NO. 26-2626

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

IN RE JUUL LABS, INC.
ANTITRUST LITIGATION

On 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 APPELLANTS AND REVERSAL

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

**TABLE OF AUTHORITIES**
(*continued*)

**TABLE OF AUTHORITIES**
(*continued*)

**Page(s)**

## 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 (9th Cir. 2021).

So much class litigation ignores the reality that most claims just aren't amenable to class-wide resolution. 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 everyone should have his own day in court." *Ortiz v. Fibreboard 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.

*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.

## INTRODUCTION & SUMMARY OF ARGUMENT

Humility is a judicial virtue. A court's job is to find the law and faithfully apply it—not to rewrite it. Here the district court rewrote it. To hold together two classes spanning 27 jurisdictions, the court built—from the antitrust codes of 26 States and the District of Columbia—a regime that exists in none of them: California's liability rules for every class member, welded to a patchwork of 27 separate damages rules. No legislature enacted that law. No State's voters chose it. It is the district court's own creation, concocted for this case and unknown to any sovereign in the Union.

This appeal concerns the certification of two indirect-purchaser classes under California's Cartwright Act. The plaintiffs say that Altria's investment in JUUL, paired with an agreement to leave the market, killed competition and inflated prices across the country. To certify those classes on that theory, the court made three moves. First, it applied California's Cartwright Act to purchases made in other States by residents of other States. Second, it then attached to that California liability scheme the separate damages rules of each class member's home State. And third, it waved away the resulting differences as something a jury could sort out after trial. Each move is a reason to reverse.

The first two moves invent law. The Cartwright Act does not cross California's border, and the trial court never explained why it should. More basic still, a class action is a procedural device, not a license to rewrite substantive law. It cannot subject defendants to a regime that no legislature ever enacted and which bolts California liability onto 27 disparate damages codes. *See* 28 U.S.C. § 2072(b); *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

That invented regime does more than offend Rule 23. It foists California's enforcement policy onto 26 other jurisdictions, and it threatens to punish a single course of conduct many times over, through enhanced damages that no State authorized in this combination. Comity and due process both forbid as much. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–73 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

Finally, the court never did the heavy lifting that Rule 23 demands. It conceded "true and material differences" among the States' damages laws, then certified anyway on its "faith" that juries could somehow manage those differences once liability was decided. ADD-31–32 & n.14. But "faith" is not the rigorous analysis the Rule requires. The Court should reverse.

# ARGUMENT

## I. A CLASS ACTION IS NO WARRANT TO WRITE NEW LAW.

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). It is a way to adjudicate many existing claims at once. It is not a shortcut to create claims, or to rewrite the substantive law those claims arise under. The Rules Enabling Act draws that line in plain terms: the Federal Rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see Dukes*, 564 U.S. at 367. A class may not be certified by inventing a body of law for the class to litigate under. Yet that's precisely what happened here.

### A. The Cartwright Act stops at California's border.

The district court's certification order effectively converts California's Cartwright Act into a roving nationwide antitrust enforcer, imposing California's antitrust policy views on other States. This violates the principles of horizontal federalism that are key to our democratic form of government. Certification here thus stands on a premise that the district court never defended: that California's Cartwright Act governs purchases made outside California, by non-Californians, in transactions with no California connection. It doesn't.

California law begins with a strong presumption that its statutes operate only within California. *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011). That presumption is as old as it is firm. Overcoming it takes "an affirmative indication" that the Legislature meant its law to reach beyond the State. *Ward v. United Airlines, Inc.*, 466 P.3d 309, 317 (Cal. 2020). Nothing in the Cartwright Act supplies one. The federal presumption runs the same way: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

That presumption reflects a structural truth in the law. A legislature "ordinarily does not intend for its enactments to create conflicts with other sovereigns." *Ward*, 466 P.3d at 321. A purchase by an Iowan in Iowa is an Iowa transaction. *See Stromberg*, 14 F.4th at 1073 (the place of the wrong in a consumer case is where the purchase occurs). California has no more business setting the antitrust rule for that sale than Iowa has setting the rule for a sale in Sacramento.

This Court has said so. In *Stromberg* it vacated a multistate Cartwright Act class, warning that a district court may not let "California . . . set antitrust enforcement policy for the entire country." 14 F.4th at 1074. Here, as there, "the relevant interests" are not "simply about the benefit or harm to resident consumers or liability to resident antitrust defendants; rather the relevant interests are about harm to the competitive process and in-state business activity." *Id.* at 1072.

The district court brushed aside all of that. It didn't apply the presumption against extraterritorial application, weigh the statute's text, or ask whether California law could govern an Iowa sale. It said only that two of the Northern District's cases doubting the Act's reach had not "declined certification solely because of extraterritoriality concerns." ADD-27. But explaining why other cases don't control is not the same as deciding the question—whether California law reaches these transactions at all. The district court never answered it. The answer is "no."

### B. Bolting California liability onto 27 damages regimes invents a law that exists nowhere.

Set the extraterritoriality problem aside, and a deeper one remains. The court did not simply choose California law, or each State's law. It chose half of each: California's liability standard for the entire class, and then every home State's damages rules on top. ADD-31–32. A North Carolinian's claim would be judged for liability under California law but for damages under North Carolina's automatic-treble rule; an Iowan's under California's liability rule and Iowa's rule doubling damages only on a showing of willful or flagrant conduct; and so on across 27 jurisdictions. *See, e.g.,* N.C. Gen. Stat. § 75-16; Iowa Code § 553.12.

No legislature ever enacted those hybrids. Each State's antitrust code is a package—a carefully considered balance of when liability should attach and how much a plaintiff may recover. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101–02 (1989) (recognizing that States may adopt differing antitrust-enforcement schemes). Pull liability from one State and damages from another, and the product is a law that no legislature wrote, no Governor signed, and no voter approved. Defendants have called it a "Frankenstein" rule of decision. ADD-32 n.14. Just so.

California's own choice-of-law rules forbid this shortcut. They require a court to take each jurisdiction's law "as a whole," compare it to California's, and decide which State's interests would be more impaired. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.4th 554, 562 (9th Cir. 2023). They do not allow a court to disassemble each State's antitrust scheme and reassemble the parts to its liking. Splitting a single claim into a liability question governed by one State and a damages question governed by another is the kind of issue-by-issue dépeçage that California disfavors and the Rules Enabling Act forbids. Stretching it across more than two dozen jurisdictions pushes that shortcut well past the breaking point.

The flaw is not merely academic. *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), prohibits federal courts from disregarding substantive distinctions in state law. And "[n]o class action is proper unless all litigants are governed by the same legal rules." *Bridgestone*, 288 F.3d at 1015. Here the litigants are governed by a rule that governs no one else in America—a special rule, conjured by the court, so that these classes would cohere. That inverts Rule 23.

The class device is meant to aggregate claims that *already* share governing law; it is not meant to forge new governing law so that disparate claims can be aggregated. Using it that way enlarges the plaintiffs' substantive rights and abridges the defendants'—but Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

## II. THE DISTRICT COURT'S HYBRID REGIME OFFENDS COMITY AND INVITES STACKED PUNISHMENTS.

This Frankenstein hybrid is not just incoherent. It tramples the respect one sovereign owes another, and it threatens to punish a single course of conduct many times over.

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. *Stromberg,* 14 F.4th at 1074.

Start with what state antitrust damages are. They are not purely compensatory. Treble and double damages—the recoveries the certification order preserves for the class—help punish and deter in-state conduct. Each State has struck its own balance. North Carolina mandates treble damages regardless of intent, N.C. Gen. Stat. § 75-16; Kansas makes them permissive, Kan. Stat. Ann. § 50-161; Arizona trebles only when "the violation is flagrant," Ariz. Rev. Stat. § 44-1408; Iowa doubles only when "the prohibited conduct is willful or flagrant," Iowa Code § 553.12. Those are deliberative policy choices about how hard to punish anticompetitive conduct, and about what a plaintiff must prove to earn an enhanced recovery.

The Constitution treats such choices as each State's own business, not its neighbors. A State may not use its damages to punish conduct occurring elsewhere, or to impose its own policy choices on sister States. *BMW*, 517 U.S. at 571–73. But the harm to comity is no different when a single forum applies its own liability standard to a nationwide course of conduct and then lets enhanced damages flow, one bespoke scheme at a time. That forum becomes the national antitrust regulator—the very result *Stromberg* rejects. 14 F.4th at 1074.

The danger compounds in a multistate class. When one proceeding fixes liability for conduct in 27 jurisdictions and then layers 27 enhanced-damages regimes on top, the defendant faces aggregate punishment that no single State authorized—and that may exceed what any State, or the Constitution, would tolerate for the conduct within its own borders. *See* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Or. L. Rev. 275, 305–08 (1999) (explaining how stacking enhanced awards for one course of conduct encroaches on sister States' sovereignty and presses against the due-process ceiling on punishment). The certification order builds that machine and pronounces it manageable.

Comity counsels the opposite. Our federal system runs on a baseline of mutual respect among the States—a recognition that each may set policy within its own sphere and have its choices honored elsewhere. *See* Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1310–11 (2015). A forum honors that baseline by applying a sister State's law to a sister State's transactions, as a whole—not by cherry picking its own liability rule and conscripting the sister State's damages rule into its service. Due process points the same way: a forum may apply its law only where it has a "significant contact or significant aggregation of contacts" to each class member's claim, so that the choice is "neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 821–22. California has no contacts with an Iowan's purchase of a Virginia company's product in Iowa.

This is no mere abstraction. For Altria, a Virginia corporation with attenuated ties to California, the district court's decision inflicts a grave injustice. A court in the same District, confronting a nationwide Cartwright Act class, refused to certify it because applying California antitrust law to residents of other States that made different policy choices would conflict with those States' laws and run headlong into *Shutts*. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1026–27 (N.D. Cal. 2007). The order below charts the opposite course and offers no justification for the inconsistency.

Because these defects go to whether any single body of law can govern the class at all, they are logically antecedent to predominance—and they doom it. If California liability cannot be exported, the classes dissolve into 27 separate antitrust regimes, and the differences among them "swamp predominance." *Stromberg*, 14 F.4th at 1067.

### III. "FAITH" IS NOT THE RIGOR THAT RULE 23 DEMANDS.

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.

Even on its own terms, the order flunks Rule 23. Before certifying a class, a court must find—"after a rigorous analysis"—that common questions predominate. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (predominance is "demanding"). When a class spans many jurisdictions, that means deciding which laws apply to each claim and asking whether those differences will overwhelm any commonality the class may share. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001).

The district court did none of that here. Rather, it conceded "true and material differences" among the States' damages regimes, ADD-32, and then declared them "readily . . . managed through jury instructions or a special verdict form," with any conflicts to be resolved "[a]fter liability is determined." ADD-31–32. Its support for that confidence was a single sentence of faith: "I have faith that federal court juries will be able to readily parse and consider instructions and verdict forms directed to various state laws." ADD-32 n.14. That is not rigorous analysis; it is magical thinking.

Faith is not enough. A court "cannot rely merely on assurances of counsel that any problems with predominance or superiority can be overcome," *Zinser*, 253 F.3d at 1189 (discussing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996)), and it surely cannot rely on its own assurances. The plaintiffs bear the burden of presenting "a suitable and realistic plan for trial of the class claims." *Id.* at 1190. Where the laws of many States apply and "no manageable trial plan" addresses those variances, a court must "decline[] certification." *Id.* Yet the order offers no plan. It postpones the problem to a trial that, on the court's own logic, may require instructing one jury on the antitrust-damages laws of 27 jurisdictions at once—after telling that same jury to decide liability under the law of one.

Deferral is not case management. The predominance question is whether individualized issues—including the differences among 27 damages regimes—will overwhelm common ones. *Comcast*, 569 U.S. at 34–35. That question must be answered now, before certification, and not shelved away for later. By certifying first and promising to analyze later, the court abused its discretion. *Zinser*, 253 F.3d at 1189.

## CONCLUSION

The certification order rests on a body of law that no State enacted, foists one State's liability regime onto 26 other jurisidictions, and defers the very rigor that Rule 23 requires. The Court should reverse.

July 28, 2026 Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,884 words, excluding the items exempted by Fed. R. App. P. 32(f), which complies with the word limit of Fed. R. App. P. 29(a)(5). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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