IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 19-15382

JULIA BERNSTEIN; ESTHER GARCIA; LISA MARIE SMITH,
on behalf of themselves and others similarly situated,
Plaintiffs/Appellees,

v.

VIRGIN AMERICA, INC.; ALASKA AIRLINES, INC.,
Defendants/Appellants.

Appeal from the United States District Court for the Northern District of California
Case No. 3:15-cv-02277-JST

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

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amicus Curiae

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Amicus Curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae*.

/s/ Adam G. Unikowsky

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All parties consent to the filing of this amicus brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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, 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. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber has a strong interest in this case. The District Court certified a class despite Plaintiffs' failure to present a trial plan to resolve the complex choice-of-law questions with respect to each class member. The District Court appeared to assume that because a proper choice-of-law analysis would result in California law applying to *many or most* class members, the District Court could avoid individualized choice-of-law analysis and apply California law to *all* class members for purposes of class certification. This ruling is fundamentally contrary to the text

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

and purpose of Rule 23. *Amicus*'s members depend on courts to apply "a rigorous analysis" to putative class actions to ensure that Rule 23's requirements have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotation marks omitted). The district court did not conduct that rigorous analysis here, and its analysis, if adopted in a precedential opinion, would significantly and harmfully alter circuit law on class certification. The Chamber therefore has a strong interest in this case.

SUMMARY OF ARGUMENT

The District Court erred in holding that Plaintiffs satisfied the superiority requirement of Rule 23. The District Court adopted a "multi-faceted approach" for determining the applicability of California law. One crucial input to that "multi-faceted approach"—job situs—will differ from class member to class member. As a result, with respect to all class members, the "multi-faceted approach" must be applied individually. Plaintiffs failed to provide any trial plan governing how that analysis could proceed without individualized adjudications that would defeat the purpose of class certification. As such, Plaintiffs failed to establish that class adjudication was superior to individualized adjudication, as required by Rule 23.

The District Court's contrary ruling reflected a fundamental misunderstanding of class-action procedure. The court reasoned, in effect, that because statistical evidence shows that *many* plaintiffs are protected by California law, it follows that

the court can apply California law to *all* plaintiffs in a classwide proceeding. But Rule 23 cannot be used to extinguish substantive defenses with respect to particular class members, such as Defendants' defense that California law does not apply. Rather, Rule 23 requires a showing that a case can be resolved on a classwide basis while preserving the defendant's right to assert the same defenses it would assert in individualized proceedings. Because Plaintiffs did not make this showing, the class-certification order should be reversed.

The District Court further erred in ignoring the risk that applying California law to the class across the board would create conflicts of law. The District Court assumed that as long as an employer could theoretically comply with California law and the laws of other jurisdictions, there was no conflict that warranted displacing California law. That ruling was wrong—and because the existence of conflicts cannot be ascertained without employee-by-employee analysis, class certification was unwarranted.

ARGUMENT

The Chamber agrees with Defendants on each of the issues they raise in their brief. Specifically, the Chamber agrees that both the Dormant Commerce Clause (Defs. Br. 15-25) and the Supremacy Clause (Defs. Br. 25-47) bar Plaintiffs' claims; that California law does not apply (Defs. Br. 47-52); and that, even under California law, the District Court's rulings are incorrect (Defs. Br. 59-61).

The Chamber submits this brief to address one issue of particular importance to its members: class certification (Defs. Br. 53-59). The District Court's class-certification order is incompatible with a bedrock principle of class action procedure: class actions are a procedural device that cannot be used to strip defendants of meritorious defenses. The Court should reverse the class-certification decision and reaffirm that district courts may not strip defendants of their right to present individualized defenses so as to facilitate class litigation.

I. The District Court's Class-Certification Order Violates Rule 23 By Preventing Defendants from Arguing that California Law is Inapplicable to Particular Class Members.

The District Court's reasoning reflects a fundamental misunderstanding of class action procedure that would cause serious harm if adopted as circuit precedent.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 569 U.S. at 33-34 (citation omitted). "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "And like traditional joinder," a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* In other words, class actions do not provide litigants with any more substantive rights than they otherwise would have had if their claims had proceeded

individually. Class actions are simply a procedural vehicle that provides "'the manner and the means' by which the litigants' rights are 'enforced'" without "alter[ing] 'the rules of decision by which [the] court will adjudicate [those] rights.'" *Id.* at 407-08 (citations omitted) (first bracket added). It could not be any other way: If Rule 23 abridged litigants' substantive rights, it would violate the Rules Enabling Act, which prohibits courts from applying procedural rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The District Court's order violates these bedrock principles. It extinguishes a substantive right: Defendants' right to argue that California law does not apply to individual class members. Defendants would have had the right to make this argument if the plaintiffs had sued individually, but were stripped of the right to do so because the class was certified.

The District Court ruled that the applicability of California law turned on a "'multi-faceted'" approach that "includes three factors": "California residence, receipt of pay in California, and princip[al] 'job situs' in California – that 'are sufficient, but not necessary conditions for an individual to benefit from the protections of California law.'" ER 27. "[O]ther factors may be relevant to the

inquiry, 'such as the employer's residence and whether the employee's absence from the state was temporary in nature.'" *Id.*[2]

Based on that ruling, Defendants moved to decertify the class. Defendants' explanation was straightforward. The "multi-faceted" approach to choice of law depends on factors that differ from class member to class member. Some class members, for instance, will have a principle "job situs" in California; others will not. As such, an employee-by-employee analysis would be necessary to determine what state's law applies—a necessary predicate to determining whether the class member may bring a claim under California law. Because there is no way to resolve the dispute on a classwide basis without individualized adjudications, class litigation is not the "superior" method of resolving the case under Rule 23(b)(3). *See* ER 27.

The District Court's basis for rejecting Defendants' argument was extraordinary. The District Court did *not* suggest there was any efficient way of resolving the choice-of-law issues with respect to each class member. Rather, the District Court merely declared that every class member would be entitled to assert the protections of California law—regardless of his or her own personal circumstances. As to the crucial question of "job situs"—*i.e.*, where the plaintiffs actually worked—the Court cited its factual conclusion that "although Plaintiffs

[2] The Chamber disagrees with this choice-of-law analysis for the reasons stated by Defendants. But even assuming it is correct, the class-certification decision is wrong, as explained below.

spent about a quarter of their total work time in California, temporary out-of-state travel was an inherent part of their job." ER 28; *see also* ER247 (evidence that class members collectively worked only 31.5% of their time in California, and worked outside California on 84.5% of their work days). Notably, the District Court did not make any finding that *every* class member spent "a quarter of their total work time in California." ER57. Rather, that statistic applied only with respect to the named plaintiffs. But because, in the District Court's view, the class *in the aggregate* worked a sufficient number of hours in California to satisfy the "job situs" prong of the District Court's "multi-faceted" test, it followed that every *individual* class member was entitled to invoke the protections of California law.

The District Court's ruling accomplishes what Rule 23 forbids: it extinguishes Defendants' substantive rights in order to facilitate class litigation. If an *individual* plaintiff sued Defendants, the plaintiff would have to prove that California law applied to *his or her* own claims. The plaintiff could not merely invoke general statistics concerning the job situs of Defendants' employees as a whole; the plaintiff would have to prove that *his or her own* work was sufficiently tied to California to justify applying California law. And the defendant could defeat the plaintiff's claim by proving that the plaintiff worked in California too infrequently for California law to apply. But because those plaintiffs are now class members, Defendants have now been stripped of that defense. According to the District Court, because class

members *in the aggregate* work a sufficient number of hours in California, it follows that *each individual employee* may claim the benefit of the class's aggregate characteristics and invoke California law. Rule 23 forbids that maneuver.

The Court made a similar error when it concluded that "California law clearly applies to Plaintiffs' claims that relate to work performed within California's borders." ER 28. This holding was not based on any determination that California law *invariably* applies to all work within California's borders. As Defendants state, the California Supreme Court has expressly rejected that proposition, even when the employee works for a California-based employer. *See* Defs. Br. 49; *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1199 (2011) (holding that nonresidents who work for a California-based employer and pass through California "temporarily during the course of the workday" are not subject to California employment protections). Rather, the Court simply made a sweeping conclusion that because the class *in the aggregate* had sufficient ties to California, it followed that *all* class members were protected by California law when they worked within the state.

Again, however, this reasoning violates Rule 23. The class definition includes both California residents and nonresidents. Defs. Br. 8. Some pass through California more often; other less often. The Court cannot simply assume that each class member may claim the protection of California law based on their time spent

in California; the class member must *prove* it. The District Court's order improperly relieves Plaintiffs of their burden to offer that proof.

Finally, the District Court included a footnote stating that "[e]ven if the case required a more complex analysis of individual class members' residency, a class action would still be superior to individual litigation." ER 28 n.8. But even in that footnote, the District Court did not suggest any mechanism for Defendants to assert employee-specific choice of law arguments. Instead, the District Court merely asserted that class litigation was superior because "the pursuit of individual claims is unlikely and liability depends on issues of common proof." *Id.* The Court stated that "the pursuit of individual claims is unlikely given the relatively low potential recovery and possible fear of retaliation for initiating an individual lawsuit against an employer." *Id.*

The Court's view seemed to be that because individualized litigation was unlikely to proceed, the interest in allowing class litigation outweighed the interest in allowing Defendants to assert employee-specific defenses. This reasoning is simply wrong. The fact that individual plaintiffs might not have the incentive to pursue individualized litigation does not establish that a court can skirt Rule 23. Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 224 (2013). And the Supreme Court has "specifically rejected the assertion that one of those

requirements … must be dispensed with because the 'prohibitively high cost' of compliance would 'frustrate [plaintiff's] attempt to vindicate the policies underlying the antitrust' [federal] law[]." *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166-68 (1974) (first bracket in original)). Here, Plaintiffs did not satisfy Rule 23, so their claim cannot proceed regardless of whether individual plaintiffs would want to pursue any individual suits.

The Court's recent decision in *Senne v. Kansas City Royals Baseball Corp.*, No. 17-16245, -- F.3d --, 2019 WL 3849564 (9th Cir. Aug. 16, 2019), does not support a contrary conclusion.[3] In *Senne*, the court upheld certification of a class of minor league baseball players who participated in a league known as the "California League." *Id.* at *4. The California League, "as the name implies," "plays games exclusively within California." *Id.* at *3, *4. The Court concluded that California law applied to baseball players' work while playing in the California League, and therefore upheld the certification of a class of such players who would assert claims under California law. *Id.* at *8.

In reaching this conclusion, the Court did not hold that the defendants could be stripped of their right to assert employee-specific choice-of-law defenses. Rather, the Court held that there *were no* such individualized defenses because California

[3] The Chamber respectfully disagrees with the majority decision and agrees with Judge Ikuta's dissent. Even under the majority opinion's reasoning, however, the class should not have been certified.

law inherently applied to anyone who played in the California League—as all class members did. The Court relied on *Sullivan*'s holding that employees who work in California for "entire days and weeks" are covered by California law. *Id.* at *8 (quotation marks omitted). According to the Court, "*Sullivan* strongly indicates that California's interest in applying its laws to work performed within its borders for days or weeks at a time would reign supreme regardless of whether another state expressed an interest in applying its own wage laws instead of California's. *Id.* at *9. Thus, because the class members played in the California League for continuous stretches—and therefore worked exclusively, rather than transiently, in California during those stretches—they were entitled to the protection of California law.

The court offered the example of Mitch Hilligoss as a player to whom California law applied. Hilligoss played in the California League for two months. *Id.* at *9. Thus, for two months, Hilligoss trained, prepared, and played in games in a California-specific league. Though Hilligoss played in other non-California leagues, the court deemed his two-month tie to California sufficiently substantial that California law applied to him during that period. *See id.*

Crucially, however, the court did not "foreclose the possibility that there could be some circumstances in which a proper application of California's choice-of-law rules might lead to the application of another state's wage and hour laws to work performed in California." *Id.* at *10. Nor did it "create a per se rule or an

unrebuttable presumption." *Id.* Thus, the Court did not hold that a baseball team based in an out-of-state league, but who came to California for an occasional away game or exhibition game, was subject to California law while temporarily in the state. Rather, the Court held that California had an interest in protecting baseball players who played in a league based exclusively in California.

The class members in this case are not similarly situated to the class members in *Senne*. There is a big difference between training, preparing for, and playing baseball games in the California League, like Hilligoss and his fellow class members did, and transiently being in California on a flight whose purpose it is to *leave* California, like the class members did here. Indeed, the *Senne* panel's refusal to create a *per se* rule seems designed to ensure that in cases like this one, California law would *not* apply.

Crucially, moreover, the District Court's reasoning was conceptually different from the reasoning in *Senne*. Unlike in *Senne*, the District Court did not hold that any inherent feature of the class definition was sufficient to establish the applicability of California law for all class members. Rather, the District Court held that features of *most* class members' work were sufficient to establish that *all* class members were protected by California law. For the reasons already explained, that holding was wrong. The Court should reverse the District Court's class-certification

order and reaffirm the basic principle that class certification should not extinguish the defendant's substantive rights.

II. The District Court Erred in Ignoring Conflicts Between California Law and Other States' Law.

The class certification order is faulty for a second reason: the District Court improperly ignored the possibility of conflicts between California law and other states' law with respect to particular class members. As Defendants correctly explain, if California law conflicts with the law of another state, the court must conduct an individualized government-interest analysis to determine which state's law applies, rather than simply assuming that California law applies. Defs. Br. 55-58. Defendants are similarly correct in observing that California law conflicts with other states' laws in multiple respects, such as both the level of the minimum wage and the method of calculating compliance. *Id.* Thus, it is impossible to determine whether California law applies to any class member without examining whether some other state would have a greater interest in applying its laws to that class member than California—an individualized analysis that should have defeated class certification. *Id.*

The District Court addressed this point by stating that because Plaintiffs asserted claims under California law, and because all plaintiffs were entitled to invoke California's protections, choice-of-law issues were moot. ER 29-30. The District Court appeared to believe that it did not matter whether other states' laws

protected the class members, because California's laws *also* protected the class members, and so the applicability of other states' laws was irrelevant. *Id.*

This reasoning is flawed. It appears to presuppose that California's laws do not conflict with other states' laws as long as it is theoretically possible to comply with both. Thus, for instance, the District Court took the view even though New York allows "averaging" and California forbids "averaging" in assessing minimum wage compliance (ER 30), it is possible to comply with both New York law and California law by not "averaging," so there is no conflict in laws that warrants a choice of law analysis. That reasoning is in substantial tension with *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881 (2019), which held that for purposes of a federal statute, California's higher minimum wage was "'inconsistent' with" the lower federal minimum wage. *Id.* at 1892-93 (citation omitted). It also conflicts with common sense: If a state declines to set a minimum wage as high as California's, that choice reflects a substantive judgment by that state that a higher minimum wage would lead to a counterproductive loss in employment—a judgment that conflicts with California's judgment that a higher minimum wage is warranted. The District Court failed to grapple with this argument at all. It simply concluded that California law applied without considering whether conflicts of law would foreclose California law from applying with respect to individual class members.

More fundamentally, the District Court *could not* have answered that question without an employee-by-employee analysis that forecloses class certification. The core problem is that many, if not most, of the class members may plausibly claim the protection of multiple jurisdictions' laws. All class members spend substantial amounts of time working in other states (which may vary from class member to class member); all class members who are not in the subclass are nonresidents of California. Even the subclass members may live in different municipalities with different minimum wage rates. Defs. Br. 56. There is no way to confidently know whether a conflict of laws exists without knowing what laws might apply on both sides of the conflict—and this requires an individualized analysis that cannot apply classwide.

The District Court concluded that this inquiry was unnecessary because Defendants had not affirmatively argued that a *different* state's laws applied. ER 30. But that is precisely the point: Defendants could not have argued that any *one* state's laws applied to the class as a whole, when conflicts of law might be resolved differently depending on the class member. And in any event it was *Plaintiffs*' burden to prove that the requirements of Rule 23 were satisfied, which in turn required proof of a manageable trial plan to resolve the conflicts of law with respect to *all* class members. Plaintiffs failed to do so, and the District Court should not have swept the conflicts-of-law problem under the rug.

Again, *Senne* does not support a different conclusion. *Senne* does not hold that plaintiffs may avoid a conflicts-of-law analysis merely by declaring that they were invoking California law and no other. Indeed, the Court appeared to presume that a conflicts-of-law analysis was necessary to determine which government had the greatest interest in applying its law. Instead, the Court held that for all players in the California League, California inherently had the greater interest than other states. *See* 2019 WL 3849564 at *12-13. That conclusion was based on the players' relationship to the California League—a relationship that has no parallel here.

The Court should not be swayed by *Senne*'s dicta concerning the balancing of government interests. The Court held that "under California's choice-of-law principles, a state has a legitimate interest in applying its wage laws extraterritorially only in two limited circumstances," one of which was when "a state's resident employee of that state's resident employer leaves the state temporarily during the course of the normal workday." *Id.* at *12 (quotation marks omitted). This case does not directly fall within that circumstance, because the class members do not work for out-of-state employers. Nevertheless, the Court did not have occasion to consider whether a foreign state would have an interest in applying its laws to resident employees who only spend transient periods in California—as is the case here. And for the reasons explained by Judge Ikuta in dissent, other states would

have an interest in applying their laws in that scenario. *Id.* at *35 (Ikuta, J., dissenting).

More fundamentally, the District Court did not conduct an adequate analysis of whether conflicts of law could be avoided for all class members based on the class definition. Rather, it issued its ruling based on the aggregate characteristics of the class, without considering whether Defendants would have to forego employee-specific defenses. At a minimum, the Court should clarify that such analysis is necessary for class certification and remand for application of the proper analysis.

* * *

The reality of this case is that choice-of-law analysis will inevitably vary for each class member. It may turn on where they reside; how much time they spend in California; and which other states the work in, and for how long. Declaring that California law applies to all class members may have made the case simpler, but making cases simpler is not a reason to violate Rule 23.

CONCLUSION

The judgment of the District Court should be reversed.

August 19, 2019

Respectfully submitted,

/s/ Adam G. Unikowsky

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 3,986 words.

Pursuant to Fed. R. App. P. 32(a)(5) and (6), this brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam G. Unikowsky