NO. 11-16188

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

AT & T MOBILITY, et al.,

Plaintiff-Appellants,

v.

AU OPTRONICS CORP. et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the District of California

No. 3:09-CV-04997-SI
Honorable Susan Y. Illston, Judge

BRIEF OF *AMICUS CURIAE* THE STATE OF CALIFORNIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The California Attorney General is California's chief law officer. Cal. Const., art. V, §13. She plays a leading role in enforcing the antitrust laws, including the Cartwright Act, under which she may bring antitrust actions on behalf of the state, its political subdivisions, and its citizens. Cal. Bus. & Prof. Code §§16750(b)-(c), 16760. Moreover, the California Legislature has expressly consigned to the California Attorney General the right to offer her views in any appellate matter that involves the Cartwright Act or the Unfair Competition Law. Cal. Bus. & Prof. Code §§ 16750.2, 17209.

The issue before this Court involves the extent to which the federal Due Process Clause bars California from deterring illegal multistate activity, where a non-trivial part of that activity occurs within California, by providing comprehensive damage relief to all in-state and out-of-state victims for all of their purchases affected by that activity. In an era in which illegal acts increasingly transcend state boundaries, the California Attorney General should be heard as to the views articulated by California courts on the need for judicious extraterritorial application of California's antitrust or consumer protection laws in those circumstances. *Cf. e.g., Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 119 (2006); *People v. Morante*, 20 Cal.4th 403, 436 (1999).

Consequently, the California Attorney General is submitting this amicus curiae brief on behalf of the State of California.

SUMMARY OF ARGUMENT

In addressing policy-related issues and carefully hewing to the dictates of the Due Process Clause, California courts have consistently found that California's laws may be applied extraterritorially so long as there is a sufficient nexus between California and the underlying conduct that is alleged to be illegal under those laws. California courts have further elaborated that such a nexus exists when a significant, non-de minimis part of those illegal acts occurs within this state. This point holds true whether the plaintiff is in-state or out-of-state and whether the injury in question occurred in-state or out-of-state.

Ignoring these precedents, the district court in this matter held that the Due Process Clause barred the extraterritorial application of Cartwright Act, even if there were the nexus described above, unless a plaintiff's *injuries* occurred in California. The district court also misconstrued United States Supreme Court precedent. Cases such as *Alaska Packers, Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947) and *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981) stand for the proposition that the due process analysis regarding the extraterritorial application of a state's laws to multistate activity focuses on whether the nexus between the alleged unlawful acts and the state itself is attenuated or slight and casual. This

analysis rejects the notion that only a single state must have constitutional jurisdiction over multistate activity or that the courts must focus on where a plaintiff's injury took place.

A focus for Due Process Clause purposes on the connection between the defendants' acts (as opposed to plaintiff's injury) and California serves important constitutional and policy imperatives. First, it allows California to guarantee that out-of-state residents will be treated the same as in-state residents in ensuring that all have a remedy for misconduct such as price-fixing when that misconduct has a substantial connection to California. Thus, this focus serves important constitutional interests of equal treatment embedded in the Commerce Clause and the Equal Protection Clause.

Second, such a focus allows California to exercise fully its traditional police powers in deterring misconduct – including especially the full deterrence through its antitrust laws of anti-competitive conduct that harms consumer welfare – in an era in which such conduct increasingly transcends "artificial, historical boundaries between States." *See People v. Morante,* 20 Cal.4th 403, 428 (1999). Full deterrence includes both the ability of in-state and out-of-state residents to recover for California-based harm and the ability of California citizens to recover damages that included their out-of-state as well as in-state purchases.

Finally, this approach serves our federalist structure. Antitrust has been a long-standing, traditional area of state regulation in which the states have been able to act on an individual basis without raising spillover effects or collective action problems. Where the antitrust laws of various states differ as to remedies, traditional conflict-of-laws analysis resolves the differences without overriding the modest and restrained analysis of constitutional jurisdiction under the Due Process Clause or unduly constraining California's ability to enforce fully its laws.

ARGUMENT

I. INTRODUCTION

The due process test set forth in *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) allows a plaintiff to invoke the extraterritorial application of a state's law if "that State [has] a sufficient aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (internal quotation marks omitted)). How the presence of a "sufficient aggregation of contacts" is to be determined in assessing the extraterritorial application of a state's antitrust or consumer protection statute is the question presented here: is it to be where the illegal acts took place in whole or in significant part, or where the plaintiff suffered the injury that flowed from those illegal acts?

The district court determined that it is the location where a plaintiff suffers the injury that flows from an illegal act that determines whether there is a sufficient aggregation of contacts under *Shutts*. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M:07-01827 SI, MDL No. 1827, 2010 WL 2609434, *3 (N.D. Cal. June 28, 2010). That determination means that in a price-fixing case it is the location where plaintiff purchased the price-fixed good that determines whether there is a sufficient aggregation of contacts to allow for the recovery of damages from out-of-state purchases. *See id.* (finding plaintiff AT&T failed to show the requisite connection between California and its claims because it had not shown that it purchased any price-fixed goods from Defendants in California). California respectfully disagrees with the district court on this standard based on an examination of California and United States Supreme Court precedent as well as important policy interests.

II. CALIFORNIA COURTS HAVE FOUND THAT THE COMMISSION OF MORE THAN DE MINIMIS ACTS IN CALIFORNIA SATISFIES POLICY-BASED AND DUE PROCESS REQUIREMENTS FOR THE EXTRATERRITORIAL APPLICATION OF ITS LAWS

Addressing policy-based questions as well as the constraints of the Due Process Clause, the California Supreme Court has repeatedly endorsed the extraterritorial application of California law so long as there was a sufficient factual nexus between the illegal conduct in question and California. In reaching this conclusion, the California Supreme Court has helpfully elaborated on when

such a factual nexus exists in determining that only a significant part, or, to put it another way, a non-de minimis part, of the illegal activity need occur in California. In reaching this conclusion, the California Supreme Court has also helpfully stressed the importance of allowing for this measured extraterritorial application of its laws to multistate activity in order to deter fully civil and criminal wrongdoing involving this state.

For example, in *Diamond Multimedia Systems v. Superior Court*, 19 Cal.4th 1036 (1999), the California Supreme Court addressed the issue whether out-of-state purchasers and sellers of securities could maintain an action in California for violation of California statutes prohibiting unlawful market manipulation. The *Diamond Multimedia Systems* court answered this question in the affirmative, not only in construing the relevant statutory language as encompassing all purchases and sales of stock, whether intrastate or interstate, but also in rejecting application of the venerable state presumption against extraterritoriality on the ground that the statutes being reviewed only applied to conduct that was committed in California. *Id.* at 1053-56, 1059-60.[1] The Court explained in persuasive language why

[1]The venerable state presumption against extraterritoriality originates from the California Supreme Court's decision in *North Atlantic Salmon v. Pillsbury*, 17 Cal. 1 (1916). The *Diamonds Multimedia System* court not only noted that *North Atlantic Salmon* applied to a statute that could extend to conduct committed wholly in another state but also observed that the California Legislature routinely allowed out-of-state residents to recover damages for out-of-state injuries so long as the (continued…)

extraterritorial application of its laws involving fraud or deceptive conduct (which are analogous to its antitrust laws) was important to safeguarding the business climate of the state and to full deterrence of wrongdoing:

> California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices. California business depends on a national investment market to support our industry. The California remedy for market manipulation helps to ensure that the flow of out-of-state capital necessary to the growth of California business will continue. The Court of Appeal rejected a claim similar to that of petitioners and recognized the importance of extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California in *Clothesrigger, Inc. v. G.T.E. Corp.* (1987) 191 Cal.App.3d 605, 236 Cal.Rptr. 605.

Diamond Multimedia Systems, 19 Cal.4th at 1063-65.

While *Diamond Multimedia Systems* involved conduct that was committed wholly in California, the California Supreme Court has reached the same conclusions when a significant *part* – though not all – of the alleged illegal conduct was committed in California. For example, in *People v. Morante,* 20 Cal.4th 403 (1999), the Court held that California's criminal laws could be applied extraterritorially to a conspiracy to commit an offense in another state so long as the prepatory acts for that conspiracy carried out in California were more than de minimis. *Id.* at 426-29, 436 (finding the prepatory acts in that case not to be de

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(…continued)
illegal acts occurred in California. *Diamonds Multimedia System*, 19 Cal.4th at 1059-60 (discussing Cal. Civ. Code §3281 and product liability cases).

minimis). The *Morante* court observed that it must take account of "the ever-increasing frequency of criminal acts and transactions which transcend artificial, historical boundaries between states." *Id.* at 428.

Furthermore, in *Kearney v. Salomon Smith Barney, Inc.,* 39 Cal.4th 95 (2006), the California Supreme Court addressed the question of whether the Due Process Clause barred the application of California's privacy statute on the wiretapping of telephone conversations when the plaintiff was in California but the defendant was in Georgia. The *Kearney* court rejected the argument that the application of California's privacy statutes to these circumstances was impermissible under the Due Process Clause:

> The present legal proceedings are based upon defendant business entity's alleged policy and practice of recording telephone calls of *California* clients, while the clients are *in California,* without the clients' knowledge or consent. California clearly has an interest in protecting the privacy of telephone conversations of California residents while they are in California sufficient to permit this state, as a constitutional matter, to exercise legislative jurisdiction over such activity.

Id. at 104 (*italics in original*). In its discussion regarding the extraterritorial application of this privacy statute, the California Supreme Court trenchantly observed that the states have freedom to apply their own policies to businesses that choose to do business within their borders even if "the law may implicate some action or failure to act that occurs outside of the state." *Id.* at 105 (citing and discussing *Allstate v. Hague*, 449 U.S. 302, 317-18 (1981) (Brennan, J., writing for

plurality; *id.* at 329-31 (Stevens, J., concurring); *id.* at 337-38 (Powell, J., dissenting); *Clay v. Sun Ins. Office Ltd.,* 377 U.S. 179, 181-82 (1964); *Watson v. Employers Liability Corp.*, 348 U.S. 66, 72 (1954)). Thus, these points hit the same themes, albeit from a different angle, as the points made in the *Morante* opinion.

As indicated by *Diamond Multimedia System*'s favorable citation to and discussion of (*see* 19 Cal.4th at 1063-65) the California appellate decision in *Clothesrigger v. GTE Corp.*, 191 Cal.App.3d 605 (1987), California appellate courts have faithfully applied this "significant connection" standard of the California Supreme Court to unfair competition cases. In *Wershba v. Apple Computers, Inc.*, 91 Cal.App.4th 224 (2001), the California Court of Appeal for the Sixth Appellate District rejected a challenge under the Due Process Clause to the certification of a nationwide settlement class based on California's Unfair Competition Law. The *Wershba* court reached this holding based on the following observations: (1) the defendant was a California corporation with its principal place of business in Cupertino, California; (2) the allegedly false representations set out in brochures were disseminated from California; (3) substantial numbers of class members were located in California; and (4) the core decision at issue in that case was made in California. *Id.* at 242. The *Wershba* court correctly observed that these facts were quite similar to those in *Clothesrigger*, involving

representations pertaining to charges for long distance telephone calls, in which the California Court of Appeal for the Fourth Appellate District upheld the certification of a nationwide class under the Unfair Competition Law in the face of a due process challenge to the inclusion of non-residents. *Compare, e.g., Clothesrigger*, 191 Cal.App.3d at 612-13 *with Wershba*, 91 Cal.App.4th at 241-42.

Significantly, though the challenged conduct that formed the basis of plaintiff's lawsuit occurred in California, the *Wershba* court nonetheless interpreted teachings on this subject as allowing for the extraterritorial application of California's laws "where the defendant is a California corporation and *some or all* of the challenged conduct emanates from California." *Wershba,* 91 Cal.App.4th at 243 (*italics added*) (citing *Clothesrigger*, 191 Cal.App.3d at 612-13 and *Northwest Mortgage Co. v. Superior Court*, 72 Cal.App.4th 214, 222 (1991)). Moreover, the *Wershba* and *Clothesrigger* courts emphasized California's interest in providing non-residents with a means of recovery for damages occurring due to conduct that has a sufficient nexus to California – as long as the home states of these non-residents had not otherwise identified an interest in denying recovery. *Wershba,* 91 Cal.App.4th at 242-43; *Clothesrigger*, 191 Cal.App.3d at 614-16.

By contrast, applying this same "substantial connection" standard, the California Court of Appeal for the Fourth Appellate District in *Northwest Mortgage Co. v. Superior Court*, 72 Cal.App.4th 214 (1999) excluded from a

nationwide class under the Unfair Competition Law all out-of-state purchasers of out-of-state insurance products from defendants where the defendants themselves were out-of-state, where the conduct in question occurred out-of-state, and where the out-of-state purchasers' injuries also occurred out of state. *Id.* at 242. Properly read as to all of its parts – as explained below – *Northwest Mortgage* supports California's position.

Northwest Mortgage involved allegations under the Unfair Competition Law that California and non-California mortgagees were equally victimized when their mortgage lender forced them to buy more expensive insurance after their insurance lapsed or was cancelled, and then gave kickbacks from those excessive premiums to insurers (thereby setting up a vicious cycle of additional insurance cancellations). *Northwest Mortgage*, 72 Cal.App.4th at 216-17. Insofar as two out of three groups within the proposed nationwide class were concerned – one group being California borrowers who had to buy more expensive insurance in or out of California, and the second group being non-California borrowers who had to buy more expensive insurance in California – the *Northwest Mortgage* court saw no obstacles to the inclusion of these two groups in the proposed class. *Id.* at 222. Yet, the *Northwest Mortgage* court distinguished the third group (out-of-state purchasers of out-of-state insurance products from out-of-state insurers involving out-of-state conduct and out-of-state injuries) because inclusion of that group not

only triggered the presumption against extraterritoriality but also failed to meet the *Shutts* "sufficient contacts" test for defeating Due Process Clause challenges.[2] *Id.* at 225-27. Thus, *Northwest Mortgage* confirms the teachings of other state cases on state law and the scope of the Due Process Clause, i.e., that the determination of impermissible extraterritoriality must focus on the underlying conduct asserted to be illegal and determine whether there is a more than de minimis connection between that conduct and the state.

The fact that only some of the challenged conduct need emanate from California to satisfy due process dictates does not mean that the *Shutts* test is a toothless one under this line of state precedent. Even aside from *Northwest*

[2] The presumption against extraterritoriality applies in the setting of the Unfair Competition Law because the Legislature did not indicate through statutory text or legislative intent that the Unfair Competition Law has automatic extraterritorial effect. *See e.g., Sullivan v. Oracle*, 51 Cal.4th 1191, 127 Cal.Rptr.3d 185, 198-99 (2011). However, this presumption operates only when the conduct sought to be encompassed by the law is wholly out-of-state. *Cf. e.g.*, *Sullivan*, 127 Cal.Rptr.3d at 198-200 (Unfair Competition Law would conceivably apply to out-of-state plaintiffs' claims regarding underpaid wages for out-of-state work performed for California corporation *if* wages were paid (or underpaid to be more precise) in California); *Northwest Mortgage*, 72 Cal.App.4th at 222-25. Though the applicability of this presumption is not before this Court, it is noteworthy that such a presumption does *not* apply insofar as the Cartwright Act is concerned. The California Legislature mandated that the Cartwright Act could have extraterritorial effect. Cal. Bus. & Prof. Code § 16750(a); *id.* §16702; *California et. al. v. Infineon Technologies A.G. et. al.*, 531 F.Supp.2d 1124, 1135 (N.D. Cal. 2007) ("Accordingly, standing to sue under this provision of the Act is granted to all natural persons, corporations, firms, partnerships, and associations – regardless of whether they are California residents or not.").

Mortgage itself, other lower courts have found insufficient contacts under this line of precedent to justify the extraterritorial application of California law. *See e.g., In re Hitachi Television Optical Block Cases*, No. 08cv1746 DMS (NLS), 2011 WL 9403 *3, 7-10 (S.D. Cal. Jan. 03, 2011) (cases such as *Clothesrigger* distinguishable in finding contacts insufficient under the *Shutts* test to justify certification of nationwide class under California's Unfair Competition Law for purchasers of Defendant's allegedly deceptive products).

This line of well-reasoned California precedent is nowhere mentioned in the district court's opinion.

III. THE DISTRICT COURT IMPROPERLY ADOPTED LOCATION OF INJURY, NOT LOCATION OF THE MISCONDUCT, AS THE BASELINE IN APPLYING THE *SHUTTS* TEST REGARDING THE EXTRATERRITORIAL APPLICATION OF THE CARTWRIGHT ACT

The district court's view that the location of a plaintiff's injuries, not the location of a defendant's unlawful conduct, is the baseline for making the *Shutts*-mandated "sufficient contacts" assessment under the Due Process Clause rests only on a passing quotation of *Allstate Ins. Co. v. Heague*, 449 U.S. 302, 308 (1981): "The court agrees that in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation' – the purchases of allegedly price-fixed goods – occurred in the various states." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2010 WL 2609434 at *3.

However, Amicus respectfully submits that a survey of United States Supreme Court precedent, including *Allstate Ins. Co.,* supports its position that the district court erred in its due process analysis.

A. A Survey of United States Supreme Court Precedent Supports the Extraterritorial Application of California Law under the Due Process Clause Where the Illegal Activity Occurred in Whole or in Non-Attenuated Part in California

To understand Due Process Clause constraints on the extraterritorial application of a state's law where multistate activity is involved, it is helpful to examine the following trio of United States Supreme Court cases: *Shutts*, 472 U.S. 797; *Allstate Ins. Co.*, 449 U.S. 302; and *Alaska Packers, Cardillo v. Liberty Mut. Ins. Co.*, 294 U.S. 532 (1947). Reading those cases together suggests that the *Shutts* test is to be applied in a highly pragmatic way where multistate activity is concerned: rather than trying to settle on a single state to be the sole forum for a claim where multistate activity is concerned, courts are supposed to look to the strength of the connections between a state, on the one hand, and the parties and transactions and occurrences that form the basis of the underlying action, on the other .

If that connection is substantial enough, it does not matter if a plaintiff suffered injuries in a state different than the one under whose laws that plaintiff has filed suit (the forum state) or if any state other than the forum state has even stronger connections. *See e.g., Pecover v. Elecs. Arts. Inc.*, No. C 08-2820 CVW,

Order on Motion for Class Certification at 36-37 (N.D. Cal. Dec. 21, 2010), *available at* http://www.easportslitigation.com/pdf/ORDERGrantingClassCertification.pdf. In fact, if a forum state's connection with the facts underlying an action are more than "slight and casual" or "attenuated," and those facts further have "some connection" to an identified legal interest of the forum state, then the forum state can exercise jurisdiction as a constitutional matter regardless if other states are also capable of exercising jurisdiction. *See e.g., Allstate Ins. Co.*, 449 U.S. at 309-13 (Brennan, J., writing for plurality); *id.* at 332-36 (Powell, J., writing for dissent).

In *Allstate Ins. Co.*, the Court addressed the question whether the Due Process Clause allowed a wife's claim under Minnesota law that the three insurance policies of her deceased husband should be "stacked" so that she would receive a recovery from all three policies. *Allstate Ins. Co.*, 449 U.S. at 305. On the one hand, the traffic accident that killed the husband and triggered these insurance policies occurred in Wisconsin; the husband and wife were both residents of Wisconsin at the time of the husband's death; and the insurance policies were delivered in Wisconsin. On the other hand, the husband commuted to work in Minnesota, giving Minnesota an important interest as an "employer" in the husband; the wife moved for good faith reasons to Minnesota before filing the lawsuit; and the defendant did business in Minnesota such that the defendant could

not claim to be unfamiliar with Minnesota or surprised that Minnesota law might be applied in a state case. *Id.* at 305, 313-18.

Justice Brennan, writing for a plurality, noted that a lawsuit could be based on facts that would give rise to constitutional jurisdiction in more than one state. *Id.* at 307-08 & n.11 (Brennan, J., writing for a plurality of the Court). Based on the facts discussed above, the plurality found that the connection between Minnesota and the wife's claims on her deceased husband's policies was substantial enough to survive due process concerns. *Id.* at 313-18.

Justice Stevens, concurring with the plurality, noted that due process concerns could be raised, whether there was or was not a substantial connection between the case and the forum state, if the forum state's laws operated in a way that was fundamentally unfair, e.g., it dramatically favored residents over non-residents. *Id.* at 326-27, 332 (Stevens, J., concurring). However, Justice Stevens found that neither Minnesota's stacking rule nor its application of it was fundamentally unfair. *Id.* at 327-28, 332.

In turn, Justice Powell, writing for himself and two other justices in dissent, agreed with the *Allstate Ins. Co.* plurality's discussion of the principles applicable to a due process analysis, characterizing that analysis as a "modest" one that must be applied with "restraint"; a state can have constitutional jurisdiction so long as its contacts with the case are not "slight and casual" and the state has a legitimate

interest in the outcome of litigation before it as shown by the existence of some connection between the facts giving rise to the litigation and the scope of the state's lawmaking jurisdiction. *Id.* at 332-36 (Powell, J., writing for dissent). However, Justice Powell found that the application of Minnesota law could not satisfy even this modest analysis given the facts supporting a connection of Minnesota to the *litigation* were "trivial or insignificant." *Id.* at 336-40.

If *Allstate Ins. Co.* therefore contains facts "on the border" between constitutionally permissible jurisdiction and constitutionally impermissible jurisdiction in applying a modest and restrained due process analysis agreed on by seven of eight justices on the Court, *Shutts* set out facts which more plainly fell upon the constitutionally impermissible jurisdiction side of the line. *Shutts* involved a class action by investors in a gas company to recover interest on royalties that were suspended pending final approval of a gas price increase. These investors sought to certify a nationwide class under Kansas law even though Kansas law "substantively" conflicted with Oklahoma law and Texas law on the award of interest, and even though 99% of gas leases involved and 97% of investors involved had no connection to Kansas. *Shutts*, 472 U.S. at 814-18.

The *Shutts* Court affirmed the reasoning by the *Allstate Ins. Co.* plurality and dissent that "a particular set of facts giving rise to the litigation could justify, constitutionally, the application of more than one jurisdiction's laws." *Id.* at 818

(citing *Allstate Ins. Co.*, 449 U.S. at 312-13 (plurality op.); *id.* at 332 (dissenting op.)). However, the *Shutts* Court found a lack of any substantial connection between the forum state and the proposed nationwide class. The out-of-state claims by out-of-state investors involving out-of-state leases were governed by laws substantively different than those in the forum state, had no factual connection to the forum state such that the parties could have reasonably expected the application of the forum state's law to the out-of-state leases, and formed the basis of very nearly all of the proposed nationwide class. *See Shutts,* 472 U.S. at 821-22.

In contrast to *Shutts*, *Alaska Packers*, which was cited and discussed with approval by the *Allstate Ins. Co.* plurality and dissenting opinions alike – *see Allstate Ins. Co.*, 449 U.S. at 311 (plurality op.); *id.* at 338-39 (dissenting op.) – set out facts that plainly fell on the constitutionally permissible jurisdiction side of the line. In *Alaska Packers*, the Court upheld against a due process challenge California's application of its Workmen's Compensation Act – which employers are not permitted to contract out of – to a non-resident from Mexico who was hired in California for a seasonal job in Alaska and was to be returned to California when that job was completed, but who was injured in Alaska and had agreed via contract to be bound by the Alaska's Workmen's Compensation Act. 294 U.S. at

538-39, 542.[3] The *Alaska Packers* Court found that California had the right to control a contract that took effect in that state even if it was to be performed elsewhere; the fact that the plaintiff's injury occurred outside of California was of no moment to the Court as it had recognized that a state could give compensation for an injury outside of its borders. *Id.* at 541-42. The Court further noted such a plaintiff might well lack a remedy otherwise – having left the State of Alaska – and so awarding him compensation in California would serve the important legal interest, which flowed from the California Workmen's Compensation Statute, of the plaintiff's *not* being a public charge in California. *Id.* at 542.

Accordingly, a survey of these United States Supreme Court cases supports the conclusion that the district court below erred. Consistent with these cases, California can allow an antitrust action that includes compensating in-state and out-of-state residents for injuries outside of its borders. Moreover, California has an interest here as strong as the one it had in *Alaska Packers* or Minnesota had in *Allstate Ins. Co.* in allowing claims for out-of-state damages from any anti-competitive conspiracy of which a substantial part was committed within the state. *See Wershba,* 91 Cal.App.4th at 242-43; *Clothesrigger*, 191 Cal.App.3d at 614-16.

[3]California courts held that the Federal Constitution required application of its Workmen's Compensation Act to non-residents. *Alaska Packers*, 294 U.S. at 538.

Under this due process precedent, these two points lead to the conclusion that the only question that the district court should have posed and then answered was whether the connection of California with the facts underlying the action – here the price-fixing conspiracy – was more than slight and casual or attenuated.[4]

IV. POLICY-BASED REASONS ROOTED IN CONSTITUTIONAL PRINCIPLES OF EQUAL TREATMENT, THE CARTWRIGHT ACT, AND FEDERALISM PRINCIPLES ALL SUPPORT OVERRULING THE DISTRICT COURT

Though Amicus believes the foregoing discussion of state and federal precedent demonstrates that the district court erred, California anticipates that the defendant-appellees will likely make policy-based arguments to support the district court's opinion. However, California respectfully submits that policy-based considerations rooted in constitutional principles of equal treatment, the Cartwright Act, and federalism all support reversal of the district court.

First, guaranteeing that out-of-state residents will be treated the same as in-state residents when both are affected by wrongdoing that has a nexus to California serves important constitutional interests of equal treatment. In particular, both the

[4] Former Chief Judge Vaughn Walker's thorough analysis in *Pecover v. Elecs. Arts. Inc.*, No. C 08-2820 CVW, Order on Motion for Class Certification at 34-37 (N.D. Cal. Dec. 21, 2010) also yields a different result than the district court's instant opinion. There, in addressing whether Cartwright Act could be applied to a nationwide class under *Shutts*, the court rejected the argument that the location of plaintiffs' injuries was the baseline for applying *Shutts*, noting that the location of the offending conduct was entitled to "significant weight" and the location of the defendant's headquarters was "relevant" as well. *Id.*

Commerce Clause and the Equal Protection Clause can require such treatment. *Cf. e.g., Children's Hospital & Medical Center v. Bonta*, 97 Cal.App.4th 740, 762-63 (2002) (discrimination in reimbursement between in-state and out-of-state hospitals seeing California patients constitutes per se discrimination under the Dormant Commerce Clause); *id.* at 769-71 (discrimination lacks a rational basis and so fails Equal Protection Clause scrutiny). And, the United States Supreme Court has recognized that the need to give non-residents equal treatment constitutes an important interest in applying *Shutts* to the extraterritorial application of that state's laws. *See Alaska Packers*, 294 U.S. at 538, 541-42; *cf. Allstate Ins. Co.*, 449 U.S. at 326-27 (Stevens, J., concurring). The holding of the district court below substantially hinders this important constitutional interest of equal treatment.

Second, the California Supreme Court recently emphasized that deterrence and full disgorgement of ill-gotten gains were important goals of the Cartwright Act, especially in the context of price-fixing cartels:

> From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition. (*See* Stats.1907, ch. 530, p. 984 [the Cartwright Act is "An act to define trust and to provide for criminal penalties and civil damages, and punishment of [entities connected with trusts], and to promote free competition in commerce and all classes of business in this state"].) It is, like antitrust laws generally, about " ' " 'the protection of competition, not competitors.' " ' " (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186, 83 Cal.Rptr.2d 548, 973 P.2d 527.) Private

> damage awards are just a tool by which these procompetitive purposes are carried out: " 'The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose.' " (*Milton v. Hudson Sales Corp*. (1957) 152 Cal.App.2d 418, 443, 313 P.2d 936; *see* also *Bruce's Juices v. Amer. Can Co.* (1947) 330 U.S. 743, 751, 67 S.Ct. 1015, 91 L.Ed. 1219 [private damage remedies provide "a strong and reliable motive for enforcement"]; *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 913, 221 Cal.Rptr. 575, 710 P.2d 375 [private treble damages are designed " 'to serve as well the high purpose of enforcing the antitrust laws' "].)
>
> As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus. The goal of deterring antitrust violations and concerns that a given private party may receive a windfall are not of equal weight. The Legislature's adoption of a double damages remedy (Stats.1907, ch. 530, § 11, p. 987), later amended to treble damages (§ 16750, subd. (a)), demonstrates as much: double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence.

Clayworth v. Pfizer, 49 Cal.4th 758, 783 (2010). The California Supreme Court has further recognized that deterrence and full disgorgement includes extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California. *See Diamond Multimedia Systems*, 19 Cal.4th at 1063-65. By logical inference, the same point also holds true for extending state-created remedies to in-state parties who suffered out-of-state injuries as a result of wrongful conduct occurring in California. And, the California Supreme Court has noted that California law must take account of the ever-growing frequency of acts

and transactions that increasingly transcend "artificial, historical boundaries between States." *Cf. Morante,* 20 Cal.4th at 428. Accordingly, the holding of the lower court in this case undercuts these policy goals of California's Cartwright Act.

Third, the ability of California to fully exercise its police powers in the area of antitrust is important to federalism goals. In drafting the Commerce Clause, the Founders did not intend that Congress would need to replace the states where (1) the states could act in a competent fashion on an individual basis (e.g., spillover effects on other states are minimal) or (2) the states' actions did not raise collective-action problems (e.g., substantially conflicting state laws or free-rider problems). *See* Robert Cooter & Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 143-44, 163 (2010); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 9-13, 30-31 & n.83 (2010). Given that the states have had a long and successful history of regulating monopolies and unfair business practices, antitrust is an area regarded as being traditionally and properly regulated by the states. *See California v. ARC America*, 490 U.S. 93, 101 & n.4 (1989). Where an area of traditional regulation by the states is concerned, the courts will presume that Congress did not intend to preempt state law. *Id.* at 100-01. That presumption does not change merely because multistate activity is involved. *Cf. id.* at 105 (finding the prospect of multiple liability on the part of

antitrust defendants does not warrant the preemption of state antitrust law); *Shutts*, 472 U.S. at 818 ("a particular set of facts giving rise to the litigation could justify, constitutionally, the application of more than one jurisdiction's laws"); Balkin, *Commerce*, 109 MICH. L. REV. at 31 ("What kinds of interactions have *effects* beyond a state's border [and so allow for federal intervention under the Commerce Clause]? . . . . It is not enough that the activity in question has effects beyond a particular state's borders; what matters is that these effects generate the sort of problem that makes a federal solution appropriate." (*Italics in original*.)); Cooter & Siegel, *Collective Action Federalism,* 63 STAN. L. REV. at 166 ("In the absence of interstate externalities or impediments to interstate markets, decentralized decision making does not pose a collective action problem."); *id.* at 168 & n.187 (noting the absence of collective action problems with state health and safety regulations if a state chooses to impose higher health and safety standards on its own companies competing in interstate commerce). Indeed, federal antitrust enforcers now count on state law to afford a process by which victims can recover their damages even when those enforcers recover criminal fines from antitrust defendants for price-fixing. *See e.g.,* Plea Agreement, ¶ 12, *United States v.Chi Mei Optoelectronics Corp.* (N.D. Cal. Feb. 8, 2010) (No. CR-09-1166SI), available at http://www.justice.gov/atr/cases/f255100/255193.htm. And, to the extent that the antitrust laws of different states may differ in any significant respect on remedies,

traditional conflict-of-laws analysis can handle that issue without misapplying the Due Process Clause. *Allstate Ins. Co.*, 449 U.S. at 323-26, 332 (Stevens, J., concurring); *see e.g., id.* at 307 (plurality op.); *id.* at 332 (dissenting op.). Correspondingly, although principles of federalism suggest the courts should avoid hindering the states in exercising their authority in these circumstances, the district court's opinion does just that under the guise of the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, California respectfully submits that this Court should reverse the district court's opinion insofar as that court applied the wrong law under the Due Process Clause. California otherwise takes no position as to whether Plaintiffs can satisfy the proper standard.

Dated: September 8, 2011 Respectfully submitted,

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September 8, 2011
Dated

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