

No. 26-2626

In the
United States Court of Appeals
For the
Ninth Circuit

IN RE JUUL LABS, INC. ANTITRUST LITIGATION

On Rule 23(f) Interlocutory Appeal from the United States District
Court for the Northern District of California, San Francisco Division
No. 3:20-CV-02345-WHO
The Honorable William H. Orrick

**BRIEF OF THE AMERICAN ANTITRUST INSTITUTE
AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), 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.

Date: September 28, 2026

/s/ David O. Fisher

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INTEREST OF AMICUS CURIAE¹

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>.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court fundamentally altered the federal antitrust enforcement landscape in *Illinois Brick Co. v. Illinois*, in which it held that indirect purchasers cannot bring federal antitrust damages suits. 431 U.S. 720, 728–29 (1977). Although the Court’s decision was based on the practical difficulty of apportioning damages down a supply chain—and the federal policy of preventing a pass-on

¹ All parties have consented to the filing of this 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.

² Individual views of members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions. A member of AAI’s Advisory Board represents the Direct Purchaser Plaintiffs, but that member played no role in AAI’s deliberations with respect to the filing of the brief.

defense as laid out in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 493–94 (1968); *Illinois Brick*, 431 U.S. at 731–33—it has broader implications for antitrust enforcement. In many cases, direct purchasers are less incentivized to sue for antitrust violations than their downstream trading partners, including because they fear disrupting an ongoing business relationship with the defendant or because they may be able to pass on overcharges to their customers. *Hanover Shoe* and *Illinois Brick* help to incentivize direct purchaser suits, but the trade-off is that the antitrust laws lose a potential enforcer in downstream purchasers.

Thirty-five states and the District of Columbia have come to a different conclusion about that trade-off. Reasoning either that the apportionment problem identified in *Illinois Brick* is overstated or otherwise outweighed by the deterrence and compensation gains of allowing both direct and indirect purchaser suits, these states passed “*Illinois Brick* repealer” amendments to their state antitrust laws, explicitly permitting their citizens to sue for antitrust damages as indirect purchasers. *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1072 (9th Cir. 2021).

The Supreme Court later ruled in *California v. ARC America* that, because *Illinois Brick* did nothing to disrupt “the interrelationship between the federal and state antitrust laws,” federal courts exercising jurisdiction over state-law claims must give effect to *Illinois Brick* repealer laws. 490 U.S. 93, 105–06 (1989). As a result, courts around the country have implemented repealer states’ policy choices

by allowing for the certification of multistate “repealer classes” of indirect purchasers seeking damages for violations of repealer states’ antitrust laws. *See, e.g., In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 232, 292–93 (N.D. Ohio 2014); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 287–88 (D. Mass. 2004). Such multistate repealer classes often satisfy Rule 23’s predominance requirement because the key question of antitrust liability and impact is common to each repealer state law and tends to predominate over any state-specific questions presented. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298–99, 301–02 (3d Cir. 2011) (en banc) (reviewing cases).

Allowing multistate repealer classes makes sense as a matter of antitrust enforcement policy, of which Rule 23’s class action mechanism is a critical component. The national antitrust enforcement regime relies primarily on deterrence as its central mechanism. To maximize deterrence, Congress imposed treble damages, joint and several liability, fee shifting, criminal fines, and even imprisonment as the cost of an antitrust violation. And, understanding that public enforcement is resource-constrained and that the victims of anticompetitive conduct are the best positioned to challenge it, Congress and the legislatures of virtually every state created a private antitrust cause of action, enlisting market participants as “private attorneys general” with the power and incentive to enforce

the antitrust laws. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 147 (1968) (Fortas, J., concurring).

But antitrust cases are notoriously expensive: they require extensive pre-complaint investigations; production, storage, and analysis of massive amounts of data; sophisticated economic modeling; and commensurately large teams of legal and economic experts. Meanwhile, individual claims are almost always relatively tiny. To make these claims economically feasible, market participants must be able to litigate their claims in classes large enough to outweigh those high litigation costs. Meritorious claims that cannot achieve economies of scale through the class action mechanism will never be brought. And because public antitrust enforcement is necessarily limited by resource restraints relative to the size of the national economy, an antitrust violation that goes unchallenged through private enforcement will likely not be challenged at all, meaning that guilty defendants can keep their ill-gotten gains and continue to violate the law with impunity.

Aware of this reality, antitrust defendants have urged courts to adopt certain *per se* rules against class certification, each of which this Court has rejected in favor of a “case-by-case” assessment under Rule 23. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 669 n.13 (9th Cir. 2022) (en banc); *see, e.g., id.* at 677–79 (rejecting rules against certification based on the inclusion of uninjured members in the class, variations in class members’ bargaining power,

individualized price negotiations, and faulty assumptions made in class plaintiffs’ damages model); *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 562–63 (9th Cir. 2019) (en banc) (rejecting rule against certification based on “idiosyncratic differences” in state law); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017) (rejecting “administrative feasibility prerequisite to class certification”).

In this case, Defendants continue the tradition of systemic attacks on the class action mechanism through a scatter-shot approach that raises familiar and novel challenges. They contend that small purchasers cannot represent a class that includes large distributors who negotiated individual sales contracts, the latest iteration of an argument this Court has repeatedly rejected. Opening Br. at 50–65; *Olean*, 31 F.4th at 667–80 (certification appropriate despite “individualized negotiations and different bargaining power among the purchasers”). They also urge this Court to revisit its *en banc* holding that a class may be certified even if it includes members who did not suffer measurable damages. Opening Br. at 49–50, 65–72 (citing *Olean*, 31 F.4th at 669). And they challenge this Court’s precedents that, where a class expert’s damages model relies on generally reliable methods, questions about the propriety of assumptions made in that model go to its evidentiary weight, not to its ability to establish harms on a class-wide basis. Opening Br. at 65–72; *Olean*, 31 F.4th at 678; *Noohi v. Johnson & Johnson*

Consumer Inc., 149 F.4th 1055, 1071 (9th Cir. 2025). These familiar arguments are easily addressable under existing precedents.

Defendants also shift their approach to the latest battlefield in the war against class certification: indirect-purchaser classes. In an attempt to deprive repealer-state indirect purchasers of the economies of scale they need to enforce the antitrust laws, Defendants urge this Court to categorically prohibit certification of multistate *Illinois Brick* repealer classes on the basis that such classes can never satisfy predominance under Rule 23(b)(3). Opening Br. at 44–49. But this argument is flawed as a matter of legal doctrine and antitrust policy. As a doctrinal matter, predominance is not defeated where, as here, questions of liability and impact are central to every class member’s claims, and the only unique issues presented under repealer states’ laws relate to the availability and amount of damages. As a policy matter, disallowing certification of multistate repealer classes would undermine the purpose of the Class Action Fairness Act (“CAFA”) and Rule 23 by forcing the parties to relitigate the exact same liability questions in each of the repealer states, wasting party and judicial resources and risking conflicting rulings. And because antitrust class actions rely on economies of scale, adopting a *per se* prohibition on certification of multistate repealer classes would render those state causes of action nonviable, frustrating the repealer states’ policy choices and weakening antitrust enforcement more broadly.

To ensure that private antitrust enforcement can continue to serve the purpose that Congress and the state legislatures intended, this Court should decline Defendants' invitation to categorically prohibit multistate repealer classes. It should also decline to revisit its *en banc* decision in *Olean* allowing certification of classes that may include members that did not suffer measurable damages, and reiterate its holding in *Olean* and elsewhere that challenges to the assumptions made in an expert's generally reliable model are not a basis for denying certification.

ARGUMENT

I. Multistate repealer classes do not present unique predominance issues.

This Court's precedent holds that Rule 23(b)(3)'s predominance requirement is satisfied when the questions of liability are common to the class, despite individual questions presented by "differing remedies based on state statute or common law. . . ." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). This is particularly so where, as here, such differing remedies "are local variants of a generally homogenous collection of causes" *Id.* In antitrust cases, common questions involving antitrust liability frequently predominate over individualized damages issues. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (identifying predominance as a test "readily met in certain cases alleging . . . violations of the antitrust laws"). For this reason, courts regularly certify multistate

antitrust classes even when state- or claimant-specific damages questions are also present. *See, e.g., Sullivan*, 667 F.3d at 298–99, 301–02 (reviewing cases); *Polyurethane Foam*, 314 F.R.D. at 232, 292–93; *Relafen*, 221 F.R.D. at 288.

In arguing that this standard rule should not apply to multistate repealer classes, Defendants rely heavily on this Court’s opinion in *Stromberg*, in which it became the only appellate court to categorically prohibit the certification of nationwide indirect purchaser classes. 14 F.4th at 1074; *see Sullivan*, 667 F.3d at 297–303 (reversing, *en banc*, prior panel opinion aligned with *Stromberg*). Like this case, *Stromberg* dealt with a class of indirect purchasers. Unlike this case, the class in *Stromberg* was nationwide; it included claims under repealer and non-repealer states alike. This Court reversed certification, holding that the law of California—a repealer state—fundamentally conflicts with the law of non-repealer states with respect to indirect purchaser standing and that those fundamental differences “swamp predominance” under Rule 23(b)(3). *Stromberg*, 14 F.4th at 1067. *Stromberg* thus stands for the proposition that common questions are categorically “swamped” by fundamental conflicts among state laws in a multistate class, and that states’ differing laws on whether or not indirect purchasers can bring a claim is such a fundamental conflict. *Id.* But where, as here, all of the relevant state laws allow indirect purchasers to bring a claim, the fundamental conflict found in *Stromberg* is absent.

Indeed, the Court’s reasoning in *Stromberg* strongly supports a predominance finding in classes made up of only repealer states. If state-law differences regarding the issue present a fundamental conflict that defeats predominance, then state-law uniformity on the same issue should support it. To rule otherwise would be to apply *Stromberg*’s logic only when it weighs against certification, employing a “heads I win, tails you lose” approach to predominance. This Court left the door open to that approach when it stated in *dicta* that, “[e]ven among the repealer states, the various state laws are hardly uniform,” and it is therefore “not clear that a single class of all repealer state Plaintiffs could be certified under Rule 23(b)(3).” *Id.* at 1074. It directed the district court on remand to “reach that question in the first instance,” *id.*, but that analysis never happened because the case was later resolved on alternative grounds, *see Key v. Qualcomm Inc.*, 129 F.4th 1129 (9th Cir. 2025).

In this case, the District Court conducted the relevant analysis as directed by this Court in *Stromberg*, and concluded that—with the exception of Arkansas, South Carolina, Tennessee, and Virginia, which do not allow class actions for the antitrust claims at issue—any true, material conflicts between California law and the laws of the various repealer states do not defeat predominance because they relate only to the recovery available and can “be fully accommodated by jury instructions and other trial and post-trial measures.” 1-ER-35. That reasoning is

fully in line with this Court’s precedents, which hold that antitrust liability is often a common question that predominates over individualized remedies questions and that repealer states are uniform on the issue of whether indirect purchasers can bring suit. *Hanlon*, 150 F.3d at 1022; *Stromberg*, 14 F.4th at 1068, 1072. It is also consistent with the underlying purposes of the Class Action Fairness Act (“CAFA”) and Rule 23 because it ensures that high-stakes state-law claims can be heard in federal court as a common class, preventing wasteful, repetitive, and potentially conflicting trials over the core question of antitrust liability in each repealer state.

A. Antitrust liability is a common question which predominates over state-specific remedies questions.

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623. “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022 (quoting 7A Wright & Miller, *Federal Practice & Procedure* § 1778 (2d ed. 1986)). Importantly, “[w]hen ‘one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.’” *Tyson*

Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453–54 (2016) (quoting Wright & Miller at § 1778).³ Thus, it is well established that, because of the “longstanding rule that ‘differing remedies’ do not preclude class certification,” the standard for predominance is met in a multistate class when the class claims revolve around a “common nucleus of fact,” even when “idiosyncratic differences between state . . . laws” exist regarding the availability and scope of remedies. *Hyundai*, 926 F.3d at 561–62 (quoting *Hanlon*, 150 F.3d at 1020, 1022–23); *see also Sullivan*, 667 F.3d at 301–03.

That test is easily met in the context of multistate repealer classes because the repealer state laws uniformly mirror the Sherman Act with respect to antitrust liability. *Sullivan*, 667 F.3d at 301–303; *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 28–30 (D.D.C. 2001), *petition for interlocutory appeal dismissed*, 289 F.3d 98 (D.C. Cir. 2002). Indeed, Defendants do not even attempt to argue that the repealer state laws differ as to the fundamental question presented: whether the 2018 agreement between Altria and Juul was illegally anticompetitive.

³ Far from “unprecedented[.]” Opening Br. at 44, the district court’s bifurcated approach to liability and remedies is a common practice in antitrust cases, including because of the individualized nature of calculating damages. *See, e.g., V5 Techs., LLC v. Switch Ltd.*, No. 2:17-cv-02349-KJD-NJK, 2021 U.S. Dist. LEXIS 216447, at *4 (D. Nev. Nov. 9, 2021) (granting motion to bifurcate trial into liability and damages phases because of “highly contested” damages claims involving “economic analyses” that “are likely to be confusing to the jury”).

That agreement is undisputedly a “common nucleus of facts” uniting the entire class, and the test for whether that agreement was illegally anticompetitive is undisputedly the same under every relevant state law. *Hyundai*, 926 F.3d at 563 (quoting *Hanlon*, 150 F.3d at 1022–23).

Instead of acknowledging that the core factual and legal question is the same under every state’s antitrust law, Defendants try to distract this Court into missing the forest for the trees, pointing to state-law differences regarding the availability and amount of damages. Opening Br. at 29–39 (arguing some states allow single damages, some allow double or treble damages only for “willful” or “flagrant” violations, and some prevent duplicative liability). But identifying such “idiosyncratic differences” regarding remedies is not nearly enough to overcome predominance in the face of the core, common question of antitrust liability. *Hyundai*, 926 F.3d at 563 (quoting *Hanlon*, 150 F.3d at 1022–23).

This Court’s “precedent is well settled” that “the need for individual damages calculations does not, alone, defeat class certification.” *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1154–55 (9th Cir. 2016) (quoting *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (listing cases)); *Hyundai*, 926 F.3d at 560–62 (same). This is true whether the need for individual damages calculations is due to a plaintiff’s individual purchase history, or to whether single, double, or triple damages are available to it according to the law of

the state in which it resides. Indeed, it is not even clear how the doubling or trebling of damages presents a “question” under Rule 23(b)(3) at all; juries are not instructed on the issue of double or treble damages, which are applied automatically. *See Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090–91 (9th Cir. 1975).

Defendants’ arguments regarding state law differences in the findings necessary to establish entitlement to double or treble damages similarly falls short. It is not enough that such “idiosyncratic differences” in state law exist; they must be both material—that is, they must make a significant difference in the legal outcome as applied to the specific facts of the case—and they must be so important as to overwhelm common issues. *Hyundai*, 926 F.3d at 561 (quoting *Hanlon*, 150 F.3d at 1022–23); *Stromberg*, 14 F.4th at 1067–68; *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012). Defendants do not even attempt to argue that their alleged conduct is not “willful” or “flagrant” such that it would not give rise to doubling or trebling under the relevant state laws, or that a lack of such a finding would amount to a significant difference in the legal outcome of the case. Indeed, such an argument would be difficult to make considering that plaintiffs have alleged a horizontal agreement which, if it occurred, would amount to a *per se* violation of the antitrust laws. 2-ER-62 (FTC document explaining that the “agreement between Altria and JLI—a horizontal understanding that Altria would

cease competing with JLI in e-cigarettes—could properly have been pled under the rule of *per se* illegality.”).

Similarly, Defendants’ attempt to establish state-law differences with respect to duplicative recovery, Opening Br. at 38, raises, at most, a hypothetical difference under state law, and fails to explain how any such difference would lead to differing outcomes “[u]nder the facts and circumstances of this case. . . .” *Mazza*, 666 F.3d at 594. Indeed, for all of defendants’ concern over duplicative recovery, each state’s law appears to protect against duplicative recovery equally well; during repealer states’ nearly 50 years of experience with overlapping direct- and indirect-purchaser actions, there has been no actual reported instance of duplicative liability. *See* Antitrust Modernization Comm’n, Report and Recommendations 274 (2007) (“AMC Report”) (noting that, in three years of Commission proceedings, “no one identified an instance of unfair or multiple recovery”); 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) (“Amici States [including repealer and non-repealer states] are also unaware of any such instance.”); 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”). Nor do Defendants explain how simply identifying the requirement of such individualized damages issues—which experience demonstrates defendants do not challenge at trial⁴—defeats Plaintiffs’ showing that the core, common question of antitrust liability predominates over such differences.

B. Standing questions are common to *Illinois Brick* repealer classes.

In order to manufacture a fundamental conflict among repealer states that might predominate over the core, common liability questions, Defendants contend that the repealer states’ laws present unique issues of antitrust standing. Opening Br. at 33–38. But in passing *Illinois Brick* repealer statutes, each repealer state has by definition granted antitrust standing to indirect purchasers. Accordingly, the

⁴ In conducting a Rule 23 predominance inquiry, courts should make a realistic assessment of how the class trial is likely to unfold. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008) (citing Fed. R. Civ. P. 23 advisory committee’s note, 2003 Amendments). Antitrust defendants never actually litigate individualized damages issues at trial, including because plaintiffs often wisely choose not to claim any damages for people they cannot show were impacted. See Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason. L. Rev. 969, 989–91 (2010). Numerous jury instructions and verdict forms, and the conspicuous absence of any pretrial dispositive motions or motions for judgment as a matter of law to exclude uninjured class members, strongly suggest that these issues are only raised as a ploy to defeat class certification. See *id.* at 991–93.

only “question” of antitrust standing presented in this case—whether indirect purchasers can bring suit for an antitrust violation—is resolved. This is the key difference which distinguishes this and other multistate repealer classes from *Stromberg*.⁵

Defendants contend that distinct state-law applications of the Supreme Court’s holding in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) (“*AGC*”), amounts to a fundamental difference among state-law variations regarding antitrust standing. Opening Br. at 33–38. At the outset it should be noted that applying *AGC* in the context of a repealer statute is itself highly questionable. The reason is simple: *AGC* essentially applies the same considerations that underlay the *Illinois Brick* rule, which were obviously rejected by the repealer states. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190

⁵ AAI respectfully maintains that this Court erred in *Stromberg* by incorrectly assuming that, in failing to pass *Illinois Brick* repealer statutes, non-repealer states affirmatively chose not to allow indirect purchasers to bring antitrust suits. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Plaintiffs-Appellees 15–17, *Stromberg*, 14 F.4th 1059 (filed August 9, 2019). Even assuming that non-repealer states did affirmatively choose not to allow indirect purchaser suits, such a decision could be based on any number of policy choices, including maximizing deterrence, which does not conflict with the law of California and other repealer states. *See id.* at 17–26. This point further underscores why multistate repealer classes do not present the same predominance problem this Court found in *Stromberg*: Because each repealer state has affirmatively chosen to allow indirect purchaser suits, each one has the same fundamental policy with respect to indirect purchasers’ antitrust standing.

F.3d 1051, 1054 (9th Cir. 1999) (summarizing *AGC* factors as including “the directness of the injury,” “the risk of duplicative recovery,” and “the complexity in apportioning damages”); Phillip Areeda et al., *Antitrust Analysis* 67 (7th ed. 2013) (reasoning of *AGC* is “generally parallel to that invoked in *Illinois Brick* to deny standing to indirect consumers”).

As the Minnesota Supreme Court noted in refusing to apply *AGC* to indirect-purchaser claims under Minnesota law, “*AGC* was informed by *Illinois Brick* and repeated, as antitrust standing guidelines, *Illinois Brick*’s reservations about indirect purchaser suits.” *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 629 (Minn. 2007); *see also AGC*, 459 U.S. at 544–45 (basing elements of antitrust standing on the “same concerns” that guided *Illinois Brick*). Thus, the court concluded, “[w]e do not believe that the legislature repudiated *Illinois Brick* and invited indirect purchaser suits only for courts to dismiss those suits on the pleadings based on the very concerns that motivated *Illinois Brick*.” *Lorix*, 736 N.W.2d at 629.; *see id.* at 626.

For this reason, federal courts have found it “inappropriate” to apply *AGC* to repealer states’ laws “in the absence of a clear directive from those states’ legislatures or highest courts.” *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008); *see also D.R. Ward Constr. Co. v. Rohm & Haas Co.*, 470 F. Supp. 2d 485, 496 (E.D. Pa. 2006) (*AGC* inappropriate for

Tennessee, Arizona, and Vermont antitrust statutes); *Moniz v. Bayer Corp.*, 484 F. Supp. 2d 228, 231 (D. Mass. 2007) (Massachusetts). And when courts do apply the *AGC* factors, they amend them to account for the repealer states' express provision of a cause of action for indirect purchasers. *See, e.g., In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 410 (D. Del. 2007) (*AGC* factors other than antitrust injury and speculativeness of injury "carry less weight in the standing analysis in jurisdictions rejecting *Illinois Brick*").

Against this backdrop, simply pointing out various state court cases applying *AGC* does not give rise to a fundamental conflict; Defendants still must show how the differing treatments would substantially change the legal outcome on the facts of this case. *Mazza* 666 F.3d at 590; *Stromberg*, 14 F.4th at 1067–68 . They fail to do so. None of the state high court cases cited by Defendants suggests that any class members in this case would be excluded under the state's *AGC* caselaw. *See Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 199 (Iowa 2007) (*AGC* not satisfied because "plaintiffs are neither consumers of the defendants' products nor competitors"); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293, 301, 297–98 (Neb. 2006) (neither *AGC* nor state antitrust standing satisfied because plaintiffs "are not indirect purchasers"); *Nev. Recycling & Salvage, Ltd. v. Reno Disposal Co.*, 423 P.3d 605, 608 (Nev. 2018) (*AGC* not satisfied because plaintiffs "did not make any

showing that they suffered any injuries (*i.e.*, damages) from respondents’ alleged conspiracy”).

Defendants purport to connect states’ varying applications of *AGC* to this case by claiming that “[p]laintiffs likely lack *AGC* standing” on the basis that “there is a risk of duplicative recovery.” Opening Br. at 33–34. But duplicative recovery is a non-issue in practice, *see supra* Part II.A. Even if it weren’t, the Supreme Court has repeatedly and unequivocally elevated antitrust laws’ deterrence goals over the risk of duplicative recovery. *ARC America*, 490 U.S. at 105 (rejecting implied conflict preemption of repealer laws even though they “impose liability over and above that authorized by federal law”); *Apple v. Pepper*, 587 U.S. 273, 287 (2019) (holding, over objection that it would raise “difficult questions about apportionment” and “risk of duplicative damages awards,” *id.* at 292–93 (Gorsuch, J., dissenting), that a retailer “may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers”). Against this backdrop, merely asserting that Plaintiffs’ claims pose “a risk of duplicative recovery,” Opening Br. at 34, is insufficient to raise material questions about duplicative recovery under state law, nor is it clear how such questions could swamp the common, core issue of antitrust liability.⁶

⁶ Defendants’ remaining arguments regarding relatively minor points of three states’ laws similarly fail to present material differences or otherwise swamp predominance. *See* Opening Br. at 30–32. They don’t argue that consumers were

C. Prohibiting multistate repealer classes would undermine the policy goals behind Rule 23.

Finally, Defendants’ proposed rule would force the parties and the courts into redundant proceedings over the same question: whether Defendants’ 2018 agreement was anticompetitive. Such an outcome would violate the express purpose of Rule 23, which was specifically designed to achieve “‘economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated. . . .’” *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23, Advisory Committee’s note to 1966 Amendment, Subdivision (b)(3)). Class certification “saves the resources of both the courts and the parties” by permitting an issue potentially affecting every member of a class “to be litigated in an economical fashion under Rule 23.” *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Accordingly, where, as here, the core question of liability involves a common course of conduct, requiring plaintiffs to prove liability in separate suits

not harmed as Florida law requires. To the extent resellers cannot recover under Missouri or Massachusetts law, those exceptions do not swamp predominance; even if they did, the appropriate solution would be to remove resellers in those states from the class rather than to deny certification. *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1139 (9th Cir. 2016) (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 826 n.15 (7th Cir. 2012) (“In circumstances... involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth.”))).

would defeat the whole purpose of the 23(b)(3) class action. *See Olean*, 31 F.4th at 663–64 (emphasizing core efficiency goals of Rule 23(b)(3) are satisfied when a common proceeding can resolve antitrust liability “in one stroke” rather than in multiple redundant proceedings).

II. Multistate repealer classes are necessary to implement repealer states’ laws.

Two principles are key to understanding the significance of multistate repealer classes to the antitrust enforcement regime. First, as a practical matter, many antitrust class claims will not be brought if indirect purchasers are unable to achieve the economies of scale that multistate class claims allow. Second, as a matter of law, federal courts are bound to give effect to state law wherever possible, and may not apply federal procedural rules in a way that would abridge or amend a state substantive right. Accordingly, this Court should be wary of adopting a restrictive interpretation of Rule 23(b)(3)’s predominance requirement that would have the practical effect of rendering repealer state indirect purchaser claims untenable.

A. Single-state indirect purchaser classes are often negative value claims.

It is widely recognized that the class action mechanism is critical to private enforcement of the antitrust laws because the high cost of litigating antitrust cases means that most antitrust claims have a negative value when pursued individually.

Robert H. Lande, *Class Warfare: Why Antitrust Class Actions are Essential for Compensation and Deterrence*, 30 Antitrust Magazine 81, 81 (2016), <https://ssrn.com/abstract=2759410>; Albert H. Choi & Kathryn E. Spier, *Class Actions and Private Antitrust Litigation*, 14 Am. Econ. J.: Microecon. 131, 133–34, 156 (2022). This Court has repeatedly explained that Rule 23 is designed specifically to implement the substantive legal rights of plaintiffs to pursue such negative-value claims. *Briseno*, 844 F.3d at 1129; *Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575, 588 n.6 (9th Cir. 2022) (noting that for such claims Rule 23 is “the only realistic possibility for redress”); *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (observing negative value-claims at issue “vividly point[] to the need for class treatment” and are “at the heart of why the Federal Rules of Civil Procedure allow class actions”).

The same is true for state-specific classes: because each state may only have a small fraction of the total number of consumers that suffered antitrust injury in a given case, the high costs of prosecuting an antitrust claim mean that class proceedings that are only state-wide will often not make financial sense to pursue. This point is supported by litigation settlement data, which shows that the smaller the total award, the higher the percentage of the award that goes to fees and expenses. For nationwide classes settled for \$1 billion or more between 2009 and 2025, median expenses and fees amounted to 15% of the total settlement fund.

Joshua P. Davis, 2025 Antitrust Annual Report: Class Actions in Federal Court at 35 (Apr. 20, 2026), <https://ssrn.com/abstract=6617318>. In contrast, for nationwide settlements under \$10 million, median fees and expenses amounted to 34% of the total settlement amount. *Id.* at 34. This means that, in case worth \$10 million, the total expenses of bringing suit are about \$3.4 million. Where the \$10 million in harms are spread across consumers nationwide, only the largest states will have a state-wide class of consumers with damages large enough to justify \$3.4 million in litigation costs.

The necessity of the class mechanism for indirect purchasers' ability to bring a claim in practice illustrates why plaintiffs regularly bring—and courts regularly certify—multistate classes of indirect purchasers, sometimes with statewide subclasses.⁷ See, e.g., *Polyurethane Foam*, 314 F.R.D. at 232, 293; *Relafen*, 221 F.R.D. at 288; *Mazza*, 666 F.3d at 596 n.4 (reserving possibility of state subclasses). Ending that practice would have the practical effect of making many indirect-purchaser claims economically untenable.

⁷ To the extent this Court finds that differences between repealer states' laws present unique questions that should be submitted to a jury, it should order that the class be divided into similar state-wide subclasses.

B. Repealer states have established a substantive right that federal courts are bound to enforce.

It is a foundational principle of federalism that federal courts sitting in diversity or supplemental jurisdiction are bound to apply relevant state law and lack the authority to declare or modify state substantive rights. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *ARC America*, 490 U.S. at 105–06. Codifying these principles in the Rules Enabling Act, Congress specifically prevented federal procedural rules that “abridge, enlarge, or modify any substantive right.” 28 U.S.C. § 2072. The repealer states explicitly created such a substantive right: the right of indirect purchasers to seek damages for antitrust violations. As a federal procedural rule, then, Rule 23 cannot be interpreted in such a way that would “abridge” indirect purchasers’ right to bring suit under those laws. *Id.* Considering the practical realities of antitrust litigation, *see supra* Part II.A., this Court should avoid an interpretation of Rule 23 that would have the practical effect of preventing repealer-state indirect purchasers from exercising their substantive rights under state law.

The same conclusion is also supported by CAFA, which Congress enacted specifically to ensure “[f]ederal court consideration of interstate cases of national importance.” Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 5. In passing CAFA, Congress did nothing to disrupt the Court’s deference to state substantive law under *Erie*. It would be an internal contradiction to hold that CAFA

purposefully pulls state-law indirect purchaser claims into federal court, only for their collective resolution to be blocked under a narrow reading of Rule 23(b)(3)'s predominance requirement. The two statutes should be read together: CAFA provides the jurisdiction for repealer state indirect purchaser suits, and the Rules Enabling Act provides the procedural mechanism (Rule 23) to resolve the dispute efficiently. *See* Geoffrey C. Hazard Jr., *Has the Erie Doctrine Been Repealed by Congress?*, 156 U. Pa. L. Rev. 1629, 1629 (2008) (CAFA is “the most recent legislative affirmation that federal procedure is appropriate for the enforcement of state law rights”).

Because single-state consumer antitrust class claims are frequently negative value claims, adopting a *per se* rule against certification of repealer-state indirect purchaser classes would contradict the purposes behind the class action mechanism, undermine *Erie* deference, and frustrate Congress's jurisdictional goals as promulgated in CAFA. It would also undermine Congress's antitrust enforcement mechanism. As explained above, *see supra* Part I, the national antitrust regime relies primarily on deterrence and depends in large part on the ability and incentive of market participants to bring enforcement actions. Prohibiting certification of multistate repealer classes would effectively remove many repealer-state indirect purchasers from the roster of “private attorneys general” enlisted by Congress and the repealer states to enforce the antitrust laws.

Perma Life, 392 U.S. at 147 (Fortas, J., concurring). This would undermine antitrust enforcement and allow antitrust violators to keep their ill-gotten gains.

III. The hypothetical existence of class members who suffered zero dollars in damages does not defeat predominance.

Defendants contend that predominance is not met where a class may include members who did not pay an overcharge because it was absorbed elsewhere in the supply chain. Opening Br. at 49–50. But as Defendants acknowledge, this Court’s binding precedents—including *en banc* authority—bar this argument. *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) (whether “some class members’ claims will fail on the merits if and when damages are decided” is “generally irrelevant to the district court’s decision on class certification” (quoting *Messner*, 669 F.3d at 823); *Olean*, 31 F.4th at 669 (reaffirming *Torres* and rejecting rule against certification of a class that includes uninjured class members). These precedents follow from the general rules that predominance is met even when individual damages questions exist, *Torres*, 835 F.3d at 1137, and that “a wrongdoer should not profit from uncertainty caused by his own wrong,” *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979).

Nor is Justice Kavanaugh’s solo dissenting opinion in *Labcorp* persuasive. *Labcorp* dealt with a class of blind patients seeking statutory damages for defendants’ failure to make self-service kiosks accessible to blind and visually impaired individuals. Defendants argued that certification was improper because

some of the class members never interacted with the offending kiosks and were therefore not entitled to statutory damages. Justice Kavanaugh would have ruled for defendants on the basis that “[c]lasses that are overinflated with *uninjured* class members” threaten “massive liability” and “coerce businesses into costly settlements.” *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 332 (2025). But unlike statutory-damages claims, where a defendant’s liability is directly proportional to the number of plaintiffs in the class, antitrust damages are based on the aggregate overcharge paid by the class as a result of the violation. *Olean*, 31 F.4th at 671–72. As made clear by this Court’s analysis in *Olean*, the presence of potentially uninjured class members does not risk inflating class-wide damages. *Id.* Thus, the concerns that motivated Justice Kavanaugh’s *Labcorp* dissent are not presented by antitrust cases.

IV. The antitrust logit model is a widely accepted model that is frequently used in antitrust cases.

Finally, Defendants seek a ruling from this Court that, because it relies on certain assumptions about market conditions, the antitrust logit model cannot be used in cases where real market data contradicting those assumptions is available. Opening Br. at 65–72. Such a rule would violate longstanding precedents disfavoring “categorical rules governing the use of representative and statistical evidence in class actions” and that merits questions may be considered “only to the extent” they are necessary to make a Rule 23 determination, *Olean*, 31 F.4th at

667, 668 n.11 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (alteration omitted). It would also require courts to assume in every antitrust case that, but for the anticompetitive conduct, the relevant market would look the same as it does in the real world, contradicting the fundamental principle that an antitrust defendant should not benefit from the inherent uncertainty of constructing the but-for world absent an antitrust violation. *See Vehicle Air Pollution*, 591 F.2d at 73.

These precedents underly the rule that, at class certification, a “district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.” *Olean*, 31 F.4th at 667. The “key inquiry” at certification is whether the plaintiff “has demonstrated the nexus between her legal theory and her damages model.” *Noohi*, 146 F.4th at 867 (quoting *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 821 (9th Cir. 2019)) (alterations omitted). Whether the actual calculation of damages “will prove accurate is a ‘merits inquiry unrelated to class certification.’” *Id.* (quoting *Nguyen*, 932 F.3d at 821). Ruling otherwise would convert class certification “into a mini-trial on the merits.” *Id.* (quoting *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015)) (internal quotation marks omitted).

Google Play is illustrative. There, the District Court held that plaintiffs' antitrust logit model was admissible and capable of proving market-wide impact at class certification. *In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD, 2022 U.S. Dist. LEXIS 213670, at *52–55 (N.D. Cal. Nov. 28, 2022). Later, following substantial discovery, the district court ruled on the merits that the model's substitutability assumptions conflicted with the evidence. *In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD, 2023 U.S. Dist. LEXIS 151490, at *67 (N.D. Cal. Aug. 28, 2023). Defendants rely only on this latter ruling while ignoring the former, seeking an improper merits ruling on the model at the class certification stage, and requiring this Court to assume an answer to the central question of this case.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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FOR THE NINTH CIRCUIT**

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