No. 21-16506

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Epic Games, Inc.,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

v.

Apple, Inc.,

Defendant-Counterclaimant-Appellee-Cross-Appellant.

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

No. 4:20-cv-05640-YGR
Hon. Yvonne Gonzalez Rogers, Judge

BRIEF OF THE STATE OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS

The State of California has a strong interest in the proper interpretation and development of its Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, which is among the State's most important consumer protection and business regulation statutes.[1] The Attorney General of California enforces the UCL and regularly brings actions in the name of the People under the statute to protect consumers and competition.

Apple's cross-appeal raises issues related to the proper application of the UCL. The district court found that Apple's anti-steering provisions violated the UCL, while at the same time concluding that Epic had not established that Apple's conduct violated the federal Sherman Act or California's Cartwright Act. Based on Apple's UCL violation, the district court enjoined Apple from enforcing its anti-steering polices. After the district court denied Apple's motion for a stay of the injunction pending appeal, Apple renewed its motion for a stay in this Court, which the Court granted on December 8, 2021, citing *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 691-92 (9th Cir. 2015) and *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001). Among the issues before

[1] The State, through its Attorney General, files this amicus brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

the Court are the appropriate scope of the UCL's "unfair" prong and the availability of injunctive relief under California law against a California company.

To assist the Court in deciding this matter, the State submits this brief focused on the "unfair" prong of the UCL. In particular, the State will discuss the history and development of the UCL, the current UCL tests recognized by the California Supreme Court, the relation of the UCL to federal and state antitrust laws, and the appropriate scope of injunctive relief when a plaintiff establishes a violation of the "unfair" prong. The State's legal analysis is based on the Attorney General's expertise and experience as the chief enforcer of California antitrust and unfair competition laws. This brief does not support either party or take a position on whether the judgment below should be affirmed or reversed. The State's arguments on the limited issues addressed in this brief do not indicate agreement or disagreement with the trial court's rulings on other issues, or with any other party's arguments on those issues.

SUMMARY OF ARGUMENT

I. As a broad and equitable statute, the UCL provides courts with discretion to identify and prohibit unfair conduct. This authority is essential

to business regulation and consumer protection in California, and a proper understanding of the UCL is essential to the resolution of this case.

First, the UCL creates a broad equitable standard that enables courts to redress myriad forms of unfair, unlawful, or fraudulent business behavior. In operation for almost a century, the UCL expanded traditional elements of the unfair competition tort both to cover more types of conduct and to protect consumers in addition to competitors.

Second, the California Supreme Court has identified three tests governing the "unfair" prong of the UCL: a balancing test; a test that asks whether the finding of unfairness was "tethered" to a legislatively declared policy or proof of some actual or threatened impact on competition; and a three-part test borrowed from the test used to determine unfairness under Section 5 of the Federal Trade Commission (FTC) Act. While the balancing test is the traditional standard, the California Supreme Court has held that the tethering test applies in an action by a competitor alleging anticompetitive practices. Importantly, that Court has not endorsed a single universal test for all claims under the "unfair" prong.

Third, as the district court recognized below, a UCL plaintiff need not establish a concurrent antitrust violation. *Chavez* and *San Jose* are not to the contrary. Those cases recognized a safe harbor under the UCL for conduct

affirmatively authorized by law, but that exception does not apply when no source of law affirmatively authorizes conduct being challenged under the UCL.

Fourth, the California Supreme Court has not required the strictures of a typical antitrust analysis when evaluating conduct for unfairness under the UCL. Trial courts are free to consider a variety of factors. Those factors include limits on the free flow of price information, which the California Supreme Court has explicitly recognized as anticompetitive.

II. The UCL does not allow a California company to avail itself of the privileges of California law while simultaneously violating California law in its interactions with individuals or entities located in other States. Courts do not contravene the dormant Commerce Clause when they enforce that prohibition against a California company.

III. Finally, if this Court is unsure about any questions of UCL interpretation, this Court should certify those questions to the California Supreme Court.

ARGUMENT

I. THIS COURT'S ANALYSIS SHOULD BE INFORMED BY A PROPER UNDERSTANDING OF THE UCL

A. The California Legislature Enacted the UCL to Address a Broad Range of Wrongful Business Conduct

California's Unfair Competition Law imposes "broad" and "sweeping" prohibitions against unfair, unlawful, or fraudulent business acts or practices. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999); *see* Cal. Bus. & Prof. Code § 17200 *et seq.* In enacting the statute, the Legislature sought "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011). The UCL thus authorizes courts to use their equitable power to combat the varied forms of unfair practice that "may run the gamut of human ingenuity and chicanery." *People ex rel. Mosk v. Nat'l Research Co.*, 201 Cal. App. 2d 765, 772 (1962).

The UCL originated in 1887 in California Civil Code Section 3369 to enforce basic rules of "common honesty and accepted business ethics." *See, e.g.*, *Hesse v. Grossman*, 152 Cal. App. 2d 536, 540 (1957). The Legislature expanded Section 3369 in 1933 to authorize courts to enjoin "unfair practices." *See Krause v. Trinity Mgmt. Servs. Inc.*, 23 Cal. 4th 116, 129

(2000). Section 3369 authorized injunctive relief against "any person performing or proposing to perform an act of unfair competition," where injunctive relief could be pursued by the Attorney General and others. Cal. Civ. Code § 3369(2) (1933) (as amended by 1933 Cal. Stat. ch. 953, § 1 at 2482). The modern UCL is broader than the original 1887 version, extending to consumers the protection once afforded only to direct competitors. *Barquis v. Merch. Collection Ass'n*, 7 Cal. 3d 94, 109 (1972). "With passage of time and accompanying epochal changes in industrial and economic conditions, the legal concept of unfair competition broadened appreciably … partly by the flexibility and breadth of relief afforded by equity, and partly by changing methods of business and changing standards of commercial morality." *Nat'l Research*, 201 Cal. App. 2d at 770.

The UCL provides law enforcers a broad and flexible tool for combating unfair business practices harming competitors or consumers. *See, e.g.*, *id.* at 770-72; *see generally* Thomas A. Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 Whittier L. Rev. 561, 564-65 (1982). Indeed, California courts have recognized that the Legislature intentionally framed the UCL in broad language to address the innumerable "new schemes which the fertility of man's invention would contrive." *American Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698

(1935); *accord, e.g.*, *Cel-Tech*, 20 Cal. 4th at 181. As the *Claibourne* court observed: "When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. … [A]n equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." 3 Cal. 2d at 698-99.

The California Supreme Court has rejected narrower interpretations of the UCL, instead endorsing the view that that the California Legislature intended the UCL's "sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Barquis*, 7 Cal. 3d at 111. The Court has even noted that "whenever the Legislature has acted to amend the UCL, it has done so only to expand its scope, never to narrow it." *Stop Youth Addiction, Inc. v. Lucky Stores*, 17 Cal. 4th 553, 570 (1998).[2]

The modern UCL has three prongs: "unfair" (addressed herein) as well as "unlawful" and "fraudulent." *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009); *see* Cal. Bus. & Prof. Code § 17200. In keeping with its history, the

[2] The statute's 2004 amendment, enacted by statewide voter proposition, limited private plaintiff standing in certain UCL cases, but did not modify the scope of unfair practices covered by the law.

"unfair" prong has been interpreted to be "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996). For almost 100 years, the California Supreme Court has endorsed broad discretion under the UCL to trial courts, noting that "[i]t is difficult indeed to draw the line" between acceptable and illegitimate methods of competition, but nonetheless firmly entrusting that line-drawing exercise to the trial court's discretion. *See Fidelity Appraisal Co. v. Federal Appraisal Co.*, 217 Cal. 307, 314 (1933).

While the UCL does not authorize courts to "simply impose their own notions of the day as to what is fair or unfair," it "'undeniably establishes … a wide standard to guide courts of equity'" because "'the Legislature evidently concluded that a less inclusive standard would not be adequate.'" *Cel-Tech*, 20 Cal. 4th at 181 (quoting *Barquis*, 7 Cal. 3d at 111-12). California courts thus have long held that each UCL case must be analyzed based on its particular facts and circumstances: "no inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself." *Pohl v. Anderson*, 13 Cal. App. 2d 241, 242 (1936). Instead of a narrowly defined rule, the UCL empowers the court with broad equitable authority to redress a scheme that "violates the

fundamental rules of honesty and fair dealing." *Barquis*, 7 Cal. 3d at 112 (quoting *Claibourne*, 3 Cal. 2d at 698-99).

B. The California Supreme Court Has Identified Three Tests to Determine Whether Conduct Violates the UCL's "Unfair" Prong

Within the historical broad equitable reach of the UCL, there are three tests that guide trial courts in applying the UCL unfair prong: the balancing test, the tethering test, and the FTC test.

Before the *Cel-Tech* decision in 1999, courts applied a "balancing" test in both consumer and competitor cases. That test requires a court to determine whether a business practice or act is unfair by "examination of the impact of the practice or act on its victim balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 285 (2005) (internal quotation marks omitted). *Cel-Tech* makes clear that this test is no longer appropriate in UCL actions brought by competitors alleging anticompetitive conduct, 20 Cal. 4th at 186-87, but the test continues to be applied in consumer cases, *see, e.g.*, *Progressive W. Ins. Co.*, 135 Cal. App. 4th at 286 (concluding that "the balancing test should continue to apply in consumer cases … because consumers are more

vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices").

In *Cel-Tech*, the California Supreme Court articulated what has come to be known as the "tethering" test. 20 Cal. 4th at 180. The Court held that "any finding of unfairness to competitors under [the UCL] be *tethered* to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* at 186-87 (emphasis added). The Court explained that when a plaintiff brings a UCL claim alleging injury from a direct competitor's "unfair" act or practice, the word "unfair" means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* at 187. As the Court recently reaffirmed, however, *Cel-Tech* holds only that the tethering test applies in "an action by a competitor alleging anticompetitive practices." *Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 303 (2020).

Finally, instead of the tethering test or the balancing test, a handful of California appellate courts have borrowed the test used to evaluate conduct for unfairness under Section 5 of the FTC Act, 15 U.S.C. § 45(n), when interpreting the UCL. That test requires "(1) the consumer injury must be

substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010) (internal quotation marks and citation omitted).

The California Supreme Court recently observed that "[i]n the years since *Cel-Tech*, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases, with appellate decisions adopting three different tests for determining unfairness in the consumer context." *Nationwide Biweekly Admin.*, 9 Cal. 5th at 303; *see also Zhang v. Superior Court*, 57 Cal. 4th 364, 380 at n.9 (2013) (collecting cases).[3] The California

[3] See *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1192 (2012) (public policy that is predicate for action must be tethered to specific constitutional, statutory or regulatory provisions); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 539 (2008) (applying balancing test, but also examining whether practice offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers); *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006) (consumer injury must be substantial, and neither outweighed by countervailing benefits nor avoidable by consumers); *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 285 (2005) (impact of the act or practice on victim is balanced against reasons, justifications and motives of the alleged wrongdoer).

Supreme Court has not yet adopted a particular test to govern UCL consumer cases. For its part, the Ninth Circuit has declined to apply the FTC test with respect to anti-consumer conduct when analyzing the UCL's unfairness prong. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007).

C. A UCL Plaintiff Need Not Establish a Concurrent Violation of Antitrust Law

1. California Supreme Court precedent recognizes that conduct may violate the UCL without violating antitrust law

The California Supreme Court has held that conduct can be unfair under the UCL without being unlawful under any other law: "The statutory language referring to 'any unlawful, unfair *or* fraudulent' practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech*, 20 Cal. 4th at 180 (internal quotations omitted). Instead, for an "unfairness" case under *Cel-Tech*, a plaintiff must show harm to competition or a significant threat of such harm. *See* 20 Cal. 4th at 187. That standard supports "a major purpose" of the UCL: "the preservation of fair business competition." *Id.* at 180 (quoting *Barquis*, 7 Cal. 3d at 110).

Cel-Tech made clear that finding a defendant's conduct "unfair" in the absence of a violation of any other law should require more than a disgruntled competitor, and identified three such potential circumstances, each of them explicitly designed with fair competition in mind. First, "unfair" could mean conduct that "threatens an incipient violation of the antitrust laws." *Cel-Tech*, 20 Cal. 4th at 187. Second, "unfair" could mean violating the "policy or spirit" of the antitrust laws, because the "effects are comparable or the same." *Id.* And finally, "unfair" could mean conduct that "otherwise significantly threatens or harms competition." *Id.* All three of these formulations expressly contemplate that conduct may be actionable under the UCL even if it does not rise to the level of an antitrust violation.

Cel-Tech recognized that the California Legislature intended for the UCL "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur … precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Id.* at 181. A focus of the UCL is fair competition, and in order to reach novel or unique types of unfair business conduct, the statute is expressly intended to be broader and more flexible than antitrust statutes. The UCL and the antitrust laws provide cumulative remedies by design. *People v. Nat'l Ass'n of Realtors*, 120 Cal. App. 3d 459,

473-74 (1981); *see* Cal. Bus. & Prof. Code § 17205 ("Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.").

At the same time, *Cel-Tech* acknowledged that the UCL's unfair prong is not a license for courts to pursue their own policy agendas. "Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair." *Cel-Tech*, 20 Cal. 4th at 185. That consideration, the Court explained, made it appropriate to "devise a more precise test for determining what is unfair under the unfair competition law" in actions brought by competitors alleging anticompetitive conduct. *Id.* Therefore, although *Cel-Tech* held that "unfair" can mean something less than an antitrust violation, the last 20 years have not seen a rush of trial courts finding anticompetitive unfairness without concurrent unlawfulness. To the contrary, state and federal courts have exercised sound discretion in making such findings only when circumstances warrant.

The State has identified two published opinions since *Cel-Tech* in which a federal court within the Ninth Circuit allowed a UCL unfairness claim alleging anticompetitive conduct to proceed without a concurrent

unlawful claim. In *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 992, 999 (N.D. Cal. 2000) the court held that "*Cel-Tech* appears to distinguish the proof required in cases by a competitor alleging 'unfair' anticompetitive business practices from claims by competitors or consumers for 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'" After Microsoft licensed Sun's Java technology and then extended it to have deliberate "strategic incompatibilities" with Sun's original version, the court issued a preliminary injunction against Microsoft under the unfair prong of the UCL, despite recognizing that "[t]here has been no showing that Microsoft has engaged in any fraudulent business practice or scheme or that it violated some specific statutory proscription." *Id*. at 995, 999. In *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1117-19 (C.D. Cal. 2001), the court ruled that a UCL unfairness claim regarding a pharmaceutical supply contract can proceed "beyond the pleading stage" when "Plaintiff … sufficiently alleg[es] that Defendants' actions were 'unfair'" even though "Plaintiff does not assert that any of Defendants' actions were 'unlawful' or 'fraudulent.'" The court went on to grant summary judgment to the defendant when the plaintiff was unable to show that the alleged unfair conduct resulted in reduced supply of medication or prices above competitive levels. *Id*. at 1119.

Thus, while a violation of the UCL's "unfair" prong will frequently involve a concurrent violation of antitrust statutes or other laws, that is not uniformly true.

2. The "safe harbor" rule applies at most to conduct that is expressly precluded from antitrust liability

The California Supreme Court has recognized that "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." *Cel-Tech*, 20 Cal. 4th at 182. The California Supreme Court has emphasized, however, that the "safe harbor" rule is narrow. To "bar a UCL action, another statute must absolutely preclude private causes of action or clearly permit the defendant's conduct." *Zhang*, 57 Cal. 4th at 379-80 (citing *Stop Youth Addiction*, 17 Cal. 4th at 565-66 and *Cel-Tech,* 20 Cal. 4th at 182-83). In other words, a defendant seeking to invoke the "safe harbor" rule "must show that a statute 'explicitly prohibit[s] liability for the defendant's acts or omissions,' or 'expressly precludes an action based on the conduct.'" *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1379 (2012) (quoting *Krumme*, 123 Cal. App. 4th at 940 n.5 and *Chavez*, 93 Cal. App. 4th at 374). "To forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct. There is a difference between (1) not making

an activity unlawful, and (2) making that activity lawful." *Cel-Tech*, 20 Cal. 4th at 183.

The California Court of Appeal has applied that safe-harbor principle to certain longstanding antitrust doctrine that has been recognized by the federal courts. In *Chavez*, the plaintiff challenged a minimum resale price agreement that the court deemed to be unilateral manufacturer conduct "permissible under the *Colgate* doctrine," which dates back over a century. 93 Cal. App. 4th at 367 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). *Chavez* held that the defendant's *Colgate*-compliant pricing policy was affirmatively permitted under the antitrust laws and the claims were accordingly subject to demurrer. *Id.* In accordance with *Cel-Tech*, the *Chavez* court did "not hold that in all circumstances an 'unfair' business act or practice must violate an antitrust law to be actionable under the unfair competition law." *Chavez*, 93 Cal. App. 4th at 376. Rather, the court held that conduct that was "deemed reasonable and condoned under the antitrust laws" could not satisfy the "unfair" prong of the UCL. *Id.* Thus, the appeals court held that conduct that was expressly precluded from antitrust liability would in essence be granted a safe harbor under the UCL.

San Jose likewise involved conduct that was deemed to qualify for the safe-harbor rule because it was expressly precluded from antitrust liability—

in that case, by baseball's longstanding exemption from the antitrust laws. *See* 776 F.3d at 691-92. In *San Jose*, this Court explained that "[o]ur analysis is governed by three Supreme Court cases decided over the course of half a century; taken together, they set the scope of baseball's exemption from the antitrust laws." *Id.* at 688-89.[4] Similar to *Chavez*, *San Jose* holds that an express exemption of this kind qualifies for the safe-harbor rule and the claims were subject to a motion to dismiss. *Id.* at 691-92.

But neither of these cases stand for the proposition (suggested in an unpublished decision from this Court) that "a finding that the conduct is not an antitrust violation precludes a finding of unfair competition," *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008). That reading is overbroad and cannot be squared with California Supreme Court precedent.

Furthermore, a failure of proof with respect to a plaintiff's companion antitrust violation does not grant the defendant a safe harbor from the UCL. *Chavez* and *San Jose* were both decided at the initial pleading stage, where the courts held that as a matter of law, no such antitrust claim could be stated

[4] Citing *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

and thus the UCL "unfair" claim based on same conduct should also be dismissed. *San Jose*, 776 F.3d at 688; *Chavez*, 93 Cal. App. 4th at 367; *see also LiveUniverse*, 304 F. App'x at 555-56. *Chavez* and *San Jose* do not address a situation where an antitrust claim could have been proven, but the plaintiff failed to carry that burden. The broad equitable reach of the UCL is expressly designed to allow a trial court to find a UCL violation where it finds anticompetitive effects but not necessarily a violation of the antitrust laws. As discussed above, the California Legislature specifically intended for the UCL to empower courts with broad equitable authority to redress schemes that "violate the fundamental rules of honesty and fair dealing." *Barquis*, 7 Cal. 3d at 112. Such flexibility is needed to "enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech*, 20 Cal. 4th at 181.

D. Nothing in California Supreme Court Precedent Requires Applying Specific Methods from Antitrust Analysis to UCL Claims and Courts Are Free to Consider a Variety of Factors

The California Supreme Court has made clear that the "unfair" prong of the UCL does not depend on a finding that the conduct in question violates antitrust law (or any other law). Accordingly, the UCL does not require the type of quantitative analysis commonly found in antitrust cases, such as the

highly technical "substitutability" analysis typically required for establishing an antitrust product market. *See, e.g.*, 1-ER-59-61.

Indeed, it would be illogical for a competition law that is expressly intended to be broader and more flexible than antitrust statutes to have the exact same limitations as those antitrust statutes. Such a requirement in this category of UCL cases would make *Cel-Tech* and its tethering test effectively a nullity. It is clear that the California Supreme Court did not intend such a result. Instead, UCL actions "often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL" and "often requir[e] the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies." *Nationwide*, 9 Cal. 5th at 304. In exercising its equitable powers, a trial court is free to consider this "variety of factors" and is not constrained by standard antitrust strictures and precedents.

Rather, as *Cel-Tech* explains, the UCL may reach conduct that "violates the policy or spirit" of the antitrust laws, even if there has not been an evidentiary showing sufficient to make out a formal antitrust violation. 20

Cal. 4th at 187. Limits on the free flow of information—and in particular price information—have been found to have anticompetitive effects and be against public policy under California law. In *Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co.*, 4 Cal. 3d 354 (1971) (*Lathrop*), the California Supreme Court explained that an agreement that "directly interfere[d] with the free play of market forces" by "impos[ing] a rule of silence" was "no less stifling to open price competition than [an] agreement not to advertise." *Id.* at 363-64 (citing *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961)); *see also, e.g.*, *Marks v. Loral Corp.*, 57 Cal. App. 4th 30, 53 (1997) ("[T]he use of price is basic to any functioning economic system, and marks the classical difference between a command and a free market economy.").

Lathrop involved an agreement that forbade subcontractors from submitting bids to general contractors outside of the builder's exchange bidding process and prevented general contractors from seeing sealed bids from subcontractors until the bidding process ended. 4 Cal. 3d at 359-60. The California Supreme Court determined that the builder's exchange's restrictions on the flow of price information had an anticompetitive effect and violated public policy, since "'public interest requires free competition so that prices be not dependent upon an understanding among suppliers of

any given commodity, but upon the interplay of the economic forces of supply and demand'" and "'economic forces of supply and demand' can have little impact on a bidding system which is conducted in secrecy and which leaves general contractors no alternative but to accept the lowest bids submitted through the Depository or withdraw from the bidding." *Id*. at 363-64 (quoting *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 44 (1946)).

The U.S. Supreme Court's analysis of a credit-card company's anti-steering provisions under the federal Sherman Act in *Ohio v. American Express*, 138 S. Ct. 2274 (2018), has no direct relevance to the question of whether another anti-steering provision would violate the UCL. No California state law precedent applies the novel holdings of the closely divided *American Express* Court to any analysis under the Cartwright Act or the UCL, and there is no indication that any California appeals court would be likely to do so. "[S]imply because the [U.S.] Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act." *Darush v. Revision LP*, No. CV 12-10296 GAF AGRX, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013). "Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard" the California Supreme Court's

existing precedent. *Id.*[5] California courts have not held *American Express* to be relevant for any analysis of anti-steering conduct on platforms under the Cartwright Act or the UCL.

II. AN INJUNCTION PROHIBITING A CALIFORNIA COMPANY FROM VIOLATING THE UCL IN INTERACTIONS WITH OUT-OF-STATE CUSTOMERS IS CONSISTENT WITH THE COMMERCE CLAUSE

The UCL authorizes California courts to enjoin California companies from violating the statute in their interactions with out-of-state customers, thereby denying to California companies the ability to injure others with "conduct emanat[ing] from California," *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001)[6]; *see also In re Tobacco II Cases*, 46 Cal. 4th at 312 (The UCL's focus is "on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices."). An injunction against a California company under the UCL limits the anticompetitive behavior of the company within the State, which can result in incidental

[5] *See also In re Cipro Cases I & II*, 61 Cal. 4th 116, 142 (2015) ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.")

[6] Disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018).

benefits to consumers and competitors elsewhere. *See, e.g.*, *Clothesrigger, Inc. v GTE Corp.*, 191 Cal. App. 3d 605, 616 (1987); *Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222-25 & n.13 (1999).

This approach is consistent with the Commerce Clause, which "precludes the application of a state statute to commerce that takes place *wholly outside of the State's borders*, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added). *Healy* concerned a state pricing-regulation statute that restricted out-of-state commerce for the benefit of its own state residents. *See id.* at 326-29. In contrast, barring a California company from enforcing a contract that violates the UCL does not restrict commerce "wholly outside" of California. Rather, such an injunction would bar that company from enforcing anticompetitive contract terms that arose from decisions made at the company's California headquarters, have effect in California, and in many cases are governed by California law. If the UCL cannot apply to a California company's interactions with out-of-state customers, a company could avail itself of the benefits of California law while using California as a launching pad for anticompetitive acts with effects in other States.

III. THIS COURT SHOULD CERTIFY TO THE CALIFORNIA SUPREME COURT ANY NOVEL QUESTIONS REGARDING THE UCL'S PROPER SCOPE AND INTERPRETATION

If this Court is uncertain about whether the district court correctly applied the UCL, it should certify that issue to the California Supreme Court, as authorized by Rule 8.548 of the California Rules of Court. This Court has recognized the importance of deferring to the California Supreme Court regarding the proper interpretation of the UCL, *see Lozano*, 504 F.3d at 736, and the California Supreme Court should remain the foremost authority on the scope and interpretation of the UCL.

If this Court believes that the UCL precedents discussed above do not provide adequate guidance to resolve this appeal, certification would be appropriate because the UCL issues would be clearly pivotal to the outcome of this appeal and would involve an issue that no California Supreme Court case has addressed. *Murray v. BEJ Mins, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019). Moreover, all relevant considerations for ordering certification would be met. These considerations include: (1) whether the question is unresolved with important public policy consequences; (2) whether the question is "new, substantial and of broad application"; (3) whether certification would overburden the state court; and (4) "the spirit of comity and federalism." *Id.* The UCL is an important and far-reaching California

statute, making it appropriate for the California Supreme Court to consider any novel state law questions in the first instance. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1092 (9th Cir. 2002) (certifying questions to Washington Supreme Court due to the "sensitivity and complexity of … state-law issues, and because of their significant policy implications"). In such cases, the California Supreme Court is often "better qualified" to answer the question. *See id.*

In addition, the importance of the issue and the spirit of comity and federalism would be served by permitting the state court the opportunity to resolve these important questions of California state law. While this Court should be "[]mindful of the burgeoning caseload of the California Supreme Court," certification in this case would certainly not be "presum[ing] to certify a run-of-the mill case" to the California Supreme Court. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003); *see, e.g.*, *Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1170 (9th Cir. 2010) (seeking certification where case raised difficult questions of state law with broad implications).

CONCLUSION

The Court should ensure that the UCL is properly applied in accordance with California law.

Dated: March 31, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that on March 31, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

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