**Nos. 19-15159**

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

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KAREN STROMBERG ET AL.,

*Plaintiffs-Appellees,*

v.

QUALCOMM INCORPORATED

*Defendant-Appellant*

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

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# BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1.1, the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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## INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

AAI submits this brief because it has a strong interest in defending the shared state and federal policy of deterring antitrust violations and compensating antitrust victims without interference from "false conflicts" under state choice-of-law rules.

## INTRODUCTION

This class action presents the question whether any state has designed its antitrust standing rules to express a policy interest in preventing recovery for antitrust

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief. Individual views of members of AAI's Board of Directors or its Advisory Board may differ from AAI's positions. Certain members of AAI's Advisory Board or their law firms represent Appellees, but they played no role in AAI's deliberations with respect to the filing of the brief.

violations caused by companies in foreign states in the hope that doing so might attract foreign businesses to the state.

The class plaintiffs sued Qualcomm, a corporation headquartered in California, under California's Cartwright Act. They challenge the terms Qualcomm imposes on the sale of modem chips and licensing of intellectual property to cell phone original equipment manufacturers (OEMs) in California. Class plaintiffs are not the OEMs who transacted with Qualcomm in California, but rather consumers located throughout the country. They contend that the California transactions had aftershocks. Although the transactions' direct anticompetitive effects allegedly occurred in the OEM market in California, consumers allegedly experienced the brunt of the injury in retail markets nationwide, where they transacted with OEMs and resellers that passed on Qualcomm's overcharges.

After the district court certified a nationwide class of indirect purchasers, Qualcomm now challenges three aspects of the certification order on interlocutory appeal. This amicus brief addresses only the third issue raised by Qualcomm: whether variations in state indirect purchaser rules prevent common issues from predominating over individual issues at trial under Rule 23(b)(3).

A court adjudicating a multistate class action is free to apply the substantive law of a single state subject to (1) constitutional limitations and (2) the forum state's choice-of-law rules. *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ.*

*Litig.)*, 926 F.3d 539, 561 (9th Cir. 2019) (en banc) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985)). If neither constitutional limitations nor choice-of-law considerations prevent application of California law, then Qualcomm's third argument is defeated. Indirect purchaser standing necessarily presents a common question if it is governed exclusively by the law of California, which is an *Illinois Brick* "repealer" state.

The district court held, and Qualcomm conceded, that California has constitutionally sufficient contacts with each class member's claims, because "Qualcomm's principal place of business is in California, Qualcomm made business decisions related to its anticompetitive conduct in California, and Qualcomm negotiated the licenses at issue in California." Class Cert Op. at 53 ("application of California law here poses no constitutional concerns"). In other words, out-of-state residents, whether from *Illinois Brick* repealer states or *Illinois Brick* "follower" states, could certainly bring individual indirect purchaser cases against Qualcomm in California under the Cartwright Act.

Qualcomm's third argument thus hinges on whether California choice-of-law rules prevent application of California law in this class action.

## SUMMARY OF ARGUMENT

Under California choice-of-law rules, California law applies "by default" unless "a litigant invokes the law of a foreign state." *Espinosa*, 926 F.3d at 561. The foreign-law proponent, in this case Qualcomm, "must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Id*. (quotations omitted). To carry its burden, Qualcomm must satisfy a "three-step governmental interest test," under which Qualcomm must prove the following:

> (1) the law of the foreign state 'materially differs from the law of California,' meaning that the law differs 'with regard to the particular issue in question'; (2) a 'true conflict exists,' meaning that each state has an interest in the application of its own law to 'the circumstances of the particular case'; and (3) the foreign state's interest would be 'more impaired' than California's interest if California law were applied.

*Id*. at 561-62 (citations omitted).

The district court held that "other states have no interest in applying their laws to the current dispute." Class Cert. Op. at 54. The court allowed that *Illinois Brick* follower states may bar indirect purchaser suits in order "to protect businesses and other actors from excessive antitrust liability by limiting suits for damages to those brought by direct purchasers." *Id*. However, the court held that such an interest "is not implicated in the present case, where the sole defendant is a California resident." *Id*. at 55. "When the [follower] state 'has no defendant residents to protect,'" the Court reasoned, "the state also 'has no interest in denying full

recovery to its residents injured by [out-of-state] defendants.'" *Id*. (quoting *Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974) (second alteration in original). "Indeed, applying other states' laws to bar recovery here would paradoxically disadvantage the other states' own citizens for injuries caused by a California defendant's unlawful activities that took place primarily in California." *Id*.

On appeal, Qualcomm challenges the district court's holding that follower states have "no" interest in applying their indirect purchaser rules in this case. Opening Brief of Defendant-Appellant Qualcomm Incorporated 66 ("Qualcomm Br."). Qualcomm believes the Court's holding in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), can be read to suggest that *Illinois Brick* follower states have an interest in enforcing their bar on indirect purchaser suits even when the only discernible effect in *that state* would be to prevent recovery for injuries in that state. *See* Qualcomm Br. 68.

Qualcomm believes further that *all* follower states would prefer to enforce their indirect purchaser bars rather than allow recovery for injuries caused by firms in other states, because doing so might help follower states attract out-of-state businesses by signaling that the state maintains a favorable business climate. *Id*. at 67-68.

Finally, Qualcomm argues that the interest it asserts on behalf of follower states conflicts with California's interest in remedying California antitrust

violations, and that follower states' interests would be comparatively more impaired than California's interests if California's repealer law is applied in this case. *See id*.

This Court should reject Qualcomm's effort to manufacture a policy conflict among state antitrust laws. Qualcomm falls well short of satisfying the governmental interest test for three reasons:

1. Qualcomm cannot show a "true conflict" between an *Illinois Brick* follower state and California. Follower states and repealer states are in harmony on substantive antitrust policy, and substantive considerations have primacy in conflict analysis. Follower and repealer states also are in harmony on remedial policy; they merely differ as to *who* may sue, which does not create a conflict under the governmental interest test.

Qualcomm's conflict argument also is foreclosed by the Supreme Court's holding in *California v. ARC America Corp.*, 490 U.S. 93 (1989). The conflict analysis applied in *ARC America* under the doctrine of implied "obstacle" preemption is substantially the same as the conflict analysis required under the second prong of the governmental interest test. *ARC America* confirms that Qualcomm has advanced a "false conflict."

2. Qualcomm also has not carried its burden to show that a foreign state has a cognizable interest in applying its indirect purchaser rule to the class claims in

this case. The comparative impairment prong of the governmental interest test, which requires that a foreign state's interest would be "more impaired" than California's interest, presupposes that a foreign state has an actual interest that is actually impaired. *See Espinosa*, 926 F.3d at 562 (true conflict must "exist[]"). Qualcomm can show only a hypothetical interest that is hypothetically impaired, and such a showing fails the governmental interest test. This Court's holding in *Mazza* cannot save Qualcomm's hypothetical interest, but even if it could, Qualcomm's theory likely does not explain why any state follows *Illinois Brick*. Alternative and countervailing hypotheticals are far more plausible than Qualcomm's hypothetical.

3. If the Court reaches the third prong of the governmental interest test, it should hold that follower states have no more than an academic interest in attracting foreign business by denying recoveries for injuries caused by companies in foreign states. Even if Qualcomm could show that some states do follow *Illinois Brick* in the hope of attracting out-of-state businesses, which it cannot, Qualcomm's interpretation of *Mazza* would undermine that goal, because businesses would be shielded from liability by those states' indirect purchaser rules without having to domicile or do business in those states. That is true of Qualcomm here.

Whereas follower states could hypothetically have at most only a nominal interest in applying their laws, California has a compelling interest as the

defendant's resident state and the locus of the anticompetitive conduct and direct anticompetitive effects that proximately caused all the injuries in this case. Moreover, all 50 states and the federal government share California's interest in enforcing California law to compensate victims and deter antitrust violations.

## ARGUMENT

### I. QUALCOMM HAS NOT SHOWN THAT AN *ILLINOIS BRICK* "FOLLOWER" STATE'S INTERESTS ACTUALLY CONFLICT WITH CALIFORNIA'S INTERESTS IN THIS CASE

#### A. Qualcomm Has Not Established that Any State Calibrates Antitrust Liability Differently than California

Qualcomm argues that if California law were applied to the class, foreign states would be impaired in their "ability to adopt policies that 'calibrate liability to foster commerce.'" Qualcomm Br. 68 (quoting *Mazza*, 666 F.3d at 593). For this argument to have merit, Qualcomm would first have to establish that California and an *Illinois Brick* follower state calibrate antitrust liability *differently*. If they calibrate liability in the same way, then no follower state's judgment is overridden by application of California law, and no policy conflict could exist.

Among other reasons, Qualcomm's argument fails because it cannot make this threshold showing. All states that follow the federal *Illinois Brick* rule impose liability for unreasonable trade restraints, and no state embraces different *substantiv*e antitrust goals and policies than California. Qualcomm does not argue otherwise. This alone strongly implies a false conflict. *Cf. Exxon Corp. v. Governor of*

*Md.*, 437 U.S. 117, 130 (1978) (it is "particularly inappropriate" to infer a conflict when the "basic purposes of the state statute and the [federal statute] are similar.").

The only question even indirectly raised by Qualcomm's argument is whether California and a given follower state have different *remedial* policies for antitrust violations. But Qualcomm cannot carry its burden on this point either. Its only argument is that repealer and follower states differ as to *who* may sue.

For purposes of examining policy conflicts under choice-of-law rules, this is a distinction without a difference. Repealer and follower states have the same remedial goals. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) ("from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation"); *id*. ("*Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge"); *ARC America*, 490 U.S. at 102 ("[S]tate laws permitting indirect purchaser recoveries . . . are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.").

The Department of Justice (DOJ), in an unexplained reversal of views long held in previous administrations, now argues in support of Qualcomm that repealer states differ in their goals from the federal government and follower states insofar as repealer states permit the risk of duplicative liability. *Compare, e.g.*, Brief of

the United States of America and the States of Louisiana, Ohio and Texas 23-24 ("DOJ *Qualcomm* Br.") ("significantly different policy choice"), *with* Brief for the United States as Amicus Curiae 25, California v. ARC America, Inc., No. 87-1862 (filed Dec. 1, 1988) ("DOJ *ARC America* Br.") ("The purposes of the . . . private damage remedies correspond as well: Congress and the States both seek to compensate victims of antitrust violations and use antitrust civil recoveries to deter future violations of the antitrust laws.").

The DOJ now says "this policy choice to allow the risk of duplicative damages irreconcilably conflicts with the policy choice of other states and the federal government." DOJ *Qualcomm* Br. 23, 25. But the DOJ forgets itself: "State Statutes Affording Indirect Purchasers a Damage Remedy Do Not Create an Irreconcilable Conflict with Federal Law." DOJ *ARC America* Br. 23 (argument heading). *See also* Brief for the United States as Amicus Curiae 28 n.19, California v. ARC America, No. 87-1862 (filed June 15, 1988) ("DOJ *ARC America* Cert. Br.") (*Illinois Brick* "does not prevent duplicative recovery; rather, it states the more limited policy of permitting only one treble damage recovery under the federal law").

Moreover, the DOJ's new position is factually incorrect. "[M]any [repealer] states require courts to ensure that defendants are not subject to multiple liability." Newburg on Class Actions § 20:12, at 435-39, 439 n.6 (5th ed. 2011) (citing statutes). And that is certainly true in California. *See, e.g.*, *Clayworth v. Pfizer, Inc.*,

49 Cal. 4th 758, 787 (2010) ("defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages"); *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811, 1815 (1995) (plaintiff lacked antitrust standing under California law where allowing suit "would run the risk of double recovery"). Neither Qualcomm nor the DOJ point to any examples where an antitrust defendant has been subjected to duplicative liability in California, or, more importantly, any risk that Qualcomm will be subjected "[u]nder the facts and circumstances of this case." *Mazza*, 666 F.3d at 594.

Indeed, judging by the number of actual reported instances of duplicative liability during states' approximately 40 years of experience with overlapping federal direct-purchaser and state indirect-purchaser actions, all 50 states appear to protect against this risk equally. Both follower and repealer states have an indistinguishable 100% success rate. *See* Antitrust Modernization Comm'n, Report and Recommendations 274 (2007) ("AMC Report") (in three years of Commission proceedings, "no one identified an instance of unfair or multiple recovery"); *see* Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 192 n.76 (2009) ("[I]f the threat of multiple recoveries of treble damages was genuine, one would think some obvious examples would be observable after more than three decades."); Brief for Texas, Iowa, and 29 Other States as Amici Curiae 19, Apple, Inc. v. Pepper, No. 17-204 (filed Oct. 1, 2018)

("States' *Pepper* Br.") ("Amici States [including numerous *Illinois Brick* follower states] are also unaware of any such instance."); *see also* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2020-21 (2015) (empirical study finding "awarded damages are not as a practical matter even close to true treble damages," let alone a multiple of this amount).

### B. *ARC America* Forecloses Qualcomm's Conflict Argument

Qualcomm states, without explanation, that states which follow the federal *Illinois Brick* rule have "sought to foreclose [indirect purchaser] liability altogether." Qualcomm Br. 64. The statement is unsupportable. Absent any evidence to the contrary, states that *follow* the federal system's *Illinois Brick* rule cannot be presumed to be any less tolerant of neighboring states' indirect purchaser rules than the federal system. And "[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *ARC America*, 490 U.S. at 103; *see also id.* at 102-03 (the issue before the Court in *Illinois Brick* and *Hanover Shoe* "was strictly a question of statutory interpretation—what was the proper construction of § 4 of the Clayton Act"); DOJ *ARC America* Br. 26-27.

The Supreme Court in *ARC America* already ruled on the question whether a state *Illinois Brick* repealer law "actually conflicts with federal law." *ARC*

*America*, 490 U.S. at 100. The choice-of-law conflict question posed by the second prong of the governmental interest test is substantially the same as the conflict preemption question the Court resolved in that case. *See, e.g.*, *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 920 (2001) (foreign law proponent must identify an "actual conflict"); *see* Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 6 U. Pitt. L. Rev. 181, 199-200 (2004) ("Obstacle implied preemption . . . is very much like the search for governmental purposes required in Governmental Interest Analysis," and "The Court's implied preemption analysis is . . . strikingly similar to Governmental Interest Analysis"); *see also* Davis, *supra*, at 184-85.

The Court in *ARC America* considered whether an *Illinois Brick* repealer "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *ARC America*, 490 U.S. at 101 (citation omitted), much as the Court here is required to consider whether "the interests of other states would be impaired by application" of California's *Illinois Brick* repealer rule. *Espinosa*, 926 F.3d at 563; *see* Davis, *supra*, at 184-85 (2004).

Without addressing *ARC America*'s holding, Qualcomm apparently interprets *Mazza* to hold that each state *field preempts* other states in the consumer protection *and* antitrust domains, thereby preventing application of a forum state's more permissive statutory standing rules within another state's borders *even if the*

*policies of the affected states do not actually conflict. See, e.g.*, Qualcomm Br. 67 (arguing district court's conflict analysis should not have focused on "one isolated policy" but rather on follower states' "comprehensive interest in fostering an attractive overall business climate through a variety of legal rules"); *cf. Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 717 (1985) (implied obstacle preemption focused on "a specific area" to see if state law "actually conflicts with federal law" whereas field preemption turns on whether federal scheme is "sufficiently comprehensive").[2]

However, "the full extent of [Qualcomm's] analysis is a citation to *Mazza* and the broad statement that 'each of the 50 states has an interest in setting the balance between protecting its consumers and setting limits on when businesses may be sued . . . .'" *Forcellati v. Hyland's, Inc.*, 2014 U.S. Dist. LEXIS 50600, at *6-7 (C.D. Cal. Apr. 9, 2014) (King, C.J.).

Among other reasons, Qualcomm's field-preemption argument fails because it cannot establish that any state has occupied the field of antitrust law. Indeed, no state's antitrust law is field preempted even by federal antitrust law, where the

[2] Upon asking the court to recognize a broad field-preemption interest, Qualcomm then pivots and asks the Court to forego governmental interest analysis altogether and instead embrace a rigid territoriality principle that looks exclusively to the locus of injury. Qualcomm Br. at 63-64 (*Mazza* balancing interest only adequately protected if "court applies the law of the state where the consumer purchased"). This is contrary to California law. *See* Pl.'s Br. at 62-68.

question arises among unequal sovereigns whose relationship is governed by the Supremacy Clause. *See ARC America*, 490 U.S. at 101 ("Congress has not pre-empted the field of antitrust law"). Field preemption (or reverse field preemption) obviously should not be found between two co-equal sovereign states. And even if it could be found, there is nothing to suggest any follower state has a "clear and manifest purpose" to intrude on the police powers of another sovereign state. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also infra* Part II.A.[3] If anything, such states have a shared interest in ensuring that those police powers are enforced. *See infra* Part III.

## II. QUALCOMM HAS NOT SHOWN THAT A FOLLOWER STATE HAS AN INTEREST IN APPLYING THE *ILLINOIS BRICK* RULE TO THE CLASS CLAIMS IN THIS CASE

### A. Legislative Inaction Is Not a "Policy Judgment"

Part of the problem with Qualcomm's argument is that the nature and strength of the interest it claims are inscrutable. Qualcomm states that following *Illinois Brick* sends a "strong message" that reflects a "forceful and deliberate policy judgment." Qualcomm Br. 64; *see* DOJ *Qualcomm* Br. 20. But it cannot identify the contents of any state's "message" because "unenacted approvals, beliefs,

[3] It is telling that the DOJ concedes some states have no actual policy but submits that these states 'have an interest in having an interest.' *See* DOJ *Qualcomm* Br. at 25, n.6. This is an appeal to field preemption principles in the clear absence of a conflict.

and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

A state's failure to enact an *Illinois Brick* repealer is neither "forceful" nor "deliberate" nor a "policy" nor a "judgment." It is simply legislative (or judicial) inaction. *See Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119, 1128 (Ariz. Ct. App. 2002) ("We . . . do not interpret the Arizona legislature's failure to explicitly authorize indirect purchaser claims as indicating its agreement with *Illinois Brick*. Silence on an issue is not an expression of legislative intent."); *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 445 (Iowa 2012) (same); *Freeman Indus. LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 519-20 (Tenn. 2005) (same).

The absence of state legislative or judicial action to repeal *Illinois Brick* carries no real weight. "Under these circumstances, it is impossible to assert with any degree of assurance that legislative failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Freeman Indus. LLC*, 172 S.W.3d at 519 (quoting *Johnson v. Transp. Agency Santa Clara County, Cal.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (alteration omitted)).

Under the governmental interest test, the Court "must determine 'the relative commitment of the respective states to the laws involved' and consider 'the history

and current status of the states' laws' and 'the function and purpose of those laws.'" *Washington Mutual Bank,* 15 P.3d at 1081. Qualcomm's failure to cite any *Illinois Brick* follower state's discernible expression of a policy interest in preventing indirect purchaser suits therefore leaves a gaping hole in its required showing.

### B. A Policy Rooted in Multiple-Liability or Burdensome-Litigation Concerns Cannot Be Inferred from Following *Illinois Brick*

#### 1. Qualcomm Asserts a Hypothetical State Interest that Necessarily Fails the Governmental Interest Test

Qualcomm also contends that *Illinois Brick* follower states are "more in favor of fostering a favorable business climate" than repealer states. Qualcomm Br. 63. In contrast, the DOJ concedes that a state's adherence to *Illinois Brick* could be based on any of the "numerous" interests identified by the Supreme Court's indirect purchaser opinions. DOJ *Qualcomm* Br. 20; *see, e.g.*, *Illinois Brick*, 431 U.S. at 735 ("the antitrust laws will be more effectively enforced"); *id*. at 733 ("ensuring that a treble-damages plaintiff is available"); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (wrongdoers less likely to "retain the fruits of their illegality").

In support of Qualcomm, however, the DOJ emphasizes that a concern for the implications of multiple liability or burdensome litigation is "consistent" with *some* of those interests. DOJ *Qualcomm* Br. 20, 21-23 ("Some states that adhere to

the Illinois Brick rule *may* share the Court's concern with duplicative recovery." (emphasis added)); *id*. at 24 (that follower states made "choices" that are "different" than those of repealer states could indicate a concern about burdensome litigation).

Speculation that a foreign state *could* have an interest that *could* be impaired is insufficient to carry Qualcomm's burden on both the second and third prongs of the governmental interest test. *Washington Mutual Bank*, 15 P.3d at 1081 (trial court must determine "that each state *has* an interest in having its own law applied, thus reflecting an actual conflict, . . . and select the law of the state whose interests *would* be 'more impaired' if its law were not applied." (emphasis added)); *Mazza*, 666 F.3d at 593 ("foreign states *would* be impaired in their ability to calibrate liability to foster commerce." (emphasis added)); *cf. Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("[A] hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

*Espinosa* makes clear that it is the responsibility of the foreign-law proponent, and not the Court, to undertake the "exhaustively detailed" analysis required by *Mazza*. 666 F.3d at 591; *see Espinosa*, 926 F.3d at 561. When the most a foreign-law proponent can offer is that "any one state may endorse any number" of *possible* rationales for adhering to *Illinois Brick*, "or others", DOJ *Qualcomm* Br.

25, the proponent has not identified an interest that "would" be impaired. *Mazza*, 666 F.3d at 591.

### 2. *Mazza* Does Not Rescue Qualcomm's Hypothetical Interest

Qualcomm attempts to evade the implications of asserting a hypothetical interest in this antitrust case by pointing to an actual interest the Court identified in *Mazza*, a consumer protection case. But all it can manage is to state the interest it must prove as though it were a conclusion. Qualcomm Br. 63 ("When a state chooses to permit indirect-purchaser antitrust suits for damages, it strikes the [*Mazza*] protection/promotion balance more in favor of protecting consumers. Likewise, when a state bars such suits, it strikes that balance more in favor of fostering a favorable business climate.").

The absence of any *showing* that the very same balancing interest identified under the "exhaustively detailed" "facts and circumstances" of *Mazza*, 666 F.3d at 591, 594, actually exists and is implicated in this antitrust case, let alone that such an interest "is just as relevant . . . here as it was in *Mazza*," Qualcomm Br. 63, should doom Qualcomm's argument. This Court should hold that a foreign law proponent who relies on a bare invocation *Mazza* has failed to carry its burden. *Cf., e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (pleadings that "are no more than conclusions" are "not entitled to the assumption of truth"); *id*. at 678

("Threadbare recitals . . ., supported by mere conclusory statements, do not suffice").

Regardless, Qualcomm's reliance on *Mazza* is misplaced. The plaintiffs in *Mazza* alleged that Honda publicly misrepresented systems available in Acura brand cars. They pleaded misrepresentation claims under three of California's consumer protection laws and a fourth cause of action for unjust enrichment. *Mazza*, 666 F.3d at 587.

The district court certified a nationwide class despite Honda's argument that individual questions would arise under the analogous laws of 43 other states. *Id.* at 585, 587. This Court reversed, emphasizing that the asserted consumer protection laws are a "creature of the state in which they are fashioned." *Id.* at 591. Under such laws, states "may impose or not impose *liability* depending on policy choices made by state legislatures." *Id*. (emphasis added). The affected states' consumer protection laws differed substantively in how they calibrated "what conduct is permitted or proscribed within its borders," 666 F.3d at 591 (state law differed on scienter and reliance requirements), and in *whether* they allowed remedies. *Id*. (availability of remedy differed according to whether willfulness is required).

Here, by contrast, Qualcomm does not contend that any follower state defines unreasonable trade restraints differently than California defines them under the Cartwright Act. *See supra* Part I.A. Nor does it contend that any follower state

differs in whether to allow compensatory and deterrence-based remedies for such restraints. *See id*. Instead, Qualcomm emphasizes that the *Illinois Brick* rule addresses the "issue of *standing*," Qualcomm Br. 64, but this just confirms the rule concerns only *who* may sue and does *not* "calibrate liability."

Qualcomm also has forgotten that most businesses experience the antitrust laws as plaintiffs, not solely as defendants. The Court in *Mazza* noted that "in setting a baseline of corporate liability for consumer harm," the 43 other states each struck a "balance" between "[m]aximizing business and consumer welfare," and some placed an emphasis on "creat[ing] a more favorable business climate." *Id*. at 592. But the business welfare implications of following *Illinois Brick* are neutral. Qualcomm cannot support its assertion that *Illinois Brick* is "pro business," Qualcomm Br. 67, because often it is not.

If the business is a defendant, for example, the rule may incentivize an otherwise unmotivated direct purchaser to pursue windfall treble damages it might not otherwise pursue. If the business is a direct purchaser, the rule may put the business to the Hobson's choice of trading off *any* private relief against the risk of having its supply cut off by a dominant trading partner with leverage over its market (like Qualcomm has over OEMs). And if the business is an indirect purchaser, it will be denied compensatory relief altogether. States thus do not and cannot know the *ex ante* business welfare effects of choosing to follow (or failing to repeal) the

*Illinois Brick* rule. And the Court should not infer that state policymakers engage in magical thinking or harbor irrational expectations, or that out-of-state businesses respond to false cues.

*Mazza* does not help Qualcomm because states do not follow *Illinois Brick* to calibrate liability or to signal a pro-business legal climate.

### 3. Qualcomm's Hypothetical Interest Is Less Plausible than Alternative and Countervailing Hypothetical Interests

Even if the Court were to indulge Qualcomm's invitation to speculate as to why 12 or 13 states[4] have not yet repealed *Illinois Brick*, it would find that several

[4] Qualcomm asserts that "22 states adhere to Illinois Brick and thus forbid indirect purchasers from recovering money damages in suits like this one." Qualcomm Br. 58. It is incorrect. To our knowledge, no authority has ever reported that 22 states adhere to *Illinois Brick*. Most authorities put the number at 12 to 13. *See, e.g.*, *Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 104, nn. 4-6 (Ariz. 2003) (identifying 12 States, not counting Delaware); Newburg, *supra*, § 20:12, at 435-439 (5th ed. 2011) (identifying 13, including Delaware); *see also* AMC Report, *supra*, at 269, 279 n.22 ("more than 35 states" permit indirect purchaser damages suits).

Qualcomm cites a chart that compiles State law on *resale price maintenance* which incidentally includes references to *Illinois Brick* repealers, and which self-identifies as a work in progress. Qualcomm Br. 58 n.23; *See* Michael A. Lindsay, Overview of State RPM Chart at i n.*, Antitrust Source (April 2017) ("If you become aware of a case or statute that should be added, email *The Source* at antitrust@att.net."). The chart contains obvious omissions, *see, e.g.*, W. Va. Code state R. § 142-9-1 ("the purpose of this rule is to allow persons who are indirectly injured by violations of the West Virginia Antitrust Act to maintain an action for damages"), and does not purport to identify States that adhere to *Illinois Brick*.

The DOJ also relies on the chart, which it sometimes refers to as a "report," DOJ *Qualcomm* Br. 20 n.4 (implying that 22 listed states have "no identified repealer statutes or decisions"), but in a recent Supreme Court filing the DOJ cited the aforementioned findings of the Antitrust Modernization Commission. *See* Brief for the United States as Amicus Curiae 18, Apple, Inc. v. Pepper, No. 17-204

alternative or countervailing rationales are far more plausible than Qualcomm's "pro-business" hypothesis.

One explanation is that a state court, confronted with legislative inaction, *see supra* Part II.A., may believe it is obligated to follow *Illinois Brick* based on a "mandatory harmonization" statute. *See Bunker's Glass*, 206 Ariz. 9, 14-15 (S.C. Az. 2003) ("It is significant . . . that six of the twelve states that have followed *Illinois Brick* have mandatory guidance statutes requiring that the state acts 'shall' be construed in harmony with federal law. Of the twelve, only New Hampshire's guidance statute is phrased permissively ("may")[.]"[5]).

The DOJ argues that harmonization provisions are "consistent" with its theory that states could be motivated to follow *Illinois Brick* by concerns about duplicative liability or burdensome litigation, DOJ *Qualcomm* Br. 23-24, but it is at least as plausible that mandatory harmonization simply ties the hands of states that would otherwise prefer to repeal *Illinois Brick*. *Cf., e.g.*, *Ciardi v. F. Hoffmann La Roche, Ltd.*, 436 Mass. 53, 57-58 (2002) (interpreting Massachusetts law as

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(filed Aug. 17, 2018); AMC Report, *supra* at 269 (leaving at most 14 states); *see also* DOJ *Qualcomm* Br. 22 n.5 (citing overlapping portion of AMC Report for different proposition). The DOJ also cites the chart for the proposition that some states have not yet addressed the *Illinois Brick* issue, DOJ Br. 25 n.6, but the chart does not purport to identify any such States.

[5] The Supreme Court of New Hampshire refused to repeal *Illinois Brick* not based on any expressed policy preference to favor or attract business, but because it believes the question is a "matter[] of public policy . . . reserved for the legislature." *Minuteman v. Microsoft Corp.*, 795 A.2d 833, 839-40 (N.H. 2002).

obligating courts to apply the *Illinois Brick* rule to indirect purchaser suits under the Massachusetts Antitrust Act, but choosing to allow indirect purchaser suits for price-fixing and other anticompetitive conduct under state consumer protection statute (citing *ARC America*)), *and* States' *Pepper* Br. 2 (Massachusetts among 31 states, including numerous follower states, urging Court to overrule).[6]

But the most appropriate inference to draw is that states follow *Illinois Brick* to benefit consumers by increasing deterrence. Deterrence is a cornerstone of the federal antitrust system that gave rise to *Illinois Brick.* 431 U.S. at 745 (grounding decision in "longstanding policy of encouraging vigorous private enforcement"). Not only does the Clayton Act provide for mandatory treble damages, attorneys fees, and costs, but Congress implicitly traded the risks of overlapping liability and multi-party litigation for deterrence gains just by creating the Act itself, which added federal causes of action on top of preexisting state causes of action. *See R. E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 660 (1974) (noting some 21 states had enacted antitrust legislation prior to the Sherman Act in 1890); *see ARC America*, 490 U.S. at 102 ("Congress intended the federal antitrust laws to

[6] To be sure, some States hold that harmonization provisions, whether mandatory or permissive, are aimed at achieving uniform substantive standards and do not necessarily implicate the question of who can sue under state antitrust law. *See, e.g.*, *Comes,* 646 N.W.2d at 446.

supplement, not displace, [existing] state antitrust remedies." (citing 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman)).

In 1989, the Supreme Court renewed this commitment in *ARC America* when it unequivocally elevated antitrust laws' deterrence goals over multiple-liability and burdensome-litigation risks. The Court rejected implied conflict preemption with full awareness that state causes of action sometimes "impose liability over and above that authorized by federal law." 490 U.S. at 105 (citing *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 257-58 (1984) (case permitting payment of both federal fines and state-imposed punitive damages for the same incident)); *see* DOJ *ARC America* Cert. Br. 17-18.

And the Court did so again this very term in *Apple v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (holding, over objection that it would raise "difficult questions about apportionment" and "risk of duplicative damages awards," 139 S. Ct. at 1528 (Gorsuch, J., dissenting), that a retailer "may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—" notwithstanding that the direct-purchaser consumers "will be entitled to the *full amount* of the unlawful overcharge" if they prevail on the merits (emphasis in original)).

Moreover, while Qualcomm and its amici offer nothing in the last 40 years to call into question the reasonableness of inferring that states follow *Illinois Brick* based on a deterrence rationale, over time it has become increasingly *un*reasonable

to infer that states follow *Illinois Brick* based on a duplicative-liability or burdensome-litigation rationale. Duplicative liability has proven to be an unfounded concern. *See supra* Part I.A. And the complexities and burdens of multi-party commercial litigation are present in direct-purchaser suits, yet the margin of difficulty added by indirect purchaser suits has decreased. *See* States' *Pepper* Br. 19-20 (discussing claim reconciliation measures and consolidation after the Class Action Fairness Act of 2005); Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 U.S.C. L. Rev. 69, 100 (2007) ("The lesson from the history of the indirect purchaser doctrine is not that the law should avoid engaging in complex calculations.").[7]

## III. QUALCOMM HAS NOT SHOWN THAT ANY STATE'S INTEREST WOULD BE COMPARATIVELY MORE IMPAIRED THAN CALIFORNIA'S INTEREST IF CALIFORNIA LAW IS APPLIED

If the Court reaches the third prong of the governmental interest test, it should find that *Illinois Brick* follower states have no more than an academic interest in shielding a California business from liability for injuries it caused based on conduct in California.

[7] To the extent the district court implied in dicta that any State follows *Illinois Brick* solely or primarily "to protect businesses and other actors from excessive antitrust liability," Class Cert. Op. at 54, it overlooked important reasons to conclude otherwise. *See id*. at 54-55 (relying on a Clayton Act case to infer why states follow *Illinois Brick* under state law).

Qualcomm argues that follower states might wish to do so in an effort to attract out-of-state businesses by signaling a favorable climate. *Id*. at 66-67. But Qualcomm's argument proves too much. Ironically, if Qualcomm's argument were accepted, out-of-state companies would have no need to do business in follower states to avail themselves of follower states' "protections." The mere existence of the follower's state's laws would give a company all the same protections it could earn by doing business there, without having to relocate or sell its products to the state's consumers. Conveniently, that is exactly what would happen to Qualcomm here.

Qualcomm challenges the district court's holding that foreign states have "no" interest in applying their indirect purchaser rules in this case. Qualcomm Br. 66. But when the defendant's headquarters, the conduct, the original cause of all the claimed injury, and the litigation itself are all based in California, and the only discernible effect in a foreign state would be to *prevent* recovery for antitrust injuries, how strong could such an interest be?

By contrast, California has a compelling interest in applying its law to this dispute for the reasons explained by class plaintiffs. *See* Pls.'s Br. 59-60 (discussing deterrence and disgorgement goals of Cartwright Act). And that interest would be seriously impaired if California cannot adequately deter Qualcomm for violations that cause injuries in follower states. Such an outcome would allow

Qualcomm to earn profits from anticompetitive conduct in California, encouraging it to repeat similar offenses there.

Follower states also have a shared interest with California in compensating antitrust victims injured by California corporations, and in deterring California corporations from engaging in anticompetitive conduct in California that has ripple effects throughout the country. All states do.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's holding that California law governs this case.

Respectfully submitted,

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

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