No. 17-___

In the
Supreme Court of the United States

IN RE APPLE IPHONE
ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and its progeny hold that the damages remedy in antitrust disputes belongs only to the immediate victims of the anticompetitive conduct ("direct purchasers"), and not to downstream parties claiming "pass-through" damages ("indirect purchasers"). Electronic marketplaces such as Apple's App Store present a new wrinkle on this doctrine, because the marketplace sponsor (*e.g.*, Apple) interacts with and delivers goods "directly" to consumers, but as an agent on behalf of third party sellers.

The district court dismissed this action under *Illinois Brick*, holding that consumer plaintiffs alleging monopolization of distribution services Apple provides to app developers were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding—in an acknowledged split with the Eighth Circuit—that consumers can sue whoever delivers goods to them, even if they seek pass-through damages.

The question presented is:

> Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Apple Inc. is a nongovernmental corporate party with no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Respondents are consumer plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, and Eric Terrell, all of whom purchased an iPhone and purchased an iPhone software application during the alleged class period. Respondents purport to represent a class of similarly situated persons in the United States who purchased an iPhone software application from December 29, 2007 to the present.

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The decision below is reported at 846 F.3d 313 (9th Cir. 2017) Pet. App. 1a-22a. The order denying rehearing *en banc* is unpublished. *Id.* at 38a-39a. The district court's decision dismissing the second amended consolidated class action complaint is unpublished. *Id.* at 23a-37a.

JURISDICTION

The court below entered judgment on January 12, 2017 (Pet. App. 1a), and denied a timely rehearing petition on May 4, 2017 (*id.* at 39a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any "person . . . [to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

This case is about petitioner Apple Inc.'s "App Store," an electronic marketplace through which third-party software developers can sell software applications (called "apps") for the iPhone directly to consumers, in exchange for certain commissions paid to Apple. A putative class of consumers claims that Apple illegally monopolized the distribution of iPhone apps, and that the commissions charged to app developers inflate the prices consumers ultimately pay for apps. The threshold issue is who may seek damages based on allegedly anticompetitive conduct by Apple that allows it to charge excessive commissions on apps distribution: the app developers, the plaintiff consumers, or both?

This is a critical question for antitrust law in the era of electronic commerce. The leading case addressing this issue was *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), which held almost two decades ago that consumers could not seek damages based on alleged monopolization of ticketing distribution services, even if this resulted in higher ticketing service fees that consumers paid directly to Ticketmaster. The Eighth Circuit correctly recognized that under this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), any damages claim belonged to the concert venues that were the direct victims of the alleged monopolization by Ticketmaster, not to consumers who had patronized Ticketmaster's electronic marketplace. In an invitation brief filed with this Court, the United States agreed that consumer damages claims were barred by *Illinois Brick*.[1]

The Ninth Circuit has now thrown that settled law into disarray, in an opinion that expressly sides with the *dissent* in the *Campos* case and declares that consumers can always sue whichever party performs the marketplace "function" of a "distributor" and *delivers* goods to them. Since Apple delivers apps (electronically) to consumers, the Ninth Circuit held that consumers can sue Apple—regardless of whether Apple has actually sold anything of its own to consumers, and regardless of whether the consumers are complaining about a charge imposed not on them in the first instance, but (as is undisputed) on third-party developers instead.

The Ninth Circuit's brand-new "distributor function" rule is the ultimate elevation of form over substance, and boldly indifferent to this Court's precedent and underlying objectives. In *Illinois Brick* and *Hanover Shoe* this Court recognized that because alleged overcharges often get "passed through" a distribution chain in highly uncertain ways, attempts to determine who actually bears the burden of the overcharge and in what proportion would greatly increase the cost, and decrease the effectiveness, of antitrust litigation. The Court chose to eliminate that problem by permitting one set of plaintiffs—the first parties to bear an alleged overcharge—to recover the *entire* overcharge, and disallowing virtually all

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[1] *See* Brief for the United States and the Federal Trade Commission as Amicus Curiae, *Campos v. Ticketmaster Corp.*, 525 U.S. 1102 (1999) (No. 98-127), https://www.justice.gov/sites/default/files/osg/briefs/1998/01/01/98-0127.ami.pet.inv.pdf ("*Campos* U.S. & FTC Br.").

damages suits by indirect victims. The guiding principles of the *Illinois Brick* doctrine are thus (a) avoiding the "famously difficult" determination of "[p]recisely what part of the overcharge will be borne by the direct purchaser, and what [portion of the overcharge] will be borne by the indirect purchaser," *Campos*, 140 F.3d at 1170, and (b) eliminating the threat of double recovery that would be posed if both direct and indirect purchasers could sue, *see Illinois Brick*, 431 U.S. at 730-31.

Yet identifying and avoiding pass-through dynamics plays no role in the Ninth Circuit's "distributor function" rule, and the Ninth Circuit expressly declared that it "makes no difference" whether developers can sue Apple to recover damages based on exactly the same commissions. Instead, the Ninth Circuit makes dispositive the delivery of goods—a concept that other circuits find irrelevant because it "does not affect the economic substance of the transaction." *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005) *cert. denied*, 547 U.S. 1163 (2006). Effectively, the Ninth Circuit has embraced Justice Brennan's dissent in *Illinois Brick,* prioritizing the availability of a consumer damages remedy over all other considerations, including this Court's express mandate to avoid duplicative remedies.

This acknowledged circuit conflict implicates questions of exceptional national importance because of the explosive growth of electronic commerce. The Ninth Circuit has approached this case as if all commerce fits the traditional resale distribution model, where the party who delivers goods is also the party who sets the price the consumer pays. But increasingly this is a world of electronic commerce based on electronic marketplaces that—like Apple's App Store—are structured around an agency or consignment sales model where the marketplace sponsor has nothing to do with the pricing of the goods it sells. StubHub, eBay, Google's Play marketplace, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace" are prominent examples of agency-based electronic marketplaces. The U.S. Census Bureau estimates that in 2016, e-commerce accounted for $389.9 billion in retail sales, and that number is steadily growing. *See* U.S. Dep't of Commerce, U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales: 1st Quarter 2017* at 2 (May 16, 2017), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. As a result, the Ninth Circuit's decision "is not some narrow ruling that will not extend far beyond the specific facts presented. The scope of the Ninth Circuit's decision has the potential to be vast." Anthony W. Swisher & Jody Boudreault, *Will Antitrust Class Action Involving Digital Store Dismantle 'Illinois Brick' Rule on Indirect Purchasers?*, The WLF Legal Pulse (Feb. 7, 2017), https://wlflegalpulse.com/2017/02/07/will-antitrust-class-action-involving-digital-store-dismantle-illinois-brick-rule-on-indirect-purchasers/.

The Ninth Circuit's "distributor function" test is blind to the economics of agency-based e-commerce marketplaces, and at odds with this Court's *Illinois Brick* doctrine. Certiorari is necessary to restore uniformity among the circuits, to make clear that the actual decisions of this Court are and remain the law, and to relieve the electronic commerce sector from a dangerous decision.

STATEMENT OF THE CASE

A. iPhone, Apps, and the App Store

In June 2007, Apple introduced the iPhone, the company's first cellular telephone product. Pet. App. 41a (¶ 2). The iPhone was a "novel," "revolutionary," and "breakthrough" product that "shifted the paradigm for smartphones, and . . . changed the entire cell phone manufacturing industry." *Id.* at 42a, 41a, 48a (¶¶ 7, 2, 26).

One of Apple's most substantial innovations associated with the iPhone involved add-on software applications, apps. Apple designed—from the ground up—an ecosystem for the use, development, sale, and distribution of apps. That ecosystem began with the initial design decision for the iPhone operating system, iOS, which will only download software applications obtained through the App Store, all of which have been vetted and approved by Apple. *Id.* at 49a (¶¶ 30-31).

The apps themselves, however, are made by thousands of registered iOS app developers who participate in the multi-billion dollar "apps economy." In March 2008, Apple released a software development kit ("SDK") for third-party developers to create approved apps for the iPhone. *Id.* at 41a, 51a-52a (¶¶ 2, 38-40). In July 2008, Apple launched the App Store, the electronic marketplace for developers to offer and distribute iOS apps to customers around the world. *Id.* at 51a (¶ 39). Apple structured the App Store around an agency sales model: developers set the price (if any) for an app, and Apple acts as the sales and delivery agent. Apple provides a variety of services to developers, including reviewing apps for safety and compatibility, hosting the App Store, and collecting the purchase price (if any) from consumers on the developer's behalf. Apple charges the developer a 30% commission on consumer apps purchases. *Id.* at 52a (¶ 41).[2]

Apple's innovations regarding the iPhone, iOS operating system and App Store created a dynamic new industry where none had existed before. Respondents acknowledge that as of 2012, just four years into its existence, the App Store "offer[ed] more than 850,000 apps" for consumers. *Id.* at 43a (¶ 9). That number is far greater today. Apple has publicly announced that as of January 2017, the App Store offered 2.2 million apps, with iOS app developers earning over $20 billion in 2016 alone.[3]

Respondents nevertheless claim that Apple has restricted competition in iPhone apps. The operative complaint alleges two claims under § 2 of the Sherman Act, for monopolization and attempted monopolization of a supposed "aftermarket" limited to distribution services for iPhone apps. *Id.* at 60a-62a (¶¶ 70-80). It principally contends that Apple violated the antitrust laws by adopting a "closed" ecosystem for iPhone apps, which allows Apple to charge an excessive 30% commission. *Id.* at 41a-43a, 45a, 51a-52a, 54a-55a (¶¶ 4, 6-8, 14, 40-41, 48, 50).

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[2] iOS developers are also required to pay Apple an annual $99 subscription fee. Pet. App. 51a (¶ 38). Furthermore, in recent years Apple's commissions have come primarily from "in-app purchases" (IAPs) rather than the initial sale of the app. IAPs are typically extra content for the native app that the developer offers to users, either by subscription or *a la carte*.

[3] *See* Press Release, *App Store shatters records on New Year's Day* (Jan. 5, 2017), https://www.apple.com/newsroom/2017/01/app-store-shatters-records-on-new-years-day/.

B. District Court Proceedings

As the Ninth Circuit notes, the procedural history of this case is complex. It originated as the second of three putative class actions filed by the same counsel alleging that Apple's introduction of the iPhone violated antitrust laws in multiple ways. Numerous twists and turns later, this case focuses exclusively on Respondents' allegations about the App Store.

Apple moved to dismiss the complaint under *Illinois Brick*, arguing that Respondents had not alleged, and could not allege, anything other than a pass-through injury. While that is in fact undeniable, earlier versions of Respondents' complaint had been studiously vague about whether Apple adds a 30% charge *on top* of the app price set by the developer, or instead (as is true) Apple charges a 30% commission *to the developer*, based on the price that the developer sets and the consumer pays. The district court thus pressed Respondents to clarify those allegations. The final, operative complaint alleges that (i) "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple a share of third party's sales proceeds," (ii) "the full purchase price[] includ[es] Apple's 30% commission," which is paid directly to Apple, and (iii) "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." Pet. App. 49a-50a, 52a (¶¶ 32, 41).

The district court found that "the [complaint] is fairly read to complain about a fee created by agreement and borne by the developers to pay Apple 30% from their own proceeds—an amount which is passed-on to the consumers as part of their purchase price." *Id.* at 36a. The court correctly recognized that therefore the harm alleged by Respondents "is an indirect effect resulting from the software developers' own costs," *id.* at 37a, and dismissed the complaint for lack of antitrust standing under *Illinois Brick*.

C. The Ninth Circuit's Decision

The Ninth Circuit reversed. Pet. App. 22a.[4]

The Ninth Circuit's decision contains no discussion of whether Respondents' damages claim presents pass-through issues—the *sine qua non* of any *Illinois Brick* analysis. Instead, the panel reasoned 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." *Id.* at 20a-21a. The panel held that there is a "fundamental distinction between a manufacturer or producer, on the one hand, and a distributor on the other," that the "distributor" is the party "who 'supplies the product directly to' plaintiffs," and that consumers always have standing to sue a "distributor," no matter what. *Id.* at 19a-21a (citation omitted). Under this "bright line," approach, the panel reasoned that because Apple delivers apps to the consumer, it acts as a "distributor," and therefore consumers are direct purchasers of apps from Apple. *Id.* at 21a.

The Ninth Circuit explained in some detail what, in its view, *did not* matter. The fact that "Apple does not

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[4] Preliminarily, the Ninth Circuit affirmed the district court's decision that it had discretion to consider Apple's renewed *Illinois Brick* motion. Respondents had argued that the motion was improper under Federal Rule of Civil Procedure 12(g) because Apple had not raised *Illinois Brick* in prior Rule 12 motions. The district court held that Respondents' position would serve only to delay the litigation and multiply costs, in violation of the principles stated in Federal Rule of Civil Procedure 1.

take ownership of the apps and then sell them to buyers after adding a markup" was unimportant because "the distinction between a markup and a [sales] commission is immaterial. . . . The key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function." *Id.* at 20a-21a.

In a similar vein, the Ninth Circuit emphasized that it "d[id] [not] rest [its] analysis on who determines the ultimate price paid by the buyer of an iPhone app." *Id.* at 21a. Indeed, the Ninth Circuit's indifference to that issue led it to be careless about the record evidence regarding how apps prices are set. It stated correctly that "the price is determined as a practical matter by the app developer," but incorrectly that "Apple's thirty percent commission is added automatically" to the price set by the developer. *Id.* Although diametrically opposed, *either* fact would suffice for the Ninth Circuit's analysis because the "distributor function" rule does not care how prices are set.

The Ninth Circuit also held that "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Id.* at 20a. This was despite the panel's recognition that an affirmative answer to that question "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit against Apple" for the same commissions Respondents challenge here. *Id.* The panel thus expressly opened the door to duplicative recoveries by different plaintiff groups.

The Ninth Circuit acknowledged that it was creating a circuit split with at least the Eighth Circuit's decision in *Campos*, by endorsing the dissent's reasoning in that case. *See id.* at 19a ("We disagree with the majority's analysis in *Ticketmaster*.").

Apple sought rehearing *en banc*, but the court of appeals denied the petition without opinion. *Id.* at 38a-39a

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision merits review, first, because of the acknowledged split with the Eighth Circuit's *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) decision, which is even broader than the Ninth Circuit recognized.

Campos considered an electronic marketplace structured around an agency sales model, much like the App Store. The Eighth Circuit approached the *Illinois Brick* issues properly, rejecting any formalistic focus on distribution—including the fact that Ticketmaster transacted with, and delivered tickets to, consumers. More important was that the consumer plaintiffs were complaining about the monopolization of a service (ticket distribution services) that Ticketmaster provides not to the plaintiff ticket buyers, but *to concert venues* (much as Apple provides distribution services to app developers). The Eighth Circuit therefore reasoned correctly that the plaintiffs' injury had to be a derivative one, undoubtedly presented pass-through issues, and therefore was barred by *Illinois Brick*.

Asked by this Court for its views, the Solicitor General opined that "the court of appeals' holding that the direct purchaser rule of *Illinois Brick* . . . precludes petitioners from recovering damages . . . based on

Ticketmaster's alleged overcharges is both correct and conventional." *Campos* U.S. & FTC Br. 5-6.

The Ninth Circuit's contrary approach cannot be reconciled with this Court's precedents in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The whole point of those decisions was to identify the one plaintiff (or class of plaintiffs) who paid the disputed charge directly and to give that plaintiff exclusive standing to sue for the entire overcharge. Any claims that would depend on allegations of pass-through harm are barred, in order to avoid complex factual disputes about apportionment and duplicative recoveries. The dissenters in *Illinois Brick* would have approached these issues differently, based on their view that Congress, in enacting Section 4 of the Clayton Act, 15 U.S.C. § 15, "intended to protect individual consumers who purchase through middlemen." *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting).[5] But the *Illinois Brick* majority adopted a different interpretation of Section 4, and the Court in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990), chose to "stand by [that] interpretation." The Ninth Circuit does not have the authority to change that.

By focusing only on whether the defendant delivers or "distributes" goods to the plaintiff, the Ninth Circuit's new standard divorces the *Illinois Brick* doctrine from the objectives that this Court identified

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[5] The author of the panel opinion made clear at the opening of oral argument that he thinks "Justice Brennan got it right in *Illinois Brick*." CA9 Oral Argument at 4:20, *Pepper v. Apple Inc.*, No. 14-15000 (Feb. 10, 2016), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009059.

as critical. Who *delivers goods* is not even germane to this Court's *Illinois Brick* analysis, as the Third Circuit correctly held in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373 (3d Cir. 2005), *cert. denied*, 547 U.S. 1163 (2006). There is not a word in *Hannover Shoe*, *Illinois Brick*, or *UtiliCorp* suggesting that this Court thought that the right way to approach an *Illinois Brick* issue is to force the facts into a manufacturer-distributor dichotomy, let alone emphasize the "distributor's" role in delivering goods. In contrast, the focus on pass-through dynamics—"the intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits"—is pervasive. *Illinois Brick*, 431 U.S. at 744. The only thing that can be said with certainty about the Ninth Circuit's approach is that it will always permit the ultimate consumer to sue someone—the outcome favored by the *Illinois Brick* dissent but rejected by the majority. The Ninth Circuit would not even rule out duplicative litigation by app developers to recover *the exact same commissions* from Apple, a clear repudiation of the policies against double recovery that drive *Illinois Brick*.

The Ninth Circuit's decision implicates issues of exceptional national importance. This is not a one-off case that can be dismissed as an outlier. Along with *Campos*, it is the most important case to have come along testing the application of *Illinois Brick* to electronic marketplaces. Those marketplaces serve hundreds of billions of dollars in commerce annually, and they are growing fast. The Ninth Circuit's new test essentially treats operators of electronic marketplaces as if they were the owners and direct sellers of every item that passes through their marketplaces, and as if a commission that *sellers* have agreed to pay is actually charged to and paid by *buyers*. Worse, it appears to allow both buyers and sellers to sue, and potentially to recover twice for the exact same charges. That is a punitive and unwise way for antitrust law to treat some of our most vibrant and important new industries. And since the technology companies operating these marketplaces are disproportionately located in the Ninth Circuit, and in any event do a tremendous volume of business there, class actions of this nature will be brought in the Ninth Circuit. Deferring review in hopes of further percolation therefore would be inappropriate. This Court should step in now.

I. THE NINTH CIRCUIT'S "DISTRIBUTOR FUNCTION" RULE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Ninth Circuit acknowledged that its decision conflicts with the Eighth Circuit's decision in *Campos*. That conflict—broader than the Ninth Circuit acknowledged—merits review.

Campos is the leading case applying *Illinois Brick* to an agency sales arrangement like the App Store, and an example of a court looking beyond superficialities of form and deep into the substance of a plaintiff's claim to determine whether its damage theory implicated pass-through concerns. Buyers of concert tickets sued Ticketmaster for allegedly monopolizing the market for ticket distribution services for large-scale popular music events. *Campos*, 140 F.3d at 1168-69. They sought to recover damages based on allegedly supracompetitive ticket service fees they paid "directly to Ticketmaster." *Id.* at 1171. The allegedly monopolized services, however, were purchased by concert venues, not plaintiffs. Ticketmaster was transacting business with the consumer plaintiffs because it had entered into venue agreements whereby the venues granted to Ticketmaster a right "to sell [tickets] as Principal's agent." *Campos* U.S. & FTC Br. 9. Indeed, those agreements set the "service fees" and "handling fees" that ticket buyers paid. Ticketmaster's actual compensation for its distribution services was set by contract with the venues. *Campos*, 140 F.3d at 1169.

The Eighth Circuit held that because the ticketing fee was a product of and reflected Ticketmaster's alleged upstream monopoly power over concert venues—the only purchasers of the monopolized service—the directly injured parties were the venues rather than the consumers. First the court held that the "billing practice[]," that Ticketmaster transacted with plaintiffs and collected a distinct service fee on each sale, was not determinative. *Id.* at 1171 ("[E]ven if a separate charge for gasoline were assessed [to a taxi passenger], the taxi passenger still could not be considered a direct purchaser [of gasoline] in any sense." (first alteration added) (quoting *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 n.17 (3d Cir.), *cert. denied*, 519 U.S. 825 (1996))). What mattered more was the fact that the venues plainly were the first and most direct victims of the allegedly illegal conduct, since they alone purchased the allegedly monopolized service. Ticket buyers were indirect purchasers because, while they may indeed have paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [the venue] was unable to avoid that overcharge." *Id.* at 1170.

As noted earlier, the Solicitor General reviewed the *Campos* decision at this Court's invitation, and agreed it was correct:

> It would be contrary to the rationale of *Illinois Brick* to allow ticket buyers to recover damages attributable to Ticketmaster's alleged monopoly overcharges merely because of the particular nature of the input that Ticketmaster supplies to the venues (*i.e.*, Ticketmaster's services as the venues' agent in dealing with ticket buyers). Clearly, the venues could also assert claims for overcharge damages as direct purchasers of Ticketmaster's services. If ticket buyers could recover damages for those same overcharges, Ticketmaster would face the risk of duplicative damages liability, a risk that this Court "d[id] not find * * * acceptable" in *Illinois Brick*[,] 431 U.S. at 731 n.11. Or, alternatively, the courts would have to engage in "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," *id.* at 737, the very exercise that the direct purchaser rule of *Illinois Brick* was designed to avoid.

Campos U.S. & FTC Br. 12 (third alteration added).

The United States also directly addressed the proper treatment of agency selling arrangements like the App Store. It explained that because Ticketmaster was acting "as the venue's 'agent' for ticket distribution services," consumers were direct purchasers *from the venues* rather than from Ticketmaster, "even though ticket buyers . . . deal with Ticketmaster, and not with the venue, when they purchase tickets." *Id.* at 10; *see also id.* at 14 (explaining that *Campos* correctly applies *Illinois Brick* principles to "the unusual case, such as this one, in which the monopolist, as agent for the direct buyer, deals with the indirect buyer").

Apple would clearly prevail under *Campos*. Like Ticketmaster, it is an agent selling goods for principals, accused of monopolizing a distribution service sold to the principals. Consumers in both cases are "downstream," buying the principals' goods at allegedly inflated prices. If anything, this is an easier case than *Campos* because tens of thousands of app developers set apps prices, creating unimaginably complicated pass-through issues. Yet the Ninth Circuit's "distributor function" rule ignores those issues altogether.

No Circuit other than the Ninth uses this "distributor function" rule; the only out-of-circuit citation by the Ninth Circuit was to the *Campos* dissent. And in *Dentsply*, the Third Circuit specifically rejected the proposition that who delivers goods prevails over who sells them. 424 F.3d at 372-73. In that case, various groups of dental labs tried to sue Dentsply for monopolization, even though artificial teeth are typically sold by manufacturers (such as Dentsply) to middle-man dealers, which then add a markup and resell the teeth to dental labs. *Id.* at 366. One group of labs argued that at least when Dentsply drop-shipped the teeth straight to the labs, the labs "were direct purchasers not subject to *Illinois Brick*." *Id.* at 372. The Ninth Circuit, following the principles of the decision below, would have agreed: since Dentsply handled the marketplace "function" of delivering the goods to the labs, the labs were direct purchasers. But the Third Circuit gave that argument short shrift. It sensibly recognized that the delivery of the goods by the manufacturer was only a "formal difference" that "d[id] not affect the economic substance of the transaction." *Id.* at 373. The economic substance was that the labs were buying from the dealers, paying the dealers "their usual price," which reflected "the dealers tak[ing] their profit." *Id.*

By crafting a new "distributor function" approach to *Illinois Brick* that elevates form over substance, the Ninth Circuit has created a clear and acknowledged circuit split that should be resolved by this Court.

II. THE NINTH CIRCUIT'S DECISION PERMITS PASS-THROUGH DAMAGES AND DUPLICATIVE RECOVERIES, IN SQUARE CONFLICT WITH THIS COURT'S DECISIONS

Certiorari is also merited on the basis of a square conflict with this Court's decisions, and a resulting multi-layered conflict with how other circuits approach *Illinois Brick* generally. In short, the Ninth Circuit has ignored the fundamental policies underlying *Illinois Brick*—avoiding pass-through theories of harm and duplicative recoveries—in favor of a formalistic distinction that finds no support in this Court's or other circuit courts' decisions.

A. The *Illinois Brick* Doctrine Does Not Permit Pass-Through Theories Of Harm

The *Illinois Brick* doctrine is about one recurring problem in antitrust litigation: what to do when the effects of anticompetitive conduct get "passed-through" a distribution chain. *Hanover Shoe* and *Illinois Brick* successively dealt with the two sides of the pass-through problem, and together ensure that courts and juries hearing antitrust cases never need to evaluate whether some or all of an alleged overcharge was, or was not, passed through to subsequent purchasers.

In *Hanover Shoe*, this Court held that an antitrust defendant could not lessen its exposure to damages with a pass-through *defense*, *i.e.*, it could not say that the plaintiff suffered no loss or less loss because it had passed on the overcharge, in whole or in part, to its own customers. 392 U.S. at 489, 492. Rather, the Court held, for purposes of Section 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff that purchased goods or services at an inflated price as a result of anticompetitive conduct by a supplier has suffered damage in the *full amount* of the overcharge. *Hanover Shoe*, 392 U.S. at 487-91. Allowing even a limited pass-on defense, this Court recognized, would inevitably lead to "complicated proceedings involving massive evidence and complicated theories" aimed at economic incidence and pass-through issues that are notoriously difficult to unravel, seriously threatening the vitality and practicality of antitrust enforcement. *Id.* at 493.

In *Illinois Brick*, this Court addressed the other side of the same coin—whether an indirect purchaser, who bears an overcharge only to the extent that it was passed on by a direct purchaser, can sue for damages.

431 U.S. at 724. The Court held that Section 4 of the Clayton Act precludes the use of pass-through theories of harm by plaintiffs as well. *Id.* at 735. In this Court's view, "the antitrust laws will be more effectively enforced by 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. This Court carefully considered an asymmetric outcome whereby plaintiffs could pursue pass-through theories (even if defendants could not under *Hanover Shoe*), but rejected that approach because of the "serious risk of multiple liability for defendants" that would result. *Id.* at 730. The holding of *Illinois Brick* is that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Id.* at 729.

Justice Brennan dissented, arguing essentially as a matter of statutory construction that Congress intended that consumers would always have a damages claim. In particular, the dissent divined, from recent legislation allowing *parens patriae* actions by States on behalf of their citizens, that Congress must have favored consumer class actions generally, irrespective of whether they presented pass-through issues. *Id.* at 765 n.24 (Brennan, J., dissenting). The majority rejected this argument. *Id.* at 733 n.14. The dissent also argued that apportioning an overcharge throughout a distribution chain is no more difficult than other challenges in antitrust litigation. *See id.* at 758-59 & n.14 (Brennan, J., dissenting). The majority disagreed with that too, adding: "In any event, as we understand the dissenters' argument, it reduces to the proposition that, because antitrust cases are already complicated, there is little harm in making them more so. We disagree." *Id.* at 743 n.27.

The Court reaffirmed its *Illinois Brick* analysis in *UtiliCorp*, which addressed who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. Two states, suing as *parens patriae* on behalf of consumers and state agencies that purchased natural gas from the defendant utility, argued that indirect purchaser suits should be allowed "in cases involving regulated public utilities that pass on 100 percent of their costs to their customers." *Id.* at 208. The Court disagreed, reasoning that there was a pass-through issue even on these facts, and that it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick* simply because some cases are easier than others. *Id.* at 217. "Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.*

Most other circuits have recognized, repeatedly and correctly, that antitrust standing under *Illinois Brick* turns on whether the plaintiff's particular claim presents a theory of pass-through harm. The Fifth Circuit has explained that "[w]hat is critical" to an *Illinois Brick* analysis is "whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory." *Pony Creek Cattle Co. v. Great Atl. & Pac. Tea Co. (In re Beef Indus. Antitrust Litig.)*, 600 F.2d 1148, 1160 (5th Cir. 1979). The Sixth Circuit has explained that if a plaintiff's theory of harm would require it to "prove what portion of the [alleged] illegal overcharge" was "passed on in the form of a higher price" for what he purchased, his claim is barred. *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). The Fourth Circuit's decision in *Dickson v. Microsoft Corp.* holds that whenever "the court would be required to determine the over-charge, if any, for [the monopolist's product] that was passed on to consumers," *Illinois Brick* bars the claim. 309 F.3d 193, 215 (4th Cir. 2002). The leading antitrust treatise urges antitrust courts to focus on this economic substance, explaining: "When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects." 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007).

Respondents' damages claim against Apple clearly depends on a theory of pass-through harm that would require the trier of fact to tackle exactly the questions that *Illinois Brick* placed off-limits. Respondents complain of a 30% commission that Apple charges developers, and claim that as a result of that commission the prices of apps are higher than what they otherwise would be. *See* Pet. App. 43a, 52a (¶¶ 8, 41). The district court found, Respondents effectively concede,[6] and it is undeniably the case that Apple's 30% commission will impact consumers only to the

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[6] *See* CA9 Plaintiffs-Appellants Opening Br. 35 n.10 (acknowledging that the commission Apple imposes on third-party developers causes those developers to "mark-up the price [of their apps]").

extent that it has some effect on the prices third-party developers choose for the apps they sell through the App Store. Yet *how* it will affect the pricing decisions of developers—and therefore how apps buyers are affected—is precisely the question that *Illinois Brick* did not want antitrust courts to entertain. *See* 431 U.S. at 732 ("[T]he attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble damages proceedings . . . ."); *see also Hanover Shoe*, 392 U.S. at 493 (the Court does not allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue).

The pass-through issues presented here are in fact exceptionally difficult. One cannot just assume that if Apple's commission did not exist, developers would want to price every one of the millions of apps in the App Store exactly 30% lower. Under the relevant "tax incidence" analysis, economically rational app developers would consider the particular supply and demand conditions *for each app*, and choose prices accordingly.[7] A pass-through analysis would therefore

[7] In *Illinois Brick*, the Court noted the basic principle of "tax incidence" analysis. *See* 431 U.S. at 741 ("*If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product." (emphasis added)). The Court also noted how hard this principle is to implement in practice, highlighting "a serious problem of measuring the relevant elasticities." *Id.* at 742. Here, where each App will have a unique cost structure and unique

require one to estimate but-for pricing decisions app-by-app countless times.[8]

Contrast that complexity with the zero-tolerance approach to pass-through that this Court adopted in *UtiliCorp*. In *UtiliCorp* there was a credible argument that regulated utilities *always* pass on 100% of natural gas price increases to consumers, who *necessarily* pay the same regulated energy prices. This Court nevertheless disallowed *parens patriae* actions on behalf of consumers. 497 U.S. at 208-12. The Court wrote: "As we have stated before, '[t]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.'" *Id.* at 211 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)). Therefore, acknowledging that "[t]he rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases," *id.* at 216, the Court found the seemingly simple pass-through issue disqualifying, *see id.* at 210-11.

Despite these facts and this Court's doctrine, the Ninth Circuit's decision *fails even to discuss whether Respondents' damages claims would implicate pass-through dynamics*. That had been the district court's focus, and it found that the harm alleged by Respondents "is an indirect effect resulting from the

elasticities of supply and demand, the complexities are as daunting as they possibly could be.

[8] It is actually much worse than that, since as noted earlier iOS developers today make most of their money from in-app purchases. Accordingly, true but-for prices would be a combination of the up-front app price plus in-app purchases. And as if that is not enough, developers usually make a version of their iOS apps for other platforms, like Android, and generally strive to adopt the same pricing structure across platforms.

software developers' own costs." But the Ninth Circuit's sole focus on "functions" was so extreme that it failed to address this finding or any other aspect of the pass-through issue. This willful indifference to the pass-through problem may be its strongest repudiation of this Court's doctrine.

The bottom line is that if Respondents have a damages action against Apple, it necessarily will require the trier of fact to consider whether, and to what extent, Apple's commission was passed through in the prices that developers selected for the particular apps that Respondents purchased. That is precisely the enterprise that this Court placed off-limits in *Illinois Brick* and *Hanover Shoe*, and that other circuits consistently recognize as the most important consideration in any *Illinois Brick* analysis.

B. The *Illinois Brick* Doctrine Does Not Permit Duplicative Recoveries

Hanover Shoe and *Illinois Brick* also work together to ensure that suits by indirect purchasers do not lead to duplicative recoveries. *See Illinois Brick*, 431 U.S. at 731 ("[W]e are unwilling to 'open the door to duplicative recoveries' under § 4." (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)); *see also UtiliCorp*, 497 U.S. at 208, 212, 214.

The Ninth Circuit, however, was openly indifferent to the prospect of duplicative recoveries here. It held that "it makes no difference to our analysis" "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick*," even if that "would necessarily imply that the developers, as direct purchasers of those services, could bring an antitrust suit" themselves and seek Apple's 30% commission as damages. Pet. App. 20a.

To any antitrust lawyer that has been practicing for the past 40 years, this is nothing short of heresy. It is fundamental that the *Illinois Brick* doctrine seeks to identify the *one* set of plaintiffs in the chain of distribution who can sue for the *entire* overcharge, to the exclusion of every other possible plaintiff. As the Eleventh Circuit has explained, "the direct purchaser rule only permits the first purchaser to recover damages . . . for any unlawful overcharge" in order to "eliminate[] the possibility that direct and indirect purchasers could seek duplicative recoveries against the antitrust violator." *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 763 F.3d 1280, 1285 (11th Cir. 2014). The Third Circuit has similarly recognized that "the scope of *Illinois Brick*'s rule barring treble damages actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery." *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). Other circuits have likewise applied *Illinois Brick* to deny standing to plaintiffs whose claims would give rise to potential duplicative recoveries. *See, e.g.*, *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012) (reasoning that in addition to a retail purchaser, "[t]he fact that [an electric utility] would be a proper plaintiff to sue [a wholesale electricity producer] for the same conduct implicates *Illinois Brick*'s concerns about duplicative recovery"), *cert. denied*, 133 S. Ct. 1998 (2013); *Cohen v. Gen. Motors Corp. (In re New Motor Vehicles Canadian Export Antitrust Litig.)*, 533 F.3d 1, 5 (1st Cir. 2008) (holding that permitting car lessees to sue car manufacturers for conspiring to prevent lower priced Canadian cars from entering the U.S. market would "risk duplicative recovery" as car dealers could also "initiat[e] their own suit"); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (recognizing that under *Illinois Brick* "multiple recovery should be avoided" and thus "allowance of indirect purchaser suits would compel apportionment of recovery"), *cert. denied*, 485 U.S. 961 (1988).

How, then, could a clear prospect of a duplicative recovery not matter to an *Illinois Brick* analysis? The only possible answer is, *if one silently applies the Illinois Brick dissent.* Justice Brennan argued that the risk of duplicative recovery would be relatively small and manageable, and therefore should not stand in the way of consumer overcharge claims. *See Illinois Brick*, 431 U.S. at 761-65 (Brennan, J., dissenting). Yet this Court firmly disagreed, *id.* at 731-32, and *UtiliCorp* reaffirmed that "[t]he *Illinois Brick* rule also serves to eliminate multiple recoveries," 497 U.S. at 212.

Certiorari is necessary to bring the Ninth Circuit back into step with the clear command of this Court's precedents, and the strong consensus of the other circuits. Indeed, the error in saying that it "makes no difference" if two sets of plaintiffs at two different market levels have standing to sue for the same damages is stark enough to warrant summary reversal.

C. The Ninth Circuit's "Distributor Function" Rule Is Unrelated To The Basis For The *Illinois Brick* Doctrine

In lieu of identifying pass-through damages and the potential for duplicative recoveries, the Ninth Circuit would focus on "functions" and delivery. These concepts, however, find no support in this Court's precedents. There is *nothing* in *Hannover Shoe*, *Illinois Brick*, or *UtiliCorp* that so much as hints at this approach.

The Ninth Circuit tried to justify its new rule by pointing out that in this Court's leading cases "distributors" were held to be direct purchasers from "manufacturers," and end consumers were held to be direct purchasers from distributors or retailers. That is true, and of course it is often the case that distributors are the direct purchasers from manufacturers, and consumers are the direct purchasers from distributors. The Ninth Circuit has nevertheless confused the legal standard with the particular factual setting to which this Court had occasion to apply that standard. Respectfully, the legal and economic basis for this Court's doctrine is perfectly obvious, and it has nothing to do with shoehorning all commerce into some manufacturer-distributor dichotomy.

The manufacturer-distributor dichotomy does not even fit this case, which concerns agency selling. The reason that "distributors" are usually amenable to suits by consumers is because distributors ordinarily buy from manufacturers and then resell to consumers at prices the distributor sets. Antitrust misconduct by the distributor does not present a pass-through problem in such circumstances, because there is no intermediary between the distributor and the consumer that might absorb some or all of that distributor-established overcharge. In agency selling, however, the agent sets only the commission price charged to its principals (for acting as their agent), not the prices consumers pay for the principals' goods. In the present case, the prices of iOS apps are set entirely by third-party developers, who know with certainty that the prices they set will be the prices that consumers pay. It therefore makes no sense to liken the agent to a price-setting distributor, when agents like Apple have no price-setting role whatever.

The Ninth Circuit's novel focus on marketplace "functions" and who delivers goods breaks the connection between the *Illinois Brick* rule and the purpose it was designed to serve—keeping antitrust courts out of the business of adjudicating pass-through issues.

III. THE NINTH CIRCUIT'S DECISION PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW BY THIS COURT

The Ninth Circuit's decision destabilizes the law on questions of exceptional importance, particularly to participants in electronic commerce. The Ninth Circuit was oblivious to the ramifications of the agency model by which Apple operates the App Store. Yet the same or similar agency or consignment sales models are increasingly prevalent in online electronic commerce and facilitate billions of dollars in transactions annually. *See* Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, 62 Mgmt. Sci. 2259, 2259-60, 2275 (2016). In addition to Apple's App Store, a few other notable examples of this model are Google's Play (originally "Android") marketplace, StubHub's ticket resale site, eBay's hugely popular auction site, Amazon's "Amazon Marketplace" business, and Facebook's "Marketplace."

The "key distinction between the reselling and agency selling formats is who sets the retail prices—in agency selling the retail prices are decided by the manufacturer, whereas in reselling they are decided by the e-tailer." *Id.* at 2259-60. As the United States recognized in *Campos*, that difference has crucial consequences for an appropriate application of *Illinois Brick* standing analysis. In an agency sales model the manufacturer or content owner's costs, demand function, incentives, and competitive constraints determine prices product-by-product. *Id.* at 2259, 2264-76. A claim that the commission paid by developers to the platform sponsor ultimately harmed consumers therefore requires exactly the sort of "famously difficult" pass through analysis that *Illinois Brick* forbids.

Nonetheless, essentially every company that sponsors an electronic marketplace "delivers" some goods—the function that the Ninth Circuit found dispositive. StubHub delivers tickets—as the agent of its customer (the ticket seller). Google will deliver a copy of Angry Birds™—as the agent of the developer. And of course Apple delivers apps—as the agent of the developer. Under the Ninth Circuit's decision, every one of these online platform providers may be sued by consumers so long as they have fulfilled the customer's order, even for practices that in the first instance affect developers, content owners, or other upstream entities. All of the considerations that are critical under *Illinois Brick* and the direct purchaser doctrine—pricing dynamics; pass-through dynamics; and even a clear potential for duplicative lawsuits and double-recovery—are irrelevant. That holding is deeply threatening to electronic commerce (as well as to agents and shipping companies in traditional "brick and mortar" commerce) and its effect is especially pernicious given the concentration of electronic commerce companies in the Ninth Circuit. Indeed, after this decision it seems unlikely that an antitrust class action against the major ecommerce companies would be filed anywhere *other* than the Ninth Circuit.

The Ninth Circuit's decision in this case reopens a Pandora's Box that this Court carefully closed over 40 years ago. It forthrightly conflicts with the Eighth Circuit in *Campos*, and to the considered views of the United States expressed to this Court in *Campos*. And it throws into disarray principles that have long been settled, nationwide, thereby leading once again to complicated judicial proceedings, a lessening of practical and robust antitrust enforcement, and arbitrary and punitive consequences for some of our most important and vibrant emerging industries. Such a profoundly impactful decision should not be left to stand without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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