No. 17-204

In the Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether there is a compelling reason to review the Ninth Circuit's determination, in accordance with the well-settled standing requirement of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), that the plaintiffs have antitrust standing where they allege they purchased software applications through an online store owned by the alleged monopolist, Apple Inc., and paid the entire purchase price for the applications *directly to the monopolist, which retained the entire monopoly profit for itself*?

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF IN OPPOSITION 1

SUMMARY 1

STATEMENT OF THE CASE 4

CONSIDERATIONS GOVERNING THE DECISION AS TO WHETHER TO GRANT A WRIT OF CERTIORARI 5

REASONS FOR DENYING THE PETITION 6

I. THE NINTH CIRCUIT DID NOT DEVIATE FROM SUPREME COURT PRECEDENT . . 6

A. The Ninth Circuit Did Not Create a New "Distributor Function" Standing Rule . . . 7

B. The Ninth Circuit Did Not Ignore the "Pass-Through" Implications of Its Ruling 9

C. The Ninth Circuit's Decision Does Not Create a Danger of "Duplicative Recoveries" 12

II. THERE IS NO CREDIBLE CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION BELOW AND THE EIGHTH CIRCUIT'S DECISION IN *CAMPOS* 13

III. THERE IS NO NEED TO RE-VISIT *ILLINOIS BRICK* 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

California v. ARC America Corp.,
490 U.S. 93 (1989) 10

Campos v. Ticketmaster Corp.,
140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) . . . . . *passim*

Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson,
523 F.3d 1116 (9th Cir. 2008) 8

Eastman Kodak Co. v. Image Technical Servs.,
504 U.S. 451 (1992) 13

Hanover Shoe, Inc. v. United Shoe Machinery Corp.,
392 U.S. 481 (1968) 6, 9, 11, 18

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) . . . . . *passim*

Kansas v. Utilicorp United, Inc.,
497 U.S. 199 (1990) 10, 17, 18

Newcal Indus., Inc. v. Ikon Office Solution,
513 F.3d 1038 (9th Cir. 2008) 13

St. Louis I.M. & S.R. Co. v. Craft,
237 U.S. 648 (1915) 11

Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.,
946 F.2d 1003 (2d Cir. 1991) 11

STATUTES

15 U.S.C. § 2 4

Sup. Ct. R. 10 . . . . . 3, 5, 15

OTHER AUTHORITIES

J.P. Bauer, "*The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*," 62 U. Pitt. L. Rev. 437 (Spring 2001) 16

BRIEF IN OPPOSITION

Respondents, Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell (hereinafter "Respondents"), respectfully submit this opposition to the petition by Apple, Inc. ("Apple" or "Petitioner") for a writ of certiorari.

SUMMARY

This case involves claims that Petitioner Apple, Inc. (hereinafter "Petitioner" or "Apple") illegally monopolized the sale of software applications (commonly called "apps") for use on Apple's iPhone, pursuant to which Respondents and a proposed class of all other apps purchasers paid Apple a 30% monopolistic surcharge for each app purchased. Respondents allege in the complaint (the "Complaint") that they and all other apps purchasers bought the apps *directly from the alleged monopolist* on an online store (called the "App Store") *owned and operated by the monopolist*. Respondents allege that they paid the full price for the apps *directly to the monopolist*, which kept all the monopoly profits for itself. Respondents also allege that the developers of the software applications (the "apps developers") *made no payment whatsoever* to Apple, other than a $99 annual registration fee.

Apple argued below that the only victims of the alleged monopoly with standing to sue under this Court's seminal *Illinois Brick* decision were the apps developers, not the apps purchasers who actually paid the supra-competitive prices to the monopolist, based on so-called "antecedent transactions" that took place between Apple and the apps developers before the apps

were sold to iPhone purchasers on the App Store, whereby the apps developers effectively absorbed the 30% markup themselves because they were "aware" of it and set their prices accordingly. However, in a thorough and well-reasoned analysis of the allegations of the Complaint, a panel of the Ninth Circuit unanimously found that Respondents plausibly allege standing under the straightforward "direct purchaser" requirement set forth in *Illinois Brick*. After briefing by the parties, the full Ninth Circuit denied Apple's petition for rehearing *en banc*.

Apple urges the Court to grant certiorari ostensibly to correct the Ninth Circuit's purported misapplication of *Illinois Brick* to the particular facts alleged in the Complaint. But the Ninth Circuit's analysis of the Complaint and its decision with respect to Respondents' standing is on all fours with *Illinois Brick*. Thus, it is apparent that Apple does not seek *certiorari* in order to have the Court correct a misapplication of law by the Ninth Circuit, but in order to have the Court *change* the law. Specifically, Petitioner seeks to have the Court jettison the straightforward direct purchaser requirement of *Illinois Brick* and replace it with a new "antecedent transaction" analysis, an approach to antitrust standing finds no support in this Court's precedent, would invite the same factual complications and speculation on damages that the bright-line standing test of *Illinois Brick* seeks to avoid, and would often leave nobody with standing to sue a monopolist (as would be the case here).

As Apple acknowledges, the "antecedent transaction" approach has been applied by only one circuit court, the Eighth Circuit in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), which was a split panel decision with a strong dissent. Moreover, that two appellate courts, *each applying the same well-settled law*, reached different results based on different factual allegations is not a "conflict" of the sort that warrants certiorari. *See* Supreme Court Rule 10 (stating that *certiorari* is "rarely granted" based on a circuit court's misapplication of a properly stated rule of law). And Respondents respectfully submit that if one of the two appellate decisions misapplied the law, it was the split panel of the Eighth Circuit in *Campos*, not the Ninth Circuit here. Thus, the Court is being asked to correct the misapplication of law by *another* court almost two decades ago.

Since *Illinois Brick* was decided 40 years ago, courts throughout the nation have had no trouble applying its "direct purchaser" standing requirement to various factual settings, including cases in which some form of payment is made to an alleged monopolist prior to the monopolist's sale of a product. There is no need for this Court to change the law now by replacing the clear "direct purchaser" standing requirement of *Illinois Brick* with a far more complex "antecedent transaction" standing requirement, and certainly not on a motion to dismiss prior to the factual development in this case.

STATEMENT OF THE CASE

This antitrust class action was brought pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2. Respondents brought this action on behalf of themselves and a class of all others who purchased software applications (or "apps") from Apple's online store for use on their iPhones from December 29, 2007 to present. ¶ 1.[1]

In 2008, faced with the threat of competition from apps developers able to sell their products to iPhone users without providing any benefit to Apple, Apple made itself the exclusive distributor of iPhone apps and rigorously maintained a monopoly on the sale of iPhone apps by approving only apps made by developers who gave Apple the exclusive worldwide right to distribute those apps through the Apple's App Store. ¶ 37. To this end, Apple contracted with apps developers, who agreed to pay Apple an annual registration fee of $99 for Apple's distribution services and to supply their apps only to Apple for distribution solely through the App Store. ¶ 38. Apple owns 100% of the App Store and controls all App Store sales, revenue collection, and other business operations. ¶ 39.

Apple charges apps purchasers a 30% commission on each app sale (unless it is a free app). ¶ 40. The price paid by purchasers for an app is the amount set by the apps developer, *plus* Apple's own supra-competitive 30% markup, both of which are paid

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[1] The operative complaint is included in Petitioner's appendix at pp. 40a-64a. Paragraphs of the Complaint are referenced herein as "¶ ___."

directly to Apple, the alleged monopolist, every time an app is purchased. ¶ 41. Apple keeps the entire supra-competitive portion of the purchase price for itself and remits the balance to the apps developers. *Id.* The apps developers do not sell their apps to iPhone customers or collect any payment from iPhone customers, and iPhone customers are the only purchasers in the entire chain of distribution. ¶¶ 38-41. Respondents seek damages based solely on the 30% markup. *Id.*

The district court dismissed the Complaint, holding that Respondents lacked direct purchaser standing under *Illinois Brick* because the supra-competitive fees they paid to Apple were "a cost passed-on to consumers by independent software developers." Pet. at 37a. The Ninth Circuit reversed, holding that Respondents had plausibly alleged that they were direct purchasers with antitrust standing under *Illinois Brick*. Pet. at 17a-22a.

CONSIDERATIONS GOVERNING THE DECISION AS TO WHETHER TO GRANT A WRIT OF CERTIORARI

Under Supreme Court Rule 10, a petition for a writ of certiorari "will be granted only for compelling reasons." Under Rule 10, certiorari may be granted if a Court of Appeals "has entered a decision in conflict with the decision of another Court of Appeals on the same important matter," or where a Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Moreover, pursuant to Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law."

None of the possible reasons for granting certiorari are present here. There is no credible appellate court conflict, and the Ninth Circuit's decision is fully consistent with this Court's precedent. At most, any conflict between circuits is the result of the misapplication of a properly stated rule of law *by another court* nearly two decades ago.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT DID NOT DEVIATE FROM SUPREME COURT PRECEDENT

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), following *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court set forth a bright-line test whereby the first party in the distribution chain to buy the alleged monopoly-priced product from the alleged monopolist is the party with standing to sue. To determine standing under *Illinois Brick*, courts must look to the chain of distribution of the price-tainted product, and may not forge exceptions to the bright-line rule or apportion losses among various levels of the distribution chain. *Id.* at 734-743.

As alleged in the Complaint, Respondents buy iPhone apps directly from the monopolist, Apple, and pay the *entire* purchase price, including the allegedly monopolistic 30% commission, directly to Apple, which keeps the supra-competitive charge for itself. ¶¶ 38-41. Meanwhile, apps developers never pay anything to Apple. Respondents are therefore undoubtedly the first party in the distribution chain to buy from the monopolist. *Id.* Viewing the factual allegations in a light most favorable to Respondents, the Ninth Circuit properly found that Respondents were "direct

purchasers" with standing to sue under *Illinois Brick*. Pet. at 17a-22a.

Apple argues that certiorari is warranted because the Ninth Circuit's ruling created "a brand new distributor function" rule based on a "manufacturer-distributor dichotomy" that undermines the policies of *Illinois Brick* and opens the door to the complications of a new type of "pass-through" liability as well as "duplicative recoveries." Pet. at 3-4, 27-29. However, the Ninth Circuit created no new standing rule. To the contrary, the Ninth Circuit strictly adhered to this Court's precedent and faithfully applied the *Illinois Brick* direct purchaser standing requirement to the facts alleged in the Complaint. Apple simply does not like the law as it is, and seeks to avoid liability altogether by having the Court eschew the "bright-line" test of *Illinois Brick* in favor of a new complex and theoretical "antecedent transaction" analysis.

A. The Ninth Circuit Did Not Create a New "Distributor Function" Standing Rule

Taking out of context the Ninth Circuit's statement that "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function" (Pet. at 9, citing 20a-21a), Apple argues that the Ninth Circuit created a new antitrust rule based on the formalistic reliance of an alleged antitrust violator's role in the supply chain. But the Ninth Circuit did not say or imply that its standing analysis began and ended with whether Apple functioned as a distributor. Rather, the Ninth Circuit was merely situating Apple's role in the supply chain in response to Apple's argument that "because it sells distribution services to app developers,

it cannot simultaneously be a distributor of apps to app purchasers." Pet. at 19a. Doing so, the Ninth Circuit concluded that Apple's 30% markup was first paid by apps purchasers to Apple, which was acting *as the distributor* in the supply chain.

In addition, the Ninth Circuit was addressing the related question of whether Respondents' claim was against Apple or the apps developers, and in that regard it was assessing the allegations of the Complaint against the allegations in a prior case, *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008), in which it had determined that a purchaser had standing to sue *the distributor* rather than the manufacturer. Pet. at 17a-18a, 21a.

Further, the Ninth Circuit was responding to Apple's argument (which Apple continues to make on the Petition) that it was acting more like an "agent" for the apps developers than as a distributor. This is so, Apple argued, because it did not buy the apps from the apps developers and set the prices - the apps prices were "entirely set" by the apps distributors. Pet. at 28-29. The Ninth Circuit correctly rejected that argument. Pet. at 19a-20a. As Respondents allege in the Complaint, Apple in fact set the *entire* monopolistic 30% commission that was charged to the apps purchasers, *without any involvement whatsoever from the apps developers*. ¶ 41.[2]

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[2] The Ninth Circuit also rejected Apple's analogizing itself to a passive shopping mall that merely leases physical space to various retail stores. Pet. at 19a. In addition to the fact that apps developers are prevented by Apple from selling through their own stores, it is Apple, not the apps developers, who sets and receives

Indeed, the Ninth Circuit made clear it was not basing its decision on the formalities or mechanics of payment, *i.e.*, on the fact that it was Respondents who actually paid the 30% markup. *See* Pet. at 20a ("We do not rest our analysis on the fact that Plaintiffs pay the App Store, which then forwards the payment to the app developers, less Apple's thirty percent commission. Whether a purchase is direct or indirect does not turn on the formalities of payment or bookkeeping arrangements. . . . Nor do we rest our analysis on the form of the payment Apple receives."). Rather, the Ninth Circuit took its analysis a step further and confirmed, based on the "function" that Apple was performing in the commercial chain at issue, that the 30% markup was charged by Apple directly to apps purchasers.

B. The Ninth Circuit Did Not Ignore the "Pass-Through" Implications of Its Ruling

Petitioner also argues that the Ninth Circuit's analysis ignored the "pass-through" concerns of *Hanover Shoe*, 392 U.S. at 493, in which the Court held that allowing a pass-through defense would inevitably lead to "complicated proceedings involving massive evidence and complicated theories," and *Illinois Brick*, 431 U.S. at 734-35, in which the Court held that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every

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the 30% markup. In Apple's shopping mall analogy, Apple is like a mall if the mall charged a 30% commission to shoppers on top of what shoppers paid to the mall's retail stores.

plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." Pet. at 19-25. However, the Ninth Circuit squarely addressed the pass-through concern in its decision, concluding that apps purchasers were the direct victims of the monopolistic overcharge and that the damage was not passed on to them by the apps developers or anyone else, but rather was imposed on them by Apple. Pet. at 13a-17a.

As the Ninth Circuit concluded, there is no question that purchasers of apps first paid the overcharge. *See* Pet. at 20a ("Apple does not take ownership of the apps and then sell them to buyers after adding a markup of thirty percent. Rather, it sells the apps and adds a thirty percent commission."). Thus, to the extent that there was any "pass-through" damage, it occurred when Apple did not remit to the apps developers the entire payment made by the apps purchasers, making the developers, at best, "indirect purchasers." *See Kansas v. Utilicorp United, Inc.,* 497 U.S. 199, 207 (1990) (defining "indirect purchaser" as one who is not the "immediate buyer[] from the alleged antitrust violator"); *California v. ARC America Corp*., 490 U.S. 93, 96 (1989) (indirect purchaser is one who "[does] not purchase [the monopolized product] directly from the [antitrust] defendant").

Apple's real point is not that the apps developers passed their injury on to the apps purchasers, but that the apps purchasers, even though they paid the 30% markup, *were not damaged* because absent the monopoly they would have paid the same 30% to the apps developers. That argument is flawed for several reasons.

First, under clear Supreme Court precedent, an antitrust defendant cannot decrease its exposure to damages with a pass-through *defense* – *i.e.*, by proving that the plaintiff was not actually damaged, even though it paid a monopolistic overcharge, because it passed the overcharge on to another. *Hanover Shoe*, 392 U.S. at 492.

Second, while Apple may be able to later show that the actual damages to the apps purchasers are less than the full 30% markup they paid to Apple – based on a number of theories, including that the markup should be reduced by some amount that apps developers would have been able to charge to the apps purchasers – that is not an *Illinois Brick* standing issue. At most, it raises questions of law and fact relating to the measure and amount of damages. *See St. Louis I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 661 (1915) (proper measure of damages "involves only a question of fact"); *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (amount of recoverable damages is a question of fact while measure of damages is a question of law).

Finally, Apple's underlying argument that the apps developers were the ones harmed because they were prevented from collecting the 30% markup charged to consumers by Apple is based upon hypothetical facts that do not exist. In the real world alleged in the Complaint, selling iPhone apps directly to consumers is not possible without the Apps Store. Moreover, even in the hypothetical world, Apple's theory that apps developers could or would have charged the entire price to the apps purchasers absent the monopoly relies on

wholly unsound speculation regarding supply and demand economics and other matters.

C. The Ninth Circuit's Decision Does Not Create a Danger of "Duplicative Recoveries"

Petitioner also asserts that the Ninth Circuit's refusal to apply the novel "antecedent transaction" analysis raises the specter of "duplicative recoveries" that the Court sought to avoid in *Illinois Brick*. Pet. at 25-27. This argument is a red herring for multiple reasons.

First, as an initial matter, there is no possibility of a double recovery under the Ninth Circuit's analysis because there is only *one 30% markup*. Thus, a claim by the apps developers, even if they had one, would not *overlap* the 30% markup paid by apps purchasers. Rather, it is a piece of the same 30% pie. Any claim by the apps developers that any part of the 30% markup was lost by them would diminish the purchasers' claim by the same amount.

Second, the above is purely academic because the app purchasers were the first to absorb any damage and the apps developers therefore have no standing to sue under *Illinois Brick*.

Third, the apps developers may well have benefitted from the existence of Apple's alleged monopoly and the use of Apple's platform because Apple could force purchasers to pay a higher purchase price for the apps than the developers otherwise would have been able to charge. *See Campos*, 140 F.3d at 1171 (noting that its decision that the concert venues rather than ticket purchasers had direct purchaser standing would have

been different if the venues were alleged to have been beneficiaries of the monopoly).

Finally, the apps developers would likely have no viable legal claim against Apple because they knowingly consented to Apple's monopolization of the iPhone apps aftermarket. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 473-78 (1992) (no viable antitrust claim by purchasers who knowingly consent to anticompetitive conduct); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1049 (9th Cir. 2008) (viable aftermarket claim only when plaintiff does not knowingly consent to anticompetitive conduct).[3]

II. THERE IS NO CREDIBLE CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION BELOW AND THE EIGHTH CIRCUIT'S DECISION IN *CAMPOS*

In *Campos*, concertgoers sued Ticketmaster for monopolizing the market for concert distribution services, which they argued Ticketmaster was able to achieve by entering into exclusive contracts with most of the popular concert venues. *Id.*, 140 F.3d at 1169-71. The Eighth Circuit majority decision found that agreements between Ticketmaster and the concert venues were "antecedent transactions" in which the

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[3] The Ninth Circuit's statement that it made "no difference" to its analysis whether the apps developers might *also* have a claim (Pet. at 20a), does not affect its decision. Whether apps developers have a claim outside of the 30% markup (for the $99 annual fee or loss in the purchase price they were able to charge) would be determined by the court if and when the apps developers were to bring such a claim.

concert venues (not the consumers paying Ticketmaster's service fees) were the ones directly damaged, because the concert venues could otherwise have built Ticketmaster's service fees into the ticket price they charged to consumers. *Id*. at 1171-72. The Eighth Circuit's dissenting decision read the factual allegations very differently: "Ticketmaster supplies the product [ticket distribution services] directly to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers." *Id*. at 1174. Consequently, the dissent found that "the entirety of the monopoly overcharge, if any, is borne by concert-goers." *Id.*

There is no difference between the Eighth and Ninth Circuit panel decisions as to the well-settled law on standing. The difference in outcomes in the two cases is based on the different factual allegations and the different ways the courts viewed those different allegations. Indeed, in the FTC's brief opposing certiorari in the *Campos* case, cited by Petitioner (*see* Pet. at 3 n.1), the FTC argued that certiorari should be denied because "the lower court's construction of the complaint is amply supported by the petitioners' specific factual allegations." Likewise, certiorari should be denied here for the simple reason that the allegations of the Complaint amply support the Ninth Circuit's unanimous decision that Respondents have direct purchaser standing under the *Illinois Brick* bright-line test.

To be sure, the Ninth Circuit went beyond factually distinguishing *Campos*, and, as Petitioner notes, criticized the way the majority in *Campos* applied *Illinois Brick* to the factual allegations before it. Pet.

at 18a-19a. But criticism by one circuit court as to how another circuit court applies well-settled law to the factual allegations of a complaint does not rise to the level of a circuit "split" that provides grounds for granting certiorari. *See* Supreme Court Rule 10. There is no conflict between these two circuits *as to what the law is*.

Further, if one of the two courts misapplied the law, Respondents respectfully submit it was the Eighth Circuit majority that did so. As the dissent stated in *Campos*, the concept of an "antecedent transaction" appears nowhere in *Illinois Brick* or any other direct purchaser case and upends the traditional rule that an "indirect purchaser" is "someone in a vertical supply chain who purchases a monopolized product from someone *other than* a monopolist":

> A mere 'antecedent transaction' will *not* turn all purchasers of a monopolized product into indirect purchasers for the purposes of *Illinois Brick*. . . . The monopoly product at issue in this case is ticket distribution services, not tickets. Ticketmaster supplies the product *directly to concert-goers*; it does not supply it first to venue operators who in turn supply it to concert-goers. It is *immaterial* that Ticketmaster would not be supplying the service but for its antecedent agreement with the venues.

Id. at 1174 (Arnold, J.) (emphasis added; citations omitted).[4]

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[4] Even accepting an "antecedent transaction" analysis, it appears that the Eighth Circuit majority misunderstood the facts of the

Indeed, in the many years since it was decided, *Campos* has never been applied by any other federal court of appeals or federal district court and it has been widely criticized.[5] Hence, this Court would be granting certiorari in order to correct *another* circuit's misapplication of the law nearly two decades ago.

III. THERE IS NO NEED TO RE-VISIT *ILLINOIS BRICK*

Apple asserts that it is important to revisit *Illinois Brick* because "the same or similar agency or consignment sales models are increasingly prevalent in online electronic commerce and facilitate billions of dollars in transactions annually." Pet. at 29. But despite Apple's alarmist argument, the sky is not falling. The decision of the Ninth Circuit, applying well-settled law to the facts alleged in the Complaint, poses no more and no different risks to antitrust

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case. The Eighth Circuit theorized that "a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself, without having to cede to Ticketmaster a portion of that price in the form of supra competitive service fees." *Id.* at 1172. But in fact concert venues did not sell tickets at their box office windows at a price that included the amount of Ticketmaster's service fee.

[5] *See*, *e.g.*, J.P. Bauer, "*The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*," 62 U. Pitt. L. Rev. 437, 446-47 (Spring 2001)("Although there was some prior relationship between the concert venues and Ticketmaster, this was clearly not a situation where Ticketmaster had created a product and then sold it at an elevated price to its 'direct purchaser,' which in turn sold it to the indirect buying plaintiffs. Here, the plaintiffs dealt directly with the defendant and paid the overcharge directly to it.")

violators than previously existed under well-settled law.

As this Court explained in *Illinois Brick*, the limitation on standing to those who purchased directly from an antitrust violator is meant to avoid undesirable complexities, including the difficulty of allocating a monopoly overcharge among those who might have absorbed part of it. *Id*. at 737-43. Accordingly, the Court stated that "the antitrust laws will be more effectively enforced concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 734-35. *See also Utilicorp*, 497 U.S. at 218-19 (1990) (declining to create an exception to the direct purchaser rule for customers of regulated public utilities). The Court also noted that the rule allowing recovery by only direct purchasers more effectively serves "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws." *Illinois Brick*, 431 U.S. at 746.

Replacing *Illinois Brick*'s bright-line "direct purchaser" requirement with an "antecedent transactions" analysis would open the door to the very complications that *Illinois Brick* sought to avoid. Indeed, those who do business with a monopolist-manufacturer or monopolist-distributor *prior to* the monopolist's sale of a product might receive a lower (or in some cases higher) price for the product delivered to the monopolist absent the monopoly. Evaluating damages to those parties would require a court to engage in a highly speculative supply and demand

analysis regarding how much a market would bear for a product or component of a product sold to a monopolist prior to the monopolist's actual sale, a far different and far more complex analysis than what a purchaser overpays for a product. And, of course, there may be multiple "antecedent" transactions, making such analysis increasingly complex, if not impossible.

In addition, as discussed above, looking to antecedent activity would often mean that there is no direct victim with standing to sue the monopolist, thereby allowing a monopolist to "retain the fruits of [its] illegality because no one [will be] available who would bring suit against them," *Hanover Shoe, Inc.*, 392 U.S. at 494, a result that would contravene the goal of promoting the "vigorous enforcement of the antitrust laws," *Utilicorp*, 497 U.S. at 214. This is, of course, Apple's aim.

Finally, this case would serve as a bad vehicle to address whether *Illinois Brick* should be unraveled to make way for an "antecedent transaction" approach to antitrust standing, particularly on a motion to dismiss before further facts are developed concerning the transactions at issue as well as the nature and scope of the alleged monopoly. Respondents allege they paid the entire monopolized 30% overcharge to the monopolist when purchasing apps in Apple's App Store and that no amount was ever paid by or charged to apps developers prior to that transaction. In other e-commerce transactions, however, manufacturers are charged up-front and, arguably, they are the first in line to pay a monopolist its overcharge. Further, under the facts alleged here, the apps developers consented to the commission charged by Apple to apps purchasers

and may have benefitted from Apple's grip on the market because they were able to charge higher prices for their apps due to Apple's monopoly control. That is also certainly not always the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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