

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

APPLE INC.,)
 Petitioner,)
 v.) No. 17-204
ROBERT PEPPER, ET AL.,)
 Respondents.)

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-204, Apple versus Pepper.

Mr. Wall.

ORAL ARGUMENT OF DANIEL M. WALL
ON BEHALF OF THE PETITIONER

MR. WALL: Thank you, Mr. Chief Justice, and may it please the Court:

The only damages theory in this monopolization action is rooted in a 30 percent commission that Apple charges app developers and which allegedly causes those developers to increase app prices to consumers.

The case is barred by the Court's Illinois Brick doctrine because the developers' pricing decisions are necessarily in the causal chain that links the commission to any consumer damages.

If the commission increases beyond the competitive level, but apps developers do not change their apps prices, consumers suffer no damages. And if app developers do change their prices to pass on some or all of the

1 over-charge, well, that is precisely the kind
2 of damages theory that the Illinois Brick
3 doctrine prohibits.

4 JUSTICE GINSBURG: Is there any -- in
5 -- in your view, is there any first buyer in
6 this picture?

7 MR. WALL: Excuse me?

8 JUSTICE GINSBURG: Is there any first
9 buyer in this picture?

10 MR. WALL: Well, there's -- there's
11 two different buyers in this picture. There
12 are the app developers who, by contract with
13 Apple, are buying a package of services which
14 include distribution and software and
15 intellectual property and testing and -- and so
16 forth.

17 And then the plaintiffs in this case
18 are the -- the buyer of the apps themselves
19 that are made with that package of goods and
20 services and --

21 JUSTICE GINSBURG: My -- my question
22 was within Illinois Brick, is there in this
23 case anyone who would qualify as a first buyer
24 with standing to sue Apple?

25 MR. WALL: The developers, yes.

1 Without a doubt, the developers are the ones
2 who, in the first instance, pay the 30 percent
3 commission.

4 I think it's -- it is -- it is
5 important to root the analysis in the common
6 ground, which has been conceded, that the only
7 damages theory is based upon that 30 percent
8 commission. That is charged by contract
9 between Apple and the developers. And it is
10 deducted from whatever price that the developer
11 chooses to -- to set, subject to only the
12 minimal restriction --

13 JUSTICE SOTOMAYOR: I'm sorry, the --
14 the first sale is from Apple to the customer.
15 It's the customer who pays the 30 percent.

16 MR. WALL: But there has always been a
17 -- a transaction between Apple and the
18 developer before that, which has the pricing
19 decision of what the developer is going to do
20 on account of the 30 percent commission. There
21 is never --

22 JUSTICE SOTOMAYOR: Could I ask you
23 something --

24 MR. WALL: Sure.

25 JUSTICE SOTOMAYOR: -- more generally

1 about Illinois Brick? That was a case of a
2 vertical monopoly: A concrete block person,
3 manufacturer, monopolizes the next intermediate
4 market who then sells to a customer.

5 MR. WALL: Yes.

6 JUSTICE SOTOMAYOR: All right. This
7 is not quite like that. This is dramatically
8 different. This is a closed loop.

9 MR. WALL: It is a closed loop, but in
10 terms of the injury theory, which is what is at
11 issue in --

12 JUSTICE SOTOMAYOR: They're not
13 claiming the 30 percent is their injury.

14 MR. WALL: No. They're --

15 JUSTICE SOTOMAYOR: They're -- they're
16 claiming their injury is the suppression of --
17 of a cheaper price, doesn't have to be
18 30 percent. They're not seeking 30 percent of
19 their sales.

20 They have to go out and prove at the
21 next step how, without this monopoly, they
22 would have paid less. It could be as little as
23 a -- a penny or nothing or it could be
24 something more. But the point is that this
25 closed loop with Apple as its spoke, they are

1 the first purchaser of that 30 percent markup.

2 MR. WALL: No, they are not. The --
3 the first purchaser is clearly the app
4 developer, who, by contract, agrees that every
5 time it puts a positive price on an app, it
6 will allow Apple to -- to take 30 percent of
7 it.

8 JUSTICE SOTOMAYOR: Apple took
9 30 percent from the customer --

10 MR. WALL: And the damages theory --

11 JUSTICE SOTOMAYOR: -- not from the
12 developer.

13 MR. WALL: Apple collects the -- the
14 funds, but even the Ninth Circuit here agreed
15 that -- that the process -- the payment flow is
16 immaterial to the Illinois Brick issue.

17 JUSTICE BREYER: Certainly, I wouldn't
18 think that's true, even if they concluded it.
19 And in a simple theory, I would have thought it
20 would have been in antitrust for at least 100
21 years. What you do is you look to see who you
22 claim is the monopolist. Who do they claim is
23 the monopolist?

24 MR. WALL: Apple.

25 JUSTICE BREYER: Apple. And if you

1 pay -- if that's true, they can raise prices to
2 some people, lower them to others, their
3 suppliers. And if you were injured because you
4 paid them more, the monopolist, you can collect
5 damages.

6 And if you're injured because they
7 forced your price down, you're a supplier, you
8 can collect damages. End of theory. I don't
9 see anything in Illinois Brick that conflicts
10 with that.

11 MR. WALL: Everything in Illinois
12 Brick --

13 JUSTICE BREYER: All right. What is
14 that?

15 MR. WALL: -- conflicts with that.

16 JUSTICE BREYER: Yeah.

17 MR. WALL: The -- the emphasis in all
18 three of this Court's decision on both pass-on
19 defenses and damages theories, that's what the
20 doctrine disallows. It -- it says that --

21 JUSTICE BREYER: Yeah, it says that if
22 -- I don't mean to interrupt you, but I don't
23 want to -- you to miss the point I'm making.

24 If Joe Smith buys from Bill, who
25 bought from the monopolist, then we have

1 something indirect. But, if Joe Smith bought
2 from the monopolist, it is direct. That's a
3 simple theory.

4 Now I can't find in reason or in case
5 law or in anything I've ever learned in
6 antitrust anything that would conflict with
7 that. And what I want you is to tell me what?

8 MR. WALL: What conflicts with that in
9 this case is that the alleged monopolization,
10 which is over the distribution function,
11 allegedly first manifests in a 30 percent
12 commission. Consumers do not pay the
13 30 percent commission.

14 There was an effort in the -- in the
15 district court to try to argue that -- that
16 Apple added that, but that was abandoned. So
17 what we have here instead is a damage theory
18 that runs through the independent pricing
19 decisions of the app developers.

20 JUSTICE KAGAN: Does your answer to
21 Justice Breyer depend on what you said, that
22 the alleged monopolization is in the
23 distribution function? Because I understood
24 the -- the Respondents now to be saying, no,
25 that's wrong; the alleged monopolization is in

1 the apps themselves.

2 In other words, the consumer says you
3 have a monopoly on apps. You might also have a
4 monopoly on the distribution function, which
5 the app developers have to live with, but you
6 have a monopoly on apps, which the consumers
7 have to live with.

8 MR. WALL: In --

9 JUSTICE KAGAN: So, in responding to
10 Justice Breyer, you said: Well, it's because
11 the alleged monopoly is the distribution
12 function. But I don't think that that's
13 correct.

14 MR. WALL: Well, two points, Justice
15 Kagan.

16 First of all, it is correct. The --
17 the complaint repeatedly alleges at paragraphs
18 3, 8, and 53 that this is a case about -- about
19 a distribution market. It has always been a
20 case about a distribution market. And it
21 necessarily is because there is no good-faith
22 allegation that -- that Apple actually
23 monopolizes the apps as software.

24 It is -- it is simply the pipeline,
25 the sale of the apps, which is -- which is

1 alternatively described in this case as either
2 distribution or as the so-called aftermarket,
3 which is simply limiting that to iOS apps
4 instead of the 80 percent of the apps --

5 JUSTICE BREYER: You know, there are
6 an awful lot of words in this case that I tend
7 to have trouble understanding. One is
8 two-sided market. Another is a lot that you
9 used.

10 MR. WALL: Uh-huh.

11 JUSTICE BREYER: So I go by simple
12 analogy. If Bill buys from the monopolist, he
13 is a direct purchaser. If Bill buys from Sam,
14 who buys from the monopolist, he is an indirect
15 purchaser. Anyone can understand that.

16 And when I get into what I think of as
17 jargon, I begin to think: Suppose I were
18 advising United Fruit Company. I have a great
19 idea. You won't have to torpedo the boats of
20 your competitors anymore.

21 Here's what you do: What you do is
22 you buy from the farmers and you tell the
23 farmers what you will pay the banana farmers is
24 a very low price plus 30 percent commission.
25 And then what you do is, when you sell to

1 banana consumers throughout the world, you
2 charge them that 30 percent commission, which
3 they say is a higher price. And if you, United
4 Fruit, did not become a monopolist.

5 Now I think I'm advising Jay
6 Rockefeller, John Rockefeller, and I give him
7 the same advice. And I give the same advice to
8 United Shoe, which happened to be a
9 distribution company.

10 MR. WALL: But --

11 JUSTICE BREYER: And we thereby have
12 -- well, you see the point.

13 MR. WALL: But the difference here is
14 -- is that there -- there is -- there is no
15 third-party intermediary that is setting the
16 price and exercising its independent
17 determination as to whether any or all of the
18 initial over-charge, which is some part or all
19 of the commission, is going to manifest itself
20 in the app's price. And that's why I started
21 with -- with -- with -- the simple I would --
22 would -- would say -- you know, the
23 hypothetical of imagine the price today is the
24 competitive price, the 30 percent is the
25 competitive price, and it goes up by 10 points

1 tomorrow.

2 No consumer is injured unless the
3 apps' prices change. The apps' prices have to
4 change. And if they don't -- and they only
5 change by virtue of a decision which implicates
6 everything this Court talked about in Hanover
7 Shoe, in Illinois Brick, and in UtiliCorp.

8 JUSTICE KAGAN: Well, Mr. Wall, I
9 think you're avoiding the question a bit
10 because, I mean, the questions that are being
11 put to you by my colleagues are really, what
12 was Illinois Brick about? Was it about a
13 vertical supply chain or, instead, was it about
14 a pass-through theory?

15 Now, in the facts of Illinois Brick
16 and, indeed, in the facts of all the Illinois
17 Brick cases that we've discussed, you had both.
18 So you didn't have to separate the two.

19 And now, here, you don't have both,
20 because this is not a vertical supply chain,
21 but there still is a pass-through mechanism.
22 So then the question is, does Illinois Brick
23 apply to that or not?

24 And I think what Justice Breyer was
25 suggesting to you, that as long as it's not

1 that vertical supply chain where the person is
2 not buying from the monopolist itself, here,
3 the person is transacting with the monopolist
4 itself, that that's what separates this case
5 from Illinois Brick and makes it entirely
6 different, notwithstanding that there's some
7 kind of pass-through mechanism involved.

8 MR. WALL: I completely agree with you
9 that the key to this is deciding what Illinois
10 Brick was about. Was it simply a formalistic
11 case about vertical chains, or was it about
12 pass-through?

13 And in answering that question, I
14 would begin with, first of all, with Hanover
15 Shoe, which is about a pass-on defense and
16 about the -- the difficulties in -- in the --
17 the -- the potential complication of antitrust
18 litigation through pass-on defense, and then
19 the framing of the question in Illinois Brick
20 by this Court which said, having already found
21 that we will not allow a pass-on defense, we
22 are now confronted with the question to whether
23 allow pass-on to be used offensively.

24 It was 100 percent about pass-on. The
25 vertical chain was the factual setting of the

1 case, and, indeed, Respondents' argument would
2 -- would have this Court believe that the
3 factual setting is the sum and substance of the
4 Court's reasoning.

5 JUSTICE ALITO: Mr. Wall, could I ask
6 you about what troubles me about your position,
7 and -- and it is this: Illinois Brick was not
8 about economic theory. It was about the
9 court's -- the court's -- the basis for the
10 decision was not economic theory, as I read the
11 case. It's the court's calculation of what
12 makes for an effective and efficient litigation
13 scheme.

14 And maybe your answer to this question
15 is that the validity of Illinois Brick is not
16 before us. But I really wonder whether, in
17 light of what has happened since then, the
18 court's evaluation stands up.

19 Take the third point that it makes
20 about that the direct -- the so-called direct
21 purchasers are the most efficient and most --
22 in the best position to -- to sue.

23 If we look at this case, how many app
24 developers are there whose apps are sold at the
25 Apple store?

1 MR. WALL: Tens of thousands.

2 JUSTICE ALITO: Yeah. Has any one of
3 them ever sued?

4 MR. WALL: None have ever sued. There
5 have been -- there have been plenty of
6 disputes, but none has ever gone to litigation.
7 For that matter, no state or federal antitrust
8 agency has ever sued either.

9 We do not take that -- we do not take
10 the -- the absence of litigation as evidence of
11 an oppressed developer community that cannot
12 speak for itself. These -- you know, the fact
13 of the matter is that nowadays major companies
14 suing their suppliers happens all of the time.

15 The idea that it -- that it -- that it
16 doesn't, which was decried by Judge Posner as
17 fanciful, has proven to be fanciful because it
18 literally happens all of the time.

19 JUSTICE GORSUCH: Well, Mr. Wall,
20 along those lines, I -- I take your point that
21 Illinois Brick and Hanover Shoe might be read
22 about the economic realities of the
23 pass-through mechanism being important, rather
24 than the contractual formalities, whether it's
25 a sales agent or a formal purchase between the

1 manufacturer and the distributor.

2 And antitrust normally accounts for
3 economics, rather than forms of contract.

4 MR. WALL: Indeed.

5 JUSTICE GORSUCH: I take your point.

6 But building on what Justice Alito had
7 in mind, Illinois Brick has been questioned by
8 31 states before this Court in an amicus brief.
9 You're asking us to extend Illinois Brick,
10 admittedly, only because of a contractual
11 formality and the economic realities are the
12 same. I'll spot you all of that for purposes
13 of this question.

14 But why should we build on Illinois
15 Brick? Shouldn't we question Illinois Brick,
16 perhaps, given the fact that so many states
17 have done so. They've repealed it.

18 There haven't been a huge number of
19 reported problems with indirect purchasers and
20 direct purchasers receiving double recovery,
21 one of the problems Illinois Brick built on,
22 and the other one, which Justice Alito alluded
23 to, is direct purchasers don't always sue
24 because there's a threat that monopolists will
25 share the rents with the direct purchasers.

1 MR. WALL: Right.

2 JUSTICE GORSUCH: And indirect
3 purchasers may be better suited to enforce the
4 antitrust laws. So long wind-up.

5 MR. WALL: Okay.

6 JUSTICE GORSUCH: Sorry, but there --
7 there's the pitch.

8 MR. WALL: Sure. So a few things.

9 First of all, it is -- it is an
10 enormously complicated and controversial issue,
11 what to do with the Illinois Brick doctrine.

12 You can see this in -- in the briefing
13 in this case where, yes, you did have states
14 saying repeal it. You also had the plaintiffs'
15 bar through the American Antitrust Institute
16 say don't repeal it.

17 There have been, I think, on the order
18 of 17 efforts in Congress to have -- have it
19 changed. Not once has it ever gotten to the
20 floor. It is a quintessentially controversial
21 political issue which belongs across the
22 street, not here.

23 I would disagree completely --

24 JUSTICE GINSBURG: Why? Why is that
25 so if the Court created the doctrine in the

1 first place?

2 MR. WALL: Because I don't think it's
3 fair to say that the Court just created it.
4 What the Court did was it applied the
5 foundational principle of all Section 4
6 jurisprudence, which is the proximate cause
7 principle of damages not going past the first
8 step, and then it -- it dealt with that in the
9 context of the potential for duplicative
10 pass-through over-charge claims, which are a
11 unique problem in antitrust.

12 It's not a general problem of all
13 damage theories. But, when you have
14 over-charge cases -- and this gets to Justice
15 Gorsuch's point about the potential for -- for
16 duplicative recovery -- it's not hypothetical.
17 It's automatic. It's mathematical.

18 If the first purchaser gets
19 100 percent of the over-charge because of
20 Hanover Shoe, anything else that is recovered
21 that gets added on to that is necessarily
22 duplicative, and that's what happens in the
23 district courts. You get the direct purchasers
24 and the direct purchasers suing on whatever
25 theory optimizes their level of recovery.

1 I'd like to reserve the rest of my
2 time and turn it over to the Solicitor General
3 at this point.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 General Francisco.

7 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE PETITIONER

10 GENERAL FRANCISCO: Mr. Chief Justice,
11 and may it please the Court:

12 I'd like to begin where Mr. Wall left
13 out, and I think it addresses many of the
14 questions that have been asked here.

15 At bottom, Illinois Brick and Hanover
16 Shoe, properly understood, prohibit
17 pass-through theories. And they reflect a
18 basic application of the background principles
19 of proximate cause that this Court generally
20 reads into statutes of this sort, and, in
21 particular, the rule that damages stop at the
22 first step.

23 Here, the first step is the app
24 maker's pricing decision, because the
25 Respondents, the consumers, are injured if and

1 only if the app makers decide to increase their
2 prices in order to recoup --

3 JUSTICE KAGAN: General --

4 GENERAL FRANCISCO: -- Apple's --

5 JUSTICE KAGAN: I have to say I find
6 that a not intuitive argument, I mean, because
7 it just seems to me that when you're looking at
8 the relationship between the consumer and
9 Apple, that there is only one step.

10 I mean, I pick up my iPhone. I go to
11 Apple's App Store. I pay Apple directly with
12 the credit card information that I've supplied
13 to Apple. From -- from my perspective, I've
14 just engaged in a one-step transaction with
15 Apple.

16 And when I come in and say Apple is a
17 monopolist and Apple is charging a
18 super-competitive price by -- by -- by
19 extracting a commission that it can only
20 extract because of its market power, I mean,
21 there's my one step.

22 GENERAL FRANCISCO: Right. I
23 understand that, Your Honor. But, in proximate
24 cause, the issue is not transactional
25 proximity. The issue is proximity between the

1 illegal conduct on the one hand, here, Apple's
2 monopolistic over-charge, and the injury to
3 consumers on the other hand, here, the higher
4 prices.

5 And Apple's monopolistic over-charge
6 is not the direct cause of higher prices. The
7 direct cause of the higher prices is the app
8 maker's decision to increase their prices in
9 order to recoup the over-charge.

10 JUSTICE KAVANAUGH: How do we know
11 that? How do we know that, given that Apple
12 really operates as a retailer in many respects
13 here, as Justice Kagan points out?

14 GENERAL FRANCISCO: Right.

15 JUSTICE KAVANAUGH: And how do we know
16 that the 30 percent charge is not affecting the
17 price?

18 GENERAL FRANCISCO: Well, you don't
19 know --

20 JUSTICE KAVANAUGH: In the same way
21 that any retailer that adds 30 percent would
22 affect the ultimate price paid by the consumer?

23 GENERAL FRANCISCO: You don't know for
24 sure, but that's the whole point. Here,
25 because app makers set the final price, they

1 have a choice to make: They either absorb the
2 over-charge and keep prices the same, in which
3 case the consumers aren't harmed at all, or
4 they increase their prices to recoup the
5 over-charge, in which case the app makers are
6 also harmed because they face a drop in sales
7 as a result of increased prices.

8 JUSTICE KAVANAUGH: But the consumers
9 are harmed then too.

10 GENERAL FRANCISCO: Yes, Your Honor.
11 And that's the whole point of Illinois Brick
12 and Hanover Shoe. When you've got part of the
13 harm going to that initial party that's bearing
14 the full brunt of the over-charge in the first
15 instance because of its pricing decision,
16 that's the party that gets the whole claim.

17 JUSTICE KAVANAUGH: But we have
18 ambiguity about what Illinois Brick means here,
19 and shouldn't that ambiguity, if -- if there is
20 such ambiguity, be resolved by looking at the
21 text of the statute? Any person injured?

22 GENERAL FRANCISCO: Yes, Your Honor.

23 JUSTICE KAVANAUGH: That's broad.

24 GENERAL FRANCISCO: And what I think
25 that Illinois Brick reflects is the type of

1 statutory interpretation that this Court has
2 engaged in in a variety of cases, including the
3 RICO cases, including the Lexmark cases, where
4 you interpret background principles of
5 proximate cause to be built into the statute,
6 including the rule that damages stop at the
7 first step.

8 JUSTICE KAGAN: Does it make a
9 difference, General, that -- that Apple is
10 influencing the prices here? In other words,
11 this is -- you're suggesting that the app
12 developers are just sort of setting these
13 prices independently --

14 GENERAL FRANCISCO: Uh-huh.

15 JUSTICE KAGAN: -- but I'll give you
16 sort of two ways in which that's not true.

17 The first way is this 99 cent
18 charge --

19 GENERAL FRANCISCO: Uh-huh.

20 JUSTICE KAGAN: -- which you might
21 say, well, that doesn't matter because, you
22 know, it could be 99 cents or it could be
23 \$100.99.

24 But, in fact, these are all low-cost
25 products for the most part. So saying a price

1 has to end with the -- you know, the -- the
2 number 99 is saying a lot about the fact that
3 you can't charge 77 cents or 55 cents --

4 GENERAL FRANCISCO: Sure.

5 JUSTICE KAGAN: -- or 32 cents. So
6 that's one.

7 And the other is the entire allegation
8 here is that Apple is truly a monopolist on
9 both sides of the market. It's able to dictate
10 to developers whatever price structure it
11 wants, and it's also able to dictate to
12 consumers what the nature of the sale is going
13 to be.

14 GENERAL FRANCISCO: Right.

15 JUSTICE KAGAN: And in that event, it
16 -- it sure seems as though, you know, Apple --
17 you know, it happened to set up this commission
18 that puts it in the ambit of Illinois Brick,
19 but it could have done a thousand other things
20 that are essentially the same that would have
21 taken it out of the Illinois Brick rule.

22 GENERAL FRANCISCO: Sure. And let me
23 take those points in turn. First, the 99 cent
24 pricing policy.

25 The first thing I'll point out is it's

1 not in the complaint, but we'll put that to the
2 side and assume that it's part of this case.
3 Here, I don't think it changes the fact that
4 the app makers still control the overall price,
5 and to the extent that -- to the extent that
6 Respondents are harmed by that, it's based on a
7 pass-through.

8 Look, if I go to an auction house and
9 I have to bid in \$10 increments, nobody thinks
10 the auction house is setting the price. The
11 bidders are still setting the price. And,
12 here, the Respondents are --

13 JUSTICE KAGAN: But if you have to bid
14 in \$10 increments and the -- and the true
15 alternative prices are \$3, \$5, and \$7 --

16 GENERAL FRANCISCO: Right.

17 JUSTICE KAGAN: -- then, indeed, you
18 are setting the price.

19 GENERAL FRANCISCO: And, well, that's
20 my second point, Your Honor. Here, any injury
21 is based on a pass-through because app makers
22 are either going to round up or they're going
23 to round down. If they round down to the lower
24 99 cent price point, the consumers aren't
25 injured at all. If they round up to the next

1 99 cent price point, the consumers are injured
2 as a result of the pass-through theory. And
3 it's that intermediating pricing decision that
4 we think that under the principles of proximate
5 cause that --

6 JUSTICE SOTOMAYOR: General, the
7 problem is that they're not measuring damages
8 by that.

9 GENERAL FRANCISCO: I --

10 JUSTICE SOTOMAYOR: As I understand,
11 they're saying it's not the 30 percent; it is
12 what the price would be if we could buy apps
13 outside of this closed loop.

14 GENERAL FRANCISCO: I --

15 JUSTICE SOTOMAYOR: And it could be
16 theoretically a lot higher than the markup, it
17 could well be within it, but the point is that
18 that 30 percent -- that 30 percent or whatever
19 that 30 --

20 GENERAL FRANCISCO: Uh-huh.

21 JUSTICE SOTOMAYOR: -- percent figure
22 is, is not the measure of our damages. That's
23 as I understand --

24 GENERAL FRANCISCO: Yeah --

25 JUSTICE SOTOMAYOR: -- that they're

1 saying the developers may have their own claim,
2 their damages likely have to stay within the
3 30 percent, but we don't measure our damages by
4 that.

5 GENERAL FRANCISCO: So, respectfully,
6 I'll disagree with that, and in explaining it,
7 Justice Kagan, I think I can also answer the
8 second part of your question.

9 The harm to the consumers here is that
10 they have to pay higher prices for apps, and
11 the reason they have to pay higher prices for
12 apps -- and, Justice Kagan, this goes to your
13 question -- is because Apple controls the
14 pipeline that connects app makers on the one
15 hand and iPhone users on the other.

16 And the way they exploit that pipeline
17 through their alleged monopoly is by charging
18 that 30 percent commission. So the only reason
19 consumers are harmed here in the form of paying
20 higher prices is because the app makers decide
21 to increase their prices in order to recoup
22 that commission.

23 And, Justice Breyer, to your question,
24 the reason why this makes it different than
25 your hypothetical of Bill buys from Sam and you

1 have transactional proximity is because the
2 question isn't proximity between the parties
3 who are transacting with one another but
4 proximity between the antitrust violation, the
5 30 percent commission, and the harm to
6 consumers in the form of higher prices.

7 JUSTICE BREYER: I wouldn't have
8 thought that was the antitrust violation. I
9 would have thought the antitrust violation is
10 having enormous market power achieved by not
11 patents and not skill, foresight, and industry
12 but, rather, anticompetitive or more
13 restrictive than necessary practices.

14 Alcoa --

15 GENERAL FRANCISCO: For sure.

16 JUSTICE BREYER: -- Alcoa did not
17 charge higher than competitive prices, and
18 that's why Learned Hand said the easy life, not
19 necessarily higher prices, is the reward,
20 often, of monopoly. Now --

21 GENERAL FRANCISCO: For sure --

22 JUSTICE BREYER: -- I would have
23 thought it's a matter for proof at the damages
24 stage whether, in fact, Apple, assuming they
25 prove it is a monopoly, has extracted higher

1 than competitive prices from those particular
2 people, the plaintiffs, or whether they've just
3 had the easy life.

4 GENERAL FRANCISCO: Right.

5 JUSTICE BREYER: Now I don't think
6 that's the stage we're at in this case. So, if
7 you say right, right, right --

8 GENERAL FRANCISCO: Well --

9 JUSTICE BREYER: -- then they must
10 win.

11 GENERAL FRANCISCO: -- no -- so what I
12 wanted to say is that, for sure, the Illinois
13 Brick theory doesn't apply across the board,
14 but it does apply when somebody is bringing an
15 over-charge theory, as in Illinois Brick, as in
16 Hanover Shoe, and as here. The --

17 JUSTICE BREYER: Have we had trial on
18 that?

19 GENERAL FRANCISCO: Your Honor, where
20 you have that kind of over-charge theory, what
21 Illinois Brick says -- asks is, under basic
22 principles of proximate cause, is there some
23 party other than the monopolist that's standing
24 in between the plaintiffs' injury in the form
25 of higher prices and the monopolist's violation

1 in the form of the commission.

2 And whenever the price setter, the
3 ultimate price setter, is somebody other than
4 the monopolist, it's never the monopolist's
5 over-charge that is the direct cause --

6 JUSTICE KAVANAUGH: But --

7 GENERAL FRANCISCO: -- of the injury.

8 JUSTICE KAVANAUGH: -- but if the app
9 developer -- if Apple bought the apps from the
10 app developer and then added 30 percent to it
11 and sold it to the consumer, you would agree
12 that a claim could lie there, correct?

13 GENERAL FRANCISCO: Your Honor, I want
14 to make sure I understand the hypothetical. If
15 Apple said --

16 JUSTICE KAVANAUGH: Apple's buying the
17 app from the app developer for a price --

18 GENERAL FRANCISCO: Right.

19 JUSTICE KAVANAUGH: -- Apple's then
20 adding 30 percent to that price and selling it
21 to the consumer. The consumer alleges that
22 Apple's doing that as a result of monopolistic
23 behavior.

24 The claim lie?

25 GENERAL FRANCISCO: Yes, you can sue

1 Apple directly, but you can't sue Apple if the
2 -- if -- if Apple isn't the price-setting
3 party, but the app maker is the price-setting
4 party. And that's why -- may I finish the
5 answer, Your Honor?

6 And that's why the key is who sets the
7 price, and it's very hard to manipulate our
8 rule because, under our rule, you actually have
9 to change the party that has the authority to
10 set the final price, and that's a fundamental
11 change in the nature of the transaction itself.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK
16 ON BEHALF OF THE RESPONDENTS

17 MR. FREDERICK: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 Apple directed anticompetitive
20 restraints at iPhone owners to prevent them
21 from buying apps anywhere other than Apple's
22 monopoly App Store. As a result, iPhone owners
23 paid Apple more for apps than they would have
24 paid in a competitive retail market.

25 Under this Court's precedents, iPhone

1 owners have a cause of action under Section 4
2 of the Clayton Act directly against Apple for
3 those over-charges. The court of appeals
4 should be affirmed for three reasons.

5 First, Illinois Brick is a bright-line
6 rule that Respondents easily satisfy.

7 Second, Apple directed its monopoly
8 abuses at Respondents. So it's appropriate
9 that Respondents can sue Apple for their
10 damages as a result of those violations.

11 And, third, Apple seeks to expand and
12 modify the bright-line rule of Illinois Brick
13 to deny indisputably direct purchasers an
14 antitrust remedy and to change the rule into a
15 standardless inquiry that will be hard to apply
16 at the pleadings stage.

17 Now, if I could return to the first
18 point, the direct purchaser rule is a
19 bright-line rule. This Court said so in
20 Illinois Brick and, importantly, a case that
21 has not yet been discussed today, in UtiliCorp,
22 in which the Court said Illinois Brick is a
23 bright-line rule for direct purchasers,
24 notwithstanding the economics that go into
25 that.

1 UtiliCorp was a case that protected
2 the defendants, who were asserting that -- who
3 -- who were asserting that the -- that there
4 was a break in the link of the chain.

5 This case is really the flip side of
6 that to protect plaintiffs who directly
7 purchased from the alleged antitrust violator
8 and are claiming damages as a result of that
9 antitrust violation.

10 CHIEF JUSTICE ROBERTS: There's --
11 there's one antitrust violation under your
12 theory, which is the increase, the 30 percent
13 increase that Apple imposes when it -- when
14 it's -- when, as you put it, it sells the apps?

15 MR. FREDERICK: Wrong. And this is
16 very important for the Court to understand.
17 The antitrust violation here is the monopoly
18 App Store. Consumers cannot buy an app
19 anywhere other than Apple's 100 percent-owned
20 monopoly App Store.

21 CHIEF JUSTICE ROBERTS: But, when it
22 comes to the -- the 30 percent increase, you're
23 -- you're obviously saying the purchasers,
24 again, under your theory of the apps, are
25 harmed by that and recover -- can recover

1 damages for that, and also that the developers
2 are harmed by that and they can recover damages
3 for it as well.

4 In other words, to the extent it might
5 be said that Apple is a two-sided market,
6 they're -- they're subject to suit on both
7 sides of the market for a single antitrust
8 price increase that they're alleged to have
9 imposed.

10 MR. FREDERICK: So, Mr. Chief Justice,
11 I think that your question kind of gets to the
12 core of a lot of the confusion here because, by
13 having an wholly-owned monopoly App Store,
14 Apple is able to distort the market at the
15 supply chain and at the retail chain for
16 consumers.

17 We, representing consumer iPhone
18 owners, are suing only for the damages that we
19 incur. That is the higher than what a
20 competitive market price would be for apps.

21 Our measure of damages is not
22 necessarily the 30 percent. The 30 percent is
23 simply proof that Apple is acting as a
24 monopolist because it extracts --

25 CHIEF JUSTICE ROBERTS: No, no, I

1 understand -- I understand your claim on your
2 side of the market. But you do think that the
3 developers have a claim as well, don't you?

4 MR. FREDERICK: Well, I have no grief
5 --

6 CHIEF JUSTICE ROBERTS: It's the same?

7 MR. FREDERICK: I have -- it's not the
8 same. It is a different claim.

9 CHIEF JUSTICE ROBERTS: For -- for the
10 same price increase --

11 MR. FREDERICK: No --

12 CHIEF JUSTICE ROBERTS: -- for the
13 same --

14 MR. FREDERICK: -- I disagree with
15 that, Mr. Chief Justice. Apple's supplier of
16 the apps, if they have a claim, it is that
17 Apple has distorted the market for the supply
18 of apps in a way that hurts app developers'
19 profits.

20 Their argument would be, if we weren't
21 suffering under the one monopoly store
22 constraint, we might be able to charge a
23 different price lower than 99 cents and be able
24 to get a direct purchase from an iPhone Apple
25 owner.

1 CHIEF JUSTICE ROBERTS: Well, I think
2 you're just saying that the measure of damages
3 would be different between the two sides of the
4 market?

5 MR. FREDERICK: And -- but they would
6 be different damages.

7 JUSTICE KAGAN: In other words, you
8 are saying the consumer says, I'm paying a
9 higher price for the product. It might be the
10 entire 30 percent commission, it might be some
11 portion of the 30 percent commission, that's
12 super-competitive, but I'm paying a higher
13 price for the product.

14 And the app developer says: Well, I
15 don't -- you know, that's irrelevant to me. I
16 don't have to buy the product. What's relevant
17 to me is fewer people are buying my apps.

18 And that represents some amount of
19 lost profits. But those two things are not --
20 I mean, it is true that two people are being
21 able to sue because Apple is -- is transacting
22 with each of these people and each of them has
23 a gripe against what -- the way Apple has
24 structured the market.

25 But the damages are entirely

1 different. One is a measure of lost profits,
2 which may or may not exist. The other is I'm
3 paying too much.

4 MR. FREDERICK: That's correct.

5 JUSTICE GORSUCH: Well, but, Mister --

6 JUSTICE ALITO: That's an interesting
7 theory, but is that the theory -- is that your
8 claim?

9 MR. FREDERICK: Yes.

10 JUSTICE ALITO: I thought this case
11 was all about the 30 percent.

12 MR. FREDERICK: Well, the other side
13 has been trying, Justice Alito, to make the
14 case all about the 30 percent. But if you read
15 the --

16 JUSTICE ALITO: So the 30 percent has
17 nothing to do with this?

18 MR. FREDERICK: The -- what the
19 30 percent is, is an allegation that Apple is
20 monopolizing the sale of apps. And we know
21 that because they can extract 30 percent on
22 every single sale, which only a monopolist
23 could do.

24 The 30 percent is not a measure of
25 damages. I'm not aware of any case from this

1 Court that says you have to plead antitrust
2 damages with particularity. But the -- because
3 of the ability to extract a monopoly rent, we
4 can say in good faith that they -- we are
5 paying more than we would pay than if a
6 competitive market existed.

7 JUSTICE GORSUCH: Mr. Frederick, I
8 think you'd agree that there can only be one
9 monopoly rent. And then the question becomes,
10 who's paying it?

11 And it might be spread partially
12 between direct purchasers and indirect
13 purchasers. It might be partially spread
14 between the app makers and the purchasers of
15 apps. And disaggregating that is the question
16 that we've been wrestling with here.

17 I guess here is where I'm stuck and
18 need your help. You say that Illinois Brick is
19 a bright-line rule premised on the existence of
20 a contractual relationship between the buyer --
21 the ultimate purchaser and the intermediate
22 seller, and that there has to be that kind of
23 relationship, rather than a sales agency
24 relationship like we have here.

25 But antitrust doesn't usually depend

1 upon such contractual formalities. It usually
2 depends upon the underlying economics. And I
3 have a hard time distinguishing this case from
4 Illinois Brick in the sense of -- in the
5 question of economic pass-through and the
6 problems that it presents, the possibility that
7 the intermediate purchaser may absorb the
8 monopoly rent and not pass it along.

9 Now that raises for me the question,
10 further question, and I -- I -- I'll wind it up
11 quickly, I promise, whether Illinois Brick is
12 correct. All right. And you have an amicus
13 that says it's not, but you don't make that
14 argument.

15 I'm really curious why --

16 MR. FREDERICK: Because --

17 JUSTICE GORSUCH: -- the plaintiffs'
18 bar is not making that argument before this
19 Court.

20 MR. FREDERICK: Because --

21 JUSTICE GORSUCH: So there -- there's
22 a whole -- a whole bunch of things for you to
23 chew on.

24 MR. FREDERICK: Okay. I'll try to
25 chew on them succinctly, Your Honor.

1 We haven't asked for Illinois Brick to
2 be overruled because we plainly meet the
3 bright-line rule. We paid Apple and Apple was
4 --

5 JUSTICE GORSUCH: Say I don't -- say I
6 don't buy the formalistic contractual -- it
7 seems to me an argument in -- in -- in the law
8 of contracts rather than the law of antitrust.
9 So help me out with economics.

10 MR. FREDERICK: Economics, we paid
11 money. Apple never shared that money with any
12 middleman. Illinois Brick is a case about a
13 middleman. There's no middleman here.

14 We paid the money. Apple kept
15 30 percent of it --

16 JUSTICE GORSUCH: Again -- again, that
17 --

18 MR. FREDERICK: -- before sending
19 70 percent on.

20 JUSTICE GORSUCH: -- that's based on
21 the form of the relationship.

22 MR. FREDERICK: But that --

23 JUSTICE GORSUCH: Talk to me about the
24 possibility, the problem that the app producer
25 might absorb the monopoly rent. That's the

1 economic problem that I'm stuck with.

2 MR. FREDERICK: Okay. If I could try
3 to answer your question with a hypothetical,
4 and if the Court would indulge me, suppose in a
5 competitive market the price for an app was 90
6 cents, not 99 cents, as Apple is charging.

7 It's 90 cents. We would all agree, I
8 think, that the consumer can sue for the nine
9 cent differential between the monopoly price --

10 JUSTICE GORSUCH: I understand the 99
11 cent argument.

12 MR. FREDERICK: Okay.

13 JUSTICE GORSUCH: Let's put that
14 aside.

15 MR. FREDERICK: All right. Now that
16 we've got that aside, let's look at it from the
17 developer's perspective.

18 If they had a claim -- if they had a
19 claim -- and I'm not saying that they do -- but
20 if they had a claim, they would need to show
21 the difference between the profits that they
22 would have achieved in the monopoly App Store
23 versus the profits they would have achieved at
24 a competitive market price.

25 That depends on three factors, okay?

1 One is the difference in sales that they would
2 achieve between 99 cents and 99 -- 90 cents.
3 The second is how their sales differences would
4 affect their revenue. And the third is whether
5 the commission was 30 percent in a competitive
6 market. Okay?

7 JUSTICE GORSUCH: Uh-huh.

8 MR. FREDERICK: So, if you take my
9 hypothetical, the damages for the developer,
10 there are three possibilities. One is that
11 it's zero. If the commission went to
12 22 percent in a competitive market, the
13 developer takes home 70 cents just as it does
14 with Apple's 30 percent in a 99 cent monopoly
15 market. At 22 percent commission, the
16 developer has zero damages.

17 It -- it -- the developer would have
18 positive damages if the commission were zero
19 because then the app developer sustains damages
20 of 20 cents. The developer would make the 90
21 cents in the competitive market instead of the
22 70 cents that Apple is now passing along by
23 virtue of the monopoly market.

24 The damages would be negative, though,
25 if, in a competitive market, the commission

1 stayed at 30 percent because, there, the
2 benefits that would achieve by the monopoly --
3 price of 99 cents give the developer an extra
4 eight cents per transaction.

5 So, in that way, Mr. Chief Justice,
6 the developer has a different claim that's
7 based on its lost profits. And that would be
8 irrespective of whether the buyer of the app,
9 the consumer, sustains damage for the nine
10 cents in my hypothetical.

11 You can run these out under different
12 -- you can get your law clerks to run all the
13 different scenarios. It always works the same
14 way.

15 JUSTICE BREYER: Unless we're --
16 unless we're prepared to overrule, which wasn't
17 our case, Alcoa, I think all you'd have to show
18 is, one, they have monopoly power, and, two,
19 they achieved it through less restrictive --
20 for more restrictive than necessary practices,
21 end of your burden.

22 In your case -- and -- and Justice
23 Gorsuch is quite right, there's only one
24 monopoly profit to be earned. And so you'd
25 have a different question when you get to the

1 damages stage. The different question is:
2 Well, how did they divide that monopoly profit?
3 You'd like to show that they got some
4 of it from consumers. But that's for a later
5 proceeding.

6 MR. FREDERICK: That's correct.

7 JUSTICE BREYER: And you're adding one
8 thing. One of the things that we want to use
9 in order to prove that they do have monopoly
10 power, i.e., the power to raise price
11 significantly above a competitive level, is
12 they charge us so -- bloody -- much money.
13 That's just a piece of evidence here, and we'll
14 worry later, agreeing that there's only one
15 monopoly profit in theory, as to who got what.

16 Now have I stated that correctly?

17 MR. FREDERICK: Yes, you have, Justice
18 Breyer.

19 I mean, the basic problem in this case
20 as it comes to this Court is who gets to
21 complain about the monopoly App Store. We say,
22 as the buyers of the apps from the monopoly App
23 Store, there's no form or function, there are
24 no contract issues, Justice Gorsuch, that
25 create a different form versus function

1 problem. We're paying the money. They're
2 keeping it. And we think we're paying more
3 than we're -- we would have to if the market
4 was a competitive market.

5 JUSTICE KAVANAUGH: They say it would
6 be different if Apple purchased the apps from
7 the app developer and then added 30 percent on
8 the sale.

9 And why is that not different?

10 MR. FREDERICK: Because it's
11 irrelevant. And here's where we part company
12 from the Solicitor General. It's irrelevant
13 who sets the price so long as what the
14 violation is here, the monopoly App Store leads
15 to higher prices that the consumers have to
16 pay. That's what the violation is. That's how
17 we are proximately harmed.

18 So, in the very hypothetical, Justice
19 Kavanaugh, that you posed to the Solicitor
20 General, the Solicitor General concedes we are
21 direct purchasers in a situation where the app
22 developer sets the price and they simply tack
23 on 30 percent by virtue of their monopoly
24 power.

25 It's no different here. If you think

1 about it in -- in terms of what is actually
2 going on, suppose Apple dropped its commission
3 from 30 percent to 20 percent, but it
4 maintained the price restriction of a 99 cent
5 app. From the consumer's perspective, we're
6 still overpaying for the app. Under that
7 hypothetical, Apple simply gives the app
8 developer more money, but that doesn't affect
9 the consumer welfare at all.

10 JUSTICE SOTOMAYOR: Now --

11 JUSTICE GORSUCH: Are we going to
12 create a -- I'm sorry. Go ahead, please.

13 JUSTICE SOTOMAYOR: The General said
14 that if, in fact, Apple bought these products
15 from suppliers and paid them and then added
16 30 percent to you, that that would be a classic
17 antitrust violation.

18 You're saying -- that's basically what
19 they're doing here anyway. But let's take the
20 reverse. Let's say they collected money from
21 you and paid all of it over to the developer
22 and then told the developer: Give us
23 30 percent of that back.

24 Would you then still be a direct
25 purchaser and --

1 MR. FREDERICK: So we would still be
2 direct purchasers if, under your hypothetical,
3 we're buying it from Apple and then Apple is
4 engaging in the Justice Gorsuch form over
5 function situations in terms of how the money
6 gets moved around.

7 I think that the -- in that situation,
8 we are still directly purchasing and we're
9 still able to complain about Apple's violation.
10 And I think, under your hypothetical, Justice
11 Sotomayor, we have to keep the idea that Apple
12 is still operating a monopoly App Store.

13 It's no different than if there was a
14 grocery store chain that monopolized the sale
15 of all vegetables. If they -- if that is the
16 only place you could buy vegetables, we would
17 say that that monopoly store outlet was able to
18 control prices and affect output. That's --
19 the -- basically what's happening here.

20 JUSTICE GORSUCH: Well, I think
21 Justice Sotomayor's question is a -- requires
22 further exploration. I mean, are -- are we in
23 danger of just incentivizing a restructuring of
24 contracts here so that all that Apple does or
25 people like it is make you purchase directly

1 from the app provider and then it then returns
2 the -- the profit to -- to Apple later?

3 And if that's all we're doing, then
4 what is the point of Illinois Brick? And you
5 still haven't explained to me why the
6 plaintiffs' bar isn't asking to overturn
7 Illinois Brick when 31 states are. So help --
8 help me on both those.

9 MR. FREDERICK: Well -- well --

10 JUSTICE GORSUCH: They're two separate
11 questions.

12 MR. FREDERICK: -- okay. So -- so let
13 me take the second one first, Justice Gorsuch.
14 I don't represent the plaintiffs' bar. I
15 represent the consumers in this case, and the
16 consumers in this case have no brief and no
17 beef with Illinois Brick.

18 We think we are direct purchasers. We
19 satisfy the rule. We come within the bright
20 line. That's okay with us.

21 What the Court decides doctrinally to
22 do with Illinois Brick is obviously something
23 where I think you go to a different situation
24 if the case arises.

25 But, on your other point, I think it's

1 the other side that is actually asking for the
2 opportunity to use contracts in order to
3 distort or recharacterize matters in a way that
4 evades the Illinois Brick bright-line rule.

5 JUSTICE GORSUCH: Well -- well, assume
6 for the moment that -- that I believe the
7 economics underlying the two arrangements are
8 very similar. Hard to distinguish. I haven't
9 yet heard you give me a good argument why.

10 So let's just posit that. Then it
11 really is just about form, isn't it?

12 MR. FREDERICK: No, I think in that
13 hypothetical, I would be prepared to say if we
14 were paying the developer directly for the app
15 and the app developer could set whatever price
16 it wanted to set, okay, keep with me on that
17 assumption, the app developer operating in a
18 free market can set whatever it wants to set,
19 and then Apple comes after the app developer
20 and says, hey, you bought it -- the consumer
21 bought it through our store, we want whatever
22 we want, that becomes not a problem with the
23 consumer; that becomes a problem between the
24 developer and the app --

25 JUSTICE GORSUCH: Ah --

1 MR. FREDERICK: -- and the seller of
2 the app.

3 JUSTICE GORSUCH: -- so pricing
4 control is really important to proximate cause
5 then?

6 MR. FREDERICK: I beg your pardon?

7 JUSTICE GORSUCH: So pricing control
8 is really important to proximate cause?

9 MR. FREDERICK: No, pricing control is
10 not important to price -- to proximate cause in
11 the sense that whether -- I think, under direct
12 proximate cause, we're buying the app directly
13 from the app developer, and, remember, a key
14 part of my answer was the app developer can set
15 that price competitively in a competitive
16 market.

17 What arrangements happen between Apple
18 exercising its monopoly control through the App
19 Store and the supplier is not something we are
20 proximately --

21 JUSTICE KAVANAUGH: Your -- your --

22 MR. FREDERICK: -- affected by that.

23 JUSTICE KAVANAUGH: Sorry to
24 interrupt. Your point was that the other side
25 is putting form over the reality?

1 MR. FREDERICK: That's correct. And
2 -- and they're doing it in a way that is
3 particularly standardless, because what the
4 court in UtiliCorp held was that even when it
5 is absolutely clear 100 percent of the
6 over-charge is going from the natural gas
7 supplier through the utility directly to the
8 consumer, this Court held: No, we're going to
9 keep the bright-line rule. Only the utility
10 gets to complain about the natural gas
11 over-charge.

12 And it was that bright-line rule that
13 the Court said is going to apply. And the
14 reason is exactly, Justice Alito, for the point
15 that you made, which is that it's about
16 judicial administration at the pleadings stage.
17 We're just trying to figure out who has the
18 claim and who could complain about the
19 antitrust violation. Here, that's clearly the
20 consumers because we're the ones who are paying
21 Apple the money to receive the app.

22 And so, to -- to Justice Kavanaugh, to
23 finish off the point, what the other side is
24 essentially asking is that, instead of having a
25 bright-line rule, it's a very fuzzy rule,

1 because they don't have a test for what
2 constitutes a pass-through. They don't have a
3 test that applies when there is no middleman.
4 There's no middleman in this particular
5 transaction. It's directly between the iPhone
6 owner and Apple.

7 And so you're going to have to figure
8 out, do they get a one ticket good for this
9 case only? They happen to be the largest
10 company in the world, or at least they were
11 some weeks ago, and they are able to extract
12 monopoly pricing by virtue of a unique
13 e-commerce monopoly on their App Store.

14 JUSTICE ALITO: What concerns me about
15 your argument is that it doesn't seem to be
16 based on the way in which this claim was
17 understood by the lower courts.

18 Maybe they misunderstood it. But, I
19 mean, the opening line of the -- the order
20 granting Apple's motion to dismiss the second
21 amended complaint by the district court: "The
22 thrust of Plaintiff's second amended complaint
23 is that Apple has engaged in antitrust conduct
24 by collecting 30 percent of the price of iPhone
25 applications."

1 MR. FREDERICK: The district court
2 just missed it, Justice Alito, respectfully.

3 JUSTICE ALITO: And where -- okay.
4 Where -- can you point to me where in the Ninth
5 Circuit's opinion they understood your claim in
6 the way that you've characterized it this
7 morning?

8 MR. FREDERICK: Yeah, they said on
9 page 21a of the petition app -- I think that's
10 the page -- that this is simply about a
11 monopoly distribution and that it is a simple
12 case as a result of that.

13 If you look at the bottom of 21a, the
14 very last paragraph: "Instead, we rest our
15 analysis, as compelled by Hanover Shoe,
16 Illinois Brick, UtiliCorp, and Delaware Valley,
17 on the fundamental distinction between a
18 manufacturer or producer on the one hand and a
19 distributor on the other." Apple is a
20 distributor of the iPhone apps, selling them
21 directly to purchasers through its App Store.

22 And because of that, we have standing
23 to complain that they are the seller of the
24 apps. That's -- it's a very simple case in
25 that -- as viewed through that lens.

1 Now I accept, Justice Alito, that
2 there have been a lot of arguments and this
3 idea about the 30 percent has led to a certain
4 lack of clarity, but I think that the position
5 we have written in our brief is the best
6 articulation of what the underlying theory is
7 here, and that is that the Apple monopoly App
8 Store over-charges iPhone owners for apps.

9 JUSTICE KAGAN: And -- and -- and the
10 rule of the end in 99-cent requirement in that
11 theory is what? In other words, would your
12 theory be the same if no such requirement
13 existed, or would it not?

14 MR. FREDERICK: It would be still an
15 over-charge case, Justice Kagan, because the
16 theory economically is that, if you are having
17 to buy only from a monopoly, you are paying
18 more than you would if there was a, you know,
19 discount apps warehouse or you could buy
20 directly from the app's developer.

21 Our assertion is that, with multiple
22 sellers, multiple suppliers of the apps, we
23 would be able to buy them at a lower price.

24 JUSTICE KAGAN: So what's the
25 significance --

1 MR. FREDERICK: It's that competition.

2 JUSTICE KAGAN: -- of that end in
3 99-cent rule?

4 MR. FREDERICK: The significance of it
5 is that it informs the price elevation and the
6 price over-charge. And it also informs that,
7 contrary to Apple's assertion, they are not the
8 agent of the apps developers. I mean, they put
9 that in their contract. That's -- that's where
10 you get to Justice Gorsuch's form over
11 substance problem, because, at 99 cents,
12 they're telling the app developer, we're
13 foreclosing from you 99 percent of all pricing
14 options.

15 CHIEF JUSTICE ROBERTS: Well, if it's
16 that significant, why didn't you include it in
17 the complaint?

18 MR. FREDERICK: Because it's not
19 significant from this perspective, Mr. Chief
20 Justice, and that is that, with an -- a
21 monopoly store, the prices are over-charged,
22 our theory is relatively simple. They brought
23 up the 99 cents in the blue brief.

24 I think it's at page 9 of their brief
25 where they raise the 99 cent issue. And as we

1 were thinking about what the implications of
2 that were, it became clear to us that that
3 meant the app developer couldn't possibly be --

4 JUSTICE GORSUCH: Sounds kind of late
5 in the day --

6 JUSTICE KAVANAUGH: It's another --

7 JUSTICE GORSUCH: -- to come up with a
8 new litigation theory.

9 MR. FREDERICK: Well, no, we're at a
10 pleadings stage, Justice Gorsuch.

11 JUSTICE GORSUCH: In the Supreme
12 Court, a blue brief, really?

13 MR. FREDERICK: Well, it's their --

14 JUSTICE GORSUCH: I mean, should we be
15 taking that up now? I mean, maybe you can
16 amend your complaint or something like that on
17 remand, but should we be addressing that?

18 MR. FREDERICK: Well, Justice Gorsuch,
19 they were the ones, is what I'm saying, that
20 brought up the 99 cents. It wasn't us.

21 JUSTICE GORSUCH: But we're usually --

22 JUSTICE KAVANAUGH: It's not --

23 JUSTICE GORSUCH: -- a court of
24 review, not first view, right.

25 MR. FREDERICK: Well, no, our point

1 was that when they raised the 99 cents is
2 somehow proof that the developer actually gets
3 to set the price, we say, no, it's actually
4 irrelevant for the reasons which I've already
5 stated.

6 But, secondly, it's just wrong
7 because, if you're constraining what 99 percent
8 of the pricing options are, you know, that --
9 that's -- it is what it is.

10 But it also has the effect
11 economically of raising the prices --

12 JUSTICE KAVANAUGH: It's going to --

13 MR. FREDERICK: -- that the consumers
14 have -- have to pay.

15 JUSTICE KAVANAUGH: It's going to add
16 to your damages, correct?

17 MR. FREDERICK: Well, it --

18 JUSTICE KAVANAUGH: Potentially.

19 MR. FREDERICK: -- it could
20 potentially add to the damages or it could
21 subtract from the damages.

22 JUSTICE KAVANAUGH: Correct.

23 MR. FREDERICK: We don't know. What
24 we know is what the price is in a
25 noncompetitive market, and we will have to have

1 experts that will assess what the damages would
2 be in a competitive market.

3 JUSTICE KAVANAUGH: Your theory
4 doesn't depend on the 99 cent?

5 MR. FREDERICK: Our theory of damages
6 or our theory of the violation?

7 JUSTICE KAVANAUGH: Well, the --

8 MR. FREDERICK: The theory of the
9 violation is the wholly-owned monopoly App
10 Store as the place to sell apps. That is what
11 the violation is here. And -- the -- how you
12 calculate the damages is you look at what is
13 the over-charge based on what the monopoly is
14 selling the app for versus what it would be
15 sold for in a competitive market.

16 The antitrust scholars, and I would
17 direct you to page 23 of their brief, they go
18 through a lot of the pricing scenarios that you
19 have explored through hypotheticals here and
20 they make very clear that, as a matter of
21 function, what is happening here is that the
22 monopoly seller of the apps here is extracting
23 an over-charge from the purchasers who are
24 direct purchasers of those apps.

25 JUSTICE ALITO: If this case were to

1 go to trial as a class action, would every app
2 purchaser potentially be entitled to three
3 times the 30 percent over-charge, or would it
4 depend on the particular app?

5 MR. FREDERICK: Your Honor, I -- I
6 think that -- I don't know the answer to your
7 question fully. I'll be candid. I have not
8 thought about how the experts are actually
9 going to try to prove it up.

10 What I would say, though, is that
11 they're probably -- what will likely happen is
12 that because there are apps that are sold at 99
13 cent, a huge number of them are free, but a
14 huge number are sold at 99 cents, some other
15 strata is sold for \$1.99, some other strata is
16 sold for \$2.99 or \$6.99, and I haven't put my
17 head around, to be perfectly honest, exactly
18 how you would carve up the damages on some sort
19 of a pro rata basis. But the idea, of course,
20 of the Clayton Act is that treble damages is
21 designed to deter antitrust violations.

22 And so this Court has made very clear
23 in its cases that the point of having that
24 deterrence is to avoid having the monopolist in
25 this case act in a way that it's not penalized

1 for its monopoly behavior.

2 And if you were to suppose that it was
3 just a single damages problem, it would be easy
4 for monopolists to simply act, and, if they get
5 caught, they just simply pay over what they
6 caused in damage, but the idea behind the
7 Clayton Act's treble damages remedy is designed
8 to deter actions just like this.

9 And that is why Apple cannot point to
10 another e-commerce distributor that does what
11 it does. In every other instance, as we point
12 out in the red brief, there is an alternative
13 to buying the product.

14 And, in fact, Apple doesn't even do
15 this with its own computer software. And we
16 have pleaded that in the complaint, Mr. Chief
17 Justice, where we say that, if you buy
18 software, you can buy it open source and you do
19 not have to buy it through Apple's monopoly
20 chain.

21 So the iPhone app monopoly App Store
22 is a unique feature of the e-commerce setting.
23 Apple has found ways using technology and
24 contractual constraints to limit the
25 opportunity of a competitive market to

1 flourish.

2 If a competitive market did flourish,
3 the prices that iPhone owners pay would be
4 lower. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Three minutes, Mr. Wall.

8 REBUTTAL ARGUMENT OF DANIEL M. WALL
9 ON BEHALF OF THE PETITIONERS

10 MR. WALL: Thank you, Mr. Chief
11 Justice.

12 I think I need to begin with the
13 experience I had in this case for its first
14 nine years, and that is it was about a
15 30 percent commission.

16 Paragraph 48 of the complaint is -- is
17 -- is the key allegation, which is the root of
18 the damages theory, which maintains that the
19 30 percent commission is a monopoly price.
20 It's called a monopoly price.

21 It's elsewhere called a
22 super-competitive price. It is the root of the
23 damages theory not just in part, not just on
24 the periphery, but entirely.

25 The brief in opposition at -- at pages

1 5 and 12 make this unmistakably clear. At --
2 at page 5, the brief in opposition states:
3 "Respondents seek damages based solely on the
4 30 percent markup."

5 So whatever other attributes of this
6 case one may want to talk about that might
7 contribute to the liability theory, the injury
8 theory, the damages theory, is, in their words,
9 solely about the -- the 30 percent.

10 JUSTICE GINSBURG: Mr. Wall, I have a
11 question about this Court's case law, and I'd
12 -- I'd like your answer to it.

13 If Apple had in every agreement with
14 an iPhone owner a provision that you can sue --
15 you can't sue, you have to go to an arbitrable
16 forum in a one-by-one --

17 MR. WALL: Yes.

18 JUSTICE GINSBURG: -- then Apple would
19 be home free in this case?

20 MR. WALL: We -- we do not have such a
21 provision. In fact, the -- all of the relevant
22 agreements with both developers and consumers
23 state that -- that there shall be litigation in
24 the Northern District of California.

25 JUSTICE GINSBURG: Yeah, I -- I know

1 -- I know you don't, but suppose you did.

2 MR. WALL: If -- if that were the
3 case, then this would be a matter for
4 arbitration, and I don't think it changes the
5 legal question.

6 JUSTICE GINSBURG: And -- and it would
7 take this case out of this Court, put it in an
8 arbitrable forum, with a single complainant?

9 MR. WALL: Indeed, it -- it would, but
10 that's not this case. There is -- there is no
11 concern about that in this case.

12 The second point that I want to make
13 is -- relates to this duplicative recovery
14 possibility. It -- there is -- we never heard
15 any suggestion prior to the Respondents' merits
16 brief about potential lost profits claims based
17 upon monopsony.

18 To the contrary, the theory throughout
19 the life of this case is that -- that
20 developers, if they sued, would sue over the
21 same 30 percent markup. The brief in
22 opposition at 12 says any claim by the app's
23 developers -- excuse me -- a claim by the app's
24 developers, even if they had one, would not
25 overlap the 30 percent markup paid by app's

1 purchasers. Rather, it is a piece of the same
2 30 percent pie.

3 So going back to what is Illinois
4 Brick about, it is about not having that
5 apportionment fight. They admitted to the --
6 to the time that this case was on this Court's
7 doorstep that this is all about an
8 apportionment fight between the developers.

9 As -- as to the -- the -- the -- which
10 is the better rule, the formalistic rule or the
11 substantive rule, I suggest that -- that the
12 formalistic rule is always the one that is most
13 subject to manipulation.

14 The substantive rule that asks is your
15 damages theory a pass-on theory focuses on what
16 is of economic substance. And, here, that's
17 what the district court judge did.

18 In -- in a patient but persistent
19 manner, she required them to say what is your
20 theory. And it -- and at JA 137 to 143, you
21 see the transcript of the district court
22 argument when -- when, finally, at JA 141, they
23 said -- or 143, rather -- they said their
24 theory is that, because of the commission, the
25 developer would mark up the app.

1 That is a classic over-charge case.
2 Now, to be sure, in a new setting, it's a new
3 world setting. It's not the brick-and-mortar
4 setting of the three cases that this case --
5 that this Court has decided before. But it is
6 the same economics that should have the same
7 outcome prohibiting pass-through damages
8 claims.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:05 a.m., the case
12 was submitted.)

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