court found, "simply about the benefit or harm to resident consumers or liability to resident antitrust defendants; rather the relevant issues are about harm to the competitive process and in-state business activity." *Id.* at

1072. Knowing where to draw the line between robust antitrust enforcement and business overdeterrence is a careful balancing act.

The district court’s certification order fails to afford many other States’ policy judgments the weight to which they are entitled. The court acknowledged “true conflicts” (Slip Op. at 31-32) in damages rules, for example, but failed to identify affected States, analyze predominance under Rule 23(b)(3), or adequately explain how it would manage hybrid Cartwright liability with varying damages laws at trial.

Under Rule 23, a plaintiff may combine only those claims truly “capable of class-wide resolution”—claims that can be resolved “in one stroke.” *Dukes*, 564 U.S. at 350. Contrary to the district court’s certification order, Plaintiffs’ claims do not allow for one-stroke resolution.

C. Due Process Precludes Applying California Law to Out-of-State Class Members’ Claims Against Altria.

Under the Due Process Clause, class certification cannot alter the parties’ substantive legal rights. *Shutts*, 472 U.S. at 821. Before any court may impose California law on Altria and absent class members on a class-wide basis, California must have “a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class.” *Id.* at 821–22 (citation omitted).

This rule ensures that federal district courts do not overreach by adjudicating claims with little or no connection to the States in which they sit. To protect absent class members who have scant voice in the proceedings, this Court has insisted that the class proponent bears the initial burden of establishing that *each* plaintiff's claim has sufficient contacts to satisfy due process. *Zinser*, 253 F.3d at 1187. Failure to carry this burden precludes certification of a multistate class under Rule 23, as it risks imposing forum law on claims lacking sufficient ties to the forum State. *Shutts*, 472 U.S. at 821–22; *Zinser*, 253 F.3d at 1187.

Due process also protects out-of-state defendants. As a Virginia company, Altria has de minimis California contacts. Altria was not a party to any of the out-of-state transactions at issue. They all occurred outside California between non-California purchasers and non-California end payors. And California law imposes a strong presumption against applying its statutes extraterritorially absent clear legislative intent. *Ward v. United Airlines*, 466 P.3d 309, 317 (Cal. 2020). Because no such intent appears in the Cartwright Act, at least two district courts have held that the Act does not reach out-of-state conduct. *See In re HIV Antitrust Litigation*, No. 19-CV-02573-EMC, 2022 WL 22609107 (N.D. Cal. Sept. 27, 2022); *In re Capacitors Antitrust Litigation*, No. 17-MD-02801-JD, 2020

WL 6462393 (N.D. Cal. Nov. 3, 2020). The district court split from those decisions even though this Court has explicitly reserved the question of whether the Cartwright Act can ever apply extraterritorially. *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013).

Here the district court’s certification order failed to sufficiently ensure that applying California law to non-California class members’ claims against Altria “is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981). Indeed, when they purchased e-cigarettes, neither Altria nor the out-of-state class members had any idea “that [California law] could control” any potential claims. *Shutts*, 472 U.S. at 822. Procedural convenience can’t trump due process.

Plaintiffs’ conspiracy allegation changes nothing. There is no “conspiracy exception” to the Due Process Clause. State antitrust laws “do not extinguish federal constitutional rights or relieve courts from performing the analysis to safeguard those rights.” *St. Jude*, 425 F.3d at 1121. Nor may Juul’s California contacts be imputed to Altria, which is entitled to “an individual determination” of any “conspiratorial conduct within California.” *AT&T Mobility*, 707 F.3d at 1113.

CONCLUSION

This Court should grant the petition.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is ten pages—no more than one-half the length permitted for a Rule 23(f) petition. *See* Ninth Circuit Rule 5-2(b); *cf.* Fed. R. App. P. 29(a)(5) (permitting *amicus* briefs to be one-half the length of the party’s brief).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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