

No. 26-1519

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE JUUL LABS, INC. ANTITRUST LITIGATION

DEVIN BLACK, *et al.*,

Plaintiffs-Respondents,

v.

ALTRIA GROUP, INC., *et al.*,

Defendants-Petitioners.

On Petition for Permission to Appeal from the United States District
Court for the Northern District of California, No. 3:20-cv-02345
Hon. William H. Orrick

**BRIEF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

SUMMARY OF ARGUMENT

In this antitrust class action, the district court improperly certified a sweeping 27-state class. The plaintiffs' theory is that Altria's investment in JUUL Labs, coupled with an agreement to exit the relevant product market, eliminated competition and caused inflated

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Defendants-Petitioners consented to the filing of this brief. Plaintiffs-Respondents did not consent.

prices. This brief focuses on one of the certified classes: the 27-state “Cartwright Act” indirect purchaser class.

The district court certified the class without conducting the rigorous analysis that Rule 23 requires. The court concluded that California’s Cartwright Act applies extraterritorially to create a uniform rule of antitrust liability, while also concluding that the jury would need to apply the different damages regimes of each of the separate 27 states. It offered no meaningful support for creating a bespoke mix of liability and damages rules handpicked from different states’ antitrust regimes. Moreover, instead of analyzing each of the 27 states’ statutes to determine whether common issues predominate, the court merely proclaimed its “faith” that, with sufficient instruction and a special verdict form, the jury could navigate a maze of individualized issues. ADD-32 n.14. That departure from settled class-action procedures violates Rule 23 and calls out for this Court’s intervention.

If left uncorrected, the district court’s decision ensures that businesses operating nationwide will face the worst of all worlds: multi-state classes with liability determined under a single state’s plaintiff-friendly regime and damages later calculated under a patchwork of

inconsistent state antitrust rules. Class actions are not supposed to be a mechanism for swapping liability rules and, regardless of the underlying merits, imposing hydraulic pressure on defendants to settle.

The Court should grant the petition for review.

ARGUMENT

I. Variations in State Law Typically Preclude Certification in Multi-State Class Actions.

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). As a result, no class may be certified until the trial court determines, “after a rigorous analysis,” that each of Rule 23’s requirements are satisfied. *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982). The “rigorous analysis” mandate is essential because certifying a class action can undermine defendants’ substantive rights. *See* 28 U.S.C. § 2072(b).

Under Rule 23(a), plaintiffs must demonstrate that the class is sufficiently numerous, common questions exist, and the representative parties are typical of the class and will adequately protect the class’s interests as a whole. Fed. R. Civ. P. 23(a). Plaintiffs seeking certification under Rule 23(b)(3) also must demonstrate that “questions of law or fact

common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). In addition, they must show that class treatment is “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3)(D).

Rule 23(b)’s predominance requirement is “demanding.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). It is satisfied only when “the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting 2 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 4:49 (6th ed.)). Moreover, complying with these requirements is particularly important when plaintiffs seek to certify multi-state classes because differences in state law can “defeat predominance.” *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 928 (9th Cir. 2019). Courts must determine, before certifying a class, which state laws apply and whether they differ in material ways. *See Jabbari v. Farmer*, 965 F.3d 1001, 1006 (9th Cir. 2020). “No class action is proper unless all

litigants are governed by the same legal rules.” *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

In *Stromberg*, for instance, this Court reversed certification of a nationwide class, holding that “the 23(b)(3) class was erroneously certified under a faulty choice-of-law analysis because differences in relevant state laws swamp predominance.” *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1067 (9th Cir. 2021). The Court explained that a district court could not allow “California to set antitrust enforcement policy for the entire country” and should have respected each state’s interest in having its own law applied to its residents. *Id.* at 1074.

Differences in state law regarding damages are no exception. As the Supreme Court has explained, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class” where plaintiffs’ proposed damages model does not match their theory of liability. *Comcast*, 569 U.S. at 34–35. While individualized damages calculations do not automatically defeat certification, differences must be carefully analyzed to ensure that common issues predominate over individual ones. *See Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094–95 (9th Cir. 2010).

II. The District Court’s Certification of the Cartwright Act Class Violated Rule 23’s Predominance Requirement.

The district court lost sight of this controlling precedent when it certified an indirect purchaser class spanning 27 states. Each of those states has made its own policy choices about antitrust enforcement — choices reflected in a balance of different liability standards, culpability requirements, and damages rules. These material differences “swamp any common issues and defeat predominance.” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

A. The district court improperly applied the Cartwright Act’s liability rules extraterritorially.

California cannot serve as the default antitrust regulator for the nation. *See Stromberg*, 14 F.4th at 1074; *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (2012). The district court brushed aside that principle, as well as precedent questioning the extraterritorial application of California law. Instead, according to the court, because none of the cases “declined certification solely because of extraterritoriality concerns,” they were irrelevant. ADD-27. But that brush off ignores the constitutional problems of allowing a single state to displace other state legislative choices. *See Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”).

More fundamentally, the district court failed to apply the requirements of California law, which includes a strong “presumption against extraterritoriality.” *Ward v. United Airlines, Inc.*, 466 P.3d 309, 317 (Cal. 2020); *cf. Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”). There is no indication that the California Legislature intended the Cartwright Act to apply extraterritorially, as courts have recognized. *See In re HIV Antitrust Litig.*, 2022 WL 22609107, at *9 (N.D. Cal. Sept. 27, 2022); *In re Capacitors Antitrust Litig. (No. III)*, 2020 WL 6462393, at *7 (N.D. Cal. Nov. 3, 2020).

The district court also fundamentally erred in applying California’s choice-of-law rules. Although the district court recognized that “true and material differences” exist under the different 27 state laws, it determined that California law would govern liability, while each state’s law would govern damages. ADD-31–32. But there is no basis for this pick-and-choose approach. The policy choices reflected in each of the 27 states’ antitrust legal regimes involve balancing liability rules with available remedies. Under California’s choice-of-law rules, a court must assess whether the law from one jurisdiction, “*taken as a whole*,

conflict[s] with California’s” law and, when “necessary[,] ... resolve that conflict.” *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.4th 554, 562 (9th Cir. 2023) (emphasis added). Courts cannot stitch together their own bespoke legal regimes that respect no state’s actual legislative choices.

The district court’s errors — applying California law extraterritorially and taking a pick-and-choose approach — creates artificial commonality that cloaks a predominance problem. Correct these errors and the outcome is obvious: no one could plausibly argue that a Balkanized class consisting of 27 states with different liability standards and different damages frameworks satisfies Rule 23(b)(3).

B. The district court failed to analyze whether common issues predominate over individual ones.

The district court also failed to analyze whether common issues predominate. After acknowledging “true and material differences” among the 27 states’ damages regimes, the court declared that those differences could be “managed through jury instructions or a special verdict form.” ADD-31–32. It barely mentioned the predominance requirement.

The court’s bare conclusion reflects a basic misunderstanding of the standards for class certification. The “third prong of the conflicts of interest analysis” — California’s choice-of-law test — does not determine whether class certification is appropriate. Choice of law is a separate inquiry that identifies which law should apply; it does not answer whether common questions predominate. *See Jabbari*, 965 F.3d at 1006 (“[A] court may have to decide which state’s or states’ law applies before it can determine whether common questions of law or fact predominate.”).

The district court was thus required to determine — “[b]efore certifying a class” — whether applying 27 different damages frameworks would create individual issues that predominate. *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *as amended on denial of reh’g*, 273 F.3d 1266 (9th Cir. 2001). That involves considering the “particular facts of the case” and carefully determining “whether individualized questions,” including the laws of 27 different states, “will overwhelm common ones.” *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023) (quoting *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022)).

The district court’s failure to conduct a rigorous analysis is sufficient to warrant reversal. *See Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024) (vacating class-certification order where trial court failed to “scrutinize classes before certifying them”). Moreover, a proper analysis shows that the predominance requirement cannot be satisfied, as the “[q]uestions of individual damage calculations” here “overwhelm” common questions. *Comcast*, 569 U.S. at 34–35. Nor are the differences among the 27 states minor. They reflect fundamentally incompatible policy choices by different states about compensation, deterrence, and access to justice. Differences include the availability of treble damages, various tiers of enhanced damages upon a showing of specific levels of culpability, limitations to actual damages, punitive damages, minimum damages, and rules against double recovery. *See* ADD-31.

Together, these differences are outcome-determinative. For example, not all treble damages states have laws containing the same language, with some making treble damages mandatory, *see, e.g.*, N.Y. Gen. Bus. Law § 340, and others making them permissible, *see, e.g.*, Kan. Stat. Ann. § 50-161. Moreover, states with damages calculations based

on “specific levels of culpability,” *see* ADD-31, differ in meaningful ways, changing not only the amount of damages but also the evidence required to calculate damages. *Compare, e.g.*, Ariz. Rev. Stat. § 44-1408 (allowing treble damages if “the violation is flagrant”), *with, e.g.*, Iowa Code § 553.12 (allowing double damages if the “the prohibited conduct is willful or flagrant”). Such differences result in the type of individual damages calculations that courts have recognized preclude a finding that common questions predominate. *See Comcast*, 569 U.S. at 34–35; *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 970 (S.D. Cal. 2016).

Despite these concerns, the district court merely stated: “I have faith that federal court juries will be able to readily parse and consider instructions and verdict forms directed to various state laws, if and as necessary.” ADD-32 n.14. But the court never explained how jury instructions would work or how they could overcome the need to resolve various individualized issues. When there is “no manageable trial plan adequate to deal with individualized issues and variances in state law,” the only appropriate action is to “decline[] certification.” *Zinser*, 253 F.3d at 1190; *see also In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 220–

21 (S.D. Ohio 1996), *on reconsideration*, 172 F.R.D. 271 (S.D. Ohio 1997).

The district court's certify-now-analyze-later approach fails.

III. The District Court's Errors Warrant Immediate Review.

Class certification is not merely “a game-changer,” but “often the whole ballgame.” *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). “Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the “risk of ‘in terrorem’ settlements that class actions entail”). Only compliance with Rule 23 prevents transforming the class-action device from one of litigation efficiency into an instrument of extortion and “blackmail.” *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quotation marks omitted).

By making California the nation's antitrust regulator and endorsing a “worry later” approach to class certification, the district court has charted a path for plaintiffs to extort their way to billions in settlements. Defendants will rarely benefit from tailored jury

instructions, because few cases will make it to trial. See Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 660 (2016). Moreover, the costs of this type of lax approach to class-action litigation are staggering. See 2025 Carlton Fields Class Action Survey 3, 6–8 (2025), available at <https://tinyurl.com/474nkhvt>. Such costs are especially heavy in “antitrust cases,” which are “exceedingly complex, expensive, and lengthy.” *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (recognizing that “antitrust” litigation is especially “time-consuming and expensive”).

The district court’s class-certification order also creates a roadmap for forum shopping. Plaintiffs can file in California, invoke California’s liability standards for the entire class, and preserve access to each state’s damages rules — cherry-picking the most favorable combination of legal standards. For businesses, this novel approach creates profound uncertainty. Moreover, failing to correct the district court will force businesses either to conform their conduct to the most restrictive standard — chilling procompetitive behavior that is lawful in other states — or accept the litigation risk under an unpredictable combination

of regimes. Neither option serves consumers, who benefit from vigorous competition and clear legal rules.

CONCLUSION

This Court should grant the petition for review.

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