No. 22-289

IN THE

Supreme Court of the United States

THE NATIONAL ASSOCIATION OF REALTORS, BRIGHT MLS, INC., MIDWEST REAL ESTATE DATA, LLC, AND CALIFORNIA REGIONAL MULTIPLE LISTING SERVICES, INC.,

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In *Ohio v. American Express Co.*, 585 U.S. __, 138 S. Ct. 2274 (2018) ("*Amex*"), this Court held that, in antitrust suits involving "two-sided" platforms with strong "indirect network effects," courts "***must*** include both sides of the platform" when defining the relevant market. *Id.* at 2286 (emphasis added). As Petitioners' opening brief demonstrated, the Ninth Circuit's opinion in this case would transform this Court's landmark *Amex* opinion into a trifle that could be easily pled around, deemed inapplicable in all but the rarest of cases, or disregarded entirely at the pleading stage.

Ordered by this Court to respond to the petition, PLS seeks to defend the Ninth Circuit's contravention of this Court's recent, binding antitrust precedent as "uncontroversial." Brief in Opposition ("Opp.") 11, 14. But PLS's opposition severely downplays the real-world impact of the lower court's evasion of *Amex* and the important federal questions raised, on the nation's multi-trillion-dollar real estate market, which is responsible for 17 percent of the nation's Gross Domestic Product. *Id.* at 17 ("[M]any people buy houses."). PLS's opposition also dismisses as irrelevant the reality that the circuit with the most antitrust suits in the country has now offered plaintiffs like PLS a pathway around this Court's ruling. *Id.*

Most importantly, PLS's opposition does not anywhere dispute that, as the district court correctly determined, this case concerns a classic two-sided market with strong indirect network effects that "must" be analyzed under *Amex*. Nor could it. MLSs have long been recognized—by the same academic authorities upon which *Amex* relied—as paradigmatic two-sided markets. Pet. 10–12 (collecting authorities). This is

the heart of the matter. PLS nonetheless contends that the Ninth Circuit's disregard of *Amex* should be excused because the Ninth Circuit included a cursory statement that PLS's conclusory allegations satisfied *Amex* in any event. The Ninth Circuit's abbreviated, fallback statement cannot shield its decision from review where the Ninth Circuit's opinion also declared *Amex* optional. Specifically, the Ninth Circuit held that *Amex* "may play a role," for rule of reason claims based on indirect evidence and "*can* apply . . . at the pleading stage, [but] we do not hold that it always does." Pet. App. 25a–26a.

Circuit courts may not declare this Court's precedents optional. And while PLS's opposition makes light of this Court's admonition about "the importance of clear rules in antitrust law," *Pac. Bell Tel. Co. v. Linkine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) as a "generalized musing[]," Opp. 17, injecting uncertainty into the antitrust regime has high costs for litigants and market participants.

PLS also fails to meaningfully dispute that the Ninth Circuit upended settled precedent by permitting competitors to bring suit based on alleged harm to *participants* in an antitrust conspiracy. Indeed, nowhere does PLS claim that such harm to co-conspirators is relevant—much less explain how, in a world of joint and several antitrust liability, co-conspirators could be both liable for, and entitled to, the same damages.

The Ninth Circuit contradicted and undermined black-letter antitrust law. If left in place, the Ninth Circuit's decision provides a roadmap for courts and parties to evade this Court's dictates and further erode

bedrock principles of antitrust law. The Court should grant review.

ARGUMENT

I. The Ninth Circuit Contravened *Amex*, Setting A Dangerous Precedent

A. *Amex* Requires Dismissal

As the district court correctly recognized, *Amex* is, and should have been, dispositive. Pet. 8–19. The district court, like the academic authorities this Court cited in *Amex*, recognized that MLSs are two-sided markets exhibiting strong indirect network effects. That is, the MLS's value increases for both buyers and sellers as the amount of information on it increases (and conversely the value to both buyers and sellers decreases as information is hidden on private networks like PLS). Pet. App. 59a. PLS, however, failed to allege a plausible injury to both sides of the market or to the market as a whole. Instead, it complained about potential harm to a small group of home sellers (those who do not care about showing their home to the broadest set of purchasers, selling their house quickly, or obtaining the most money), without alleging harm to the universe of buyers and without ultimately alleging harm to *competition*. Pet. App. 60a. Accordingly, the district court correctly dismissed the case under *Amex*, and the Ninth Circuit should have affirmed rather than disregard *Amex*. PLS's opposition regarding *Amex* fails, for five primary reasons.

First, PLS makes no effort to engage with Petitioners' argument that the Ninth Circuit opinion creates confusion as to whether *Amex* applies at the pleading stage. Pet. 13–14. The Ninth Circuit stated,

"we do not hold that [*Amex*] always" applies at the pleading stage and that in some indeterminate set of cases *within* the realm of two-sided markets with indirect network effects—"the complaint will not contain the necessary facts" to apply this Court's decision. Pet. App. 26a. Nothing in *Amex* suggests that this Court intended its holding to be so limited. PLS claims that the Ninth Circuit was merely making an "anodyne observation," Opp. 14, but the Ninth Circuit left no doubt that it would allow plaintiffs costly discovery even if *Amex* bars their suit. Plaintiffs could, for example, elect not to plead a two-sided market even where one plainly exists and avoid *Amex* altogether.

And while the Ninth Circuit cursorily addressed PLS's allegations under *Amex*, its flawed analysis ultimately assumed that the applicability of *Amex* would be "a factual question that the district court cannot resolve on the pleadings." Pet. App. 27a–28a. Thus, far from a "straightforward application of *Amex*," Opp. 10, the Ninth Circuit's approach is an invitation to evasion. If *Amex* were to apply only at trial, then it will almost never be applied, and almost always pleaded around. The inevitable result: strike suits, undeserved settlements, and a drain on judicial resources.

Second, PLS insists the Ninth Circuit "placed no limits on *Amex*," Opp. 14, but acknowledges that the Ninth Circuit did *not* reject PLS's argument that *Amex* applies *only* to platforms with "simultaneous transactions." This effectively limits *Amex*'s application to credit card companies. Rather than recognize the obvious inconsistency between PLS's tunnel-vision approach and *Amex*'s actual reach, the Ninth Circuit called the question "difficult" and refused to "resolve"

it—creating uncertainty where this Court already has been clear. Pet. App. 22a. One certainty does emerge, however—plaintiffs like PLS will use this ruling to cabin *Amex* to a feeble, credit-card-only ruling. *See* Opp. 14 (arguing that *Amex* "applies only to two-sided platforms that facilitate simultaneous transactions," like credit-card networks); *id.* at n.1 (stating the Ninth Circuit "did not resolve this issue," such that "PLS adheres to" that narrowing "interpretation of *Amex*.").

Third, PLS argues that, even if *Amex* applies, the Ninth Circuit "faithfully follow[ed]" that decision, but to satisfy *Amex*, PLS must address the two sides of the MLS market (home buyers *and* sellers) and explain how the Clear Cooperation Policy ("Policy") caused an overall harm to competition—*i.e.*, a "plausible antitrust injury." Pet. 10 (quoting Pet. App. 60a–61a). But PLS failed to address both sides of the relevant market, instead focusing nearly exclusively on a narrow swath of home *sellers* (or home sellers' agents) while ignoring that the challenged policy promotes competition overall by increasing "available information about the market." Pet. 12 (quoting Pet. App. 61a). The Ninth Circuit's ruling thus apparently allows *Amex* to be satisfied by a pleading's mere gesture to both sides of a two-sided market, transforming *Amex* from a landmark substantive ruling to a meaningless decision where plaintiffs need only "check the box."

Fourth, PLS ignores a wealth of academic literature—on which *Amex* itself relied—that identifies MLSs as a textbook two-sided platform with strong network effects. Pet. 10–12 (collecting sources). Failing to challenge these authorities in any meaningful way, PLS effectively concedes that the Ninth Circuit's

opinion is out of sync with the view of scholars whose work provided *Amex*'s economic foundation.

Fifth and finally, PLS claims there is no circuit split regarding *Amex*, Opp. 16, but fails to address the facts of the decisions Petitioners cited, Pet. 14–16. These cases make clear that courts are divided, with the Ninth Circuit rendering *Amex* virtually meaningless while other courts have applied *Amex* in a variety of contexts beyond the credit-card market.

B. PLS Fails To Address The Grave Consequences Of The Ninth Circuit's Ruling

Petitioners' brief set forth specific reasons why this case necessitates the Court's review. Pet. 16–18. In particular, review is urgently needed in light of: (1) the paramount importance of clarity in antitrust laws, as repeatedly underscored by this Court; (2) the crucial role the home real estate market plays in the U.S. economy, *see, e.g.*, Pet. App. 78a ¶ 26; (3) the significance of two-sided markets in antitrust law; and (4) the requirement that lower courts cannot freely circumvent this Court's precedents. Rather than conduct any analysis, cite sources, or engage with any of these arguments, PLS waves them away as "generalized musings." Opp. 17. They are not.

In *Amex* itself, in response to these very same arguments that PLS dismisses without analysis or support, the Court granted certiorari. *See* Petition for Writ of Certiorari at 16–17, 25–30, *Ohio v. American Express Co.*, 138 S. Ct. 2274 (No. 16-1454) (emphasizing importance of clarity in antitrust laws and the impact of issue to U.S. economy). Thus, this Court has already found the application of the antitrust laws to

two-sided platforms to be of a matter of national importance worthy of its attention.

Moreover, the Ninth Circuit—like every other lower court—is bound by this Court's holdings. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 374–75 (1982) (per curiam) (recognizing "the Court of Appeals . . . ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress"). This constraint "is both wise and necessary" to "promote[ ] consistency and predictability while discouraging adventurous second-guessing by widely dispersed subaltern judges." Bryan A. Garner, Hon. Neil M. Gorsuch, Hon. Brett M. Kavanaugh, et al., *The Law of Judicial Precedent* 30 (2016). And this constraint requires review of the Ninth Circuit's contradictory approach to *Amex*.

C. The Ninth Circuit's *Per Se* Violation Analysis Does Not Preclude Review

PLS also argues that this case is a "poor vehicle" because the Ninth Circuit also stated that PLS adequately alleged a *per se* illegal group boycott. Opp. 17–18. While PLS insists *per se* doctrine is a clear alternative and a reason to forego review, the Ninth Circuit itself recognized this doctrine as "a source of confusion for decades." Pet. App. 18a. PLS's opposition does nothing to demonstrate why this confused ruling should shield the Ninth Circuit's *Amex* ruling from review.

PLS further ignores that the Ninth Circuit did *not* resolve this case on the basis of an alleged *per se* violation. Rather, the Ninth Circuit left it "to the district court to determine in the first instance whether it should apply *per se* analysis or rule of reason analysis

at later stages in this litigation." Pet. App. 22a. Thus, even assuming *arguendo* that the Ninth Circuit's opinion did provide an independent holding, the Ninth Circuit allowed *Amex* to remain at issue as part of a rule of reason analysis if this case were to move forward. This vehicle, in other words, is still carrying the baggage of its problematic approach to *Amex*.

II. The Ninth Circuit Upended Established Law By Authorizing Antitrust Suits In The Absence Of Antitrust Injury

In its opposition, PLS misstates Petitioners' arguments about antitrust injury, then attacks a strawman. PLS admits real estate brokers are members of the alleged conspiracy and that PLS's sole claim to antitrust injury is purported harm to those same real estate brokers. The brokers, then, are both the injurers and the injured. Permitting an antitrust suit under these circumstances, as the Ninth Circuit did, violates bedrock principles of antitrust law and creates needless conflicts with other courts. Pet. 19–24.

PLS floats several arguments to claim that antitrust injury should focus on alleged harm to co-conspirators instead of their consumers, but none has merit. Opp. 18–24.

As an initial matter, PLS claims that this Court "should deny review of this issue because neither the District Court nor the Ninth Circuit addressed it." Opp. 19. The record, however, shows that this issue was clearly pursued below, and the Ninth Circuit's opinion, in permitting PLS's claim to proceed, effectively rejected Petitioners' antitrust standing argument. *See, e.g.*, Brief of Defendant-Appellee National Association of Realtors at 28–33, *PLS.com, LLC v.*

Nat'l Ass'n of Realtors (9th Cir. 2022) (No. 21-55164, ECF No. 53). Moreover, despite now arguing that *Illinois Brick* is "completely irrelevant," Opp. 19, PLS—not Petitioners—injected *Illinois Brick* and the indirect-purchaser rule into this case at the Ninth Circuit. *See* Appellant's Opening Brief at 25–26, 31, *PLS.com, LLC v. Nat'l Ass'n of Realtors* (9th Cir. 2022) (No. 21-55164, ECF No. 25) (claiming that, under *Illinois Brick*, competitive effects should not be evaluated with respect to home buyers and sellers because they are merely "indirect purchasers").

PLS then then miscasts Petitioners' argument. Opp. 19–21. Petitioners do not argue that an "indirect purchaser is filing suit," or that PLS "is seeking to recover any pass-through overcharges." Opp. 20. Rather, Petitioners have advanced the basic principle that antitrust injury requires cognizable harm to *competition* from the challenged conduct. And here, the only alleged harm is imposed on the very brokers who allegedly carried out the conspiracy.

PLS argues that PLS is not itself a co-conspirator, but that is neither here nor there. *Id.* The only alleged harm the Ninth Circuit cited was injury to buyers' and sellers' *agents*. Pet. App. 8a–9a. Those brokers are members of MLSs, and—according to PLS's own pleading—allegedly conspired with Defendants to adopt and implement the challenged Policy. Pet. 20 (citing Pet. App. 72a, 75a, 78a–79a, 96a–97a).

PLS attempts to resuscitate its case by claiming that "the affected real estate agents are not 'co-conspirators,'" on the theory that perhaps some of the "affected real estate agents resisted promulgation of the Clear Cooperation Policy." Opp. 21. But PLS deliberately based its suit on the allegation that real estate

brokers are conspiring against it, such that PLS could plead a horizontal conspiracy between competitors. By suggesting, for the first time here, that PLS's antitrust injury claim is actually based on some unidentified *subset* of real estate brokers conspiring to hurt another subset of real estate brokers, PLS abandons the case it pleaded and that the lower courts heard. It may not do so to prevent this Court from addressing the actual claims.

PLS also offers a "general[]" argument that "it is common for industry organizations to require membership as a condition of participation," relying primarily on case law considering the NCAA. Opp. 21–22. But none of the NCAA cases PLS cites addressed whether a co-conspirator may bring an antitrust case to challenge the conspiracy of which its members are participants—the issue simply was not presented. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984). In any event, the plaintiff universities in those cases were exactly the kind of objecting co-conspirator on which PLS did *not* base its antitrust injury claims. *See id.* Unlike the universities who challenged NCAA policies, here no broker subject to the Clear Cooperation Policy has sued, and PLS's Amended Complaint did not allege that any broker has been harmed.

The equitable principles PLS invokes (at pp. 22–23) merely underscore that parties who voluntarily and actively participate in an allegedly anticompetitive scheme—like real estate brokers in PLS's complaint—are barred from bringing an antitrust suit. *See, e.g.*, *Sullivan v. NFL*, 34 F.3d 1091, 1107 (1st Cir. 1994); *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 830 F.2d 716, 720–23 (7th Cir. 1987); *Javelin*

Corp. v. Uniroyal, Inc., 546 F.2d 276, 279 (9th Cir. 1976); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 16 (4th Cir. 1971); *cf. Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) (concluding that *in pari delicto* defense did not apply to participants where "participation [is] not voluntary in any meaningful sense"), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

Even if PLS were correct that the analysis of harm to competition should focus on the impact of the Policy to brokers, it has failed to plausibly allege any harm to those brokers, much less harm to competition. PLS has conceded that, after the Policy went into effect, PLS was "still free to use"—such that no one had to "pay twice" to access listings on the multiple listing service and PLS. Appellant's Excerpts of Record, Vol. 2, at 114, *PLS.com, LLC v. Nat'l Ass'n of Realtors* (9th Cir. 2022) (No. 21-55164, ECF No. 26-3). Thus, even accepting PLS's singular focus on real estate brokers (as opposed to competition), the Amended Complaint does not allege that the Policy harms brokers.

Nor does PLS dispute that the Ninth Circuit created a meaningful split with courts across the country. Pet. 23–24. While PLS attempts to cabin the decisions of other circuits, Opp. 24, those other circuits correctly recognized that "the right party to sue" is "the first buyer from a conspirator." *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 836 (7th Cir. 2020). The Ninth Circuit violated that principle, and this Court should resolve the split that the Ninth Circuit created.

CONCLUSION

The petition for a writ of certiorari should be granted.[1]

Respectfully submitted,

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[1] Alternatively, this Court should summarily reverse the Ninth Circuit's decision, which flouts the Court's precedent.