No. 22-289

IN THE
Supreme Court of the United States

THE NATIONAL ASSOCIATION OF REALTORS, et al.,
Petitioners,

v.

THE PLS.COM, LLC,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*"), this Court held that "when defining the credit-card market" for purposes of a federal antitrust claim, "courts must include both sides of the platform—merchants and cardholders." *Id.* at 2286. Petitioners own or control most multiple listing services (MLSs), which are databases of real estate listings used by real estate agents representing both buyers and sellers. In response to competitive pressure from respondent, a would-be rival in the market for listing services, petitioners instituted a policy under which any member who lists a property on respondent's service must also list that property on petitioners' services. Respondent filed suit, alleging that this policy violates the Sherman Act. Faithfully applying *Amex*, the Ninth Circuit concluded that respondent stated an antitrust claim because the complaint adequately alleged harm to agents on both sides of petitioners' platform.

   The first question presented is: Did the Ninth Circuit's routine application of *Amex* contain insufficient "analysis," as petitioners claim?

2. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers—that is, purchasers who buy products from sellers who bought those products at inflated rates from antitrust violators—may not sue the antitrust violators for monetary

damages. In this case, respondent filed a lawsuit alleging that petitioners injured PLS, a competitor, real estate agents, the *direct* purchasers, and their customers—home buyers and sellers.

The second question is: Is *Illinois Brick* relevant to a competitor suing for an injury it suffered from an antitrust violation?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, The PLS.com, LLC states that that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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BACKGROUND

A. MLSs' anticompetitive "Clear Cooperation Policy"

Most people who buy and sell homes hire real estate agents. Pet. App. 7a. Sellers' agents help sellers market their homes. *Id.* Buyers' agents help buyers find homes that match their preferences. *Id.*

To assist their clients, real estate agents pay fees to multiple listing services ("MLSs"), which are databases of homes for sale in particular residential areas. Pet. App. 7a. Sellers' agents use MLSs to publicize properties their clients are selling, while buyers' agents use MLSs to identify properties for their clients to buy. *Id.* Most MLSs are owned and controlled by members of the National Association of Realtors ("NAR"). Pet. App. 8a.

MLSs have substantial market power. Pet. App. 80a. As a practical matter, it is impossible to compete effectively as a real estate agent unless one signs up for MLS membership; a buyer needs access to sellers and a seller needs access to buyers. *Id.* As a result of that market power, MLSs impose significant restrictions on their members and members have little choice other than to comply. *Id.*

MLSs are notorious for engaging in anticompetitive conduct to preserve their monopolies over local real estate listings. *See, e.g.*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819 (6th Cir. 2011) (MLS policy violated antitrust laws). This case concerns a particularly brazen effort to stymie competition.

MLSs require sellers to share detailed information about their homes as a condition for their homes being listed. But many sellers have privacy or security concerns about widely distributing that information on an MLS. Pet. App. 72a. Those sellers prefer to publicize limited information and then disclose more details to prospective buyers as needed. Such listings are known as "pocket listings." Pet. App. 8a.

Historically, sellers marketed pocket listings bilaterally, through face-to-face communications, telephone calls, or email. Pet. App. 8a. But respondent, The PLS.com, LLC ("PLS"), recognized that broadcasting such listings to a wider audience could break MLSs' stranglehold over the listings industry by combining the attractive features of a pocket listing with the efficiency of a listing network. In 2017, PLS—an acronym for "Pocket Listing Service"—created a new database of real estate listings. Pet. App. 8a. The database, contrary to petitioner's labels of "exclusivity and secrecy," Pet. 3, made previously private listings widely available to any licensed real estate professional. Pet. App. 8a. Unlike MLSs, PLS's database included listings anywhere in the United States and allowed agents more freedom to choose what information they put on the site, all for a lower price. *Id.*

PLS's model proved attractive to sellers' agents, who could list their clients' homes without being hampered by MLSs' intrusive requirements. It also benefitted buyers' agents, who had access to "pocket listings" previously available only through word of mouth. Better yet, PLS charged real estate agents less

than MLSs did while offering them access to nationwide, as opposed to regional, listings. Pet. App. 8a. In short, PLS offered a better listing service than MLSs at a lower price. PLS grew rapidly and, by late 2019, had 20,000 members who sold billions of dollars' worth of residential real estate. *Id.* For the first time in the lives of most Americans, an alternative to MLSs' monopoly had emerged. Pet. App. 74a–75a.

Incumbent MLSs—and NAR, the dominant industry trade association—took notice. An NAR study warned that "[o]ff-MLS listings may contribute to the unraveling of the MLS as we know it." Pet. App. 9a. Another NAR study declared: "After half a century of operating as the only gateway, there is a strong likelihood that the MLS may lose its exclusive positioning as the principal source of real estate listings." *Id.* (quoting NAR study).

Rather than compete on the merits with an upstart, MLSs conspired to destroy it. In September 2019, two years after PLS launched, several MLSs issued a white paper calling for "collective action to address the threat in the MLS system presented by the rise of pocket listings and the prospect of a competing listing network that would aggregate such listings." Pet. App. 9a (quoting MLS white paper), 89a. A month later, representatives of MLSs met at a conference to discuss the need for NAR affiliates to act in unison against the competitive threat from PLS at the next month's NAR convention. Pet. App. 9a, 91a.

At the NAR convention, following enthusiastic, coordinated endorsements by multiple top executives of MLSs, NAR adopted its "Clear Cooperation Policy"

by voice vote. Pet. App. 9a, 92a. This policy provides: "Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with the other MLS participants." Pet. App. 9a–10a. MLS members who failed to abide by this policy would face several-thousand-dollar fines or suspension if not termination of their access to MLSs—effectively obliterating their careers as real estate agents. Pet. App. 10a. NAR enacted this policy over the objection of members who informed NAR that the policy was anticompetitive and likely illegal. Pet. App. 92a. The practical effect of the Clear Cooperation Policy was to force agents to use the MLS for all of their listings, to the exclusion of PLS. Pet. App. 18a.

The Clear Cooperation Policy was included as a mandatory rule in the 2020 version of the NAR Handbook on Multiple Listing Policy. Pet. App. 45a. NAR requires that all NAR-affiliated MLSs modify their rules to conform to the Clear Cooperation Policy. Pet. App. 45a n.47. In other words, NAR forces NAR-affiliated MLSs to abide by the Clear Cooperation Policy and these MLSs, in turn, force real estate agents to abide by the Clear Cooperation Policy through fines and by conditioning access to MLSs. Pet. App. 45a.

It would be hard to fathom a more obviously anticompetitive agreement than the Clear Cooperation Policy. PLS introduced competition in the market for real estate listing services by giving both sellers' agents and buyers' agents a choice. PLS enabled sellers' agents to choose a listing service that allowed them greater discretion to preserve their clients'

privacy and discretion. But that choice is wiped away if every listing must also be posted on an MLS within 24 hours. Pet. App. 75a. PLS gave buyers' agents the choice of a database granting access to pocket listings that previously would be known only through word of mouth. Pet. App. 73a. By forcing all PLS listings to transform into non-pocket listings on MLSs, the Clear Cooperation Policy wiped that choice away, too. Pet. App. 75a. In short, by enacting the Clear Cooperation Policy, NAR and its affiliated MLSs destroyed the opportunity of both buyers' agents and sellers' agents to choose the database service they liked best and forced them to use the MLS instead. The incumbent MLSs did this not by selling a better product, but by conspiring to destroy the livelihood of any dissenting real estate agent who used PLS without obeying NAR's commands.

The Clear Cooperation Policy yielded predictably devastating consequences for agents, home sellers, home buyers, and PLS. Agents were forced to list (and search for properties) on MLSs and stop listing solely on PLS. Pet. App. 10a. As a result, agents were forced to pay more money for a less valuable service—a service that eliminated both sellers' freedom of choice and buyers' opportunities to access a nationwide database of pocket listings. Home buyers and sellers lost the ability to choose their preferred ways to buy and sell houses. And PLS lost listings, participants, commercial opportunities, and access to capital. Pet. App. 102a–103a.

B. Proceedings below

In May 2020, PLS filed this lawsuit, asserting claims under both federal and state antitrust law. PLS named as defendants NAR, as well as three MLSs that contain the majority of real estate listings in their respective service areas: Bright MLS, Inc., Midwest Real Estate Data, LLC, and California Regional Multiple Listing Service, Inc. (collectively, "petitioners"). PLS sought damages and injunctive relief.

The district court dismissed the complaint on the ground that PLS had not adequately pleaded antitrust injury. In the district court's view, PLS was required to allege a "plausible injury … to both home sellers and home buyers," and failed to do so. Pet. App. 26a–27a (internal quotation marks omitted).

The Ninth Circuit reversed. In a comprehensive opinion, the court held that PLS stated a claim under the antitrust laws.

The Ninth Circuit began by rejecting the district court's conclusion that PLS did not adequately plead antitrust injury. As the court explained, competitors like PLS may "enforce the antitrust laws only when they have experienced an 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent.'" Pet. App. 13a (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). An antitrust injury is an injury that "flows from acts harmful to consumers." *Id.* (quotation marks omitted).

The district court took the view that PLS could not establish antitrust injury unless it established injury to the *ultimate* consumers—home buyers and sellers.

Pet. App. 13a. But as the Ninth Circuit explained, this conclusion reflected an unduly narrow understanding of "consumers." Contrary to the district court's view, "a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes and can allege antitrust injury." Pet. App. 13a–14a.

In this case, the "consumers" of MLSs' services are real estate agents who pay to post or view listings on behalf of their clients. And PLS's complaint specifically alleged that the Clear Cooperation Policy harmed real estate agents. Pet. App. 103a ("The Defendants' conduct simultaneously harmed PLS and consumers in the relevant market by excluding PLS and thereby artificially maintaining or increasing the prices paid by licensed real estate professionals for listing network services for the sale of residential real estate."). The Ninth Circuit held that PLS's "allegation that the Clear Cooperation Policy harmed real estate agents—who are the consumers of PLS's and the MLSs' listing network services" sufficed to allege antitrust injury to PLS. Pet. App. 15a.

The Ninth Circuit further held that PLS had adequately alleged a violation of the Sherman Act. As the court explained, some practices are "so harmful to competition and so rarely proved justified" that they are *per se* violations of the Sherman Act. Pet. App. 15a–16a (quotation marks omitted). Most restraints, however, are subject to the "rule of reason" which "requires courts to conduct a fact-specific assessment of market power and market structure … to assess the restraint's actual effect on competition." Pet. App. 16a

(quotation marks omitted) (ellipsis in original). The court held that PLS stated both a *per se* claim and a rule of reason claim.

As to PLS's *per se* claim, the Ninth Circuit explained that "group boycotts"—*i.e.*, "concerted attempt[s] by a group of competitors … to protect themselves from competition from non-group members"—are *per se* violations of the Sherman Act. Pet. App. 17a (quotation marks omitted). The Ninth Circuit held that the "Clear Cooperation Policy, as PLS characterizes it, shares all the hallmarks of a group boycott: PLS's competitors coerced its suppliers (sellers' agents) not to supply PLS with listings (or to do so only on highly unfavorable terms), and they did so for the express purpose of preventing PLS, a new entrant to the market after decades of little to no competition, from competing with the MLSs." Pet. App. 18a.

As to PLS's rule of reason claim, the court held that PLS had stated a claim under *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) ("*Amex*"). As the court explained, for certain rule of reason claims, plaintiffs must "define the relevant market and show that the defendant has market power in that market to prove that the challenged practice is anticompetitive." Pet. App. 25a. *Amex* addressed how to define a relevant market when analyzing a product within a class of two-sided platforms. A two-sided platform "offers different products or services to two different groups who both depend on the platform to intermediate between them." Pet. App. 23a (quotation marks omitted). *Amex* held that "courts must define

the relevant market to include both sides of the platform because one cannot accurately assess the competitive impact of a particular practice by looking to only one side of the market." Pet. App. 24a (internal quotation marks omitted).

The Ninth Circuit applied *Amex* and held that PLS's complaint complied with *Amex*. The court held that "*Amex can* apply to rule of reason claims based on indirect evidence at the pleading stage," depending on the "characteristics of the relevant product." Pet. App. 26a. The parties disputed whether the characteristics of the real estate listings market triggered *Amex*, but the court concluded that it "need not resolve the parties' dispute regarding the precise characteristics that trigger *Amex* … because PLS's allegations satisfy *Amex*, even if it applies." *Id.*

The court explained that "*Amex* does not require a plaintiff to allege harm to participants on both sides of the market." Pet. App. 27a. "All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the 'market as a whole.'" *Id.* (quoting *Amex*, 138 S. Ct. at 2287). But "although it is not required, PLS *did* allege that the Clear Cooperation Policy harms competition in the [residential] real estate listing network services market because it injures *both* sellers' agents *and* buyers' agents." *Id.* "PLS alleges that the Clear Cooperation Policy prevented innovative competitors from entering the market and growing large enough to meaningfully compete with the MLSs, leaving *both* buyers' agents

and sellers' agents with fewer choices, supra-competitive prices, and lower quality products." *Id.*

The court rejected petitioners' argument that it did not adequately allege a conspiracy against certain MLSs. Pet. App. 30a–34a. Finding that PLS "adequately alleged a violation of the Sherman Act and antitrust injury," the court reversed the district court's dismissal and remanded for further proceedings. Pet. App. 34a.

REASONS FOR DENYING THE WRIT

The Court should deny certiorari on both questions presented. In their first question, petitioners claim the Ninth Circuit curtailed *Amex*'s applicability and "elect[ed] *not* to analyze both sides of the market." Pet. i. As a cursory glance at the Ninth Circuit's opinion will reveal, the Ninth Circuit held the exact opposite of what petitioners claim it held. The court did not decide whether *Amex* applied and found that it "need not resolve … the precise characteristics that trigger *Amex*." Pet. App. 26a. The Ninth Circuit further held that, if *Amex* applies, PLS stated a claim under *Amex* *because* petitioners' anticompetitive restraint harms both sides of the market: "it injures *both* sellers' agents *and* buyers' agents." Pet. App. 27a. That straightforward application of *Amex* does not warrant review. Additionally, the court held (and petitioners ignore) that PLS adequately pleaded a *per se* claim where market definition (and therefore *Amex*) are not at issue.

As to the second question, petitioners contend that injuries to real estate agents—the direct purchasers in

the relevant market—do not establish "antitrust injury." This is because, petitioners argue, real estate agents are "co-conspirators" and therefore lack standing to sue under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). As a threshold matter, the Court should deny review on this issue because the courts below did not address it. On its merits, petitioners' argument fails because the injured real estate agents are neither "plaintiffs" nor "co-conspirators." *Illinois Brick* is therefore wholly irrelevant.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners contend that the Court should grant certiorari because the Ninth Circuit failed to follow *Amex*. Petitioners blatantly mischaracterize the Ninth Circuit's holding. The Ninth Circuit held that even under the most defendant-friendly interpretation of *Amex*, PLS stated a federal antitrust claim because it alleged harm on both sides of the market. Rather than address the Ninth Circuit's actual holding, petitioners' arguments are primarily directed to the Ninth Circuit's observations that it was not deciding certain issues about *Amex*'s potential applicability that are not necessary to resolve here. The Ninth Circuit's uncontroversial dicta does not warrant Supreme Court review.

A. *Amex* held that when defining the relevant market for two-sided platforms, courts must consider both sides of the market

American Express places "antisteering provisions"

in its contracts with merchants, which bar merchants from steering customers towards other credit cards, such as Visa or Mastercard. In *Amex*, this Court held that those provisions do not violate the Sherman Act.

The Court explained that "[r]estraints can be unreasonable in one of two ways." 138 S. Ct. at 2283. "A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *Id.* (internal quotation marks omitted). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.'" *Id.* at 2284 (citation omitted). In rule-of-reason cases, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.*

In attempting to meet that initial burden, the plaintiffs relied "exclusively on direct evidence to prove that Amex's antisteering provisions have caused anticompetitive effects in the credit-card market." *Id.* at 2284–85. The Court observed that "[t]o assess this evidence," it "must first define the relevant market." *Id.* at 2285.

The Court explained that American Express provides services to *both* cardholders *and* merchants—it provides credit and rewards to cardholders while providing quick, guaranteed payment to merchants. *Id.* at 2280. "By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a 'two-sided platform.'" *Id.* The Court held "courts must include both sides of the platform—

merchants and cardholders—when defining the credit-card market." *Id.* at 2286. The plaintiffs, however, "stake[d] their entire case on proving that Amex's agreements increase merchant fees." *Id.* at 2287. This argument "wrongly focuse[d] on only one side of the two-sided credit-card market." *Id.* Plaintiffs' case failed because they failed to prove "anticompetitive effects on the two-sided credit-card market as a whole." *Id.*

B. The Ninth Circuit's decision faithfully follows *Amex*

Petitioners' assertions that the Ninth Circuit "flouted," "eviscerated," and "gutted" *Amex*, Pet. 8, 13, suggest that petitioners did not read or understand the Ninth Circuit's decision. The Ninth Circuit held that PLS stated a claim under *Amex* because PLS "*did* allege that the Clear Cooperation Policy harms competition in the real estate listing network services market because it injures *both* sellers' agents *and* buyers' agents." Pet. App. 27a. This holding presents a straightforward and unremarkable application of *Amex*.

Petitioners express concern that the Ninth Circuit's ruling "creates needless confusion as to whether and when *Amex* even applies at the motion to dismiss stage." Pet. 13. They complain about the Ninth Circuit's statement that *Amex*'s applicability at the pleading stage "depends on the facts." *Id.* (citing Pet. App. 26a). But the Ninth Circuit's statement was plainly correct. The court observed under "both parties' theories, whether *Amex* applies depends on the characteristics of the relevant product." Pet. App. 26a.

Hence in some cases, the complaint will include "facts … that disclose those characteristics," and in other cases, "the complaint will not contain the necessary facts." *Id.* Petitioners do not even try to explain why this anodyne observation is wrong. In addition to being uncontroversial, the Ninth Circuit's observation is also dicta, given that it held that PLS's allegations *did* satisfy *Amex*.

Petitioners further claim that the Ninth Circuit "further limited *Amex*, without justification, to a narrow range of markets." Pet. 14. To the contrary, the Ninth Circuit placed no limits on *Amex*. Although PLS argued in the Ninth Circuit that *Amex* applies only to two-sided platforms that facilitate simultaneous transactions,[1] the Ninth Circuit did not resolve PLS's argument. Instead, after summarizing both parties' arguments on this issue, the court held: "We need not resolve the parties' dispute regarding the precise characteristics that trigger *Amex*, however, because PLS's allegations satisfy *Amex*, even if it applies." Pet. App. 26a.

Petitioners also complain about the Ninth Circuit's statement that "*Amex* does not require a plaintiff to allege harm to participants on both sides of the market." Pet. 14 (quoting Pet. App. 27a). But the Ninth Circuit's discussion of this issue was uncontroversial:

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[1] Although the Ninth Circuit did not resolve this issue, PLS adheres to the interpretation of *Amex* it presented to the Ninth Circuit.

> As a preliminary matter, *Amex* does not require a plaintiff to allege harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the "market as a whole." 138 S. Ct. at 2287. Sometimes this will be by alleging harm to participants on both sides of the market and sometimes it will not. It is possible that a practice harming participants on one side of the market could outweigh the benefits to participants on the other, causing anticompetitive effects on the market as a whole.

Pet. App. 27a. This analysis is completely consistent with *Amex*. Petitioners do not offer any explanation of why they think it is wrong. In any event, this discussion was dicta because, again, the Ninth Circuit correctly held that PLS pleaded harm to both sides of the market. *Id.*

When petitioners finally get around to acknowledging the Ninth Circuit's actual holding (Pet. 14), they state in a single sentence that the Ninth Circuit offered "no analysis." Pet. 14. Wrong again. The Ninth Circuit explained: "PLS alleges that the Clear Cooperation Policy prevented innovative competitors from entering the market and growing large enough to meaningfully compete with the MLSs, leaving both buyers' agents and sellers' agents with fewer choices, supra-competitive prices, and lower quality products." Pet. App. 27a. The Ninth Circuit's decision is correct: the complaint contains an extensive

explanation of how "[t]he Defendants' conduct simultaneously harmed PLS and consumers in the relevant market by excluding PLS and thereby artificially maintaining or increasing the prices paid by licensed real estate professionals for listing network services for the sale of residential real estate." Pet. App. 103a; *see* Pet. App. 99a–103a. Petitioners fail to explain why they believe these allegations are insufficient. In any event, petitioners' sentiment that the Ninth Circuit's decision contains insufficient "analysis" does not warrant Supreme Court review.

Indeed, it is obvious how the Clear Cooperation Policy harms both sides of the platform. Sellers' agents are harmed because their clients lack an alternative platform on which they can post listings while protecting their privacy. Buyers' agents are harmed because sellers are forced to market their "pocket listings" through more limited communications channels—reducing buyers' access to those listings. On top of that, both buyers' and sellers' agents lose the benefits of price competition from a lower-cost alternative platform. Under any interpretation of *Amex*, PLS has pleaded antitrust injury in the relevant market.

Petitioners' asserted circuit split (Pet. 15–16) does not exist. *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019), and *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021), both held that platforms that matched buyers and sellers in simultaneous transactions were two-sided platforms subject to *Amex*. *US Airways*, 938 F.3d at 58 (*Amex* applied to

platform that "connect[s] travel agents to airlines in simultaneous transactions"); *Viamedia*, 951 F.3d at 439 (interconnects that bring advertisers and video distributors together are two-sided platforms). These holdings do not conflict with the decision below. Consistent with those decisions, the Ninth Circuit held that, assuming that MLSs operate two-sided platforms under *Amex*, PLS's complaint alleges harm to the market as a whole by alleging harm to both sides of the market. Pet. App. 27a.

Petitioners offer four additional arguments in favor of Supreme Court review: (1) Antitrust law, in general, should be "clear." (Pet. 16–17.) (2) Many people buy houses. (Pet. 17.) (3) Two-sided markets are complicated, so "clear guidance" is helpful. (Pet. 18.) (4) The Ninth Circuit should follow Supreme Court precedent because many antitrust lawsuits are filed in California. (Pet. 18–19.) None of these generalized musings supplies a reason to review the Ninth Circuit's routine application of *Amex*.

C. Petitioners fail to address the Ninth Circuit's independent holding that PLS alleged a *per se* antitrust violation

In addition to its holding that PLS stated a rule of reason claim, the Ninth Circuit held that PLS adequately alleged a *per se* illegal group boycott. The court explained:

> The Clear Cooperation Policy, as PLS characterizes it, shares all the hallmarks of a group boycott: PLS's competitors coerced its suppliers (sellers' agents) not to supply PLS

> with listings (or to do so only on highly unfavorable terms), and they did so for the express purpose of preventing PLS, a new entrant to the market after decades of little to no competition, from competing with the MLSs.

Pet. App. 18a. *Per se* violations are not judged under the rule of reason and hence PLS does "not need to precisely define the relevant market." *Amex*, 138 S. Ct. at 2285 n.7. Hence, *Amex*'s holding that market definition must account for both sides of the platform is irrelevant to the Ninth Circuit's holding that PLS stated a *per se* claim.

Petitioners completely ignore this aspect of the Ninth Circuit's decision. As a result, even if petitioners' arguments about *Amex* were correct in all respects, this action would still proceed. Because petitioners do not challenge this alternative basis for the Ninth Circuit's decision, this case is a poor vehicle for Supreme Court review.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners' second question presented is as follows: "[W]here *Illinois Brick* established the 'indirect purchaser' rule such that the first party *outside* the conspiracy has standing to sue, can a competitor establish standing based on harm to alleged members of the conspiracy?" Pet. i. Petitioners' argument demonstrates serious confusion about the holding of *Illinois Brick* and the facts of this case.

Petitioners' argument goes something like this: The Ninth Circuit held that the "Clear Cooperation Policy

harmed real estate agents—who are the consumers of PLS's and the MLSs' listing network services." Pet. App. 15a. But, petitioners claim, real estate agents are co-conspirators, and therefore are either uninjured or are estopped from bringing suit based on their injuries. Thus, Petitioners appear to claim, the injury PLS has suffered as an excluded competitor in selling listing network services to real estate agents cannot be an antitrust injury, and thus PLS lacks antitrust standing.

To begin, the Court should deny review of this issue because neither the District Court nor the Ninth Circuit addressed it. Neither decision below cited *Illinois Brick* nor made any reference to real estate agents as "co-conspirators." Because this Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should deny review.

On the merits, there are so many problems with petitioners' argument that it is hard to know where to start.

First, *Illinois Brick* is completely irrelevant to this case. *Illinois Brick* is a case about antitrust standing of customers purchasing from an antitrust violator, and this case is about the injury suffered by an excluded competitor vying to serve those direct purchasing customers. Relying on lower courts' extrapolation from *Illinois Brick*, petitioners opine that real estate agents are co-conspirators, and co-conspirators cannot be antitrust plaintiffs. *E.g.*, Pet. 21 (citing *In re Nat'l Football League's Sunday Ticket Antitrust Litigation*, 933 F.3d 1136, 1156 (9th Cir. 2019)) ("[T]he Ninth Circuit [holds]" that the indirect purchaser rule does

not "operate as a green light to suits by antitrust conspirators *themselves*"). But PLS is the plaintiff, not a real estate agent. PLS, a competitor, is not even arguably a co-conspirator and does not even arguably lack standing on that basis.

The Court's prudential standing rule against indirect purchasers has no bearing on competitor suits. Nothing in *Illinois Brick* purports to limit competitors' ability to bring lawsuits. *Illinois Brick* held that indirect purchasers could not bring antitrust claims for damages based on the allegation that the direct purchasers "had passed on the claimed illegal overcharge." 431 U.S. at 724. The Court emphasized "the evidentiary complexities and uncertainties" involved in calculating pass-through overcharges as a basis for barring indirect purchasers from suing. *Id.* at 731–32. Neither *Illinois Brick*'s holding nor its reasoning applies here. No indirect purchaser is filing suit, and PLS is not seeking to recover any pass-through overcharges that would lead to any evidentiary complexities. Instead, PLS is suing in its *own* right for the damages *it* has suffered as a result of petitioners' anticompetitive conduct.

The fact that real estate agents sustained injuries is pertinent only for the narrow purpose of establishing that the injury suffered by PLS in being foreclosed from competing for the business of those agents is an "antitrust injury"—that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat.*, 429 U.S. 477, 489 (1977). But *Illinois Brick* is a case about antitrust

standing of customers, not antitrust injury of excluded competitors. Neither *Illinois Brick* nor any other case cited by the petitioners has ever suggested that injuries sustained by the victims of a group boycott cannot be antitrust injuries or support antitrust standing. And petitioners make no attempt to show that *Illinois Brick* should be extended in this way.

Second, petitioners' premise that "co-conspirators" may not sue is irrelevant for an additional reason: the affected real estate agents are not "co-conspirators." To the contrary, PLS alleges that affected real estate agents *resisted* promulgation of the Clear Cooperation Policy. Pet. App. 92a ("NAR adopted the Clear Cooperation Policy over the complaints of some NAR members, who informed NAR that the policy was anticompetitive and likely illegal."). To the extent those agents complied with the Clear Cooperation Policy, it was only because MLSs threatened them with fines and expulsion if they did not. Having attempted to squelch those dissenters' efforts, petitioners cannot turn around and claim that the dissenters are "co-conspirators" whose injuries (such as paying supra-competitive prices to access MLSs) must be disregarded.

More generally, Petitioners' starting assumption—that real estate agents' membership in MLSs renders them "co-conspirators" that are jointly and severally liable for any judgment against MLSs—is simply wrong. *E.g.*, Pet. 22. It is common for industry organizations to require membership as a condition of participation. For instance, any college that wants to participate in big-time college sports must be a member

of the NCAA. This does not mean every major university in the country is jointly and severally liable any time the NCAA commits an antitrust violation. *See, e.g.*, *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

To the extent petitioners' theory is that a member of an organization cannot suffer an antitrust injury from the organization's anticompetitive policies, that is wrong. Industry organizations routinely impose anticompetitive restraints that harm a subset of their members; those members suffer antitrust injuries and have standing to sue. The NCAA again provides an instructive example. Until the 1980s, the NCAA barred its members from negotiating their own television contracts, which benefited some of its members but harmed others. The University of Oklahoma, an NCAA member that was harmed by the restraint, sued the NCAA and won. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984). Petitioners' theory would absurdly imply that because the University of Oklahoma was a member of the NCAA, it was unharmed by the NCAA's rule, despite the glaring reality that it *was* harmed by the NCAA's rule to the tune of millions of dollars per year. Likewise here, the complaint contains detailed allegations explaining how real estate agents are harmed by MLS's anticompetitive conduct, and petitioners strikingly make *no* arguments that these allegations are somehow implausible.

To the extent petitioners are claiming that organizational members are somehow equitably estopped from suing the organization that is injuring them, that is also wrong. There is no rule that an

injured member of an organization is estopped from suing the organization for antitrust violations. The University of Oklahoma—an NCAA member—was the successful plaintiff in *NCAA v. Board of Regents of University of Oklahoma*. Even if petitioners were right, such an estoppel would be irrelevant here, where no member of any conceivable conspiracy is a plaintiff.

What is more, even coerced conspirators are allowed to bring antitrust suits if they can show harm. This Court has held that "the doctrine of *in pari delicto* … is not to be recognized as a defense to an antitrust action." *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 138–40 (1968), *overruled in part on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). Courts may not "undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others." *Id.* at 139. Even if the real estate agents chose to participate in MLSs, many "did not actively seek each and every clause of the agreement. Rather, [the at-issue provision was] quite clearly detrimental to their interests, and they alleged that they had continually objected[.]" *Id.*; *see, e.g.*, *Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 67–68 (2d Cir. 1988) (explaining why certain co-conspirators have standing to challenge cartel arrangements to which they are a party). Hence, even if real estate agents were otherwise enthusiastic members of MLSs, they could still sue their MLS if they could establish that they were harmed by a specific anticompetitive restraint of the MLS, just as

the plaintiff in *Board of Regents* did.

And finally—even accepting all of petitioners' incorrect premises and assuming that PLS was required to plead antitrust injury to ultimate home buyers and sellers—PLS has met that burden. Looking past the real estate agents who were injured by the anticompetitive conduct, the Amended Complaint also alleges that individual home buyers and sellers were harmed by the Clear Cooperation Policy. Pet. App. 99a ("[T]he conduct of NAR and the MLS Defendants harmed (i) real estate professionals serving both buyers and sellers of residential real estate services that desired to use listing networks other than those operated by the NAR-affiliated MLSs, and also (ii) *those buyers and sellers of residential real estate*." (emphasis added)).

Petitioners' assertion of a circuit split (Pet. 23–24) lacks merit. *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832 (7th Cir. 2020), and *In re National Football League's Sunday Ticket Antitrust Litigation*, 933 F.3d 1136 (9th Cir. 2019), held that particular purchasers had standing to sue because they qualified as direct purchasers under *Illinois Brick*. These cases did not address antitrust injury or antitrust standing of an excluded rival injured by exclusionary rules of an association of competitors.

In sum, because petitioners' second argument was not addressed below, misunderstands the facts of this case, and distorts hornbook antitrust law principles, it does not warrant Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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