NO. 08-55708

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, ex rel
EDMUND G. BROWN JR.,

Plaintiff-Appellant,

v.

SAFEWAY, INC., a Safeway Company doing business as VONS; ALBERTSONS, INC.; RALPH GROCERY COMPANY, a division of the Kroger Company; FOOD 4 LESS FOOD COMPANY, a division of the Kroger Company,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
AT SANTA ANA

No. CV 04-0687 AG (SSx)
The Honorable Andrew J. Guilford
United States District Court Judge

AMICI CURIAE BRIEF OF STATES IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF CALIFORNIA

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The Attorneys General of Arizona, Connecticut, Delaware, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nevada, Ohio, Oklahoma, Oregon, Tennessee, Washington, and West Virginia ("the States") file this amici curiae brief in support of the state of California. Attorneys General are the chief law enforcers of their states and are charged with the duty of enforcing both state and federal antitrust laws. The States are authorized to bring suit under federal law in their *parens patriae* capacity to protect their general economies. *See Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). Any decision that expands antitrust exemptions or heightens standards of proof of antitrust violations diminishes the ability of Attorneys General to carry out their law enforcement mission.

II. ARGUMENT

A. The Revenue-Sharing Agreement Involves a Profit-Pool and *De Facto* Customer Allocation that are Unlawful Under Both the *Per Se* Rule and the "Quick Look" Standard.

1. Profit-pooling and customer allocations violate the per se rule.

The *per se* rule is properly applied to restraints that "would always or almost always tend to restrict competition and decrease output[.]" *Leegin Creative Leather Products v. PSKS*, 551 U.S. ____, No. 06-480, slip op. at 6, 127 S. Ct. 2705, 2713 (2007). The rule finds liability based on the *likelihood* of a restraint's

predominantly anticompetitive effects where "the possibility of countervailing procompetitive effects is remote." *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). Thus, regardless of the actual effects to date, the *per se* rule guards against *potential* anticompetitive conduct.

The *per se* rule applies to *types* of restraints, measured by the nature of the restraint, not the particular circumstances behind the challenged agreement. Once a restraint is found *per se* unreasonable, further inquiry is unwarranted and proffered justifications are irrelevant. *U.S. v. Topco Assocs., Inc.*, 405 U.S. 596, 610-11 (1966) (assertions of "good intentions" and other justifications do not avoid *per se* condemnation). Nor is a lack of judicial experience with a particular industry a basis for avoiding *per se* treatment. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

Traditional antitrust principles, including the *per se* rule, clearly apply where the non-statutory labor exemption ("NSLE") does not exempt anticompetitive restraints. *Muko v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421, 427-28 (3d Cir. 1982). In jettisoning the *per se* rule in this case, the court ignored the Revenue-Sharing Agreement's (RSA's) clear disincentives to competition and potential for supracompetitive pricing. Instead,

the court improperly focused on labor policy issues, the claimed beneficial effects of the RSA, and the intentions of the parties, all of which are irrelevant under a *per se* analysis.

A similar agreement was condemned as illegal *per se* by the Supreme Court in *Citizen Publishing v. U.S.*, 394 U.S. 131 (1969). There, the Court deemed a "profit-pool" between competing newspapers a *per se* antitrust violation, separate and apart from a concomitant *per se* price-fixing violation. *Id.* at 136. The Court said the "violations are plain beyond peradventure… Pooling of profits pursuant to an inflexible ratio reduces incentives to compete … and runs afoul of the Sherman Act." *Id.* Since *Citizen Publishing*, the Court has never changed the relevant standard for adjudging profit-pooling between competitors. The supermarkets' RSA in this case is specifically structured to *reallocate profits pursuant to a fixed ratio,* creating at the same time the potential for supracompetitive pricing by virtue of its inherent disincentives to price competition.

Moreover, the RSA here constitutes a customer allocation scheme that is at least as harmful as the profit-pool condemned in *Citizen Publishing*. Just as the *per se* rule on price-fixing applies to all industries alike, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-51 (1982), customer allocations similarly have been held to constitute *per se* violations across a variety of

industries, whether or not territorial in nature. *See, e.g., New York v. St. Francis Hospital*, 94 F. Supp. 2d 399, 415-16 ("Appellants' agreement to allocate patients among themselves and divide the market for hospital services is the paradigm of the horizontal market division that the Supreme Court has deemed per se illegal."); *U.S. v. Goodman*, 850 F.2d 1473, 1476-77 (11th Cir. 1990); *U.S. v. Suntar Roofing*, Inc. 897 F.2d 469 (10th Cir. 1990); *U.S. v. Cooperative Theatres of Ohio*, 845 F.2d 1367, 1373 (6th Cir. 1988); *U.S. v. Cadillac Overall Supply*, 568 F.2d 1078, 1090 (5th Cir. 1978). That a market allocation does "not foreclose all possible avenues of competition" does not preclude *per se* liability. *Blackburn v. Sweeney*, 53 F.3d 825, 827-28 (7th Cir. 1995). After all, "the same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect." *Leegin*, 551 U.S. at ____, slip op. at 24-25, 127 S. Ct. at 2703.

Customer allocations may arise where parties divide customers or reassign accounts, or they may arise by implication by dividing territories. However, there is no difference, legally or in practical effect, between a territorial allocation and a customer allocation. *U.S. v. Consolidated Laundries*, 291 F.2d 563, 574-75 (2nd Cir. 1961). Similarly, there is no difference between a customer allocation agreement that divides customers and one that divides the profits from the revenue

those customers bring. An after-the-fact allocation of customer revenue to maintain respective market shares effectively allocates customers, as it achieves the same result, and should be recognized as a *de facto* customer allocation.

Even if a particular form of customer allocation does not appear to be a "garden variety" market division, it is not insulated from *per se* condemnation. *U.S. v. Andreas*, 216 F.3d 645, 667-68 (7th Cir. 2000) (that the challenged restraint "did not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment," as it functionally achieves the same anticompetitive result as other *per se* violations); *U.S. v. Capital Service*, 568 F. Supp. 134, 155 (E.D. Wis. 1983) ("if division of markets is the goal of the arrangement or the overriding effect, it should be characterized as a market division even though it achieves that consequence quite indirectly"). The district court erred in not condemning the RSA as a *per se* violation, as both a *de facto* customer allocation and an unlawful profit-pool under *Citizen Publishing*.

The *per se* rule was founded by the judiciary on the basis of common sense, practicality, and judicial economy; importantly, the rule provides clarity and guidance to the business community, the courts and antitrust enforcers.[1]

[1] "The current rule of reason standard provides little guidance to litigants, judges, or juries. Antitrust enforcement relies primarily on self-policing by the business community, but voluntary compliance is impossible when antitrust standards are

Continental TV v. GTE Sylvania, 433 U.S. 36, 50 n.16 (1977) (citing *Northern Pacific Railroad v. U.S.* 356 U.S. 1, 5 (1958), and *U.S. v. Topco Associates,* 405 U.S. 596, 609-10 (1972)); *see also Leegin*, 551 U.S. at ____, slip op. at 6, 127 S. Ct. at 2713. The district court's misapplication of the *per se* rule is inconsistent with the important policies behind the rule, and the court erred not finding a violation. *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 432-33 (1990) (*per se* rules arise from judicial interpretations of the Sherman Act, but have "the same force and effect as any other statutory commands").

2. The RSA is unlawful under the "quick look" standard.

Even if not unlawful under the *per se* rule, the RSA is unlawful under the Supreme Court's "quick look" abbreviated rule of reason standard. Where the great likelihood of anticompetitive effects of a challenged restraint can easily be ascertained, the "quick look" is appropriate. *FTC v. California Dental Association*, 526 U.S. 756, 770-71 (1999). That likelihood is found where the anticompetitive effects are obvious, and where "an observer with even a rudimentary

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unclear." Piraino, T., Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century, 82 Ind. L.J. 345, 357 n. 64, 65 (Spring 2007) (citing and quoting Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 12-13 (1984) ("When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers no help to businesses planning their conduct.")).

understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id*. at 770.

In failing to apply the "quick look" standard, the district court ignored the clear disincentives to price competition created by the RSA. Defendant-Appellees attempted to proffer procompetitive justifications, but their rationale for the RSA has more to do with conflict with unions – irrelevant since their conduct is not shielded by a labor exemption – than with enhancing consumer welfare through competition. Their assertion that the RSA offered some possibility of lower prices for consumers is too speculative and remote to establish a valid procompetitive justification under the "quick look" standard. Defendant-Appellees failed to meet their burden before the district court, and consequently the district court erred in failing to find liability.

B. Defendant-Appellees' Proposed Expansion of the Non-Statutory Labor Exemption is Contrary to Sound Public Policy Because it Disregards Consumer Welfare.

The policies underlying the nation's labor and antitrust statutes are, in certain respects, at odds with each other. The labor laws that establish the collective bargaining process were enacted to further the goal of "peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp. v.*

NLRB, 379 U.S. 203, 211 (1964). Conversely, the primary objective of the antitrust laws is to "preserve business competition." *Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 809 (1945).

The policy conflict is apparent – collective bargaining is by nature collaborative, while competition is fundamentally independent and adversarial. Recognizing these contrasting principles, the Supreme Court has stated that it is logically "difficult, if not impossible," to require the collective negotiation of certain issues by groups of employees and employers, while simultaneously strictly prohibiting them from collaborating on any issue that might affect competition. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996). The Court has acknowledged its "responsibility" to reconcile these two important policy goals. *Allen Bradley*, 325 U.S. at 806. To that end, it fashioned the non-statutory labor exemption ("NSLE") to accommodate both policies to the extent possible. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 412 U.S. 616, 636 (1975).

Neither the goals of antitrust nor of labor law have supremacy over one another. Indeed, the Supreme Court has expressly rejected any formula in which consumers' stake in maintaining a competitive economy is consistently subjugated to collective bargaining's interests, saying,

> [i]t would be a surprising thing if Congress, in order to prevent a misapplication of [the Sherman Act] to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective…. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy.

Allen Bradley, 325 U.S. at 809-10. Consumers' interest in the fruits of a competitive marketplace thus remains a focal point of the NSLE analysis.

Courts have defined and limited antitrust exemptions for multiemployer bargaining activity because of the "evils which such economic power may entail." *Cordova v. Bache & Co., Inc.*, 321 F. Supp. 600, 607 (S.D.N.Y. 1970). They recognize that without a viable competitive process, the resulting collusion among business entities is likely to harm consumers, most commonly through increased prices. *Allen Bradley*, 325 U.S. at 806 (purpose of the Sherman Act was to "protect consumers from monopoly prices").

The process of accommodating both the goal of fostering peaceful resolution of labor disputes and the goal of maintaining healthy business competition for the good of consumers is a delicate one. *Connell Construction*, 421 U.S. at 636. The NSLE allows some collective action by employers when necessary to maintain the "integrity of the multiemployer bargaining unit." *NLRB v. Brown,* 380 U.S. 278, 289 (1965) (*hereafter "NLRB v. Brown"*). However, the balance shifts in

situations where the agreement at issue merely furthers a "competitive interest rather than an interest in regulating … labor relations." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 667 (1965). In such a situation, there is no reason to exempt collusive, anticompetitive agreements from the reach of the antitrust laws. *Id.* at 667-69. Thus, when the integrity of the multiemployer bargaining unit is no longer at stake, then the interests of competition and, ultimately, consumers take precedence.

Commentators and courts have noted that consumers are especially at risk of harm from agreements that allocate markets and market shares such as the RSA entered into by Appellant supermarkets. *In re Terozosin Hydrochloride Antitrust Litigation*, 352 F. Supp. 2d 1279, 1313 (S.D. Fla. 2005) (agreements among competitors that allocate markets have the "obvious tendency to diminish output and raise prices"). Some have even described these types of agreements as more harmful than price fixing agreements. H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶2031, 217-18 (2005); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

Despite repeated cautionary statements by the courts about the dangers of expanding the reach of the NSLE, Defendant-Appellees seek to broaden the

exemption. Moreover, they seek to broaden it far beyond what is necessary to protect the integrity of the collective bargaining process. Their arguments[2] disregard consumer welfare and are contrary to the case law set forth in *United Mine Workers* and *Allen Bradley*.

1. Revenue sharing after the termination of collective bargaining.

While the RSA remained in effect, by its own terms, a full two weeks beyond the termination of the multiemployer bargaining unit, the supermarket chains seek protection for their revenue-sharing activities under the NSLE. Their argument is based upon a contorted interpretation of the Supreme Court's statements regarding impasse. The chains describe the post-strike period during which they continued to share revenue as a "recovery period," needed because shoppers do not return to old shopping patterns immediately after a strike. *See* The Parties' Memorandum of Points and Authorities with Respect to Defendants' Motion for Summary Judgment, at 26, U.S.D.C., C.D. Cal., Case No. CV 04-0867 (AG) (SSx). Defendant-Appellees contend that *Brown* "plainly extends the NSLE's protection to conduct occurring 'after' collective bargaining negotiations have concluded." *Id.* at 28 (citing *Brown*, 518 U.S. at 250). This overly-expansive

[2] The trial court's analysis properly finds that the RSA failed to meet *each of the four* of the *Brown* factors which govern application of the NSLE. In the interest of brevity, the States will discuss only two of those factors here – the inclusion of a non-party and the extension beyond the labor dispute.

interpretation misconstrues *Brown* and asks this Court to disturb the delicate balance of policy interests that the Supreme Court has so carefully respected.

In *Brown,* the Court dealt with stalled negotiations between the National Football League and the players' union. NFL member teams entered into a wage agreement to be effective during the period of impasse. *See Brown,* 518 U.S. at 234-35. The Court rejected the argument that the antitrust exemption did not apply when the negotiations were at a stalemate. *Id.* at 244. Its rationale was that, during impasse, the bargaining unit "remains intact," that "employers must stand ready to resume collective bargaining," and that "the bargaining process is not over when the first impasse is reached." *Id.* at 244.

The *Brown* holding on exemption during impasse simply does not apply to the instant case where the collective bargaining process has ended. *Brown* suggests that the exemption lasts only until the "collapse of the collective-bargaining relationship," and that it may end even earlier in cases of extremely long impasse. *Id.* at 250 (*citing Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995); and *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B. 1005, 1006-07 (1995)). In either case, one principle is clear – the NSLE does not and should not immunize anticompetitive activity engaged in *after* a collective bargaining process has ended.

The supermarket chains' reliance on *Brown* to support their argument to the contrary is misplaced.

2. Agreements involving parties outside the collective bargaining agreement.

The chains argue that "the inclusion of a non-party in an agreement arising out of collective bargaining negotiations does not cause the agreement to lose its exempt status." *See* The Parties' Memorandum of Points and Authorities with Respect to Defendants' Motion for Summary Judgment, at 37. But while they cite the *Brown* decision liberally in the court below, they ignore the fact that the Court in that case identified as one of the key factors to its decision to apply the NSLE the fact that the agreement at issue "concerned *only* the parties to the collective-bargaining relationship." *Brown,* 518 U.S. 231, 250 (emphasis added). The States believe that existing law does not support extension of the labor exemption to agreements with nonparties and that such an extension would encourage and protect anticompetitive conduct that harms consumers.

Even before *Brown,* courts held that only concerted action involving parties to a collective bargaining agreement may qualify for an exemption from antitrust scrutiny. The opinion in *Cordova* makes clear that employers may not invoke an exemption from antitrust scrutiny without belonging to a multiemployer bargaining unit to which the union has "unequivocally" consented. *Cordova*, 321 F. Supp. at

607. The court described its rationale explicitly, cautioning that exemptions from the antitrust laws can lead to broad exercises of economic power that ultimately can harm the public. *Id.* By extension, a third party unrelated to the collective bargaining agreement could not satisfy this prerequisite. Logic dictates that if employers are permitted to reach beyond the ranks of their multiemployer bargaining units to invite participation by non-members in agreements that restrain competition, the collective bargaining process becomes a convenient cover for the very types of "evil" accumulations of economic power of which *Cordova* warned. The supermarket chains' insistence that the inclusion of a firm from outside the multiemployer bargaining unit in its RSA is inconsequential relegates the interests of consumers to a level utterly inconsistent with the case law on the subject of labor exemptions.

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III. CONCLUSION

The States respectfully request that the Court reject the requested expansion of the NSLE and find the Defendant-Appellees supermarket chains' RSA unlawful.

RESPECTFULLY SUBMITTED this _____ day of October 2008.

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