No. 19-15159

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN STROMBERG et al.,
Plaintiffs-Appellees,

v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

On Appeal from the
United States District Court for the Northern District of California
No. 5:17-md-2773 (Hon. Lucy H. Koh)

BRIEF OF THE UNITED STATES OF AMERICA AND THE STATES OF LOUISIANA, OHIO, AND TEXAS AS AMICI CURIAE IN SUPPORT OF APPELLANT

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MICHAEL F. MURRAY
Deputy Assistant Attorney General

WILLIAM J. RINNER
Chief of Staff and Senior Counsel

KRISTEN C. LIMARZI
MARY HELEN WIMBERLY
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 353-0163
michael.murray@usdoj.gov

Counsel for the United States

(counsel for the States listed on inside cover)

JEFF LANDRY
Attorney General

ELIZABETH BAKER MURRILL
Solicitor General

LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70802
murrille@ag.louisiana.gov

Counsel for Louisiana

DAVE YOST
Ohio Attorney General
BENJAMIN M. FLOWERS
State Solicitor

30 E. Broad Street, 17th Floor
Columbus, OH 43215
bflowers@ohioattorneygeneral.gov

Counsel for Ohio

KEN PAXTON
Attorney General of Texas
KYLE HAWKINS
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov

Counsel for Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF THE AMICI

The United States has responsibility for enforcing federal antitrust laws and has a strong interest in their correct application both in public and private antitrust enforcement actions in order to protect competition and innovation for the benefit of consumers. This interest extends to cases like the present one, in which a district court is applying a single state's law nationwide, as if it were a federal law. The amici states also have responsibility for enforcing federal antitrust laws in their proprietary and parens patriae capacities and thus also have a strong interest in their correct application. In addition, the amici states also have an interest in the proper application of state antitrust law.

In certifying a nationwide class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3), the district court below concluded that California law could be applied to the claims of hundreds of millions of class members—most cell phone users—from across the United States. California antitrust law allows so-called "indirect-purchaser" damages suits—that is, purchasers of a good may recover damages from an upstream supplier for anticompetitive overcharges passed on to them by a more directly injured party, especially direct purchasers from the antitrust violators.

The federal government and many of the states have made a different choice and precluded indirect purchasers from recovering damages (with certain potential exceptions not relevant here). These choices reflect concerns as diverse as the states themselves, including that indirect-purchaser suits give rise to excessive litigation, present an undue risk of duplicative recovery (by both direct-purchaser distributors and the indirect-purchaser consumers), or improperly divorce state antitrust law from federal antitrust law. Notwithstanding the policy choice reflected in those states' laws, the district court erroneously concluded those states had "no interest in applying their laws to the current dispute." ER54 (Dist. Ct. Class Cert. Order 54). By applying California law to the claims of the millions of class members who made their purchases in states that do not allow them to recover, the district court flouted the views of these states and, consequently, basic principles of federalism, in a decision that could reach beyond antitrust law.

Amici therefore offer this brief, pursuant to Fed. R. App. P. 29(a)(2), to explain why the district court's ruling on this particular ground was erroneous.

STATEMENT OF THE ISSUE

Whether the district court erred by holding that a single state's rule allowing indirect purchasers to sue for damages applies to the claims of a nationwide class in the face of contrary rules from many other states and contrary federal policy.

STATEMENT OF THE CASE

This case is about the allegedly anticompetitive patent-licensing practices of Qualcomm, "the leading supplier of modem chips worldwide." ER5 (Dist. Ct. Class Cert. Order 5). Modem chips are what allow a mobile phone, or "cellular handset," to communicate with a cellular communications network. ER3-4 (*id.* at 3-4). Qualcomm sells modem chips to original equipment manufacturers (OEMs), the entities that produce cellular handsets. ER5-7 (*id.* at 5-7).

"Cellular communications depend on widely distributed networks that implement cellular communications standards," ER2 (*id.* at 2), which are set by "standards setting organizations" (SSOs), ER3 (*id.* at 3). When technology incorporated into a standard is patented—as is common—the incorporated patent is called a "standard essential patent" (SEP). *Id.* In the normal circumstance, "before incorporating a

technology into a standard, SSOs require participants to publicly disclose any claimed SEPs and promise to license SEPs to anyone who practices the standard on a royalty-free or fair, reasonable, and non-discriminatory (FRAND) basis." *Id.* (brackets and quotation marks omitted; quoting First Am. Compl. ¶ 45).

Qualcomm "has several patents that have been declared essential to cellular communications standards." ER7 (*id.* at 7). It disputes the breadth of the allegations in this case that "Qualcomm belongs to each of the leading SSOs involved in setting wireless communication standards and has made commitments to such SSOs to license its SEPs on FRAND terms." ER131 (First Am. Compl. ¶ 42). Instead, Qualcomm admits only that it "is a member of and has committed to certain SSOs that it will license certain SEPs consistent with the respective SSO's intellectual property rights . . . policy." ER97 (Answer ¶ 42).

Plaintiffs in this case are purchasers of cellular handsets containing modem chips. ER13-14, ER66 (Dist. Ct. Class Cert. Order 13-14, 66). They claim that they were harmed by Qualcomm's anticompetitive behavior, which they allege falls into three categories.

ER8 (*id.* at 8). First, Qualcomm purportedly licensed its cellular SEPs to OEMs under a so-called "no license-no chips" policy: "Essentially, unless OEMs agree to take out a separate SEP licensing agreement with Qualcomm on Qualcomm's preferred terms that covers all of the handsets that the OEM sells, Qualcomm will not supply the OEM with any Qualcomm modem chips." ER8 (*id.* at 8); *see* ER8-10 (*id.* at 8-10). Second, Plaintiffs allege, Qualcomm "refuses to license its FRAND-encumbered cellular SEPs to competing modem chip manufacturers." ER10 (*id.* at 10); *see* ER10-11 (*id.* at 10-11). Third, according to Plaintiffs, Qualcomm and Apple entered into exclusive-dealing agreements in which Apple agreed "to use only Qualcomm's modem chips in Apple's flagship products." ER12 (*id.* at 12); *see* ER11-13 (*id.* at 11-13).

Plaintiffs allege that Qualcomm's purportedly anticompetitive behavior enables it to coerce OEMs into accepting unreasonable licensing terms, including above-FRAND royalties that apply to "every modem chip that an OEM buys, including the modem chips made by Qualcomm's competitors." ER9-10 (*id.* at 9-10); *accord* ER13-14 (*id.* at 13-14). This "surcharge" is allegedly "passed down the distribution

chain from the modem chips purchasers to Plaintiffs who purchase the handsets containing such modem chips." ER14 (*id.* at 14) (brackets and quotation marks omitted; quoting First Am. Compl. ¶ 144). Plaintiffs contend that the passed-through harm exists "in the form of higher quality-adjusted prices" for handsets. ER31 (*id.* at 31).

The present appeal arises from a multi-district litigation consolidating cellular-handset-purchaser suits against Qualcomm in the Northern District of California. Plaintiffs assert violations of federal Sherman Act Sections 1 and 2, 15 U.S.C. §§ 1, 2, as well as California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq., and Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. ER168-77 (First Am. Compl. ¶¶ 168-210). They seek injunctive relief and damages, among other things. ER177 (First Am. Compl. 58).[1]

In November 2017, the district court dismissed Plaintiffs' Sherman Act claims pursuant to *Illinois Brick Co. v. Illinois*, 431 U.S.

[1] The Federal Trade Commission and Apple, a direct purchaser of Qualcomm's modem chips, have also challenged Qualcomm's patent-licensing practices on various grounds. *See Fed. Trade Comm'n v. Qualcomm Inc.*, No. 5:17-cv-220 (N.D. Cal.) (Koh, J.); *Apple Inc. v. Qualcomm Inc.*, No. 3:17-cv-108 (S.D. Cal.) (Curiel, J.) (stipulated dismissal, following parties' settlement, entered on April 25, 2019).

720 (1977). ER221-23 (Dist. Ct. Dismissal Order 42-44). The court explained that Section 4 of the Clayton Act, 15 U.S.C. § 15, which creates a private right of action for persons injured by violations of the Sherman Act, "does not allow indirect purchasers to bring suits for money damages, even if the indirect purchasers suffered an injury in the form of an overcharge passed on from direct purchasers." ER221 (*id.* at 42) (citing *Ill. Brick Co.*, 431 U.S. at 730). Indirect purchasers are claimants seeking to recover from an upstream supplier for anticompetitive overcharges passed on to them by the supplier's customers. Because "Plaintiffs do not contest the applicability of *Illinois Brick* and cannot establish that an exception applies," the court concluded, "they cannot bring a damages claim under § 1 or § 2 of the Sherman Act as a matter of law." ER223 (*id.* at 44).

The district court declined to dismiss Plaintiffs' California claims, concluding that Plaintiffs had adequately pleaded antitrust injury and Article III standing, and they had stated claims under California law. *See* ER196-221, ER223 (*id.* at 17-42, 44). In particular, the court cited California's choice-of-law rules and held that California's Cartwright

Act could apply to the claims of the entire putative nationwide class, in the event that class were certified. ER215-21 (*id.* at 36-42).

In September 2018, the district court decided the class-certification question and issued the order currently on appeal. ER1-66 (Dist. Ct. Class Cert. Order). The court certified a nationwide damages class of cellular-handset purchasers under Fed. R. Civ. P. 23(b)(3), concluding that "common questions predominate overall and with regard to . . . antitrust violation, antitrust impact, and damages." ER22 (Dist. Ct. Class Cert. Order 22). The court also certified an identically defined "Rule 23(b)(2) class for injunctive relief only." ER65 (*id.* at 65). The two classes were defined as follows:

> All natural persons and entities in the United States who purchased, paid for, and/or provided reimbursement for some or all of the purchase price for all UMTS, CDMA (including CDMAone and cdma2000) and/or LTE cellular phones ("Relevant Cellular Phones") for their own use and not for resale from February 11, 2011, through the present (the "Class Period") in the United States. This class excludes (a) Defendant, its officers, directors, management, employees, subsidiaries, and affiliates; (b) all federal and state governmental entities; (c) all persons or entities who purchased Relevant Cellular Phones for purposes of resale; and (d) any judges or justices involved in this action and any members of their immediate families or their staff.

ER66 (*id.* at 66).

Amici's brief focuses on the district court's certification of the Rule 23(b)(3) class—in particular, the court's predominance finding with respect to damages, based on its choice-of-law analysis. In making that finding, the court confirmed its earlier holding that "other states have no interest in applying their laws to the current dispute," and thus there was no need to "address which state's interests would be most impaired if its policy were subordinated to the law of another state." ER54, 57 (*id.* at 54, 57). "[T]he Cartwright Act may be applied to a nationwide class because other states do not have an interest in barring their own citizens from recovering damages for a California-based corporation's anticompetitive conduct that took place almost entirely in California." ER52 (*id.* at 52). Accordingly, the court ruled, Plaintiffs could prove damages on a class-wide basis. ER51-57 (*id.* at 51-57).

SUMMARY OF ARGUMENT

The district court's certification of a nationwide class of indirect purchasers under California's Cartwright Act was erroneous and undermines state and federal policies. First, the ruling rests on a misapplication of choice-of-law principles because it categorically rejects the existence of other states' interests in having their laws applied to

their resident claimants. Second, the ruling's effective nationalization of California law allowing indirect-purchaser damages claims conflicts with the policies of numerous states that, consistently with federal law, have declined to permit such claims because of their policy views on the risks of excessive litigation, duplicative damages, federal-state harmony, or other matters.

ARGUMENT

I. The District Court's Choice-of-Law Analysis And Certification Of A Nationwide Class Ignore The Fact That Every State Has An Interest In Having Its Law Applied To Its Resident Claimants

The United States agrees with Qualcomm that the district court erred in certifying the class when it held that "other states have no interest in applying their laws to the current dispute." ER54 (Dist. Ct. Class Cert. Order 54). As was the case in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), "the district court . . . erroneously concluded that California law could be applied to the entire nationwide class." *Id.* at 585.[2]

[2] This Court's recent decision in *In re Hyundai & Kia Fuel Economy Litig.*, No. 15-56014 (9th Cir. June 6, 2019) (en banc), reaffirms that *Mazza* governs in this case. There, the en banc Court explicitly distinguished between settlement classes in which no one raises the

1. "In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *see* ER52 (Dist. Ct. Class Cert. Order 52) (quoting *Castano*). Plaintiffs here sought to avoid this potential predominance problem by "seek[ing] damages on behalf of the entire class under the California Cartwright Act." ER52 (Dist. Ct. Class Cert. Order 52). A nationwide class may be certified under a single state's law, however, only if permitted by applicable choice-of-law rules. "A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Mazza*, 666 F.3d at 589 (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.), *opinion amended in other part on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001)).

The district court below held, and all parties agree, that *Mazza* identifies the correct choice-of-law rule: California's governmental-interest test. *See* ER51-54 (Dist. Ct. Class Cert. Order 51-54);

---

inapplicability of California law, where *Hyundai*'s analysis governs, and cases like this one involving litigation classes and contested certification proceedings where such inapplicability was raised, where *Mazza* governs.

Qualcomm Pet. for Permission to Appeal 6-16; Pls.' Opp'n to Pet. for Permission to Appeal 7-8, 13-14. Under this test, the class-action proponent bears the initial burden to demonstrate that the application of California law comports with Due Process by "show[ing] that California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza*, 666 F.3d at 589 (quoting *Wash. Mut. Bank v. Super. Ct.*, 15 P.3d 1071, 1081 (Cal. 2001)). "Qualcomm does not dispute that Plaintiffs have sufficiently alleged that California has a constitutionally sufficient aggregation of contacts to the claims of each putative class member in this case." ER53 (Dist. Ct. Class Cert. Order 53).

Accordingly, "the burden shift[ed] to [Qualcomm] to demonstrate 'that foreign law, rather than California law, should apply to class claims.'" *Mazza*, 666 F.3d at 590 (quoting *Wash. Mut. Bank*, 15 P.3d at 1081). "California law may only be used on a classwide basis if 'the interests of other states are not found to outweigh California's interest in having its law applied,'" which is determined using a three-step test. *Id.* (quoting *Wash. Mut. Bank*, 15 P.3d at 1082).

The first step requires a court to "determine[] whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different." *Mazza*, 666 F.3d at 590 (quoting *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527 (Cal. 2010)). There is no dispute that Qualcomm has met its burden on the first step of this analysis. *See* ER54 (Dist. Ct. Class Cert. Order 54). "[T]here are material differences between California's Cartwright Act and the antitrust statutes of certain other states. Specifically, some states would not allow suits for damages by indirect purchasers, like Plaintiffs, to proceed at all." *Id.*

The parties' dispute concerns the second step, which requires the district court to "examine[] each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Mazza*, 666 F.3d at 590 (quoting *McCann*, 225 P.3d at 527). The district court resolved this step by categorically (and erroneously) concluding that "other states have no interest in applying their law to prevent this lawsuit from going forward." ER54 (Dist. Ct. Class Cert. Order 54). It thus never reached the third step of the governmental-interest test, which would have

required the court to "evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Mazza*, 666 F.3d at 590 (quoting *McCann*, 225 P.3d at 527).

2. The district court's resolution of the choice-of-law analysis at step two rests on a misreading of *Mazza*. The court correctly quoted *Mazza* as instructing that "every state has an interest in having its law applied to its *resident claimants*." ER56 (Dist. Ct. Class Cert. Order 56) (brackets omitted; quoting *Mazza*, 666 F.3d at 591-92). Yet the district court's added emphasis on the "resident claimants" in the quotation is misplaced, as is its dispositive finding that "[n]o resident claims the benefit of non-California law here." ER56-57 (*id.* at 56-57). The "resident claimants" do not have the relevant interest; it is "*every state* [that] has an interest." *Mazza*, 666 F.3d at 591-92 (emphasis added). The court thus failed to conduct the correct analysis, which was to "apply California's three-part conflict test to *each* non-forum state with an interest in the application of its law." *Zinser*, 253 F.3d at 1188.

The district court compounded its error when it misstated the interest underlying other states' antitrust laws as being merely to "limit which actors may bring antitrust damages actions to the benefit of the state's *resident defendants*." ER57 (Dist. Ct. Class Cert. Order 57) (emphasis added). The court failed entirely to recognize each state's antitrust laws define the protection afforded to its residents from anticompetitive conduct by both domestic and out-of-state businesses. In *Mazza*, however, this Court expressly held that a court errs "by discounting or not recognizing each state's valid interest in shielding *out-of-state businesses* from what the state may consider to be excessive litigation." 666 F.3d at 592 (emphasis added). Because that is exactly what the court did here, its resolution of California's governmental-interest test at step two cannot stand.

Unless this Court reverses or remands the district court's class-certification decision on other grounds raised by Qualcomm, this Court (or the district court on remand) should reach the third step of the governmental-interest test. The next section of the brief discusses the considerations that bear on this inquiry—and further demonstrate why

the district court's categorical rejection of non-California interests was erroneous.

II. The District Court's Certification Of A Nationwide Class Asserting Claims Under California Law Substantially Impairs The Interests Of Other States And The Federal Government

The district court's holding that variance in state indirect-purchaser law does not defeat predominance is misguided because it effectively nationalizes the antitrust policy of a single state through the certification of a nationwide class. California's policy choices, however, run contrary to the policies of both the federal government and numerous other states, which preclude indirect-purchaser damages actions. These policy choices are substantially impaired, without adequate justification, when California law is applied on a nationwide basis to damages claims arising out of transactions taking place entirely outside of California.

1. The third step of California's governmental-interest test asks "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Mazza*, 666 F.3d at 590 (quoting *McCann*, 225 P.3d at 527). A court should apply "the law of the state whose interest would be more impaired if its law were not

applied." *Id.* (quoting *McCann*, 225 P.3d at 527). "The test recognizes the importance of our most basic concepts of federalism, emphasizing . . . 'the appropriate scope of conflicting state policies,' not evaluating their underlying wisdom." *Id.* at 593 (quoting *McCann*, 225 P.3d at 534). Critically, the answer to the choice-of-law question need not be the same for the entire class. *See id.* at 594 (describing as a "false premise that one state's law must be chosen to apply" to all claims of a nationwide class).

The district court's decision to apply California law to a nationwide damages class "did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." *Mazza*, 666 F.3d at 593. Under California choice-of-law principles, "the place of the wrong has the predominant interest," *id.* (quoting *Hernandez v. Burger*, 162 Cal. Rptr. 564, 568 (Cal. Ct. App. 1980)), with the "place of the wrong" being "the state where the last event necessary to make the actor liable occurred," *id.* Plaintiffs' own description of the commercial transaction that directly gives rise to

their claims demonstrates that, for the many class members who did not purchase handsets in California, the "place of the wrong" is *not* California: as Plaintiffs themselves describe it, "Plaintiffs did not interact directly with Qualcomm at all in California or elsewhere, but instead purchased cell phones indirectly from other businesses that are not parties to this lawsuit." Pls.' Opp'n to Pet. for Permission to Appeal 14 (emphasis removed). This description shows that Plaintiffs' argument in defense of the decision that they merely "are seeking to impose liability under California law against a California defendant for its conduct in California" is only half of the story. Pls.' Opp'n to Pet. for Permission to Appeal 14.

This case is identical to *Mazza* in this regard. The "last events necessary for liability as to the foreign class members"—the purchase of the handsets—"took place in the various foreign states, not in California." *Mazza*, 666 F.3d at 594. Accordingly, "[t]hese foreign states have a strong interest in the application of their laws to transactions between their citizens and corporations doing business within their state." *Id.*

"Conversely, California's interest in applying its law to residents of foreign states is attenuated." *Mazza*, 666 F.3d at 594. Although "California has an interest in regulating those who do business within its state boundaries, and foreign companies located there," it is not necessary to "apply[] California law to the claims of foreign residents concerning acts that took place in other states . . . to achieve that interest in this case." *Id.* Moreover, California's interest in compensating the victims of anticompetitive conduct cannot reasonably extend to compensating consumers who both resided and suffered harm elsewhere. The district court accordingly erred in certifying a nationwide class under California's law allowing indirect-purchaser damages claims that includes out-of-state class members who purchased their cell phones outside of California, in states that do not allow private indirect-purchaser damages claims.[3]

2. Although Plaintiffs attempt to minimize states' interest in prohibiting their resident claimants from pursuing indirect-purchaser damages claims, *see* Pls.' Opp'n to Pet. for Permission to Appeal 10-13,

[3] Amici take no position on whether a class limited to residents of states allowing recovery by indirect purchasers would eliminate the predominance problem presented by a nationwide class.

the interest in prohibiting such claims is at least as significant as the interest underlying the consumer-protection laws at issue in *Mazza*. As reflected in an April 2017 report published by the American Bar Association, many of the states' antitrust laws currently do not allow indirect-purchaser damages claims.[4] The policy choices of these states are consistent with numerous important state interests, including several reflected in two Supreme Court decisions on federal antitrust standing—*Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481

[4] *See* Michael A. Lindsay, *Overview of State RPM*, The Antitrust Source, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf (Apr. 2017) (using the abbreviation *IB* to identify so-called *Illinois Brick* "repealer" state statutes and court decisions that authorize indirect purchasers to sue for damages under state antitrust laws). The report identifies repealer statutes or decisions in Alabama, Alaska, Arizona (decision only), Arkansas, California, Colorado, District of Columbia, Florida (decision only, limited to unfair-trade-practices law), Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wisconsin. Of those, five states (Alaska, Arkansas, Colorado, Idaho, and Washington) limit their repealer laws to claims asserted by their attorneys general on behalf of indirect purchasers. That leaves the following states with no identified repealer statutes or decisions: Connecticut, Delaware, Georgia, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wyoming.

(1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)—and one reflected in longstanding state law.

a. In *Hanover Shoe*, the Supreme Court barred the so-called "pass-on" defense in antitrust cases brought under Section 4 of the Clayton Act, holding that a plaintiff who purchased goods or services at an inflated price as a result of a supplier's illegal monopolization may recover damages in the full amount of the overcharge, even if the plaintiff passed on some or all of the overcharge to its customers. 392 U.S. at 494. The Court concluded that it is no defense to a treble-damages action that the plaintiff passed on to its customers, in the form of higher prices, the defendant's monopoly overcharge. *Id.* at 489.

In *Illinois Brick*, the Supreme Court considered whether an indirect purchaser could make "offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." 431 U.S. at 735. The Court concluded it could not. *Id.* In short, federal antitrust law permits direct purchasers to recover the full amount of overcharges stemming from an antitrust violation. They do so even if those direct purchasers passed on some or

all of the overcharge to indirect purchasers, and bar indirect purchaser actions entirely (with limited potential exceptions).[5]

In explicating this rule, federal antitrust law enumerated at least two important and enduring policy interests that are consistent with state antitrust laws that follow the *Illinois Brick* rule. The first interest concerns the risk of duplicative damages. The Court in *Illinois Brick* concluded that, as a result of its *Hanover Shoe* decision, allowing indirect-purchaser suits "would create a serious risk of multiple liability for defendants" because defendants could be held liable to both direct and indirect purchasers for the exact same overcharge, subject to trebled damages. 431 U.S. at 730. The Court, however, was "unwilling to 'open the door to duplicative recoveries.'" *Id.* at 731 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)). Some states that adhere

[5] The "indirect-purchaser rule" embodied by *Hanover Shoe* and *Illinois Brick* has been (rightly) criticized and is only one of multiple ways to structure an indirect-purchaser rule that would avoid duplicative recovery. For instance, some commentators have argued that direct and indirect purchasers each should be permitted to recover under federal law for their proportionate injury, and the current regime of parallel federal and state antitrust litigation has proved to be complex and inefficient, and a far deviation from the ideal two-tiered enforcement regime in our federal system. *See, e.g.* Antitrust Modernization Comm'n, *Report and Recommendations* 268-72 (Apr. 2007).

to the *Illinois Brick* rule may share the Court's concern with duplicative recovery.

States that have "repealed" *Illinois Brick* without adopting a mechanism to apportion damages between direct and indirect purchasers or other appropriate safeguards have made a significantly different policy choice. They have potentially subjected defendants to the risk of duplicative liability: that is, 100% of the overcharge recovered by direct purchasers under federal law, plus up to an additional 100% of the overcharge passed on to indirect purchasers recovered under state law. This policy choice to allow the risk of duplicative damages irreconcilably conflicts with the policy choice of other states and the federal government, which follow the rule of *Illinois Brick* as a means to prevent duplicative damages.

The second interest concerns excessive litigation. The Court in *Illinois Brick* predicted that allowing indirect purchasers to recover would prompt "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant," that is, burdensome litigation. 431 U.S. at 740. This was not idle speculation. "As predicted, enactment of *Illinois Brick*

repealers has triggered numerous costly indirect purchaser class actions in state courts." William H. Page, *Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule* Illinois Brick, 53 Antitrust Bull. 725, 728 (2008). States that have not "repealed" *Illinois Brick* have made a different choice to avoid this type of litigation. This choice is irreconcilable with those states that have decided to allow this type of litigation.

b. Finally, longstanding state law supplies a third interest consistent with state antitrust laws that follow the *Illinois Brick* rule. Many state antitrust laws contain "harmony" provisions requiring that the state antitrust laws be interpreted consistently with federal antitrust laws. *See generally* Jonathan T. Tomlin & Dale J. Giali, *Federalism and the Indirect Purchaser Mess*, 11 Geo. Mason L. Rev. 157, 162 (2002) (collecting citations to such laws and related court decisions). Many states that follow the *Illinois Brick* rule have relied on these provisions in making that decision. *See id.* These state laws

prioritize consistency, unlike those states that have chosen to "repeal" *Illinois Brick*.[6]

These three interests represent diverse rationales for adhering to the *Illinois Brick* rule. Any one state may endorse any number of them, or others, as its rationale. All of them embody important state determinations regarding protections against excessive litigation, duplicative damages, and inconsistency of laws. Consequently, when a repealer law, such as California's, is applied to transactions taking place entirely in other states, that application stands as an affront to the other states' "strong interest in the application of their laws to transactions between their citizens and corporations doing business within their state." *Mazza*, 666 F.3d at 594.

Moreover, by applying California's law to the claims of a nationwide indirect-purchaser class, the district court allowed California to set antitrust policy for the entire nation. If that role is to be occupied, however, it is reserved for federal law. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("But while we do not doubt that

[6] In addition, those states that have not yet decided their state policy by statute or judicial decision (*see supra* n.4) have an interest in being able to decide that question for themselves.

Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States."). The Court therefore should reject the certification of the proposed nationwide class under California law that awards damages on entirely out-of-state transactions because allowing such a class to proceed would arguably allow California law to "regulate[] a product in interstate commerce beyond [California's] state boundaries." *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993); *see* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 395 (1983) (citing potential nationwide application of California's indirect-purchaser rule in particular and noting that "extraterritorial application of state antitrust law . . . can be offensive to the two-tier, federal-state antitrust enforcement mechanism").[7]

[7] Caution is particularly appropriate with respect to this case because the interaction of antitrust law and patent rights in cases like this one is in flux. Although claims of the sort in this case are grounded in certain scholarly literature, *see* Fiona M. Scott Morton & Carl Shapiro, *Strategic Patent Acquisitions*, 79 Antitrust L.J. 463, 464, 494 (2014), such claims and theories of liability remain controversial, and more recent scholars have questioned their viability, *see* Douglas H. Ginsburg, Koren W. Wong-Ervin & Joshua D. Wright, *The Troubling Use of Antitrust to Regulate FRAND Licensing*, CPI Antitrust Chronicle, Vol. 10, No. 1, at 6-7 (2015); *Assistant Attorney General Makan Delrahim Delivers Keynote Address at University of Pennsylvania Law*

CONCLUSION

For the foregoing reasons, this Court should reject the certification of a nationwide class that would require the application of California law to the claims of states that have made a different policy choice regarding indirect-purchaser suits for alleged violations of the antitrust laws.

Respectfully submitted.

June 10, 2019

/s/ Michael F. Murray

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MICHAEL F. MURRAY
Deputy Assistant Attorney General

WILLIAM J. RINNER
Chief of Staff and Senior Counsel

KRISTEN C. LIMARZI
MARY HELEN WIMBERLY
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

School: The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university.

(202) 353-0163
michael.murray@usdoj.gov

Counsel for the United States

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General

LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70802
murrille@ag.louisiana.gov

Counsel for Louisiana

DAVE YOST
Ohio Attorney General
BENJAMIN M. FLOWERS
State Solicitor

30 E. Broad Street, 17th Floor
Columbus, OH 43215
bflowers@ohioattorneygeneral.gov

Counsel for Ohio

KEN PAXTON
Attorney General of Texas
KYLE HAWKINS
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov

Counsel for Texas

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-15159

I am the attorney or self-represented party.

This brief contains 5,231 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Michael F. Murray **Date** 06/10/2019

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I certify that on June 10, 2019, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

/s/ Michael F. Murray
Counsel for the United States