

APPLE V. PEPPER: APPLYING THE INDIRECT PURCHASER RULE TO ONLINE PLATFORMS

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INTRODUCTION

Long-established antitrust precedent bars customers who buy a firm’s product through intermediaries from suing that firm for antitrust damages.¹ Such a policy is meant to incentivize the “direct purchasers,” who can recover full damages, to sue antitrust-violating firms² and to encourage judicial efficiency in damage calculations.³ In *Apple Inc. v. Pepper*,⁴ this “indirect purchaser rule” is brought into the smartphone age in a price-fixing dispute between technology giant Apple and iPhone users.⁵ This case will determine whether iPhone users buy smartphone applications (hereinafter “apps”) directly from Apple through the App Store, or if Apple is merely an intermediary seller-agent of app developers.⁶ If the Court determines the latter, iPhone users will have no standing to sue, practically blocking any consumer from suing Apple for antitrust claims related to app distribution.⁷

The indirect purchaser rule bars customers from suing antitrust-violating firms unless those customers buy products directly from the firm, even when those customers were charged supracompetitive,

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1. Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

2. *Id.* at 746.

3. *Id.*

4. *Apple Inc. v. Pepper*, 138 S. Ct. 2647 (June 18, 2018) (No. 17-204) (granting writ of certiorari).

5. Amy Howe, *Argument Analysis: Justices Poised to Allow Antitrust Dispute Against Apple Over Apps to Go Forward*, SCOTUSBLOG (Nov. 26, 2018, 3:51 PM), <https://www.scotusblog.com/2018/11/argument-analysis-justices-poised-to-allow-antitrust-dispute-against-apple-over-apps-to-go-forward/>.

6. *Id.*

7. *Id.*

illegal prices that resulted from the firm’s conduct.⁸ Customers who buy a firm’s products through middlemen do not have statutory standing to sue and cannot recover antitrust damages.⁹ Even when direct purchasers of the antitrust-violating firm “pass-on” the supracompetitive costs downstream to their own customers, those downstream customers cannot sue the original, antitrust-violating firm for damages. The indirect purchaser rule is not sympathetic to whether those downstream customers consequentially paid supracompetitive prices and were themselves harmed.¹⁰

The indirect purchaser rule is simple but rigid: It prevents downstream victims of anticompetitive conduct from suing. The rule, quintessentially “bright-line,” helps prevent duplicative liability for antitrust defendants and obviates the need to perform complex calculations to allocate damages down different levels of a supply chain.¹¹ But it also categorically bars any party classified as an indirect purchaser from bringing suit even if that party suffered significant anticompetitive harm.¹² The rule allows direct purchasers to recover full antitrust damages, even when the direct purchasers pass-on illegal overcharges to their own customers, the “indirect purchasers,” which incentivizes private antitrust enforcement by direct purchasers.¹³ A buyer of a product in an antitrust suit is either a direct purchaser or an indirect purchaser; the former has standing to sue while the latter does not.¹⁴

The indirect purchaser rule is generally considered settled precedent. How the rule should apply to online platforms, however, differs between circuit courts. Specifically, courts have split on the question of how to determine which users of online marketplaces are direct purchasers and which users are indirect purchasers.¹⁵ For example, the Eighth Circuit held that individuals who buy concert

8. *Ill. Brick*, 431 U.S. at 728–29.

9. *Id.*

10. *In re Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *3 (N.D. Cal. Dec. 2, 2013), *rev’d* 846 F.3d 313 (9th Cir. 2017), *argued* *Apple Inc. v. Pepper*, No. 17-204 (2017) (hereinafter “*In re Apple I*”) (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012)).

11. *Ill. Brick*, 431 U.S. at 746.

12. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 323 (9th Cir. 2017), *argued* *Apple Inc. v. Pepper*, No. 17-204 (2017) (hereinafter “*In re Apple II*”) (calling the *Illinois Brick* rule “bright line” and applying it to determine if the plaintiff had standing to sue).

13. *Ill. Brick*, 431 U.S. at 746.

14. *See In re Apple II*, 846 F.3d at 323.

15. *See, e.g., id.* (disagreeing with the Eighth Circuit’s analysis of how to define a direct purchaser).

tickets from intermediary ticket sellers like Ticketmaster are indirect purchasers for antitrust purposes, even though these individuals buy the tickets directly from the intermediary.¹⁶ In *Campos v. Ticketmaster*, the court concluded that the product in question (tickets) and the anticompetitive transaction in question involved only the intermediary and the original ticket-selling venue, not individual customers.¹⁷ The Ninth Circuit, on the other hand, took a more literal approach that allows plaintiffs to sue intermediaries; it held that individuals who buy apps through platforms, such as Apple's App Store, were direct purchasers from the platform simply because the individuals bought the product directly from the platform.¹⁸ Which factors go into calculating product prices or the formal structure of who pays whom were not important to the Ninth Circuit's analysis. Instead, what mattered was the basic distribution chain and how the product changed hands.¹⁹

In *Apple Inc. v. Pepper*, the Supreme Court has an opportunity to resolve the circuit split, and the Court should do so by adopting the Ninth Circuit's application of the indirect purchaser rule. Rejecting the Ninth Circuit's approach would bar consumers from suing technology platforms for antitrust damages, regardless of whether the consumers' claims were likely to win in litigation. Adopting the Eighth Circuit's competing approach would bar consumers from suing online platforms for potentially legitimate recovery and place a great burden on the government as the lone plaintiff available to challenge anticompetitive practices by technology giants.

In this case, a class of iPhone app buyers sued Apple for monopolizing the iPhone app market.²⁰ Apple iPhones make up about forty-four percent of the smartphone market, or 110 million iPhones

16. See *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998) (“[T]icket buyers only buy Ticketmaster’s services because concert venues have been required to buy those services first. As we explained above, such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs’ suit for damages.”).

17. *Id.*

18. *In re Apple II*, 846 F.3d at 324.

19. See *id.* (“[W]e rest our analysis, as compelled by *Hanover Shoe*, *Illinois Brick*, *UtiliCorp*, and *Delaware Valley*, on the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other. Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.”).

20. *Id.* at 316.

owned.²¹ Users who want to download apps for their devices must do so through the Apple App Store, regardless of whether the given app was made by Apple or a third-party developer.²² The App Store is controlled exclusively by Apple,²³ which takes a thirty percent commission on all paid app downloads.²⁴ In total, about two million apps are available for download through the App Store.²⁵

At issue on appeal to the Supreme Court are not the merits of the antitrust claims, but whether the app purchasers have standing to sue at all. Phrased differently, the Court must decide whether the app purchasers are direct purchasers of apps from Apple. If so, the plaintiff app purchasers can proceed in bringing an antitrust suit against Apple. Alternatively, the Court could decide that the consumer app purchasers are merely indirect purchasers of Apple, who actually buy apps directly from third-party software developers. In that case, Apple would be classified as a passive middleman, immune to antitrust suit by app purchasers at all.²⁶ The Court should take the former approach and affirm the decision of the Ninth Circuit holding that consumer app purchasers have standing to sue Apple's App Store. Otherwise, consumers will be unable to recover for potentially legitimate antitrust injuries, and Apple's conduct will be unlikely to be challenged by another party.

21. First, 77% of Americans own a smartphone. PEW RESEARCH CENTER, MOBILE FACT SHEET, <http://www.pewinternet.org/fact-sheet/mobile/> (last visited Feb. 19, 2019). Second, the United States population is 327 million. UNITED STATES CENSUS BUREAU, QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/US/IPE120217> (last visited Feb. 19, 2019) (showing a population estimate in the United States of 327,167,434 as of July 1, 2018). Third, multiplying 77% by 327 million equals roughly 250 million American smartphone owners. Fourth, the Apple iOS operating system holds about a 44% share of the smartphone market. STATISTA, SUBSCRIBER SHARE HELD BY SMARTPHONE OPERATING SYSTEMS IN THE UNITED STATES FROM 2012 TO 2018, <https://www.statista.com/statistics/266572/market-share-held-by-smartphone-platforms-in-the-united-states/> (last visited Feb. 19, 2019) (showing the Apple iOS subscriber share as 44.4% in November 2018). Finally, multiplying 44% by the 250 million total smartphone owners yields an estimate of the total number of iPhone owners at 110 million.

22. *In re Apple II*, 846 F.3d at 315–16.

23. *Id.*

24. *In re Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *2 (N.D. Cal. Dec. 2, 2013), *rev'd* 846 F.3d 313 (9th Cir. 2017), *argued* *Apple Inc. v. Pepper*, No. 17-204 (2017).

25. STATISTA, NUMBER OF APPS AVAILABLE IN LEADING APP STORES AS OF 3RD QUARTER 2018, <https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/> (last visited Feb. 19, 2019) (showing that Google Play and Apple App Store, the two leading app stores, each offer at least two million apps for download).

26. *See* discussion *infra* Parts II & IV.

I. FACTS

Noted above, over 100 million Americans own an Apple iPhone.²⁷ In addition to selling the base iPhone hardware, Apple controls which apps are available for download on every iPhone, including ringtones, instant messaging, internet, video,²⁸ gaming, photos, and other functions.²⁹ Third-party developers create many of these iPhone apps, but all iPhone apps must be sold to users exclusively through the App Store, an Apple-controlled sales channel³⁰ through which Apple takes a thirty percent commission from payments for non-free apps.³¹

In 2011, private class plaintiffs, angered by Apple's exclusive control over iPhone app distribution, filed a putative antitrust class action against Apple for monopolization and attempted monopolization of the app market³² under the Sherman Act.³³ By controlling the entire distribution market for iPhone apps through the App Store, Apple allegedly foreclosed users from buying apps from any other source and charged supracompetitive commissions on app distribution.³⁴

After lengthy proceedings and the filing of a second amended consolidated complaint,³⁵ the district court dismissed the complaint under Rule 12(b)(6)³⁶ for plaintiffs' failing to show statutory standing under the Sherman Act.³⁷ Under *Illinois Brick*,³⁸ only a "direct purchaser"³⁹ or the "first party in the chain of distribution" can seek damages for antitrust violations.⁴⁰ The plaintiffs, the district court ruled, were not direct purchasers from Apple. Rather, they bought apps directly from third-party developers, and Apple merely collected

27. See *supra* note 21 (calculating 110 million iPhone owners in the United States).

28. *In re Apple II*, 846 F.3d at 315.

29. *In re Apple I*, 2013 WL 6253147, at *1.

30. *In re Apple II*, 846 F.3d at 315–16.

31. *In re Apple I*, 2013 WL 6253147, at *2.

32. *In re Apple II*, 846 F.3d at 316.

33. Sherman Act § 2, 15 U.S.C. § 2 (2012); *In re Apple I*, 2013 WL 6253147, at *1.

34. *In re Apple I*, 2013 WL 6253147, at *1–2.

35. *In re Apple II*, 846 F.3d at 317.

36. Fed. R. Civ. P. 12(b)(6).

37. *In re Apple II*, 846 F.3d at 317.

38. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977) (“[W]e decline to abandon . . . that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the [injured party].”).

39. *In re Apple I*, 2013 WL 6253147, at *3.

40. *Id.* (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012)).

indirect fees during the purchase process.⁴¹ Because the plaintiffs were simply “indirect purchasers” in relation to Apple, they had no statutory standing to bring suit under the Sherman Act.⁴²

On appeal, the Ninth Circuit reversed the dismissal of the case.⁴³ It found that the plaintiffs had standing to sue under the Sherman Act as direct purchasers from Apple because Apple was the party distributing the apps.⁴⁴

In August 2017, Apple filed a petition for writ of certiorari with the Supreme Court, seeking reversal of the Ninth Circuit’s grant of standing to the plaintiff app consumers.⁴⁵ In June 2018, the Supreme Court granted certiorari.⁴⁶ Robert Pepper is one of four named class representatives for plaintiff respondents.⁴⁷ The class includes “[a]ll persons in the United States . . . who purchased an iPhone application . . . any time from December 29, 2007 through the present.”⁴⁸ If the standing decision is reversed, the class will not be allowed to sue Apple, and many individuals will go without any legitimate recourse against Apple for the alleged monopolistic practices.

II. LEGAL BACKGROUND

Under the indirect purchaser rule, only the “first party in a chain of distribution” has statutory standing under the Sherman Act to sue for antitrust damages.⁴⁹ This doctrine developed from two separate Supreme Court decisions, *Hanover Shoe*⁵⁰ and *Illinois Brick*,⁵¹ that addressed antitrust issues associated with multiparty supply chains.⁵²

41. *Id.* at *6.

42. *Id.* at *6–7.

43. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 325 (9th Cir. 2017), *argued* Apple Inc. v. Pepper, No. 17-204 (2017).

44. *Id.* at 324–25.

45. Petition for a Writ of Certiorari, *Apple Inc. v. Pepper* (2017) (No. 17-204), 2017 WL 3393652.

46. *Apple Inc. v. Pepper*, 138 S. Ct. 2647 (June 18, 2018) (No. 17-204) (granting writ of certiorari).

47. Brief in Opposition at *1, *Apple Inc. v. Pepper*, No. 17-204, 2017 WL 3977645 (Sept. 6, 2017).

48. *In re Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013), *rev’d* 846 F.3d 313 (9th Cir. 2017), *argued* *Apple Inc. v. Pepper*, No. 17-204 (2017).

49. *Id.* at *3 (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012)).

50. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

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

52. Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functional Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 72 (2007).

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Court addressed antitrust standing specifically for direct purchasers, holding they can recover the full value of illegal overcharges from a defendant, regardless of who ultimately bears the injury or whether those overcharges are passed down the supply chain.⁵³ In large part, the rule was created to incentivize private antitrust actions by direct purchasers,⁵⁴ or so-called “private attorneys general.”⁵⁵ In this case, Hanover Shoe sued United Machinery (“United”) for illegal monopolization of the shoe machinery industry.⁵⁶ United argued there was no injury to Hanover Shoe—and therefore no treble damages owed—because overcharges paid by Hanover Shoe were later passed to Hanover Shoe’s customers.⁵⁷ The District Court rejected this “pass-on” defense and found United liable, awarding treble damages to Hanover Shoe.⁵⁸ Upon final appeal, the Supreme Court agreed.⁵⁹ The Court held that even if a buyer “passes-on” illegally high prices to its own customers to recoup the cost, such actions do not reduce the amount of damages that buyer can actually recover from the defendant.⁶⁰

In *Illinois Brick Co. v. Illinois*, the Supreme Court again rejected the “pass-on” damages theory, but this time for use as an offensive tool, intending that whatever pass-on rule was adopted would apply equally to plaintiffs and defendants.⁶¹ The Court decided that downstream customers could not recover antitrust damages passed on to them.⁶² In this case, indirect purchasers of concrete blocks sued the block manufacturer even though they bought the blocks from contractors and middlemen.⁶³ As the Court noted, the blocks “passe[d] through two separate levels in the chain of distribution” before they reached the plaintiffs.⁶⁴ The Court held that because the

53. 392 U.S. at 489.

54. *See id.* at 494 (“[I]f buyers [were] subjected to the passing-on defense . . . [t]he[] ultimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action.”).

55. *Ill. Brick*, 431 U.S. at 746.

56. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 483 (1968).

57. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 297 (M.D. Pa. 1967), *vacated*, 377 F.2d 776 (3d Cir. 1967), *rev’d*, 392 U.S. 481 (1967).

58. *Id.* at 272.

59. *Hanover Shoe*, 392 U.S. at 491–94.

60. *Id.* at 494.

61. 431 U.S. 720, 728–29 (1977).

62. *Id.*

63. *Id.* at 726.

64. *Id.*

plaintiffs were not direct purchasers from the manufacturer, they did not suffer a cognizable antitrust injury.⁶⁵ The Court also concluded that antitrust laws would be better served by allowing direct purchasers to recover “the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.”⁶⁶

The Court realized that such a rule denies indirect purchasers recovery even when they have sustained legitimate antitrust injuries. However, the Court was ultimately more concerned with making direct purchasers whole and not depleting overall recovery in difficult-to-calculate pass-on issues or causing duplicative liability for defendants.⁶⁷

Since *Illinois Brick*, the Court has rigidly applied the indirect purchaser rule.⁶⁸ Indirect purchasers simply cannot sue to recover the portion of anticompetitive overcharges they bear; that right rests solely with direct purchasers who buy from the defendant firm that violated antitrust law(s).⁶⁹ For example, in *Kansas v. UtiliCorp United, Inc.*, the Court attempted to justify this rigid application by appealing to simplicity: “The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.”⁷⁰ As the doctrine currently stands, the bright-line determination of whether a plaintiff is classified as a direct or indirect purchaser is vital to the question of whether they will be able to establish standing.⁷¹

Circuit courts disagree, however, on how to define “direct” and “indirect” purchasers under *Illinois Brick* regarding online distribution platforms.⁷² For example, the Eighth Circuit defines an

65. *Id.* at 746–47.

66. *Id.*

67. *Id.* at 746–47.

68. *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 219 (1990) (“[T]he petitioners contend that [the statute] must allow the States to sue on behalf of consumers notwithstanding their status as indirect purchasers. We have rejected this argument before.”).

69. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998).

70. *UtiliCorp*, 497 U.S. at 208.

71. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 323 (9th Cir. 2017), *argued* Apple Inc. v. Pepper, No. 17-204 (2017) (calling the *Illinois Brick* rule “bright line” and applying it to determine if the plaintiff had standing to sue).

72. *See, e.g., id.* (“We disagree with the [Eighth Circuit] majority’s analysis in *Ticketmaster*. . . “[A]ntecedent transaction” analysis has no basis in Supreme Court precedent.”); *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 at 1169 (An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.”).

indirect purchaser as “one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.”⁷³ In *Campos v. Ticketmaster Corp.*, plaintiffs bought tickets directly from Ticketmaster but were deemed indirect purchasers of Ticketmaster, lacking standing.⁷⁴ Ticketmaster was simply an intermediary for tickets, and thus the plaintiffs were indirect purchasers.⁷⁵ Conversely, the Ninth Circuit eschews any test involving an “antecedent transaction.” Instead, the Ninth Circuit identifies the product at issue and then examines the “direct vertical chain of transactions.”⁷⁶ When a distributor buys a product and then sells it to purchasers, that distributor can be the “appropriate defendant” for antitrust standing.⁷⁷ Under this analysis, purchasers from distributor intermediaries can also be direct purchasers if the product and conduct in question involve distribution to the plaintiffs.⁷⁸

In *In re Apple iPhone Antitrust Litigation*, the appealed Ninth Circuit decision that turned into *Apple Inc. v. Pepper*, the court held that app buyers through Apple’s App Store system are direct purchasers from Apple.⁷⁹ The court found that consumers buy apps directly from Apple even when Apple does not personally create the apps. Significant to the court’s holding was that Apple sells and distributes apps made by third-party developers directly to consumers.⁸⁰

III. HOLDING

The Ninth Circuit held the plaintiff iPhone app buyers were direct purchasers of apps from Apple regardless of whether independent developers created the apps, and that therefore they held sufficient statutory standing to sue Apple under the Sherman Act.⁸¹ The Ninth Circuit interpreted the indirect purchaser rule to first require identifying the product at issue and then simply determining if the

73. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (1998).

74. *Id.* at 1171. The ticket buyers were deemed indirect purchasers of tickets from the antecedent transaction between Ticketmaster and concert venues. *Id.*

75. *Id.*

76. *In re Apple II*, 846 F.3d at 323 (quoting *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1174 (1998) (Arnold, J., dissenting)).

77. *Id.*

78. *Id.*

79. *Id.* at 324–25.

80. *Id.*

81. *Id.*

defendant sold that product directly to the plaintiffs.⁸² The product at issue in the case was “the sale of iPhone apps.”⁸³ Because Apple was a distributor that sold iPhone apps directly to purchasers, the plaintiffs were direct purchasers capable of suing Apple and not barred by the indirect purchaser rule.⁸⁴ Moreover, the Ninth Circuit’s decision to hold that app buyers were direct purchasers was not based on any findings that buyers directly paid money to Apple, that there was a difference “between a markup and a commission,” or that Apple had or had not solely determined app prices.⁸⁵

IV. ARGUMENTS

The core issue dividing the parties in *Apple v. Pepper* is whether consumer owners of iPhones have standing under the Sherman Act to sue Apple for anticompetitive app distribution practices, or whether the precedent of the indirect purchaser rule from *Illinois Brick* bars recovery.⁸⁶

Petitioner Apple, seeking reversal of the Ninth Circuit’s decision to grant standing, argues that the indirect purchaser rule set out in *Illinois Brick* bars the plaintiff app buyers from suing Apple. Third-party iPhone app developers bought software distribution services—the product at issue in the case—from Apple. Then the plaintiff app buyers bought iPhone apps—not the product at issue—from those third-party developers. That is, Apple did not directly set the price for or sell the software distribution services at issue to plaintiffs.⁸⁷

Meanwhile, respondents Pepper, et al., seeking affirmance of the Ninth Circuit’s grant of standing, argue that the plaintiff app buyers did have standing to sue Apple for antitrust damages: The plaintiff iPhone app buyers were direct purchasers from Apple because they bought iPhone apps—the distribution of which Apple is accused of monopolizing—directly from Apple through the Apple-controlled App Store. This store is the only place to buy iPhone apps.⁸⁸

82. *Id.* at 323.

83. *Id.* at 324.

84. *Id.*

85. *Id.*

86. Brief for Respondents at *i, *Apple Inc. v. Pepper*, No. 17-204, 2018 WL 4659225 (Sept. 24, 2018).

87. Brief of Petitioner at *2–4, *8, *Apple Inc. v. Pepper*, No. 17-204, 2018 WL 3870180 (Aug. 10, 2018).

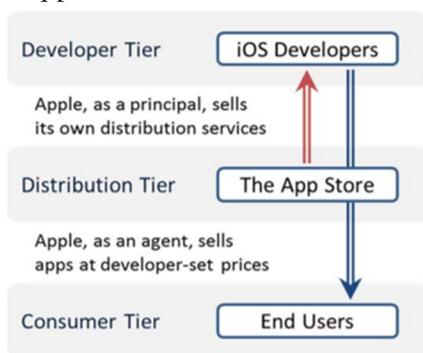
88. Brief for Respondents, *supra* note 86, at *18–19.

A. Petitioner's Arguments

Petitioner Apple argues that straightforward application of the indirect purchaser rule precludes plaintiffs from recovering any antitrust damages.⁸⁹ In sum, petitioner argues that third-party app developers, not Apple, set app prices, so consumers who buy apps through the App Store are merely indirect purchasers of Apple.⁹⁰

Petitioner asserts that based on the allegations, the product at issue is the bundle of distribution services Apple offers to third-party developers for developing iPhone apps, not the distribution and sale of finished apps to consumers.⁹¹ Petitioner reaches this conclusion by focusing on the “market realities”⁹² of the App Store and classifying it as a “two-sided”⁹³ platform, where the product sold to third-party app developers is a separate product from that sold to the consumer plaintiffs.⁹⁴ Petitioner relies on *Ohio v. Am. Express Co.*, a 2018 Supreme Court case that created a framework for understanding electronic platforms that connect user groups, noting that “a two-sided platform offers different products or services to two different groups.”⁹⁵

Petitioner created the following chart to explain its theory of the structure of iPhone app transactions.⁹⁶



89. Brief of Petitioner, *supra* note 87, at *20.

90. *Id.* at *3.

91. *Id.* at *36.

92. *Id.* at *34–35.

93. *Id.* at * 35.

94. *Id.* at *36.

95. *Id.* (quoting 138 S. Ct. 2274, 2280 (2018)).

96. Brief of Petitioner, *supra* note 87, at *8; *see also id.* at *8 n.2 (“The graphic captures the important point—the agent/principal nature of the relationship between Apple and app developers.”).

Petitioner argues that the antitrust claims of the plaintiffs involve only the services Apple sells to third-party developers, not the products sold to “[e]nd [u]sers,” and that the plaintiffs are merely end users.⁹⁷ Therefore, the plaintiff app purchasers are barred from bringing suit because the only possible damages recovered from Apple would require a pass-through theory of harm, which is distinctly barred by the indirect purchaser rule.⁹⁸

Additionally, Petitioner asserts that only third-party developers set app prices, which makes Apple a mere agent of app developers.⁹⁹ Because the price of apps is set entirely by the third-party developers who make the apps, Apple claims that any illegal overcharges paid by plaintiffs were passed-through Apple from those third-party developers to reach the plaintiffs.¹⁰⁰ Ultimately, Petitioner argues that a “pass-through” theory of antitrust harm is precluded by *Hanover Shoe, Illinois Brick*, and the related progeny of cases.¹⁰¹

Accordingly, as indirect purchasers with no theory of harm except for “pass-through” damages from third-party developers, the plaintiffs lack standing to recover antitrust damages from Apple.¹⁰²

B. Respondents’ Arguments

Respondents argue the app buyers fit neatly into the *Illinois Brick* precedent as direct purchasers: The plaintiffs “cannot purchase apps through any other means” than the Apple-controlled App Store, and the plaintiffs pay Apple the allegedly supracompetitive prices directly.¹⁰³ Therefore, because they are direct purchasers, app purchasers have standing to sue Apple for antitrust damages.¹⁰⁴

First, respondents classify the product at issue in the case, taken directly from the plaintiffs’ antitrust allegations, as the retail sale of apps to consumers.¹⁰⁵ Similar to a brick-and-mortar retailer, Apple

97. *Id.* at *36, *40–41.

98. *See id.* at *40–41 (“In that setting, consumer app purchasers could only seek damages based on a pass-through theory of harm barred by *Illinois Brick*.”).

99. *Id.* at 35.

100. *Id.* at *40–41.

101. *Id.* at *3.

102. *Id.* at *40–41.

103. Brief for Respondents, *supra* note 86, at *1, *12.

104. *Id.* at *12 (“[R]espondents purchase apps directly from Apple through Apple’s App Store; they claim that Apple violated the Sherman Act by monopolizing the retail market for apps; and they assert that Apple’s unlawful conduct is responsible for the overcharges they have suffered. Accordingly, they can seek damages from Apple under the Clayton Act.”).

105. *Id.* at *14, *24–25.

owns and operates its own store, sells iPhone apps directly to consumers, and then pays upstream iPhone app developers.¹⁰⁶ Respondents paint Apple as significantly more than a mere intermediary or agent of app developers.¹⁰⁷

In addition to selling apps directly to plaintiffs, respondents argue that Apple has total control over the pricing and selling process of iPhone apps.¹⁰⁸ Apple requires that “all prices in the app store must end in 99 cents” and also “retains the contractual right to change unilaterally” agreements with app developers and iPhone owners, including the ability to “set every price” in the App Store.¹⁰⁹ And even if app developers have some “discretion” in setting app prices as Apple contends, that is not material to whether consumers can sue because Apple “could decide tomorrow that it wants to set every price.”¹¹⁰ Respondents also note that Apple monopolizes the app market “at the retail level,” and since Apple is the *only* party that can sell apps to iPhone owners, the only reasonable conclusion is that app buyers purchase apps directly from Apple.¹¹¹ And even if Apple reclassifies the product at issue as “app-distribution services,” rather than “apps” sold to consumers, plaintiffs would still be direct purchasers because Apple provides app distribution services to both third-party developers and consumers.¹¹²

Second, respondents advocate for sticking vehemently to the bright-line indirect purchaser rule from *Illinois Brick* because underlying policy considerations help the respondents’ case.¹¹³ Respondents assert that granting statutory standing would not threaten duplicative liability on Apple because the app buyers are the only party capable of suing Apple for unlawful monopoly overcharges for app sales.¹¹⁴ Any harms suffered by app developers would be separate from damages owed to plaintiffs, because the damages would involve framing Apple as a monopsonist: the sole buyer of iPhone apps made by developers.¹¹⁵ However, in the present case with the app

106. *Id.* at *27.

107. *Id.* at *15.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at *14.

112. *Id.* Apple could reclassify the product at issue for argument because Apple, as the defendant, did not write the complaint. *Id.*

113. *Id.* at *38.

114. *Id.* at *39.

115. *Id.* at *40.

buyers, Apple is a monopolist as the sole seller of iPhone apps.¹¹⁶ Further, specific calculations of damages paid to plaintiffs would not overlap with those paid to app developers because the sides buy different services at different levels of the app distribution process.¹¹⁷

Respondents also recognize that American antitrust law favors and encourages private actions, exemplified by the ability of plaintiffs in antitrust suits to recover treble damages.¹¹⁸ If the app buyers do not challenge Apple’s anticompetitive conduct, what other private party will? App developers do not have an incentive to sue Apple because they may benefit from Apple’s practices. And any app developers who do have an incentive to sue Apple under antitrust law would have a separate cause of action for being underpaid, not overcharged, from Apple’s conduct.¹¹⁹ The plaintiff class of iPhone owners is hailed as the “best positioned” to bring the case.¹²⁰

In sum, respondents argue that the plaintiff iPhone app purchasers are direct purchasers of apps from Apple, wielding proper standing to sue Apple under the Sherman Act, supported by both straightforward application of case law and by policy considerations surrounding the indirect purchaser rule as first cemented in *Illinois Brick*.

V. ANALYSIS

The Supreme Court should affirm the Ninth Circuit’s decision by classifying the iPhone app buyers as direct purchasers, thereby granting them standing to sue Apple. Such a result is a proper application of the indirect purchaser rule and aligns with the policies underlying antitrust statutes.

1. Both App Buyers and App Developers Are Direct Purchasers of Apple

Illinois Brick does not require that there be only a single direct purchaser; rather, each victim of an antitrust violator may sue as a direct purchaser for its own “distinct harm[s].”¹²¹ In this case, app

116. *Id.*

117. *Id.*

118. *Id.* at *46.

119. *Id.*

120. *Id.* at *17.

121. Brief of Antitrust Scholars as *Amici Curiae* in Support of Respondents at *7, *Apple Inc. v. Pepper*, No. 17-204, 2018 WL 4773103 (Oct. 1, 2018).

developers and app buyers should both be classified as direct purchasers of Apple.

Although Apple sells two similar but separate products—to app developers, the ability to create and sell apps to consumers; to consumers, finished apps—the harms suffered by each party stem from the same alleged monopolistic conduct on the same platform.¹²² Notwithstanding Petitioner’s arguments, Apple does not sell only to app developers, who then sell to consumers; it sells directly to both app developers and consumers.¹²³ Petitioner’s theory that app developers set prices and that illegal overcharges paid by plaintiffs are merely passed through Apple should hold no weight.¹²⁴

App developers, were they to sue Apple, would face completely separate antitrust injuries from the same alleged conduct, so Apple would not face duplicative liability if the plaintiff app buyers are allowed to proceed.¹²⁵ The app buyers are “differently situated plaintiffs” than would be the app developers in a hypothetical lawsuit, and each party would be “seeking remedies for ‘different injuries in different markets.’”¹²⁶ Injuries suffered by app developers, who are essentially suppliers, would be calculated as lower profits or sales while the injuries suffered by app buyers, in the present case, would stem from supracompetitive prices paid for apps.¹²⁷

Petitioner asserts that Apple has no say in the prices set by app developers.¹²⁸ But Apple controls the entire iPhone app distribution market via the App Store and uses price controls.¹²⁹ For example, payments from app buyers go first to Apple, which then distributes of

122. See *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 315–16 (9th Cir. 2017), *argued* Apple Inc. v. Pepper, No. 17-204 (2017) (“The iPhone is a ‘closed system,’ meaning that Apple controls which apps . . . can run on an iPhone’s interface.”).

123. See *id.* (“Apple prohibits *app developers* from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violates this prohibition. Apple discourages *iPhone owners* from downloading unapproved apps, threatening to void iPhone warranties if they do so.”) (emphasis added).

124. See at Brief of *Amicus Curiae* Open Markets Institute in Support of Respondents at *5, Apple Inc. v. Pepper, No. 17-204, 2018 WL 4846925 (Oct. 1, 2018) (“This monopolistic control of iPhone-app distribution enables Apple to dictate terms to both iPhone users and iPhone app developers.”).

125. Brief for Respondents, *supra* note 86, at *2.

126. *Id.* (quoting *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002)).

127. *Id.* at *2–3.

128. Brief of Petitioner, *supra* note 87, at *3 (“[T]he developer always independently sets its app prices. Apple does not set app prices for third-party developers.”).

129. See *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 315–16 (9th Cir. 2017), *argued* Apple Inc. v. Pepper, No. 17-204 (2017) (discussing Apple’s controls over the App Store).

a portion of the proceeds to app developers.¹³⁰ Apple also has the unilateral ability to approve which apps are available for sale.¹³¹ An arbitrary, formalistic distinction between how money changes hands between parties would allow monopolists, especially those running platforms like Amazon and Google, to simply restructure transactions to remove the ability for consumers to sue them, thereby dodging antitrust liability.¹³² Claims that Apple is merely a passive intermediary simply because Apple operates a transactional platform are unfounded. The App Store is a quintessential monopoly that guides app developers' hands and from which the plaintiff app buyers directly purchase every app.¹³³ Both app buyers and developers are direct purchasers of distinct services, and their economic injuries are inextricably linked to the same monopolistic conduct.

2. *Declining to Grant Standing to the Plaintiff App Buyers Would Stifle Private Antitrust Enforcement and Leave Anticompetitive Conduct Unpunished*

If the Court accepts Petitioner's arguments—that iPhone app buyers are not direct purchasers of Apple—Apple's conduct will likely go unchallenged.¹³⁴ Although the federal government can bring antitrust suits with a broad grant of jurisdiction, it has limited resources.¹³⁵ Additionally, private antitrust suits are a congressionally intended cornerstone of policing antitrust violators, indicated by the availability of treble-damages.¹³⁶ In *Hanover Shoe*, the Court noted that without private antitrust suits, “those who violate the antitrust

130. *Id.*

131. *Id.*

132. See Brief of Antitrust Scholars as *Amici Curiae* in Support of Respondents, *supra* note 121, at *7 (“Petitioner’s theory would further undermine enforcement by permitting monopolists and cartelists to avoid liability through clever transaction structuring.”).

133. See *In re Apple II*, 846 F.3d at 315–16 (“Apple prohibits app developers from selling iPhone apps through channels other than the App Store, threatening to cut off sales by any developer who violates this prohibition.”).

134. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). The Court in *Hanover Shoe* noted that if “no one [is] available who would bring suit” against an antitrust-violating firm, that firm will “retain the fruits of their illegality.” *Id.* If iPhone consumers, the only private party incentivized to bring suit, are unable to establish standing, then Apple will likely go unpunished. *Id.*

135. See, e.g., 15 U.S.C. § 4 (2012) (“[I]t shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.”).

136. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (observing congressional intent to enforce antitrust laws via private suits); see also *Hanover Shoe*, 392 U.S. at 494 (exclaiming the importance of private, treble-damage antitrust actions).

laws . . . would retain the fruits of their illegality because no one [would be] available to bring suit against them” and that “[t]reble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.”¹³⁷ Incentivizing private antitrust suits is why the Court in *Hanover Shoe* allowed direct purchasers to recover full damages even when illegal overcharges were passed down the supply chain.¹³⁸

If app developers were deemed the only direct purchasers of Apple, then there would not be any antitrust challenges to Apple because the app developers are unlikely to bring suit. The Court in *Illinois Brick* acknowledged that “[w]e recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.”¹³⁹ In the present case, iPhone app developers *must* sell their apps via Apple, so it is likely they would be hesitant to sue Apple despite being direct purchasers.¹⁴⁰

Moreover, some app developers may actually benefit from Apple’s monopoly by sharing in the monopoly profits, meaning the app developers “may not wish to assert claims to the overcharge.”¹⁴¹ Apple charges a thirty percent commission on app sales¹⁴² and dictates how app developers sell their products, but app buyers must buy apps through Apple and may pay supracompetitive prices, allowing developers to happily ride the coattails of Apple’s monopoly control by reaping overcharges themselves.¹⁴³

CONCLUSION

Denying antitrust standing to the plaintiff app buyers in *Apple Inc. v. Pepper* would misapply the indirect purchaser rule to online platforms and cripple private antitrust enforcement by foreclosing millions of private plaintiffs from bringing antitrust actions. For these

137. *Hanover Shoe*, 392 U.S. at 494.

138. *Id.* at 488, 494; *see also Ill. Brick*, 431 U.S. at 746 (1977) (discussing direct purchasers as “private attorneys general”).

139. *Ill. Brick*, 431 U.S. at 746.

140. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 316 (9th Cir. 2017), *argued* Apple Inc. v. Pepper, No. 17-204 (2017).

141. *Ill. Brick*, 431 U.S. at 739–40.

142. *In re Apple II*, 846 F.3d at 316.

143. Richman & Murray, *supra* note 52, at 94 (“Because illegal cartels and monopolists can share rents with direct purchasers without explicitly including them in an illegal conspiracy (and threaten to boycott those who bring suit) antitrust violators can manipulate the incentives of the only parties who have standing.”).

reasons, the Supreme Court should affirm the judgment of the Ninth Circuit and grant the consumer app purchasers standing.