No. 17-204

IN THE

Supreme Court of the United States

APPLE, INC.,
Petitioner,

v.

ROBERT PEPPER, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. The vigorous enforcement of the antitrust laws against large corporations, including powerful technology platforms, is essential to protecting the U.S. economy and democracy from concentrated private power. Private antitrust enforcement is an essential part of the overall antitrust enforcement system and helps deter, and provide compensation to the victims of, antitrust violations.

The Open Markets Institute files this brief to make three points. First, contrary to the claims of Apple and its *amici*, Apple's App Store is not a neutral, open marketplace (or in Apple's words, a provider of "distribution services"). Pet. Br. 5. Instead Apple has established through contractual and technical restrictions a monopoly over the distribution of iPhone apps. By creating and maintaining this monopoly, Apple compels owners of iPhones and developers of iPhone apps to conduct business on Apple's terms. Through its App Store bottleneck, Apple exercises power over both iPhone

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

owners (as a seller) and iPhone app developers (as a buyer).

Second, consumers of iPhone apps are authorized to sue Apple to recover damages for its alleged monopolization of the retail iPhone-app market under a straightforward application of this Court's direct-purchaser rule. That rule, as the Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and reaffirmed in *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), holds that indirect purchasers of a monopolized good may not sue the monopolist for any overcharge that they paid. Instead, the cause of action is for the direct purchaser to assert—the one who bought the good from the monopolist and paid the full overcharge. Because all iPhone apps must be purchased directly from Apple, consumers are direct purchasers.

The only way Apple can prevail in this appeal, therefore, is if this Court were to create a new exception to the direct-purchaser rule. But there is no basis for any exception here. For one thing, this Court has consistently refused to get into the business of carving out case-by-case exceptions. A bright-line rule, the Court has explained, beats the "unwarranted and counterproductive exercise [of] litigat[ing] a series of exceptions." *UtiliCorp*, 497 U.S. at 217. The Court has been firm on this point: "The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216. Apple's position, for instance, directly contravenes this Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968), which holds that antitrust violators are "not entitled to assert a passing-on defense."

The third part of this brief takes on a central plank of Apple's argument: that permitting consumers to sue for damages would open the door to double recovery. This policy concern, which was one of the reasons discussed in *Illinois Brick*, is misplaced here. The double-recovery concern in *Illinois Brick* was a concern about recovering twice for the *same kind of harm* caused by the *same antitrust violation*—an overcharge imposed by a monopoly supplier. But if a developer were to take the step of suing Apple in a separate case, it would do so not as a fellow buyer of the same product from a monopolist (the only *seller* in town), but as a supplier of a product to a monopsonist (the only *buyer* in town).

There is no principle in antitrust law holding that antitrust violators exercising market power in both directions on the supply chain cannot be held to account for the distinct harms that they inflict on distinct entities. The law actually cuts the other way: Just as a monopolist can be separately sued by competitors (for lost profits) and consumers (for overcharges), a firm that is both a monopsonist and a monopolist can be separately sued by sellers (for underpayments) and buyers (for overpayments).

In this case, app developers are not likely to seek damages for potential antitrust injuries from the exercise of Apple's monopsony power. Developers who bring suit against Apple risk jeopardizing their access to the App Store, as Apple can seek retribution against them in any of a myriad of different ways. In addition, many app developers may be unwilling to sue Apple for its monopolization of the app distribution market due to a perception that Apple may manipulate the pricing and sale of the apps in ways that ultimately benefit the developers. Consequently, adopting Apple's position that only app developers have an antitrust cause of action may mean that *no one* brings a suit for damages against

Apple over potential antitrust violations in the iPhone distribution market.

ARGUMENT

I. Apple has established a bottleneck over the distribution of iPhone apps.

In the textbook ideal of a marketplace, no single buyer or seller exercises power. Instead many buyers and sellers come together to engage in economic activity. Furthermore, new buyers and sellers face no barriers and can enter the market freely. Due to this decentralized, open market structure, power is broadly dispersed and not exercised by one or a small number of market participants.

Since the Founding, America's citizens have used a great variety of regulatory tools to achieve such open market structures. This includes the establishment of public markets in which to sell and buy. It also includes using various forms of regulation, including antitrust law, to ensure that private markets are governed in a fair, transparent manner. *See, e.g.*, *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963). Americans have repeatedly updated their regulatory tools to address radical changes in technology, such as the advent of the railroad, the telephone, and the Internet. *See, e.g.*, Richard R. John, *Network Nation* (2010) (examining the history of federal and state legislation and regulation to control private power in telegraph and telephone services). The basic goal, time and again, was to ensure that the private corporations that control these monopoly networks do not exploit their essential middleman position to enclose the markets and regulate sellers and buyers in ways that serve their own private ends.

Apple and its *amici*, at least implicitly, characterize Apple's App Store as a neutral provider of "distribution services." Pet. Br. 5. But the reality here is quite different. Apple, through contractual and technical restrictions, has established itself as the sole distributor of apps for the iPhone. In the iPhone-app distribution market, Apple resembles other dominant technological platforms, such as Amazon and Uber, that exercise power over both suppliers of goods and services and customers. Evgeny Morozov, *Where Uber and Amazon rule: welcome to the world of the platform*, The Guardian, June 6, 2015, https://perma.cc/7QQ7-GWEZ. In other words, Apple has acquired a bottleneck position *between* iPhone owners and iPhone app developers, requiring both groups to transact exclusively through the App Store. This monopolistic control of iPhone-app distribution enables Apple to dictate terms to both iPhone users and iPhone app developers.

From the point of view of iPhone buyers, Apple's direct control over, and regulation of, the market for apps has a number of effects. This includes long-term locked-in dependency on Apple for the provision of all additional products related to the iPhone. It also includes having to pay supracompetitive prices for such products; in the case of apps the price must cover Apple's 30 percent surcharge on every app that it sells.[2] This includes being made subject to the particular, and

[2] Jobs himself emphasized the link between the iPhone and App Store. Part of the idea behind the App Store, as he envisioned it, was to "add value to the iPhone," allowing Apple to "sell more iPhones because of it." Nick Wingfield, *"The Mobile Industry's Never Seen Anything Like This": An Interview With Steve Jobs at the App Store's Launch*, Wall St. J., Aug. 7, 2008, https://on.wsj.com/2v4Mu3M.

arbitrary, political and moral rules that Apple uses to regulate the nature of the apps that are available for sale to iPhone customers. And it includes being made subject to arbitrary, discriminatory manipulation in the act of shopping for and buying apps.

As the sole distributor of iPhone apps, Apple, as a buyer, *also* directly exercises market power over app developers. It creates and imposes contractual terms that it alone has the power to change. In addition to retaining 30% of the purchase price, Apple requires that the price for any app end in 99 cents. This 99-cent rule eliminates the vast majority of possible prices that could be charged for each app. Apple has also used its power as the sole distributor of iPhone apps to impede market access to apps that compete against its own services. *See, e.g.*, Peter Kafka, *Spotify Says Apple won't approve a new version of its app because it doesn't want competition for Apple Music*, Recode, June 30, 2016, https://perma.cc/BZ3G-V4J2. Apple has also excluded apps from the App Store for entirely arbitrary reasons. *See, e.g.*, Jason Koebler, *Apple Is Blocking an App That Detects Net Neutrality Violations From the App Store*, Vice Motherboard, Jan. 18, 2018, https://bit.ly/2FODwvY. Through the App Store, Apple exercises extraordinary control over individuals and businesses developing and improving apps for the iPhone.

II. Consumers of iPhone apps have a cause of action against Apple under the direct-purchaser rule, and no exception to that rule is warranted.

Section 4 of the Clayton Act grants a cause of action for treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). The question in this case concerns the meaning of this language. Have the plaintiffs—consumers of iPhone apps, all of whom purchased those apps directly from Apple—adequately alleged that they have been injured "by reason of" Apple's monopolization of the retail market for iPhone-apps, such that they can sue Apple for damages under section 4?

The answer is yes.

The plaintiffs in this case are direct purchasers entitled to sue under the direct-purchaser rule. Due to Apple's successful efforts to enclose and regulate the market for iPhone apps, buyers of apps are prevented from forming a direct relationship with the developers of apps. Instead, buyers receive apps directly from Apple, through the App Store that Apple pre-installed on their iPhones. Apple collects the full purchase price from them, stores their billing information, and processes the sale. No intermediary is involved. And all this is by Apple's own design: Steve Jobs, Apple's former CEO, said at the time the App Store was launched that Apple wanted to be able to "wirelessly deliver the content right on the device," and to "automatically update the apps" for consumers. Wingfield, *An Interview With Steve Jobs*. The App Store, he said, was "built on the same iTunes infrastructure, including all the storage and all the billing and getting email receipts and all of that kind of stuff." *Id.*

Apple's own actions ensure that the consumers' relationship is directly with Apple. Consumers may therefore sue Apple for any overcharge imposed as a result of Apple's monopoly over the retail market for iPhone apps.

Because a straightforward application of the direct-purchaser rule authorizes this suit, Apple asks this Court to carve out an exception to the bright-line rule. Characterizing itself as the provider of "distribution services," Pet. Br. 5, Apple argues that consumers should not be allowed to sue it for damages because iPhone "app prices are independently set by developers," meaning that consumers are harmed only "to the extent that the developers choose to pass-through" the overcharge in the form of higher app prices. Pet. Br. 6. In other words: Apple mounts a pass-through defense. But, as discussed earlier, this mischaracterizes Apple's App Store, which exists as an intermediary between iPhone owners and iPhone app developers and functions as a buyer and seller of apps.

This Court has held for half a century that antitrust violators are "*not* entitled to assert a passing-on defense." *Hanover Shoe*, 392 U.S. at 494 (emphasis added). As the Court put it in *Hanover Shoe*: "As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." *Id.* at 489. Hence the settled rule that "when a buyer shows that the price paid by him for [a product] is illegally high and also shows the amount of the overcharge, he has made out a prima facie case" for damages against the antitrust violator. *Id.* The upshot of this rule is that "direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge." *Illinois Brick*, 431 U.S. at 745–46. And that's true whether some, none, or all of the overcharge is later passed on; direct purchasers may recover the full amount *regardless*.

Since *Hanover Shoe*, this Court has consistently refused to "create an exception to the direct purchaser rule." *UtiliCorp*, 497 U.S. at 207; *see also Illinois Brick*, 431 U.S. at 744 ("We reject these attempts to carve out exceptions to the [direct-purchaser] rule for particular types of markets."). Indeed, the Court has applied the rule even when the direct purchaser might not have suffered *any* injury from the overcharge because the *full* amount was passed through to purchasers. *See UtiliCorp*, 497 U.S. at 208–09. Even then, the Court held that the direct purchaser had a cause of action, finding that it would be "inconsistent with precedent and imprudent in any event to create an exception." *Id.* at 208; *see also id.* at 216 ("The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule."); *id.* at 217 ("[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.").

Those words carry equal force here. To start, there is no textual basis for Apple's proposed exception. If anything, the breadth of the language Congress used in section 4—authorizing "any person" injured "by reason of anything forbidden in the antitrust laws"—cuts in the opposite direction. 15 U.S.C. § 15(a). So too does the common-law principle that courts should not "go beyond the first step" in making proximate-cause determinations. *Hanover Shoe*, 392 U.S. at 490 n.8 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). As Justice Holmes explained a century ago, a defendant "ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom [the defendant] took the sum." *Id.* In this case, that describes the consumer.

Apple's proposed exception would also undermine the Clayton Act's "expansive remedial purpose." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Through section 4, "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations," *Id.*; *see also id.* at 477 ("The unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective."). Consistent with that broad purpose, this Court has repeatedly recognized that it is "critical" that section 4 be interpreted in a way that "promote[s] the vigorous enforcement of the antitrust laws." *UtiliCorp*, 497 U.S. at 214. The Court has thus been careful not to "engraft artificial limitations on the § 4 remedy," *McCready*, 457 U.S. at 472, or to "add requirements to burden the private litigant beyond what is specifically set forth by Congress," *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957).

III. Applying the direct-purchaser rule here would not create a risk of duplicative recoveries.

A. A hypothetical antitrust suit by app developers would seek damages for an injury distinct from the injury alleged by consumer-plaintiffs here.

The real thrust of Apple's bid for an exception is its objection that it would be subject to duplicative recovery if the direct-purchaser rule were enforced. As Apple and its *amici* see it, applying the rule here would give rise to a risk that both consumers and developers would sue Apple for the same competitive harm, which was one of the concerns discussed in *Illinois Brick*.

But in the event developers decide to bring an antitrust suit, this policy concern is not present here. The concern identified in *Illinois Brick* had to do with recovering twice for the same harm caused by the same violation—an overcharge imposed on a good supplied by a monopolist. Allowing both direct and indirect purchasers of that same good to sue for the same overcharge would either lead to double recovery or require complex determinations for allocating damages between direct and indirect purchasers. The Court concluded it was far simpler to allow only the direct purchaser to sue—and to sue for the entire overcharge. While this rule prevents downstream injured purchasers from obtaining compensation under federal antitrust law, *Illinois Brick* and *Hanover Shoe* together are, in theory, designed to promote deterrence by concentrating the full overcharge recovery in one class of purchasers.

This case is different. If developers were to sue Apple in a separate case, they would do so to remedy a distinct harm caused by distinct anticompetitive behavior. Rather than complaining about an overcharge by a seller and seeking recovery of that overcharge (as the consumers seek to do in this case), they would be complaining about an underpayment by a buyer and seeking recovery of that underpayment. There is no unfairness in allowing them do so. If an antitrust violator exercises market power in both directions on the supply chain, it can be held to account for the distinct harms that its anticompetitive conduct inflicts.[3] *See Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("[The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.").

Other areas of antitrust law support this outcome. It is hornbook law that a monopolist can be sued by

[3] This concern is not new or somehow unprecedented. In the congressional debates leading up to the passage of the Sherman Act, a member of the House accused the beef trust of "rob[bing] the farmer on the one hand and the consumer on the other." 21 Cong. Rec. 4098 (1890) (remarks of Rep. Wilson).

competitors for lost profits caused by its monopolization. It is also hornbook law that the monopolist can also be sued by consumers for overcharges. Although this is an imperfect analogy, it illustrates a familiar principle in the law more broadly: when a wrongdoer does something that directly causes different kinds of foreseeable harm to different people, those people are not barred from seeking redress for their harms.[4] Just so here. By putting itself in between developers and consumers—and thereby ensuring that it is the only buyer and seller of iPhone apps, respectively—Apple has exercised market power in both directions on the supply chain. It can be held accountable for the direct harms caused as a result.

B. As a practical matter, developers are unlikely to bring an antitrust suit for damages against Apple.

The most obvious and pragmatic reason that developers would decide not to pursue antitrust claims against Apple is fear of retribution. Developers who sue Apple for antitrust violations run the risk of being removed from the App Store and losing their access to end users—a threat that is not entirely theoretical. *See, e.g.*, Steven Melendez, *Apple tight-lipped on removal of Freedom and other content-blocking apps*, Fast Co., Sep. 20, 2018, https://bit.ly/2OZZP64. *See also* Stephen

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[4] *See McCready*, 457 U.S. at 484 n.21 ("If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.").

Calkins, *'Illinois Brick' and Its Legislative Aftermath*, 47 Antitrust L.J. 967, 972 n.42 (1978) (noting "there is concern that some direct purchasers may fail to sue out of fear of jeopardizing a relationship with a supplier").

Many app developers may also be hesitant to sue Apple for its monopolization of the app market due to a perception that Apple may manipulate the pricing and sale of the iPhone apps in ways that ultimately benefit the developers. Apple, for instance, requires that the price for any app end in 99 cents. This 99-cent rule eliminates the vast majority of possible prices that could be charged for each app. Given how cheap apps are (most are no more than a few dollars), the rule may cause developers to set prices at a higher level than the market would otherwise demand (for example, $1.99 instead of $1.25 or $1.50). In such an instance, Apple's market power could actually *benefit* the developer.[5]

It goes without saying that someone who benefits from something cannot be counted on to sue to stop the very thing that benefits them (even assuming they could permissibly do so). As Judge Arnold noted in his dissent in *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1174 (8th Cir. 1998) (Arnold, J., dissenting), a downstream monopolist can sometimes share its monopoly profits with upstream participants and thereby neutralize hypothetical antitrust plaintiffs. At the very least, the developers' incentive to sue would be significantly less

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[5] Furthermore, the 99-cent rule points up the considerable degree to which Apple exerts control over the prices that iPhone users pay for iPhone apps. Even if Apple does not dictate what the specific price for each app must be, it unquestionably dictates what the price must not be—and that's 99% of the possible options. So although Apple tries to convey the impression that it simply has no say over app prices, that is not true as a factual matter.

than that of the direct purchasers, who paid the supracompetitive prices.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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