No. 17-204

IN THE
Supreme Court of the United States

APPLE, INC.,
Petitioner,
v.

ROBERT PEPPER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: September 6, 2017

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents did not respond to a request for consent. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared frequently in this Court to address the proper scope of the federal antitrust laws. *See, e.g., FTC v. Actavis*, 133 S. Ct. 2223 (2013); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

WLF is concerned that the decision below greatly expands the potential for antitrust class actions against companies involved in ecommerce and other forms of agency selling. The Ninth Circuit has fundamentally changed this Court's "direct purchaser" doctrine in a manner that will significantly complicate antitrust litigation and will expose numerous companies to claims for duplicative recoveries. WLF seeks to file its brief in order to explain why that change is inconsistent with the purposes underlying the "direct purchaser" doctrine.

WLF is also concerned that the decision below is

inconsistent with the fundamental purpose of antitrust laws: to promote competition. By substantially increasing the exposure to antitrust liability of companies that aggressively enter new markets and provide consumers with innovative products, the Ninth Circuit decision threatens to chill the very sorts of activities that the antitrust laws are designed to encourage. WLF seeks to file its brief to urge the court to review that inconsistency.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

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 victim of the alleged offense.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared frequently in this Court to address the proper scope of the federal antitrust laws. *See, e.g., FTC v. Actavis*, 133 S. Ct. 2223 (2013); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

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WLF is also concerned that the decision below is inconsistent with the fundamental purpose of antitrust laws: to promote competition. By substantially

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file.

increasing the exposure to antitrust liability of companies that aggressively enter new markets and provide consumers with innovative products, the Ninth Circuit decision threatens to chill the very sorts of activities that the antitrust laws are designed to encourage. Review is warranted to address that inconsistency.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In June 2007, Petitioner Apple, Inc. began marketing the iPhone, the company's first cellular telephone product. The product has been highly popular with consumers. Nonetheless, throughout the past decade Apple has faced intense competition in the "smartphone" market, and no party claims that Apple monopolizes that market.

Apple's design permits and encourages independently produced software applications ("Apps") to run on the iPhone. Independent software developers have responded by creating more than 2.2 million Apple-approved Apps; they offer the majority of Apps to iPhone owners free of charge.

Apple designed its iPhone operating system as what Respondents pejoratively call a "closed system." That is, Apple retains sole discretion to decide which software applications may be downloaded to an iPhone. Contracts entered into between Apple and prospective

developers state that Apps will be sold only through an electronic marketplace maintained by Apple (the "App Store"), which provides consumers with a convenient means of finding and downloading reliable Apps.

Apple agrees to serve as the developers' agent in sales transactions conducted through the App Store. Contractors retain unfettered discretion to determine the price at which their Apps will be offered for sale. If developers offer their Apps for free, Apple alone bears the costs of reviewing, hosting, and distributing the Apps to consumers through the App Store. If a developer chooses to charge for an App, Apple imposes a commission equal to 30% of the sales price. Respondents allege that Apple conditions its approval of any App on the developer's "agreement to give Apple a [30%] share of the [developer's] sales proceeds." Pet. App. 50a. When handling sales transactions on behalf of developers, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." *Id.* at 52a.

Respondents (purchasers of Apps at the App Store) allege that Apple has engaged in an anticompetitive scheme to monopolize the "aftermarket" for iPhone Apps, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Pet. App. 60a-61a. Respondents fault Apple both for maintaining a "closed system" that prevents third parties from downloading iPhone Apps and for establishing the App Store as the exclusive sales venue. *Ibid.* By acquiring monopoly power in this manner, Apple allegedly has reduced output and competition and has raised the prices that iPhone owners must pay for Apps. *Ibid.*

The district court dismissed Respondents' Second Amended Complaint (SAC) with prejudice, concluding that Respondents lacked antitrust standing because "the SAC does not allege facts from which Plaintiffs can be classified as direct purchasers." Pet. App. 36a. The court noted that Respondents "d[id] not allege in the SAC any price 'fixed' by Apple." *Ibid.* Rather, the court concluded, the 30% commission "[of] which Plaintiffs complain is not a fixed fee [imposed on them by Apple], but a cost passed-on to consumers by independent software developers." *Id.* at 37a. The court concluded that Respondents' claims were barred by the direct-purchaser doctrine set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which holds that the damages remedy in antitrust disputes belongs only to the immediate victim of the allegedly anticompetitive conduct, not to those (such as Respondents) who do not qualify as direct purchasers. *Ibid.*[2]

The Ninth Circuit reversed and remanded, concluding that Respondents "are direct purchasers of iPhone apps from Apple under *Illinois Brick* and that they therefore have standing to sue." Pet. App. 22a. In arriving at that conclusion, the appeals court deemed it irrelevant that "[i]n the case before us, the price is determined as a practical matter by the app developer who sets a price." *Id.* at 21a. Instead, the court explained, "we rest our analysis" on Apple's status as the distributor of iPhone Apps: "[b]ecause Apple is a

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[2] Having dismissed for lack of antitrust standing, the district court declined to address Apple's further claim that the SAC failed to state a claim for violation of the antitrust laws. *Ibid.*

distributor, [Respondents] have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps." *Ibid.*

The Ninth Circuit noted that the Eighth Circuit concluded, in a case involving "a transaction closely resembling the transaction in the case before us," that the plaintiffs lacked antitrust standing to assert a claim for antitrust damages. Pet. App. 18a (citing *Campos v. Ticketmaster Corp.*, 140 F.3d 116 (8th Cir. 1998)). While recognizing that its decision directly conflicted with the Eighth Circuit's decision, the court stated, "We disagree with the majority's analysis in *Ticketmaster"* and expressed agreement with the dissenting opinion. *Id.* at 19a.

The appeals court further recognized that software developers arguably could point to the same marketing provisions relied on by Respondents and assert that they possess standing to assert antitrust claims because they are "direct purchasers" of distribution services provided by Apple. Pet. App. 20a. But the court declared its indifference to the possibility that Apple might face potential liability from two separate antitrust claims arising from a single course of conduct, stating, "But whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." *Ibid.*

SUMMARY OF ARGUMENT

As Apple has convincingly demonstrated, the decision below directly conflicts with a decision of the

U.S. Court of Appeals for the Eighth Circuit. The need to resolve that conflict by itself provides sufficient justification to grant the petition.

WLF writes separately to focus on the conflict between the Ninth Circuit's decision and this Court's "direct purchaser" case law. The Court has repeatedly held that a plaintiff lacks antitrust standing unless he can demonstrate that he is the immediate victim—the direct purchaser—of the anticompetitive conduct alleged to violate the antitrust laws. The Court has explained that downstream purchasers lack antitrust standing even if they can demonstrate that the economic harm created by the anticompetitive conduct was passed through to them. *See, e.g., Illinois Brick*, 431 U.S. at 736-38; *Utilicorp United*, 497 U.S. at 216-17.

The Ninth Circuit "rested its analysis" of Respondents' standing on a single factor: Apple's role as the distributor of iPhone Apps. Pet. App. 21a. It determined that Respondent possess antitrust standing precisely "[b]ecause Apple is a distributor." *Ibid*. But the identity of a product's distributor simply is not germane to the factors that the Court has examined in determining who should be permitted to recover antitrust damages. If the Ninth Circuit were correct, then Apple could avoid all antitrust liability simply by delegating operation of the App Store to a third party.

The allegedly anticompetitive aspect of Apple's conduct is its decision to bar developers from selling iPhone Apps independently of Apple; rather, they must sell through the App Store and pay a commission to Apple. That conduct allegedly causes Respondents to

pay higher prices for their Apps, but those higher prices are not derived from Apple's decision to serve as the App Store distributor. Apple does not take title to the Apps sold by the developers and thus cannot be deemed to have sold anything to Respondents. If Apple is not a seller, then Respondents are not "direct purchasers" from Apple.

More importantly, the Ninth Circuit has failed to account for the Court's rationale in limiting antitrust standing to direct purchasers. In discussing its *Illinois Brick* rationale, the Court has explained that: (1) an antitrust violator "could not use a pass on defense in an action by direct purchasers" (per the Court's earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp*, 392 U.S. 481 (1968)); and therefore (2) "it would risk multiple liability to allow suits by indirect purchasers." *Utilicorp United*, 497 U.S. at 207. Yet, the Ninth Circuit's decision creates the very risk of multiple liability that *Illinois Brick* and *Utilicorp United* warned against. If (as alleged by Respondents) Apple's maintenance of a "closed system" has anticompetitive effects, then App developers are directly and adversely affected—they are denied the ability to market iPhone Apps unless they pay a 30% commission to Apple. Accordingly, the developers possess antitrust standing to allege that the closed system violates antitrust laws. But according to the Ninth Circuit, purchasers of iPhone Apps also possess antitrust standing to challenge the very same business practices and to recover damages for the very same commission charges.

Indeed, the Ninth Circuit expressed indifference to this multiple-liability conundrum, stating,

"[W]hether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." Pet. App. 20a. Because the desire to prevent multiple recoveries was so central to the direct-purchaser rule adopted by *Illinois Brick* and because the Ninth Circuit's analysis blindly ignores that rationale, the Court should strongly consider summarily reversing the decision below.

Review is also warranted because the decision below is likely to deter aggressive competition of the very sort that the antitrust laws are intended to encourage. Respondents complain that Apple charges monopoly prices for its iPhone Apps, but the Court has repeatedly emphasized that "antitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices." *linkLine*, 555 U.S. at 454. "Charging monopoly prices is an important element of the free-market system." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* ["*Trinko*"], 540 U.S. 398, 407 (2004). Indeed, "[t]he opportunity to charge monopoly prices—at least for the short term—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Ibid.*

Apple took a major financial gamble that consumers would respond favorably to its iPhone operating system, a system that provided innovative mobile phone features and the opportunity to add any of the thousands (now millions) of Apps that Apple tested and determined were of acceptable quality. Those consumers who preferred an operating system that was open to Apps from to any source could satisfy

their preference by purchasing competing products. But many consumers expressed their preference for Apple's approach by purchasing iPhones.

Respondents contend that Apple's strategy violated the antitrust laws because, they allege, it restricted competition and unfairly drove up prices of iPhone Apps. In other words, Respondents contend that Apple's risk-taking activity, which resulted in the introduction of an innovative and popular new consumer product, should be condemned under the Sherman Act because, on balance, it harmed competition.

Respondents' claims highlight a persistent problem in antitrust litigation: it can often be very difficult to distinguish vigorous competition from acts that undermine competition. Yet, if companies fear that their efforts to innovate may result in their being sanctioned under the antitrust laws, they may avoid innovative activity altogether. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (warning against antitrust enforcement that may "chill the very conduct the antitrust laws are designed to protect").

By upholding antitrust standing without regard to the risk of multiple liability, the Ninth Circuit decision significantly increases the danger that companies will avoid innovative activity lest they be faced with potentially ruinous antitrust liability. Congress authorized courts to award treble damages against companies engaged in conduct that undermines competition; it did not authorize six-fold damages. Review is warranted because the decision below

threatens to deter innovation by exposing companies to damages claims never authorized by Congress.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S LIMITATIONS ON ANTITRUST STANDING

Section 4 of the Clayton Act, 15 U.S.C. § 15, authorizes any person injured by a violation of the antitrust laws to sue for treble damages, costs, and an attorney's fee. One could plausibly argue that virtually everyone within the United States is "injured" to some degree by a violation of the antitrust laws because the costs imposed by the violation reverberate throughout the economy as those whose costs increased due to the violation increase their prices to compensate for the loss. But the Court has consistently imposed reasonable limits on who should be deemed to have suffered a Section 4 injury, *i.e.*, to possess antitrust "standing." In particular, in *Illinois Brick* established a bright-line rule that limits antitrust standing to "direct purchasers"—those who are the immediate victims of the anticompetitive conduct.

The Court's decision to limit antitrust standing has been motivated to a significant degree by a desire to ensure that antitrust defendants will not face liability to multiple plaintiffs asserting the very same damages. The Court stated in *Illinois Brick* that "allowing offensive but not defensive use of pass on would create a serious risk of multiple liability for defendants" and that it was "unwilling to 'open the door

to duplicate recovery' under § 4." 431 U.S. at 730.[3] To avoid opening that door, the Court concluded that it must either allow both offensive and defensive use of pass on, or allow neither. *Id.* at 736. The Court ultimately determined that neither offensive nor defensive use of pass on should be permitted, a determination that has come to be known as the "direct purchaser" rule. *Id.* at 736-48.

The Court has expressed three rationales for limiting antitrust standing to the immediate victims of antitrust violations: (1) apportioning damages among direct purchasers and those to whom the direct purchasers may have passed on a portion of their increased costs is a highly complex and often insoluble problem ; (2) permitting recovery by indirect purchasers would, on average, reduce the incentives for private antitrust enforcement; and (3) limiting standing to direct purchasers eliminates the risk of multiple recoveries arising from a single damage claim. *Utilicorp United*, 497 U.S. at 206-08.

The Court has recognized that those three

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[3] "Defensive use of pass on" occurs when a defendant asserts that an antitrust plaintiff should not be permitted to recover the full amount of the overcharges he incurred because of an antitrust violation, because he was able to avoid any loss—by increasing his prices to cover the full extent of the overcharges. "Offensive use of pass on" occurs when a plaintiff asserts that although it was not a direct victim of the defendant's antitrust violations (*i.e.*, it purchased nothing directly from the defendant), those violations nonetheless caused them compensable injury because the violations ultimately caused them to pay more for goods they purchased from those who had more direct dealings with the defendant.

rationales "will not apply with equal force in all cases." *Id.* at 216. The Court has nonetheless rejected efforts to create fact-specific exceptions to the direct-purchase rule, reasoning that the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule" and that it is "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 216-17.

A. Respondents Are Not "Direct Purchasers" as that Term Was Understood by *Illinois Brick*

Review is warranted because the Ninth Circuit based its antitrust-standing determination on an understanding of "direct purchasers" that conflicts sharply with *Illinois Brick* and its progeny. Apple is not a "seller" of iPhone Apps in the sense contemplated by *Illinois Brick*, and thus Respondents cannot be deemed "direct purchasers" from Apple.

The Ninth Circuit "rested its analysis" of Respondents' standing on a single factor: Apple's role as the distributor of iPhone Apps. Pet. App. 21a. It determined that Respondent possess antitrust standing precisely "[b]ecause Apple is a distributor." *Ibid.* But the identity of a product's distributor simply is not germane to the factors that the Court has examined in determining who should be permitted to recover antitrust damages. If the Ninth Circuit were correct, then Apple could avoid all antitrust liability simply by delegating operation of the App Store to a third party.

Moreover, the Ninth Circuit's rationale would permit plaintiffs to claim "direct purchaser" status (and

thus antitrust standing) with respect to shippers such as UPS and Federal Express. Those companies might well object on the ground that they simply deliver goods as agents for the seller and never actually take title to the shipped goods. But that is Apple's defense as well—it is uncontested that Apple never takes title to the Apps supplied by independent software developers. And as the Ninth Circuit acknowledged, "the price is determined as a practical matter by the app developer who sets a price." Pet. App. 21a.

In many instances, a party that distributes a product to buyers is also a seller who conveys title to the product directly to the buyers. In those instances, the buyers would possess standing to assert antitrust claims against the distributor. But when, as here, the distributor neither sets the sales price nor transfers title to the buyer, nothing in *Illinois Brick* suggests that the buyer qualifies as a "direct purchaser" from the distributor.

The common law routinely rejects efforts to impose tort liability on an agent who distributes property to a purchaser at his principal's request. For example, an auctioneer acting as sales agent for the owner of a car is not responsible in a products-liability lawsuit for injuries to the purchaser caused by defects in the car. *See, e.g., New Texas Auto Auction Services, L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 404 (Tex. 2008) (citing Restatement (Third) of Torts § 1, cmt g (1998)).

Moreover, *Illinois Brick* adopted the "direct purchaser" rule in substantial part because of its ease of application. The Court reasoned that calculating the

damages incurred by a direct purchaser (the amount by which the defendant's anticompetitive conduct increased the prices paid by the direct purchaser) would be a relatively straightforward exercise. In contrast, attempting to calculate damages incurred by indirect purchasers "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Illinois Brick*, 431 U.S. at 737. But the Ninth Circuit's classification of Respondents as "direct purchasers" from Apple, Pet. App. 17a-21a, does not facilitate the simplified damage calculations contemplated by *Illinois Brick*. Because the price charged to purchasers is determined by independent App developers, not by Apple, any damages calculation would require a Court to engage in a complex analysis to determine how much of the 30% Apple commission was incorporated into the developer's final price. The need for that complex analysis calls into question whether Respondents really qualify as *Illinois Brick* "direct purchasers."

B. The Ninth Circuit's Decision Permits Duplicative Recoveries, a Result Antithetical to the *Illinois Brick* Rule

As noted above, the Court's decision to limit antitrust standing has been motivated to a significant degree by a desire to ensure that antitrust defendants will not face liability to multiple plaintiffs asserting the very same damages. *Illinois Brick*, 431 U.S. at 731. Yet, the Ninth Circuit's decision creates the very risk of multiple liability that *Illinois Brick* and *Utilicorp United* warned against.

Respondents allege that Apple has engaged in

anti-competitive conduct by maintaining a "closed system" that prevents independent software developers from downloading Apps directly onto the iPhone and by establishing the App Store as the exclusive sales venue. Pet. App. 60a-61a. Those policies have their most direct impact on independent software developers. In the absence of those restrictions, developers would be able to sell their Apps to iPhone owners without Apple's interference. But the current policy prohibits direct contact between the developers and iPhone owners and requires developers to pay a 30% commission to Apple (for distribution services) for each App they sell through the App Store. Those direct impacts on developers undoubtedly are sufficient to establish their standing to challenge the "closed system" as a violation of antitrust laws.

Yet, according to the Ninth Circuit, purchasers of iPhone Apps also possess antitrust standing to challenge the very same business practices and to recover damages for the very same commission charges. The Ninth Circuit nonetheless makes no effort to resolve the conflict between its decision (which creates a significant danger of multiple liability) and *Illinois Brick* (which adopted the "direct purchaser" rule in large measure to prevent any possibility of multiple liability). Indeed, the Ninth Circuit expressed indifference to the danger of multiple liability, stating, "[W]hether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis in the case now before us." Pet. App. 20a.

The Ninth Circuit's rationale is that once a "direct purchaser" is identified, there is no need to

address the issues that animated *Illinois Brick*—the extreme difficulty in apportioning damages and the potential for multiple liability. According to the Ninth Circuit, its conclusion that Respondents possess antitrust standing is "compelled" by *Hanover Shoe, Illinois Brick,* and *Utilicorp United* once it is determined that Apple is a "distributor" that provides iPhone Apps "directly" to Respondents. *Id.* at 21a. That approach to antitrust standing directly conflicts with *Illinois Brick*, which instructs that any rule for determining whether a plaintiff is a "person injured" (within the meaning of Section 4 of the Clayton Act) must take into account the need to avoid multiple liability. *Illinois Brick*, 431 U.S. at 729-36.

Because the desire to prevent multiple recoveries was so central to the direct-purchaser rule adopted by *Illinois Brick* and because the Ninth Circuit's analysis blindly ignores that rationale, the Court should strongly consider summarily reversing the decision below. The Court has not hesitated to summarily reverse antitrust decisions of federal appeals courts when the decisions flatly contradict prior decisions of this Court. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing decision that failed to recognize that "agreements between competitors to allocate territories to minimize competition" were *per se* antitrust violations).

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS LIKELY TO AFFECT A BROAD RANGE OF INDUSTRIES AND COULD END UP DETERRING COMPETITION

As the Petition explains in detail, the App Store

is hardly a unique business model. Similar agency sales models are increasingly prevalent in online electronic commerce. *See* Pet. 29-31. If the decision below remains in place, the hosts of such sales platforms will be subject to antitrust claims patched together by any enterprising lawyer who can convince one or more customers of those sites to sign on as antitrust plaintiffs. In light of the broad applicability of the decision below to a wide range of companies, review by this Court is warranted.

A. The Threat of Excessive Antitrust Liability Can Inappropriately Deter Competition

Review is particularly warranted because the decision below is likely to deter aggressive competition of the very sort that the antitrust laws are intended to encourage. The danger of overdeterrence is particularly acute, when (as here) plaintiffs allege a violation of Section 2 of the Sherman Act, which prohibits monopolizing, or attempting to monopolize "any part of the trade or commerce among the several states." 15 U.S.C. § 2. The distinction between authorized and illegal monopoly activity is often difficult to discern.

This Court has repeatedly emphasized that antitrust intervention entails "costs" to competition:

> Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States v. Microsoft*

> *Corp.*, 253 F.3d 34, 58 (C.A.D.C. 2001 (en banc) (*per curiam*). Mistaken inferences and the resulting false condemnations are "especially costly, because they chill the very conduct that antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.

Trinko, 540 U.S. at 883 (quoting *Matsushita Elec.*, 475 U.S. at 594). *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (stating that "the costs of an erroneous finding of [§ 2] liability are high"). As two leading commentators have explained, "One problem haunting most antitrust litigation ... is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that courts will prohibit ... acts that *appear* to be anticompetitive but really are the opposite." William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000) (emphasis in original).

B. Respondents' Antitrust Claim—That Apple Improperly Monopolized the "Aftermarket for iPhone Apps"—Threatens to Deter Pro-Competitive Conduct

Respondents allege that Apple has improperly monopolized the "aftermarket for iPhone Apps." Pet. App. 60a. They allege that Apple unlawfully acquired monopoly power over this aftermarket by designing the iPhone as a "closed system" and requiring all iPhone Apps to be purchased through the App Store—thereby

permitting Apple to extract a 30% commission on all App sales. *Id.* at 60a-61a.

Whether those allegations adequately state a § 2 claim upon which relief can be granted is not an issue before the Court. But what *is* before the Court is the Ninth Circuit idiosyncratic interpretation of *Illinois Brick*'s "direct purchaser" rule. By adopting an interpretation that fails to guard against multiple liability and thereby substantially heightens exposure to antitrust damages claims, the Ninth Circuit decision threatens to deter competition by companies that do not wish to expose themselves to such claims.

That Apple engaged in substantial amounts of pro-competitive conduct when it decided to launch the iPhone in 2007 is a matter of record. At that time, the smartphone market had just begun to develop, and Apple had zero share of it. The iPhone and the App Store have greatly expanded consumer choice. As Respondents recognize, the iPhone "revolution[ized]" the cell phone industry. Pet. App. 48a. Consumers now have access to huge numbers of Apps for a variety of smartphones. Apple alone offers more than two million Apps, the majority of which are free. Pet. 7. Consumers who are dissatisfied with the prices of iPhone Apps have readily available alternatives: they can purchase competing apps and apply them to other smartphone brands.

Respondents nonetheless contend that Apple improperly restricted competition by maintaining a monopoly over the aftermarket for iPhone Apps, thereby enabling Apple to extract a monopoly profit from all sales. But as this Court has repeatedly

emphasized, "Charging monopoly prices is an important element of the free-market system. ... The opportunity to charge monopoly prices—at least for the short term—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407. In order "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful [under § 2] unless it is accompanied by an element of anticompetitive *conduct*." *Ibid* (emphasis in original).

The "incentive to innovate" is substantially reduced if, as a result of relaxation of antitrust standing rules, arguably innovative activity can expose a company to six-fold antitrust damages claims rather than the treble damages authorized by Congress. *See Illinois Brick*, 431 U.S. at 731 n.11 ("[P]roponents of [granting antitrust standing to indirect purchasers] fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. ... Tr. of Oral Arg. 58 ('a little slopover on the shoulders of the wrongdoers ... is acceptable.') We do not find this risk acceptable."). Review is warranted because the decision below threatens to deter innovation by exposing a large number of companies—particularly e-commerce companies—to damages claims never authorized by Congress.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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