No. 14-2892

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD PERRAS,

Appellant,

v.

H&R BLOCK, INC., *et al.*

Appellees.

Appeal from an Order Denying Class Certification
United States District Court for the Western District of Missouri, No. 12-450

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Appellate Rule 26.1, *Amicus Curiae* Chamber of Commerce of the United States (the "Chamber") makes the following disclosures:

The Chamber has no parent corporation.

No publicly held corporation owns any portion of the Chamber.

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INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States (the "Chamber") submits this *amicus curiae* brief in support of Appellees, H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology LLC (collectively, "H&R Block"). The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in important cases that implicate the orderly administration of justice in our federal system. This is such a case. Appellant Ronald Perras, a California resident, brought suit in the United States District Court for the Western District of Missouri under the Missouri Merchandising Practice Act ("MMPA"), Mo. Rev. Stat. § 407.010 *et seq.*, a consumer protection statute. Appellant sought to certify a nationwide class of consumers that by definition excludes residents of Missouri, but argued for the application of Missouri law, specifically the MMPA, to the claims of the entire proposed class. The trial court determined that certification of the proposed class was not appropriate because Federal Rule of Civil Procedure 23(a)(3)'s

predominance requirement was not met, as Appellant could not constitutionally apply the MMPA to claims arising from transactions occurring in states other than Missouri.

The Chamber submits this *amicus curiae* brief in support of H&R Block to urge affirmance of the decision below. The members of the Chamber often engage in business transactions in multiple states or nationwide, and their operations could be seriously impeded if they are forced to comply universally with state-specific laws that conflict with the laws of many other states in which their business is conducted.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Chamber states that (1) no party's counsel has authored this *amicus curiae* brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and (3) no person other than the Chamber, its members, or its counsel have contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

This case raises an important question of whether a court may apply the law of a single state—here, the forum state of Missouri—to the claims of class members from all around the United States, when that forum state's law unquestionably conflicts with the laws of other states. This question has both

constitutional dimensions and important practical implications for interstate businesses, which plan their activities with the reasonable expectation that transactions will be governed by the law of a state with significant contacts with the transaction at issue. Here, none of the putative class members resides in Missouri. Appellant argues this is immaterial because H&R Block has its place of incorporation and principal place of business in Missouri. In actuality, Appellant asks this Court to ignore the limitations placed on states by the Due Process Clause and the Full Faith and Credit Clause of the Constitution to facilitate the artificial formation of a nationwide class, whose claims do not actually share predominant common issues of law, and to allow a plaintiff to forum-shop around the entire United States for the law he or she wishes to have applied to that nationwide class.

The United States Supreme Court addressed this very issue in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), holding that the forum state's law in that case could not constitutionally be applied to all claims in a multi-state dispute. The Court held that, if there is a genuine conflict between the law of the forum state and the laws of other relevant jurisdictions, the forum state "must have a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [forum] law is not arbitrary or unfair." *Id.* at 821-22 (internal quotation and citation omitted). The Court further held that "[w]hen

considering fairness in this context, an important element is the expectation of the parties." *Id.* at 822. Although the Court recognized that the defendant owned property and conducted substantial business in the forum state, and that the forum state had an interest in regulating business within its borders, the Court also found that the majority of the plaintiff class members resided in other states and that the majority of the claims related to out-of-state transactions. *Id.* at 819, 821-22. Importantly, the Court found no indication that, when the transactions at issue occurred, the parties expected the forum state's law to control. *Id.* at 822. Accordingly, the Court held that the forum state's law could not constitutionally be applied to the asserted class claims. *Id.* at 823.

Shutts therefore establishes that the relevant analysis to assure that the application of a state's law comports with due process turns on whether a state has significant contacts with the *claims* asserted by each member of the plaintiff class. And when considering fairness, an important element of the inquiry is the *expectations of the parties* that a given state's law would apply to a dispute between them. The importance of the reasonable expectation element cannot be overstated. Businesses plan their activities to conform to the law of the states with significant contacts with their transactions. The due process right to the predictable application of law with a significant relationship to the claims at issue is therefore critical to businesses that operate in multiple states or nationwide. It is

also vital to ensure that consumers transacting within a single state have uniform rights regardless of the citizenship of the entity with which they are transacting.

I. A Forum State Must Have Significant Contacts with the Claims Asserted by the Plaintiff Class Members to Apply Its Substantive Law

As *Shutts* establishes, due process requires that a forum state have significant contacts with the *claims* of the plaintiff class members. Here Appellant's and the putative class members' claims are consumer protection claims. Specifically, Appellant asserts that H&R Block misrepresented the nature of a "compliance fee" to consumers. Appellant paid the $4 fee as part of the total amount he paid to H&R Block for tax preparation services in California. Appellant sought certification of a nationwide class of millions of H&R Block clients (except for residents of Missouri) who also paid compliance fees when they purchased tax preparation services at H&R Block offices around the country. Appellant asserts claims under the MMPA, Missouri's consumer protection statute, which prohibits certain practices in trade or commerce and creates a civil right of action for persons who purchase merchandise and suffer an ascertainable loss as a result of the use or employment of a prohibited practice.

By their very nature, consumer protection claims arise from a business's transactions with consumers, and accordingly, the constitutional fairness inquiry in the context of consumer protection claims must consider whether the forum state has "significant contacts" with the consumer transactions at issue. *See, e.g., Siegel*

v. Shell Oil Co., 256 F.R.D. 580, 585 (N.D. Ill. 2008), *aff'd*, 612 F.3d 932 (7th Cir. 2010) (consumer protection claims alleging that defendant falsely represented "price at the pumps" arose at place of each class member's gas purchase).

Here, it is undisputed that all of the transactions forming the basis for the putative class's MMPA claims occurred *outside* of the forum state of Missouri. The putative class is defined as "all persons in the United States, *excluding citizens of the State of Missouri*," that purchased tax return preparation services from H&R Block (emphasis added). Appellant does not dispute that he—and all putative class members—purchased, and that H&R Block performed, those tax preparation services in states other than Missouri. Indeed, Appellant does not allege that he or any other putative class member had *any* contact with Missouri in their transactions with H&R Block. Accordingly, Missouri does not have the required significant contacts with any of the claims asserted by the proposed class members.

Appellant nevertheless argues that the application of Missouri law is appropriate because H&R Block is incorporated and has its principal place of business in Missouri. But this argument conflates the due process considerations relevant to two distinct concepts: personal jurisdiction and choice of law. Due process allows the courts of a forum in which a defendant is incorporated or has its principal place of business to exercise general jurisdiction over the defendant—that is, the courts of a defendant's home state may adjudicate claims against the

defendant arising anywhere. *See Diamler AG v. Bauman*, 134 S. Ct. 746, 757-58 & n.11 (2014). In addition, courts outside of a defendant's home state may exercise personal jurisdiction over a defendant, but only when the defendant has sufficient "minimum contacts" with the forum state such "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). The court's adjudicatory power in that second context is called specific jurisdiction, and the "[d]ue process limits on" that type of "adjudicative authority" exist "principally [to] protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* at 1122.

But the question of whether a court may exercise general or specific personal jurisdiction over a defendant is distinct from (and generally antecedent to) the separate question of which law applies to any case properly within the court's jurisdiction. The due process analysis governing this separate choice of law inquiry—as explained—turns on contacts between the *claims* and the forum state. In *Shutts*, the Court held that the assumption of jurisdiction cannot be an "added weight [on] the scale when considering the permissible constitutional limits on choice of substantive law." 472 U.S. at 821; *see also Soo Line R.R. Co. v. Overton*, No. EV 90-66-C, 1991 WL 497771, at *9-10 (S.D. Ind. June 25, 1991), *aff'd*, 992 F.2d 640 (7th Cir. 1993). A corporation's citizenship is not a

"significant contact," for purposes of the constitutional choice of law analysis, with consumer protection claims based on transactions that occurred entirely outside of the corporation's home state. *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (consumer fraud injuries lacked significant contacts to defendant's corporate headquarters).

The only Missouri contact to which Appellant points to justify applying the MMPA to the class claims here is H&R Block's making certain decisions related to the allegedly deceptive compliance fee at its headquarters in Missouri. But this is not a constitutionally "significant contact" with respect to the claims asserted by Appellant and the putative class because the MMPA prohibits certain practices in trade or commerce, *i.e.*, in *transactions* with consumers. Here, those transactions occurred in every state *but* Missouri. *See, e.g.*, *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 149 (S.D.N.Y. 2008) (allegations that deceptive marketing strategy was conceived at defendants' principal place of business were not controlling on choice of law governing consumer protection claims); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (plaintiff failed to meet burden of demonstrating that defendant's contacts with Michigan—where it had its principal place of business and made certain design decisions concerning allegedly defective product—were "significant" for purposes of constitutional choice of law inquiry).

In short, Appellate cites *no* contact between Missouri and the putative class's MMPA claims and thus necessarily fails to establish the "significant contact" that *Shutts* makes a predicate to a constitutional application of Missouri law. 472 U.S. at 821. That failure alone warrants this Court's affirming the district court's judgment.

II. The Expectations of the Parties Are the Critical Inquiry

Allowing the putative class to bring MMPA claims here would violate due process not only because those claims lack significant contacts with Missouri but also because none of the parties reasonably expected that Missouri law would apply to disputes arising from tax preparation services performed *outside* of Missouri—the only transactions that form the basis for the class claims. The parties' expectations are critical as to whether the application of a forum state's law passes constitutional muster: "The touchstone here is the reasonable expectation of the parties." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333 (1981) (Stevens, J., concurring). And for businesses that transact with consumers in multiple states, their planning not surprisingly depends upon the reasonable expectation element of this test.[1]

[1] To be sure, some businesses do include choice of law provisions in contracts with their customers. In such cases, the parties to a transaction have expressly agreed to the application of a particular state's law, and the enforcement of that contractual choice of law aligns with the parties' reasonable expectations. But such an agreement is not at issue here—in this case, neither H&R Block nor the putative

A. Corporations Transacting Business Nationwide Do Not Reasonably Expect the Application of Their Home State's Laws to Transactions Entirely Outside that State

Appellant's theory is that a corporation should reasonably expect the law of the state of its incorporation or principal place of business to govern all disputes with it, under all circumstances. This theory cannot be squared with *Shutts* and ignores the constitutional fairness inquiry altogether. Under *Shutts*, the question is whether a business would reasonably expect the application of a state's law to the actual claims being asserted against it. *See* 472 U.S. at 821-22. Although a business might reasonably expect the application of its home state's law with regard to its activities in that state, it is not reasonable for the business to expect the extraterritorial application of that law to its activities occurring entirely outside of its home state.

In particular, it is not reasonable for a business to expect the application of the consumer protection laws of its home state to consumer transactions that occur entirely outside of the state. While states do have an interest in regulating certain activities of their domestic corporations, other states *also* have an interest in protecting their local consumers in transactions with foreign corporations. *See, e.g.*, *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, No. 05 C

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class members contractually agreed to apply Missouri law to any disputes pertaining to the purchase of or payment for H&R Block's tax preparation services, meaning no party reasonably expected that the MMPA would govern here.

2623, 2006 WL 3754823, at *3 (N.D. Ill. Dec. 18, 2006) (home state of corporation has interest in "controlling the acts" of its corporate citizens, but home states of consumer plaintiffs also have interest in regulating business that takes place within their borders for the benefit of their consumer citizens); *In re Vioxx Products Liab. Litig.*, 239 F.R.D. 450, 456 (E.D. La. 2006) (recognizing interests of consumer plaintiffs' home jurisdictions in protecting their own consumers).

Courts nationwide have recognized this comity-based principle: "States have a strong interest in protecting consumers with respect to sales within their borders, but they have a relatively weak interest, if any, in applying their policies to consumers or sales in neighboring states." *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 278 (D. Mass. 2004); *see also Patton v. Topps Meat Co., LLC*, No. 07-CV-00654, 2010 WL 9432381, at *7 (W.D.N.Y. May 27, 2010); *Grand Theft Auto*, 251 F.R.D. at 153. Likewise, another court has observed, "It is hard to see why the laws of other states should be tossed overboard and their residents remitted to [forum] law for transactions that, for individual consumers, are local in nature." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007).

Consumer protection laws protect and compensate consumers; they do not primarily police corporate conduct. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 83 (D. Mass. 2005) ("state consumer

protection statutes are designed to protect consumers rather than to regulate corporate conduct"); *Relafen*, 221 F.R.D. at 277 (same). Where a consumer transaction occurs entirely outside of a business's home state—with a consumer in another state at the business's location in that state—the business would reasonably expect the application of *that* state's consumer protection laws, and would conduct the transaction accordingly.

The extraterritorial application of a business's home state's law to its transactions entirely outside of that state, absent a contractual agreement to do so, also raises federalism concerns. This country has operated since its foundation on the basic principle that a state cannot through legislation govern activity that occurs entirely outside of its borders. *See, e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 163-64 (1914); *Allgeyer v. La.*, 165 U.S. 578, 591-92 (1897). This Court has also explained the federalism rationale for the "significant contacts" inquiry:

> The Court's "contacts" analysis cannot be explained by considerations of fairness to the parties alone. When a state's law is applied to a transaction with which the state has no significant contact, it infringes upon the legitimate interests that other states may have in the transaction; this infringement is not reasonable in a due process sense within the context of our federal system of government.

McCluney v. Joseph Schlitz Brewing Co., 649 F.2d 578, 582 (8th Cir.), *aff'd sub nom. McCluney v. Jos. Schlitz Brewing Co.*, 454 U.S. 1071 (1981).

Although different states' consumer protection laws may regulate a similar subject matter, they vary widely in light of the different policy choices each state's elected officials make about what conduct should be regulated and how those regulations should be enforced. *See, e.g.*, *Bridgestone*, 288 F.3d at 1018 ("State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules."); *In re Hitachi Television Optical Block Cases*, No. 08CV1746, 2011 WL 9403, at *6 (S.D. Cal. Jan. 3, 2011) (observing that California's consumer protection laws "conflict with the laws of other states in several material respects"); *Corder v. Ford Motor Co.*, 272 F.R.D. 205, 210-11 (W.D. Ky. 2011) (noting "substantial differences" in state consumer protection statutes); *In re Intel Corp. Microprocessor Antitrust Litig.*, No. CA 05-485, 2010 WL 8591815, at *53 (D. Del. July 28, 2010) (holding that "California's antitrust and consumer protection laws are not in harmony with those of each of the 49 other states and the District of Columbia"); *Siegel*, 256 F.R.D. at 584-85 (observing that state consumer protection laws "vary considerably"); *Pharm. Indus.*, 230 F.R.D. at 84 (comparing differences among state consumer protection statutes).

Allowing one state—even a business's home state—to impose its laws on consumer transactions that occur entirely in other states interferes with the policy choices of those other states, thereby violating federalism principles and raising

serious constitutional concerns. *See, e.g.*, *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005) ("*St. Jude I*") ("State consumer protection standing statutes do not extinguish federal constitutional rights or relieve courts from performing the analysis required to safeguard those rights."). *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (defendant corporation's "status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

B. Consumers Do Not Reasonably Expect the Application of Consumer Protection Laws of States with No Connection to the Transactions

In addition to the reasonable expectations of the defendant business, a court must consider the reasonable expectations of the individual members of the proposed plaintiff class, particularly those of the absent class members. *See, e.g.*, *True v. Conagra Foods, Inc.*, No. 07-00770-CV, 2011 WL 176037, at *7 (W.D. Mo. Jan. 4, 2011). It would be surprising indeed if any of the putative class members here reasonably expected that Missouri consumer protection law would apply to their consumer transactions occurring entirely outside of Missouri.[2] *See, e.g.*, *St. Jude I*, 425 F.3d at 1120 (finding there was "no indication out-of-state

[2] Again, a consumer accepting a contractual choice of law would have different expectations.

parties 'had any idea that [forum] law could control' potential claims when they received their" products manufactured by the defendant); *True*, 2011 WL 176037, at *7 (finding "nothing to suggest" that any members of class composed entirely of non-Missouri residents had meaningful contacts with Missouri or would have expected Missouri law to apply to their product contamination claims).

Appellant here seems to confuse whether the application of the MMPA would be surprising or unexpected to the parties (which it undeniably is) with whether it is beneficial to Appellant's pursuit of class certification (because he thinks it provides greater protection to consumers than the laws of other states). Perras Br. at 51-53. But whether it comports with due process to apply the forum state's law to out-of-state conduct turns on whether the parties *reasonably expected* its application, not on whether its application makes the case easier to administer or the plaintiff more likely to prevail. *See, e.g.*, *Pharm. Indus.*, 230 F.R.D. at 83 (declining to apply consumer protection laws of states where defendants had their principal place of business to nationwide class, even though it would promote uniform results and make managing class easier); *Ford*, 177 F.R.D. at 370-71 ("Even assuming Michigan has the most consumer-friendly laws, plaintiffs' cryptic argument that any state whose consumer laws are more rigorous than Michigan's must surrender to the application of Michigan law overlooks the fact that there might be important policy reasons behind a state's adoption of more restrictive

consumer-oriented laws, and that application of Michigan law might actually impair these states' policies. It is simply incorrect to assume that the overriding interest in all consumer-oriented cases is protection of the consumer. The policies of each state with contacts must be examined. Plaintiff has not undertaken this analysis."). To hold otherwise would allow plaintiffs to artificially form nationwide classes and impermissibly forum-shop for the law they wish to apply to the class claims. *See Shutts*, 472 U.S. at 820 ("[P]laintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. 'If a plaintiff could choose the substantive rules to be applied to an action … the invitation to forum shopping would be irresistible.'").

Moreover, while Appellant's theory that the law of a business's home state should apply to its activities everywhere may result in a beneficial outcome for Appellant and the putative class in this case, it is not a workable choice of law principle under the Constitution or as a practical matter. Absent a contractual choice of law provision, a local business entering a transaction with a consumer at the business's location in a given state generally will be subject to that state's consumer protection laws. Both the business and the consumer reasonably expect this result. Altering this outcome with respect to an interstate business, simply because it is incorporated or has its principal place of business elsewhere, would create a double-standard under which interstate businesses would be subject to

different rules than local businesses. This would ultimately make the applicable law less predictable for consumers and may not always lead to the beneficial results Appellant purports to find here. For example, Missouri consumers would reasonably expect Missouri consumer protection law to apply to their transactions with a business in Missouri, even if that business has its place of incorporation or headquarters in another state, and even if the Missouri consumers bring suit in the business's home state. Applying Appellant's choice of law theory would alter that reasonably expected result. Yet the Constitution requires that choice of law be predictable, *i.e.*, reasonably expected by the parties, so that its application is not unfair.

CONCLUSION

For all of these reasons, the Chamber of Commerce of the United States respectfully requests that the Court affirm the judgment of the district court denying class certification.

December 9, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 37(a)(7)(B) and 29(d), I certify that the foregoing brief is printed in 14-point proportionally spaced serif typeface (Microsoft Word 2010 Times New Roman). I further certify that according to the software used to prepare it, the brief contains 4,049 words, which is less than half the length authorized for the brief of the Appellees, the parties whom this *amicus curiae* supports. I further certify that the brief has been scanned for viruses and is virus-free.

/s/ Jennifer A. Williams
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