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 FOR THE R STREET INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHARLES DUAN
Counsel of Record
THOMAS STRUBLE
R STREET INSTITUTE
1212 New York Ave. N.W.
Suite 900
Washington, D.C. 20005
(202) 525-5717
cduan@rstreet.org
tstruble@rstreet.org

Counsel for Amicus Curiae

August 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The R Street Institute is a non-profit, non-partisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

SUMMARY OF ARGUMENT

Respondents' claim against Apple should be dismissed, regardless of how the relationship between Respondents, Apple, and iOS application developers is characterized, based on the practical considerations recognized in *Illinois Brick* relating to duplicative recovery, complexity, and justiciability. Respondents' relief lies not with Section 4 of the Clayton Act, but with the Department of Justice, Federal Trade Commission, and state attorneys general.

1. The treble damages remedy provided by Congress in Section 4 of the Clayton Act of 1914 is an extraordinary one that applied too broadly could impose

---

[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief, and all parties have given their consent. Petitioner consented to this brief and Respondents filed blanket consent for the filing of *amicus* briefs. Petitioner's consent letter has been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

heavy costs both on the economy—with firms facing potentially massive litigation risks—and on the courts—who would face complex economic theories, sprawling litigation, and the arduous task of distributing any potential damages among all affected parties.

These and other practical considerations gave rise to the *Illinois Brick* rule, which allows only direct purchasers to sue under Section 4 for an alleged antitrust violation. In addition to the concerns about complexity and justiciability noted above, concerns about the prospect of duplicative recovery were also raised. If indirect purchasers were allowed to sue under Section 4, firms would face treble-damages lawsuits not just from their direct purchasers, but potentially anyone in the supply chain who was harmed by the allegedly anticompetitive conduct. Those same practical considerations are present here.

Allowing Respondents' claim to proceed would risk Apple having to suffer through not only one treble-damages suit, but potentially multiple treble-damages suits based on the same conduct from application developers, cloud services providers, hardware makers, or any other affected party in the iOS supply chain. That would not only be unjust, but it would also do tremendous harm to the American economy, particularly the information and communications technology sectors, which have such large customer bases and global supply chains. These factors would also make the monopolization claim against Apple quite complex, as proof of harm and any calculation of damages would both require detailed economic models and

predictions, likely offered by dueling experts from either side. And distributing any awarded damages, if the claim were successful, would also be difficult, as there are tens or even hundreds of millions of iOS users worldwide.

2. Thus, Respondents' complaint should not be allowed to proceed. For consumers like Pepper, their relief lies not with Section 4, but with the Department of Justice, Federal Trade Commission, and state attorneys general. History shows that these actors can provide effective relief to consumers following violations of the antitrust laws. Indeed, these actors can not only adequately protect users, but they are best placed to do so.

The Department of Justice, Federal Trade Commission, and state attorneys general all regularly accept antitrust complaints from consumers like Pepper. These actors also have the authority, expertise, and resources necessary to pursue complex and sprawling antitrust litigation. Additionally, these actors are bound by statutory constraints that protect defendants from potential duplicative recovery or other unjust harms while still providing adequate remedies for aggrieved consumers.

And the antitrust protections offered by these actors are not merely theoretical. These actors have all recently brought antitrust suits against major technology companies, some of which led to substantial refunds and other forms of consumer redress.

For the foregoing reasons, this Court should reverse the Court of Appeals.

ARGUMENT

I. Respondents Lack Antitrust Standing for the Same Practical Considerations Identified in *Illinois Brick*.

"The treble damages remedy of [Section] 4 is an extraordinary one, and must be carefully confined within reasonable limits." *Gregory Marketing Corp. v. Wakefern Food Corp*., 787 F.2d 92, 98 (3d. Cir. 1986). The *Illinois Brick* rule is one such reasonable limit on Section 4 of the Clayton Act of 1914, Pub. L. No. 63-212, § 4, 38 Stat. 731 (15 U.S.C. § 15), and the practical considerations that led to its creation should drive its application in the present case with equal force. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730–32 (1977).

A. The *Illinois Brick* Rule is Based on Practical Considerations.

In *Illinois Brick*, the State of Illinois sued Illinois Brick Co., a manufacturer of bricks, under Section 4 of the Clayton Act for allegedly colluding to fix prices in violation of Section 1 of the Sherman Act. *Id.*, at 726–27. The State of Illinois did not buy bricks from Illinois Brick Co. directly, but instead purchased buildings from general contractors, who purchased brick structures from masonry subcontractors, who purchased bricks directly from Illinois Brick Co. *Id.* at 726. Ultimately, as an indirect purchaser, the State of Illinois was denied standing in its case against Illinois Brick Co. under Section 4. *Id.*, at 736–48.

Illinois Brick recognized that practical considerations are the primary basis for limiting antitrust

standing under Section 4. And perhaps the strongest practical consideration recognized in *Illinois Brick* was the possibility of duplicative recovery:

> Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.

Illinois Brick, 431 U.S. at 730. Allowing multiple, treble-damages suits to be brought against the same party for the same conduct would unfairly punish antitrust violators. It would also hurt the economy writ large, as firms facing additional litigation from class-action treble-damages lawsuits by indirect purchasers would likely scale back on investments to compensate for that added risk. Thus, courts have rightfully been "unwilling to 'open the door to duplicative recoveries' under [Section] 4." *Id.* at 731 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)).

Additionally, *Illinois Brick* recognized the "uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,'" and "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. 720, 731–32 (1977)

(quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 493 (1968)). Those considerations are primarily about the complexity of antitrust suits. They recognize that antitrust suits frequently require detailed economic modeling—typically in the form of conflicting reports and testimony offered by dueling expert witnesses—both to demonstrate harm and to calculate damages. And with indirect purchasers, those damages calculations for each level of the supply chain would require "virtually unascertainable figures[.]" *Id.* at 725 n.3.

Finally, *Illinois Brick* recognized concerns about justiciability. When the relevant markets comprise millions or even billions of consumers scattered across multiple jurisdictions, the task of managing a case, joining plaintiffs, and distributing damages among all affected parties would be tremendously difficult, if not altogether impossible.

> Permitting the use of pass-on theories under [Section] 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id. at 737. There are rules of civil procedure available to join all potential claimants to a suit, but as a practical matter, "[i]t is unlikely, of course, that all potential plaintiffs could or would be joined. Some may not wish to assert claims to the overcharge; others may be unmanageable as a class; and still others may be beyond the personal jurisdiction of the court." *Id.* at 739.

These practical considerations led to the creation of the *Illinois Brick* rule, and they should drive its application in the present case with equal force.

B. The Practical Considerations Recognized in *Illinois Brick* are Also Present Here.

The practical considerations relating to duplicative recovery, complexity, and justiciability recognized in *Illinois Brick* are also present here. Consider that there are over a billion iOS devices in consumers' hands today, *see* Apple, *Apple Reports First Quarter Results* (Feb. 1, 2018) (available online),[2] millions of iOS application developers, *see, e.g.*, Andy Boxall, *There are 12 Million Mobile Developers Worldwide, and Nearly Half Develop for Android First*, BUSINESS OF APPS (Oct. 7, 2016) (available online), and hundreds of suppliers providing materials, manufacturing, and assembly services to Apple worldwide. *See* Apple, *Supplier List* (Feb. 2018) (available online). There are also countless providers of hosting and content delivery services who might also be harmed by

---

[2] URLs for online resources are provided in the Table of Authorities.

Apple's alleged monopolization of the iOS application store.

The rules of civil procedure would allow all potential plaintiffs to join Respondents' case, but many are "beyond the jurisdiction of the personal jurisdiction of the court[,]" and may be "unmanageable as a class," so here, as in *Illinois Brick*, "[i]t is unlikely … that all potential plaintiffs could or would be joined." 431 U.S. at 738. Thus, if Respondents' were to proceed and ultimately prevail in proving their claim, Apple would have to pay treble damages and attorneys' fees to all the plaintiffs, but that still would not resolve the matter completely. Apple might yet face further treble-damages suits from other plaintiffs who, for one reason or another, refused to join the initial class.

Allowing the monopolization claim against Apple to proceed would also require complex economic models and predictions, likely offered by dueling experts from either side, both to demonstrate harm and to calculate damages. Calculating damages and apportioning them among all affected parties would involve the same "virtually unascertainable figures," that were rejected in *Illinois Brick*, 431 U.S. at 725 n.3. Additionally, if the claim against Apple were successful, distributing the awarded damages would also be difficult, as there may be hundreds of millions or even billions of affected parties worldwide.

In this case, neither the district court nor the Ninth Circuit recognized the practical implications of their decisions, instead focusing only on how to define Respondents' relationship with Apple. *See* Order Granting Apple's Motion to Dismiss Second Amended

Complaint with Prejudice, *In re Apple iPhone Antitrust Litigation*, No. 11-06714-YGR, at 9–10 (N.D. Cal. Dec. 3, 2013); *In re Apple iPhone Antitrust Litigation*, 846 F.3d 313, 322–25 (9th Cir. 2017). But the practical considerations recognized in *Illinois Brick* are present here regardless of how the iOS supply chain is ultimately defined, and all these practical considerations suggest that the *Illinois Brick* rule should apply here to limit Section 4 treble-damages suits for alleged monopolization of the iOS application store to iOS application developers.

II. Respondents Have Effective Relief in the Department of Justice, Federal Trade Commission, and State Attorneys General.

That *Illinois Brick* limits standing under Section 4 does not mean that aggrieved consumers are without recourse. For consumers like Pepper, their relief lies not with Section 4, but with the Department of Justice, Federal Trade Commission, and state attorneys general. And history shows that each of these actors can provide effective relief to consumers following violations of the antitrust laws. In fact, these actors can not only adequately protect users, but they are best able to do so.

A. Role of the Department of Justice

The Department of Justice plays a key role in antitrust. It has the duty to "institute proceedings in equity to prevent and restrain" violations of the Sherman Act. *See* Sherman Antitrust Act of 1890, § 4, 26 Stat. 209 (15 U.S.C. § 4). It also has sole responsibility among federal agencies for policing antitrust violations among firms outside the Federal Trade

Commission's jurisdiction, such as common carriers, non-profits, and banks. *See* Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5(a)(2), 38 Stat. 719 (15 U.S.C. § 45(a)(2)).

In performing these responsibilities, the Department of Justice accepts and reviews public complaints about possible violations of the antitrust laws and regularly files suit seeking remedies on behalf of aggrieved consumers. *See* U.S. Dep't of Justice, Antitrust Div., *Report Violations* (available online) (last updated Jan. 29, 2018). In fact, the Department of Justice recently pursued an antitrust action against Apple and successfully obtained remedies for millions of consumers just like Pepper. In 2013, the Department of Justice brought a claim against Apple alleging it had colluded with publishers to fix prices on electronic books. *See United States v. Apple Inc.*, 952 F.Supp.2d 638 (S.D.N.Y. 2013). Following a bench trial, the district court found Apple guilty of violating the antitrust laws, *id* at 709, a ruling which was upheld on appeal. *United States v. Apple Inc.*, 787 F.3d 131 (2d. Cir. 2015), *cert. denied*, 136 S.Ct. 1376 (2016).

Ultimately, the Department of Justice obtained a settlement from Apple that amounted to $566 million in consumer refunds and $50 million in attorneys' fees. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with Apple Inc., at 1, *In re Electronic Books Antitrust Litigation*, No. 11-02293-DLC (S.D.N.Y. July 16, 2014). According to the plaintiffs' expert economist in that case, Dr. Roger Noll, that amounted to more than double the total damages suffered by consumers. *Id.* n.4. And

importantly, those consumer refunds were distributed broadly, covering any "natural-person consumers who purchased qualifying E-books from any settling publisher from April 1, 2010, to May 21, 2012[.]" *Id.* at 7. That included not only Apple customers, but also Amazon customers, Barnes & Noble customers, and others who had no direct relationship with Apple. *See, e.g.*, Olivia Solon, *Free Credits in Your Amazon Account? Apple Pays up After Price-Fixing Suit*, THE GUARDIAN (June 21, 2016) (available online).

Respondents' case against Apple alleges monopolistic rather than collusive anticompetitive behavior, but aside from that, the similarities between this case and the eBook antitrust litigation are striking. Had Respondents filed their complaint with the Department of Justice, there would be no issues with standing or duplicative recovery and this complex, sprawling litigation would be in the hands of an agency with the expertise and resources necessary to handle it. This is the avenue for relief Respondents should have pursued, rather than a class-action suit under Section 4.

B. Role of the Federal Trade Commission

The Federal Trade Commission also plays a key role in antitrust. Section 5 of the Federal Trade Commission Act charges it with policing "unfair methods of competition," 15 U.S.C. § 45. This authority covers the existing prohibitions in the Sherman Act, as well as "other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act." *See* Fed. Trade Comm'n, *Guide to Antitrust Laws: The Antitrust Laws*

(available online) (last visited Aug. 15, 2018). This gives the Commission broader antitrust authority than the Department of Justice, enabling it to pursue cases that would not technically violate the Sherman Act, but which would likely harm consumers or competition if left unchecked.[3]

Like the Department of Justice, the Federal Trade Commission accepts and reviews public complaints over alleged anticompetitive conduct, *see* Fed. Trade Comm'n, *Report an Antitrust Violation* (available online) (last visited Aug. 15, 2018), and the Commission would have clear authority to pursue a monopolization complaint against Apple. Additionally, with its substantial experience in antitrust law and an entire bureau of economic expertise to draw upon, the Federal Trade Commission would be perfectly qualified to pursue a monopolization claim against Apple. Indeed, the Commission has a strong track record of bringing such cases and obtaining substantial redress for consumers.

For example, the Commission obtained over $32 million in consumer refunds from Apple and over $70 million in consumer refunds from Amazon, after both firms were found to have violated Section 5 by allowing unauthorized in-app purchases through their

[3] There are also important limitations on the Commission's antitrust authority, including a lack of jurisdiction over certain firms, including common carriers, non-profits, and banks. *See* Fed. Trade Comm'n, *Guide to Antitrust Laws: The Enforcers* (available online) (last visited Aug. 15, 2018). However, none of those limitations are applicable here.

application stores. *See* Fed. Trade Comm'n, *Apple Inc. will Provide Full Consumer Refunds of at Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent* (Jan. 15, 2014) (available online); Fed. Trade Comm'n, *Refunds Now Available from Amazon for Unauthorized In-App Purchases* (May 30, 2017) (available online).

And the Commission has obtained substantial injunctive relief from major technology companies, too. For example, to settle an investigation into allegedly monopolistic practices in how it licensed its microprocessor and semiconductor patents, chipmaker Intel agreed to modify its behavior to benefit both competitors and consumers. *See* Fed. Trade Comm'n, *In re Intel Corp.*, Decision and Order, Docket No. 9341 (Oct. 29, 2010) (available online).

Again, Respondents should have pursued this avenue for relief, rather than a class-action suit under Section 4.

C. Role of State Attorneys General

Finally, state attorneys general play another key role in antitrust. They regularly accept antitrust complaints from consumers like Pepper, *see, e.g.,* Commonwealth of Pa., Office of Attorney Gen., *Submit a Complaint: Antitrust Complaint* (last visited Aug. 15, 2018) (available online), and any state attorney general can sue as *parens patriae* on behalf of consumers in their state and obtain treble damages in relief. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (15 U.S.C. § 15c). Importantly, such relief expressly excludes any amount "which duplicates amounts which

have been awarded for the same injury," 15 U.S.C. § 15c(a)(1)(A), and also provides finality for the defendant by making any judgment obtained by a state attorney general "*res judicata* as to any claim under [Section 4] by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection." 15 U.S.C. § 15c(b)(3).

This form of action was clearly designed to handle cases like the current one against Apple in a way that Section 4 was not. The difficulties inherent in complex antitrust litigation are addressed through various limitations that protect defendants and the judicial system, while still providing effective remedies for plaintiffs.

And there is recent evidence to show that complaints like the one brought by Respondents against Apple could, and should, have been brought by a state attorney general acting as *parens patriae* on behalf of both iOS users and application developers. For example, Missouri Attorney General Josh Hawley is currently pursuing an antitrust suit against Google, owner of the Android mobile operating system that rivals Apple's iOS. *See, e.g.*, Wendy Davis, *Missouri AG Expands Antitrust Probe of Google*, MEDIAPOST DIGITALNEWSDAILY (July 25, 2018) (available online). State attorneys general were also instrumental to building the antitrust case against Microsoft in the late 1990s and enforcing the final judgment. *See, e.g.*, State of Ca., Dep't of Justice, Office of the Attorney Gen., *State Attorneys General to Coordinate*

Enforcement of Microsoft Antitrust Judgments; Offer Online Complaint Form at New Web Site (Sept. 11, 2003) (available online).

While some criticize the enforcement of federal antitrust laws by state attorneys general, *see, e.g.*, Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J. L. & PUB. POL'Y 5, 8–12 (2004), they remain a viable source of relief for consumers like the Respondents. If neither the Department of Justice nor the Federal Trade Commission were able to provide the relief Respondents sought, they should have petitioned their state attorneys general rather than pursue a class-action suit under Section 4.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals.

Respectfully submitted,

CHARLES DUAN
Counsel of Record
THOMAS STRUBLE
R STREET INSTITUTE
1212 New York Ave. N.W.
Suite 900
Washington, D.C. 20005
(202) 525-5717
cduan@rstreet.org
tstruble@rstreet.org

Counsel for Amicus Curiae

August 2018